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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU - PART 15

Present: HON. WILLIAM R. LaMARCA
Justice

CHARLENE K. VERKOWITZ,

Plaintiff,

-against-

INDEX NO: 17206/06

ERNEST TORRES,

Defendant.

Appearances:
For Plaintiff:

Charlene K. Verkowitz, Esq.
Plaintiff Pro Se
561 Lakeville Road
New Hyde Park, NY 11040

For Defendant:

Gallagher, Walker, Bianco & Plastaras, Esqs.
By: Michael R. Walker, Esq.
Attorneys for Defendant
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Mineola, NY 11501

MEMORANDUM DECISION AFTER TRIAL

Introduction

Plaintiff, CHARLENE K. VERKOWITZ, an attorney appearing *Pro Se,* (hereinafter referred to as "VERKOWITZ"), commenced this action against ERNEST TORRES, her former client, (hereinafter referred to as "TORRES"), seeking a judgment for counsel fees in the sum of $7,915.89 together with interest from December 19, 2002 plus costs and disbursements of the action. The action was commenced by the filing of a Summons and Complaint on or about October 19, 2006 alleging breach of contract for failure to pay the

aforementioned legal fees.

Background

TORRES retained VERKOWITZ on November 7, 2002 to represent him in a Suffolk County Family Court Support hearing. On that day, Torres executed a Family Court Retainer and Statement of Client's Rights and Responsibilities, and pursuant to said agreement, he provided a retainer fee in the amount of $3,500.00.

Thereafter, on December 19, 2002, TORRES retained VERKOWITZ to represent him in a matrimonial action he commenced in Suffolk County Supreme Court. Unused portions of defendant's Family Court Retainer were credited to his matrimonial bill. Pursuant to the subsequent matrimonial retainer agreement, TORRES provided an additional $3,500.00 toward counsel fees.

Notwithstanding VERKOWITZ' statement that she provided legal representation in accordance with the retainer agreements, with which TORRES disagrees, TORRES signed a Consent to Change Attorney Form on July 14, 2003, relieving her as counsel on his case.

During the 8 month period from November 7, 2002 through July 14, 2003, VERKOWITZ sent TORRES four billing statements. The frequency with which she periodically sent her legal billing statements to TORRES is the major issue to be resolved by the Court.

There is no dispute as to when billing statements were sent to TORRES: December 6, 2002, February 3, 2003, June 17, 2003 and November 5, 2003. (VERKOWITZ did not seek any legal fees detailed in her fourth billing statement). The time that elapsed between the second and third billings was in excess of 120 days. The second bill dated February 3, 2003, showed that TORRES had a credit balance of $2,309.93. VERKOWITZ testified

that during the 120 days that elapsed between billings, she continually advised TORRES that his retainer was exhausted. Also during this 120 day time period, VERKOWITZ testified that TORRES was often in her office reviewing the preparation of pleadings for his case. TORRES denies that he was advised about additional bills. Further, TORRES claims that he told VERKOWITZ that due to his dire financial straits, of which she was well aware, as it was the subject of a motion to rescind or modify a separation agreement between TORRES and his wife, he could not pay any additional attorney fees.

The Law

22 NYCRR § 1400.2 and 1400.3(9):

§ 1400.2. Statement of Client's Rights and Responsibilities

An attorney shall provide a prospective client with a statement of client's rights and responsibilities, in a form prescribed by the Appellate Divisions, at the initial conference and prior to the signing of a written retainer agreement. If the attorney is not being paid a fee from the client for the work to be performed on the particular case, the attorney may delete from the statement those provisions dealing with fees. The attorney shall obtain a signed acknowledgment of receipt from the client. The statement shall contain the following:

STATEMENT OF CLIENT'S RIGHTS AND RESPONSIBILITIES

You are entitled to receive a written, itemized bill on a regular basis, at least every 60 days.

§ 1400.3. Written Retainer Agreement

An attorney who undertakes to represent a party and enters into an arrangement for, charges or collects any fee from a client shall execute a written agreement with the client setting forth in plain language the terms of compensation and the nature of services to be rendered. The agreement, and any amendment thereto, shall be signed by both client and attorney, and, in actions in Supreme Court, a copy of the signed agreement shall be filed with the court with the statement of net worth. Where substitution of counsel occurs after the filing of the net worth statement, a signed copy of the attorneys' retainer agreement shall be filed with the court within 10 days

> of its execution. A copy of a signed amendment shall be filed within 15 days of signing. A duplicate copy of the filed agreement and any amendment shall be provided to the client. The agreement shall be subject to the provisions governing confidentiality contained in Domestic Relations Law, section 235(1). The agreement shall contain the following information:
>
> RETAINER AGREEMENT
>
> (9) Frequency of itemized billing, which shall be at least every 60 days; the client may not be charged for time spent in discussion of the bills received.

Discussion

There is no doubt that VERKOWITZ did not abide by the rules, in that she did not provide written itemized bills at least every 60 days.

> "[A]n attorney is precluded from seeking fees from his or her client where the attorney has failed to comply with 22 NYCRR 1400.3, which requires the execution and filing of a retainer agreement that sets forth, inter alia, the terms of compensation and the nature of services to be rendered" (*Bishop v Bishop*, 295 AD2d 382, 383, 743 N.Y.S.2d 724, quoting *Mulcahy v Mulcahy*, 285 AD2d 587, 728 N.Y.S.2d 90; see *Kayden v Kayden*, 278 AD2d 202, 717 N.Y.S.2d 908). Likewise, an attorney's failure to provide written, itemized bills at least every 60 days pursuant to 22 NYCRR 1400.2 will also preclude collection of a fee (see *Wagman v Wagman*, 8 AD3d 263, 777 N.Y.S.2d 678; *Julien v Machson*, 245 AD2d 122, 666 N.Y.S.2d 147). The failure to abide by these rules "promulgated to address abuses in the practice of matrimonial law and to protect the public, will result in preclusion from recovering such legal fees" (*Julien v Machson*, 245 AD2d 122, 122, 666 N.Y.S.2d 147; see *Behrins & Behrins v Sammarco*, 305 AD2d 346, 347, 759 N.Y.S.2d 151; *Mulcahy v Mulcahy*, 285 AD2d 587, 728 N.Y.S.2d 90).

Gahagan v Gahagan, 51 AD3d 863, 859 NYS2d 218 (2nd Dept. 2008).

VERKOWITZ argues that she was in substantial compliance with the rules. She relies upon several cases to support her argument: *Mulcahy v Mulcahy*, 285 AD2d 587, 728 NYS2d 90 (2nd Dept. 2001); *Sherman v Sherman*, 34 AD3d 670, 824 NYS2d 656 (2nd Dept. 2006); and *Wagman v Wagman*, 8 AD3d 263, 777 NYS2d 678 (2nd Dept. 2004). Reliance on these cases, however, is misplaced as the concept of substantial compliance

in these cases addresses the recovery of legal fees from an adversary spouse. That is not this case.

In the matter of *Gross v Gross*, 36 AD3d 318, 830 NYS2d 166 (2nd Dept. 2006), also cited by VERKOWITZ, the Court distinguished the case from those of attorney noncompliance with the rules. In *Gross v Gross*, *supra,* there was a Stipulation of Settlement entered into in open court, signed by both parties, which was relied on by the Court, in denying the plaintiff's relief as a "misplaced attempt" to avoid paying legal fees to an attorney who earned those fees in good faith and compliance with the rules. We have no such settlement in this case.

Another issue to be addressed by this Court concerns the credit balance of $2,309.93 indicated on the second bill timely presented to TORRES. The law is clear that:

> Where there is noncompliance with 22 NYCRR 1400.3, a court need not direct the return of a retainer fee already paid for properly-earned services (see, *Markard v Markard*, 263 AD2d 470).

Mulcahy v Mulcahy, *supra*.

In all cases cited by VERKOWITZ, the courts recited the law as set forth in *Gahagan v Gahagan*, *supra,* that attorneys must follow the rules or forfeit legal fees.

There is no doubt that the third bill submitted by VERKOWITZ to TORRES was not sent within 60 days as mandated by NYCRR 1400.2 and 1400.3(9). Further, VERKOWITZ cannot receive legal fees pursuant to the theory of "substantial compliance" because she violated the mandates of NYCRR 1400.2 and 1400.3(9). Therefore, her demand for legal fees is denied.

However, in accordance with *Mulcahy v Mulcahy, supra,* VERKOWITZ does not have to return the retainer balance of $2,309.93 found on bill No. 2 dated February 3, 2003.

For the above stated rationale the plaintiff's complaint is dismissed.

All further requested relief not specifically granted is denied.

This constitutes the decision of the Court.

Dated: April 17, 2009

WILLIAM R. LaMARCA, J.S.C.

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