

Altman v Myers

2006 NY Slip Op 30649(U)

December 18, 2006

Supreme Court, New York County

Docket Number: 604401/2005

Judge: Emily Jane Goodman

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

EMILY JANE GOODMAN

PRESENT

PART 17

Index Number : 604401/2005

ALTMAN, RICHARD A.

vs

MYERS, FORREST W.

Sequence Number : 001

DISMISS ACTION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause - Affidavits - Exhibits ...

Answering Affidavits - Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *is decided per attached memorandum.*

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

FILED
JAN 05 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 12/18/06

[Signature]
EMILY JANE GOODMAN *s.c.*

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

-----X
RICHARD A. ALTMAN,

Plaintiff,

-against-

Index No.: 604401/05

FORREST W. MYERS,

Defendant.
-----X

EMILY JANE GOODMAN, J.S.C.:

Defendant, an artist ("Artist"), moves, pursuant to CPLR 3211 (a) (7), to dismiss his former attorney's Complaint seeking "reasonable legal fees" in excess of \$250,000, in connection with representation in a federal lawsuit (the "Lawsuit").¹ Plaintiff, the Artist's former lawyer ("Lawyer"), opposes the motion, maintaining that he is entitled to such fees, despite having agreed to represent Artist on a contingency fee basis. He bases his claim on Artist's refusal to allow him to continue with an appeal after the Artist lost the underlying lawsuit. In essence, he argues that the appeal would have been successful, would have enabled Artist to obtain legal fees as the prevailing party, and would have entitled counsel to those fees.

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Background

In 1972, Artist was commissioned to install a sculpture on the North wall of a building located at 599 Broadway in Soho, Manhattan, known as "the Wall." He hired Lawyer to defend

¹The Lawsuit is entitled Board of Managers of Soho International Arts Condominium v City of New York, New York City Landmarks Preservation Commission and Forrest Myers, 01 Civ 1226 (DAB) (SDNY). Decisions made in connection with the Lawsuit are reported at 2003 US Dist LEXIS 10221 (SDNY June 17, 2003) and 2005 US Dist LEXIS 9139 (SDNY May 13, 2005).

him in the Lawsuit, in an attempt to save the sculpture from destruction as a result of rehabilitation to the building wall and the building owner's decision to put a commercial sign in place of the sculpture. The parties hereto entered into an agreement, dated March 30, 2001 (the "Agreement"), which provides:

"This is to confirm our previous agreement that you will represent me on ~~pro bono~~ (sic) a contingent fee basis² in the Federal Lawsuit filed against me by David Topping and the Soho International Art Condominium regarding the removal of my artwork, "The Wall" at 599 Broadway, NYC."

Lawyer added the following language, by hand:

"My fee will be either half of any money damages received by way of judgment or settlement, or any court-awarded attorney's fee, whichever is larger."

After a federal bench trial, a judgment, dated May 16, 2005, was entered against Artist. Lawyer claims that within a few days thereafter, he obtained Artist's consent to file a notice of appeal. On or about May 27, 2005, the building owner moved for the award of attorney's fees against Artist on the basis that it was the prevailing party in the Lawsuit. On November 19, 2005, Artist allegedly informed Lawyer that he wanted to withdraw his appeal.³ Lawyer's motion to withdraw from representation of Artist, based on irreconcilable differences was granted without

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NEW YORK

²Although contingent fee arrangements are usually calculated as a percentage of the client's net recovery, a contingent fee is defined as a "fee charged for a lawyer's services only if the lawsuit is successful or is favorably settled out of court" (Black's Law Dictionary 315 [7th ed 1999]).

³Lawyer admits that he informed his client that he would not oppose the federal attorney's fee motion unless Artist permitted him to continue with the appeal (Altman Affirmation ¶ 11). Artist found pro bono counsel to represent him in connection with that motion.

* 4]

opposition on November 30, 2005.⁴ Lawyer did not make an application for legal fees in connection with his withdrawal, but instead chose to bring this action. On February 10, 2006, Artist, who was represented in the appeal by new counsel (pro bono), stipulated to withdraw his appeal.

Parties' Arguments

The Complaint herein alleges that, in connection with the Lawsuit, Lawyer "intended to apply to the Court for a reasonable attorney's fee to be paid by the owner of the building, in the event of a final determination in defendant's favor" but that "[o]n or about November 29, 2005, defendant terminated plaintiff's services . . . without cause" (Complaint ¶¶ 13, 17-18). The Complaint further states that as a result, Artist became liable to pay Lawyer for the reasonable value of his services.

Artist maintains that, under the express language of the Agreement, he lost the Lawsuit and therefore, Lawyer is not entitled to recover legal fees thereunder. Artist also maintains that, because a valid fee agreement exists, Lawyer has no right to quantum meruit payment. However, these arguments are clearly not the issue in this case.

Lawyer maintains that he was entitled to recover in quantum meruit because he was wrongfully discharged. Artist contends that he was free to discharge Lawyer any time after judgment was entered against him, without being subject to a claim of quantum meruit, citing, Crowley v Wolf (281 NY 59 [1939] [attorney employed on a contingency fee basis was not entitled to quantum meruit after his client discharged him after the client lost, even though the attorney

⁴Lawyer does not explain the inconsistency between his allegation that he was discharged by Artist and the fact he moved to withdraw based on irreconcilable differences.

wished to pursue exceptions to the special referee's report]).⁵ Artist argues that this is especially true given the Agreement did not mention the appeal.

Lawyer, however, contends that because the Court must deem the allegation that he was discharged without cause as true for purposes of this motion, he states a claim for quantum meruit, citing Campagnola v Mulholland (76 NY2d 38 [1990]); Lai Ling Cheng v Modansky Leasing Co. (73 NY2d 454 [1989]); Cushion v Nemes (266 AD2d 126 [1st Dept 1999]) and Smith v Boscov's Dept. Store (192 AD2d 949 [3d Dept 1993]). Moreover, while acknowledging that the attorney-client relationship normally terminates upon the entry of final judgment, Lawyer distinguishes Crowley, supra, in that unlike the attorney in Crowley, he continued to represent Artist on appeal. In that connection, Lawyer states that he filed a Notice of Appeal and attended settlement conferences for about six months (Altman Affirmation ¶ 25).⁶ Accordingly, Lawyer alleges that the Agreement was not considered terminated after the adverse judgment, but rather, the parties "by their actions, they treated it as a continuing understanding" and "voluntarily extended the retainer . . . to represent [Artist] in the appeal for six months" (Opp. Mem. at 4-5; Altman Affirmation ¶ 25).

After this motion was submitted, the Court asked for further briefs on the issue of the

⁵The Court held that the client "was not bound to permit the attorney to continue after she had been convinced by the referee's decision that she had no chance of winning in the end. It is quite well settled that where the plaintiff in a case becomes satisfied that his cause of action lacks merit he may discontinue the suit, and surely where a trial of the cause of action has been held, and an adverse judgment rendered, there is no obligation upon the plaintiff to further carry on the litigation simply because counsel desires to do so" (*id.* at 65 [internal quotations and citations omitted]).

⁶These allegations are not mentioned in the Complaint. However, in assessing a motion to dismiss for failure to state a cause of action, the court may freely consider affidavits submitted by plaintiff to remedy any defects in the complaint (*see Leon v Martinez*, 84 NY2d 83 [1994]). Although Lawyer should have submitted an affidavit, and not an affirmation, because he is a party (*see* CPLR 2106), the Court, in its discretion, will disregard the error given the lack of prejudice (*see* CPLR 2001).

applicability of the written retainer requirements of 22 NYCRR 1215.1 to this action.⁷ In that regard, Lawyer first argues that the written retainer requirements do not apply because the Agreement was not governed by the rule at that time, and, the appeal was included as part of the scope of representation because Agreement did not specifically exclude an appeal. He also argues that if the written retainer requirements apply, he falls within the exception of 22 NYCRR 1215.2 (b), which exempts an attorney from the written retainer requirements where “the attorney’s services are of the same general kind as previously rendered to and paid for by the client” (22 NYCRR 1215.2 [b]). Lawyer thus maintains that his services for the appeal were of the same general kind as the underlying litigation, and that services in the underlying litigation were paid for by the client.⁸

Artist counters that, because the Agreement does not mention the pursuit of an appeal, any oral agreement to represent him on appeal could not have arisen until after the judgment was entered against him in May 2005—years after the effective date of the written retainer requirements. Because Lawyer did not comply those requirements, Artist contends that he is barred from the recovery of any attorney’s fees. Artist also contends that the exception does not apply because appellate work is generally not the same general kind of work as the trial work

⁷The Court also asked for further briefs on the issue of whether an attorney with a contingent fee arrangement, who is discharged after an adverse judgment, may still recover in quantum meruit. Neither party cited any case on point. Lawyer’s reliance on Universal Acupuncture Pain Servs., P.C. v Quadrino & Schwartz P.C. (370 F3d 259 [2d Cir 2004]) does not address the issue. That case involves the well-known proposition that an attorney who agreed to a contingency fee arrangement, but was discharged without cause, prior to completion of the underlying litigation, is entitled to quantum meruit.

⁸The Complaint alleges that Artist paid certain sums to Lawyer over the years totaling approximately \$16,000. The Affirmation provides that Lawyer received \$15,000 from a fund-raiser to save the Wall (Altman Affirmation § 20) but that Lawyer paid most of the expenses (id. at § 23).

previously rendered, and because Artist did not pay for that work.

Discussion

On a motion to dismiss a complaint for legal insufficiency, the court accepts the facts alleged as true and determines simply whether the facts alleged fit within any cognizable legal theory (see Morone v Morone, 50 NY2d 481 [1980]). The pleading is to be liberally construed, accepting all the facts alleged therein to be true, and according the allegations the benefit of every possible favorable inference (see Goshen v Mutual Life Ins. Co. of New York, 98 NY2d 314 [2002]; Leon v Martinez, 84 NY2d 83, 87 [1994]). The credibility of the parties is not under consideration (see S.J. Capelin Assoc. v Globe Mfg. Corp., 34 NY2d 338 [1974]).

The complaint fails to state a cause of action to the extent that fees are sought in connection with Lawyer's representation of Artist in the underlying Lawsuit.⁹ All Lawyer's cited cases involve instances where a lawyer on a contingency fee basis is discharged, without cause, prior to trial. The seminal case, Lai Ling Cheng v Modansky, *supra*, held that where a lawyer with a contingency fee arrangement is discharged without cause, prior to trial, and the client proceeds with another attorney, the discharged attorney can elect to receive compensation in quantum meruit or on a contingent fee percentage based on a proportionate share of the work performed.¹⁰ Lai Ling was based on the Court of Appeals case Matter of Montgomery (272 NY 323 [1936]), which did

⁹The Complaint appears to seek legal fees going back to 1997. Except with respect to legal fees claimed in connection with the Lawsuit, the Complaint does not specify the period during which legal fees are sought, nor the nature of the legal fee arrangement. As the motion to dismiss is only addressed to legal fees sought in connection with the Lawsuit, the remainder of the action shall continue as described herein.

¹⁰Because of "the inequity involved in allowing the discharged attorney to wait until the case is lost and then demand a fee measured in quantum meruit" where the attorney does not make the election at the time of discharge, the presumption is that a contingent fee arrangement has been chosen (Cohen v Grainger, Tesoriero & Bell, 81 NY2d 655, 660 [1993]).

not involve a contingency fee arrangement. In that case, the client cancelled her contract with her attorney, and replaced him after he had completed 5/6th of the work required under the contract. Because a client has the right to terminate his or her lawyer at any time, the Court held that damages were not available under breach of contract (id. at 326). However, damages were available in quantum meruit (id.). Accordingly, Matter of Montgomery stands for the proposition that when a client prevents his or her attorney from completing the work called for under a contract by discharging that attorney prior to its completion (and discharge is not for cause), that attorney is entitled to recover in quantum meruit for the work completed (see also Shaw v Mfrs. Hanover Trust Co., 68 NY2d 172, 177 [1986] ["If plaintiff breached the retainer agreement, then respondent is owed fees for its services on a quantum meruit basis" [internal quotations and citations omitted]). Permitting an attorney who is discharged prior to completion of services to recover in quantum meruit is based upon "a principle inherently designed to prevent unjust enrichment [that] strikes the delicate balance between the need to deter clients from taking undue advantage of attorneys, on the one hand, and the public policy favoring the right of a client to terminate the attorney-client relationship without inhibition on the other" (Demov, Morris, Levin & Shein v Glantz, 53 NY2d 553, 558 [1981]).

Therefore, to state a cause of action for quantum meruit, Lawyer would have to allege that his client discharged him prior to the completion of the work under the Agreement. Where a fee agreement does not reference the taking of an appeal as part of the scope of representation, prosecution of an appeal is not within the scope of the agreement (see Shaw v Mfrs. Hanover Trust Co., supra [no legal fee was owed under a contingency fee agreement after entry of an adverse judgment because the retainer agreement only mentioned prosecuting a claim for damages, not an

appeal]; Holzberg v Feuerstein, 104 AD2d 971 [2d Dept 1984] [same]). The “client should be fully informed of all relevant facts and the basis of the fee charges, especially in contingent fee arrangements” and “the onus is upon the lawyers who draft such agreements” to do so with clarity (Shaw v Mfrs. Hanover Trust Co., supra at 176 and 179 [internal quotations and citations omitted]). Further, an agreement between an attorney and a client must be construed most favorably for the client (id. at 177).

Recognizing this problem, Lawyer creates his “continuing understanding” argument. As previously noted, Lawyer alleges that the Agreement was not considered terminated after the adverse judgment, but rather, the parties, “by their actions, they treated it as a continuing understanding” and “voluntarily extended the retainer . . . to represent [Artist] in the appeal for six months” (Opp. Mem. at 4-5; Altman Affirmation ¶ 25). Lawyer also points to “Mr. Myer’s expressed intention to appeal immediately after the adverse judgment, and have plaintiff continue to represent him” (Opp. Mem. at 5). However, Artist’s expressed intention to appeal after the adverse judgment cannot translate into the appeal being included within the scope of representation under the original Agreement. The Complaint does not allege that Artist modified the Agreement retroactively to include the appeal within the scope of the Agreement.¹¹ Accordingly, at best, the parties entered into a new fee agreement with respect to the appeal, after the adverse judgment was entered.

As the Complaint alleges that the discharge occurred on or about November 29, 2005, after the date that the adverse judgment was entered, and the Court has determined, as a matter of law,

¹¹Even had the Complaint made such allegations, Lawyer cannot circumvent the written retainers requirements of 22 NYCRR 1215.1 with such an argument.

that the appeal was not within the scope of representation, Lawyer fails to state a claim for quantum meruit. Lawyer completed his work under the contract, and because Artist lost, counsel is not entitled to recovery under the Agreement (see Tuff & Rumble Mgmt. v Landmark Distrib., 254 AD2d 15 [1st Dept 1998] [an attorney is not entitled to a contingency fee under the contract if the action fails to provide recovery]), and, is not entitled to quantum meruit.

However, the Court cannot, at this time, dismiss the Complaint's fairly implied allegation of entitlement to quantum meruit for services rendered in connection with the appeal, based upon a theory of a new fee agreement for the appeal, insofar as Lawyer failed to comply with 22 NYCRR 1215.1.

22 NYCRR 1215.1 provides that:

(a) Effective March 4, 2002, an attorney who undertakes to represent a client and enters into an arrangement for, charges or collects any fee from a client shall provide to the client a written letter of engagement before commencing the representation, or within a reasonable time thereafter:

- (1) if otherwise impracticable; or
- (2) if the scope of services to be provided cannot be determined at the time of the commencement of representation.

For purposes of this rule, where an entity (such as an insurance carrier) engages an attorney to represent a third party, the term *client* shall mean the entity that engages the attorney. Where there is a significant change in the scope of services or the fee to be charged, an updated letter of engagement shall be provided to the client.

(b) The letter of engagement shall address the following matters:

- (1) explanation of the scope of the legal services to be provided;
- (2) explanation of attorney's fees to be charged, expenses and billing practices; and
- (3) where applicable, shall provide that the client may have a right to arbitrate fee disputes under Part 137 of this Title.

(c) Instead of providing the client with a written letter of engagement, an attorney may comply with the provisions of subdivision (a) of this section by entering into a signed written retainer agreement with the client, before or within a reasonable time after commencing the representation, provided that the agreement addresses the matters set forth in subdivision (b) of this section.

The Court is aware of no appellate authority on the issue of whether the failure to comply with 22 NYCRR 1215.1 prevents recovery. There is appellate authority holding that an attorney is precluded from recovering legal fees for the failure to comply with the written retainer requirements in matrimonial actions under 22 NYCRR 1400.3 (see, e.g., Mulcahy v Mulcahy, 285 AD2d 587 [2d Dept 2001]). There are also several lower court cases regarding compliance with 22 NYCRR 1215.1, which range from holding that the failure to comply is not a bar (see Estate of Feroletto, 6 Misc2d 680 [Surrogate's Court, Bronx County 2004] [attorney is entitled to quantum meruit because it is unduly harsh to unjustly enrich the client at the expense of the attorney where the failure to comply is not willful and the client was aware that counsel was to be compensated for services]), to determining that the failure is a complete bar (see Feder, Goldstein, Tanenbaum & D'Errico v Ronan, 195 Misc2d 704 [Nassau Dist Ct 2003] [attorney did not have to pay another attorney for the cost of one appearance due to failure to comply with 22 NYCRR 1215.1]). It has also been determined that an attorney's failure to comply with 22 NYCRR 1215.1 is a bar to recovery, but the attorney does not have to disgorge any amount that the client has already paid (see Lewin v Law Offices of Godfrey G. Brown, 8 Misc2d 66 [Civ Ct, Kings County 2005] [noting that this holding is consistent with appellate authority under 22 NYCRR § 1400.3]).

Here, Lawyer alleges that there was legal fee arrangement with Artist on appeal and it was a contingency fee arrangement. Therefore, given the Court of Appeals statement that clients must be fully informed of all relevant facts and the basis of the fee charges, especially in contingent fee cases (see Shaw, supra), the Court concludes that Lawyer's failure to comply with the written retainer requirements bars him from seeking fees, unless an exception applies. The Court cannot decide, at

this time, whether Lawyer falls under the exemption of 22 NYCRR 1215.2 (b). Assuming, without deciding, that this rule can be interpreted to apply to the work done in only one action,¹² the Complaint states that "Defendant paid certain sums to plaintiff over the years, totaling approximately \$16,000" (Complaint ¶ 16). Therefore, additional discovery is need to determine whether the bar applies.¹³

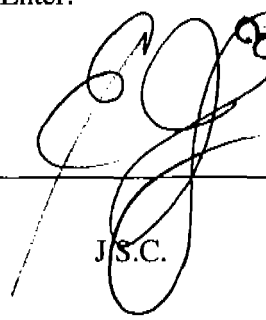
Accordingly, it is

ORDERED that the motion to dismiss is granted to the extent that any claim for reasonable attorney's fees arising out of the underlying Litigation is dismissed.

This Constitutes the Decision and Order of the Court.

Dated: December 18, 2006

Enter:


J.S.C.

EMILY JANE GOODMAN

FILED

JAN 05 2007

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¹²The parties have not addressed this issue.

¹³The Complaint does not specify whether the \$16,000 includes Lawyer's receipt of \$15,000 from a fund-raiser held to save the Wall. If so, such payments would not qualify as payments made by the client under 22 NYCRR 1215.2 (b), because presumably those payments were made by individuals supporting the fund-raiser, not payments made by Artist.