Tannenbaum Helpern Syracuse & Hirschtritt LLP v Nahoum
2007 NY Slip Op 30407(U)
March 28, 2007
Supreme Court, New York County
Docket Number: 0601039
Judge: Barbara R. Kapnick

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

PRESENT: BARBARA R. KAPNICK PART 12

Index Number : 601039/2006
TANNENBAUM HELPERN SYRACUSE
VS
NAHOUM, KEN
Sequence Number : 001
DISMISS ACTION

INDEX NO. 601039/06
MOTION DATE
MOTION SEQ. NO. 001
MOTION CAL. NO.

were read on this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED
MAR 29 2007
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 3/28/07

BARBARA R. KAPNICK 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: IAS PART 12

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TANNENBAUM, HELPERN, SYRACUSE & HIRSCHTRITT LLP,

Plaintiff,

-against-

KEN NAHOUM,

Defendant.

----------X

DECISION/ORDER
Index No. 601039/06
Motion Seq. No. 001

BARBARA R. KAPNICK, J.:

This is an action by plaintiff law firm to recover $67,231.95 allegedly due and owing for legal fees and disbursements stemming from plaintiff's representation of the defendant between October and December 2005 with respect to various issues arising from construction performed in several units owned by defendant at 95 Greene Street. Plaintiff's Amended Complaint sets forth claims for breach of the retainer agreement (first cause of action) and quantum meruit (second cause of action).

Defendant now moves for an order pursuant to CPLR § 3211 'partially' dismissing plaintiff's Complaint on the ground that plaintiff failed to comply with 22 NYCRR § 1215.1 which provides as follows:

> (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 impractible; 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 (emphasis supplied).

(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 courts of this State have held that an attorney who intentionally fails to provide a client with a written retainer agreement in accordance with Rule 1215.1 is 'precluded' from recovering the full amount of attorney's fees for which he has billed. See, Beech v. Gerald B. Lefcourt, P.C., 12 Misc.3d 1167(A) (Civ. Ct., N.Y. Co. 2006); Grossman v. West 26th Corp., 9 Misc.3d 414 (Civ. Ct., Kings Co. 2005); Klein Calderoni & Santucci, LLP v. Bazerjian, 6 Misc.3d 1032(A)(Sup. Ct., Bronx Co.

2005); Feder, Goldstein, Tanenbaum & D'Errico v. Ronan, 195 Misc.2d 704 (Dist. Ct., Nassau Co. 2003).

There is no dispute that plaintiff provided defendant with a detailed retainer agreement dated July 20, 2005, acknowledged and agreed to by defendant on October 14, 2005, which stated, in relevant part, as follows:

> You have engaged our firm to review your files so that we can advise you regarding your rights and remedies concerning your current construction in the building and possible claims that you have against third parties. We have not been retained for any other purpose and have not been engaged to represent you in any litigation or arbitration (emphasis supplied).
>
> * * *
>
> ... When you are satisfied that the terms are satisfactory, please acknowledge receipt of the memorandum and your agreement to the terms of our representation by signing and returning the enclosed copy of this letter promptly to me along with a check for the retainer in the amount of $6,000. Should you eventually retain our firm to represent you in litigation it would be necessary for us to work out an acceptable financial arrangement that would include the payment of an additional retainer.

A significant change in the scope of services and the fee to be charged occurred in October 2005 when plaintiff undertook to represent defendant in connection with arbitration and litigation. Plaintiff was thus required at that time to provide defendant with an updated letter of engagement.

Defendant did send an e-mail to plaintiff on October 17, 2005 which stated as follows:

> i sent on friday the letter back to you with a check,[1],,i just wanted to tell you that the most important matter is the metro-build arbitration which i need to make a decision as to if i replace zetlin as the litigators in this arbitration as it is scheduled for the end of november i believe,,,i can send the correspondence,,, let me know when you would like to discuss this i understand you need some time to familiarize yourself with everything perhaps it would make things go quicker with my help so let me know if you need me,,,thanks ken nahoum

Vincent J. Syracuse, one of the partners in the plaintiff firm sent a reply e-mail stating, "Thanks we look forward to working with you".

However, this e-mail exchange cannot be deemed to constitute an updated written letter of engagement within the meaning of Rule 1215.1, since plaintiff's short reply did not outline the scope of the legal services to be provided and did not explain the attorney's fees to be charged, the expenses and/or the billing practices in connection with those services.

Accordingly, based on the papers submitted and the oral argument held on the record on January 24, 2007, this Court finds that plaintiff failed to comply with the requirements of 22 NYCRR § 1215.1. Defendant's motion is, therefore, granted to the extent

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[1] The check dated October 15, 2005 is in the amount of $6,000.

of dismissing plaintiff's first cause of action for breach of the retainer agreement.

However, there is no evidence in the papers submitted that plaintiff's failure to comply with section 1215.1 was willful. See, cf., Nadelman v. Goldman, 7 Misc.3d 1011(A)(Civ. Ct., N.Y. Co. 2005). Moreover, "[i]t appears unduly harsh to unjustly enrich the [defendant] at the expense of the [plaintiff]" in this case, since there can be no dispute based on the initial retainer agreement that defendant "knew that counsel was to be compensated for services rendered." Matter of the Estate of Carmela Feroleto, 6 Misc.3d 680, 684 (Surrog. Ct., Bronx Co. 2004) See also, Beech v. Lefcourt, P.C., supra.

Therefore, this Court finds that section 1215.1 does not preclude an award in this case for services rendered based on quantum meruit. Any other result would create "an unfair windfall" for the defendant/client. See, Matter of Feroleto, supra at 683. Plaintiff's second cause of action is thus severed and continued.

The issue of the amount of fees to be recovered by plaintiff based on a quantum meruit theory is referred to a Special Referee to hear and report with recommendations.

Plaintiff's counsel is directed to serve a copy of this order with notice of entry upon the Special Referee Clerk, who shall place this matter on the Part 50R calendar for referral to a Special Referee.

This constitutes the decision and order of this Court.

Date: March 28, 2007

Barbara R. Kapnick
J.S.C.

BARBARA R. KAPNICK
J.S.C.

Supreme Court
60 Centre Street, New York, New York 10007

Special Referee Clerk, Room 119

Information Sheet To be attached to a copy of order and filed in Room 119
Special Referee Selection Program

Date: March 28 , 2007

Title of Action: Tannenbaum, Helpern, Syracuse & Hirschtritt, LLP v. Ken Nahoum,

Index No. 601039/06

Issues: See order dated: March 28, 2007

Estimated Length of Time Needed for Hearing: 1 to ~~2 hours~~ adjourn

Attorneys	**Names, Address and Telephone Numbers**
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