

**Siagha v David Katz & Assoc., LLP**

2007 NY Slip Op 32329(U)

July 23, 2007

Supreme Court, New York County

Docket Number: 0603927/2005

Judge: Carol R. Edmead

Republished from New York State Unified Court  
System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for  
any additional information on this case.

This opinion is uncorrected and not selected for official  
publication.

PRESENT: HON. CAROL EDMEAD  
Justice

PART 35

OMAR SIAGHA

INDEX NO. 603927/05

MOTION DATE 6/19/07

MOTION SEQ. NO. 003

MOTION CAL. NO. \_\_\_\_\_

- v -

David Katz & Associates, et al

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 \_\_\_\_\_

**FILED**  
JUL 26 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

PAPERS NUMBERED \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion  
In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that plaintiff's motion for an order (1) awarding partial summary judgment pursuant to CPLR 3212 on its claim for disgorgement of all fees as against defendant David Katz and Katz & Associates, (2) disgorging defendant of such fees in excess of one-third of the final amount collected from the defendant and/or its carrier as a result of the judgment obtained in *Siagha v Salant-Jerome, Inc.*, or (3) awarding partial summary judgment against Keith LePack in the amount of not less than \$100,000, is granted solely to the extent that defendants David Katz and David Katz & Associates shall be disgorged of such fees in excess of one-third of the final amount collected from the defendant and/or its carrier as a result of the judgment obtained in *Siagha v Salant-Jerome, Inc.*; and it is further

ORDERED that defendants' cross-motion is denied; and it is further

ORDERED that damages against defendants David Katz and Katz & Associates be assessed at the time of the trial of the action or disposition of the action; and it is further

ORDERED that plaintiff serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the court.

Dated: 7/23/07



**HON. CAROL EDMEAD** 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 35

\_\_\_\_\_  
OMAR SIAGHA,

Plaintiff,

-against-

DAVID KATZ & ASSOCIATES, LLP, DAVID KATZ,  
KEITH LePACK, KATZ & ROSENBLATT, LLP and  
MICHAEL J. ROSENBLATT,

Defendants.

\_\_\_\_\_  
EDMEAD, J.S.C.

Index No. 603927/05

**DECISION/ORDER**

**FILED**  
JUL 26 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

**MEMORANDUM DECISION**

This is a contract action to recover alleged damages concerning legal fees and expenses allegedly not included in the retainer agreement of plaintiff Omar Siagha ("plaintiff").

Plaintiff moves for an order (1) awarding partial summary judgment pursuant to CPLR 3212 on his claim for disgorgement of all fees as against defendant David Katz ("Katz") and Katz & Associates ("K&A"), (2) disgorging defendants of such fees in excess of one-third of the final amount collected from the underlying defendant and/or its carrier as a result of the judgment obtained in *Siagha v Salant-Jerome, Inc.*, or (3) awarding partial summary judgment against Keith LePack ("LePack") in the amount of not less than \$100,000.

Defendants Katz, K&A and LePack (collectively "defendants") oppose the motion, and cross move for an order dismissing the action pursuant to CPLR 3211(a)(5) and (7), or in the alternative, awarding summary judgment pursuant to CPLR 3212 in favor of Katz, K&A and LePack., and imposing sanctions and costs against plaintiff pursuant to 22 NYCRR 130-1.1, *et seq.*, for plaintiff's frivolous action in keeping LePack named as a defendant.

*Background from the Verified Complaint*

Sometime before April 13, 1994, plaintiff contacted defendant Michael J. Rosenblatt, Esq. (“Rosenblatt”) for representation in an action against a restaurant based upon a physical assault by the restaurant’s employee that occurred on or about April 8, 1993. At the time, Rosenblatt was an associate of Schwartz, Gutstein & Associates (the “Schwartz firm”). On or about April 13, 1993 plaintiff retained the Schwartz firm. The Schwartz firm never requested that plaintiff execute a written retainer as required for all contingency fee cases pursuant to DR 2-106(D). The firm only had plaintiff execute a blank retainer which stated, “Case Taken Subject to Investigation.” The Schwartz firm filed a retainer statement with the Office of Court Administration (“OCA”).

Sometime thereafter, Rosenblatt left the Schwartz firm and opened his own office, “The Law Offices of Michael J. Rosenblatt.” On December 26, 1993, Rosenblatt had plaintiff sign a Consent to Change Attorney Form and his new firm took over the case. Plaintiff became a client of the Law Offices of Michael J. Rosenblatt. Rosenblatt never had plaintiff execute a retainer agreement memorializing his contingency fee, in violation of DR 2-106(D), nor did he file a Retainer Statement with OCA in violation of 22 NYCRR §603.7.

Thereafter, Rosenblatt and David Katz, Esq. formed Katz & Rosenblatt. Plaintiff became a client of Katz & Rosenblatt. Although Katz & Rosenblatt was retained, the firm did not have plaintiff execute a retainer agreement memorializing their contingency fee agreement in violation of DR 2-106(D). Katz & Rosenblatt never filed a Retainer Statement with OCA pursuant to 22 NYCRR §603.7.

Katz & Rosenblatt commenced and prosecuted an action *Omar Siagha v Saint-Jerome*,

*Inc. d/b/a Ruby's River Road Café & Bar, "Tito Doe" the bar manager whose name is unknown at this time and "John Doe," unidentified employee (Index No. 123232/95), on behalf of plaintiff against the restaurant where he was assaulted. Katz & Rosenblatt moved for summary judgment on behalf of plaintiff as to liability based upon Saint-Jerome's default and the motion was granted. Saint Jerome appealed the summary judgment decision and the default judgment was affirmed by the Appellate Division. Saint Jerome moved for permission to appeal to the Court of Appeals before the Appellate Division, and then the Court of Appeals, and both motions for leave were denied.*

A trial was conducted on damages and a verdict was issued on or about June 30, 1998 finding for plaintiff for \$1,187,500. Saint Jerome appealed the verdict and the Appellate Division affirmed. Saint Jerome moved for permission to appeal to the Court of Appeals and the motion was denied.

On or about August 1998, after the damages verdict, Saint Jerome's insurance companies denied coverage and refused to satisfy the judgment. Katz & Rosenblatt commenced a declaratory judgment action. This action was dismissed, Katz & Rosenblatt appealed and the Appellate Division First Department reversed and granted plaintiff summary judgment. The insurance companies sought leave to appeal to the Court of Appeals, and that motion was denied.

Plaintiff's judgment was for \$1,680,093.08 and K&A received a total fee of \$870,057.60. This was purportedly equal to one-third of the recovery less purported expenses and minus legal fees for the appeal of the summary judgment, the appeal on the merits and the declaratory judgment action. The legal fees charged to plaintiff for the appellate and collateral matters was \$182,100.00. Plaintiff recovered approximately 52% of the gross settlement.

*Notice to Admit*

After issue was joined, plaintiff served a Notice to Admit. David Katz, as a defendant in this action responded to plaintiff's Notice to Admit. None of the other defendants responded to said Notice to Admit and, as such their non response is deemed an Admission. David Katz admitted 1-7 below:

1. David Katz and Associates, LLP, David Katz, Keith LePack and Katz & Rosenblatt, LLP (hereinafter "defendants") never provided plaintiff with a retainer agreement regarding their representation of plaintiff in *Omar Siagha v Saint-Jerome, Inc., d/b/a Ruby's River Road Café & Bar, Tito 'Doe' the bar manager whose last name is unknown at this time, and 'John Doe,' an unidentified employee,* (hereinafter "Action").
2. Defendants never obtained a written retainer agreement from plaintiff, signed by plaintiff, as to their representation of him in the Action.
3. Defendants never sent any correspondence, e-mail or other document memorializing, confirming or explaining their fee agreement with Plaintiff.
4. Defendants never provided plaintiff with a retainer agreement regarding their representation of plaintiff for any appeals or collateral litigation with respect to the Action.
5. Defendants never obtained a written retainer agreement from plaintiff, signed by plaintiff, as to their representation of him in any appeals or collateral litigation with respect to the Action.
6. The original firm that plaintiff retained to handle the Action, Schwartz, Gutstein, & Associates, filed a retainer with the Office of Court Administration ("OCA") for the Action, but none of the defendants filed a subsequent retainer statement with OCA.
7. Defendants never sent any correspondence, e-mail or other documents to plaintiff or his family that discusses, mentions, or explains legal fees for appellate or collateral litigation relating to the Action.
8. Defendants never sent a Closing Statement to plaintiff summarizing all monies received and distributed from the settlement proceeds in the Action.

*Plaintiff's Deposition*

Plaintiff does not remember if he signed a retainer agreement when he met with Rosenblatt; nor does he remember the terms of such an agreement if he signed same. (Pl.'s dep. p 12) Plaintiff does not remember when he first met defendant Katz or LePack. (Pl.'s dep. pp. 13-14) Plaintiff states that he did not receive a letter outlining all of the expenses and costs that would be associated with the appeal. He is not sure if Amy Carlin, Esq., whom plaintiff remembers seeing in the office, was being paid to handle the appeal. (Pl.'s dep. pp 41-42) Plaintiff does not remember if he was told that there would be a second lawsuit to collect on the judgment. (Pl.'s dep. p. 49) Plaintiff vaguely remembers receiving a letter dated January 4, 2005 from defendant LePack explaining about all of the money and what would have to be done to obtain it. (Pl.'s dep. p. 50) Plaintiff either never signed or does not remember ever signing a retainer agreement with anyone for the underlying personal injury case. (Pl.'s dep. pp. 60-62) He does, however, remember signing a paper that said "one third." (Pl.'s dep. pp. 64-65)

*Deposition Testimony of Defendant David Katz*

David Katz first met defendant LePack in September 1996. It may have been LePack's response to Katz & Rosenblatt's ad in the New York Times. LePack was not a partner of the law firm of Katz & Rosenblatt at any time during the plaintiff's underlying personal injury action. (Katz dep. pp. 5-6) LePack remained a salaried employee. He was made a non-equity partner. But, at all times, LePack remained an employee. LePack never exercised any control over the finances or anything other than a case load of personal injury cases while at Katz & Rosenblatt or David Katz & Associates. (Katz dep. p. 6-7) LePack never had a partnership interest in either

firm during the pendency of this action. (Katz dep. p. 8)

*Plaintiff's Contentions*

Plaintiff was informed when he originally retained defendants that they would receive a percentage of his recovery as their legal fees, but there would be no legal fees in addition to that percentage. Plaintiff never received a written retainer inconsistent with that understanding. In fact, he was never asked to sign a retainer agreement and, therefore, there was no agreement stating how the defendants' contingency fees would be calculated. Similarly, there was no retainer statement stating that appellate work or collateral litigation legal fees would not be included within the contingency fee percentage.

Further, defendants failed to fully, properly and timely explain to plaintiff that there may be appellate work for his case, he would be charged legal fees separately for the appellate work, the legal fees would be in addition to their contingency fee, the method in which he would be billed for these fees, or the hourly rate that would be applied.

According to the retainer agreement attached to the Rosenblatt affidavit submitted in support of plaintiff's motion, the retainer agreement filed with OCA provided in part as follows:

"2. Terms of compensation.

Thirty-three and one-third (33 1/3) percent of the sum recovered whether recovered by suit, settlement or otherwise."

Rosenblatt states that he and plaintiff did not discuss anything with regard to potential appellate legal fees or appellate court costs of the underlying personal injury action, or any fees or costs pertaining to a declaratory judgment action. He is not aware as to whether anyone else from Katz & Rosenblatt discussed these subjects.

*Defendants' Contentions*

Upon information and belief, when Rosenblatt substituted in, he did not file a new retainer statement with OCA. However, defendants filed an OCA retainer statement, *Nunc Pro Tunc*. In any event, even if any or all of the defendants failed to file a retainer agreement or a letter of engagement, that failure to comply with 22 NYCRR §1215.1 does not prohibit the recovery of counsel fees.

LePack was an associate/employee of defendant law firms during the pendency of the underlying action. LePack was always an employee and eventually became a non-equity partner. As an employee, LePack worked extensively on plaintiff's lawsuit from the time of hiring as an employee until the conclusion of the case. LePack tried the underlying tort case, argued its appeals, prosecuted the declaratory judgment case and argued its appeals.

As an employee, LePack cannot be held liable for any alleged wrongdoing by his employers. An employee cannot be held personally liable for alleged wrongs by a law firm or its partners.

Here, there exists no contract between plaintiff and LePack, individually, and no contract exists between plaintiff and defendant David Katz. After a discussion between the defendants herein, defendants informed plaintiff of the necessity to fight the appeal. Defendants offered plaintiff the choice of paying an outside firm or allowing defendants to represent him in the appeal. He chose defendants' firm. On or about November 20, 1997, David Katz drafted an engagement letter sent to plaintiff that reads as follows:

“As you know, based on the extensive discussions and meetings we've had, and your meetings with Michael [Katz] and Keith [LePack], we have recommended, and you have agreed to utilize our services to fight defendant's

appeal in your ongoing personal injury action, so as to preserve your case and chances to collect any money for your injuries.

As we've explained, our fees for the appeal are separate from and outside of the regular contingency retainer which you signed at the inception of this case. Our fees for the appeal or appeals will be based on an hourly billing at the rate of \$300.00 per hour, payable at the conclusion of the appeal(s), and upon collection of the proceeds. You will only be obligated to pay our hourly fees on the appeal(s) if we are successful.

Should you have any [sic] questions, please let me know."

Plaintiff acknowledged this meeting with defendants. Plaintiff appeared at defendants' office and defendants informed him that they would need to fight any appeal. In fact, David Katz and LePack met with plaintiff concerning the status and to inform him of the appeal and how plaintiff would pay for it. (See pl.'s dep. P. 39, line 5 through p. 40, line 16) There is a further letter dated November 17, 1998. Both letters are purported to be signed by David Katz.

*Plaintiff's Reply*

In reply, plaintiff contends that both the cross-motion and the opposition are procedurally barred because they are not supported with admissible evidence. LePack's unsworn affirmation in violation of CPLR 2106 is inadmissible and insufficient to deny Plaintiff's sworn statements. Additionally, the attachments to LePack's unsworn affirmation are not made with personal knowledge and are not properly authenticated. Lastly, defendants failed to attach the pleadings to their cross-motion.

As to the sufficiency of defendants' arguments, defendants now appear with two letters, unsigned by plaintiff, purporting to serve as retainer agreements for the appeal and collateral litigation in the underlying action. There are numerous problems with these letters, including that plaintiff never signed them, and that they are not supported, attested to, or authenticated by

any affidavit or by anyone connected with the underlying case.

Defendant David Katz, the purported signatory on the two letters purporting to advise plaintiff of a fee for appeals and collateral work, has already admitted in response to the Notice to Admit, that he never sent any correspondence, e-mail or other documents to plaintiff or his family that discusses, mentions, or explains legal fees for appellate or collateral litigation relating to the Action.

The late surfacing of these documents smells strongly of fabrication, but Katz has already sworn under oath that these documents - even if they exist - were never tendered to plaintiff; therefore, they cannot be considered by the Court.

And, even if the court were to consider such "late discovered" documents, they are trumped by the signed retainer agreement.

Plaintiffs also claim that they are not required to file a retainer statement under 22 NYCRR 1215.1 in order to get a fee. Further, this court's decision in *Fishkin v Taras*, 600989/2002, which found that an attorney is not entitled to any fee for failure to file a retainer, was decided under an entirely different provision in the law. In any event, defendants' untimely filed the retainer statement, a few weeks after this motion was served, some two years after this lawsuit was served, and some twelve years after plaintiff became the defendants' client, and thus cannot possibly be justified nor a defense to this action.

In addition, the limited liability law does not protect lawyers in the same manner as other businesses or apply to lawyers who contract with third parties for whom no legal services are provided.

Lastly, the motion for sanctions is frivolous because the claim against LePack is

meritorious.

## DISCUSSION

### I. Plaintiff's Motion for Summary Judgment

In order to prevail on a motion for summary judgment, the moving party must demonstrate entitlement to judgment as a matter of law (*Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 404 N.E.2d 718; *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498, 144 N.E.2d 387). This standard requires that the proponent of a motion for summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient “evidentiary proof in admissible form” to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinder*, 307 AD2d 230, 762 NYS2d 386 [1<sup>st</sup> Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11, 751 NYS2d 433, 434 [1<sup>st</sup> Dept 2002]). Thus, the motion must be supported “by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions” (CPLR § 3212[b]). A party can prove a *prima facie* entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman, supra*; *Prudential Securities Inc. v Rovello*, 262 AD2d 172 [1st Dept 1999]). The failure to make such a showing will result in the denial of the motion, regardless of the sufficiency of the opposing papers (*Pappalardo v. New York Health & Racquet Club*, 279 A.D.2d 134, 718 N.Y.S.2d 287 [1st Dept 2000] citing *Lesocovich v. 180 Madison Ave. Corp.*, 81 N.Y.2d 982, 985, 599 N.Y.S.2d 526, 615 N.E.2d 1010; *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642).

Once this showing is made, however, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so ((CPLR §3212[b]); *Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman v City of New York*, *supra*, 49 NY2d at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 765 NYS2d 326 [1<sup>st</sup> Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman*, *supra* at 562). The opponent “must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist” and “the issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief” (*Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772 [1st Dept 1983], *affd.*, 62 NY2d 686 [1984]).

A. CPLR 2106

As an initial matter, the Court addresses the procedural deficiency of defendants’ cross-motion and opposition submissions as raised in plaintiff’s reply. In opposing plaintiff’s motion and in support of their cross-motion, defendants submitted an affirmation by LePack instead of an affidavit.<sup>1</sup> It is uncontested that CPLR 2106<sup>2</sup> precludes the Court from considering the

---

<sup>1</sup> On June 28, 2007, Katz attempted to submit an affidavit of LePack and David Katz. LePack’s affidavit, contains assertions identical to the statements contained in his earlier affirmation. However, since the same cannot be said of Katz’ affidavit, the Court refused to accept the affidavit of Katz as an improper sur-reply. Nonetheless, the Court’s decision, however, does not rest on LePack’s affirmation or affidavit.

<sup>2</sup> CPLR 2106 provides, in pertinent part:

The statement of an attorney admitted to practice in the courts of the state ... authorized by law to practice in the state, who is not a party to an action, when subscribed and affirmed by him to be true under the penalties of perjury, may be served or filed in the action in lieu of and with the same force and effect as an affidavit.

Those who are statutorily permitted to use such an affirmation cannot do so when they are a party to an action (*see LaRusso v Katz*, 30 AD3d 240, 243 [1<sup>st</sup> Dept 2006], *citing Slavenburg Corp. v Opus Apparel*, 53 NY2d 799, 801 [1981]).

contents of defendant LePack's affirmation given that LePack is a named defendant in this legal malpractice action. However, under the circumstances here, that defendant's "cross-motion and affirmation in opposition" papers are supported by an affirmation of an attorney who is also a party to this action does not render "both the cross motion and the opposition" procedurally barred from consideration, as plaintiff contends.

With respect to the branch of defendant's submissions seeking summary relief pursuant to CPLR 3212, subsection (b) of this very section expressly requires that a summary judgment motion "be supported by affidavit." Thus, with respect to defendant's cross-motion, which does not contain an affidavit from a witness with personal knowledge of the facts, but an affirmation from a party attorney, such cross-motion is procedurally defective (*cf. Russo v Katz*, 30 AD3d 240 [1<sup>st</sup> Dept. 2006]).

However, with respect to the branch of defendant's submissions that opposes plaintiff's motion for summary judgment, no such specific requirement exists. Instead, as the opponent, defendant must submit evidence in admissible form. Further, caselaw decided pursuant to CPLR 2106 does not appear to preclude the Court from considering the contents of the exhibits attached to defendant's opposition, such as the deposition transcripts of plaintiff and David Katz, income tax returns, and pleadings, for purposes of determining whether issues of fact exist as to plaintiff's motion (*see Daus v Cassavaugh*, 17 AD3d 837 [3d Dept 2005] [where defendants' chiropractor's affirmations were not in admissible form and thus properly not considered in deciding whether threshold burden on "significant limitation of use" category of "serious injury" under No-Fault Act was satisfied, other proof submitted by the moving defendants, including affirmation of physician who examined plaintiff at request of her no-fault carrier and medical

report from plaintiff's treating physician, satisfied that burden]; *see also O'Connor v Singh*, 2007 WL 1307910 [App. Term. 1<sup>st</sup> Dept] [acknowledging the distinction created under *Daus* where submissions include other documents submitted in admissible form, thereby permitting the court to "evaluate the strength of the [ ] opposing submission").

Defendant's reliance on *DeMaio v Yeshiva Univ. Dev. Found.*, 38 AD3d 473 [1<sup>st</sup> Dept 2007] and *Pisacreta v Minniti*, 265 AD2d 540 [2d Dept 1999]) is misplaced. In *DeMaio*, the plaintiff's opposition papers were deemed insufficient to raise an issue of fact because plaintiff relied *solely* on inadmissible evidence. Further, in *Pisacreta*, the opposing papers were held insufficient to defeat the plaintiff's motion for default judgment, under circumstances in which defendant attorney's affirmation was submitted to establish a meritorious defense to a legal malpractice claim. In both cases, the improper affirmations constituted the essential, primary evidentiary support in opposition. Further, the submissions herein include, *inter alia*, deposition transcripts and other information independent from the improper affirmation, available to the Court for review (*Wertheimer v New York Property Ins. Underwriting Assn.*, 85 AD2d 540 [1<sup>st</sup> Dept 1981] [reciting the rule that evidence, otherwise excludable at trial, may be considered to deny a motion for summary judgment provided that this evidence does not form the sole basis for the court's determination]).

Notwithstanding the above, however, plaintiff must still establish his entitlement to summary judgment as a matter of law, regardless of the sufficiency of the opposing papers (*see Diaz v Nunez*, 5 AD3d 302 [1st Dept 2004] [motion for summary judgment should have been denied regardless of the sufficiency of plaintiff's opposing papers]).

B. Disgorgement of Defendants' Entire Fee

Plaintiff relies on this court's decision in *Fishkin* as the bulwark for his argument that Katz and K&A should be disgorged of their entire fee, arguing that the filing of the retainer agreement by the Schwartz firm does not "count for anything where the file was handed from attorney to attorney." At the outset, plaintiff fails to cite, and the Court was unable to uncover, any caselaw in support of the restricted proposition that a filed retainer agreement pertaining to a matter has no bearing upon a substituted counsel's handling of the same matter. Nor does *Fishkin* stand for such a proposition.

In *Fishkin*, the Court addressed the issue of whether the plaintiffs' failure to file retainer statements with OCA, pursuant to 22 NYCRR 603.7(a)(3), precluded them from recovering any legal fees. The plaintiffs claimed that they were hired as outside counsel by the defendants under an oral agreement to render legal services in personal injury cases in which the defendants were retained on a contingency fee basis. The defendants moved for summary judgment and argued that the plaintiffs' failure to timely file retainer statements with OCA precluded them from recovering any legal fees. The plaintiffs maintained that the filing of a retainer statement was not a condition precedent to receiving a legal fee. Nonetheless, the plaintiffs filed retainer statements *Nunc Pro Tunc* in two of the matters during the pendency of the litigation, but offered no explanation for the late filings other than to say that section 603.7(a)(3) had been misinterpreted. Such an excuse was belied by the fact that plaintiff Fishkin filed a retainer statement in one of the cases at issue some 12 years earlier, thereby evidencing his awareness of the rule. This court held that pursuant to section 603.7(a)(3), an attorney who was retained by another attorney, on a contingency fee basis in a personal injury action, must file a retainer statement with OCA within

15 days of being retained, and that the purpose of requiring such filings was to protect the public from excessive and unconscionable agreements. Since the plaintiffs failed to timely file retainer statements in three matters and in the absence of proof of retainer statements being filed in the remaining matters the court granted the defendants' motion for summary judgment.

Unlike the matters in *Fishkin* for which no retainer agreement was filed, a retainer agreement with respect to plaintiff's underlying personal injury claim was filed with OCA.

The instant situation is more properly governed by 22 NYCRR 603.7(a)(1) and (2). Section 603.7(a)(1) states in pertinent part that,

[e]very attorney who, in connection with any action or claim for damages for personal injuries,...accepts a retainer or enters into an agreement, express or implied, for compensation for services rendered or to be rendered in such action,...whereby his compensation is to be dependent or contingent in whole or in part upon the successful prosecution or settlement thereof, shall, within 30 days from the date of any such retainer or agreement of compensation, sign personally and file with the [OCA]...a written statement of such retainer or agreement of compensation....

Further, 603.7(a)(2) states that “[a] statement of retainer must be filed in connection with each action, claim or proceeding for which the attorney has been retained.”

The retainer agreement to pay defendant “33 1/3” percent of the sum recovered regarding plaintiff's claim for personal injuries sustained at “Ruby's” contains Michael Rosenblatt's name. Rosenblatt, the sole attorney identified on the retainer agreement, later “morphed” into the firm known as Katz & Rosenblatt and it cannot be seriously argued that the firm of Katz & Rosenblatt was so unrelated to Rosenblatt that a new retainer agreement needed to be filed. Subsequently, according to the deposition of David Katz, upon Rosenblatt's resignation, K&A “stepped in” or became a “successor” to Katz & Rosenblatt. Thus, that K&A, which was ultimately responsible for the recovery in plaintiff's favor, did not file a separate retainer agreement with respect to

plaintiff's underlying personal injury action is not fatal, given that K&A was "morphed" as a result of Rosenblatt's withdrawal from Katz and Rosenblatt.

Such circumstances, militate against a finding that David Katz or K&A, willfully disregarded the rules of the First Department. Thus, unlike the decision in *Fishkin*, the Court declines to ignore the *Nunc Pro Tunc* filing herein of the retainer agreement in connection with the 33 1/3 contingency fee, which is not excessive or unconscionable.

Accordingly, the branch of plaintiff's motion for an order disgorging defendants' entire fee is denied as to those amounts representing 33 1/3 of the amount recovered.

C. Disgorgement of Defendants' Fee In Excess of One-Third

Whether the retainer agreement permits David Katz or K&A to retain fees in excess of the 33 1/3 amount begins with analysis of the agreement at issue. The retainer agreement provides that:

In consideration of the services rendered and to be rendered by you, [plaintiff] agrees to pay you and you are authorized to retain out of any moneys that may come into your hand by reason of the above claim: Thirty-three and one-third (33 1/3) percent of the sum recovered whether recovered by suit, settlement or otherwise. . . .Such percentage shall be computed on the net sum recovered after deducting from the amount recovered expenses and disbursements . . . ."

The importance of an attorney's clear agreement with a client as to the essential terms of representation cannot be overstated (*Shaw v Manufacturers Hanover Trust Co.*, 68 NY2d 172 [1986]). The client should be fully informed of all relevant facts and the basis of the fee charges, especially in contingent fee arrangements (*id.* at 176, *citing* Code of Professional Responsibility, EC 2-19, EC 2-20 and Wolfram, *Modern Legal Ethics* § 9.4). While, in the law generally, equivocal contracts will be construed against the drafters, courts as a matter of public policy give particular scrutiny to fee arrangements between attorneys and clients, casting the burden on

attorneys who have drafted the retainer agreements to show that the contracts are fair, reasonable, and fully known and understood by their clients (*Id. citing Jacobson v. Sassower*, 66 N.Y.2d 991, 993, 499 N.Y.S.2d 381, 489 N.E.2d 1283; *Gair v. Peck*, 6 N.Y.2d 97, 106, 188 N.Y.S.2d 491, 160 N.E.2d 43, *cert. denied* 361 U.S. 374, 80 S.Ct. 401, 4 L.Ed.2d 380; *see also*, 1 Speiser, Attorneys' Fees §§ 2:3, 2:9).

Assuming the retainer agreement applies to David Katz and K&A, and unlike the retainer agreement in other legal fee disputes, the retainer agreement is silent as to the type of work to be performed by counsel or any fees related to post trial work (*cf. Fredericks v Chemipal*, 2007 WL 1310160 (S.D.N.Y.); *Cohen Swados Wright Hanifin Bradford & Brett, LLP v. Frank R. Bayger, P.C.*, 269 A.D.2d 739, 703 N.Y.S.2d 319 [4<sup>th</sup> Dept 2000]). The sole retainer agreement at issue is a standard Blumberg form that speaks only providing services to “prosecute or adjust a claim for damages arising from personal injuries . . .,” without specific mention of appeals or collateral litigation.

A client retaining an attorney on a contingent basis, in the absence of clear and express language to the contrary, contemplates that the percentage fixed is to constitute payment for whatever services may be necessary to obtain collection of any judgment which may be recovered, whether the services be in connection with an appeal taken from the judgment or in connection with efforts to collect the judgment, or both (*Ellis v Mitchell*, 193 Misc. 956, 85 N.Y.S.2d 398 [Sup. Ct. New York County 1948] *citing Larkin v. Frazier*, 224 N.Y. 421, 121 N.E. 105). New York law is generally hostile to midstream efforts to increase contingency fee percentages (*see, e.g.*, 22 NYCRR 603.7[e][4] [limiting opportunities for attorneys to increase contingent fee percentages in certain types of actions]; *Belzer v Bollea*, 150 Misc2d 925, 928-29

[NY Sup Ct 1990] [rejecting contingent fee increases that did not comport with 22 NYCRR 603.7(e)(4) regardless of “whether the client in fact agreed or disagreed to additional fees”]). Thus, based on a plain reading of the retainer agreement, there was no agreement for plaintiff to compensate any attorneys, including Katz and K&A separate fees related to services performed on appeal or other collateral matters beyond the 33 1/3 amount as specified in the retainer agreement.<sup>3</sup>

Having established a *prima facie* entitlement to summary relief, defendants “must assemble and lay bare” affirmative proof to demonstrate that genuine issues of fact exist[,]” and “the issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief” (*Kornfeld v. NRX Technologies, Inc.*, 93 A.D.2d 772 [1st Dept.1983], *affd.*, 62 N.Y.2d 686 [1984]).

It has been held that “[a] party's affidavit that contradicts [his or] her prior sworn testimony creates only a feigned issue of fact, and is insufficient to defeat a properly supported motion for summary judgment (*Harty v. Lenci*, 294 A.D.2d 296, 298, 743 N.Y.S.2d 97 [2002], *citing Phillips v. Bronx Lebanon Hosp.*, 268 A.D.2d 318, 320, 701 N.Y.S.2d 403 [2000], and *Kistoo v. City of New York*, 195 A.D.2d 403, 404, 600 N.Y.S.2d 693 [1993]; *see also Amaya v. Denihan Ownership Co., LLC*, 30 A.D.3d 327, 327-328, 818 N.Y.S.2d 199 [2006]; *Telfeyan v. City of New York*, 40 A.D.3d 372, 836 N.Y.S.2d 71 [1<sup>st</sup> Dept 2007] [stating that affidavit testimony that is obviously prepared in support of ongoing litigation that directly contradicts

---

<sup>3</sup> The Court notes that even if it were to consider the deposition transcript of the plaintiff, there is no testimony therein indicating that he understood, was aware, or agreed to pay additional fees related to any attorney's legal services for appellate and collateral matters. Plaintiff testified that he did not receive a letter with a clear breakdown of all the costs and expenses that would be associated with the appeal, he also testified that he is not sure if he received a letter memorializing a conversation with defendants about the appeal, and he does not remember if he was told that there would be a second lawsuit to collect on the judgment.

deposition testimony previously given by the same witness, without any explanation accounting for the disparity, “creates only a feigned issue of fact, and is insufficient to defeat a properly supported motion for summary judgment”).

According to the prior sworn statement by David Katz, dated April 14, 2006, Mr. Katz admitted that he and K&A “never sent any correspondence, e-mail or other document memorializing, confirming or explaining their fee agreement with Plaintiff,” and “never provided plaintiff with a retainer agreement regarding their representation of plaintiff for any appeals or collateral litigation with respect to the Action.” Mr. Katz also swore that defendants never obtained a “written retainer agreement from plaintiff signed by plaintiff, as to their representation of him in any appeals or collateral litigation” or sent any correspondence that “discusses, mentions or explains legal fees for appellate or collateral litigation.”

Yet, in opposition to the motion, one year later, defendants’ submit two letters signed by Mr. Katz, dated in November 1997 and 1998, indicating that their fees for the appeal were separate from and outside of the regular appeals and would be based on a hourly billing rate of \$300.00. Defendants also submitted a 9-page, unsigned billing statement, dated September 14, 2004 (which is not on law firm letterhead). If contradicting *sworn* testimony creates only a feigned issue of fact and deemed insufficient to defeat summary relief, surely, unsworn letters from Mr. Katz, and unsworn, unsigned billing records, which were admittedly never sent to plaintiff, are even more deficient. And, any acquiescence by plaintiff to defendants’ handling of the appeal and collateral action is far different from an agreement to pay additional fees for such services.

There being no indication that the parties reached an agreement as to the billing rates

associated with appellate and collateral work, defendants are solely entitled to retain 33 1/3 of the amount recovered, plus costs and expenses incurred by the defendant throughout the course of their representation.

Therefore, the branch of plaintiffs' motion for an order disgorging defendants of such fees in excess of one-third of the final amount collected from the defendant and/or its carrier as a result of the judgment obtained in *Siagha v Salant-Jerome, Inc.*, is granted.

D. Liability of Keith LePack for \$100,000

Lastly, plaintiff seeks summary judgment against LePack personally on the theory that LePack's status as a non-equity partner made him more than a mere employee of the firm and thus liable to plaintiff.

The *indicia* of partnership may be found where there is: (1) joint control over the enterprise, (2) profit splitting, and (3) loss sharing (*Prince v O'Brien*, 256 A.D.2d 208 [1st Dept. 1998]; *see also, Blaustein v. Lazar Borck & Mensch*, 161 A.D.2d 507, 555 N.Y.S.2d 776 [1<sup>st</sup> Dept 1990]). The existence of all three elements is essential to finding the existence of a partnership (*Id.*). Where there is no evidence of a partnership, a mere employee of a law firm cannot be held personally liable for the alleged wrongs of a law firm or its partners (*Zito v Fishbein Badillo Wagner Harding*, 11 Misc3d 713 [NY Sup Ct 2006]).

In the instant matter, plaintiff failed to satisfy the foregoing factors so as to establish, as a matter of law, that LePack was more than a mere employee. The only evidence plaintiff offers that could be construed as evidencing joint control is the fact that Katz identified LePack as a "non-equity partner" of K&A. However, Katz testified that LePack always remained an employee and never exercised any control over finances or anything else at the firm other than

the cases he prosecuted. As to the profit sharing element, plaintiff contends that LePack was awarded a \$100,000 bonus as a direct result of the judgment paid in the underlying matter, cites no case law to buttress this argument. If anything, the bonus could be offered as evidence that LePack was a mere employee since \$100,000 is a rather small percentage of the overall amount that K&A received and if he were a true partner he would have received a far greater amount. Further, there is no evidence that LePack shared in the firms' losses.

Thus, plaintiff is not entitled to summary relief against LePack at this juncture.

## II. Defendants' Cross-Motion

For the reasons set forth in the above discussion concerning CPLR 2106, defendants' cross-motion for summary judgment is procedurally defective, and thus denied. Defendants' cross-motion for sanctions and costs is denied, as unwarranted.

### CONCLUSION

Based on the foregoing, it is hereby

ORDERED that plaintiff's motion for an order (1) awarding partial summary judgment pursuant to CPLR 3212 on its claim for disgorgement of all fees as against defendant David Katz and Katz & Associates, (2) disgorging defendant of such fees in excess of one-third of the final amount collected from the defendant and/or its carrier as a result of the judgment obtained in *Siagha v Salant-Jerome, Inc.*, or (3) awarding partial summary judgment against Keith LePack in the amount of not less than \$100,000, is granted solely to the extent that defendants David Katz and David Katz & Associates shall be disgorged of such fees in excess of one-third of the final amount collected from the defendant and/or its carrier as a result of the judgment obtained in

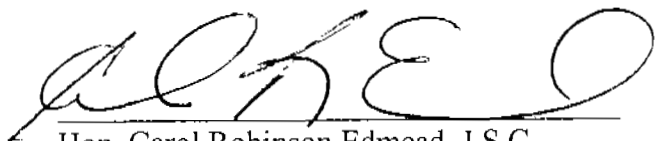
*Siagha v Salant-Jerome, Inc.*; and it is further

ORDERED that defendants' cross-motion is denied; and it is further

ORDERED that damages against defendants David Katz and Katz & Associates be assessed at the time of the trial of the action or disposition of the action; and it is further

This constitutes the decision and order of the court.

Dated: July 23, 2007



Hon. Carol Robinson Edmead, J.S.C.

**FILED**  
JUL 26 2007  
NEW YORK  
COUNTY CLERK'S OFFICE