Jeffrey Rosenberg & Associates, LLC v Landa
2006 NY Slip Op 30246(U)
July 27, 2006
Supreme Court, New York County
Docket Number:
Judge: Shirley W. Kornreich
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SCANNED ON 8/7/2006

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

PRESENT: SHIRLEY WERNER KORNREICH J.S.C.

PART 54

Index Number : 602049/2005

ROSENBERG, JEFFREY L.

vs

LANDA, BEN

Sequence Number : 001

PSJ

DATE 6/15/06

SEQ. NO.

MOTION CAL. NO.

The following papers, numbered 1 to 6 were read on this motion to/for partial summary judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-2
Answering Affidavits — Exhibits	3
Replying Affidavits + 2 letters 5/30/06 & 6/1/06	4-6

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.

FILED
AUG 07 2006
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 7/27/06

SHIRLEY WERNER KORNREICH J.S.C.

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

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

---X

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.

---X

Index No.: 602049/05

DECISION and ORDER

FILED
AUG 07 2006
NEW YORK
COUNTY CLERK'S OFFICE

KORNREICH, SHIRLEY WERNER, J.:

In this action to recover a legal fee, the plaintiff law firm moves for summary judgment on its second cause of action for an account stated. The defendants oppose the motion on the grounds that they orally objected to the bills, that the bills were excessive, especially in light of the results achieved, and that Jeffrey L. Rosenberg, Esq., misrepresented his credentials prior to his firm's engagement. The motion for summary judgment is granted to the extent indicated below.

A. Facts

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 represent defendants in connection with the purchase to determine whether they 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 retained counsel who is paid an annual fee of $1,000,000.00.

Page three of the Retainer provided that plaintiff's invoices were to be paid within twenty days and that defendants were required to object in writing to any invoices within twenty days of receipt, defined in the Retainer as the "Reasonable Review Period." 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 provides that legal fees for collection of plaintiff's fees are 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....

Defendants allege that prior to entering into the Retainer, Jeffrey L. 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. However, he does not deny that he never handled a RICO case to conclusion or tried a jury case.

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. Defendants point to other examples of plaintiff's excesses. Those include extensive research on elementary matters for which a seasoned litigator might refrain from charging, such as the requirements for a Rule 26(a) disclosure and the limitations on federal court interrogatories. Plaintiff apparently also billed for research, during the pendency of the motion to dismiss, on the invocation of the fifth amendment by a potential witness. Instead of waiting for the outcome of the motion, and thereby saving defendants money, plaintiff continued to review documents, research, interview witnesses, and write prolix memoranda to his clients, in a case that he admits had a strong chance of dismissal. Ultimately, plaintiff billed and received a total of approximately $690,000.00 for his services during a two year period. This motion seeks an additional $134,833.94 plus interest. All this for a case that never reached the discovery phase.

Plaintiff makes much of the fact that the investigation of the case was complicated, that it required the review of many documents, and that he told defendants from the outset that RICO complaints are often dismissed, all of which is supported by the record. He 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, which ultimately was successful. However, the outcome of the motion in the RICO case undercuts his argument that he made fruitful use of his time.

Plaintiff's exhaustive (and expensive) efforts did not lead him to particularize in detail the allegations necessary to support the RICO complaint. Moreover, the Attorney General's indictment, unlike the complaint that plaintiff drafted, managed to particularize twenty specific fraudulent documents that were submitted to Medicaid. Plaintiff's unnecessary work simply did not pay off.

B. Account Stated

The 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. Accordingly, defendants oral objections do not constitute a defense to plaintiff's account stated claim.

Moreover, defendants' payments to plaintiff ratified the Retainer and created an account stated. *King v. Fox,* 2006 N.Y. LEXIS 1481, 2006 N.Y. Slip Op. 4746, n.o.r.; *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.

Accordingly, plaintiff is entitled to summary judgment on the second cause of action for

an account stated. In searching the record, the Court dismisses the first and third cause of action for breach of contract and quantum meruit as moot.

C. Fees on Fees and Interest

The Retainer unambiguously provides that plaintiff is entitled to legal fees incurred in collecting its fee and 15% interest on unpaid balances. Attorneys fees may be awarded where they are agreed upon expressly. "It is not uncommon ... for parties to a contract to include a promise by one party to hold the other harmless for a particular loss or damage and counsel fees are but another form of damage which may be indemnified in this way." *Hooper Associates, Ltd. v. AGS Computers, Inc.*, 74 N.Y.2d 487, 491 (1989). Likewise defendants may collect interest at the rate set forth in the Retainer, which defendants agreed to and ratified by payment during the course of the representation. *See, Carey v. Mui-Hin Lau,* 140 F. Supp. 2d 291, 299 (S.D.N.Y. 2001)

D. Excessive Fee

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, 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(A). A fee is excessive when:

> after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee may include the following:
>
> (1) The time and labor required, the novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly.
>
> (2) The likelihood, if apparent or made known to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
>
> (3) The fee customarily charged in the locality for similar legal services.
>
> (4) The amount involved and the results obtained.
>
> (5) The time limitations imposed by the client or by circumstances.
>
> (6) The nature and length of the professional relationship with the client.
>
> (7) The experience, reputation and ability of the lawyer or lawyers performing the services.
>
> (8) Whether the fee is fixed or contingent.

22 N.Y.C.R.R. §1200.11(B); *see also, Matter or Denhoffer*, 127 A.D.2d 230 (1st Dept. 1987); *Matter of Dowsey*, 137 A.D.2d 203 (2d Dept. 1988).

It is a violation of Disciplinary Rule 6-101 for a lawyer to handle a legal matter which he knows or should know that he or she is not competent to handle. 22 N.Y.C.R.R. §1200.30(A)(1). It is a violation of the Disciplinary Rules for a lawyer to misrepresent his or her experience. *Matter of Dorfman*, 304 A.D.2d 273 (1st Dept. 2003).

Applying these principles to the case at bar, the court is of the definite and firm conviction

that plaintiff's fee is excessive and unreasonable based upon the amount charged, the result achieved, and the poor judgment exercised by plaintiff in continuing to zealously pursue defendants' RICO case despite the pending motion to dismiss, with full recognition that the case might be disposed of summarily. The pleading of facts with particularity is a garden variety legal undertaking, which plaintiff failed to accomplish despite the enormity of the time it devoted to defendants' case. The court cannot avoid the conclusion that commencement of a RICO action, rather than an action for breach of contract, was itself a poor exercise of judgment, given plaintiff's belief of the difficulty of sustaining such a claim. Finally, it appears that Mr. Rosenberg exaggerated his experience with RICO matters. While another lawyer might have lowered the bill to compensate for lack of experience, the court concludes that plaintiff chose instead to profit from it, at the expense of the client.

However, the Court is constrained to enforce the Retainer as written due to the decisions in *King v. Fox,* 2006 N.Y. LEXIS 1481, 2006 N.Y. Slip Op. 4746, n.o.r., and *Parker Chapin Flattau & Klimpl v. Daelen Corp.*, 59 A.D.2d 375, 378 (1st Dept. 1977). As in both of those cases, defendants here ratified the disputed fees. They continued to pay them, fully aware of plaintiff's excesses, which were documented in detailed time records. They are not clients who were unaware of their attorneys' misconduct. They admit they made complaints about excessive work by plaintiff. 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 ratify the Retainer

by making payments, including some with interest as required by the Retainer. *Id.* Accordingly, it is

ORDERED that plaintiff's motion for partial summary judgment on its second cause of action for an account stated is granted and plaintiff shall recover of defendants the sum of $134,833.94, plus interest at the rate of 15% per annum from June 1, 2005; and the first and third cause of action for breach of contract and quantum meruit are dismissed as moot; and it is further

ORDERED that the issue of plaintiff's reasonable attorney's fees incurred in prosecuting this action at the rate of $475.00 per hour, is referred to a Special Referee to hear and determine; and it is further

ORDERED that a copy of this order with notice of entry shall be served on the Clerk of the Reference Part (Room 119) to arrange a date for the reference to a Special Referee; and it is further

ORDERED that the Clerk shall notify all parties of the date of the hearing on the issue of attorney's fees; and it is further

ORDERED that the Clerk shall enter judgment accordingly, and sever the claim for attorney's fees to be tried by the Special Referee, which shall continue as a separate action; and it is further

ORDERED that upon service upon him of a copy of this order with notice of entry, the Clerk is directed to enter judgment accordingly.

Dated: July 27, 2006

ENTER:

J.S.C.