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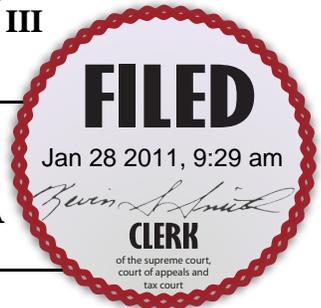
APPELLANT PRO SE:

LUIZ ALVES
Granger, Indiana

ATTORNEYS FOR APPELLEE:
BARNES & THORNBURG, LLP

FORREST BOWMAN, JR.
FORREST BOWMAN III
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**



LUIZ ALVES,)
)
Appellant-Plaintiff/Counterclaim)
Defendant,)
)
vs.)
)
DAMON R. LEICHTY, JAMES W. TUESLEY,)
and BARNES & THORNBURG LLP)
)
Appellees-Defendants,)
)
)
BARNES & THORNBURG LLP,)
)
Counterclaim Plaintiff.)

No. 71A03-1005-PL-301

APPEAL FROM THE SAINT JOSEPH SUPERIOR COURT
The Honorable David C. Chapleau, Judge
Cause No. 71D06-0806-PL-127

January 28, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Luiz Alves, pro se, appeals from the trial court's order granting summary judgment in favor of Damon R. Leichty, James W. Tuesley, and Barnes & Thornburg LLP (collectively, B & T) and entering judgment on B & T's counterclaim against Alves in the amount of \$93,992.40 plus costs. Alves presents two issues for our review, of which the following is dispositive: Did the trial court err by granting summary judgment in favor of B & T on its counterclaims for account, account stated, and services rendered?

We affirm.

Alves filed a pro se complaint for legal malpractice against B & T alleging that he had engaged the firm to represent him in connection with a dispute between Alves and his business partner, Paulo Teixeira, and that B & T negligently rendered legal services to him, including representing him when they were aware of a conflict of interest in the matter. B & T filed an answer, including a counterclaim for unpaid attorney fees totaling nearly \$75,000.00. Alves failed to comply with discovery, and after extensions of time, including one granted after a hearing on a motion to compel, in addition to warnings about sanctions for noncompliance, the trial court granted B & T's motion to dismiss Alves's complaint. The dismissal was affirmed by this court in a memorandum decision. *See Alves v. Leichty*, Cause No. 71A03-0912-CV-605 (Ind. Ct. App. July 1, 2010).

On December 16, 2009, B & T filed a motion for summary judgment on its counterclaim for unpaid attorney fees and designated evidence in support of its motion. Alves, pro se, filed a memorandum in opposition to B & T's motion and submitted a designation of evidence. The trial court held a hearing on the motion, later granting the motion in favor of B & T. Alves filed a "Motion to Modify Order or Correct Error," which

the trial court denied. *Appellant's Appendix* at 92. Alves now appeals. Additional facts will be supplied.

Alves challenges the propriety of the trial court's order granting partial summary judgment in favor of B & T. Our standard of review for summary judgment is the same as that used in the trial court: summary judgment is appropriate only where the evidence shows there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C); *Board of Sch. Comm'rs of City of Indianapolis v. Pettigrew*, 851 N.E.2d 326 (Ind. Ct. App. 2006). All facts and reasonable inferences drawn from those facts are construed in favor of the non-moving party. *Board of Sch. Comm'rs of City of Indianapolis v. Pettigrew*, 851 N.E.2d 326. Review of a summary judgment motion is limited to those materials designated to the trial court. *Id.*

We observe that the only issue before the trial court was the issue of summary judgment as to B & T's counterclaim against Alves for account, account stated, and services rendered. "An account stated is an agreement between the parties that all items of an account and balance are correct, together with a promise, expressed or implied to pay the balance." *MHC Surgical Ctr. Assocs., Inc. v. State Office of Medicaid Policy & Planning*, 699 N.E.2d 306, 309 (Ind. Ct. App. 1998). "It operates as a new contract without the need for consideration, and the plaintiff does not need to plead and prove the creation and performance of each contract underlying the account." *B.E.I., Inc. v. Newcomer Lumber & Supply Co., Inc.*, 745 N.E.2d 233, 236 (Ind. Ct. App. 2001) (citing John D. Calamari & Joseph M. Perillo, *Contracts* § 21-9, at 875 (3rd ed. 1987)). One may infer an agreement that the balance is correct from the delivery of the statement and the account debtor's failure to

object to the amount of the statement within a reasonable time. *Auffenberg v. Bd. of Trustees of Columbus Reg'l Hosp.*, 646 N.E.2d 328 (Ind. Ct. App. 1995). “The amount indicated on a statement is not conclusive, but is prima facie evidence of the amount owed on the account.” *B.E.I., Inc. v. Newcomer Lumber & Supply Co., Inc.*, 745 N.E.2d at 237. Once a prima facie case is established on an account stated, the burden then shifts to the account debtor to prove that the amount claimed is incorrect. *Auffenberg v. Bd. of Trustees of Columbus Reg'l Hosp.*, 646 N.E.2d 328.

In B & T's counterclaim against Alves, B & T alleged that they rendered legal services on behalf of Alves and incurred expenses during that representation from August 26, 2005 until July 31, 2006 in his dispute with Teixeira. B & T submitted bills to Alves for those services and expenses on an almost monthly basis. B & T alleged that on July 13, 2006, Alves promised to pay the unpaid amounts, but that those amounts remain due and unpaid in the amount of \$73,483.96. Alves did not object to the statements of his account with B & T. Furthermore, Alves has not designated any materials in opposition to B & T's counterclaim that would preclude the entry of summary judgment against him. Alves's designated materials relate to his original complaint, which was dismissed for failure to comply with discovery, and thus were not relevant to B & T's counterclaim. We conclude that based on the designated materials before us the trial court did not err by entering summary judgment in favor of B & T on their counterclaim. Furthermore, because this issue is dispositive of the appeal we need not address Alves's argument regarding the trial court's conclusion that he was estopped from designating materials relating to his original complaint.

Judgment affirmed.

MAY, J., and MATHIAS, J., concur.