

<b>Leinwand v Bougades</b>
2008 NY Slip Op 32228(U)
August 5, 2008
Supreme Court, New York County
Docket Number: 0113564/2007
Judge: Barbara R. Kapnick
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**BARBARA R. KAPNICK**

PRESENT: \_\_\_\_\_

PART 12

Index Number : 113564/2007

**LEINWAND, HARRIS D.**

vs.

**BOUGADES, WALTER N.**

SEQUENCE NUMBER : 001

SUMMARY JUDGMENT

INDEX NO. 113564/07

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001

MOTION CAL. NO. \_\_\_\_\_

This motion is to/for \_\_\_\_\_

PAPERS NUMBERED \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion \_\_\_\_\_

**MOTION IS DECIDED IN ACCORDANCE WITH  
ACCOMPANYING MEMORANDUM DECISION**

**FILED**

AUG 08 2008

COUNTY CLERKS OFFICE  
NEW YORK

Dated: 8/5/08



**BARBARA R. KAPNICK**

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate

DO NOT POST

REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IA PART 12

-----X  
HARRIS D. LEINWAND,

Plaintiff,

- against -

WALTER N. BOUGADES,

Defendant.  
-----X

BARBARA R. KAPNICK, J:

DECISION/ORDER  
Index No. 113564/07  
Motion Seq. No. 001

**FILED**

AUG 08 2008

COUNTY CLERK'S OFFICE  
NEW YORK

In this action, plaintiff Harris D. Leinwand, Esq. seeks to recover legal fees for services he rendered on behalf of Walker Thomas Associates, Ltd. from March 12, 1999 through June 15, 2004, in connection with its Chapter 11 and Chapter 7 case in Bankruptcy Court.

On or about November 9, 2006, the Bankruptcy Court awarded plaintiff the sum of \$174,921.10 for his legal fees in connection with the Chapter 11 bankruptcy proceeding. Plaintiff claims that the amount of \$85,956.32 is currently outstanding.<sup>1</sup>

Defendant Walter N. Bougades, the President of Walker Thomas Associates, Ltd., allegedly guaranteed payment of plaintiff's legal fees.

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<sup>1</sup> Plaintiff also claims to be owed additional legal fees totaling \$8,702.50 for work performed when the Chapter 11 proceeding was converted to a Chapter 7 proceeding. Plaintiff, however, withdrew his application for those fees on the record on May 28, 2008.

Plaintiff now moves for summary judgment against the defendant.

Defendant does not dispute that his signature appears on the third page of the Retainer Agreement as the Guarantor, but states that he has no recollection of signing that page in connection with the execution of the Retainer Agreement. He further claims that "such an agreement would be totally outside the contemplation of the parties at the time the Retainer Agreement was executed." In addition, defendant alleges that plaintiff "never raised the issue of a guarantee of his fees with [him] at any time", and claims that he "never agreed to personally guarantee Leinwand's fees."

Defendant further argues that although the fees sought herein were previously awarded to plaintiff in the Bankruptcy Court, the doctrine of res judicata does not apply here because defendant was not personally a party to the Bankruptcy proceeding and was not represented by counsel in that proceeding.

Plaintiff argues in reply that defendant's claim that he never personally guaranteed his legal fees is directly contradicted by a letter to plaintiff dated March 22, 1999 in which defendant states as follows:

Please find enclosed an executed retainer agreement between you and Walker Thomas Associates, Ltd., DIP, with Walter N. Bougades signing additionally as Guarantor [emphasis supplied]. Also enclosed is check number 2293, dated March 22, 1999, in the amount of five thousand dollars (\$5,000.00) drawn in your favor. As discussed, this check was issued by my father, Walter R. Bougades, as a loan and favor to me; you are requested to deposit same on or after Wednesday, March 24, 1999, this in order that funds transferred into this account clear collection.

Kindly note two (2) changes to this retainer agreement. One, while my father has granted me the loan, he is not willing to be a guarantor to the agreement. And two, while I fully agree and personally guarantee to reimburse any and all reasonable expenses associated with representation of Walker Thomas [emphasis supplied], I have deleted the reference to a \$1,500.00 advance against same. I trust you will agree that neither change materially affects the agreement to represent Walker Thomas Associates, Ltd. DIP. Kind regards.

Sincerely yours,

Walker Thomas Associates, Ltd. DIP  
/s/  
Walter Bougades  
President & Guarantor [emphasis supplied]

In addition, defendant swore in an Affidavit dated September 17, 2002 submitted in the United States Bankruptcy Court, Eastern District of New York in opposition to the motion to convert the Debtor's Chapter 11 case to a Chapter 7 proceeding, that "[m]y father and I guaranteed payment of his [plaintiff's] time charges;..."

Finally, plaintiff argues that as President of Walker Thomas Associates, Ltd. and guarantor of his legal fees, defendant had a full and fair opportunity to contest his legal fees at the time the issue was raised in the Bankruptcy Court.

In a sur-reply affidavit which defendant submitted with leave of this Court, defendant represents that it was his intent and understanding that he "was merely guaranteeing the payment of disbursements as described in the retainer agreement" and that any prior statement that either he or his father guaranteed payment of the attorney's fees is factually incorrect.

Based on the papers submitted and the oral argument held on the record on May 7, 2008 and May 28, 2008, this Court finds that plaintiff has made out a prima facie showing of its entitlement to summary judgment.

Moreover, defendant's claim that he never personally guaranteed plaintiff's legal fees is belied by the documentary evidence.

Accordingly, plaintiff's motion for summary judgment is granted. The Clerk may enter judgment in favor of plaintiff Harris D. Leinwand and against defendant Walter N. Bougades in the

sum of \$85,956.32, together with interest to be calculated by the Clerk from November 9, 2006, and costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs.

This constitutes the decision and order of this Court.

Dated: August 5, 2008

  
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BARBARA R. KAPNICK  
J.S.C.

**BARBARA R. KAPNICK  
J.S.C.**

**FILED**  
AUG 08 2008  
COUNTY CLERK'S OFFICE  
NEW YORK