

Peirce v Neuman

2011 NY Slip Op 31812(U)

July 1, 2011

Supreme Court, New York County

Docket Number: 116678/2008

Judge: Paul G. Feinman

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.

Index Number : 116678/2008

PART 12

PEIRCE, CAROL

vs
NEUMAN, JAMES

INDEX NO. 116678

Sequence Number : 001

MOTION DATE _____

SUMMARY JUDGMENT

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

Answering Affidavits -- Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

by defendant for summary judgment

Upon the foregoing papers, it is ordered that this motion is granted and the cross motion is denied.

See Annexed Decision/Order.

FILED

JUL 06 2011

NEW YORK COUNTY CLERK'S OFFICE

Courtesy copies mailed.

Dated: JULY 1, 2011

Paul Feinman

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Scanned to New York EF on 7/5/11

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 12

-----X
CAROL PEIRCE,

Plaintiff,

Index Number 116678/2008

Mots. Seq. Nos. 001, 002

-against-

JAMES NEUMAN,

Defendant.

DECISION AND ORDER

FILED

JUL 06 2011

**NEW YORK
COUNTY CLERKS OFFICE**

-----X
For the Plaintiff:

Carol Peirce, *pro se*
ID # 59515-054
FCI Coleman Medium Satellite Camp
PO Box 1027
Coleman, FL 33521

For the Defendant:

David S. Greenfield, Esq.
100 Lafayette Street, ste. 502
New York, NY 10013

Papers considered in review of this motion and cross motion for summary judgment, and separate motion for summary judgment:

	Papers	E-file Document Number
Seq. 001	Notice of Motion, Affidavit, Memo of Law, Exhibits	1
	Notice of Cross Motion	2
	Reply Memo of Law in Supp.	3
Seq. 002	Notice of Motion, Affidavits, Exhibits	1

PAUL G. FEINMAN, J.:

In motion sequence number 001, defendant James Neuman moves pursuant to CPLR 3212 for summary judgment and dismissal of the complaint. Plaintiff Carol Peirce, who is self-represented, opposes and cross-moves for summary judgment against defendant. In motion sequence 002, plaintiff again moves for summary judgment against defendant. All of the motions are jointly decided in this decision and order.

For the reasons provided below, defendant's motion for summary judgment, sequence number 001, is granted and the Clerk is directed to enter judgment dismissing the complaint, together with costs and disbursements. Plaintiff's cross motion, and her separate motion brought as sequence number 002, are denied.

D. Greenfield
100 Lafayette Street, Ste. 502
New York, NY 10013
Tel: 212-691-1234
Fax: 212-691-1234
E-mail: david@dsge.com

Plaintiff retained defendant pursuant to a flat fee retainer agreement entered into on April 3, 2008, to represent her in connection with an appeal of her recent conviction on charges of federal conspiracy to commit fraud, mail fraud, and theft from a program receiving federal funds (Mot. seq. 001, Neuman affid. at ¶ 5). The agreement took the form of a letter from defendant to plaintiff, dated April 3, 2008, and signed by both parties. Under the letter agreement, defendant would charge a total of \$50,000.00 in legal fees for his representation, unless plaintiff agreed that it was ultimately not in her best interest to submit a post-verdict motion pursuant to Rule 29 or Rule 33, in which case the fee would be reduced to \$40,000.00 (Mot. seq. 001, ex. B, letter agreement at 1).

The agreement provided for a series of payments and a schedule for the same. An initial payment of \$7,500.00 was due immediately upon execution of the agreement, and, upon payment, defendant was to then undertake to review the record of the proceedings in order to evaluate whether a motion under Rule 29 or Rule 33 of the Federal Rules of Criminal Procedure should be submitted. If plaintiff opted to go forward with the motion, the agreement provided she would owe an additional \$27,500.00 to defendant on or before April 14, 2008 (*id.* at 1-2). If plaintiff opted to forego the motion, the agreement provided, "then that amount of \$27,500.00 may be submitted at a later date" (*id.* at 2). The letter agreement further stated that defendant would not file a notice of appearance until he had received a total sum of \$35,000.00 (*id.*). The balance of the fee was to be due before the sentencing date. The amount of the balance depended on whether a Rule 29 or Rule 33 motion was prepared; if it was the balance due would be \$15,000.00 and if it was not, the balance due would be \$5,000.00 (*id.*). The final

paragraph of the letter agreement provides “[t]hough no guarantees have or can be made concerning the outcome of your case, I will represent you to the best of our ability” (*id.*).

Pursuant to the terms of the letter agreement, plaintiff made several payments amounting to \$35,000.00 by April 11, 2008, and defendant commenced review of the extensive record of the proceedings in her case. During the first few weeks of April, the parties communicated on several occasions through e-mail, by telephone, and in person to discuss plaintiff’s post-conviction options. The exhibits to the defendant’s motion demonstrate that he undertook extensive preparation by reading the trial transcript, outlining it, and researching relevant case law. The exhibits also demonstrate that he actually commenced the drafting of an appellate brief. At a meeting in mid-June 2008, defendant advised plaintiff against submitting a post-verdict motion because he did not believe there was sufficient support for her to argue that her trial attorney’s representation was ineffective, and instead recommended that they focus their efforts on sentencing issues (*id.* at ¶¶ 31-32). A month later, on or around July 18, 2008, plaintiff told defendant that she intended to terminate his legal representation and hire a new attorney (*id.* at ¶ 32). Thereafter, the parties became engaged in a dispute over fees and defendant’s right to keep amounts already paid to him by plaintiff. Plaintiff was later sentenced and has been incarcerated throughout the entirety of this action.

Plaintiff’s *pro se* complaint is interpreted by the court to assert a claim for breach of contract, alleging that defendant failed to perform the work as agreed in the parties’ letter agreement and failed to provide a refund upon plaintiff’s request (Mot. seq. 001, ex. I, complaint at ¶¶ 6 - 10). Defendant’s answer admits that he was paid \$35,000 pursuant to the parties’ letter agreement, but denies breaching the contract (Mot. seq. 001, ex. I, answer). After discovery was conducted, a note of issue was filed on August 19, 2010. Apparently, plaintiff served her first

motion for summary judgment on defendant's attorney on October 27, 2010. She also claims that on that date she attempted to file the motion with the court but it was rejected because payment was not offered by money order (Mot. seq. 001, plaintiff's affirm. at ¶ 2). Due to complications related to her incarceration, plaintiff was not able to serve the motion again until March 30, 2011, which was assigned sequence number 002. By this point, defendant had filed his motion for summary judgment on March 1, 2011, which was assigned sequence number 001. Defendant explains that, having been served with plaintiff's previous attempted motion, he originally expected to file a cross-motion until he discovered that plaintiff's motion had not in fact been filed. When several months had passed without plaintiff re-filing the motion, he decided to move for summary judgment rather than wait and cross move (*see* Mot. seq. 001, attorney affirm.). In addition to filing her motion under sequence number 002, plaintiff cross-moved under sequence number 001 seeking the same relief. Given the procedural history of this action and the excuses offered for the parties' delay, the court finds good cause for the motions being late and will consider the merits of the motions and cross-motion, although untimely (*see Brill v City of New York*, 2 NY3d 648, 653 [2004]).

Although plaintiff has not sought to amend her complaint, the papers she submitted in support of her motion and cross-motion attempt to assert additional causes of action. Plaintiff now seeks summary judgment for (1) recovery of \$35,000.00 withheld by defendant under quantum meruit for attorney fees, plus interest and court fees, (2) monetary damages in excess of \$40,000 under her claim for negligent misrepresentation, negligence and breach of contract, and (3) monetary damages in the amount of \$15,000 under her claim of unjust enrichment (Mot. seq. 002, not. of mot.).

In support of its motion for summary judgment dismissing the complaint, defendant argues that because the parties entered into a flat fee retainer agreement and plaintiff admits that she terminated the agreement, the only remaining issues are (1) whether plaintiff discharged defendant “for cause,” (2) if she did discharge him without cause, whether defendant established that he performed the work as he has claimed, and (3) whether the hourly rate chosen by defendant is reasonable under the circumstance.

Analysis

To prevail on a summary judgment motion, the moving party must produce evidentiary proof in admissible form sufficient to warrant the direction of summary judgment in his or her favor (*GTF Mtkg. Inc. v Colonial Aluminum Sales, Inc.*, 66 NY2d 965, 967 [1985]). Once this burden is met, the burden shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring a trial (*Kossen v Algaze*, 84 NY2d 1019, 1020 [1995]).

The complaint alleges breach of contract by defendant because of his alleged failure to perform his obligations under the parties’ letter agreement. “A breach of contract claim against an attorney based on a retainer agreement may be sustained only where the attorney makes an express promise in the agreement to obtain a specific result and fails to do so” (*Pacesetter Communications Corp. v Solin & Breindel, P.C.*, 150 AD2d 232, 236 [1st Dept 1989]). Here, the letter agreement includes a provision stating “[t]hrough no guarantees have or can be made concerning the outcome of your case, I will represent you to the best of our ability” (Mot. seq. 001, ex. A, letter agreement). There are no actionable express promises made in the retainer agreement defendant is said to have breached. Furthermore, plaintiff cannot rely upon alleged

oral promises made to overcome the express language of the contract sued upon (*see Pacemaker*, 150 AD2d at 236).

To the extent plaintiff asserts causes of action for negligent representation and negligence, plaintiff is essentially alleging attorney malpractice (*see Schwartz v Olshan Grundman*, 302 AD2d 193, 199-200 [1st Dept 2003]). To prevail on a cause of action for legal malpractice, plaintiff must satisfy three elements: (1) the negligence of the attorney; (2) that the negligence was the proximate cause of the loss sustained; and (3) actual damages (*Leder v Spiegel*, 31 AD3d 266, 267-268 [1st Dept 2006]). In order to establish proximate cause, “plaintiff must demonstrate that ‘but for’ the attorney’s negligence, plaintiff would either have prevailed in the matter at issue, or would not have sustained any ‘ascertainable damages’” (*id.*; citing *Brooks v Lewin*, 21 AD3d 731, 734 [1st Dept 2005]). The failure to demonstrate proximate cause requires dismissal of a legal malpractice claim regardless of whether the attorney was negligent (*Schwartz*, 302 AD2d at 198).

Here, plaintiff does not offer sufficient proof establishing proximate cause. Plaintiff alleges that defendant’s conduct caused her to lose the opportunity to file a post-conviction motion under Federal Rules of Criminal Procedure 29 or 32 (Mot. seq. 002, plaintiff’s affid. at 19). However, plaintiff does not even attempt to provide prima facie proof that she would have succeeded if such a motion was filed. For this reason alone, plaintiff fails to establish the proximate cause element necessary to sustain a claim of malpractice. To the extent plaintiff seeks recovery under a theory that defendant negligently misrepresented that he would bring a post-conviction motion, such claim is extinguished by reference to the unambiguous terms of the retainer letter agreement, which clearly contemplates that a Rule 29 or Rule 32 may or may not

be filed depending on defendant's evaluation of the record and applicable law (Mot. seq. 001, ex. A, letter agreement). Plaintiff's claim sounding in unjust enrichment is duplicative of her claim that she is entitled to a refund of the legal fees she paid to defendant.

Under New York law, a "client has an absolute right to discharge an attorney at any time. If the discharge is with cause, the attorney has no right to compensation or to a retaining lien" (*Teichner v W & J Holsteins, Inc.*, 64 NY2d 977, 979 [1985]). "Where the discharge is without cause, the attorney is limited to recovering in quantum meruit the reasonable value of the services rendered" (*Campagnola v Mulholland*, 76 NY2d 38, 44 [1990]). An attorney is discharged with cause when his or her conduct falls "below the ordinary and reasonable skill and knowledge commonly possessed by a member of the profession" (*Morrison Cohen Singer & Weinstein v Zuker*, 203 AD2d 119, 119-120 (1st Dept 1994)). Even if the court were to accept all of the unsworn and conclusory allegations asserted by plaintiff, many of which were only asserted for the first time in plaintiff's motion papers, plaintiff has not established that defendant's conduct fell below the applicable standard. Most of plaintiff's claims concern reasonable strategic choices regarding litigation, which as a matter of law, do not constitute sufficient "cause" for termination without reasonable compensation (*id.* at 120). In short, the court holds that as matter of law, plaintiff's discharge of defendant was without cause.

Having found that the plaintiff's discharge of defendant was without cause, the court must next consider whether there is a material question of fact as to whether the \$35,000.00 in fees paid to counsel prior to his discharge without cause constitutes a sum in excess of the reasonable value of the work he had performed. Having considered the difficulty of the questions involved, the voluminous trial record, the time and labor required, the lawyer's experience, ability and reputation and the customary fee by the Bar for similar services, it does

not appear that the fees paid by plaintiff to defendant exceeds the amount which would be due in quantum meruit. There is nothing inherently unreasonable about the \$350.00 hourly rate used by defendant, a criminal appellate practitioner for over 20 years; indeed, the affidavits submitted by other criminal appellate practitioners suggest that such a rate may be below the market rate for complex Second Circuit criminal appeals. Prior to his discharge, the evidence establishes that defendant had expended 70 hours reviewing the trial transcripts, exhibits, and documents, between 7 to 17 hours meeting with and corresponding with plaintiff and others, 22 hours researching potential appellate issues, and 28.7 hours actually drafting a statement of facts, a motion for bail pending appeal, affidavits, and a stipulation to substitute counsel, and 1 hour actually appearing in court. In other words, using a quantum meruit calculation, defendant had not only earned the flat fee by the time of his discharge without cause, but had completed hourly work in excess of the fees already paid. Because on this record, the court concludes as a matter of law that the flat rate fee of \$35,000.00 paid to defendant does not exceed what he would be entitled to in quantum meruit, there is no need for a trial.

Accordingly, it is

ORDERED that the defendant's motion for summary judgment bearing motion sequence number 001 seeking dismissal of plaintiff's complaint is granted; and the Clerk of Court shall enter judgment dismissing the complaint in its entirety, together with costs and disbursements; and it is further

ORDERED that the plaintiff's cross motion filed under motion sequence number 001 and her motion for summary judgment bearing motion sequence number 002 are denied.

Dated: July 1, 2011
New York, New York

Carol A. Stearns
J.S.C. **FILED**

JUL 06 2011
NEW YORK
COUNTY CLERK'S OFFICE