SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LOUIS L. NOCK** **PART** **38M**

Justice

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COHEN GOLDSTEIN, LLP,

Plaintiff,

- v -

LATASHA MARBURY,

Defendant.

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INDEX NO. 656642/2022

MOTION DATE 08/04/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document numbers (Motion 001) 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, and 38

were read on this motion for SUMMARY JUDGMENT.

LOUIS L. NOCK, J.

Plaintiff law firm commenced this action by summons and verified complaint filed June 7, 2022, seeking a judgment for outstanding legal fees allegedly incurred by its former client, the defendant, related to services allegedly rendered to her in the context of a divorce action titled *Marbury v Marbury* (index No. 056477/2020 [Sup Ct Westchester County]). The complaint seeks the sum of $279,305.05. Defendant filed an answer with counterclaim on July 5, 2022, although the counterclaim was discontinued by stipulation filed July 28, 2022.

The complaint's first cause of action sounds in breach of contract, referencing, and exhibiting, what it casts as a "Retainer Agreement" (Complaint ¶ 5) (the "Agreement"). The Agreement opens with the following paragraphs:

> This will confirm that we have agreed to represent you in connection with your present marital difficulties.
>
> ***We are not requesting a retainer at this time and will seek payment of our fees from your husband. Nonetheless to the extent our fees are not paid by your husband,*** you will be responsible for the payment of our fees and costs.

(NYSCEF Doc. No. 2 at 1 [emphasis added].)

Provisions are found in the Agreement which are inconsistent with the foregoing recital of no retainer, such as:

"If your retainer is fully expended . . . ."

". . . the payment of retainers and fees due . . . ."

". . . prior to the depletion of your retainer . . . ."

"The balance of your retainer will be refunded."

". . . after the retainer is depleted . . . ."

(*Id.*, at 2.) None of those provisions, concerning retainer payments, is applicable because, as the Agreement recites at its outset: "We are not requesting a retainer at this time and will seek payment of our fees from your husband." (*Id.*, at 1.)[1] Significantly, for purposes of this motion, the Agreement appends the "Statement of Client's Rights and Responsibilities" (the "Statement") which, in operative augmentation of the immediately preceding contractual clause, states: "The other party may be responsible to contribute to or pay your attorney's fees, if the Court orders the party to do so." (Statement at 2.) And further consonant with the Agreement's earlier provision ("Nonetheless to the extent our fees are not paid by your husband, you will be responsible for the payment of our fees and costs"), the Statement similarly provides: "However, if the other party fails to pay the Court ordered fee, you are still responsible for the fees owed to your attorney . . . ." (*Id.*)

The Court of Appeals has set forth the foundational principles for contractual construction by the courts of this state, as follows:

> It is fundamental that, "when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms," and that courts should read a contract "as a harmonious and integrated whole" to determine and

[1] The record contains no evidence of a subsequent agreement requiring the payment of a retainer fee.

> give effect to its purpose and intent. Courts may not, through their interpretation of a contract, add or excise terms or distort the meaning of any particular words or phrases, thereby creating a new contract under the guise of interpreting the parties' own agreements. In that regard, a contract must be construed in a manner which gives effect to each and every part, so as not to render any provision "meaningless or without force or effect."

(*Nomura Home Equity Loan, Inc., Series 2006-FM2, by HSBC Bank USA, N.A. v Nomura Credit & Capital, Inc.*, 30 NY3d 572, 581 [2017] [citations omitted].)

Applying the foregoing principles to the case at hand, the court reasonably interprets the integrated, harmonized, provisions of the Agreement and its appended Statement to give rise to a requirement on the plaintiff, in the first instance, to pursue payment of its fees from defendant's husband (who was, and still is, defendant's adversary in the underlying divorce action) as a condition precedent to any secondary pursuit of payment of its fees from defendant. This gives meaning to the clauses "[w]e are not requesting a retainer at this time and will seek payment of our fees from your husband" (Agreement at 1) and "[t]he other party may be responsible to contribute to or pay your attorney's fees, if the Court orders the party to do so" (Statement at 2).

Plaintiff is only released from its primary obligation to pursue its fees from the husband upon the contingency of non-payment by the husband of its fees, and as indicated by the integrated, harmonized, clauses "[n]onetheless to the extent our fees are not paid by your husband, you will be responsible for the payment of our fees and costs" (Agreement at 1) and "if the other party fails to pay the Court ordered fee, you are still responsible for the fees owed to your attorney" (Statement at 2). Harmonizing those clauses, as this court is required to do, mandates an interpretation which must give effect to the reference to a "fail[ure] to pay [a] Court ordered fee" (*id.*). In other words, were this court to simply absolve plaintiff of its primary obligation to pursue the husband for its fees upon any instance of an as-yet nonpayment by the husband, that would render the companion clause, referencing a failure to pay a court-ordered

fee, completely meaningless, which this court is instructed by the Court of Appeals not to allow (*see, Nomura, supra*).

In the instant case, plaintiff did put into motion the contractually required track of pursuing the husband for its fees, as demonstrated by its cross-motion in the underlying divorce action seeking an award of its fees (*see*, NYSCEF Doc. No. 127 [Decision and Order of Hon. Nancy Quinn Koba, Justice, Sup Ct, Westchester County] at 2). The underlying court expressly held that issue in abeyance pending a trial (*see, id.*, at 19). Thus, it cannot be said that the husband "fail[ed] to pay [a] Court ordered fee," triggering defendant's "responsib[ility] for the fees owed" (Statement at 2). It is the husband's failure to pay a court-ordered fee (referenced in the Statement) which must inform, and define the scope of, the more vague reference to nonpayment by the husband (referenced in the Agreement). To be sure, plaintiff could have employed language in the Agreement to the clear and unambiguous effect that responsibility would attach to defendant *either* upon her husband's failure to pay court-ordered fees or the *absence* of payment by the husband during the pendency of fee-related motion practice in the underlying case. Plaintiff, which drafted the Agreement (*see*, NYSCEF Doc. No. 2), took no such care in draftsmanship. It simply made vague reference to nonpayment by the husband in the Agreement, which, of necessity, must be defined by and harmonized with the Statement's definitive reference to a failure to pay court-ordered fees (*see*, *Nomura, supra*).

As the Court of Appeals has declared:

> Further militating against plaintiff's interpretation is the equally well-settled maxim that, where there is ambiguity in the terms of a contract prepared by one of the parties, 'it is consistent with both reason and justice that any fair doubt as to the meaning of its own words should be resolved against' such party.

(*Rentways, Inc. v O'Neill Milk & Cream Co.*, 308 NY 342, 348 [1955] [citing *Mutual Life Ins. Co. v Hurni Packing Co.*, 263 US 167 [1923].)

Plaintiff exhibits certain email communications purporting to indicate that defendant provided post-Agreement assurances that it would "get [its] money" (NYSCEF Doc. No. 18 [3/15/22 at 1:50 PM]; *see also, id.* [3/15/22 at 2:48 PM] ["If I could afford to pay you at this moment I would"]). Those indications, assumedly sourced to defendant, do not define defendant's strictly legal obligation as governed by the Agreement and Statement, integratedly construed (*see, supra*). Indeed, those indications cannot even stand as evidence of mutual intent in plaintiff's favor, given defendant's express communication to plaintiff (submitted by plaintiff) that: "You and I agreed upon you would get your money when my divorce is final. Why did you do this every other month to me? . . . We have a contract." (NYSCEF Doc. No. 18 [3/15/22 at 3:01 PM].)

The complaint's second, third, and fourth causes of action sound in account stated, unjust enrichment, and *quantum meruit*, respectively. Those causes of action cannot exist in duplicative fashion, vis-à-vis the first cause of action for breach of the Agreement (*see, Clark-Fitzpatrick, Inc. v Long Island R.R. Co.*, 70 NY2d 382, 388 [1987] ["the existence of a valid and enforceable written contract governing a particular subject matter precludes recovery in quasi contract for events arising out of the same subject matter"]; *Suverant LLC v Brainchild, Inc.*, 191 AD3d 513, 515 [1st Dept 2021] ["The account stated and unjust enrichment claims must be dismissed as against Brainchild, because there is a valid contract between plaintiff and Brainchild"]; *Sabre Intl. Sec., Ltd. v Vulcan Capital Mgt., Inc.*, 95 AD3d 434, 438 [1st Dept 2012] ["a claim for an account stated may not be utilized simply as another means to attempt to collect under a disputed contract"]; *Vanpoy Corp., S.R.L. v Soleil Chartered Bank*, 204 AD3d 486, 487-88 [1st Dept 2002] [account stated dismissed "as duplicative of the breach of contract claim"]).

In sum, this court finds that the defendant's responsibility to pay the fees sought in this action does not ripen unless and until a determination is rendered in the underlying divorce action obligating the husband to pay the fees, and is disobeyed, or, alternatively, until a determination is rendered in said action absolving the husband from paying the fees.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment is denied.

This will constitute the decision and order of the court.

ENTER:

5/6/2024
DATE

LOUIS L. NOCK, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	X DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE