INDEX No. 06-010914

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 6 - SUFFOLK COUNTY

P R E S E N T:

Hon. Gary J. Weber MOTION DATE
Acting Justice of the Supreme Court Motion Seq. #

BIBI HASHNA KHAN, as Assignee and successor in interest to RNK INVESTMENTS LTD., Assignor, RIZWAN NAYEEN KHAN and REEAZ AMEER KHAN,

Plaintiff(s)

-against-

CEED GLOBAL HOLDINGS CORP., GLOBAL HOME GROUP LL, EUGENE FERNANDEX and JAMES J. GARDNER

Defendant(s)

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This matter was a non-jury trial tried before the court on June 2, 2008, June 3, 2008, June 9, 2008 and June 12, 2008.

The court reserved decision on the entire case and all open motions on June 12, 2008.

The plaintiff called Rizwan Nayeen Khan, Reeaz Ameer Khan and Bibi Hashni Khan as witnesses. The defendants called James Gardner, Debra Mae Fernandez, Edward Gulmi, Deborah Gulmi and Eugune Fernandez to testify. Plaintiff recalled Reeaz Ameer. Khan. The defense called Sarina Indelicato and the plaintiff recalled Bibi Hashni Khan and Rizwan Khan.

FINDINGS OF FACT

Rizwan Nayeen Khan and Reeaz Ameer Khan, hereinafter "Rizwan" and "Reeaz" are natives of Guyana who have relatives and ties in the United States. Apparently Reeaz was spending a lot of time in the United States trying to advance the business interests of himself and his brother as the events giving rise to this lawsuit unfolded. For his part, Rizwan came here fairly frequently, but spent most of his time in Guyana trying to advance the family business interests there.

Sometime prior to July 25, 2005 Rizwan came to the understanding and belief that he could or would obtain a profitable contract to build a soccer stadium in Guyana. In order to accomplish the putative building project Rizwan and Reeaz decided, in as much as cement was in short supply throughout the world, that it would be necessary for Rizwan to make efforts in the United States to secure a contract in the world market for the purchase and delivery to Guyana of the cement needed to build the stadium.

A contract was entered into with Ceed Global Holding Corp., hereinafter "Ceed" as seller and R.N.K. Investment Ltd., hereinafter "R.N.K.", a corporation incorporated in Guyana, whose principals were Rizwan and Reeaz, as purchasers on July 25, 2005. (Plaintiff's Exhibit One).

This contract was cancelled by the parties, apparently because a letter of credit needed to fund it was not obtained.

In any event, a new arrangement was concluded as between Ceed and R.N.K. whereby 12,500 metric tons of cement was to be shipped by Ceed to R.N.K. in Georgetown, Guyana in exchange for the sum of $706,000.00.

The money in the sum of $706,000.00 was paid to Ceed, the cement was never delivered to R.N.K.

The transaction took many complicated twists and turns as the parties, principally Rizwan, and Reeaz on behalf of R.N.K. and Eugene Fernandez, hereinafter "Fernandez" and James J. Gardner, hereinafter "Gardner" attempted to negotiate various solutions to the underlying problem that $706,000.00 had been paid to Ceed and R.N.K. had admittedly not received any cement.

As of March 6, 2006 Ceed had received a total of $706,000.00 from or for the account of R.N.K. and had returned a total of $64,000.00 to or for the account of R.N.K., leaving a balance of $640,000.00 due R.N.K. from Ceed on account of the undelivered cement.

On March 6, 2006, Fernandez had prepared and delivered a promissory note to Rizwan in which the basic facts pertaining to the transaction as outlined above were recited and by the operative terms of which Ceed was to repay R.N.K. the sum of $642,000.00 without interest over a period of six (6) months commencing March 1, 2006 with monthly payments of principal only in the sum of $107,000.00.

Although the note did not call for the payment of any interest, a late charge of 5% was due for any installment paid later than ten (10) days after its due date.

Fernandez and Gardner guaranteed the note (see Plaintiff's Exhibit Twelve).

By assignment dated March 6, 2006 Rizwan, on behalf of R.N.K., assigned this note to Ms. Bibi Hashna Khan, hereinafter "Bibi", the plaintiff in this action.

The promissory note contained a provision calling for the payment of reasonable attorney's fees by the maker in the event that the note was turned over to an attorney for collection.

On November 2, 2005 Fernandez signed a check, purportedly on behalf of Global Home Group LLC, hereinafter "Global", payable to "Reeaz Amer Khan" and gave it to Reeaz.

The check contained the notation "check to be cashed if paper for cement not sh".

Payment on the "check" was stopped when Reeaz tried to cash it on November 8, 2005.

DECISION
A
The defense that R.N.K. was operating without authority in New York

Defendant's counsel has submitted a Memorandum of Law which summarizes and supports a defense vigorously maintained by counsel throughout the trial - specifically that R.N.K. Investments Ltd. is a foreign corporation, which is not licensed to do business in the state of New York and, hence is barred, as is Bibi, from bringing this action in the courts of New York State by provisions of New York Business Corporation Law Section 1312(a), New York B.C.L. Section 1312(a) provides as follows:

> "(a) A foreign corporation doing business in this state without authority shall not maintain any action or special proceeding in this state unless and until such corporation has been

> authorized to do business in this state and it has paid to the state all fees and taxes imposed under the tax law or any related statute, as defined in section eighteen hundred of such law, as well as penalties and interest charges related thereto, accrued against the corporation. This prohibition shall apply to any successor in interest of such foreign corporation.

Defense counsel is correct in so far as the statutory language and authority is concerned, if one views the statutory language in a strictly literal sense.

The case law, on the other hand, is to the effect that whether or not a corporation is doing business in New York must be approached on a case by case basis. In order to come under the ambit of B.C.L. 1312(a) the corporation must be engaged in a continuous course of conduct in the state - casual or occasional conduct of business will not qualify. *See Highfill, Inc. V. Bruse and Iris Inc. (50 A.D.3rd 742, 855 N.Y.S.2d 635 (A.D. Second Dept. 2008)).*

Here, although there was much activity surrounding the failed attempt to either obtain the cement or retrieve the money paid to obtain it, it is clear, from this record at least, that the only business activity that R.N.K. pursued in New York State was related to the instant transaction. R.N.K.'s sole purpose in doing business in New York was to buy cement from Ceed. When the cement was not delivered the customer wanted its money back.

Hence, defendant's application that R.N.K. and/or Bibi are barred from maintaining this action pursuant to B.C.L. 1312(a) is denied.

PLAINTIFF'S FIRST AND SECOND CAUSES OF ACTION
AGAINST CEED GLOBAL HOLDINGS CORP.
EUGENE FERNANDEZ AND JAMES J. GARDNER

Plaintiff is entitled to judgment against Ceed, Fernandez and Gardner as makers of the note.

Simply put, Ceed received money from plaintiff's assignor in order to obtain and deliver cement. No cement was delivered. Ceed, Fernandez and Gardner then promised, in the form of this note, to pay the money back pursuant to the terms of the note.

Fernandez and Gardner, as principals of the corporation executed the note.

As the defendants testified themselves, their objective in signing the note was to gain time to resolve the matter from R.N.K.. It is well settled that forbearance is consideration.

The "late charge" of 5% per late installment is reasonable in amount - especially since the note does not call for the payment of interest.

PLAINTIFF'S THIRD CAUSE OF ACTION
AGAINST GLOBAL HOME GROUP LLC AND
EUGENE FERNANDEZ FOR DEFAULT ON A
PROMISE TO PAY

This cause of action must be dismissed.

There is clearly an open question as to whether or not Fernandez had any authority to issue this document in the form of a check on behalf of Global, since Global was a stranger to the failed cement transaction up until that time. Certainly, as of November 2, 2005, when Fernandez issued the check, Global had never received any money or thing of value from R.N.K.

The legend placed on the "check to be cashed if paper for cement no sh", converted the check from an unconditional promise to pay into some form of promissory instrument other than a check.

The important element here is the fact that the making and delivery of this particular instrument, whatever it was, to R.N.K. was nothing more than a manifestation of the ongoing efforts of R.N.K., through Rizwan and Reeaz, to either receive the cement that they had paid for or to obtain a return of R.N.K.'s money.

The instrument that Rizwan received on November 2, 2005 represented the same money as was promised in the note of March 6, 2006, which was made payable to and executed by the proper parties - as this document was not. Rizwan, although interested in advancing R.N.K.'s interests in these regards, was not himself a party to the contract between Ceed and R.N.K., just as Global was not.

The promissory note of March 6, 2006 and plaintiff's assignor's agreement to accept it, operate as a novation and rendered void whatever rights or obligations, if any, that may have arisen from the delivery of the document dated November 2, 2005 issued to Rizwan by Fernandez.

PLAINTIFF'S FOURTH CAUSE
OF ACTION FOR ATTORNEY'S FEES

The promissory note at bar (Plaintiff's Exhibit Twelve) calls for the payment of "reasonable attorneys fees" by the makers in the event that the note is turned over to an attorney for collection. Such clauses have long been held good.

Plaintiff's attorney has submitted into evidence Exhibits 24, 25 and 26 which pertain to the efforts expended by counsel in pursuit of this case.

These proofs represent a claim for legal services and disbursements in the total sum of $18,597.13, apparently up to and including May 19, 2003.

Based upon his billing rates in this matter, Plaintiff's attorney claims that the value of services rendered is the sum of $18,597.13 of which $15,400.00 has already been paid.

Where, as in this case, an attorney is engaged under a contract for a definite purpose and not under a general retainer, he or she is entitled to recover on *quantum meruit* the fair and reasonable value of the services rendered. Having presented the issue to the undersigned for determination, the Court must be guided by the longstanding principals recognized by *Matter of Freeman, 34 NY2d 1* and *Matter of Potts, 123 Misc 346, aff'd 213 AD 59, aff'd 241 NY 593*

The Court is not necessarily bound by the fact that Plaintiff's attorney has already been paid any specific sum of money for attorney's fees by Plaintiff, since Plaintiff is, effectively, demanding that the Defendant reimburse Plaintiff for any fees that might have been paid or will be paid.

What is determinative is not the amount that Plaintiff may have paid or will pay for legal fees but what is a reasonable legal fee. (*See Nitti v. Credit Bureau of Rochester, 375 N.Y.S.2d 817 (Supreme Court Monroe County 1975 citing with approval Cape Cod Food Products v. National Cranberry Association, 119 F. Supp. 242).*

Thus, Plaintiff has the burden of establishing both the reasonableness and the value of services rendered (see *Matter of Potts, supra).* Reasonableness is determined on a *quantum meruit* basis using generally recognized criteria, namely the time spent in rendering the legal services, the nature of those services, the difficulties encountered, the worth of the action, the results obtained, the amount involved, and the professional standing of counsel (see *Matter of Freeman, supra; Matter of Potts, supra).* When determining reasonableness of fees, detailed contemporaneous time records are an important vehicle through which counsel validates the time claimed (see *Matter of Kelly, 187 AD2d 718*). The time spent by counsel, however, is only one factor to be considered in determining reasonable

compensation (see *Matter of Kentana, 170 Misc. 663)*, often serving as an appropriate starting point (see *Estate of Gillett, 139 Misc2d 188, 527 NYS2d 690)*.

The Court finds that the time expended by Plaintiff's attorney in protecting the interests of the Plaintiff does not exceed that which should reasonably be expended in the performance of same. Having due regard for all the elements relevant to the fixing of legal fees (see *Matter of Freeman, supra; Matter of Potts, supra*), and being constrained by the proof submitted in support of the requested fee, as well as the value of entire case, the court fixes and determines the fair value of counsel's services and disbursement to date to be the sum of $18,597.13.

Plaintiff's counsel is granted leave, if he be so inclined, to submit a supplemental affidavit of services together with any proposed judgment reflecting a request for an award of any legal fees earned, but unbilled as of May 19, 2008, provided these reflect the same hourly billing rate as the invoices previously billed.

Any and all applications or motions remaining outstanding which are inconsistent with this decision are denied.

Submit judgment on notice.

Dated: August 29, 2008

Gary J. Weber, Acting J.S.C.

Non-Final Disposition
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