SCAN

SHORT FORM ORDER mod,mod

SUPREME COURT - STATE OF NEW YORK

Present:

HON. UTE WOLFF LALLY,

Justice

TRIAL/IAS, PART 5
NASSAU COUNTY

LAWRENCE F. KOBAK,

Plaintiff(s),

-against-

MOTION DATE: 9/8/09
INDEX No.:7411/09
MOTION SEQUENCE NO:1,2

CAL. NO.:

WOLF & FUHRMAN, P.C. et al.,

Defendant(s).

The following papers read on this motion:

Notice of Motion/ Order to Show Cause.....	1-4
Notice of Cross Motion.....	5-8
Answering Affidavits.....	9-11
Replying Affidavits.....	12-15
Briefs:	

Upon the foregoing papers, it is ordered that this motion by defendants for an order pursuant to CPLR 3212 granting them summary judgment is determined as provided herein.

Cross-motion by plaintiff for an order pursuant to CPLR 3212 granting him summary judgment in the amount of $132,018.11 which equals 40% of the attorney's fees earned by the defendant law firm in the actions Centeno v Hoshovsky, Taddeo v Park Terrace Care Center and Estevez v Toth, and a declaration that his employment contract with the defendant law firm is null and void due to the defendant law firm's breach thereof is determined as provided herein.

In his complaint the plaintiff alleges that he was employed by the defendant law firm from on or about January 1, 2002 until December 31, 2005 and that, pursuant to his employment agreement,

when he procured a case, he was entitled to 40% of the legal fee earned by the defendant law firm in all cases where another attorney did not have to be paid and a referral fee of 17% of the legal fee earned by the defendant law firm in all cases where another attorney did have to be paid a referral fee. He further alleges that pursuant to the parties' written agreement, with the exception of the aforementioned fee agreement, any material breach thereof by either party results in a nullification of the non-breaching party's contractual obligations. The plaintiff alleges that he is entitled to 40% of the legal fee earned by the defendant law firm in the actions Estevez v Toth, in which the defendant law firm earned $236,241.96, Centeno v Hoshovsky, in which the defendant law firm earned $66,667.00, and Taddeo v Park Terrace Care, in which the defendant law firm earned $26,956.31, and that the defendant law firm has willfully materially breached their agreement by failing to pay him.

The defendant law firm seeks summary judgment dismissing the complaint. The plaintiff has cross-moved for summary judgment in the amount of $132,018.11, 40% of the total fees earned by the defendant law firm in Estevez v Toth, Centeno v Hoshovsky, and Taddeo v Park Terrace Care, as well as a declaration relieving him of any contractual duties under his employment agreement on account of the defendant law firm's alleged material breach thereof.

The defendant law firm concedes that the plaintiff is entitled to 17% of the fees collected by it in the cases Centeno v Hoshovsky and Taddeo v Park Terrace Care. In fact, the defendant law firm alleges that the plaintiff was advised that it had just received its fees in the Taddeo case shortly before he commenced this action and that it has not yet received its fee in the Centeno case. As for the Estevez case, the defendant law firm alleges that it was retained by one of the decedent's daughters, Mercedes Estevez, on December 18, 2002 and that it commenced that action on December 26, 2002. It notes that in the Retainer Statement filed by plaintiff on behalf of its firm, the plaintiff represented that no one referred the client. Mercedes Estevez attests in her affidavit that after meeting with and extensively discussing the matter with the defendant Eliot Wolf, she retained the defendant law firm to represent her family's interest in relation to her mother's untimely death. She states that neither she nor anyone else in her

family retained the plaintiff, nor did the plaintiff refer them to the defendant law firm. She acknowledges that before retaining the defendant law firm, she contacted a lawyer in New York City regarding her mother's case but he declined the case and so her sister contacted another lawyer who referred them to the defendant Eliot Wolf as an attorney who specializes in medical malpractice.

The defendant law firm has not established its entitlement to summary judgment with regard to the fees allegedly owed in the Centeno v Hoshovsky or the Taddeo v Park Terrace Care case. It boldly alleges that only 17% of the fee earned by it is owed to the plaintiff. It entirely fails to refute the plaintiff's allegation that he is owed 40% of the fee pursuant to their agreement.

The defendant law firm has established its entitlement to summary judgment dismissing the plaintiff's claim to a fee in the Estevez v Toth case, thereby shifting the burden to the plaintiff to establish the existence of a material issue of fact.

In opposition to the defendant law firm's motion and in support of his own, the plaintiff attests that he was an employee of the defendant law firm when the retainer agreements in Centeno v Hoshovsky, Taddeo v Park Terrace Care Center and Estevez v Toth were entered. His employment agreement provides:

> b- Percentage Compensation to employee for Cases Derived from Employee
> i: 40% of the legal fee for all cases that only involve the employee obtaining the case and no other source.
> ii: 17% of the legal fee for cases that involve the employee obtaining the case from another attorney.

With respect to Centeno v Hoshovsky and Taddeo v Park Terrace Care Center, the plaintiff notes that the defendant law firm concedes that he referred the plaintiffs to it and there is no evidence that any other attorney was involved in the referral. The plaintiff has accordingly established his entitlement to 40% of the

fees earned by the defendant law firm in the Centeno v Hoshovsky and Taddeo v Park Terrace Care Center cases, thereby shifting the burden to the defendant law firm to establish the existence of a material issue of fact.

As for the Estevez v Toth case, the plaintiff alleges that his friend Scott Baron's law firm was contacted by Evilisa Estevez regarding her mother's case and that that firm referred her to him. In an attempt to establish this fact, the plaintiff has submitted an affidavit by Andrea P. Palmer, Esq., the Managing Attorney of Scott Baron & Associates, P.C., who attests "that **upon information and belief** Evilisa Estevez called [their] office . . . and was then referred to Larry Kobak, Esq.," and that he kept their office updated on the status of that case throughout that litigation. Representations made only upon information and belief do not suffice as proof in evidentiary form to create a question of fact requiring a trial [Wood v Nourse, 124 AD2d 1020, 1021 (4th Dept. 1986), citing Onendoga Soil Testing, Inc. v Barton, Brown, Clyde & Loguidice, P.C., 69 AD2d 984 (4th Dept. 1979)]. That the plaintiff may have worked on the Estevez v Toth case while at the defendant law firm, standing alone, is irrelevant in assessing his entitlement to a referral fee as is the defendant law firm's response to or alleged lack thereof to the plaintiff's inquiries regarding the status of that case subsequent to his departure from the defendant law firm. This correspondence hardly rises to the level of an account stated [Marion Scott Real Estate, Inc. v Rochdale Village, Inc., 23 Misc3d 1129(A) (Supreme Court Queens County 2009) (letter alleging breach of contract and demanding payment insufficient to establish an account stated). In fact, there is no evidence that the parties agreed to treat that statement as an account stated]. A "statement" "cannot be used to create liability where none otherwise exists" [M. Paladino, Inc. v Lucchese & Son Contr. Corp., 247 AD2d 515, 516 (2nd Dept. 1998); see also, Gurney, Becker & Bourne v Benderson Dev. Co., 47 NY2d 995, 996 (1979)].

Nevertheless, the plaintiff correctly avers that just because the retainer agreement in Estevez v Toth was entered into before he and the law firm entered into their written employment agreement does not defeat his entitlement to a referral fee as he has established that the defendant law firm oftentimes paid him

referral fees for cases he referred to it before their written employment agreement was entered. While the affidavits of Stephen Orsetti and Roberto Ruocco have been submitted by the plaintiff in Reply, they constitute rebuttal evidence. Those individuals assert that they were the only people at the Scott Baron & Associates firm who accepted incoming calls from potential new clients; that that firm does not handle medical malpractice cases; and, that Scott Baron & Associates referred all medical malpractice cases to the plaintiff. Where, like here, "the proof demonstrates 'a deliberate and repetitive practice' by a person 'in complete control of the circumstances,' " that " 'evidence of habit . . . [is] admissible to prove conformity on specified occasions' because 'one who has demonstrated a consistent response under given circumstances is more likely to repeat that response when the circumstances arise again' " [Rivera v Anilesh, 8 NY3d 627, 634 (2007), quoting Halloran v Virginia Chems., 41 NY2d 386, 391 (1977)]. When "these conditions are satisfied, 'a party should be able, by introducing evidence of such habit or regular usage, to allow the inference of its persistence on a particular occasion' " [Rivera v Anilesh, supra, at p. 634, quoting Halloran v Virginia Chems., supra, at p. 392]. The affidavits of Stephen Orsetti and Roberto Ruocco constitute evidence of custom and practice sufficient to raise an issue of fact as to whether Estevez v Toth was, in fact, referred by Scott Baron & Associates to the plaintiff. The plaintiff's attestation that he spoke with Evilisa Estevez before she met with Wolf and actually retained the defendant law firm further raises an issue as to whether she was in fact referred to him.

In opposition to the plaintiff's summary judgment motion regarding the Taddeo v Park Terrace Care Center, the defendant law firm has raised an issue of fact concerning the rate at which the plaintiff is entitled to be compensated. The defendant law firm notes that even the plaintiff's own records indicate that that case was referred to him by Scott Baron, Esq., which would relegate the plaintiff to a 17% fee. The plaintiff's interpretation of the parties' contract as limiting him to 17% only when another attorney must be compensated is rejected: The contract simply does not so provide. While the defendant law firm has not contested the plaintiff's right to 40% of its fee earned in the Centeno v Hoshovsky case, it represents that the plaintiff has not been paid yet because its fee has not been paid. In sum, the plaintiff is

awarded $26,664.00, 40% of $66,667, as and for his referral fee in the Centeno v Hoshovsky case.

Resolution of the amount of the plaintiff's referral fee in Taddeo v Park Terrace Care and whether he is entitled to a referral fee and if so the amount in Estevez v Toth must await trial.

As and for the declaratory relief sought by the plaintiff regarding his obligations under his contact, the plaintiff has established a material breach thereof by the defendant law firm on account of their inexplicable attempt to limit him to only 17% of the attorney's fee earned in Centeno v Hoshovsky when he is clearly entitled to 40%. It is hereby declared that the plaintiff's obligations under that employment agreement with the defendant law firm are null and void.

Dated: OCT 26 2009

J.S.C.

ENTERED

OCT 28 2009

NASSAU COUNTY
COUNTY CLERK'S OFFICE

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