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

PRESENT : DONNA M. MILLS **PART** 58
Justice

RICHARD WARE LEVITT, d/b/a LEVITT & KAIZER, Attorneys at Law, a New York Partnership,
Plaintiff,

-against-

JEFFREY BROOKS,

Defendant.

INDEX NO. 116338/10

MOTION DATE

MOTION SEQ. NO. 002

MOTION CAL NO.

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

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause-Affidavits– Exhibits....	1-3
Answering Affidavits– Exhibits	4-5
Replying Affidavits	6, 7

CROSS-MOTION: _____ YES ✓ NO

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION.

Dated: 10/25/11

J.S.C.
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: IAS PART 58

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

Plaintiff,

-against-

JEFFREY BROOKS,

Defendant.

----------X

Index No. 116338/10

MILLS, J:

In this action, plaintiff Richard Ware Levitt (Levitt) seeks payment of $224,956.16 in legal fees under a retainer agreement, dated January 18, 2010 (Agreement), for legal services provided to defendant's brother in the criminal action, *United States v Brooks* (06-CR-550), in the United States District Court in the Eastern District of New York (Criminal Action).[1] The complaint asserts causes of action for breach of contract, unjust enrichment, quantum meruit, and payment under a guaranty contained in the Agreement. Defendant Jeffrey Brooks (Brooks) moved to dismiss the complaint. By decision and order dated April 19, 2011, this court granted Brooks's motion to the limited extent of dismissing the claim for unjust enrichment (4/19/11 Decision). Levitt now moves for summary judgment on the surviving causes of action.

The factual background of this case was stated in detail in the 4/19/11 Decision. Therefore, the court presumes familiarity with that decision and the facts are not restated here. To the extent that additional facts are necessary to resolve the instant motion, they are discussed

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[1] Defendant concedes that his brother, David Brooks, was convicted on all counts of conspiracy and securities fraud after a trial that lasted over seven months. David Brooks is currently awaiting sentencing in the Criminal Action.

in the following analysis.

Legal Analysis

Levitt moves for summary judgment on his first cause of action for breach of contract. To be entitled to summary judgment, Levitt must demonstrate "the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages." *Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 (1st Dept 2010).

The Agreement provides terms for Levitt's ongoing representation of David Brooks, and expressly incorporates the initial, March 22, 2009 agreement regarding Levitt's representation of David Brooks in the Criminal Action. Agreement, Solomon Aff., Ex. 18, at 1. Among those terms, the Agreement states that "David and Jeffrey Brooks agree to be jointly and severally liable for payment of the fees that are the subject of this letter. Jeffrey Brooks agrees that he is willing to accept this responsibility as consideration for the undersigned's agreement to represent his brother David Brooks." *Id.*, ¶ 6. The Agreement is signed by both David and Jeffrey Brooks, and it is witnessed by nonparty Jil Klinkert (*id.*), an admitted acquaintance of Brooks (Verified Answer, Solomon Aff., Ex. 2, ¶ 7).

Brooks concedes the existence of the Agreement. In his opposition brief, he states that "[t]he contract upon which plaintiff sues is the second retention agreement between Levitt and David Brooks for legal services. Defendant Jeffrey Brooks agreed to be jointly and severally liable under the second retention agreement." Brooks Opp. Brief, at 11. Brooks also admits that "David and Jeffrey Brooks each signed the agreement ... ." *Id.* at 23.

David Brooks acknowledged, and the district court confirmed, Levitt's performance and the outstanding debt owed to him. For instance, Levitt submits a schedule titled "Brooks -

Outstanding Invoices," dated September 22, 2010, which Levitt claims was filed in the Criminal Action by David Brooks's defense counsel. Solomon Aff., Ex. 20. The schedule identifies "Richard Levitt" and an "Amount" owed of $265,000.[2] *Id.*

Levitt also submits David Brooks's "Opposition to Richard Levitt's Motion to Withdraw as Counsel and for Immediate Payment of Legal Fees," dated November 4, 2010 and submitted to the district court in the Criminal Action. *Id.*, Ex. 21. In these opposition papers, David Brooks "acknowledged his debt to Levitt before this Court," stating that he "made every attempt to satisfy it." *Id.* at 2. He stated that, "[a]mong the 'outstanding legal bills' listed in the Attached Schedule was $265,000 owed to Richard Levitt." *Id.* (referring to the above-referenced schedule titled "Brooks - Outstanding Invoices"). David Brooks argued that he "had every intention of paying his debt in full, as soon as it became possible for him to do so" (*id.* at 3), stating that, "[i]n fact, between September 22 and the date that Levitt's motion was filed, [David] Brooks made a significant payment in a good-faith effort to reduce his debt" (*id.* at 3 n 1). In support of this statement, David Brooks again cited the above-referenced schedule, listing the amount owed to Levitt as $265,000, as compared to the amount currently sought by Levitt of $224,956.16. *Id.* The district court held that the debt was uncontested, and ordered David Brooks to pay Levitt the full amount owed, *sua sponte* converting Levitt's motion into an independent civil action, in *Levitt v Brooks* (US Dist Ct, ED NY, 11-CV-1088, Seybert, J., March 14, 2011), and directing the Clerk of the Court to docket a judgment in Levitt's favor against David Brooks in the amount

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[2] According to Levitt, the $265,000 figure included a balance that David Brooks had allegedly agreed to maintain in an escrow account. The $224,956.16 now sought by Levitt excludes the "cushion" of that account, and represents only amounts owed by Brooks. Levitt Opening Brief, at 5 n 2.

of $224,956.16. Solomon Aff., Ex. 22. The next day, the Clerk of the Court entered the judgment (3/15/11 Judgment).[3] *Id.*

Brooks breached the Agreement by failing to pay for Levitt's legal services, after Levitt demanded, but never received, payment from David or Jeffrey Brooks. Levitt Aff., ¶¶ 18, 24. The 3/15/11 Judgment evidences the breach and Levitt's damages for his provision of legal services that remain unpaid in the Criminal Action. These undisputed facts make a prima facie showing of Levitt's entitlement to summary judgment on his breach of contract cause of action.

In opposition, Brooks argues that the Agreement is void as a result of duress and coercion, which are the subject of his fifth affirmative defense. According to Brooks, Levitt was already bound by his initial retainer agreement with David Brooks when Levitt threatened to cease providing legal services unless Brooks agreed to be jointly and severally liable. Brooks also claims that Levitt's threat was improper because, "one week before jury selection" and "on the eve of a criminal trial whereby David Brooks was facing charges with penalties of up to 25 years in prison," the district court denied Levitt's motion to withdraw as counsel. Brooks Opp. Brief, at 13.

"A contract is voidable on the ground of duress when it is established that the party making the claim was forced to agree to it by means of a wrongful threat precluding the exercise of his free will." *See Austin Instrument v Loral Corp.*, 29 NY2d 124, 130 (1971). Duress is demonstrated "by proof that one party to a contract has threatened to breach the agreement by withholding goods unless the other party agrees to some further demand." *Id.* "This showing of a threatened violation of the contractual obligations by itself ordinarily will not suffice.

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[3] On March 29, 2011, David Brooks filed a Notice of Appeal of the judgment.

However, economic duress is established when the facts show that such breach will result in an irreparable injury or harm." *Sosnoff v Carter*, 165 AD2d 486, 491 (1st Dept 1991).

All of the cases cited by Brooks make clear that the duress or coercion must have been experienced by the party asserting the defense. *Austin Instrument*, 29 NY2d at 130-31; *Stewart M. Muller Constr. Co. v New York Tel. Co.*, 40 NY2d 955, 956 (1976); *Sosnoff v Carter*, 165 AD2d 486, 491 (1st Dept 1991); *Baratta v Kozlowski*, 94 AD2d 454, 458 (2d Dept 1983). Brooks admits that the initial retainer agreement was "signed solely by David Brooks and not by Defendant Jeffrey Brooks." Brooks Opp. Brief, at 2. Thus, even if Levitt had threatened to breach the initial retainer agreement if David and Jeffrey Brooks refused to sign the Agreement, Brooks – who was never a party to the first agreement – could suffer no harm. Brooks was never a defendant in the Criminal Action, and he was not represented by Levitt in that action. As discussed above, David Brooks has already acknowledged the legitimacy of the legal fees. David Brooks never raised duress or coercion in the dispute with Levitt that resulted in the 3/15/11 Judgment, and the district court already determined that David Brooks acknowledged his debt to Levitt. None of the evidence shows that Brooks himself was under duress when he signed the Agreement.

Sosnoff (165 AD2d 486, *supra*), cited by Brooks, is illustrative. In *Sosnoff*, the defendant real estate developer, Jason Carter, entered into a partnership agreement with the plaintiff investor, Martin Sosnoff, to build a residential project in Manhattan. When the market crashed in 1987, Sosnoff allegedly repudiated his contract obligations and forced Carter to agree to new terms. Those terms included converting the Sosnoff's equity investment into a debt and giving him a note. In addition, Carter and his wife signed personal guarantees. Sosnoff's wife

commenced the action by moving for summary judgment in lieu of complaint, as assignee of the note and guarantees, when Carter stopped making payments on the note. The First Department affirmed the trial court's denial of summary judgment, finding that an issue of fact existed on the duress defense. Carter's wife does not appear to have been a party to Carter's original agreement with Sosnoff. While the Court did not specifically analyze the claim of duress as asserted by Carter's wife, the Court's denial of summary judgment to Sosnoff hinged upon the fact that the Carter family was faced with "financial ruin" (*id.* at 487) and "certain financial disaster," including a mortgage of the "family residence, in order to keep [the real estate project] alive" (*id.* at 490). Thus, Carter's wife's free will and potential harm were clearly brought into question. Brooks, on the other hand, fails to submit any evidence to rebut Levitt's prima facie showing that Brooks was unable to exercise free will or faced any harm when confronted with the Agreement. For the foregoing reasons, Brooks's duress and coercion argument fails to rebut Levitt's prima facie showing, and Brooks's fifth affirmative defense is dismissed.

Brooks next argues that Levitt has not established damages, for failure to prove the amount or legitimacy of any attorney's fees. As discussed above, the debt was uncontested in the Criminal Action, and the 3/15/11 Judgment is prima facie evidence of Levitt's damages. Moreover, the federal court was obligated to examine the reasonableness of Levitt's fees in the Criminal Action before directing the Clerk to enter the Judgment. *Katzenberg v Lazzari*, 2007 WL 2973586, *4, 2007 US Dist LEXIS 75080 (ED NY 2007) ("the Court ... has an obligation to review the rates charged so they are in line with those [rates] prevailing in the community for similar services of lawyers of reasonably comparable skill, experience, and reputation" [internal quotation marks and citations omitted]); *Lynch v Town of Southampton*, 492 F Supp 2d 197, 211

(ED NY 2007) (stating "Court's obligation to determine the 'presumptively reasonable fee'"), *affd* 2008 WL 5083010, 2008 US App LEXIS 24426 (2d Cir 2008); *see also Samuel v Druckman & Sinel, LLP*, 50 AD3d 322, 324 (1st Dept 2008) (the Court is obligated "to oversee the reasonableness of legal fees"). Indeed, Judge Seybert, the trial judge in the Criminal Action, was in the best position to judge the reasonableness of those fees based upon Levitt's representation of David Brooks. *Rosario v Amalgamated Ladies' Garment Cutters' Union, Local 10, I.L.G.W.U.*, 749 F2d 1000, 1004 (2d Cir 1984) ("award of attorney's fees to a prevailing party rests squarely within the district court's discretion and normally will not be disturbed upon appeal," as "[t]he trial judge is in a better position than an appellate court to appraise the need for and potential benefits derived from the attorney's services, based on the judge's personal observation of counsel's performance and his intimate familiarity with the case"). For these reasons, Brooks fails to raise a triable issue of fact concerning the reasonableness of Levitt's fees.

Brooks's argues that the legal briefs submitted by David Brooks's attorneys in the Criminal Action cannot be attributed to David Brooks as admissions or evidence against him. This argument is without merit. *See e.g. Matter of Union Indem. Ins. Co. of N.Y.*, 89 NY2d 94, 103-104 (1996); *Morgenthow & Latham v Bank of N.Y. Co.*, 305 AD2d 74 (1st Dept 2003); *Purgess v Sharrock*, 33 F3d 134, 143-44 (2d Cir 1994). The cases cited by Brooks on this point are distinguishable on their facts. *See United States v Valencia*, 826 F2d 169, 173 (2d Cir 1987) ("informal discussions between prosecutor and defense counsel" held inadmissible as party admission by defendant); *Matter of Hyde*, 177 Misc 666 (Sur Ct, NY County 1941) (holding that attorney letters could not bind his deceased client to a debt, where statute expressly required signature of "the person to be charged thereby," and where the same attorney later attempted to

use the letters as attorney for the deceased debtor's judgment creditor).

None of Brooks's remaining affirmative defenses have merit. His first and second affirmative defenses are based upon lack of consideration and failure to state a cause of action. Answer, ¶¶ 27, 28. Brooks argued both defenses on his motion to dismiss, but he does not raise either defense in opposition to the instant summary judgment motion. For the reasons stated in the 4/19/11 Decision, the Agreement is supported by consideration and Levitt stated viable causes of action. Therefore, Brooks's first and second affirmative defenses are dismissed.

Brooks's third and fourth affirmative defenses claim that Levitt's causes of action are barred by payment and release, and by accord and satisfaction. Answer, ¶¶ 29, 30. "Essential elements of an accord and satisfaction are dispute as to the amount due and knowing acceptance by the creditor of a lesser amount." *Marine Midland Bank, N.A. v Scallen*, 161 AD2d 103, 105 (1st Dept 1990). Brooks does not raise these defenses on the instant motion, and the court finds no evidence in the record of any payment of the amounts owed by Jeffrey or David Brooks. Accordingly, Brooks's third and fourth affirmative defenses are dismissed.

Brooks's final affirmative defense claims that Levitt's causes of action are barred under the doctrine of unclean hands, and by Levitt's violations of the Rules of Professional Conduct and "any other applicable professional and ethical guidelines and authority." Answer, ¶ 31. Brooks fails to submit any evidence in support of this defense, and the court finds none in the record. Therefore, the sixth affirmative defense is dismissed. *Fade v Pugliani/Fade*, 8 AD3d 612, 614 (2d Dept 2004) ("[t]he person seeking to invoke the doctrine of unclean hands has the initial burden of showing, prima facie, that the elements of the doctrine have been satisfied").

Because summary judgment is granted on Levitt's breach of contract cause of action, the

court need not address Levitt's motion for summary judgment on his fourth cause of action for recovery under a guaranty, and Levitt is precluded from recovery on his third cause of action for quantum meruit. *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 (1987) ("[t]he existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter").

The court notes Brooks's final arguments that summary judgment is premature, that David Brooks's assertion of his Fifth Amendment rights preclude summary judgment, and, in the alternative, that the court should stay this action until the Criminal Action is resolved. None of these arguments rebut Levitt's prima facie showing, raise an issue of fact, or otherwise present any legal or factual basis for denying Levitt's motion.

Accordingly, it is hereby

ORDERED that the motion for summary judgment on the complaint herein is granted and the Clerk is directed to enter judgment in favor of plaintiff and against defendant in the amount of $224,956.16, together with interest at the rate of __% per annum from the date of December 17, 2010 until the date of the decision on this motion, and thereafter at the statutory rate, as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs.

Dated: 10/25/11

FILED

OCT 31 2011

NEW YORK
COUNTY CLERK'S OFFICE

ENTER:

J.S.C.

DONNA M. MILLS, J.S.C.