

**Angel v Greenhaus**

2009 NY Slip Op 32457(U)

October 19, 2009

Supreme Court, New York County

Docket Number: 105349/2009

Judge: Paul G. Feinman

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

PRESENT: **HON. PAUL G. FEINMAN**

PART 12

Index Number : 105349/2009

ANGEL, SUSAN

vs

GREENHAUS, PHILIP SHERWOOD

Sequence Number : 002

DISMISS

INDEX NO.

105349/2009

MOTION DATE

6/29/09

MOTION SEQ. NO.

002

MOTION CAL. NO.

8

were read on this motion to/for

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

1

Answering Affidavits — Exhibits

2

Replying Affidavits

3

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH  
THE ANNEXED DECISION AND ORDER.

**FILED**

OCT 26 2009

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 10/19/09

[Signature]

J.S.C.

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: CIVIL TERM: PART 12

-----X  
SUSAN ANGEL,

Plaintiff,

- against -

PHILLIP SHERWOOD GREENHAUS,  
Defendant.  
-----X

Index Number 105349/2009  
Submission Date 6/29/2009  
Mot. Seq. No. 002  
Mot. Cal. No. 8  
**DECISION AND ORDER**

**For the Plaintiff:**

Susan Angel, pro se  
530 East 86<sup>th</sup> Street, Apt 2A  
New York, NY 10028  
(917) 597-8639

**For Defendant:**

Phillip Sherwood Greenhaus, Esq., pro se  
60 East 42<sup>nd</sup> Street, 40<sup>th</sup> Floor  
New York, NY 10165  
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Papers considered in review of this motion to dismiss and motion for summary judgment:

**Papers**

Notice of Motion and Annexed Exhibits  
Affidavit in Opposition and Annexed Exhibits  
Reply Affidavit

**Document Numbers**

1  
2  
3

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**PAUL G. FEINMAN, J.:**

Defendant moves (1) to dismiss plaintiff's complaint and (2) for summary judgment on his counterclaims. For the reasons set forth below, defendant's motion for summary judgment is: granted as to the first counterclaim for breach of contract; granted, in part, as to the second counterclaim seeking interest. Accordingly, the remainder of defendant's counterclaims, as well as his motion to dismiss are rendered academic.

***Background***

From December 2005 until approximately November 2006, defendant served as plaintiff's counsel for various matrimonial proceedings (Mot. Exs. A, Compl. ¶ 1, B, Answer ¶ 10). The parties executed retainer agreements on December 1, 2005, May 19, 2006, and August 24, 2006 (Mot., Exs. C, D, E). On March 29, 2006, plaintiff submitted the first of a number of *ex*

*parte* letters to the court, in which she detailed, among other things, her allegedly meager financial situation (Mot. Ex. H, Angel letter dated Mar. 29, 2006). A second letter was sent on May 16, 2006 (Mot., Ex. H, Angel letter dated May 23, 2006). These and other letters were apparently sent without the consent of defendant, who was then her counsel, to either the judge presiding over plaintiff's matrimonial action, or the then-Administrative Judge for New York County Supreme Court, Civil Term, or both.

Two days later, defendant filed an order to show cause, which was signed, requesting to withdraw as plaintiff's counsel for two reasons: (1) because he had previously advised plaintiff that such conduct was improper and unreasonable; and (2) because she had not tendered a number of the fees she owed to him (Mot., Ex. H, Aff. in Supp., at 4-5). Apparently, the parties then came to an agreement and defendant withdrew the application (Mot., Ex. G, Aff. in Opp. at 2). Then, despite that agreement, on May 23, 2006, plaintiff sent yet another *ex parte* letter to the court without counsel's approval (Mot. Ex. H., Angel letter dated May 23, 2006). The next day, defendant sent plaintiff a letter confirming their agreement that plaintiff would cease sending such letters (Mot. Ex. H, Greenhaus letter dated May 24, 2006).

On September 21, 2006, plaintiff, for a fourth time, submitted an *ex parte* letter to the court (Mot. Ex. H, Angel letter dated Sept. 21, 2006). Because of plaintiff's recalcitrance, defendant filed another order to show cause on September 26, 2006, which was signed, requesting to withdraw as plaintiff's counsel (Mot., Ex. G). By decision and order dated November 2, 2006, filed November 8, 2006, defendant was relieved as plaintiff's attorney (Mot., Ex. J, Dec. and Order). Apparently, plaintiff then filed an order to show cause seeking to stay that order claiming that she would be prejudiced if defendant were relieved, which the court

denied because “the level of disagreement is so high and so high-pitched that effective working between a lawyer and a client is no longer possible” (Mot., Ex. K, Transc., at 5, 7).

Over the course of the next few months, defendant repeatedly sent invoices to plaintiff itemizing the fees she owed to him, but these attempts to collect the fees were unsuccessful (Mot. Ex., L). Finally, on March 28, 2008, plaintiff requested a fee arbitration alleging she was unable to pay defendant because she was “basically destitute” and “he knew that if [she] did not receive awards of legal fees, [she] would be unable to pay him” (Mot., Ex. F). At the arbitration hearing defendant was awarded \$22,300.82 (Mot., Ex. A, Not. of Arb.).

On April 16, 2009, plaintiff commenced this action by summons and complaint seeking a trial *de novo* (Mot., Ex. A). Defendant then served his answer by mail and interposed counterclaims seeking \$22,302.17, plus interest, for his labor and services performed as plaintiff’s matrimonial attorney (Mot. Ex. B). Because plaintiff did not respond to those counterclaims, defendant submitted a proposed order to show cause seeking dismissal of plaintiff’s complaint and a money judgment in defendant’s favor based on his counterclaims (Mot., Ex. M). This court declined to sign the order without prejudice to the application being brought on by ordinary notice of motion, as no emergency warranting immediate relief (Mot., Ex. M). Defendant filed this motion on June 22, 2009, seeking: (1) dismissal of plaintiff’s complaint; (2) summary judgment on his counterclaims; and (3) costs and disbursements (Mot.). Plaintiff did not serve a responsive pleading to defendant’s answer with counterclaims until June 19, 2009 (Pl.’s Reply Aff.).

### *Analysis*

Initially, the parties submitted their dispute to the New York State Fee Dispute Resolution

Program (*see generally* 22 NYCRR 137). Neither party disputes that de novo review “is available . . . as of right” (*Eiseman Levine Lehrhaupt & Kakoyiannis, P.C. v Torino Jewelers, Ltd.*, 44 AD3d 581, 583 [1st Dept 2007, McGuire, J., dissenting]; *see* 22 NYCRR 137.8 [a]) to determine “the fair and reasonable value of the legal services rendered” because plaintiff timely demanded the same within 30 days of the arbitration award (*Chase v Bowen*, 49 AD3d 1350, 1350-1351 [4th Dept 2008]). Now, because defendant has “laid bare his proof [by] submitting affidavits and documentary evidence in support of [his] position[.]” (*Toledo v West Farms Neighborhood Hous. Dev. Fund Co., Inc.*, 34 AD3d 228, 229 [1st Dept 2006]), and because his motion for summary judgment is dispositive, this court need not address defendant’s motion to dismiss (*see Wiesen v New York Univ.*, 304 AD2d 459, 460 [1st Dept 2003]; *Levin v Intercontinental Cas. Ins. Co.*, 268 AD2d 205, 205 [1st Dept 2000], *affd* 95 NY2d 523 [2000]).

Among other relief, defendant seeks summary judgment on the four counterclaims set forth in his answer. The first, third and fourth counterclaims each seek recovery of \$22,302.17 under the theories of breach of an express contract, quasi-contractual recovery for quantum meruit or unjust enrichment, and breach of an implied-in-fact contract respectively; all of which are premised upon the same alleged sum owed. The second counterclaim seeks 9% interest on that sum (Mot. Ex. B).

The proponent of a motion for summary judgment bears the initial burden of establishing entitlement to judgment as a matter of law (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]) by offering credible evidence demonstrating the absence of triable issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The burden of raising a triable question of fact then shifts to the opponent (*see Torkel v NYU Hosps. Ctr.*, 63 AD3d 587,

592 [1st Dept 2009]) and evidence is viewed in the light most favorable to that party (*see Brown v Muniz*, 61 AD3d 526, 531 [1st Dept 2009]).

To establish entitlement to judgment as a matter of law on the first counterclaim, defendant must present credible evidence that no triable issue of fact exists as to whether (1) an express or implied agreement existed between he and the plaintiff, (2) he tendered performance, (3) plaintiff failed to do so, (4) and he suffered damages (*see* PJI 4:30; Judiciary Law § 474). In the context of fee arrangement agreements, “the burden [is] on attorneys who have drafted the retainer agreements to show that the contracts are fair, reasonable, and fully known and understood by their clients” (*Shaw v Manufacturers Hanover Trust Co.*, 68 NY2d 172, 176 [1986]).

Here, to substantiate his counterclaims, defendant has submitted the following documents: (1) an affidavit attesting to his first-hand knowledge of the alleged basis for liability (Mot., Aff.); (2) the retainer agreements upon which the counterclaims are premised (Mot., Exs. C, D, E); (3) the original summons and complaint (Mot. Ex. A); (4) a comprehensive detailed record of the invoices (Mot., Ex., L); and (5) a detailed supplementary affidavit explaining those invoices (Mot., Ex. L, Supp. Aff., at 2-9). The retainer agreements signed by the parties plainly set forth the terms of payment. Plaintiff does not dispute that she duly executed those agreements, in which she “acknowledged that [she] read th[e] Retainer Agreement in its entirety . . . had full opportunity to consider its terms, and [had a] full and satisfactory explanation of its terms, and that [she] fully underst[oo]d its terms and agree[d] to all such terms” (Mot., Ex. D, at 3). In fact, neither plaintiff’s complaint nor her opposing affidavit contest the formation, terms, nor the validity of the agreement. Instead, her pleadings focus on

the supposed impracticability of granting a judgment in defendant's favor because of her allegedly impoverished state (Pl.'s Reply Aff.). To the extent that plaintiff argues that defendant is not entitled to the fees because "he knew [she] had no funds" (Reply Aff., at 3), the inability to pay is not a meritorious defense to the action and she contradicts the very agreements she executed (*see Jacobson v Sassower*, 66 NY2d 991, 993 [1985]).

Equally unpersuasive is plaintiff's contention that resolution of this action must await final resolution of her matrimonial action. Her allegations regarding the then-assigned matrimonial judge are, simply put, devoid of any support in the record, and moreover, without relevance to what her contractual obligations were to her former attorney.

Here, defendant established his prima facie entitlement to summary judgment by tendering the signed retainer agreements, invoices for services rendered, setting forth his hourly rate and the number of billable hours expended, the particular services rendered; he also established that the plaintiff duly approved such invoices and made a partial payment on them (*see Landa v Dratch*, 45 AD3d 646, 648 [2d Dept 2007]) (Mot., Ex., L). With abundant clarity, defendant specified each hour for which he billed and submitted copies of the corresponding invoices he had sent to plaintiff over the course of representing her (*see Ween v Dow*, 35 AD3d 58, 62 [1st Dept 2006]; *Santora & McKay v Mazzella*, 182 AD2d 572, 573 [1st Dept 1992]) which she "failed to thereafter timely object to the invoice, and made partial payment thereon" (*Landa v Sullivan*, 255 AD2d 295, 295 [2d Dept 1998]). There is no indication, nor does plaintiff allege, that she objected to any of those invoices.

While this court recognizes that pleadings drafted by a *pro se* litigant should be liberally construed (*see Matter of Zelodius C. v Danny L.*, 39 AD3d 320, 320 [1st Dept 2007]; *Pezhman v*

*City of New York*, 29 AD3d 164, 168 [1st Dept 2006]), and that, as the nonmoving party, the evidence must be viewed in a light most favorable to her, plaintiff's allegations in opposition fail, as a matter of law, to raise a question of fact sufficient to withstand summary judgment (*see Landa v Dratch*, 45 AD3d at 648; *Kaye, Scholer, Fierman, Hays & Handler v Russell Chems.*, 246 AD2d 479, 480 [1st Dept 1998]; *Herbert Paul, P.C. v Coleman*, 236 AD2d 268, 296 [1st Dept 1997]). Thus, defendant is entitled to summary judgment on his first counterclaim for breach of contract. Accordingly, the court does not reach the merits of the alternative theories put forth by defendant in the third and fourth counterclaims.

CPLR 5001 (a) entitles a party to recover statutory interest "upon a sum awarded because of a breach of performance of a contract" (*Healthcare Capital Mgt. v Abrahams*, 300 AD2d 108, 108 [1st Dept 2002]). While the statutory interest rate is, as defendant argues, 9% (*see* CPLR 5004), the retainer agreements provided for "an interest rate of 6% per annum" (Mot., Exs. D, at 2; E, at 2). Ordinarily, "damages for breach of contract are ordinarily ascertained as of the date of the breach" (*Cole v Macklowe*, 64 AD3d 480, 480 [1st Dept 2009]), however, the counterclaim fails to allege a date for the breach by plaintiff. Therefore, the Clerk of Court shall calculate interest as running from the entry of judgment at 6% per annum.

Therefore, it is

ORDERED that defendant is granted judgment on the first counterclaim in the amount of \$22,302.17, together with interest as prayed for allowable by law at the rate of 6% per annum from the date of entry of judgment, as calculated by the Clerk of the Court, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs, the

ORDERED that the motion for summary judgment on defendant 's third and fourth counterclaims, as well as defendant's motion is to dismiss, are deemed denied as they are rendered academic by this decision and order; and it is further

ORDERED that a copy of this order be served upon the Clerk of Court, 60 Centre Street, Basement, New York NY 10007.

This constitutes the decision and order of the court.

Dated: October 19, 2009  
New York, New York

  
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J.S.C.

**HON. PAUL G. FEINMAN**

**FILED**  
**OCT 26 2009**  
**COUNTY CLERK'S OFFICE**  
**NEW YORK**

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