Ross v DeLorenzo
2004 NY Slip Op 30247(U)
September 23, 2004
Supreme Court, Suffolk County
Docket Number: 99-17550
Judge: Edward D. Burke
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~~SHORT FORM~~ ORDER

INDEX NO. 99-17550

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 9 - SUFFOLK COUNTY

PRESENT:

Hon. EDWARD D. BURKE
Justice of the Supreme Court

MOTION DATE 12-23-03 (#004)
MOTION DATE 1-14-04 (#005)
ADJ. DATE 6-16-04
Mot. Seq. #004 Mot D
Mot. Seq. #005 MD

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ROBERT A. ROSS,

Plaintiff,

- against -

LINDA DELORENZO,

Defendant.

---X

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Upon the following papers numbered 1 to 80 read on these motions for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 21; 31 - 78 ; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 22 - 30 ; Replying Affidavits and supporting papers ____; Other 79 - 80 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (#004) by defendant Linda DeLorenzo for an order granting summary judgment dismissing the complaint and imposing sanctions against plaintiff, and the motion (#005) by plaintiff for an order granting summary judgment in his favor and awarding him damages in the sum of one-third of the consideration received by defendant under the terms of a settlement agreement in the underlying action, are consolidated for purposes of this determination; and it is

ORDERED that defendant's motion is granted to the extent set forth herein, otherwise denied; and it is further

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

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In November 1994, defendant Linda DeLorenzo retained plaintiff Robert Ross, Esq. to represent her in a matrimonial action against her husband, Anthony DeLorenzo. Linda and Anthony DeLorenzo began their relationship in the 1970s, at which time defendant was married to her first husband, Vito Bongiorno. Mr. DeLorenzo, a self-employed international art and antiques dealer, owned an art gallery in Manhattan and had numerous business interests. He apparently amassed considerable wealth in the art industry, and maintained homes in New York, Florida and Puerto Rico. Mr. DeLorenzo disputed defendant's allegation that they had lived together as husband and wife, alleging that he had continuously maintained a separate residence throughout the course of their relationship. However, it is undisputed that Mr. DeLorenzo and defendant enjoyed lavish lifestyles during their relationship, and that defendant's expenses were paid by Mr. DeLorenzo. In the late 1980s, defendant learned that Mr. DeLorenzo was romantically involved with other women, and the couple's relationship deteriorated. Nevertheless, defendant and Mr. DeLorenzo were married in a civil ceremony in January 1990. It is undisputed that they never lived together as husband and wife after the ceremony, and that the purpose of the marriage was to secure inheritance rights for a child, Andi DeLorenzo, born during their relationship.

The 1994 retainer agreement between the parties states that legal fees are earned based on the rate of $225 per hour for plaintiff's services and $185 per hour for an associate's services, and includes a statement regarding a client's rights and responsibilities in a matrimonial action. Defendant paid plaintiff a retainer fee of $5,000 under this agreement. Thereafter, the parties entered into a second retainer agreement in April 1995. This agreement states, in relevant part, that defendant retains plaintiff "to prosecute or adjust a claim for damages sustained by Linda DeLorenzo arising from a partnership and/or constructive trust with Anthony DeLorenzo and [defendant] hereby gives [plaintiff] the exclusive right to take all legal steps to enforce the said claim and hereby further agrees not to settle this action in any matter without your written consent." The agreement further states that "[i]n consideration of the services rendered and to be rendered by [plaintiff], the [defendant] hereby agrees to pay [plaintiff] and [plaintiff is] authorized to retain out of any moneys that may come into [plaintiff's] hand by reason of the above claim: one-third of all sums recovered whether recovered by suit, settlement or otherwise."

Six months later, on October 24, 1995, the parties' entered into a third retainer agreement. This agreement, in the form of a countersigned letter by plaintiff to defendant, states that defendant retained plaintiff "to commence a matrimonial action" and that plaintiff's rate "will be determined by the amount of time devoted to this matter, computed at my prevailing hourly rate, which is presently $225.00 per hour for my services and $200.00 per hour for services rendered by an associate of my office." The Court notes that there is no statement in the written retainer agreement indicating that consideration was given in connection with the third agreement. The agreement states that at least every thirty days defendant will receive statements indicating the services rendered, the time devoted to the case, and the disbursements incurred. It further states, "You [defendant] fully understand and acknowledge that there are no additional or

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different terms or agreements other than those expressly set forth in this agreement, " and that "pursuant to court rules, a copy of this retainer letter is required to be filed with the court in which your action is pending."

On November 1, 1995, defendant commenced an action in New York County, assigned index number 95- 312559, for a judgment of divorce and other related relief against Anthony DeLorenzo and various businesses allegedly controlled by him. In addition to causes of action for a judgment of divorce, the amended complaint contained two causes of action for an accounting and a cause of action for the imposition of a constructive trust. The amended complaint alleged, among other things, that in 1975 the couple entered into an oral partnership agreement to purchase and sell specialty antiques and collectible art, and that the various defendant corporations had been established "in furtherance of the parties' agreement and with the understanding that the profits of same would be used for and applied to the equal benefit" of the parties. According to plaintiff's testimony at an examination before trial in this action, he only filed the October 1995 retainer agreement in the DeLorenzo matrimonial action. No answer was served by Mr. DeLorenzo, and there is no indication that the corporate defendants appeared in the matrimonial action. By order dated November 27, 1996, defendant was granted various forms of pendente lite relief, including an interim counsel award in the sum of $20,000.

Subsequently, in May 1997, Mr. DeLorenzo brought an action against defendant for partition and sale of property located in St. James, New York. The property, which is improved with a single family residence, was purchased by Mr. DeLorenzo in 1978. Defendant lived in the St, James residence from 1978 or 1979 until she sold it in 2000. As indicated earlier, Mr. DeLorenzo alleged that while he visited defendant and Andi at the St. James house, he continuously maintained a separate residence throughout their relationship. In 1981, Mr. DeLorenzo executed a deed that created a joint tenancy with rights of survivorship in the St. James property. The complaint sought a judgment, *inter alia*, directing the sale of the premises, an accounting of expenditures made by defendant and Mr. DeLorenzo to maintain the property during the joint tenancy, and reimbursement for such expenditures from the sale proceeds.

On May 29, 1998, defendant and Mr. DeLorenzo entered into a comprehensive written stipulation of settlement, which provided for, among other things, the payment of maintenance, the distribution of the jointly-owned residence in St. James and its contents, and a lump-sum payment for defendant's interest in the martial property. More particularly, pursuant to Article 7 of the settlement agreement, defendant was entitled to receive as maintenance four payments totaling $450,000 during the period between May 29, 1998 and January 31, 2001. Pursuant to Article 9, she was entitled to receive received title to the real property located in St. James and would give up any interest she had in the property located in Puerto Rico. Mr. DeLorenzo's interest in the St. James property was valued at approximately $183,000. The Court notes that Article 9 stated that these property transfers "constitute a portion of the equitable distribution between the parties and, as such, are non-taxable events." Additionally, it stated that as part of the settlement agreement, a stipulation discontinuing the partition action with prejudice would be

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executed by Anthony DeLorenzo.

Pursuant to Article 12, which was entitled Equitable Distribution, defendant further was entitled to receive a payment in the sum of $850,000 "as and for equitable distribution of marital property" upon the execution of the agreement. Article 10 provided, in part, that "[u]pon the execution of this stipulation neither party shall hold himself or herself out as the owner or have title or possession of the other's property." For purposes of Article 10, the term "property" was defined as including "any businesses, bank accounts, pensions, real or personal property of whatever kind or nature, and including property located in * * * Osprey, Florida, and the Commonwealth of Puerto Rico." Article 10 also stated that defendant would have possession of all property located at the St. James residence except two lamps, which she would deliver to Mr. DeLorenzo in exchange for a $20,000 payment upon the execution of the agreement. In addition, the settlement stated that Mr. DeLorenzo would pay defendant $25,613 for the purchase of a new automobile, and would provide her with health insurance coverage for a period of five years. Lastly, the written settlement contained the following statement: "This agreement shall render all claims against any businesses or corporations of whatever kind or nature (or which he has or had an interest) owned by the defendant, Anthony DeLorenzo, terminated. All actions against co-defendants are discontinued with prejudice."

On the same day the settlement agreement was executed, defendant and Mr. DeLorenzo appeared before the Supreme Court, New York County (Heitler, J.), and stated on the record that they understood and consented to the terms of the settlement agreement. An oral application by defendant to amend her complaint to include a claim of constructive abandonment was granted by the Court. The Court, after conducting an inquest, granted defendant a judgment of divorce on the ground of constructive abandonment. In accordance with the settlement agreement, defendant received checks from Mr. DeLorenzo totaling $970,000, as well as a deed transferring his interest in the St. James property, at the conclusion of the court proceeding.

Shortly thereafter, defendant sent plaintiff a check for $200,000. Accompanying the check was a handwritten letter, dated June 15, 1998, by defendant to plaintiff. The letter, which requests that plaintiff deposit the check after June 18th, concludes with the statement, "I will give some thoughts to the discussion we had about partial fee." A letter by plaintiff to defendant, dated July 31, 1998, states, "I still have not been paid the balance of my fee," and asks that defendant contact him to discuss the matter. During the next two months, the parties exchanged additional letters regarding plaintiff's legal fee in the matrimonial action. In December 1998, plaintiff sent defendant a purported itemized statement of legal services rendered during the period from November 21, 1994 to August 12, 1998. The statement indicates that plaintiff and his associate performed 1,188.10 hours of legal services for defendant at a cost of $256,247. It claims $19,873 in disbursements and credits her with $29,763 in payments, resulting in an outstanding balance of $246,357. The bill does not credit defendant with the $200,000 payment made in June 1998, or specify whether the work was performed on matrimonial or civil matters. A previous billing statement, dated January 12, 1998, indicates 1,087 hours of services for

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defendant at a cost of $234, 601, disbursements in the sum of $18,577, and past payments in the sum of $28,163, resulting in a balance of $225,015.

Meanwhile, a judgment of divorce in the DeLorenzo matrimonial action was issued by the Court (Heitler, J.) on August 18, 1998. The judgment states, among other things, as follows:

> ORDERED AND ADJUDGED that all causes of action against Anthony DeLorenzo, Anthony DeLorenzo d/b/a DeLorenzo, Anthony DeLorenzo d/b/a DeLorenzo, 1950, Anthony DeLorenzo, Inc., Anthony DeLorenzo, Inc. t/a DeLorenzo, 1950, Anthony DeLorenzo, Inc. t/a DeLorenzo Gallery, DeLorenzo 1950 Ltd., DeLorenzo Downtown Ltd., and DeLorenzo Real Estate Corp. are hereby dismissed, except for [Linda DeLorenzo's] claims for a judgment of divorce and ancillary relief, which are disposed of herein.

It does not appear any further actions were taken in the underlying matrimonial action. In January 1999, defendant filed a request to submit the parties' fee dispute to arbitration. The request was rejected, however, as the amount in dispute exceeded $100,000.

On August 16, 1999, plaintiff commenced this action to recover legal fees "not less than the sum of $173,800," together with interest thereon from June 1, 1998, for services rendered to defendant in connection with her action against Mr. DeLorenzo. The first cause of action is for breach of contract and alleges that defendant retained plaintiff to represent her in a matrimonial action and "to prosecute an action against Anthony DeLorenzo for damages she sustained arising from a partnership and/or constructive trust with Anthony DeLorenzo," and that she agreed to pay all out-of-pocket disbursements paid by plaintiff in connection with such matters. It alleges that defendant owes plaintiff $157,000 for services rendered and $16,800 for disbursements. The second cause of action seeks to recover under the theory of quantum meruit. It alleges that defendant accepted the services rendered by plaintiff and benefitted therefrom; that defendant agreed to pay for such services; that the reasonable value of the services rendered is $157,000; and that defendant owes a balance of $16,800 for plaintiff's out-of-pocket expenses. Finally, the third cause of action seeks to recover damages for fraud. It alleges that plaintiff orally agreed to reduce his fee to $300,000, and that defendant agreed to such fee and falsely represented she would use the settlement proceeds to pay such fee. It further alleges that defendant made the false representations "with the intent to deceive the plaintiff and to induce him to give her the settlement checks and documents," that defendant's false representations induced him to deliver the settlement proceeds to defendant, and that plaintiff has been damaged in the sum of $173,000 as a result of such false representations.

On the eve of trial, after conferencing the case with the parties' counsel, this Court (Catterson, J.) directed that a motion for summary judgment be filed in this action. Accordingly,

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defendant now moves for an order granting summary judgment dismissing the complaint and imposing sanctions against plaintiff, arguing that the contingent fee agreement is unenforceable and that plaintiff's prosecution of this action is completely without merit. Plaintiff opposes defendant's motion and moves for order granting summary judgment in his favor on the complaint.

In his affidavit in the support of the motion, plaintiff states that the parties entered into the first retainer agreement after defendant met with him to discuss commencement of a matrimonial action against Anthony DeLorenzo. Plaintiff states that he concluded that "as a result of the nature and duration of DeLorenzo's marriage . . .[defendant] was not entitled to receive any viable maintenance or equitable distribution award." This determination, he states, was "especially problematic to [defendant], as she had no independent means of support and even had to borrow funds from a friend to pay my retainer." Plaintiff explains that he then developed arguments under which defendant might recover against Anthony DeLorenzo under the theories of constructive trust and oral partnership. He avers that the parties entered into the contingent fee agreement after he discussed possible non-matrimonial claims with defendant and his "willingness to represent her in connection with those claims on a contingency fee basis."

Plaintiff also asserts in his affidavit that the more than $1,500,000 received by defendant under the settlement agreement "was substantially predicated upon, and related to, the constructive trust and partnership claims" against Mr. DeLorenzo and the corporate defendants. He states that "in order to minimize the tax impacts to [defendant], to enhance Mr. DeLorenzo's ability to pay more consideration by providing him with tax incentives, to avoid triggering capital gains to [defendant], and to minimize impacts in the event Mr. DeLorenzo were to file for bankruptcy * * * it was agreed that certain funds would be characterized and allocated as equitable distribution or maintenance so as to provide for certain benefits to the parties and to enable [defendant] to receive additional consideration." Plaintiff states that prior to the execution of the settlement agreement he agreed "to reduce my fee for the non-matrimonial claims to $300,000 with the understanding that it would be remitted promptly after the initial consideration under the stipulation of settlement was received" by defendant. Further, plaintiff testified at an examination before trial that he told defendant in February 1998 that if her action against Mr. DeLorenzo settled for between $1,800,000 and $2,200,000, he would accept a lump-sum payment of $300,000, plus disbursements, as full settlement for his legal fee. He testified that defendant accepted his offer, but the agreement was not reduced to a writing. In addition, he testified that the billing statement from January 1998 was incomplete, and that he calculates defendant owes him at least $300,000 for breach of the retainer agreements.

Conversely, defendant testified at an examination before trial that she repeatedly advised plaintiff she did not want to go to trial and that she would settle her action against Mr. DeLorenzo for $1,000,000. She testified, among other things, that during the time settlement negotiations were occurring, plaintiff advised her he would accept a fee of $200,000. She testified that shortly after the settlement of the matrimonial action, plaintiff presented her with a legal bill for

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$256,000. Defendant testified that she refused to pay the additional $56,000, because she believed the parties had agreed plaintiff would receive $200,000 for his services. She also testified that she did not receive any written billing statements from plaintiff prior to the execution of the settlement agreement.

Summary judgment dismissing the third cause of action is granted. It is well established that a cause of action to recover damages for fraud does not lie when the only fraud alleged relates to a breach of contract (*see*, ***New York Univ. v Continental Ins. Co.***, 87 NY2d 308, 639 NYS2d 283 [1995]; ***Cavalry Investments v Household Automotive Fin. Corp.***, 8 AD3d 317, 777 NYS2d 719 [2d Dept 2004]; ***Shah v Micro Connections***, 286 AD2d 433, 434, 729 NYS2d 497 [2d Dept 2001]). A party may be liable in tort "when it has breached a duty of reasonable care distinct from its contractual obligations, or when it has engaged in tortious conduct separate and apart from its failure to fulfill its contractual obligations" (***New York Univ. v Continental Ins. Co.***, *supra*, at 316, 639 NYS2d 283 [1995]; *see*, ***First Bank of Ams. v Motor Car Funding***, 257 AD2d 287, 690 NYS2d 17 [1st Dept 1999]). Both a breach of contract claim and a fraud claim also may be maintained where the defendant misrepresented a material fact collateral to the contract, and such misrepresentation was the inducement for the contract (*see*, ***Channel Master Corp. v Aluminum Ltd. Sales***, 4 NY2d 403, 176 NYS2d 259 [1958]; ***Fresh Direct v Blue Martini Software***, 7 AD3d 487, 776 NYS2d 301 [2d Dept 2004]; ***WIT Holding Corp. v Klein***, 282 AD2d 527, 724 NYS2d 66 [2d Dept 2001]). Allegations that a party entered into a contract without an intention of abiding by its terms, then, are insufficient to state a cause of action for fraud (***New York Univ. v Continental Ins. Co.***. *supra*, at 318, 639 NYS2d 283; ***Place v Ginsberg***, 280 AD2d 656, 657, 721 NYS2d 243 [2d Dept], *lv denied* 96 NY2d 714, 729 NYS2d 441 [2001]). "To say that a contracting party intends when he enters into an agreement not to be bound by it is not to state 'fraud' in an actionable area, but to state a willingness to risk paying damages for breach of contract" (***Briefstein v P.J. Rotondo Constr. Co.***, 8 AD2d 349, 350, 187 NYS2d 866 [1st Dept 1959]; *see*, ***Gordon v Dino De Laurentiis Corp.***, 141 AD2d 435, 529 NYS2d 777 [1st Dept 1988]).

Thus, absent an independent duty of care owed by defendant, plaintiff must show a misrepresentation of a material fact by defendant that was collateral or extraneous to, but which was an inducement for, the retainer agreement at issue to establish a viable cause of action for fraud (*see*, ***Deerfield Communications Corp. v Chesebrough-Ponds, Inc.***, 68 NY2d 954, 510 NYS2d 88 [1986]; ***First Bak of Ams. v Motor Car Funding***, *supra*; ***RKB Enters. v Ernst & Young***, 182 AD2d 971, 582 NYS2d 814 [3d Dept 1992]). Here, there is no evidence that defendant made a false representation regarding a matter extraneous to the retainer agreement that induced plaintiff to enter such contract. Instead, the alleged fraudulent misrepresentation related only to defendant's intent to perform under the contract (*see*, ***Atkins Nutrionals v Ernst & Young***, 301 AD2d 547, 754 NYS2d 320 [2d Dept 2003]; ***Sokol v Addison***, 293 AD2d 600, 742 NYS2d 311 [2d Dept 2002]; ***Kamyr, Inc. v Combustion Eng'g***, 198 AD2d 44, 603 NYS2d 451 [1st Dept 1993], *lv denied* 83 NY2d 751, 611 NYS2d 133 [1994]). Therefore, the fraud claim is dismissed as merely redundant of the breach of contract claim (*see*, ***34-35th Corp. v 1-10 Indus.***

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Assocs., 2 AD3d 711, 768 NYS2d 644 [2d Dept 2003]; ***Coppola v Applied Elec. Corp***., 288 AD2d 41, 732 NYS2d 402 [1st Dept 2001]; *cf.*, ***Fresh Direct v Blue Martini Software***, *supra*; ***WIT Holding Corp. v Klein***, *supra*).

Summary judgment dismissing the second cause of action also is granted. To succeed on a claim in quantum meruit, a party must establish (1) the performance of services in good faith, (2) the acceptance of such services by the person to whom they are rendered, (3) an expectation of compensation for such services, and (4) the reasonable value of such services (*see*, ***Matter of Alu***, 302 AD2d 520, 755 NYS2d 289 [2d Dept 2003]; ***Geraldi v Melamid***, 212 AD2d 575, 622 NYS2d 742 [2d Dept 1995]; ***Moors v Hall***, 143 AD2d 336, 532 NYS2d 412 [2d Dept 1988]). However, a "quasi or constructive contract rests upon the equitable principle that a person shall not be allowed to enrich himself unjustly as the expense of another. In truth, it is not a contract or promise at all. It is an obligation which the law creates, in the absence of any agreement" to prevent a party's unjust enrichment (***Miller v Schloss***, 218 NY 400, 407, 113 NE 337 [1916]; *see*, ***Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.***, 70 NY2d 382, 521 NYS2d 653 [1987]). Thus, the existence of a valid and enforceable agreement governing the particular subject matter generally precludes recovery in quasi contract for events arising out of the same subject matter (***Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.***, *supra*, at 388, 521 NYS2d 653; *see*, ***Mucerino v Firetector, Inc.***, 306 AD2d 330, 761 NYS2d 269 [2d Dept 2003]; ***Aviv Constr. v Antiquarium, Ltd.***, 259 AD2d 445, 687 NYS2d 344 [1st Dept 1999]; *cf.*, ***Zuccarini v Ziff-Davis Media***, 306 AD2d 404, 762 NYS2d 621 [2d Dept 2003]). Here, plaintiff's cause of action to recover damages under the theory of quantum meruit is precluded by the existence of a valid retainer agreement between the parties (*see*, ***Melissakis v Proto Constr. & Dev. Corp.***, 294 AD2d 342, 741 NYS2d 731 [2d Dept 2002]; ***Armienti & Brooks v Acceleration Natl. Ins. Co.***, 274 AD2d 319, 710 NYS2d 74 [1st Dept 2000]; ***Clark v Vicinanzo***, 151 AD2d 951, 543 NYS2d 226 [3d Dept 1989]).

Both plaintiff and defendant's applications for summary judgment on the claim for breach of contract, however, are denied. At the time the retainer agreements were executed, the New York Lawyer's Code of Professional Responsibility prohibited attorneys from "enter[ing] into an arrangement for, charg[ing] or collect[ing] * * * any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of maintenance, support, equitable distribution, or property settlement" (former Code of Professional Responsibility DR 2-106 [c][2] [former 22 NYCRR 1200.11 (c)(2)]; *see*, ***Weinstein v Barnett***, 219 AD2d 77, 640 NYS2d 103 [1st Dept 1996]). Special rules governing the conduct of attorneys who undertake to represent a client in a matrimonial action also were in effect at the time. Contained in Part 1400 of the Rules of the Appellate Division, these rules set forth procedures that must be followed by all attorneys who undertake to represent a client "in a claim, action or proceeding * * * for divorce, separation, annulment, custody, visitation, maintenance, child support or alimony, or to enforce or modify a judgment or order in connection with any such claims, actions or proceedings." As relevant to the instant controversy, an attorney who represents a party in a claim or action for a judgment of divorce must execute a written retainer agreement with the client and file such agreement with the Supreme Court along with his or her

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client's statement of net worth (Rules of App. Div., All Departments [22 NYCRR] §1400.3).

The Court finds that under the circumstances present in this action, plaintiff is not entitled to recover a fee under the contingency agreement. As stated earlier, plaintiff testified at his examination before trial that he filed the October 1995 retainer agreement in connection with the action brought by defendant against Mr. DeLorenzo. After 2 ½ years of litigation, defendant agreed to discontinue, with prejudice, her claims against Mr. DeLorenzo and the corporate defendants for an accounting and the imposition of a constructive trust. The judgment of divorce, then, dismissed all claims against Mr. DeLorenzo and the corporate defendants, except the claim for a judgment of divorce.

Plaintiff's argument, in effect, that, regardless of his previous representation to the Court in the New York County action that he would be compensated for legal services provided to defendant based on an hourly fee arrangement, he is entitled under the contingency fee agreement to 30% of "all receipts without regard to any characterization" is rejected. It is beyond peradventure that the action brought by defendant against Mr. DeLorenzo was in the nature of a domestic relations matter. Contingency fee contracts in domestic relations matters are void as against public policy (*see*, ***Matter of Dangler***, 192 AD 237, 182 NYS 471 [1st Dept 1920]; ***Van Vleck v Van Vleck***, 21 AD 272, 47 NYS 470 [4th Dept 1897]; ***Levine v Levine***, 206 Misc 884, 135 NYS2d 304 [Sup Ct, Queens County 1954]). Unlike tort litigation, for example, where the attorney's efforts produce the res, the purpose of the divorce action is to terminate the marital relationship, fix the parties' rights and obligations, and distribute the marital estate. Such a fee arrangement in a divorce action necessarily creates for the attorney a proprietary interest in the marital estate. In addition to the potential for a conflict of interest between the attorney and the client, payment of a contingent fee necessarily results in a diminution of client's share of such estate and may deprive him or her of assets needed for his or her future support.

Plaintiff's argument, if accepted, would permit attorneys to circumvent the rule prohibiting attorneys from charging a contingent fee in matrimonial matters by simply entering into two separate retainer agreements with their clients and then joining a claim for damages or equitable relief with a claim for divorce, maintenance, support, equitable distribution or property settlement. Contrary to the conclusory allegations by plaintiff's counsel, the contingency retainer agreement cannot be countenanced on the ground that defendant lacked the financial means to pay her legal expenses. Pursuant to Domestic Relations Law §237, a court may direct a spouse to pay such sums as necessary to enable the other spouse to carry on or defend against a matrimonial action or proceeding. As explained by the Court of Appeals in ***O'Shea v O'Shea***, the power given to courts to award counsel fees for services provided in a matrimonial action "is designed to redress the economic disparity between the monied spouse and the non-monied spouse," and to ensure that the "scales of justice are not unbalanced by the weight of the wealthier litigant's wallet" (***O'Shea v O'Shea***, 93 NY2d 187, 190, 689 NYS2d 8 [1999]). The Court notes that the contingent fee agreement also violates public policy in that it requires plaintiff's consent to settle any action for damages brought by defendant against Mr. DeLorenzo (*see*, Code of Professional

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Responsibility DR 7-101 [22 NYCRR 1200.32]; *see also*, Code of Professional Responsibility Canon 7).

In any event, the stipulation of settlement entered into by the DeLorenzos expressly classified the various asset transfers as either maintenance payments or equitable distribution of marital property. A stipulation of settlement in a matrimonial action which did not merge into the judgment of divorce is an independent contract and, as such, is subject to the principles of contract construction and interpretation (***Rainbow v Swisher***, 72 NY2d 106, 109, 531 NYS2d 775 [1988]; ***Sieratzki v Sieratzki***, 8 AD3d 552, 553-554, 779 NYS2d 507 [2d Dept 2004]; ***De Luca v De Luca***, 300 AD2d 342, 751 NYS2d 766 [2d Dept 2002]). When a court is called upon to construe the provisions of a contract, "ascertainment of the intention of the parties is paramount (*citation omitted*) and due consideration must be given to the purpose of the parties in entering into the contract" (***Schmidt v Magnetic Head Corp.***, 97 AD2d 151, 157, 468 NYS2d 649 [2d Dept 1983]). Where, as here, the terms of a written contract and clear and unambiguous, the intent of the parties must be found from within the four corners of the instrument and without resort to extrinsic evidence (*see*, ***Rainbow v Swisher***, *supra*; ***Chimart Assocs. v Paul***, 66 NY2d 570, 498 NYS2d 344 [1986]; ***Sieratzki v Sieratzki***, *supra*; ***Brennan v Brennan***, 300 AD2d 524, 752 NYS2d 557 [2d Dept 2002]). "The best evidence of what parties to a written agreement intend is what they say in their writing" (***Slamow v Del Col***, 79 NY2d 1016, 1018, 584 NYS2d 424 [1992]). The unambiguous language used in the settlement agreement, therefore, must be accepted by this Court as evidencing defendant and Mr. DeLorenzo's intent that the various asset transfers were designed to recompense defendant for her contributions to their marital partnership, not as payment for legal wrongs committed by Mr. DeLorenzo. Plaintiff's allegations that the assets received by defendant under the terms of the settlement agreement were "substantially predicated upon, and related to, the constructive trust and partnership claims" against Mr. DeLorenzo and the corporate defendants, or that such transfers were deliberately mischaracterized as payments for maintenance or in equitable distribution to minimize the tax consequences to the parties, then, are rejected as an improper attempt to re-write the settlement agreement.

Although the contingent fee retainer agreement entered into by the parties is unenforceable, plaintiff is entitled under the third retainer agreement to compensation based on his hourly fee. As issues of fact exist as to the services actually rendered by plaintiff and the value of such services, summary judgment dismissing the first cause of action is improper (*see*, ***Reisch & Klar v Sadofsky***, 78 AD2d 517, 431 NYS2d 591 [2d Dept 1980]).

Plaintiff shall immediately serve a copy of this order on opposing counsel and the Clerk of the Court.

Dated: SEPTEMBER 23, 2004

EDWARD D BURKE A.J.S.C.

_____ FINAL DETERMINATION **__X__ NON-FINAL DETERMINATION**