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SHIRLEY WERNER KORNREICH

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PART 54

Index Number : 602049/2005

ROSENBERG, JEFFREY L.

VS.

LANDA, BEN

SEQUENCE NUMBER : 003

COUNSEL FEES, EXPENSES

INDEX NO. _____

MOTION DATE 12/15/06

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to 6 were read on this motion to/for reargument + X-motion for reargument + disqualification

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-2
Answering Affidavits — Exhibits	3-4
Replying Affidavits	5-6

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 12/28/06

SHIRLEY WERNER KORNREICH J.S.C.

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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JEFFREY L. ROSENBERG & ASSOCIATES, LLC,

Plaintiff,

-against-

BEN LANDA, BENT PHILIPSON, EASTCHESTER REHABILITATION AND HEALTH CARE CENTER, L.L.C., EASTCHESTER REALTY ASSOCIATES, L.L.C., SPLIT ROCK REHABILITATION AND HEALTH CARE CENTER, L.L.C. and EASTROCK REALTY ASSOCIATES, L.L.C.,

Defendants.

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Index No.: 602049/05

DECISION and ORDER

KORNREICH, SHIRLEY WERNER, J.:

In this action to recover a legal fee, defendants move to reargue this court's order of July 27, 2006 ("Prior Order"), which granted plaintiff's motion for summary judgment on its second cause of action for an account stated, with interest at the rate of 15%, and referred to a Special Referee the amount of attorneys' fees and interest owed to plaintiff for collecting its fee, as prayed for in the first cause of action. The plaintiff law firm opposes the motion and cross-moves to reargue and renew, on the ground that the court should not have found that plaintiff violated two Rules of Professional Conduct. For the reasons that follow, based upon the recent decision in *Ween v. Dow*, 2006 NY Slip Op 7227, 822 N.Y.S.2d 257, 2006 N.Y. App. Div. LEXIS 12033 (1st Dept. 2006) and the court's continuing jurisdiction to reconsider its prior orders, the court grants both motions to reargue, the Prior Order is hereby vacated, and this decision and order is substituted in its place. To the extent that defendants claim that plaintiff does not have standing to reargue a motion that it won, the court notes that "every court retains

continuing jurisdiction to reconsider prior interlocutory orders during the pendency of the action." *Liss v. Trans Auto Systems, Inc.*, 68 N.Y.2d 15, 20 (1986).

On or about June 21, 2001, the individual defendants entered into an agreement to purchase two nursing homes, related real property and certain other assets for approximately $37,000,000.00. After consummation of the agreement, defendants felt that the sellers, referred to in plaintiffs papers as the "Zelmanowicz Group," had overstated the profitability of the nursing homes due to fraudulent Medicaid billing practices. On or about June 3, 2003, defendants entered into a written retainer agreement ("Retainer") with plaintiff, pursuant to which plaintiff was to determine whether defendants had a cause of action against the sellers, and, if so, to pursue a settlement, a rebate of the purchase price, or litigation. It is undisputed that the individual defendants are experienced businessmen and nursing home operators, who regularly employ attorneys for their businesses, including a retained counsel who is paid an annual fee of $1,000,000.00.

Page three of the Retainer provided that, within twenty days of receipt, defendants were to pay plaintiff's invoices or object to them in writing. The Retainer further provided that:

> the failure to make such objections alone, or in conjunction with any payment thereafter, shall constitute Your confirmation that our fees and services are acceptable to You and agreed upon.

The hourly billing rate for the time of Jeffrey L. Rosenberg was agreed to be $450.00, and the hourly rate for Stephan King was set at $400.00. The Retainer imposed a 15% interest rate on balances remaining unpaid for more than twenty days. Finally, the Retainer provided that legal costs for collection of plaintiff's fees were to be paid by defendants:

> [S]hould we be required, in our discretion, to institute any action or proceeding to recover all or part of our legal fees or expenses provided for hereunder, ... You

> agree and shall be obligated to reimburse this Firm for the hours expended in that connection at the rate of $475.00 per hour, or such higher rate as may then pertain to Your account....

The Retainer did not contain a reciprocal attorneys' fees provision in favor of defendants.

Defendants allege that prior to entering into the Retainer, Jeffrey L. Rosenberg ("Rosenberg"), the named principal of the plaintiff law firm, represented that he and his firm had extensive experience in litigation under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §1961 et seq. ("RICO") and that he had tried numerous jury cases. Defendants claim that they later discovered that Mr. Rosenberg had never handled a RICO matter to conclusion or tried a jury case. Plaintiff explains at length that he was retained on the strength of recommendations and his success in representing other clients, with whom defendants had a business relationship.

In the Prior Order, the court found that it was undisputed that Rosenberg misrepresented his credentials because he did not deny that he never handled a RICO case to conclusion or tried a jury case. However, plaintiff's reargument motion correctly points out that Rosenberg's reply affirmation on the original motion (¶44, p. 18), averred that the "contention ... that I made representations as to my expertise which were false, are ... no more than unsupported, convenient, false assertions." Rosenberg also contends for the first time on this motion that Stephan King had RICO and jury trial experience. Pursuant to the terms of the Retainer, Stephan King and Rosenberg were to work on defendants' matters.

In September of 2003, on defendants' behalf, plaintiff filed a thirty-nine page RICO complaint against the sellers in the United States District Court for the Southern District of New York. The complaint alleged, among other things, that the fraudulent statements to Medicaid

were made through mail and wire transmissions and constituted predicate acts of mail and wire fraud under RICO. The case was ultimately dismissed, on April 12, 2005, by Judge Laura Taylor Swain. *See, Eastchester Rehab. & Health Care Ctr., L.L.C. v. Eastchester Health Care Ctr., L.L.C.*, 2005 U.S. Dist. LEXIS 6593 (S.D.N.Y. 2005), n.o.r. The ground for the dismissal was the failure to plead with particularity the predicate acts of mail and wire fraud. According to Judge Swain, the complaint failed to identify: "the particular filings they [defendants in this case] claim were fraudulent and explain why the contents of those filings were false or misleading," "who was responsible for the filings" and "approximately when the submissions occurred." *Id.*

Plaintiff billed defendants approximately $85,000.00 by the time the complaint was filed. In November and December of 2003, plaintiff billed approximately $63,000.00 for preparing a RICO statement, which was the other document that Judge Swain considered in deciding the motion to dismiss. Although it is not clearly stated in the record, it appears from plaintiff's time records that the review of the seller's memorandum of law in support of the motion to dismiss began on February 18, 2004. Plaintiff admits that there was an automatic stay of discovery due to the pendency of the motion, but that it continued billing for discovery. Plaintiff's efforts included interviewing witnesses in Florida and a failed motion to lift the stay (on the ground that one witness was obese and the other had a heart condition). Plaintiff does not deny billing $50,000.00 for that motion. Defendants allege that they asked plaintiff to slow down and questioned his pursuit of discovery preparation during the stay, but felt that they were too far into the case to fire plaintiff. Ultimately, plaintiff billed and received a total of approximately $690,000.00 for its services during a two year period. This motion seeks an additional $134,833.94 plus interest.

Plaintiff counters that the investigation of the case was complicated, that it required the

review of many documents, and that Rosenberg told defendants from the outset that RICO complaints are often dismissed, all of which is supported by the record. Rosenberg also points out that he spent much time conferring with the New York State Attorney General's Office, in an effort to secure an indictment of the sellers. However, plaintiff's exhaustive (and expensive) efforts did not lead him to particularize in detail the allegations necessary to support the RICO complaint, in contrast to the Attorney General's indictment, which managed to particularize twenty specific fraudulent documents submitted to Medicaid by the sellers.

It has long been the law in New York that the courts have equitable power over retainer agreements between attorneys and their clients for the purpose of preventing an attorney from obtaining a fee "so excessive as to evince a purpose to obtain improper or undue advantage." *In re Fitzsimons*, 174 N.Y. 15, 24 (1903).

> The courts are very sensitive of the honor of the bar. Transactions between a lawyer and his client must be fair ... It is always open ... for the client to plead or show that for some equitable reason [the retainer agreement] should not be enforced. Equity is a patient listener to all such charges, examines them carefully and thoroughly.

Rodkinson v. Haecker, 248 N.Y. 480, 490 (1928); *see also, King v. Fox*, 7 N.Y.3d at 190; *Gair v. Peck*, 6 N.Y.2d 97 (1959); *First Nat'l Bank v. Brower*, 42 N.Y.2d 471, 474 (1977)(recognizing traditional authority of courts to supervise charging of legal fees under the courts' inherent and statutory power to regulate practice of law); *Jacobson v. Sassower*, 66 N.Y.2d 991, 993 (1985).

Disciplinary Rule 2-106 provides that a "lawyer shall not ... charge or collect an excessive fee." 22 NYCRR § 1200.11; *see also, Matter or Denhoffer*, 127 A.D.2d 230 (1st Dept. 1987); *Matter of Dowsey*, 137 A.D.2d 203 (2d Dept. 1988).

However, the Court of Appeals has recently held that an unconscionably excessive retainer

agreement can be ratified by a fully informed client:

> Where a fully informed client with equal bargaining power knowingly and voluntarily affirms an existing fee arrangement that might otherwise be considered voidable as unconscionable, ratification can occur so long as the client has both a full understanding of the facts that made the agreement voidable and knowledge of his or her rights as a client. *King v. Fox*, 7 N.Y.3d 181, 193 (2006).

Accord, *Parker Chapin Flattau & Klimpl v. Daelen Corp.*, 59 A.D.2d 375, 378 (1st Dept. 1977)(partial payment of account acknowledges validity of bill and establishes account stated).

Although defendants claimed to have objected to the bills on various dates beginning on November 13, 2003 and ending on January 6, 2005, they made payments throughout that time. During 2005 alone, they paid plaintiff $175,000.00. Defendants allege that they complained about the performance of excessive services, which were documented in detailed time records. Defendants are experienced business people, with lawyers on retainer whom they could have consulted if they had questions about the quality of plaintiff's representation, the same lawyers who took over after plaintiff was discharged and who are representing defendants in this case. Defendants agreed in advance to put their objections to the invoices in writing within twenty days and they were capable of changing attorneys. Instead they chose to continue making payments, including some with interest as required by the Retainer.

Defendants' argument that their oral objections are sufficient to overcome the presumption created by retention of plaintiff's bills without objection must be rejected on the facts of this case. Although it is the general rule that oral objections may overcome the presumption, *Lockwood v. Thorne*, 18 N.Y. 25 (1858), defendants have cited no case, and research by the court has disclosed none, in which an oral objection was sufficient in the face of a written agreement which provides that objections to all invoices must be in writing. In this case, the Retainer has such a provision,

which negates the validity of oral objections. Defendants oral objections do not constitute a defense to plaintiff's account stated claim. Additionally, ratification renders irrelevant the issue of whether or not the fee was excessive.

However, upon reargument, the court finds that it overlooked that there is a factual dispute as to whether Rosenberg misrepresented his experience. As there is a question of fact as to whether Rosenberg misrepresented his experience, it follows that there is a question of fact as to whether defendants were misinformed about plaintiff's qualifications, which would negate ratification by a "fully informed" client.

Moreover, upon reargument, defendants argue correctly that a lawyer who violates a disciplinary rule may suffer the forfeiture of the legal fee. *Yannitelli v. D. Yannitelli & Sons Constr. Corp.*, 247 A.D.2d 271, 272 (1st Dept. 1998); *In re Estate of Winston*, 214 A.D.2d 677 (2d Dept. 1995)(attorney who violates Disciplinary Rules not entitled to legal fees). It is a violation of Disciplinary Rule 6-101 for a lawyer to handle a legal matter which the lawyer knows or should know that he or she is not competent to handle. 22 N.Y.C.R.R. §1200.30(A)(1), or for a lawyer to misrepresent his or her experience. *Matter of Dorfman*, 304 A.D.2d 273 (1st Dept. 2003). Therefore, there is an issue of fact as to whether plaintiff forfeited its fee by misrepresenting its credentials, which precludes summary judgment on plaintiff's account stated claim.

With respect to the issue of collection fees, *Ween v. Dow*, *supra,* held unenforceable retainer agreements which "[permit] the recovery of attorneys' fees by the attorney should he prevail in a collection action, without a reciprocal allowance for attorneys' fees should the client prevail...." *Ween v. Dow*, supra at 4-5. Here, the Retainer lacks mutuality and the provision for collection fees is not enforceable. Therefore, the court vacates its Prior Order to the extent that it

granted plaintiff summary judgment on the portion of the first cause of action for collection fees and referred that issue to a Special Referee. Moreover, upon reargument, the court grants summary judgment in favor of defendants, dismissing that portion of the first cause of action that seeks fees for collecting plaintiff's fee for prosecuting this action.

With respect to the 15% interest rate, the First Department held in *Ween v. Dowm supra,* that in determining the interest rate an attorney may charge a client for unpaid balances, the court should apply a "reasonableness standard." The interest rate considered in *Ween* was 1%. In this case, plaintiff is seeking an interest rate of 15%. Again, defendants ratified the interest rate by payment, unless the Retainer is unenforceable because it was procured by misrepresentation, which is an issue of fact. Accordingly, the Prior Order is hereby vacated insofar as it awarded plaintiff 15% interest.

Finally, the court rejects plaintiff's claim that on the prior motion, the court should have searched the record and disqualified defense counsel *sua sponte*. No such motion was before the court and there is no authority for a court to search the record to disqualify an attorney. Plaintiff's cross-motion for renewal and reargument does not request disqualification, although that relief is requested for the first time in plaintiff's affidavit in support of its motion to renew and reargue. The court will consider the issue despite the absence of a proper motion in the interest of judicial economy. *C.P.L.R.* §104.

The ground raised for disqualification on the present motion (*see*, ¶¶ 56-60, pp. 40-42 of the affidavit of Jeffrey Rosenberg, sworn to on September 29, 2006) is that defense counsel were involved in and approved a strategy that generated the fees that defendants now claim were

excessive. Plaintiff also asserts in conclusory fashion that defense counsel have a "systemic" conflict of interest, which is not identified, and "a stake in the outcome of this action."

Disciplinary Rule 5-102 provides that a lawyer shall not accept employment in a case in which "it is obvious that the lawyer ought to be called as a witness on a significant issue on behalf of the client" or where the lawyer "may be called as a witness on a significant issue, other than on behalf of the client, and it is apparent that the testimony would or might be prejudicial to the client." Disqualification decisions based on the advocate witness rule cannot be made without consideration of a civil litigant's fundamental right to counsel of its choice and the court must be mindful of the possibility that disqualification is sought for improper reasons, to delay, or to redound to the strategic advantage of one party over another. *S & S Hotel Ventures Ltd. Partnership v. 777 S. H. Corp.*, 69 N.Y.2d 437 (1987); *Strongback Corp. v. N.E.D. Cambridge Ave. Dev. Corp.*, 2006 NY Slip Op 6921 (1st Dept. 2006);*212 E. 10 N.Y. Bar Ltd. v. Jeffrey Samel & Assocs.*, 249 A.D.2d 220 (1st Dept. 1998). The movant bears the burden of demonstrating that the attorney's testimony will be necessary at the trial. *Id.*

In this case, there is no need to call defense counsel as a witness on the issue of excessive fees, as defendants ratified the amount of the fees by payment and the only factual issue is whether plaintiff's fee is forfeited because Rosenberg misrepresented his credentials. Accordingly, it is

ORDERED that the parties' motions for reargument and renewal are granted, and upon reargument, and pursuant to the court's inherent powers, the court's Prior Order, dated July 27, 2006, and entered on August 7, 2006, is hereby vacated and recalled and this decision and order is

substituted in its place; and it is further

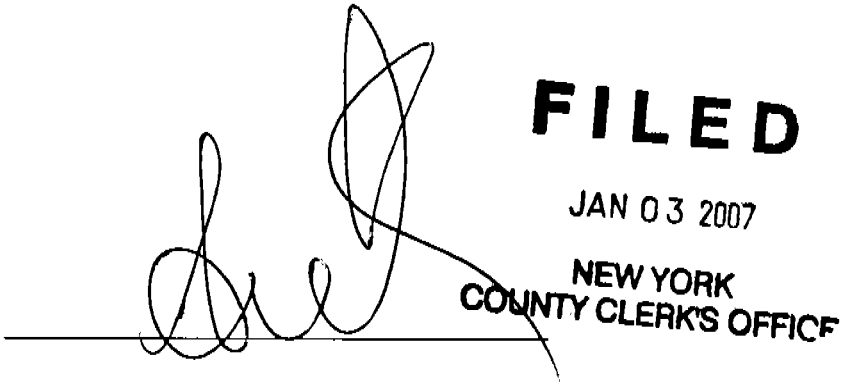
ORDERED that plaintiff's motion for partial summary judgment on its second cause of action for an account stated and the portion of the first cause of action seeking plaintiff's fees for prosecuting this action is denied ; and it is further

ORDERED that summary judgment is granted in defendants' favor on the portion of the first cause of action seeking plaintiff's fees for prosecuting this action, and that portion of the first cause of action is dismissed with prejudice and the remainder of the action is severed and shall continue as a separate action; and it is further

ORDERED that plaintiff's motion to disqualify the law firm of Abrams, Fensterman, Flowers, Greenberg & Eisman, LLP, is denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: December 28, 2006



J.S.C.