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

PRESENT: **HON. SHIRLEY WERNER KORNREICH** PART 54

Justice

Index Number : 603139/2007

K.C. OKOLI, P.C.

VS.

MADUEGBUNA, SAMUEL O.

SEQUENCE NUMBER : 001

DISMISS ACTION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2,3
Replying Affidavits	4,5

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance

WITH ACCOMPANYING MEMORANDUM

DECISION AND ORDER.

[redacted]

FILED

APR 21 2008

COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 4/15/08

HON. SHIRLEY WERNER KORNREICH

J.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: PART 54

----------X

LAW OFFICES OF K.C. OKOLI, P.C., and KENECHUKWU C. OKOLI,

Plaintiffs,

- against -

SAMUEL O. MADUEGBUNA and MADUEGBUNA COOPER LLP,

Defendants.

----------X

INDEX NO. 603139/2007

DECISION AND ORDER

KORNREICH, SHIRLEY WERNER, *J.*:

Defendants in this attorney's fee dispute, file a motion to dismiss the complaint pursuant to CPLR 3211(a)(1), (7) and (8), and, alternatively, a motion to strike paragraphs 75 to 84 of the complaint pursuant to CPLR 3024(b). In support of the motion, defendants file copies of the pleadings, correspondence and other exhibits. Plaintiffs oppose the motion, filing in support an affidavit by Okoli, copies of correspondence and other exhibits. A reply, sur-reply and sur-sur-reply were filed. The court will not consider the sur-reply and sur-sur-reply, which were submitted without prior judicial consent.

I. Causes of Action

The complaint includes two causes of action, one sounding in contract and the other in fraud. The first alleges the existence of an oral contract between the parties to equally share the fees in contingency fee cases. Plaintiffs describe an arrangement stemming from the parties' mutual Nigerian upbringing and connections. The relationship grew informally over time, Okoli alleging an ongoing reciprocal affiliation in which plaintiff Okoli, the more experienced attorney,

initially involved Maduegbuna, the newer lawyer, in his cases. As this reciprocal relationship grew over time, the dynamic changed and Maduegbuna separated from his mentor and started his own firm. Okoli alleges that he continued to help and promote Maduegbuna, and the two lawyers provided reciprocal aid to each other in the form of legal research, citations, and the occasional court appearance. This mutual aid was mostly gratis.

As Maduegbuna's practice grew, Okoli alleges, Maduegbuna asked Okoli for his help in some of his cases. The instant dispute arises from Okoli's expectation of a greater share in the contingency fee proceeds received in one of these cases (the "McCarthy case") and the claim that Maduegbuna left Okoli's name off of a brief that Okoli co-wrote (the "Hurd case"). In the McCarthy cause of action, Okoli alleges breach of contract. Specifically, Okoli states that based on past practices, the latter was obligated to pay Okoli 50% of the $300,000 contingency fee he received after settlement of the "McCarthy case." In support of this conclusion, plaintiffs allege that Maduegbuna formally brought Okoli into the McCarthy case, told him they would share joint responsibility in the case, and "share whatever attorneys fee was realized as they had done in the past." Complaint, ¶ 45. Additional allegations describe prior cases in which Okoli served as "co-counsel" and state that, "In none of the contingent fee cases ... was Okoli or ...[his firm] ever paid less than equal share...." Complaint, ¶ 39. The complaint alleges that although the parties had never actually discussed the issue of the "relative share of fees" (Complaint, ¶ 54), after the settlement this topic was broached. Apparently, Okoli offered to let Maduegbuna keep 60%, but the latter offered Okoli 20%, which he rejected. Defendants then sent plaintiffs a check for $60,000, representing 20% of the fee. The services Okoli had provided on the McCarthy case, as alleged, included giving advice, discussing how the case should be handled, reviewing

documents, motions and briefs, conducting depositions, attending conferences and drafting correspondence.

The second cause of action, the Hurd case, sounds in fraudulent appropriation of intellectual property and alleges that Maducgbuna misrepresented himself as the sole author of an appellate brief that had been jointly written with Okoli. He allegedly did this by leaving Okoli's name off of the brief when it was filed with the appellate court, and by e-mailing Okoli a copy of the brief that he said had been filed, but which *did have* Okoli's name on it. The complaint alleges that this e-mail was fraudulent because it represented that the brief attached to it was the brief that was filed, which it was not. The complaint seeks a correction of this "ethical" violation (¶ 84), but does not identify specific damages for the alleged fraud.

II. Discussion and Legal rulings

A. Standards on Motions to Dismiss

In determining a motion under CPLR 3211(a), the Court must "accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994); *Morgenthow & Latham v. Bank of N.Y. Co., Inc.*, 305 A.D.2d 74, 78 (1st Dept. 2003), *lv. denied* 100 N.Y.2d 512 (2003), quoting *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994). Since the Court's inquiry on such a motion is narrow, it must liberally construe the complaint, accepting as true both the material allegations of the complaint and whatever can be reasonably inferred from them. *DeMicco Bros., Inc. v. Con. Ed. Co.*, 8 A.D.3d 99 (1st Dept. 2004). Factual claims in the complaint, however, if contradicted by documentary evidence, are not entitled to such consideration. *Maas v. Cornell Univ.*, 94 N.Y.2d 87, 91

(1999); *Bishop v. Maurer*, 33 A.D.3d 497, 498 (1st Dept. 2006) (grant of motion to dismiss affirmed where documentary evidence contradicted factual assertions of malpractice). In fact, a complaint may be dismissed based upon a defense founded upon documentary evidence if the documentary evidence resolves all factual issues as a matter of law and disposes of the plaintiff's claim. CPLR 3211(a)(1); *Ozdemir v. Caithness Corp.*, 285 A.D.2d 961, 963 (3d Dept.), *lv. denied* 917 N.Y.2d 605 (2001). Affidavits of the plaintiffs may be used by the court to remedy defects in the inartfully drawn complaint. *Rovello v. Orofino Realty Co., Inc.*, 40 N.Y.2d 633, 635-6 (1976). The court's inquiry should be to determine whether plaintiff has a cause of action. *Id.*

B. Fraud

Turning to plaintiffs' fraud claim, plaintiffs have failed to sufficiently state a cause of action for fraudulent appropriation of intellectual property or for fraudulent misrepresentation. A legal brief is not "intellectual property". *See Downey v. General Foods Corp.*, 31 N.Y.2d 56, 71 (1972). The Court of Appeals in *Downey* explained what constitutes "property" in the area of intellectual intangibles such as ideas,

> An idea may be a property right. But, when one submits an idea to another, no promise to pay for its use may be implied, and no asserted agreement enforced, if the elements of novelty and originality are absent, since the property right in an idea is based upon these two elements.

Id. at 61. *See Paul v. Haley,* 183 A.D.2d 44, 52-53 (2d Dept. 1992), *lv. denied* 81 N.Y.2d 707 (1993) (only ideas that are original and genuine are considered property under New York law); Legal argument in which an attorney cites to and uses statements made in opinions drafted by others is hardly "novel." Moreover, in this case plaintiffs do not allege that they were not paid

for the legal brief.

In addition, the complaint fails to specifically plead the essential elements for a claim of fraud or misrepresentation. CPLR 3016(b); *Old Republic Natl. Tit. Ins. Co. v. Cardinal Abstract Corp.*,14 A.D.3d 678 (2d Dept. 2005) (fraud cause of action failed to plead with specificity elements of fraud). The requisite elements of a fraud claim are: material misrepresentation of fact, knowledge of falsity or reckless disregard for the truth, scienter, justifiable reliance, and damages proximately caused. Mere conclusory language is not enough. *Id.* The alleged misrepresentation in the complaint, *i.e.*, omitting Okoli's name from the brief, is simply not "material," and it does not constitute a misrepresentation that Maduegbuna was the sole author, only that he took responsibility for the accuracy and representations made in the document. Finally, the complaint completely fails to allege any specific damages, only that "plaintiffs have suffered loss and damage." Complaint, ¶ 83. The Second Cause of Action fails under CPLR 3211(a)(7) and 3016(b).

C. Breach of Contract

The complaint does not allege the existence of a written agreement regarding fee sharing between the parties. Rather it alleges a course of conduct and Okoli's understanding of the parties' informal arrangement. Okoli admits that no discussion was had as to the fee arrangement until the case was completed, at which time the parties disagreed. On its face, there does not appear be "mutuality of assent" as to the material issue of what would be paid Okoli. *See S. S. I. Investors v. Korea Tungsten Min. Co.*, 80 A.D.2d 155. (1st Dept. 1981), *aff'd* 55 N.Y.2d 934 (1982) (writings and conduct of parties did not establish a "clear, present contractual intent").

In addition, the arrangement as described by plaintiffs is unenforceable as it violates Code

of Professional Responsibility DR 2-107(A)(22 NYCRR 1200.12 [a] [2]). DR2-107(A) provides:

> A lawyer shall not divide a fee for legal services with another lawyer who is not a partner in or associates of the lawyer's law firm, unless:
>
> 1. The client consents to employment of the other lawyer after a full disclosure that a division of fees will be made.
>
> 2. The division is in proportion to the services performed by each lawyer or, by a writing given the client, each lawyer assumes joint responsibility for the representation.
>
> * * * *

Plaintiffs fulfilled neither section 1 nor section 2 of the rule. The plain language of the Disciplinary Rule requires the client's consent to employment of outside counsel and the division of fees. Where joint representation by attorneys from different firms occurs, the rule permits an attorney to recover a fee disproportionate to the value of his services if he has assumed responsibility for the representation and the client has been advised in writing that the attorneys are representing him jointly and have agreed to the amount of the fee. *Samuel v. Druckman & Sinel,* LLP, _ _A.D.3d___, 2008 NY Slip Op 3073 (1st Dept. 2008); *Robert P. Lynn, Jr., LLC v. Purcell*, 40 A.D.3d 729 (2d Dept. 2007). "[W]here each lawyer does not assume joint responsibility for a client's representation in writing, the division of any fee must be in proportion to the services performed by each lawyer." *Ford v. Albany M.D. Ctr,* 283 A.D.2d 843, 845-846 (4th Dept. 2001), *lv. denied* 96 N.Y.2d 937 (2001). In the absence of "joint responsibility," which is the circumstance here, Okoli can only be compensated according to quantum meruit. *See Ford, supra.* Okoli, however, has not pled quantum meruit. Accordingly, it is

ORDERED that the motion by defendants to dismiss the complaint is granted with leave

to replead asserting a claim in quantum meruit, within twenty days of service of this order/decision with notice of entry; and it is further

ORDERED that the motion to strike paragraphs 75 through 84 of the complaint is denied as moot; and it is further

ORDERED that the Clerk shall enter judgment accordingly.

ENTER:

Date: April 15, 2008
New York, N. Y.

J.S.C.