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| <b>Reed v 16-18 W. 119th St. Hous. Dev. Fund Corp.</b>                                                                                                                                                                                                           |
| 2012 NY Slip Op 33388(U)                                                                                                                                                                                                                                         |
| March 16, 2012                                                                                                                                                                                                                                                   |
| Supreme Court, New York County                                                                                                                                                                                                                                   |
| Docket Number: 106871/11                                                                                                                                                                                                                                         |
| Judge: Carol R. Edmead                                                                                                                                                                                                                                           |
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NYSCEF SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

HON. CAROL EDMEAD

PART 35

Index Number : 106871/2011  
REED, SHARON  
vs  
16-18 WEST 119TH STREET  
Sequence Number : 001  
DISM ACTION/ INCONVENIENT FORUM

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
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

Upon the foregoing papers, it is ordered that this motion

In accordance with the accompanying memorandum decision, it is hereby

ORDERED that the motion (sequence number 001) of defendant Ingram Yuzek Gainen Carroll & Bertolotti LLP to dismiss the complaint is granted and the complaint is severed and dismissed as against said defendant with costs and disbursements as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment in favor of said defendant; and it is further

ORDERED that the remainder of the action shall continue.

This constitutes the decision and order of the court.

Dated: 3/16/12

  
HON. CAROL EDMEAD 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):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 35

-----X  
SHARON REED, as ADMINISTRATRIX OF THE  
ESTATE OF PATRICIA REED,

Plaintiff,

-against-

16-18 WEST 119<sup>TH</sup> STREET HOUSING  
DEVELOPMENT FUND CORPORATION,  
MARIE SAFI, INDIVIDUALLY and AS PRESIDENT  
OF THE BOARD OF DIRECTORS and  
INGRAM YUZEK GAINEN CARROLL &  
BERTOLOTTI, LLP,

Index No. 106871/11

Defendants.

-----X  
HON. CAROL R. EDMOND, J.S.C.:

### MEMORANDUM DECISION

In this action arising out of the sale of a cooperative apartment, defendant Ingram Yuzek Gainen Carroll & Bertollotti LLP (Ingram Yuzek) moves, pursuant to CPLR 3211 (a) (7), to dismiss the complaint for failure to state a cause of action.

#### *Background*

The following facts are taken from the complaint. Plaintiff Sharon Reed was appointed as the administratrix of the estate of Patricia Reed. Defendant 16-18 West 119<sup>th</sup> Street Housing Development Fund Corporation (the Cooperative Corporation) owns the residential cooperative located at 16-18 West 119<sup>th</sup> Street, New York, New York. Defendant Marie Safi is the president of the Board of Directors. Ingram Yuzek represented the Cooperative Corporation during the sale of the apartment.

On or about August 31, 2003, Patricia Reed died intestate, owning the shares assigned to

Unit 1B. Upon Ms. Reed's death, her friend Hassan Mohammed continued to live in the premises with the approval of the Cooperative Corporation, paying the expenses on the unit until his death on October 8, 2008. Plaintiff was appointed administratrix of the estate on or about May 1, 2009. After being appointed administratrix of the estate, plaintiff sought to sell the unit.

Plaintiff alleges that the Cooperative Corporation agreed to charge plaintiff maintenance from the date of her appointment until the sale of her unit. Plaintiff asserts that this agreement was orally communicated to plaintiff and her attorney James W. Badie, Esq. According to plaintiff, in June 2009, she agreed to sell the unit to a Ms. Jean Hee Kim. Plaintiff alleges that, from June 2009 until August 2009, she wanted to get into the premises to clean it up and get it ready for the sale, but never received the keys from the management. On July 10, 2010, the Cooperative Corporation denied the buyer's application. On November 18, 2010, plaintiff found another buyer for the unit, a Mr. Justin Sherman, and entered into the contract of sale. The Cooperative Corporation approved the second buyer, and the sale occurred on or about March 15, 2011.

The complaint asserts one cause of action for "excessive legal fees" (denominated as the fourth cause of action) against Ingram Yuzek (Complaint, ¶¶ 32-39).<sup>1</sup> Specifically, plaintiff asserts that, on March 9, 2011, Ingram Yuzek sent a memorandum to plaintiff's attorney stating that the total fee for the closing was \$6,500 of which \$4,500 was owed to the firm and \$2,000 was owed to the Cooperative Corporation for fees already paid to the firm (*id.*, ¶ 36). Plaintiff

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<sup>1</sup>The complaint also asserts three causes of action against the Cooperative Corporation which are not relevant to this motion: (1) overpayment of "flip tax"; (2) overpayment of maintenance; and (3) excessive payment of maintenance and late fees (Complaint, ¶¶ 16-20, 21-26, 27-31).

further alleges that Ingram Yuzek failed to provide an itemized bill (*id.*, ¶ 37).

#### *Arguments*

Ingram Yuzek now moves to dismiss the complaint, arguing that there is a lack of privity between plaintiff and it. Ingram Yuzek contends that it was the Cooperative Corporation which retained and paid Ingram Yuzek for legal services and then sought reimbursement of its attorneys' fees from plaintiff. At the closing, pursuant to the contract between plaintiff and the Cooperative Corporation, the Cooperative Corporation required plaintiff to pay various fees in connection with the transfer of shares assigned to plaintiff's apartment, including the Cooperative Corporation's attorney's fees. Ingram Yuzek maintains that, as is customary in real estate closings, the Cooperative Corporation directed plaintiff to tender a check directly to the law firm instead of having plaintiff pay the Cooperative Corporation and then having the Cooperative Corporation pay the law firm. Additionally, Ingram Yuzek argues that there is no cognizable claim for "excessive legal fees." Ingram Yuzek submits a copy of its invoices for its services, totaling \$6,500 (Weinstein Affirm. in Support, Exh. A).

In opposition, plaintiff contends that, by having her pay the bills at the closing, defendants established privity between the parties. Plaintiff asserts that, to the extent that plaintiff's claims are indefinite, a bill of particulars and discovery are Ingram Yuzek's proper remedies. Additionally, plaintiff notes the following: (1) at no time prior to the closing did Ingram Yuzek provide a bill for the services rendered, except for an e-mail on March 9, 2011 (Marmon Affirm. in Opposition, Exh. A); (2) usually a transfer agent has a set fee for the transfer of shares from seller to purchaser and provides this figure in advance of the closing; (3) Ingram Yuzek charged plaintiff for each and every phone call from any party, for all research done for

general work, and for conversations and communication with the Cooperative Corporation, with no reference to the purpose of the conversations; (4) Ingram Yuzek charged plaintiff for the work done for the initial applicant; and (5) a number of the charges appear to be duplications.

In reply, Ingram Yuzek argues that plaintiff has only opposed the motion with an attorney's affirmation. Ingram Yuzek points out that plaintiff has failed to dispute that it is not a proper party, but simply argues that the fees are excessive. Ingram Yuzek further argues that there is no requirement that a law firm charge its client a flat fee to perform legal services in connection with a cooperative apartment closing, that the firm did provide counsel with the fee payable by his client at the closing, and that plaintiff has provided no evidence of a reasonable fee for such services.

#### *Discussion*

On a motion to dismiss pursuant to CPLR 3211 (a) (7), the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). However, "bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, are not presumed to be true and accorded every favorable inference" (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1st Dept 1999], *aff'd* 94 NY2d 659 [2000] [internal quotation marks and citation omitted]). Where extrinsic evidence is submitted in connection with the motion, the appropriate standard of review "is whether the proponent of the pleading has a cause of action, not whether he has stated one" (*IIG Capital LLC v Archipelago, L.L.C.*, 36 AD3d 401, 402 [1st Dept 2007] [internal quotation marks and citation omitted]).

An attorney-client relationship is based on contract (*see Mandel v Liebman*, 303 NY 88, 92 [1951]). An attorney-client relationship arises when a contract is formed between an attorney and client for the performance of legal services or the rendition of advice (*see Matter of Priest v Hennessy*, 51 NY2d 62, 69 [1980]). "Overbilling and padding of costs can constitute a breach of contract, and can give rise to a cause of action in favor of a client and against an attorney" (*O'Connor v Blodnick, Abramowitz & Blodnick*, 295 AD2d 586, 587 [2d Dept 2002] [citation omitted]).

Here, the complaint alleges that the *Cooperative Corporation* retained and paid Ingram Yuzek, and then required plaintiff to pay the Cooperative Corporation's attorney's fees at the closing (Complaint, ¶¶ 33-35). Plaintiff also concedes in opposition that Ingram Yuzek represented the Cooperative Corporation (Marmon Affirm. in Opposition, at 2). Although plaintiff argues that privity is established by the fact that she directly paid Ingram Yuzek, it is well established that the payment of legal fees, without more, does not establish an attorney-client relationship (*see Matter of Priest*, 51 NY2d at 69 [payment of legal fees by a third person does not by itself create an attorney-client relationship between the attorney and client's benefactor sufficient to sustain a claim of privilege]; *People v O'Connor*, 85 AD2d 92, 95 [4th Dept 1982] [attorney-client relationship is not established because one pays a legal fee]).

Therefore, plaintiff's cause of action for a refund of attorney's fees lies solely against the Cooperative Corporation, and not against Ingram Yuzek (*see Shenouda v Cohen*, 17 AD3d 565, 566 [2d Dept 2005] [plaintiff could not recover damages from attorney representing unrefunded balance of fees paid to attorney, where attorney was not retained by plaintiff, but rather was retained by plaintiff's family to perform services on plaintiff's behalf]; *Salles v Chase Manhattan*

*Bank*, 300 AD2d 226, 234 [1st Dept 2002] [Tom, J, dissenting] ["As counsel, its privity was with the client, and not with the bank . . . the obligation for attorneys' fees ran from the client to the attorney, and not from the bank to the attorney, notwithstanding the convenience of cutting the checks as presumably specified in the judgment . . ."]]).

*Conclusion*

Accordingly, it is hereby

ORDERED that the motion (sequence number 001) of defendant Ingram Yuzek Gainen Carroll & Bertollotti LLP to dismiss the complaint is granted and the complaint is severed and dismissed as against said defendant with costs and disbursements as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment in favor of said defendant; and it is further

ORDERED that the remainder of the action shall continue.

Dated: March 16, 2012.

ENTER:



Hon. Carol Robinson Edmead, J.S.C.

**HON. CAROL EDMead**