[*1]

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

PRESENT: Carol Edmead Justice PART 35

Index Number : 103002/2008

TABAK, MELUSHI & SHISHA LLP

VS

ROEILL, JASON

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

his motion 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

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that defendants' motion for an order, pursuant to CPLR §3212, dismissing plaintiff's breach of contract claim against Jason Roeill is granted; and it is further

ORDERED that defendants' motion for an order, pursuant to CPLR §3212, dismissing plaintiff's tortious interference with contract claim against Moran Towing Company is granted; and it is further

ORDERED that plaintiff serve a copy of this order with notice of entry upon all parties within 20 days of entry.

That constitutes the decision and order of the Court.

Dated: 1-6-09

HON. CAROL EDMEAD

J.S.C.

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

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 35

----------x

TABAK, MELLUSI & SHISHA, LLP,

Plaintiff,

-against-

JASON ROEILL and
MORAN TOWING COMPANY,

Defendants.

----------x

Index No. 103002/08

DECISION/ORDER

HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

Plaintiff Tabak, Mellusi & Shisha, LLP ("plaintiff") seeks damages from defendants Jason Roeill ("Mr. Roeill") and Moran Towing Company ("the employer") (collectively "defendants") for breach of contract and tortious interference with a contract, respectively.

Defendants now move for summary judgment, pursuant to CPLR 3212, dismissing plaintiff's claim, on the grounds that plaintiff failed to establish that Mr. Roeill breached a contract with plaintiff or that the employer tortuously interfered with any contract between Mr. Roeill and plaintiff.

Factual Background

On February 6, 2007, Mr. Roeill was injured while working as a deckhand on a tugboat owned by the employer. On June 14, 2007, Mr. Roeill retained plaintiff to represent him in connection with Mr. Roeill's personal injury claim against the employer. On October 2, 2007, plaintiff sent the employer a letter informing the employer that plaintiff was representing Mr. Roeill (Complaint, Exhibit B). On November 16, 2007, Mr. Roeill faxed a letter to plaintiff

stating simply that "I am discharging you as my attorneys, effectively immediately" (affirmation in opposition, Exh. 1). Plaintiff received the letter on or about November 17, 2007. On November 21, 2007, Mr. Roeill signed a settlement agreement with the employer (defendants' Exh. 3).

Plaintiff's Complaint[1]

Plaintiff contends that on June 14, 2007, Mr. Roeill entered into a written contingency fee agreement with plaintiff pertaining to the injuries Mr. Roeill sustained in the accident on February 6, 2007. Plaintiff alleges that it "provided legal services for the benefit of" Mr. Roeill (*id.* at paragraph 11), and that under the agreement, plaintiff "was to receive 1/3 or (33 1/3%) and [Mr. Roeill] was to receive 2/3rd or (66 2/3%) of any amount recovered after deduction for court costs and reasonable case disbursements"(defendants' motion, Exh. 1, paragraph 9). The contingency fee agreement expressly provides that a "monetary recovery obtained by the Law Firm, either as a result of a law suit verdict, a settlement or otherwise, is to be distributed as follows; the Law Firm is entitled to receive thirty-three and one-third (33 1/3%) of any amount recovered, the client [Mr. Roeill] will received [sic] 66 2/3%." [2]

Plaintiff contends that defendants reached a settlement agreement with each other for the injuries Mr. Roeill allegedly suffered *prior* to Mr. Roeill's discharge of plaintiff on November 16, 2007. Therefore, plaintiff is entitled to one-third of the amount of the settlement, pursuant to the contingent fee agreement (Complaint, paragraph 9). Mr. Roeill has not yet paid plaintiff. As a result, plaintiff has suffered $550,000 in damages.

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[1] Defendants' Exh. 1.

[2] At the Court's request, plaintiff faxed to the Court and defendant's counsel a copy of the Retainer Agreement.

Plaintiff also contends that the employer was on notice that plaintiff represented Mr. Roeill on or about October 3, 2007, after plaintiff sent the employer a letter dated October 2, 2007 informing the employer of plaintiff's representation of Mr. Roeill. In November 2007, Mr. Roeill arranged a meeting with the employer "for the specific purpose of discussing employment opportunities," plaintiff contends. "During the course of this meeting [the employer] intentionally and improperly interfered with the Contract and the attorney-client relationship between Plaintiff and [Mr. Roeill] by intentionally inducing [Mr. Roeill] to settle all personal injury claims without the benefit of Plaintiff's legal representation and to thereafter breach the Contract for the benefit of [the employer]" (Complaint, paragraph 23). As a result of the employer's intentional and improper interference, Mr. Roeill breached his contract with plaintiff and settled with the employer. According to the settlement, Mr. Roeill was "provided with the sum of $250,000 to pay for 'his immediate needs' plus an annuity with a present value of $1,400,000.00 and for [Mr. Roeill] 'to pay [plaintiff]'" (Complaint, paragraph 14). As a result of Mr. Roeill's breach and the employer's tortious interference with plaintiff's contract with Mr. Roeill, plaintiff has suffered $550,000 in damages.

Defendants' Motion[3]

Defendants contend that the employer's attorney, Jethro M. Eisenstein ("Mr. Eisenstein"), had no contact with Mr. Roeill until *after* Mr. Roeill discharged plaintiff (Eisenstein affirmation, paragraph 5, citing transcript of settlement agreement placed on record by Mr. Eisenstein and Mr. Roeill, defendants' Exh. 4). When Mr. Eisenstein asked Mr. Roeill whether anyone coerced or

[3] Defendants' motion comprises an affirmation from the employer's attorney, Jethro M. Eisenstein ("Eisenstein affirmation"); Exh. 1, a copy of plaintiff's Complaint (along with Exhs. A, B and C); Exh. 2, a copy of defendants' amended answer; Exh. 3, a copy of the settlement agreement between Mr. Roeill and the employer; and Exh. 4, a transcript of the November 21, 2007 settlement conference between Mr. Roeill and the employer.

forced Mr. Roeill to fire plaintiff, Mr. Roeill responded, "No" (*id.*). Mr. Roeill also stated that the decision to terminate plaintiff was his own and that he understood that he could change his mind about having plaintiff involved (*id.*).

Defendants contend that Mr. Roeill had an absolute right to discharge his attorney at any time, with or without cause; therefore, Mr. Roeill did not breach a contract with plaintiff when he discharged plaintiff. Further, plaintiff performed no services for Mr. Roeill; thus, plaintiff is not entitled to a fee under its contingent agreement with Mr. Roeill, nor is plaintiff entitled to a fee in *quantum meruit*.

Further, breach of contract is an element of a claim for tortious interference with contractual relations, and since Mr. Roeill did not breach a contract, plaintiff has not met the elements for the tortious interference claim. Therefore, as no factual dispute exists, the dismissal of plaintiff's Complaint is warranted.

Defendants further argue that even if the employer had interfered with a contract between Mr. Roeill and plaintiff, the employer was lawfully protecting its economic interest by engaging in settlement talks with Mr. Roeill, a recognized defense to tortious interference with a contract. Therefore, the employer's actions in settling with Mr. Roeill were not tortious, but privileged. Plaintiff was aware that Mr. Roeill was interested in resuming employment with the employer, as evidenced by the letter plaintiff sent the employer on October 2, 2007 (defendants' Exh. 1, Exh. B, plaintiff's letter to the employer). "There is no rule that prohibited [the employer] from discussing a settlement of his claims with" Mr. Roeill (defendants' memorandum of law, p. 7). Citing *Felsen v Sol Café Mfg. Corp.* (24 NY2d 682, 687 [1969]), defendants argue that the "issue is whether the actor is 'in the exercise of an equal or superior right,'" and here, the employer had

such a right. Defendants also argue that the employer's interference with the contract was justified as it was "incidental to some other lawful purpose." Further, courts have upheld such interference based on the inducer's "self-interest alone," defendants argue (defendants' memorandum of law, p. 9). The employer's conduct here falls under the exception.

Plaintiff's Opposition[4]

In opposition, plaintiff first argues that defendants have not met their burden for summary judgment because this case involves disputed issues of fact. Plaintiff contends that on November 2, 2007, Mr. Roeill telephoned a partner in the plaintiff law firm, Ralph Mellusi ("Mr. Mellusi") to advise plaintiff that Mr. Roeill was planning to meet with the employer "for the sole purpose" of discussing the prospect of returning to work for the employer (plaintiff's opposition, paragraph 6; Mellusi affirmation, paragraph 34). However, at the meeting, the employer negotiated a settlement of Mr. Roeill's personal injury claim and "intentionally and with malice" caused Mr. Roeill to discharge plaintiff (*id.* at paragraph 7). Mr. Roeill first disclosed to plaintiff that he had settled with the employer during a telephone conversation with Mr. Mellusi that took place *before* Mr. Roeill discharged plaintiff. During that telephone conversation, Mr. Roeill informed Mr. Mellusi of the terms of the settlement agreement. "In that same telephone conversation, [Mr. Mellusi] advised [Mr. Roeill] that he had made a big mistake settling the case on his own under these conditions and requested all documents be sent for [Mr. Mellusi's] review, which [Mr. Roeill] agreed to do" (*id.* at paragraph 8). After plaintiff had not received the documents from Mr. Roeill, Mr. Mellusi called Mr. Roeill on November 15, 2007 and again asked Mr. Roeill to

[4] Plaintiff's reply includes an affirmation by Ralph J. Mellusi, a partner in plaintiff law firm ("Mellusi affirmation").

send the papers (Mellusi affirmation, paragraph 36). On November 17, 2007, plaintiff's office received Mr. Roeill's faxed letter of discharge.

Plaintiff contends that although the employer maintains that its attorney had no contact with Mr. Roeill until after Mr. Roeill discharged plaintiff, the employer met and settled the case with Mr. Roeill without plaintiff's participation. Citing two documents, plaintiff argues that the employer was aware that plaintiff was representing Mr. Roeill: the October 2, 2007 letter plaintiff sent the employer informing the employer of plaintiff's representation of Mr. Roeill, and the undated letter to Mr. Roeill signed by Mr. Roeill and the employer's vice president, Peter R. Keyes, ("Exh. 2") confirming the settlement terms. Those terms included $250,000 "to cover [Mr. Roeill's] immediate needs and . . . to pay a fee to your attorneys" (*id.* at paragraph 6, citing Mellusi affirmation; Exh. 2).

Plaintiff argues that the date of the settlement agreement is a major factual issue that is in dispute, and defendants have failed to establish that the employer and Mr. Roeill entered into the agreement prior to Mr. Roeill's discharge of plaintiff. Plaintiff first notes that although the letter from the employer's vice president (Exh. 2) is undated, "there can be no dispute that it was signed by both defendants and that this occurred prior to the discharge" of plaintiff" (plaintiff's opposition, paragraph 10) . "[W]hat "transpired on November 21st does not minimize the legal significance of Exh. 2," plaintiff argues.

Plaintiff also contends that the undated letter from the employer's vice president ("Mr. Keyes") constitutes the settlement agreement. According to plaintiff, the opening sentence states: "I am writing to confirm the terms of the *financial settlement* between you and Moran to compensate you for the injuries you suffered on February 6th, 2007" (*emphasis added*). The

subsequent paragraphs detail the terms of the settlement. Then, in paragraph 5, Mr. Roeill "affirms his clear unambiguous understanding that he is:

> -'settling his claim' and that he understands
> -'what he is "settling the claim for"; and that he understands that
> - 'the settlement is the end of the claim' and that the paper he is signing accurately
> -'states the agreement'"
>
> (*id.* at paragraph 12, citing Exh. 2).

Plaintiff points out that nothing in Exh. 2 "states or suggests that the parties intended to do something in the future to settle the claims, or that there were unresolved conditions or terms to be discussed. . . . Significantly, the last sentence also makes clear that [the employer] intended to make a major financial commitment to purchase the annuity" that was mentioned in the agreement, after Mr. Roeill signed the document (*id.* at paragraph 13). Therefore, plaintiff argues, what transpired during the meeting between Mr. Roeill and Mr. Keyes on November 21, 2007 did not constitute the settlement. Because only Mr. Roeill and the employer had knowledge of the date and circumstances of the settlement agreement, a motion for summary judgment should not be granted prior to discovery.

Second, plaintiff argues that plaintiff is entitled to a share of the settlement between Mr. Roeill and the employer. Even defendants acknowledged that plaintiff was entitled to a fee in Exh. 2, when it listed among the terms of the settlement agreement that Mr. Roeill receive $250,000 in cash for his immediate needs and to pay his attorney fees. Citing caselaw, plaintiff argues that an attorney "rendering services and not discharged for cause is entitled to a fee for services rendered" (plaintiff's opposition, p. 8). At the least, plaintiff is entitled to a fee based on *quantum meruit*, and the Court can base the fee on several factors, including the attorney's

contingency fee. Plaintiff further argues that New York law allows an attorney to recover the full amount of a contingency fee if the attorney is discharged without cause *after* a settlement. Plaintiff argues that defendants misconstrue the caselaw regarding a client's right to terminate an attorney. A client can terminate an attorney at any time for any reason without being compelled to pay damages, up to a certain point, and that point is the settlement of a case. If a client terminates an attorney after a case is settled, the client must pay the contingency fee.

Plaintiff argues that there is an issue of fact as to exactly when the employer and Mr. Roeill reached a settlement agreement. There is also an issue of fact as to whether the employer intentionally and maliciously caused Mr. Roeill to breach the retainer agreement. Finally, if the Court holds that plaintiff is entitled to the value of its services in *quantum meruit* as opposed to its contingency fee, there is an issue of fact as to the value of plaintiff's services to Mr. Roeill. Therefore, defendants' motion for summary judgment should be denied.

Defendants' Reply[5]

Defendants contend that the Eisenstein affidavit and the documents accompanying the affidavit establish that no material facts are in dispute. Plaintiff disputes only that Mr. Roeill and the employer reached a settlement on November 21, 2007. "Whether the undated letter [plaintiff's Exh. 2] was signed before or after the discharge of [plaintiff] is immaterial, because as a matter of law the undated letter does not constitute the settlement of Jason Roeill's claim" (defendants' reply, p. 3).

Defendants argue that a lawyer is entitled to recover under a retainer agreement only if he has completed his services to the client before the discharge. A settlement is not considered

[5] Includes affidavit from Mr. Roeill ("Roeill affidavit").

complete until payment has been made. The case plaintiff discusses in opposition, *Cook v Moran Atlantic Towing Corp.* (79 FRD 392, 396 [1978]), is distinguishable because in the cases on which the *Cook* court relied the settlement had been completed and the plaintiff paid before the plaintiff discharged the law firm. Here, "[w]henever the undated letter was executed, it was not accompanied by payment. Payment only occurred after TMS was discharged." Further, the contingent retainer agreement entitled plaintiff to a percentage of "any amount recovered" (*id.* at 3; Complaint, paragraph 9), and Mr. Roeill had recovered nothing when he discharged plaintiff (*see* Roeill affidavit)[6]. Mr. Roeill was not given the $250,000 check until the settlement conference of November 21, 2007 (defendants' Exh. 4, p. 5, line 11). Mr. Roeill also was not given a job as a dispatcher or his health care benefits until November 21, 2007. The annuity payments did not begin until January 15, 2008. Therefore, as plaintiff's services were not complete, plaintiff is entitled to recover only under *quantum meruit*. Because plaintiff has not sought relief in *quantum meruit* in this action, plaintiff's breach of contract claim against Mr. Roeill must be dismissed.

Further, because Mr. Roeill discharged plaintiff before Mr. Roeill settled with the employer, as was Mr. Roeill's right, Mr. Roeill did not breach his retainer agreement with plaintiff. Thus, plaintiff cannot establish its claim for tortious interference with a contract. And, plaintiff fails to identify or present any disputed facts as to whether the employer intentionally and maliciously caused Mr. Roeill to breach the retainer agreement. Finally, even if the

[6]Mr. Roeill contends that he "did not receive any money or other benefits from my settlement with [the employer] until after I met with [the employer's] lawyer . . . on November 21, 200" (Roeill affidavit, paragraph 5).

employer caused Mr. Roeill to breach his contract with plaintiff, the employer's actions were privileged as they were taken to protect the employer's economic interest.

Analysis

Summary Judgment

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action . . . has no merit" (CPLR §3212[b]), sufficient to warrant the court as a matter of law to direct judgment in his or her favor (*Bush v St. Claire's Hosp.*, 82 NY2d 738, 739 [1993]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Wright v National Amusements, Inc.*, 2003 N.Y. Slip Op. 51390(U) [Sup Ct New York County, Oct. 21, 2003]). This standard requires that the proponent of a motion for summary judgment make a prima facie showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinder*, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11, 751 NYS2d 433, 434 [1st Dept 2002]). Thus, the motion must be supported "by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions" (CPLR § 3212[b]). A party can prove a *prima facie* entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman*; *Prudential Securities Inc. v Rovello*, 262 AD2d 172 [1st Dept 1999]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR § 3212[b]). Thus, where the

proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman* at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 765 NYS2d 326 [1st Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman* at 562). The defendant "must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist" and "the issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief" *(Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772 [1st Dept 1983], *affd*,62 NY2d 686 [1984]). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient *(Alvord and Swift v Steward M. Muller Constr. Co.*, 46 NY2d 276, 281-82, 413 NYS2d 309 [1978]; *Fried v Bower & Gardner*, 46 NY2d 765, 767, 413 NYS2d 650 [1978]; *Platzman v American Totalisator Co.*, 45 NY2d 910, 912, 411 NYS2d 230 [1978]; *Mallad Const. Corp. v County Fed. Sav. & Loan Assn.*, 32 NY2d 285, 290, 344 NYS2d 925 [1973]; *Plantamura v Penske Truck Leasing, Inc.*, 246 AD2d 347, 668 NYS2d 157 [1st Dept 1998]).

Breach of Contract

Due to the nature of plaintiff's contractual relationship with Mr. Roeill, plaintiff has failed to state a cause of action for both breach of contract and tortious interference with contractual relations. It is well settled that the "*discharge* of the attorney by his client does not constitute a breach of the contract, because it is a term of such contract, implied from the peculiar

relationship which the contract calls into existence, that the client may terminate the contract at any time with or without cause" (*Atkins & O'Brien LLP. v ISS Intern. Service System, Inc.*, 252 AD2d 446, 678 NYS2d 596 [1st Dept 1998] [emphasis added] *citing Martin v Camp*, 219 NY 170, 174 [1916]; *see also Agusta & Ross v Trancamp Contracting Corp.*, 193 Misc 2d 781, 787, 751 NYS2d 155, 160 [2002] ["[T]he client has the right to terminate his attorney's services at any time, with or without cause, and thus cannot be compelled to pay damages for exercising such a right"]). The court in the *Matter of Dunn* explained the "peculiar relationship" between an attorney and his client giving rise to this rule:

> It is apparent that a relationship so personal and confidential may be more easily disturbed than a less sensitive on, and that its effectiveness may be so impaired by any change which destroys the confidence of the client or which requires the unwilling transfer by the attorney of his allegiance in a given matter to a substituted client as to make it desirable to permit a termination of the relation rather than to attempt to coerce its continuance under adverse conditions. This policy of permitting its dissolution in a manner which would not prevail in the case of ordinary contracts has been upheld in various cases.
> (205 NY 398, 402, [1912]) (citations omitted).

Therefore, since Mr. Roeill had the unconditional right to discharge plaintiff without cause, his "discharge" of plaintiff on November 16, 2007, in and of itself, did not constitute a "breach" of the retainer agreement.

To the extent that plaintiff seeks the contigency fee pursuant to the Retainer Agreement on the ground that an attorney may recover the full amount of a contingency fee if the attorney is discharged without cause *after* a settlement, plaintiff's claim in this regard also lacks merit. On this issue, *McAvoy v Schramme* (238 AD 225, 264 NYS 181 [1st Dept 1933]) is instructive:

> It is well established that a client may discharge his attorney at any time for any reason he deems sufficient. In such circumstances the attorney is relegated to an action for the reasonable value of his services, *unless he has fully performed his contract. In the event of full performance prior to discharge, however, the attorney may stand upon his contract and the measure of his damages is the agreed value of his services*. Martin v. Camp, 219 N. Y. 170, 114 N. E. 46, L. R. A. 1917F, 402; Matter of City of New York (In re Rosedale and St. Lawrence Avenues in City of New York), 219 N. Y. 192, 114 N. E. 49; Matter of Dunn, 205 N. Y. 398, 98 N. E. 914, Ann. Cas. 1913E, 536. (*Emphasis added*).

Contrary to plaintiff's contention, it cannot be said that plaintiff fully performed its contract prior to discharge, so as to permit plaintiff to recover the amount due pursuant to the Retainer Agreement.

The Retainer Agreement expressly provides that plaintiff's fee thereunder is for a "monetary recovery obtained by the Law Firm, either as a result of a law suit verdict, a settlement or otherwise." Based on a plain reading of the Retainer Agreement (*American Exp. Bank Ltd. v Uniroyal, Inc.*, 164 AD2d 275, 562 NYS2d 613 [1st Dept 1990] [words and phrases are given their plain . . . a court should enforce the plain meaning of that agreement]), plaintiff's entitlement to the contingency fee was based on a "recovery obtained by the Law Firm." It is uncontested that Mr. Roeill attended a meeting with the employer at his own will and that plaintiff did not participate in this meeting. Plaintiff does not claim or allege that it participated in any settlement, either by phone, correspondence, or otherwise. Although plaintiff explains in detail the legal work performed in investigating and establishing the merits of plaintiff's claim for personal injuries, plaintiff's papers clearly establish that such legal work played no role in assisting plaintiff in recovering the settlement, that plaintiff played no role in the settlement negotiations, and more important, that the monetary recovery was not obtained by plaintiff.

Cook v Moran Atlantic Towing Corp. (79 F.R.D. 392 [DCNY 1978]), a case cited by plaintiff, does not warrant a different result. In *Cook,* the court discusses the cases of *Ward v Donovan* (235 NY 240 [1923]) and *In re Reisfeld* (227 NY 137, 140 [1919]) : "Ward and Reisfeld both stand for the proposition that where a client enters into a contingent fee agreement with an attorney, and subsequently, without discharging the attorney, settles the case directly with the defendant, the attorney may assert his statutory lien against the settlement proceeds, and collect the contracted-for percentage from that recovery" (*Cook v Moran Atlantic Towing Corp.*, 79 FRD 392, 395 [1978] [holding that at the time of settlement, client had not terminated attorneys]). The court noted that recovery by a discharged attorney for fees pursuant to a retainer agreement turned "upon whether, at the time of the client's direct settlement with the defendant, the attorneys were still within his employ; or whether the attorneys had been discharged prior to the time of settlement. In the latter circumstance, the original contract of employment between attorney and client is not in effect at the time of settlement, its terms accordingly will not be enforced, and the attorneys are limited to the reasonable value of their services prior to the time of their discharge."

Here, plaintiff argues that the undated letter confirming the settlement between Mr. Roeill and the employer was arguably drafted prior to plaintiff's discharge, and thus, may establish plaintiff's right to recover under the Retainer Agreement. However, the terms of the Retainer Agreement govern the rights and obligations between plaintiff and Mr. Roeill, and according to the Retainer Agreement, plaintiff's recovery on a contingency fee was to be based upon "monetary recovery obtained by the Law Firm" (*see generally, Jacobson v Sassower*, 122 Misc 2d 863, 474 NYS2d 167 [N.Y. Sup. 1983] [employment of an attorney by a client is largely

governed by the contractual provisions of the retainer]). Again, the record establishes, and plaintiff fails to contest, that plaintiff's work bore no relation to the settlement achieved by Mr. Roeill, and that the settlement was unrelated to the work that had previously been performed by plaintiff. Further, the October 2, 2007 letter plaintiff wrote to the employer explaining that it represented Mr. Roeill is insufficient to raise an issue of fact as to whether the "monetary recovery [was] obtained by the Law Firm." Therefore, plaintiff cannot establish that it completed the work required under the Retainer Agreement so as to entitle it to the fee outlined thereunder.

Therefore, plaintiff's claim for legal fees due under the Retainer Agreement lacks merit.

Tortious Interference with Contract

Since plaintiff's breach of contract claim lacks merit, plaintiff has no claim against the employer for tortious interference with a contract. In any event, New York courts do not recognize an action by an attorney for tortious interference with contractual relations with a former client. In *Kaplan v Heinfling*, for example, the First Department rejected an attorney's complaint of tortious interference with a contract to represent a corporation, on the ground that the attorney/plaintiff failed to state a cause of action.

> As the Court of Appeals forcefully pointed out in [*Demov, Morris, Levin & Shein v Glantz* , 53 NY2d 553, 557 [1981], it is the public policy of this State that a client "should have the unbridled prerogative of termination. Any result which inhibits the exercise of this essential right is patently unsupportable." In this case plaintiff's retainer was terminated by Leo Zelkin, president of Englishtown, acting under authority which he clearly possessed in his corporate capacity. Nothing in the nature of that termination may fairly be characterized as improper. . . . We are persuaded that to permit the termination of plaintiff's retainer of counsel, although accomplished through appropriate and lawful means, to be a basis for an action for damages . . . would have a clear tendency to inhibit the exercise of the client's "unbridled prerogative of termination."
> (136 AD2d 34, 40-41 [1st Dept 1988]).

Therefore, plaintiff's claim against the employer for tortious interference with contract lacks merit.

Recovery under quantum meruit

When a client discharges an attorney after some services are performed *but prior to the completion of the services* for which the fee was agreed, the discharged attorney is entitled to recover the reasonable value of services rendered in *quantum meruit (Atkins & O'Brien LLP. v ISS Intern. Service System, Inc.*; *Matter of Cooperman*, 83 NY2d 465, 611 NYS2d 465 [1994] [an attorney is not left without recourse for unfair terminations lacking cause]). Permitting a discharged attorney "to recover the reasonable value of services rendered in *quantum meruit,* a principle inherently designed to prevent unjust enrichment, strikes the delicate balance between the need to deter clients from taking undue advantage of attorneys, on the one hand, and the public policy favoring the right of a client to terminate the attorney-client relationship without inhibition on the other" (*Demov, Morris, Levin & Shein v Glantz,* 53 NY2d 553, 558, 444 NYS2d 55 *supra*, *citing Matter of Krooks,* 257 NY 329, 332). "Where an attorney retained for a specific purpose under an express contract is discharged without cause before completion of the agreed-for services, the attorney's right to recovery is limited to a cause of action in quantum meruit for services rendered up to the time of the discharge" (*Brill v Chien Yuan Kao*, 61 AD2d 1000, 1000, 402 NYS2d 642, 643 [1978]). Further, an attorney's right to payment under a theory of *quantum meruit* accrues immediately upon the attorney's discharge (*Zimmerman v Kallimopoulou*, 56 Misc 2d 828, 830, 290 NYS2d 270, 273 [1967]).

Although the record here may support a claim to recover attorney fees on the ground of *quantum meruit*, the Court notes that plaintiff's Complaint does not allege a claim for legal fees

under this theory. Further, plaintiff has not made a proper application to amend its Complaint to assert such a claim (CPLR §3025(b)). Although expedient, it would be improvident for the court, *sua sponte*, to grant plaintiff leave to amend to assert said claim (*Monaco v New York University Medical Center*, 213 AD2d 167, 169, 623 NYS2d 566, 569 [1st Dept 1995] ["While we are cognizant of the fact that leave to amend should be freely granted (CPLR 3025[b]), such leave should be denied where the proposed pleading fails to state a cause of action" (*id.*) (citations ommitted)]). The trial court in *Monaco* "clearly abused its discretion when it endeavored to correct the deficiency in the complaint by deeming it amended" (*id.*).

Conclusion

Based on the foregoing, it is hereby

ORDERED that defendants' motion for an order, pursuant to CPLR §3212, dismissing plaintiff's breach of contract claim against Jason Roeill is granted; and it is further

ORDERED that defendants' motion for an order, pursuant to CPLR §3212, dismissing plaintiff's tortious interference with contract claim against Moran Towing Company is granted; and it is further

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Dated: December 30 2008

Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD