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

Present: HON. WILLIAM R. LaMARCA
Justice

SCAN

SUSAN GROSS f/k/a SUSAN G. BERLLY,

Plaintiff,

-against-

INDEX NO: 20577/05

WILLIAM S. COHN and HERBIL HOLDING CO.,

Defendant.

Appearances:
For Plaintiff:

Steinberg & Early-Hubelbank, PLLC
Attorneys for Plaintiff
1400 Old Country Road, Suite 416
Westbury, NY 11590

For Defendant:

Forchelli, Curto, Schwartz, Mineo,
Carlino & Cohn, LLP
Attorneys for Defendants
330 Old Country Road
Mineola, NY 11501

MEMORANDUM DECISION AFTER TRIAL

Introduction

Plaintiff, SUSAN GROSS f/k/a SUSAN G. BERLLY (hereinafter referred to as "GROSS") an attorney, commenced this action on or about December 23, 2005 by filing a Summons and Complaint with allegations against WILLIAM S. COHN (hereinafter referred to as "COHN") and HERBIL HOLDING CO. (hereinafter referred to as "HERBIL").

The litigation arises from a contract between the parties, pursuant to a letter agreement dated August 1, 1998 (Plaintiff's Exhbit "1"), prepared by GROSS on her

letterhead and addressed to William S. Cohen, Esq., wherein she agreed to provide legal services to "include, but not be limited to foreclosure, contract, closing and collection work for Herbil Holding Co., Diversified Lien Co. and any other entities in which you have an interest; collection work for Cohn, Rosenthal and Avrutine, P.C., and other civil litigation and property work which you may refer". The fee schedule for a variety of services was as follows:

I. Tax lien foreclosures and mortgage foreclosures, $3,500 per lien/mortgage earned as follows:

$1,500.00 upon filing of Notice of Pendency, Summons and Verified Complaint.
$1,000.00 upon completion of service.
$1,000.00 upon filing of Motion for Default/Summary Judgment.

A. In addition, should there be a settlement of the matter at any time, or a final judgment of sale, an additional $100.00 per hour shall be earned and payable in addition to the above for time spent negotiating the settlement terms and preparing all necessary documents, including but not limited to correspondence, settlement statements, stipulations of discontinuance and cancellation of notice of pendency.

B. All matters assigned after commencement of an action to foreclose or bar claim or lien or mortgage will be billed at $100.00 per hour plus disbursements.

C. This reduced fee is in consideration of your provision of office space as needed and the necessary amenities, including, but not limited to secretarial support and office equipment and supplies. Disbursements will be made by the client, when possible and any disbursements made by the undersigned will be billed an payable upon receipt.

This work will be performed at your office when possible and all files will remain in your possession.

II. Collection work for Herbil Holding Co., Diversified Lien Co., Cohn, Rosenthal & Avrutine, PC., and any other entities in which you have an interest: $50.00 per hour plus ten (10%) percent of the net recovery, if any. This work will be performed at my office and all files will remain in my possession. This fee

and all related expenses will be billed and paid/reimbursed on a monthly basis.

III. Civil Litigation matters for other parties: 2/3 of fee to [GROSS], 1/3 of fee to William S. Cohn, to be billed at the rate of $225.00 per hour plus disbursements.

This work will be performed at my office and all files will remain in my possession. This fee and all related expenses will be billed to the client on a monthly basis and your portion will be paid within thirty (30) days upon receipt of payment from the client.

The letter was signed by GROSS and " William S. Cohen".

The complaint alleges that, in accordance with Paragraph II of the agreement, GROSS represented HERBIL in a collection matter against Leon D. Mitrany and Minnetta Mitrany, (hereinafter referred to as "MITRANY"). It is further alleged that HERBIL prevailed in said litigation and was awarded a sum certain, as well as title to certain property owned by MITRANY, hereinafter referred to as the "Indiana Avenue Property". The complaint contains five (5) causes of action: The first cause of action alleges that, in accordance with the parties agreement, in Paragraph II, there is due and owing from the defendants to GROSS the sum of $47,026.13, plus 10% of the value of the Indiana Avenue Property. The second cause of action alleges that defendants were unjustly enriched in the sum noted in the first cause of action. The third cause of action alleges that the defendants wrongfully converted the money and the asset set forth in the first cause of action. The fourth cause of action alleges that the defendants breached a fiduciary agreement by acting in in bad faith and with dishonesty and in failing to remit the sums due to GROSS. The fifth cause of action alleges that GROSS performed her duties pursuant to the agreement and that the value of her services was greater than the nominal fee agreed upon as evidenced by the contingent portion of the retainer. GROSS alleges that the

defendant failed to pay her the true value of her services.

Background

This dispute was tried before the Court over a period of four (4) days from September 24 through September 27, 2007, to determine the duties and responsibilities of the parties under the August 1998 agreement. The parties had a different interpretation of the meaning of the above noted Paragraph II. They argued as to whether the language was clear and unambiguous or subject to outside interpretation. GROSS contended that the agreement was a fee sharing arrangement between attorneys, GROSS and COHN, and that she was entitled to recovery of a percentage of COHN's recovery, in accordance with the parties' agreement. It is defendant's position that GROSS refused to try the case and that he had to retain trial counsel who were responsible for the recovery and not GROSS. Defendants argue that GROSS withdrew from the case without cause and has no right to compensation or a lien notwithstanding a specific retainer agreement. In the alternative, defendants argue that even if GROSS was discharged without cause, she would be entitled to quantum meruit recovery, only, and not a contingency fee, no matter what a retainer agreement may have provided.

Trial Testimony

GROSS testified at trial that the August 1998 agreement was made with COHN, as between attorneys. In contrast, COHN testified that the agreement intended that GROSS would be the attorney-of-record with a retainer from the client, in this case, HERBIL. It should be noted that COHN was an officer and shareholder in the subject corporations and had numerous business interests in all of the matters encompassed by Paragraph II.

GROSS testified that, on or about May 20, 1999, she commenced collection activity for monies due and owing in the matter of HERBIL HOLDING CO., FLOCO REALTY CO. and DIVERSIFIED LIEN CO., (hereinafter collectively referred to as "HERBBIL") v. LEON D. MITRANY, individually and as Executor of the Estate of MINNETTA MITRANY, a/k/a E. REGAL, a/k/a M. AXEE, a/k/a ROSALIND AXELROD, LYN STATON MITRANY and SION LESLIE MITRANY, (hereinafter referred to as "MITRANY"). The evidence reflects that GROSS commenced the action as the attorney-of-record for plaintiffs, and performed legal services for them, including preparation and filing of the Summons and Complaint, motions, affidavits, discovery demands, responses, appearances, conferences, depositions, all pre-trial litigation and thereafter filed a Note of Issue and Certificate of Readiness. She stated that she continued in that capacity until November 2002.

GROSS testified that the parties agreed that she was not a trial lawyer and that separate counsel would be engaged to conduct the trial. It is essentially GROSS' position that she never withdrew from the case, that she provided continuing services to the trial counsel and that she is entitled to 10% of the net recovery on the action, according to Paragraph II of the agreement. GROSS contended that there was precedent for engaging outside counsel as COHN not only knew that GROSS wasn't a trial attorney but had authorized the retention of trial counsel in the matter of *Cohn, Rosenthal & Avrutine, PC v Telestar Development Corp*. That matter was resolved for the sum of $22,500.00. From the gross amount, the costs of litigation including outside counsel fees ($5,500.00) were deducted and GROSS received 10% of the balance. Although there was testimony that the transaction did not conform to Paragraph II of the agreement and that GROSS collected excess fees and did not account for $140.00 she had been paid, GROSS testified

that both she and COHN had made the mistake and that her fees were subsequently adjusted to $1,840.00 ($22,500-$5,500=$17,000x10%)+$140 for a total of $1,840.00. COHN acknowledged that amount in a Memorandum dated March 17, 2002 (Plaintiff's Exhibit "9"). That transaction is consistent with the provisions set forth in Paragraph II of the agreement.

COHN emphatically denied any such agreement to hire outside counsel which precipitated the litigation between the parties. COHN testified that the retainer was clear and unambiguous-- that GROSS was retained to represent HERBIL, not him, in all phases of litigation from pre-trial through the actual trial.

The evidence reflects that, by Memorandum dated October 28, 2002 (Plaintiff's Exhibit "4"), GROSS reminded COHN that she was not a trial attorney and that trial counsel would have to be retained in the HERBIL matter and that she would sit as second chair. At that point the case was marked ready for trial, as all pretrial procedures had been completed after negotiations of settlement had broken down. The case was on the Calendar Control Part (CCP) trial calendar for April 19, 2002. Sometime before November 9, 2002, GROSS filed a Note of Issue and Statement of Readiness. Shortly after the Memorandum of October 28, 2002, GROSS received a Substitution of Counsel, dated November 9, 2002 (Plaintiff's Exhibit "5"), substituting the firm of Gilbride, Tusa, Cass & Spellane, LLC., by James P. Donahue, Esq. (hereinafter referred to as "Donahue"), as counsel for plaintiff in the pending matter. The substitution was signed by COHN and Donahue and GROSS testified that she was not asked nor did she sign the Substitution of Counsel. GROSS further testified that thereafter she was consulted by Donahue, had numerous phone conversations with him, and met with him and COHN in COHN's office.

She stated that she turned the file over to Donahue. The trial took place in March 2003, and the Court, still having GROSS as the attorney-of-record, forwarded the decision to GROSS. GROSS testified that, in accordance with the parties agreement, her monthly bills for the period from May 1999 to November 2002 were submitted for payment and she was paid a total of $20,224.76 (Plaintiff's Exhibit "12").

Incoming counsel, Donahue, commenting on the HERBIL et al v MITRANY litigation as it related to GROSS' services, testified that the case was an accounting action that was not very complex and merely required mathematical computations from information possessed by HERBIL in its records. He stated that, notwithstanding all the pre-trial discovery conducted by GROSS (approximately seven [7] days of depositions of the defendant), those efforts were of no value to him. Donahue testified that, when he received the files from GROSS, the case was not ready for trial, and that he found it necessary to retain a forensic accountant to compile information which took many months, enlisting the aid of the members of the HERBIL organization. Once the information was compiled it was a matter of mathematical computation to establish what was due from MITRANY to HERBIL. Donahue explained that the subject of the litigation between HERBIL and MITRANY concerned an agreement that they would buy tax liens and share the costs and profits 50/50. Donahue testified that judgment was entered in favor of HERBIL and against MITRANY in the sum of $609,993.96, plus one-half the value of the Indiana Avenue property located in Long Beach. Responding to GROSS' demand for 10% of the net recovery, including the Indiana Avenue Property, Donahue testified that he did not recall that GROSS provided any information having to do with that property and "I think we discovered it under my watch".

The parties agree that the total expenses attendant to the HERBIL v MITRANY litigation, including GROSS' previously paid legal fees of $20,244.76, were $139,732.64 (Defendant's Exhibit "E"). The analysis of the fees demanded by GROSS, excluding the Indiana Avenue Property, in accordance with Paragraph II of the parties agreement is as follows:

Gross recovery in the HERBIL v. MITRANY litigation	$609,993.96
Minus total expenses	($139,732.64)
Net recovery	$470,261.32.

Ten (10%) percent due to GROSS = $47,026.13.

To prove the value of the Indiana Avenue Property, GROSS offered a document which indicated that the fair market value of the property, as determined by the Department of Assessment as of April 1, 2007, was $545,900.00 (Plaintiff's Exhibit "8"). HERBIL was awarded one-half value of the real property or the sum or $272,950.00. Ten (10%) percent of that value is $27,295.00. GROSS demands said sum, in addition to the $47,026.13, based on the aforementioned calculations, for a total of $74,321.13, plus interest.

COHN vigorously argued that any alleged conversation with him, on the issue of GROSS' ability or inability as trial counsel, be excluded from evidence. COHN relied on Paragraph II of the agreement which he stated was clear and unequivocal – that GROSS was retained to complete the legal work that she undertook to its conclusion, including trial. He cited the parol evidence rule for the proposition that, where the parties have reduced their agreement to writing, any prior or contemporaneous oral agreement offered to contradict or add to the writing should be excluded from the evidence.

Parole Evidence Rule

Prince, Richardson on Evidence, 11th Edition, Article XI, §§ 11-101 and 11-103, defines the Parole Evidence Rule as follows:

> §11-101 Parol Evidence Rule Defined.
>
> Where the parties have reduced their agreement to writing, the parol evidence rule excludes evidence of any prior oral or written agreement or of any contemporaneous oral agreement when offered to contradict, vary, add to, or subtract from the terms of the writing. . . The parol evidence rule is more than a rule of evidence; it is a rule of substantive law which defines the limits of the contract. . . (citations omitted).
>
> § 11-103. Reason for Rule.
>
> . . . The rule is a protection against fraud and perjury, infirmity of memory, and the death of witnesses. . .(citations omitted).

However, a written agreement may be modified by a subsequent oral agreement.

> The parol evidence rule . . . is a rule which precludes evidence of conversations or negotiations by the parties to a written contract when such conversations or negotiations occur either *prior to, or at the time of, the execution of the written contract when such conversations would contradict, vary, add to or subtract from its terms. . .* Accordingly a parol contract made *after* the written contract does not fall within the prohibition of the rule.
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> "Those who make a contract, may unmake it. * * *Whenever two men contract, no limitation self-imposed can destroy their power to contract again". (Beatty v. Guggenheim Exploration Co., 225 N.Y. 380, 387-388.)"An existing contract may be modified later by subsequent agreement, oral or written. (Martin v. Peyton, 246 N.Y. 213, 218).

McIntyre v Latchford, 10 Misc.2d 951,171 NYS2d 412 (Supreme Monroe Co. 1958).

It is the Courts judgment, in view of the deviation from the terms of the August 1998 Agreement with respect to the matter of *Cohn, Rosenthal & Avrutine, PC v Telestar Development Corp*, wherein the parties actions reflect that GROSS was not the trial

attorney and that outside counsel was retained for the purpose of trial, that a new agreement was formulated by the parties and that the Parole Evidence Rule does not bar evidence with respect to said arrangement. However, notwithstanding the conclusion that a new agreement was reached between the parties, it is clear to the Court that GROSS was discharged as counsel before conclusion of the matter, that she turned over the file to incoming counsel and that she was formally substituted as the attorney of record and had no further responsibility for the case.

Referral Fees Between Attorneys Or Retainer By Client

GROSS' attorney argued that an agreement between attorneys for the sharing of fees contemplates contribution by each in preparing the client's case. The August 1998 Agreement set forth compensation for GROSS and made no mention that COHN was to provide any legal services in those matters covered by Paragraph II. Clearly GROSS was the attorney of record in the HERBIL et al v. MITRANY matter, and the Court finds that GROSS was retained by HERBIL. In light of the Court's analysis of the evidence presented herein, it is the Court's judgment that GROSS did not voluntarily withdraw from the case but was dismissed without cause.

Discharge For Cause Or Without Cause

As analyzed by the I.A.S. Court in the instant matter, by Short Form Order dated June 27, 2007 (Winslow, J.), wherein the parties' motions for summary judgment were denied,

> [i]t is a well established principle under New York law that a client has the right to discharge a hired attorney even without cause. *Matter of Montgomery*, 272 NY 323; *Matter of Dunn*, 205 NY 398. Also a bedrock principle in New York State is that the attorney forfeits entitlement [to fees] only when terminated for cause or withdraws without cause. *Lai Ling Chen*

> *v Modasky Leasing Co. Inc.*, 73 NY2d 454. In New York when a client discharges an attorney without cause, the attorney is entitled to recover compensation from the client measured by the fair and reasonable value of the services rendered. (quantum meruit). "Recovery on a quantum meruit basis is called for even where the attorney discharged without fault was employed under a contingent fee contract (*see*, 7 NY Jur 2d, Attorneys at Law, § 150, at 52). Simply awarding one third of a rejected settlement offer is not permissible (*see DeSalvatore v Lavigne*, 143 AD2d 513, 514). The lien must still be determined on a quantum meruit basis (*see Matter of Shaad*, 59 AD2d 1061). Therefore, while the terms of the percentage agreement is one factor that may be taken into account in determining the value of the services rendered, it is not to be considered the dispositive factor (*see* 7 NY Jur 2d, Attorneys at Law, §150, at 54; *see also*, Annotation, 92 ALR3d 690, § 3). Other factors, such as the nature of the litigation, the difficulty of the case, the time spent, the amount of money involved, the results achieved and amounts customarily charged for similar services in the same locality, for example, should also be considered (*see generally*, 7 NY Jur 2d, Attorneys at Law, § 160, 68-73)". *See Smith v Boscov's Department Store*, 192 AD2d 949 at pages 950-951; *compare Cohen v Grainger, Tesoriero & Ball, et al.*, 81 NY2d 655; *Padilla v Sansivieri*, 31 AD2d 64.

Conclusion

The Court sitting without jury assumed the duel role of fact finder and law giver. It was necessary to evaluate testimony of witnesses to determine their interest or prejudice, if any, in the outcome of the case and to assess the credibility of the witnesses.

After careful consideration of the evidence presented herein, the Court finds that the Parol Evidence Rule was no bar to the introduction of evidence regarding the conduct of the parties in fashioning a new oral agreement. The oral agreement provided that GROSS would not be trial counsel in the HERBIL matter in which outside counsel was to be retained to conduct the trial. The Court also finds that GROSS had a retainer agreement with HERBIL and that she was discharged as counsel before the completion of the matter, without cause. As such, the retainer agreement was no longer in effect and the issue of compensation to GROSS is to be determined on a quantum meruit basis. After dismissal

of the attorney, the cancelled contract no longer serves to establish the sole standard for the attorney's compensation. Together with other elements, it may be taken in consideration as a guide for ascertaining quantum meruit. *Paulsen v Halpin*, 74 AD2d 990, 427 NYS2d 333 (4th Dept. 1980). The Court has considered GROSS' hourly rate, the bargained for contingency fee of ten (10%) percent of any recovery and Donahue's testimony. It is clear to the Court that GROSS agreed to a reduced hourly rate of $50.00 per hour in anticipation of the equalizing factor found in the ten (10%) percent interest in the total recovery. The Court also considered the value of the Indiana Avenue Property in Long Beach.

Based on the factors to be considered in determining a counsel fee award on a quantum meruit basis as set forth above, the Court finds that the appropriate award to GROSS is $35,000.00. Said sum, together with the counsel fees previously paid to her at a diminished rate, results in a total fee of $55,244.76 on the HERBIL et al v. MITRANY matter, which the Court concludes is fair and reasonable compensation for GROSS' services on the matter.

Second Counterclaim

The defendants withdrew the first and third counterclaims. On the second counterclaim, defendants assert that they incurred fees and expenses that would not have been necessary had GROSS tried the case to its conclusion. In view of the fact that the Court has determined that GROSS was dismissed without cause, and the matter was thereafter handled by new counsel, the expenses alleged in this counterclaim are those that would necessarily flow from the litigation which cannot be assessed against GROSS. The Court finds the second counterclaim to be without merit and same is dismissed.

This constitutes the decision of the Court.

Submit judgment with notice of settlement.

Dated: April 11, 2008

WILLIAM R. LaMARCA, J.S.C.

TO: Steinberg & Early-Hubelbank, PLLC
Attorneys for Plaintiff
1400 Old Country Road, Suite 416
Westbury, NY 11590

Forchelli, Curto, Schwartz, Mieo, Carlino & Cohn, LLP
Attorneys for Defendants
330 Old Country Road
Mineola, NY 11501

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