

Zucker v Russo

2008 NY Slip Op 30581(U)

February 22, 2008

Supreme Court, Nassau County

Docket Number: 8589-05/

Judge: Kenneth A. Davis

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SCAⁿ

SHORT FORM ORDER
SUPREME COURT - STATE OF NEW YORK

Present:

HON. KENNETH A. DAVIS,

Justice

TRIAL/IAS, PART 3
NASSAU COUNTY

SCOTT M. ZUCKER,

Plaintiff,

SUBMISSION DATE: 1/17/08
INDEX No.: 18589/05

-against-

ROBERTA RUSSO,

MOTION SEQUENCE # 4,5

Defendants.

The following papers read on this motion:

- Notice of Motion/ Order to Show Cause..... XX
- Answering Papers..... X
- Reply.....
- Briefs: Plaintiff's/Petitioner's.....
- Defendant's/Respondent's.....

This motion by plaintiff Scott M. Zucker for an order pursuant to CPLR 3212 granting him: (1) summary judgment in the amounts of \$6,500 and \$40,750 on his first cause of action; (2) summary judgment in the amount of \$10,000 on his second cause of action; and, (3) summary judgment dismissing the defendant's two counterclaims is denied.

This cross-motion by defendant Roberta Russo for an order pursuant to CPLR 3212 granting her summary judgment dismissing the complaint against her and awarding her judgment in the amount of \$18,225, plus interest from October, 2005, on her counterclaims, or, in the alternative, an order narrowing the issues for trial is

denied.

In his first and second causes of action, the plaintiff attorney seeks to recover sums allegedly due pursuant to two retainers. In his third cause of action, he seeks to recover fees for services allegedly rendered for other matters. The defendant has counterclaimed for breach of contract and unjust enrichment. She seeks to recover the retainer fees she paid the plaintiff as well as costs which she advanced.

The plaintiff attorney and defendant client both seek summary judgment. The pertinent facts are as follows:

On October 25, 2002, the defendant client retained the plaintiff attorney in writing to represent her with respect to her claims against Zenith Realty and one of its principals, Hyman Horowitz. Pursuant to that agreement, the defendant paid the plaintiff a \$6,500 retainer fee and agreed to pay him 15% of her gross total recovery. The retainer agreement provided that the \$6,500 would be offset against an award or settlement; that the attorney's fee does not include motion practice or an appeal; and, that the defendant was responsible for enumerated costs and disbursements. At her examination-before-trial, the defendant admitted that following her retention of the plaintiff, she recovered \$315,000 from Zenith/Horowitz. The plaintiff attorney accordingly seeks 15% of that recovery, less the retainer amount of \$6,500.

On January 16, 2003, the defendant client retained the plaintiff attorney in writing to represent her with respect to her claims against Merrill Lynch. Pursuant to that agreement, the defendant paid the plaintiff a \$10,000 retainer fee and agreed to pay him 10% of her gross total recovery. That retainer agreement also provided that the \$10,000 would be offset against any award or settlement; that the attorney's fee did not include motion practice or an appeal; and, that the defendant was responsible for enumerated costs and disbursements.

At her examination-before-trial, the defendant client admitted meeting with the plaintiff attorney to discuss the Zenith/Horowitz matter as well as discussing the matter with him on the phone. She testified that she provided various pertinent documents for his review and that she gave him Horowitz's phone number so that he could contact him. She also acknowledged that the plaintiff prepared a complaint for filing. In fact, she advanced the filing fee to him. Defendant admitted that shortly after she retained the plaintiff, she began receiving payments from Zenith/Horowitz in November 2002 which continued until at least February 2005 and totaled \$315,000. Defendant admitted that she and Horowitz were in direct contact after she retained the plaintiff and that she never told the plaintiff of those communications or that she received payments from Horowitz. In fact, the defendant testified at her examination-before-trial that she instructed the plaintiff to stop

working on the Zenith/Horowitz matter in January 2003 because her sister was engaged in resolving a claim with him and she did not want to "offend" Horowitz. When asked if she had any basis for firing the plaintiff, the defendant responded: "Did I think that he did something wrong? No, I just didn't want him to go through with it"

The defendant client similarly admitted meeting with the plaintiff attorney to discuss the Merrill Lynch matter as well as discussing that matter on the phone with him, too. She testified that she provided him with her voluminous records. She also testified that the plaintiff told her that an expert would be needed to substantiate her claims and that the plaintiff arranged to have an expert review her records. She acknowledged that the plaintiff prepared a Statement of Claim against Merrill Lynch which she met with him to review and that she in fact advanced a filing fee for that document, too. At her examination-before-trial, the defendant testified that at some point in 2003, she instructed the plaintiff to stop working on the Merrill Lynch matter also. She testified that she did not terminate the plaintiff for cause with respect to the Merrill Lynch matter, either.

The defendant client sought a refund of the retainers and fees which she had paid the plaintiff attorney and this action and counterclaims ensued.

In support of his motion, the plaintiff attorney states that

he used the contact information for Zenith/Horowitz which the defendant client had provided to him "to reach out to them in an effort to resolve the matter without resort to litigation." However, in opposition to this motion, Horowitz has attested that he never had any contact with the plaintiff attorney: He never spoke with him nor did he ever receive any calls from him.

In opposition to the plaintiff attorney's motion and in support of her own, the defendant client attests that she only asked the plaintiff to refrain from working on the Zenith/Horowitz matter for a brief period and that although she instructed him to resume his efforts, nothing ever got done. She similarly attests that while she reviewed a "bare bones" draft of a NASD complaint in the Merrill Lynch matter, the, plaintiff "lost interest" in that matter when she refused to transfer her investments to his friend. She attests that when nothing was getting done and she sought a refund of her retainers, she was repeatedly assured that they would be sent but then the plaintiff stopped taking her calls. She attests that she ultimately retained Joel Negrin, Esq. to advance her claims and seek a refund from the plaintiff. The defendant claims that plaintiff had nothing to do with Zenith/Horowitz's payment of her claim. As for her discharge of the plaintiff, the defendant attests that she was never served with a copy of her deposition and had she been, she would have added a statement to the effect that she didn't think the plaintiff did anything at all

which was why she fired him and why she believes that he is not entitled to any money. The defendant client also claims that the plaintiff attorney never advised her of her right to arbitrate their fee dispute, however, she ultimately sought and obtained arbitration when Attorney Negrin told her about it.

Dismissal of the complaint for the plaintiff attorney's failure to comply with Part 137 of the Rules of the Chief Administrator of the Courts (22 NYCRR 137, *et seq.*) is denied. That part requires an attorney who brings an action to recover a fee to allege in the complaint that the client received notice of the right to pursue arbitration and mediation and did not file a timely request therefor or that the dispute is not otherwise covered by 22 NYCRR Part 137. While the complaint is in fact deficient and would be subject to dismissal for its failure to plead compliance with or an exemption from that Part (McCarthy v CBC Capital Ventures, Inc., 18 Misc.3d 1118 [A] [Supreme Court Nassau Co. 2008]; see also, Kaye Scholer LLP v Fall Safe Air Safety Systems Corp., 2007 WL 4639431 [Supreme Court New York Co. 2007]; Wexler & Burkhardt, LLP. v Grant, 12 Misc3d 1162 [A] [Supreme Court Nassau Co. 2006]; Hobson-Williams v Jackson, 10 Misc.3d 58 [App. Term, 2nd Dept. 2005]; Herrick v Lyon, 7 AD3d 571 [2nd Dept. 2004]), it is not disputed that this matter has in fact been arbitrated, thereby obviating the concerns addressed by Part 137.

Turning to the merits, "[a] client has the absolute right to

discharge an attorney at any time, with or without cause." Byrne v Leblond, 25 AD3d 640, 641 (2nd Dept. 2006) citing Matter of Cohen v Grainger, Tesoriero & Bell, 81 NY2d 655, 658 (1993), lv to app den. 88 NY2d 811 (1996); Campagnola v Mulholland, Minion & Roe, 76 NY2d 38, 43 (1990); Lai Ling Cheng v Modansky Leasing Co., 73 NY2d 454, 457 (1989); Teichner v W & J Holsteins, 64 NY2d 977, 979 (1985), appeal den. 70 NY2d 606 (1987). "If the outgoing attorney is discharged for cause, the attorney is not entitled to any fee, notwithstanding a specific retainer agreement." Byrne v Leblond, supra, Campagnola v Mulholland, Minion & Roe, supra, at p. 44; Teichner v W & J Holsteins, supra, at p. 979. "As against the client, where the discharge is without cause the outgoing attorney is limited to recovering in quantum meruit the reasonable value of the services rendered." Byrne v Leblond, supra, citing Matter of Cohen v Grainger, Tesoriero & Bell, supra, at p. 658; Campagnola v Mulholland, Minion & Roe, supra, at p. 44; Lai Ling Cheng v Modansky Leasing Co., supra, at p. 457-458; Teichner v W & J Holsteins, supra, at p. 979. However, when an attorney has "completed its representation of [his] former client prior to being discharged without cause," he is entitled to stand on his contract and to recover the agreed upon value of his services. Wald v Wald, 170 AD2d 669 (2nd Dept. 1991), citing Finkelstein v Kins, 124 AD2d 92, 95 (1st Dept. 1987), amended on other grounds, 131 AD2d 351 (1st Dept. 1987); Kronish, Lieb, Shainswit, Weiner & Hellman v Howard

Stores Corp., 44 AD2d 813 (1st Dept. 1974); see also, In re Site for New York State Aided Low Rent Public Housing Project Known as Mill Brook Homes, 1 AD2d 667 (1st Dept. 1955), aff'd., 2 NY2d 869 (1957); McAvoy v Schramme, 238 App.Div. 225 (1st Dept. 1933), aff'd. 263 N.Y. 548 (1933); Kramer v Doppler, 29 Misc2d 209 (New York Supreme 1961), aff'd., 15 AD2d 457 (1st Dept. 1961).

Under the circumstances extant, whether the plaintiff attorney was terminated for cause presents an issue of fact. While the defendant client testified at her examination-before-trial that the plaintiff did not do anything wrong, she has expanded upon that testimony attesting that the plaintiff attorney failed to take any action at all, thereby bringing about his own discharge. Assuming, *arguendo*, that the plaintiff was not fired for cause, whether he was terminated after he completed what he was hired to do with respect to the Zenith/Horowitz matter thereby allowing him to recover under the retainer agreement or whether he was discharged before he completed his representation of the plaintiff with respect to that matter thereby relegating him to a recovery in *quantum meruit* also presents issues of fact.

The motion and cross motion are both denied.

Dated: FEB 22 2008 **ENTERED** 
Kenneth A. Davis, J.S.C.

FEB 26 2008