

**Levitt v Brooks**

2011 NY Slip Op 31083(U)

April 19, 2011

Sup Ct, NY County

Docket Number: 116338/10

Judge: Donna M. Mills

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

PRESENT : DONNA M. MILLS  
*Justice*

PART 58

RICHARD WARE LEVITT, et al.,  
Plaintiff,

-v-

JEFFREY BROOKS,  
Defendant.

INDEX NO. 116338/10

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001

MOTION CAL NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to dismiss.

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits... 1 & 4

Answering Affidavits- Exhibits \_\_\_\_\_ 2 + 5 + 2A

Replying Affidavits \_\_\_\_\_ 3

CROSS-MOTION: \_\_\_\_\_ YES  NO

Upon the foregoing papers, it is ordered that the motion is hereby decided in accordance with the attached memorandum decision.

**FILED**

APR 28 2011

Dated: 4/19/11

NEW YORK COUNTY CLERK'S OFFICE

*Donna M. Mills*  
DONNA M. MILLS, J.S.C.

Check one: \_\_\_\_\_ FINAL DISPOSITION

NON-FINAL DISPOSITION

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

-----  
RICHARD WARE LEVITT, d/b/a LEVITT &  
KAISER, Attorneys at Law, a New York  
Partnership,

INDEX NO.  
116338/10

Plaintiff,

- against -

JEFFREY BROOKS,

DECISION/ORDER

Defendants.  
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**FILED**

DONNA M. MILLS, J:

APR 28 2011

Pursuant to CPLR § 3211(a)(7), defendant Jeffrey Brooks moves to dismiss this action on the grounds that the complaint fails to state a cause of action. Plaintiff opposes the motion.

NEW YORK  
COUNTY CLERK'S OFFICE

**BACKGROUND**

This is an action against a non-client to collect legal fees for services rendered. By his Verified Complaint, plaintiff seeks to recover \$224,956.16 for legal services provided to David H. Brooks and alleges four causes of action against Defendant Jeffrey Brooks: (1) Breach of Contract; (2) Quantum Meruit; (3) Unjust Enrichment; and (4) Guarantee.

Defendant Jeffrey Brooks is sued as the guarantor under a second retention agreement for legal services provided by plaintiff to David H. Brooks, the defendant's brother. It is undisputed that David H. Brooks retained plaintiff to assist with research, writing, and trial preparation in a criminal federal case, in which David H. Brooks was being prosecuted for white collar crimes. It is also undisputed that David H. Brooks fell behind in payments to plaintiff, which resulted in a new retainer agreement being signed by David H. Brooks, and the defendant Jeffrey Brooks signing as a guarantor. Prior to the new retainer agreement between the parties, and David H. Brooks, plaintiff filed a motion in the

federal criminal proceeding to withdraw as counsel for David H. Brooks, as a result of missed payments. Rather than pursuing the motion, the parties in this action, and David H. Brooks negotiated the new retainer agreement with the guaranty.

Thereafter, plaintiff assisted in David H. Brooks' defense during his trial, however, plaintiff claims that he was not paid pursuant to the new retainer agreement, which led to this lawsuit against the defendant Jeffrey Brooks as guarantor.

#### APPLICABLE LAW AND DISCUSSION

When a court addresses a motion to dismiss for failure to state a cause of action (CPLR 3211 [a][7]), the allegations contained in the complaint should be accepted as true and the court must determine whether such facts fit any cognizable legal theory (see Morales v Copy Right, Inc., 28 AD3d 440 [2<sup>nd</sup> Dept. 2006]). Moreover, "whether plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (EBC, Inc. v Goldman Sachs & Co., 5 NY3d 11, 19, [2005]). Applying this standard here, this court concludes that plaintiff's causes of action for breach of contract, quasi contract and guaranty should survive defendant's motion to dismiss.

Defendant argues that the January 18, 2010 retainer agreement in which he signed as a guarantor, is void for lack of consideration. He contends that plaintiff had a pre-existing obligation to represent his brother under the original retainer agreement and as such, no consideration existed to validate the January 18, 2010 retainer agreement.

The consideration necessary to support a contract claim can consist of either a benefit to the promisor or a detriment to the promisee (see Beitner v Becker, 34 AD3d 406, 407 [2<sup>nd</sup> Dept. 2006]). Here the complaint alleges, among other things, that David H. Brooks may have been breaching the initial retainer agreement, and plaintiff did refrain from withdrawing from representing him after his brother Jeffrey Brooks agreed to sign the new retainer agreement as a guarantor. Since forbearance to do an act that a person has

a legal right to do constitutes consideration (see Rogowsky v McGarry, 55 AD3d 815 [2<sup>nd</sup> Dept. 2008]), plaintiff's refraining from pursuing his right to seek withdrawal and to continue to represent David H. Brooks the complaint alleges the necessary element of consideration. In light of these facts, Defendant and David H. Brooks executed the second retainer agreement in exchange for plaintiff's agreement to continue his representing David H. Brooks in the criminal proceedings against him. As such, plaintiff has stated a viable cause of action for both breach of contract and guarantee.

Defendant's contention that the cause of action for quasi-contract fail to state a cause of action are similarly not persuasive. Defendant claims that quasi-contract claims are barred where a contract governs the same subject matter. However, there is no reason for this court to be determining, at this stage, whether or not the subject retention agreement is enforceable. Moreover, plaintiff is entitled to bring claims under both contract and quasi-contract theories, pled in the alternative. A plaintiff is simply "not precluded from proceeding on both breach of contract and quasi-contract theories where there is a bona fide dispute as to the existence of the contract." (see Curtis Properties Corp. v Greif Co., 236 AD2d 237, 239 (1<sup>st</sup> Dept. 2007)). The existence of a valid, enforceable contract governing the subject matter of this action has yet to be established.

The third cause of action for unjust enrichment asserted against defendant, Jeffrey Brooks, is however deficient. The criteria for recovery under a theory of unjust enrichment are: "(1) the performance of the services in good faith, (2) the acceptance of the services by the person to whom they are rendered, (3) an expectation of compensation therefor, and (4) the reasonable value of the services" ( Moors v. Hall, 143 A.D.2d 336, 337-338, [2<sup>nd</sup> Dept. 1988]). As the Court emphasized in Kagan v. K-Tel Entertainment (172 A.D.2d 375, 376, [1<sup>st</sup> Dept. 1991]), to recover from a particular

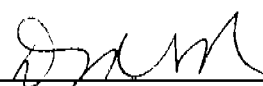
defendant, "a plaintiff must demonstrate that services were performed for the defendant resulting in its unjust enrichment Kapral's Tire Svc. v. Aztek Tread Corp., 124 A.D.2d 1011, 1013, [4<sup>th</sup> Dept. 1986]). It is not enough that the defendant received a benefit from the activities of the plaintiff ( Armstrong v. I.T.T.S. Corp., 10 A.D.2d 711, [2<sup>nd</sup> Dept. 1960]); if services were performed at the behest of someone other than the defendant, the plaintiff must look to that person for recovery (Citrin v. Columbia Broadcasting, 29 A.D.2d 740, 286 N.Y.S.2d 706)." Plaintiff points to no service that was rendered to defendant Jeffrey Brooks for which plaintiff can reasonably expect compensation.

Accordingly, defendant's motion to dismiss the action is granted to the limited extent of dismissing the third cause of action in the complaint sounding in unjust enrichment.

This constitutes the decision and order of the Court.

Dated: 4/19/11

So Ordered

  
\_\_\_\_\_

Donna M. Mills, J.S.C.

**FILED**  
APR 28 2011  
NEW YORK  
COUNTY CLERK'S OFFICE