

**Kasowitz, Benson, Torres & Friedman LLP v
Fletcher**

2014 NY Slip Op 32586(U)

October 2, 2014

Supreme Court, New York County

Docket Number: 158590/13

Judge: Anil C. Singh

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 61

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KASOWITZ, BENSON, TORRES AND FRIEDMAN LLP,

INDEX NO.
158590/13

Plaintiff,

-against-

DECISION

ALPHONSE FLETCHER, JR. and FLETCHER ASSET
MANAGEMENT, INC.,

Defendants.

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HON. ANIL C. SINGH, J:

Plaintiff moves pursuant to CPLR 3212 for summary judgment against Fletcher Asset Management, Inc., the remaining defendant in this action, seeking judgment in the amount of \$2,304,630.54 for unpaid legal fees. Defendant cross-moves for summary judgment, seeking dismissal of the first cause of action, which is for breach of contract.

Plaintiff (Kasowitz) is a law firm that was retained to perform legal services for defendants. Part of those services were performed in litigating a claim by defendant Alphonse Fletcher, Jr., against his cooperative apartment building, The Dakota, for illegal discrimination in rejecting his application to buy an additional unit to combine with the one he currently owned. Other claims against the Dakota were for defamation.

The engagement began on July 29, 2011, and was terminated on November 30, 2012. Both parties executed an engagement letter, copies of which are annexed as exhibit F to plaintiff's moving papers, and the affidavit of David E. Ross, Esq., sworn to on May 16, 2014.

The terms of the letter are as follows:

This letter confirms the retention of Kasowitz, Benson, Torres & Friedman LLP ("KBT&F") to represent you and Fletcher Asset Management, Inc., in connection with pending and potential litigation against The Dakota, Inc. and related matters.

KBT&F bills for its services based on the hourly time charges of its attorneys and legal assistants. Disbursements (e.g., duplicating, postage, telefax and other similar expenses) are billed separately. Bills are rendered on a monthly basis and are payable on receipt.

We require an initial retainer of \$62,500.00 to undertake this representation. Any unused portion of the retainer will be returned to you when the matter is completed. Please forward the retainer promptly to us. Wiring instructions are included at the end of the letter.

We are required to advise you that, under state law, in the event of any fee dispute between you and KBT&F involving a sum of more than \$1000 but less than \$50,000, you have the option to seek resolution of such dispute in an arbitration proceeding conducted pursuant to Part 137 of the Rules of the Chief Administrator of the Courts of the State of New York.

Please return an executed original of this letter and keep one copy for your files.

We look forward to working with you.

Sincerely, etc

Based on plaintiff's invoices for billable time and disbursements, defendants were charged a total of \$3,303,165.33, of which \$998,534.79 was paid, leaving an unpaid balance of \$2,304,630.54.

Plaintiff commenced the instant action by filing a summons and complaint on September 19, 2013. The complaint named two defendants: Alphonse Fletcher, Jr., and Fletcher Asset

Management, Inc. Plaintiff's first cause of action is for breach of contract. The second cause of action is based on quantum meruit, and the third cause of action is for an account stated.

In an order dated May 2, 2014, the Court granted plaintiff's motion for a default judgment against defendant Alphonse Fletcher, Jr., as to liability only, and referred the issue of damages to a Special Referee to hear and report.

On May 19, 2014, plaintiff and defendant Fletcher Asset Management, Inc. ("Fletcher") executed a so-ordered stipulation, stating that: 1) the default judgment that was entered against the individual defendant would have no collateral estoppel or res judicata effect upon Fletcher; and 2) a judgment against the individual defendant was not enforceable against Fletcher.

Plaintiff bases its third cause of action on an account stated theory alleging that defendants retained invoices sent to them without objection, and made several partial payments in response to the invoices, either of which would be sufficient to support an account stated claim (*Morrison Cohen Singer and Weinstein, LLP v Waters*, 13 AD3d 51, 52 [1st Dept 2004]). However, "[o]n a motion for summary judgment, evidence of an oral objection, with some specificity, to an account rendered is sufficient to rebut any inference of an implied agreement to pay the stated amount [citations omitted]" (*Collier Cohen Crystal and Bock v MacNamara*, 237 AD2d 152 [1st Dept 1997]). Defendant has annexed a number of copies of emails between Fletcher and plaintiff complaining as to how the litigation that generated the instant claim was being handled. Fletcher even cited case law to defendant in criticism of their inaction and ineffectiveness in obtaining favorable results (exhibit 1, dated June 18, 2012, annexed to the affidavit of Alphonse Fletcher Jr. dated June 13, 2014 in support of defendants' cross-motion). Another email, as part of the same exhibit, dated July 8, 2012, says, in relevant part, "we have to

find a way to stop the Dakota's retaliation and can't wait for discovery that may never come. I was disappointed with the less-than-zealous projected schedule in the below e-mail but we have not even met that."

On pages four and five of plaintiff's supporting affidavit by David E. Ross, sworn to May 16, 2014, it is alleged that "Following Defendants' partial payment to KBTF in April 2012, Defendants failed to make another payment towards any of their KBTF invoices, yet at no time during the representation did they object in any way to either the services rendered by KBTF or the invoices that followed...." Clearly, the emails annexed to Fletcher's supporting affidavit attached to the cross-motion specifically contradict plaintiff's allegations that there was no objection to the service rendered. This raises a triable issue of fact sufficiently to preclude summary judgment in plaintiff's favor on its third cause of action. Accordingly, that branch of plaintiff's motion for summary judgment on its third cause of action is denied.

As regards defendant's cross-motion to dismiss the first cause of action, the application is made in reliance on 22 NYCRR section 1215.1 (b). This rule requires an attorney to provide a client with a written letter of engagement before entering into any representation or within a reasonable time thereafter. Subsection (b) thereof provides "The letter of engagement shall address the following matters: (1) explanation of the scope of the legal services to be provided; 2) explanation of attorney's fee to be charged, expenses and billing practices; and 3) where applicable, shall provide that the client may have a right to arbitrate fee disputes under part 137 of this title."

From the text of the letter cited above, it is clear that only item (3), concerning the right to arbitrate, appears in the letter of engagement agreed to by the parties herein. Nothing is said

about the scope of the litigation other than identifying the adversary party (The Dakota). No “explanation” is given of attorneys’ fees to be charged other than that the rate is hourly and bills will be sent once a month.

Before approaching the issues of the appropriate sanctions for non-compliance, the writing itself fails to establish an “objective meeting of the minds” required to sustain an enforceable contract. In order for a breach of contract to exist, there must be a meeting of the minds on the agreement said to have been breached (*Four Seasons Hotels Ltd v Vinnik*, 127 A.D.2d 310 [1st Dept 1987]) “[A] mere agreement to agree, in which a material term is left for future negotiations, is unenforceable” (*Joseph Martin, Jr., Delicatessen, Inc. v Schumacher*, 52 N.Y.2d 105, 109 [1981]).

In Fletcher’s supporting affidavit to the cross-motion, Alphonse Fletcher, Jr., alleges that he was not informed of any billing rates until he received the first invoice. Therein he learned that seven persons associated with plaintiff were billing for their work on Fletcher’s case at rates that spread between \$1,100.00 per hour for Mr. Kasowitz, down to \$290.00 per hour for a paralegal, resulting in a bill of more than \$3.3 million in a time period of 16 months. “[A]s a matter of public policy, courts pay particular attention to fee arrangements between attorneys and their clients” (*Jacobson v Sassower*, 66 NY2d 991, 993 [1985]). If the terms of a retainer agreement are not established, the attorney may recover only in quantum meruit to the extent that the fair and reasonable value of legal services can be established (*Nabi v Sells*, 70 AD3d 252, 253 [1st Dept 2009]).

It is now well settled that “a strict rule prohibiting the recovery of counsel fees for an attorney’s noncompliance with 22 NYCRR 1215.1 is not appropriate and could create unfair

windfalls for clients. . . .” (*Seth Rubenstein, P. C. v Ganea*, 41 AD3d 54, 63 [2nd Dept 2007]).

However, “the attorney who failed to properly document the fee agreement in writing as required by 22 NYCRR 1215.1 bears the burden of establishing that the terms of the alleged fee arrangement were fair, fully understood, and agreed to by [the client]” and may thus recover in quantum meruit (*id.* at 64).

Plaintiff would distinguish the case at bar from the progeny of the *Seth Rubenstein* case on the theory that they all involved fact patterns wherein the claimant-lawyer failed to present the non-paying client with any signed letter of engagement in any form, whereas in the instant matter, there is a fully executed letter of engagement, with only the vaguest treatment of two of the required “matters” to be “addressed” under NYCRR 1215.1 (b) (1) and (2). Such a distinction is misleading. The clear language of the rule is that the required letter of engagement “shall address” the matter of “fees to be charged” and “scope of the legal services,” not merely that a signed letter shall touch upon these items to the extent of mentioning that the client shall be billed hourly. There is nothing in the letter of engagement in the instant matter that advises the defendants what they are signing on for in terms of the magnitude of plaintiff’s bills. The client is paying \$62,500.00 as an initial retainer, the “unused portion of which shall be returned.” How does that evolve into a bill for over three million dollars? Plaintiff’s distinction would eviscerate the entire purpose for which the rule was promulgated, which was to “minimize[] potential conflicts and misunderstandings between the bar and clientele” (*Seth Rubenstein, P. C. v Ganea*, 41 AD3d at 61).

Accordingly, that branch of plaintiff’s motion for summary judgment on its first cause of action for breach of contract is denied, and defendant’s cross-motion to dismiss the first cause of

action is granted. That branch of plaintiff's motion for summary judgment on its second cause of action for recovery of a fee under quantum meruit is denied, and the disputed issue of the fair and reasonable value of the plaintiff's services under quantum meruit is reserved for trial.

WHEREFORE, it is

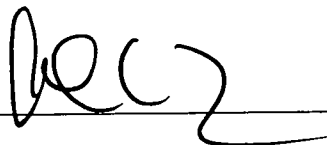
ORDERED that the branch of plaintiff's motion for summary judgment on the third cause of action is denied; and it is further

ORDERED that defendant's cross-motion for summary judgment dismissing the first cause of action for recovery of legal fees under breach of contract is granted, and the first cause of action is dismissed; and it is further

ORDERED that so much of the plaintiff's motion as prays for summary judgment on its second cause of action for recovery of legal fees under quantum meruit is granted only to the extent that the issue of the reasonable value of plaintiff's services is reserved for trial.

This constitutes the decision and order of the court.

Dated: Oct 2, 14



A handwritten signature in black ink, appearing to read 'Anil C. Singh', is written over a horizontal line.

J. S. C.

**HON. ANIL C. SINGH
SUPREME COURT JUSTICE**