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| Salon, Marrow, Dyckman & Newman LLP v Chrein |
| 2007 NY Slip Op 34536(U) |
| March 23, 2007 |
| Supreme Court, New York County |
| Docket Number: 104067/05 |
| Judge: Judith J. Gische |
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Supreme Court of the State of New York
County of New York: Part 10

SALON, MARROW, DYCKMAN &
NEWMAN LLP,

Plaintiff,

****Corrected****
Decision After Trial

-against-

Index# 104067/05

CHARLES CHREIN,

Defendant.

Gische, J;

The court conducted a bench trial in this matter on January 31, 2007. Plaintiff is a law firm and was represented at trial by one of its members. Defendant appeared *pro se*.

The underlying complaint asserts three causes of action arising out of the plaintiff law firm's representation of defendant in connection with an appeal to the New York State Supreme Court, Appellate Division, first department in a case entitled CHARLES CHREIN - against- CAROL HORN and SOLLER, SHAYNE & HORN ("Chrein/Horn case"). The causes of action pled in this case are: breach of contract (1ST cause of action), *quantum meruit* (2nd cause of action) and account stated (3rd cause of action). Defendant interposed an answer denying the material allegations in the complaint, containing affirmative defenses and a counterclaim. By orders, respectively dated September 16, 2005 and November 21, 2006, the Hon. Roland Acosta struck affirmative defenses A, B and C and defendant's counterclaim for malpractice. The basis for the dismissal of the malpractice counterclaim was that it was not brought within the applicable statute of limitations. Consequently, the only affirmative defense remaining is defendant's claim that plaintiff did not fulfill the terms of any alleged contract.

Based upon the testimony taken and the exhibits received into evidence at trial, the court makes the following findings of fact and conclusions of law:

The parties entered into a written retainer agreement dated March 9, 2000, in which defendant retained plaintiff law firm to represent him in connection with an appeal of a lower court decision and order, in the Chrein/Horn case, dated 10/20/99. The lower court denied Mr. Chrein's motion for leave to sue his former wife, Carol Horn, and former wife's attorneys, Soller, Shayne & Horn. It also granted a motion to dismiss, with prejudice, a plenary action Mr. Chrein had filed against such parties.

In connection with the initial appeal, plaintiff prepared and filed a brief, a reply brief and a record on appeal. Plaintiff, however, missed the oral argument date which was set for December 1, 2000. So apparently did the attorney for respondents on the appeal. Plaintiff made efforts to have the Appellate Division reschedule oral argument. According to the letters submitted by defendant, the work undertaken by plaintiff in connection with the missed oral argument took place between November 7, 2000 and December 14, 2000. Plaintiff's request for a new oral argument date was denied and the underlying appeal was submitted to and decided by the court only on the filed papers.

The Appellate Division ultimately denied Mr. Chrein's appeal and affirmed the lower court decision. In addition, the Appellate Division awarded the respondent attorneys fees and court costs. After consultation, defendant then authorized plaintiff to bring a motion for leave to appeal to the Court of Appeals. The Court of Appeals denied leave on the basis that the matter had not been finally determined. Plaintiff, thereafter, brought a motion for clarification of the Order because the Appellate Division affirmance had effectively ended the underlying litigation. The Court of Appeals denied the motion for clarification.

Plaintiff sent regular bills for its services to Mr. Chrein at his residential address. The bills submitted into evidence are itemized, containing breakdowns of the time billed and descriptions of the services provided. They also detail disbursements made on defendant's behalf. Through May 2001 defendant made sporadic payments on the bills. He did not object to the amounts billed. He did, however, recount to plaintiff his ongoing financial difficulties and paid small amounts on the arrears, as he was able to do so. Defendant received credit for all amounts he paid to plaintiff. The billings were all at hourly rates that were consistent with the original retainer agreement signed by the parties. As of February 2002, plaintiff's billing reflected an unpaid balance due in the amount of \$25,717.10. Subsequently plaintiff sent defendant statements reflecting the balance due on at least three separate occasions. While there is some correspondence in which defendant expressed his disappointment at there not having been oral argument on the appeal, Mr. Chrein never objected to the amounts he was billed for the services rendered; nor did he ever paid the outstanding balance.

The primary (if not only) basis for defendant's sole defense in this action is that plaintiff, having missed the opportunity to orally argue the appeal, is guilty of malpractice. Mr. Chrein argues that although his malpractice counterclaim is barred by the statute of limitations, he is not barred by raising these facts in his defense. Defendant has not, however, proven any malpractice. While he may have been disappointed that there was no oral argument on his appeal, there is simply no basis to conclude that he would have had a different legal outcome had there been oral argument. Malpractice requires proof that but for the offending conduct, a different result would have been obtained. Thaler & Thaler v. Gupta, 208 AD2d 1130 (3rd dept. 1994). Defendant concedes that the briefs were excellent

and he continued to pay legal fees to plaintiff even after he knew that the oral argument date had been missed. Despite defendant's belief to the contrary, there is no basis to conclude that the Appellate Division Judges did not understand or appreciate his arguments in the absence of oral argument.

Attorney retainers agreements are enforceable contracts. They are, however, scrutinized as a matter of public policy for fairness and reasonableness. King v. Fox, 7 NY3d 181 (2006). While plaintiff's failure to appear for oral argument did not rise to the level of malpractice, defendant should not be charged for anything related to such oral argument. It appears, for the most part, that plaintiff did not charge for Mr. Chrein such services. There are billed entries in the total amount of \$130, however, for November 7, 2000 and December 7, 2000 that relate to the oral argument issue. Indeed there was no other work relevant to the Appeal that could have been performed during that time. The other billings are appropriate and in order. Giving credit for the \$130, plaintiff is owed a total of \$25,587 for legal services rendered in accordance with its retainer agreement.

The court dismisses the second cause of action for *quantum meruit*. In general, where there is a valid contract, a cause of action for *quantum meruit* will not lie. Clark v. Fitzpatrick, 70 NY2d 382 (1987). In the case of an attorney client relationship pursuant to a retainer, a claim for *quantum meruit* lies where the attorney has been discharged before the matter is concluded. Otherwise the attorney can proceed for breach of contract under the retainer agreement. King v. Fox, *supra*. Since plaintiff was never discharged before the appeal was concluded, there is no valid claim for *quantum meruit*.

The third cause of action is for account stated. An account stated is an agreement

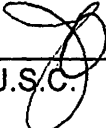
between parties to account, based upon prior transactions between them, with respect to correctness of account items and balance due. It may be express or implied from retention of account rendered for unreasonable period of time without objection and from surrounding circumstances. JBH Inc. v. Godinez, 34 AD3d 873 (3rd dept. 2006). It requires that there be an actual debt due. Erdman Anthony & Associates, Inc. v. Barkstrom, 298 AD2d 981 (4th dept. 2002).

Plaintiff has established an account stated. Bills for services were regularly sent by plaintiff and received by defendant. Thereafter statements were sent. No objections were made with respect to such bills and statements regarding their accuracy or the amounts billed. Defendant is still entitled to a \$130 credit against the accounts stated because it is attributable to an item that was not properly billed to defendant in the first place.

Having prevailed on the first and third causes of action asserted in the complaint, plaintiff is entitled to a money judgment against defendant in the amount of \$ \$25,587. Plaintiff is also entitled to interest. Since the defaults for payment of services occurred over a period of time, the court selects April 1, 2001 as a single reasonable intermediate date from which to calculate interest. CPLR § 5001(b).

Plaintiff is directed to settle judgment on notice to defendant. This constitutes the courts decision after trial. The parties are directed to pick up their exhibits within the next 15 days, otherwise they will be forwarded to the clerks office.

Dated: New York, New York
March 23, 2007



J.G. J.S.C.