

**Landa v Dratch**

2008 NY Slip Op 31147(U)

April 16, 2008

Supreme Court, Nassau County

Docket Number: 6681-06/

Judge: William R. LaMarca

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU - PART 17

Present: HON. WILLIAM R. LaMARCA  
Justice

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JAY LANDA,

Plaintiff,

-against-

INDEX NO: 16681/06

BARRIE DRATCH,

Defendant.

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Appearances:  
For Plaintiff:

For Defendant:

Jay Landa  
Plaintiff Pro Se  
595 Stewart Avenue, Suite 510  
Garden City, NY 11530

Barrie Dratch  
Defendant Pro Se  
5 Margaret Street  
Glen Cove, NY 11542

**MEMORANDUM DECISION AFTER TRIAL**

**Introduction**

This matter flows from a matrimonial action to obtain a Judgment of Divorce in which defendant, BARRIE DRATCH (hereinafter referred to as the "CLIENT"), was represented by plaintiff, JAY LANDA, her attorney (hereinafter referred to as the "ATTORNEY"). After fee arbitration was concluded on September 27, 2006, the ATTORNEY brought this action, *de novo*, in which he sought to be paid for the services

rendered to the CLIENT and for the disbursements that he incurred. The trial of this matter was conducted before the Court, without jury, on January 30, 2008 and February 6, 2008.

### Background

The Complaint in this action alleges four (4) causes of action, as follows:

1. for an account stated in the amount of \$28,275.00, covering the period from inception through February 15, 2005;
2. for an account stated in the amount of \$17,190.00 covering the period from March 5, 2005 through October 31, 2005;
3. for an account stated in the amount of \$2,815.00 covering the period from November 1, 2005 through May 25, 2006; and
4. for work, labor, services and disbursements incurred during the entire period.

The date of the commencement of the action is unclear as the Complaint in evidence (Court Exhibit "I") is dated April 24, 2007, and contains no time and date stamp from the County Clerk, while the Answer (Court Exhibit "II"), which contains a general denial and four (4) separate affirmative defenses, is dated November 20, 2006.

Upon receipt of the Answer, the ATTORNEY moved for an order to strike prejudicial and unnecessary matter from the CLIENT's answer with respect to the findings of the arbitrator, to dismiss the CLIENT's affirmative defenses which also contained references to the findings of the arbitrator and for summary judgment on the first cause of action for an account stated in the sum of \$28,275.00. The Supreme Court, Nassau County (Spinola, J.), by Short Form Order dated April 3, 2007, denied the motion for the relief demanded by the ATTORNEY.

On appeal, the Appellate Division, Second Department, by Decision and Order dated November 13, 2007, modified the order of the lower Court, on the law, by striking the allegedly prejudicial and unnecessary matter from the answer, dismissing the CLIENT's third and fourth affirmative defenses and awarding the ATTORNEY summary judgment on

the first cause of action for an account stated in the sum of \$28,275.00. Second Department found that the CLIENT duly approved the invoices rendered by the ATTORNEY and made a partial payment thereon.

This Court tried the outstanding allegations contained in the second, third and fourth causes of action of the complaint and the remaining affirmative defense which essentially alleged that the ATTORNEY's claim of charges due and owing are excessive and improper.

#### Plaintiff's Position

At trial, the ATTORNEY testified that, on March 27, 2003, the CLIENT was given, and acknowledged receiving, a Statement of Client's Rights & Responsibilities (Plaintiff's Exhibit "1") and that she entered into a Retainer Agreement (Plaintiff's Exhibit "2"). In pertinent part, the documents provide that the CLIENT has the obligation to examine each bill rendered, and to promptly advise of any questions or objections. Although not found in the Statement of Client's Rights & Responsibilities, the Retainer states that if no question or objection is raised within ten (10) days, the bill will be deemed approved by the client.

As to the second cause of action, the ATTORNEY testified that, during the period from March 5, 2005 through October 31, 2005, he rendered professional services to the CLIENT and provided her with itemized bills (Plaintiff's Exhibit "4"). The ATTORNEY testified that, during that period, the services pertained primarily to post trial matters such as the preparation of a Post Trial Memorandum of Law on the CLIENT's behalf (Plaintiff's Exhibit "5"), review of her then Husband's Post Trial Memorandum of Law (Plaintiff's Exhibit "6"), preparation of an application for counsel fees on her behalf (Plaintiff's Exhibit

"7"), and a review of the Husband's application for counsel fees (Plaintiff's Exhibit "8") and a response thereto (Plaintiff's Exhibit "9"). The bills totaled \$17,290.00 (Plaintiff's Exhibit "10"). The ATTORNEY stated that the client never communicated or otherwise objected to the bills. It appears that, on November 15, 2005, the CLIENT made a payment in the amount of \$100.00. The ATTORNEY urges that, therefore, an account was stated in the amount of \$17,190.00.

As to the third cause of action, the ATTORNEY testified that during the period from November 1, 2005 through November 28, 2005 he rendered professional services to the CLIENT, and from May 18, 2006 through May 25, 2006 he incurred disbursements on her behalf, and that he provided her with itemized bills (Plaintiff's Exhibit "11"). The ATTORNEY testified that, during that period, the charges pertained primarily to post trial matters such as preparing the Judgment of Divorce and ancillary documents and obtaining a certified copy of the Judgment. The bills totaled \$2,815.00 (Plaintiff's Exhibit "12") and the ATTORNEY testified that the CLIENT neglected and failed to communicate or object to the bill, and therefore an account was stated in the amount of \$2,815.00.

On the fourth cause of action, plaintiff seeks recovery of all outstanding fees in the event his second and third cause of actions are denied, on the basis of work, labor and services rendered.

The ATTORNEY testified that all of the work done on the CLIENT's behalf was necessary and that she has not timely objected to the regular bills forwarded to her. It is the ATTORNEY's position that he is entitled to judgment for counsel fees on the basis of an account stated. In his Post Trial Memorandum of Law, the ATTORNEY asserts that absent fraud, mistake or overreaching, an account stated is conclusive on the parties, and

the Court may not examine the reasonableness of the underlying fees, citing *Rodkinson v Haeker*, 248 NY480, 162 NE 493 (C.A. 1928). In the alternate, the ATTORNEY contends that, in light of his award of 100% of the services rendered prior to the conclusion of the trial (\$28,275.00), he should be awarded the full amount for the post-trial pre-judgment services rendered in the sum of \$20,005.00 on the fourth cause of action. Citing *Rubenstein v Rubenstein*, 137 AD2d 514, 523 NYS2d 986 (2<sup>nd</sup> Dept. 1988), counsel points out that the relevant factors in the determination of the value of legal services are the nature and extent of the services, the actual time spent, the necessity therefor, the nature of the issue involved, the professional standing of counsel and the results achieved.

#### Defendant's Position

Based upon the documents in evidence, it appears that the parties in the underlying matrimonial action were married on June 25, 1995, and the wife, the defendant herein, commenced an action for a separation on June 25, 2003. Thereafter, the husband answered and counter-claimed for a divorce. The wife, then age 38, was a teacher earning approximately \$77,000.00 per year, and the husband, then age 38, was a television producer earning approximately \$111,000.00 per year. The parties had two (2) children, and it appears that prospective child support, custody and visitation were amicably settled by the parties and that neither requested maintenance from the other. Indeed, the parties agreed that their limited assets, consisting primarily of their respective retirement accounts, and their mounting credit card debt would be evenly divided so that equitable distribution was agreed to as well. The only issues at the divorce trial appear to have been retroactive child support and counsel fees.

At the trial herein, the CLIENT testified that the ATTORNEY was aware of her limited circumstances and that she had taken a loan from her credit union to pay his initial retainer of \$10,000.00. She testified that she frequently complained to the ATTORNEY that his mounting bills were too expensive and beyond her ability to pay, but that he assured her he had written many articles and books and that he knew the law and believed that she had a good chance of winning retroactive child support and counsel fees and counseled her not to settle, even though he knew she wanted to avoid the costs of trial. The CLIENT testified that she did as she was instructed and signed approval of many of the bills. Indeed, the CLIENT points out that the reason the Second Department granted the ATTORNEY summary judgment on the first cause of action was because she had signed the monthly bills and they found an account stated. However, the CLIENT testified that she refused to sign the bills from March 5, 2005 forward, and that her refusal to sign, contrary to her actions in the past, was her way of objecting to the bills rendered. She stated that the ATTORNEY spent almost forty (40) hours in post-trial work on a case that was basically uncomplicated except for his making it so, and that he billed her excessively despite her diminished financial circumstances in which she is working and supporting two (2) children with only modest child support from her former husband. She stated that the ATTORNEY has obtained an income deduction order of 10% of her salary based upon the prior judgment entered of \$28,275.00 and that he continues to dun and bill her despite her ongoing protestations that his fees are excessive.

The Court of Appeals instructs:

As a general principle, a lawyer may make a contract with his client either for future or past services. Such a contract for compensation will be enforced unless it appears to have been procured by fraud, deceit, overreaching,

undue influence, or through any other means which would move a court of equity to modify or set it aside. The circumstances may be many, which would prevent the enforcement of the agreement. No one can undertake to specify the instances. Sufficient to state that no undue advantage can be taken of the relationship or of the circumstances or of the client to procure such a contract. The courts are very sensitive to the honor of the bar. Transactions between a lawyer and his client must be fair. Unless unreasonable upon its face, the contract, however, like any other contract is presumed to be fair until the contrary appears. . . It is always open, however, for the client to plead or to show that for some equitable reason it should not be enforced. Equity is a patient listener to all such charges, examines them carefully and thoroughly. When groundless, however, the contract or the account stands.

*Rodkinson v Haeker, supra.*

After careful consideration of the evidence presented at trial and the post-trial submissions of the parties, the Court finds that no account stated has been established herein. The Court finds that, in direct contrast to the procedure followed by the CLIENT in the pre March 5, 2005 bills, wherein she signed and returned each invoice provided to her over an approximately two (2) year period of time, her refusal to sign the post March 5, 2005 bills alerted the ATTORNEY to her disapproval of said bills. It appears that the CLIENT repeatedly complained but the ATTORNEY continued to work on the matter, with the hourly rate accruing at \$350.00 per hour, knowing of his client's inability to pay and of her financial condition, and seemingly without any check or balance and out of proportion to the financial issues involved. These circumstances do not amount to an account stated. The Court finds that the retainer provision that rigidly determines a bill to be an account stated within ten (10) days of billing to be durationally unreasonable, at variance with the Procedure for Attorneys in Domestic Relations Matters, 22 NYCRR Part 1400, and under the circumstances of this case unenforceable.

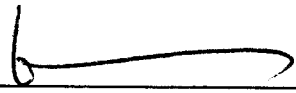
The Court has examined the time billings for the period from March 5, 2005 through May 25, 2006, on the fourth cause of action. The ATTORNEY was unsuccessful in obtaining either retroactive child support or counsel fees for the CLIENT and, given the modest circumstances of the parties, the time charges billed and accrued on the underlying matrimonial action are of questionable value. See, *Rubenstein v Rubenstein, supra*. It is certainly within the control of a client to litigate a case as a matter of principle, where the financial outcome would be smaller than the attorneys' fees and disbursements accrued to achieve the result, and such causes are not frivolous. However, the case at bar is not in that category. Nor is the fact the client was not successful the reason upon which this decision is grounded. Herein, it is clear to the Court that the CLIENT objected, after a cost/benefit analysis to her, but that the ATTORNEY continued nevertheless. The situation evolved where only the ATTORNEY would recover at the end of the proceeding and where, in essence, the CLIENT was held captive by her retainer, with her protests unheard. After a careful review of the billing statements submitted herein, given the facts of this case and in the discretion of the Court, it is hereby

**ORDERED**, that the second and third causes of action are dismissed; and it is further

**ORDERED**, that the ATTORNEY is awarded the sum of \$4,250.00 for the work, labor, services and disbursements rendered for the period from March 5, 2005 through May 25, 2006.

Submit judgment with notice of settlement.

Dated: April 16, 2008

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WILLIAM R. LaMARCA, J.S.C.

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