

**Meyer, Suozzi, English & Klein, P.C. v Vista Maro,
LLC**

2011 NY Slip Op 30173(U)

January 12, 2011

Supreme Court, Nassau County

Docket Number: 11455/10

Judge: Ute W. Lally

Republished from New York State Unified Court
System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

SCAN

SHORT FORM ORDER

**SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 3**

**Present: HON. UTE WOLFF LALLY
Justice**

MD

MEYER, SUOZZI, ENGLISH & KLEIN, P.C.,

**Motion Sequence #1
Submitted November 19, 2010**

Plaintiff,

-against-

INDEX NO: 11455/10

VISTA MARO, LLC,

Defendants.

The following papers were read on this motion for summary judgment:

Notice of Motion and Affs.....	1-3
Affs in Opposition.....	4&5
Affs in Reply.....	6&7
Memoranda of Law.....	8-9a

This motion by the plaintiff Meyer, Suozzi, English & Klein, P.C., for an order pursuant to CPLR 3212 granting summary judgment in its favor and directing the entry of a judgment against defendant the amount of \$152,050.44 plus interest thereon as provided by law is denied.

In this action, the plaintiff Meyer, Suozzi, English & Klein, P.C. seeks to recover damages representing legal fees allegedly due and owing from the defendant Vista Maro,

LLC to Meyer, Suozzi, English & Klein, P.C. in the amount of \$152,050.44.

“On a motion for summary judgment pursuant to CPLR 3212, the proponent must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact.” (*Sheppard-Mobley v King*, 10 AD3d 70, 74, *aff’d. as mod.*, 4 NY3d 627, citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853). “Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers.” (*Sheppard-Mobley v King*, *supra*, at p. 74; *Alvarez v Prospect Hosp.*, *supra*; *Winegrad v New York Univ. Med. Ctr.*, *supra*). Once the movant’s burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact. (*Alvarez v Prospect Hosp.*, *supra*, at p. 324). The evidence presented by the opponents of summary judgment must be accepted as true and they must be given the benefit of every reasonable inference. (*Demishick v Community Housing Management Corp.*, 34 AD3d 518, 521, citing *Secof v Greens Condominium*, 158 AD2d 591).

It is not disputed that the defendant Vista Maro retained Meyer, Suozzi, English & Klein, P.C. on July 28, 2008 in writing to represent it in two actions, *Q. International Courier, Inc. v Vista Maro, LLC et al.*, (Index No. 07-700042 Supreme Court Queens County) and *Vista Maro, LLC v Q. International Courier, Inc., et al.*, (Index No. 08-10311 Supreme Court Queens County). The Retainer Agreement provided:

“Upon Vista Maro’s request, the agreed upon fee for Meyer, Suozzi, English & Klein, P.C.’s legal services for this representation will be **unconditional and absolute** flat amount of Three Hundred Thousand (\$300,000) Dollars. It is understood and agreed that based upon contingencies of the litigation and other risk factors, **Meyer, Suozzi, English &**

Klein, P.C. is entitled to the entire amount of this fee regardless of the outcome of the Litigation or the timing of its resolution” (emphasis added).

The Retainer Agreement called for a payment of three installments of \$100,000. The first payment was due simultaneously with the execution of the Retainer Agreement; the second installment was due on or before November 15, 2008; and, the third and final installment was due on January 15, 2009. The Retainer Agreement further provided that the “installment payment schedule solely addresses the *timing* of payment and shall not effect Vista Maro’s obligation to pay the entire fee and that “any unpaid amount of the fee shall be paid no later than the resolution of the Litigation or at Meyer, Suozzi, English & Klein, P.C.’s written request.” More importantly, the Agreement provided that “Vista Maro shall have the right to change counsel at any time; provided, however, that Meyer, Suozzi, English & Klein, P.C. shall be entitled to the entire \$300,000 fee regardless of any change of counsel.” Vista Maro also agreed to be responsible for costs and disbursements.

In support of its motion, Meyer, Suozzi, English & Klein, P.C. alleges and Vista Maro does not dispute that the two actions in which Meyer, Suozzi, English & Klein, P.C. represented Vista Maro were settled and discontinued via stipulation of the parties in April, 2009. Meyer, Suozzi, English & Klein, P.C. further alleges and again, Vista Maro does not dispute that only \$150,000 of Meyer, Suozzi, English & Klein, P.C.’s unconditional \$300,000 legal fee and only \$193.54 of the \$2,243.98 costs and disbursements have been paid, leaving an unpaid balance of \$152,050.44.

In support of its motion, Meyer, Suozzi, English & Klein, P.C. has submitted eight invoices which were sent to Vista Maro, LLC between July 9, 2009 and June 21, 2010,

which were never paid or objected to.

“While, in the law generally, equivocal contracts will be construed against the drafters, courts as a matter of public policy give particular scrutiny to fee arrangements between attorneys and clients, casting the burden 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 173, 176, citing *Jacobsen v Sassower*, 66 NY2d 991, 993; *Gair v Peck*, 6 NY2d 97, 106, cert den., 361 US 374; 1 Speiser, *Attorneys’ Fees* §§ 2:3, 2:9). Thus, “[t]he law requires that an agreement between the client and the attorney be construed most favorably to the client.” (*Bizar & Martin v U.S. Ice Cream Corp.*, 228 AD2d 588, 589, citing *Shaw v Manufacturers Hanover Trust Co.*, *supra*, at p. 176; *Jacobson v Sassower*, *supra*, at p. 993; *Greenberg v Bar Steel Constr. Corp.*, 22 NY2d 210, 213).

A client retains the unfettered right to terminate his attorney at any time with or without cause. (*Matter of Cooperman*, 83 NY2d 465, 472; *Martin v Camp*, 219 NY170). In fact, 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 upon, the discharged attorney is entitled to recover [only] the reasonable value of services rendered in quantum meruit. (*Atkins & O’Brien, LLP v ISS Intern. Service System, Inc.*, 252 AD2d 446, citing *Matter of Cooperman*, *supra*, at p. 473, citing *Lai Ling Cheng v Modansky Leasing Co. Inc.*, 73 NY2d 454; *Teichner by Teichner v W & J Holsteins, Inc.*, 64 NY2d 977; *Matter of Montgomery’s Estate*, 272 NY 323). “Special non-refundable retainer agreements clash with public policy and transgress provisions of the Code of Professional Responsibility

(see, DR 2-110 [A] [3]; [B] [4]; 2-106[A]), essentially because these fee agreements compromise the client's absolute right to terminate the unique fiduciary attorney-client relationship." (*Matter of Cooperman, supra*, at p. 471). Special non-refundable retainer agreements "impose a penalty on a client for daring to invoke a hollow right to discharge." (*Id.*, at p. 474). "Instead of becoming responsible for fair value of actual services rendered, the firing client would lose the entire 'nonrefundable' fee, no matter what legal services, if any, were rendered." (*Id.*) The Court of Appeals held that "this would be a shameful, not honorable, professional denouement." (*Id.*).

Nevertheless, in (*Id.*, at p. 476), the Court of Appeals specifically stated that it "intend[ed] no effect or disturbance with respect to other types of appropriate and ethical fee arrangements. Minimum fee arrangements and general retainers that provide for fees, not laden with the nonrefundability impediment irrespective of any services will continue to be valid" The Court of Appeals concluded that "while the special nonrefundable retainer agreement will be unenforceable . . . quantum meruit payment for services actually rendered will still be available and appropriate." (*Id.*, at p. 475). Concomitantly, "[u]nder New York law, a client has an affirmative cause of action for rescission of an invalid retainer agreement and restitution or recoupment of legal fees paid in excess of the reasonable amount due to the attorney for services actually rendered." (*Levisohn, Lerner, Berger & Langsam v Medical Taping Systems, Inc.*, 20 F. Supp. 2d 645, 650 (S.D.N.Y. 1998), citing *V.W. v J.B.*, 165 Misc2d 767 (Supreme Court New York County (1995) *reversed on other grounds*, 219 AD2d 77).

A nonrefundable retainer is defined as "a fee paid by a client in advance of services and denominated by the lawyer as nonrefundable, irrespective of whether the client discontinues the representation or whether the lawyer does any work." (*Nonrefundable Retainers Revisited*, 72 N.C.L. Rev. at 3).

The Retainer Agreement that Meyer, Suozzi, English & Klein, P.C. seeks to recover on is a non-refundable retainer agreement and as such, is unenforceable. [See *Matter of Cooperman, supra*; *Wong v Michael Kennedy, P.C.*, 853 F.Supp. 73 (E.D.N.Y. 1994) (agreement invalid because it expressly said fee was nonrefundable); *cf. Gala Enterprises, Inc. v Hewlett Packard Co.*, 970 F.Supp. 212 (S.D.N.Y. 1997) (agreement not a nonrefundable special retainer because it made no express reference to refundability of fee)]. That the agreement does not specifically state that the fee is "nonrefundable" is irrelevant. The Retainer Agreement requires full payment of the \$300,000 fee regardless of whether any work is done and whether its services are terminated. It clearly constitutes a nonrefundable retainer agreement. That Meyer, Suozzi, English & Klein, P.C. completed the services contracted for does not legalize the agreement, either: Meyer, Suozzi, English & Klein, P.C. is entitled to recover only in quantum meruit.

Therefore, Meyer, Suozzi, English & Klein, P.C.'s motion must be denied.

Dated: January 12, 2011



 UTE WOLFF LALLY, J.S.C.

ENTERED
 JAN 18 2010
 NASSAU COUNTY
 COUNTY CLERK'S OFFICE

TO: Meyer, Suozzi, English & Klein, PC
Attorneys for Plaintiff
990 Stewart Avenue, Suite 300
Garden City, NY 11530

June Diamant, Esq.
Attorney for Defendant
229 Linwood Avenue
Cedarhurst, NY 11516

meyer,suozzi-vistamaro,#1/sumjudg