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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**
Justice

TRIAL/IAS PART 20

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JAY LANDA,

Plaintiff,

-against-

Index No.: 008391/09
Motion Sequence...01
Motion Date...12/08/09

CHRISTINE SHERMAN,

Defendant.

_____X

Papers Submitted:
Notice of Motion.....x
Memorandum of Law.....x
Affidavit In Opposition.....x
Reply Affidavit.....x

Upon the foregoing papers, the Plaintiff, Jay Landa, proceeding *pro se*, moves for the following relief: for an order, pursuant to CPLR § 3212, granting summary judgment on the First and Second causes of action contained in the underlying complaint; for an order, presumably, although not denominated, pursuant to CPLR § 3211[b], dismissing the Defendant's affirmative defenses and counterclaim; and for an order, presumably, although not so denominated, pursuant to CPLR § 603, severing the Plaintiff's Third cause of action.

The Plaintiff, who is an attorney licensed to practice law within the State of

New York, represented the Defendant within the context of a matrimonial action, in which she was the plaintiff (*see* Moving Affidavit at ¶¶1,5,6). In connection with said representation, which commenced on April 19,1995, the Defendant was allegedly provided with a STATEMENT OF CLIENT'S RIGHTS AND RESPONSIBILITIES[1] and entered into a written RETAINER AGREEMENT (*id.* at ¶6; Exh. 2). Thereafter, on or about January 5, 1996, the Defendant elected to employ other matrimonial counsel in place of the Plaintiff (*see* Reply Affidavit at Exh. 13). However, subsequently, the Defendant elected to engage the services of the Plaintiff, and accordingly, on December 18, 1996, a second written Retainer Agreement was executed by the Defendant, in which she acknowledged her indebtedness to the Plaintiff in the sum of $30,331.43, presumably for past services rendered (*see* Moving Affidavit at Exh. 2).

During the course of the matrimonial action, an inquest was held after which the Defendant was granted "an uncontested divorce on the ground of abandonment (*see* Affidavit in Opposition at Exh. A). The Judgment of Divorce was ultimately entered on August 24, 2001 (*see* Reply Affidavit at Exh. 17). In addition thereto, a trial was held with respect to financial matters. Pursuant to the Decision and Order After Trial (Skelos, J), the Court denied the Defendant counsel fees, having determined that she was on "equal financial footing" with her former husband, but did award the Defendant a special award of counsel fees incurred in connection with an enforcement application (*see* Affidavit in Opposition at

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[1] While it is alleged that the defendant duly received a copy of the a Statement of Clients's Rights and Responsibilities as is required by 22 NYCRR 1400.2, a copy thereof has not been provided for this Court's review.

Exh. A).

Subsequent thereto, by Notice of Motion returnable October 10, 2003, the Plaintiff moved on behalf of the Defendant, for an award of counsel fees incurred for certain services rendered post-judgment (*see* Affidavit in Opposition at Exh. C). Notwithstanding that said application was interposed on October 10, 2003, the Retainer Agreement for these post-judgment services was not executed until October 29, 2003 (*see* Moving Affidavit at ¶8; *see also* Exh. 2).

By Decision-Order dated January 31, 2005, Referee Marston Gibson denied the counsel fee application, which order was appealed (*see* Affidavit in Opposition at Exh. E). On November 21, 2006, the Decision-Order was affirmed by the Appellate Division, Second Department (*id.* at Exh. F)[2]. In so affirming, the Appellate Division held that the "retainer agreement between the appellant [the Defendant in this action] and her attorney [the Plaintiff in this action] terminated by its own terms upon entry of the judgment of divorce." The Appellate Division further held that "the filing of a new retainer agreement in support of the instant motion for a post-judgment attorney's fee, which purportedly ratified the former agreement, did not amount to substantial compliance with the matrimonial rules." (*id.*). That Court held that the Plaintiff "was not entitled to recover a fee for post-judgment services rendered to the appellant" but noted that "fees incurred following the submission of the second retainer agreement" were not properly before it (*id.*).

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[2] *Sherman v Sherman*, 34 AD3d 670 [2d Dept 2006].

The underlying action was thereafter commenced in or about May 2009, to recover legal fees which the Plaintiff alleges remain outstanding (*see* Moving Affidavit at Exh. 2). Said complaint contains the following three causes of action: The First Cause of Action alleges an Account Stated in the sum of $55,832.68 relative to services rendered between April 19, 1995 and February 23, 2004; the Second Cause of Action alleges an Account Stated in the sum of $20,210.39 for services rendered and disbursements expended between February 24, 2004 and April 1, 2006; and the Third Cause of Action alleges that for the period between February 24, 2004 and April 1, 2006, the sum of $20,210.39 remains outstanding for professional services rendered and disbursements expended (*id.*)

In response to the Plaintiff's complaint, the Defendant interposed an Answer which included nine Affirmative Defenses and one Counterclaim (*id.* at Exh. 3). The Plaintiff's instant application seeking various forms of relief, including summary judgment as to the First and Second causes of action subsequently ensued and is determined as set forth hereinafter. The application is opposed by the Defendant.

It is well settled that a motion for summary judgment is a drastic remedy that should not be granted where there is any doubt as the existence of a triable issue of fact (*Sillman v Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395[1957]; *Bhatti v Roche*, 140 A.D.2d 660 [2d Dept 1998]). To obtain summary judgment, the moving party must establish his or her claim or defense by tendering sufficient evidentiary proof in admissible form sufficient to warrant the Court, as a matter of law, to direct judgment in the movant's favor

(*Friends of Animals v Associated Fur Mfrs.*, 46 N.Y.2d 1065 [1979]). Such evidence may include deposition transcripts as well as other proof annexed to an attorney's affirmation (CPLR § 3212 [b]; *Olan v Farrell Lines,* 64 N.Y.2d 1092 [1985]).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial (*Zuckerman v City of New York*, 49 N.Y.2d 557 [1980]). It is incumbent upon the non-moving party to lay bare all of the facts which bear on the issues raised in the motion (*Mgrditchian v Donato*, 141 A.D.2d 513 [2d Dept 1998]). Conclusory allegations are insufficient to defeat the application and the opposing party must provide more than a mere reiteration of those facts contained in the pleadings (*Toth v Carver Street Associates*, 191 A.D.2d 631 [2d Dept 1993]). When considering a motion for summary judgment, the function of the court is not to resolve issues but rather to determine if any such material issues of fact exist (*Barr v County of Albany*, 50 N.Y.2d 247 [1980]).

Within the particular context of a motion which seeks summary judgment on an action for an account stated, it is incumbent upon the moving party to proffer the relevant invoices, which clearly detail the services provided, the hourly rate charged, and the billable hours expended (*Landa v Dratch*, 45 A.D.3d 646 [2d Dept 2007]). In addition, the moving party must demonstrate that the defendant duly approved such invoices and made partial payments thereon (*id; see also Landa v Sullivan*, 255 A.D.2d 295 [1998]).

With respect to the first Cause of Action, the Court finds that the Plaintiff has failed to demonstrate his entitlement to judgment as a matter of law (*Friends of Animals v Associated Fur Mfrs.*, 46 N.Y.2d 1065 [1979], *supra*). As noted above, in accordance with the above-cited Appellate Division decision, the Plaintiff is not entitled to recover for post-judgment fees incurred after the entry of the judgment of divorce on August 24, 2001. However, the First cause of action demands recovery for legal services rendered between April 19, 1995 and February 23, 2004, which quite clearly includes the period of time following the entry of the judgment of divorce. Thus, as the Plaintiff has failed to meet his *prima facie* burden, the application is **DENIED** (*Sillman v Twentieth Century-Fox Film Corp*, 3 N.Y.2d 395 [1957], *supra*).

As to the Second Cause of Action cause of action which seek fees and disbursements incurred between February 24, 2004 and April 1, 2006, the Court again finds that the Plaintiff has failed to demonstrate his entitlement to judgment as a matter of law (*Friends of Animals v Associated Fur Mfrs.*, 46 N.Y.2d 1065 [1979], *supra*). Here, the billing records submitted for the services incurred between February 24, 2004 and April 1, 2006 are devoid of any evidence that the Defendant approved the bills[3] (*Landa v Dratch*, 45 A.D.3d 646 [2d Dept 2007], *supra*)

Accordingly, the branch of the Plaintiff's motion seeking summary judgment

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[3] While the invoices annexed to the Plaintiff's moving affidavit contain a signature line upon which the defendant should have indicated her receipt and approval, no such signature is present thereon (*see* Moving Affidavit at Exh. 2).

regarding the Plaintiff's second cause of action is **DENIED**.

The Court now addresses that branch of the Plaintiff's application which seeks severance of the Third cause of action. Severance is governed by CPLR § 603, which provides the following, in relevant part: "In furtherance of convenience or to avoid prejudice the court may order a severance of claims, or may order a separate trial of any claim, or of any separate issue."

As a general proposition, the court will not order severance unless there is evidence that prejudice will be visited upon a substantial right of the party seeking the severance (*Guilford v Netter*, 179 A.D.2d 801 [2d Dept 1992]; *Naylor v Knoll Farms of Suffolk County, Inc.*, 31 A.D.3d 726 [2d Dept 2006]). Moreover, severance is not warranted where the various causes of action asserted against a defendant involve common question of law and fact and the interests of judicial economy and consistency of verdicts are better served by conducting one trial (*id.; see also Sichel v Community Synagogue,* 256 A.D.2d 276 [1st Dept 1998]).

In the instant matter, the three causes of action contained in the complaint all involve common issues of law and fact, to wit: the Plaintiff's entitlement to fees for legal services rendered to the Defendant in connection with her matrimonial action (*id.*). More specifically, the Plaintiff's SECOND and THIRD causes of action each seek identical sums of money for the identical period of time (*id.*). Additionally, the Plaintiff has not demonstrated that he will suffer prejudice by trying the three causes of action together

(*Guilford v Netter*, 179 A.D.2d 801 [2d Dept 1992], *supra*).

Accordingly, the branch of the Plaintiff's motion which seeks severance of the Third cause of action is hereby **DENIED**.[4]

"A party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit" (CPLR § 3211[b]; *Butler v Catinella*, 58 A.D.3d 145 [2d Dept 2008]). "Upon a motion to dismiss a defense, the defendant is entitled to the benefit of every reasonable intendment of its pleading, which is to be liberally construed. If there is any doubt as to the availability of a defense, it should not be dismissed" (*Butler v Catinella*, 58 A.D.3d 145 [2d Dept 2008], *supra* quoting *Federici v Metropolis Night Club, Inc.*, 48 A.D.3d 741 [2d Dept 2008] at 743).

The Defendant's First Affirmative Defense alleges that pursuant to the decision of the Appellate Division as to post-judgment fees, the Plaintiff is precluded from recovering same based upon res judicata and collateral estoppel. Inasmuch as the Plaintiff's First Cause of Action appears to seek fees for services undertaken after the entry of the judgment of divorce, the Plaintiff's motion to dismiss the defense is **DENIED** (*id.*).

The Defendant's Second Affirmative Defense alleges that the Plaintiff should have appealed the trial court's decision denying her an award of counsel fees, and as a consequence of his failure to do so, is now estopped from the recovery of additional fees

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[4] The Court notes that is his Reply Affidavit, the plaintiff avers that the "third cause of action * * * is not before the Court in this motion [and] is based upon *quantum meruit*" (*see* Reply Affidavit at ¶66). However, the record herein clearly indicates that the Third Cause of Action is indeed before this Court and is the particular subject of the application seeking severance.

beyond those he has already received. Having carefully reviewed the substance of the Defendant's Second Affirmative Defense, the Court finds that same alleges negligence on the part of the Plaintiff. The statute of limitations for interposing such a claim has expired (CPLR § 214[6]).

Accordingly, the branch of the Plaintiff's motion seeking dismissal of the Defendant's Affirmative Defenses is **GRANTED** and the Second Affirmative Defense is hereby dismissed as is the Third Affirmative Defense, which also alleges negligence on the part of the Plaintiff. (CPLR § 3211[b]).

With respect to the Defendant's Fourth Affirmative Defense which alleges that the Plaintiff was discharged for cause, the Plaintiff's motion is **GRANTED** and the defense is hereby dismissed (*Butler v Catinella*, 58 A.D.3d 145 [2d Dept 2008], *supra*). The record herein, including the opposing Affidavit sworn to by the Defendant, is totally devoid of any evidence that the Plaintiff was ever discharged for cause (*id.; Federici v Metropolis Night Club, Inc.*, 48 A.D.3d 741 [2d Dept 2008], *supra*).

The Defendant's Fifth Affirmative Defense challenges the language contained in the various retainer agreements which states that "If no question or objection is raised within ten days, the bill will be deemed approved by you." The Defendant alleges that said language was ambiguous and written to mislead her into believing that she did not have a right to arbitrate the fee dispute. Upon review of the record, it is revealed that the Defendant, through her current counsel, by letter dated June 9, 2009, expressly declined her right to

arbitrate the within fee dispute. Thus, as this defense is plainly devoid of merit, the Plaintiff's application is **GRANTED** and the defense is dismissed (CPLR §3211[b]).

The Defendant's Sixth Affirmative Defense, which alleges that the use of an account stated in a matrimonial action is not permissible, is hereby dismissed. An account stated has been and continues to be an appropriate and accepted mechanism for a lawyer to collect fees incurred within matrimonial actions (*Barting v Barting*, 16 A.D.3d 249 [1st Dept 2005]; *Landa v Blocker*, Sup Ct, Nassau County, August 17, 2009, Murphy, J.).

The Defendant's Seventh Affirmative Defense alleges that certain equitable distribution funds were placed in the Plaintiff's escrow account, which he was under an obligation to disburse, but would not do so unless the Defendant executed the third retainer agreement. The Defendant alleges that she signed the third agreement under duress and the Plaintiff is thus estopped from enforcing same. "Repudiation of an agreement on the ground that it was procured by duress requires a showing of *both* 1) a wrongful threat, and 2) the preclusion of the exercise of free will" (*Ehrlich v Tullo*, 274 A.D.2d 303 [1st Dept 2000]). In the instant matter, there is nothing in the record to demonstrate that the Defendant was deprived of her ability to exercise her free will and to seek alternative legal advice and counsel prior to executing another retainer agreement with the Plaintiff (*id.*). Accordingly, the Plaintiff's application is **GRANTED** and the Defendant's Seventh Affirmative Defense is hereby dismissed.

The Defendant's Eighth and Ninth Affirmative Defense each separately allege

that the amounts charged were excessive. "[I]t is well settled that the courts posses the traditional authority to 'supervise the charging of fees for legal services' pursuant to their 'inherent and statutory power to regulate the practice of law'" (*Koral v Koral*, 185 A.D.2d 298[1992] quoting *Matter of First Natl. Bank of East Islip v Brower*, 42 N.Y.2d 471 [1977] at 474; *Campion v Campion*, 32 A.D.3d 814 [2d Dept 2006]; *Collier, Cohen, Crystal & Block*, 237 A.D.2d 152 [1st Dept 1997]). Further, a preexisting agreement for the payment of fees does not "foreclose [a] court from inquiring into the propriety of an attorneys' fee, even in the absence of undue influence or fraud" (*Koral v Koral*, 185 A.D.2d 298[1992], *supra*). Thus, consistent with this Court's inherent authority and in duly according the Defendant's Eighth and Ninth Affirmative Defenses with every favorable intendment, the Plaintiff's motion seeking dismissal thereof is hereby **DENIED** (*id; see also Butler v Catinella*, 58 A.D.3d 145 [2d Dept 2008], *supra*).

As to the Defendant's single counterclaim, same alleges that the Plaintiff was negligent in his representation and as a result the Defendant claims she has been damaged in the amount of the fees she has thus far remitted, which total $130,556.44. As noted above, the statute of limitations for interposing a claim predicated thereon has expired and accordingly, the Plaintiff's application is **GRANTED** and the counterclaim is dismissed(CPLR §214[6]).

Based upon the foregoing, it is hereby,

ORDERED, that the Plaintiff's Motion for Summary Judgment on the First

and Second Causes of Action in the complaint is **DENIED**; and it is further,

ORDERED, that the branch of the Plaintiff's motion seeking severance of his Third Cause of Action is **DENIED**; and, it is further,

ORDERED, that the branch of the Plaintiff's motion for an order dismissing the Defendant's Affirmative Defenses is hereby **GRANTED** as to those defenses denominated SECOND, THIRD, FOURTH, FIFTH, SIXTH and SEVENTH and **DENIED** as to those defenses denominated FIRST, EIGHTH and NINTH; and it is further

ORDERED, that the branch of the Plaintiff's motion seeking dismissal of the Defendant's counterclaim is hereby **GRANTED**; and it is further

ORDERED, that a preliminary conference in this matter shall be held on **March 2, 2010 at 9:30 a.m.** at the courthouse lower level; and it is further

ORDERED, that the Plaintiff shall serve a copy of this Order upon the Defendant's counsel, pursuant to CPLR § 2103 (b) 1, 2, 3 or 6, within seven (7) days of the date of this Order. **PROOF OF SERVICE MUST BE FILED WITH THE COURT.**

This constitutes the Decision and Order of the Court.

All applications not specifically addressed herein are denied.

DATED: Mineola, New York
February 1, 2010

Hon. Randy Sue Marber, J.S.C.