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SHORT FORM ORDER

INDEX No. 13-21093

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 9 - SUFFOLK COUNTY

PRESENT:

Hon. DANIEL MARTIN

MOTION DATE 4-16-14 (#002 & #003)
MOTION DATE 6-27-14 (#004)
ADJ. DATE 7-8-14
Mot. Seq. # 002 - MotD
003 - XMD
004 - MD

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DOMENICK A. PELLE and DAVID D. PELLE, as individuals and PELLE & PELLE, a co-partnership,

Plaintiffs,

- against -

SCOTT L. WISS, SCOTT L. WISS, P.C., DAVID E. KASTON, RICHARD M. ABERLE, ad KASTON & ABERLE, LLP.,

Defendants.

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JOHN L. JULIANO, P.C.
Attorney for Plaintiffs
39 Doyle Court
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SCOTT WISS, P.C.
Attorney for Defendants Wiss
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KASTON & ABERLE, LLP
Attorney for Defendants Kaston and Aberle
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Upon the following papers numbered 1 to 48 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 19, 41 - 44; Notice of Cross Motion and supporting papers 27 - 32; Answering Affidavits and supporting papers 20 - 23, 24 - 26, 45 - 48; Replying Affidavits and supporting papers 33 - 37, 38 - 40; Other memorandum of law 4; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that these motions are hereby consolidated for purposes of this determination; and it is further

ORDERED that the motion by the plaintiffs for an order pursuant to CPLR 3212 granting summary judgment in their favor is granted to the extent that they are granted partial summary judgment as to the defendants' liability, and is otherwise denied; and it is further

ORDERED that the cross motion by the defendants David E. Kaston, Richard M. Aberle, and Kaston & Aberle, LLP for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint is denied; and it is further

ORDERED that the motion by the defendants Scott L. Wiss and Scott L. Wiss, P.C. for an order dismissing the complaint is denied.

This is an action for breach of contract in which the plaintiffs Domenick A. Pelle, and David D. Pelle, as individuals, and Pelle & Pelle, a co-partnership (collectively Pelle), allege that they are entitled to legal fees in the amount of $27,777.71 pursuant to a fee-sharing agreement with trial counsel.

It is undisputed that Pelle was retained by Kevin J. Banigan (Banigan) on June 20, 2006, to represent him in a claim for damages for personal injuries (Banigan action), and that Pelle was to receive thirty three and one-third (33 1/3%) percent of the net sum recovered. Thereafter, Pelle conducted a full investigation of the facts surrounding the incident and filed a notice of claim against the City of New York. Subsequently, Pelle retained the defendants Scott L. Wiss (Wiss) and Scott L. Wiss, P.C. (Wiss P.C.) as trial counsel, and Wiss handled the Banigan action, periodically advising Pelle concerning the progress of the case. Wiss then began work at another law firm, and eventually became a partner in a second law firm while handling the Banigan action. By letter dated November 1, 2007, Wiss advised Pelle that he had joined this second law firm, Kaston, Aberle & Levine, and that "we have noted the file that you are the referring attorney and you will receive the appropriate legal fee once the matter is resolved." On or about October 1, 2009, the law firm of Kaston, Aberle, Levine & Wiss dissolved and the defendants David E. Kaston and Richard M. Aberle formed a new partnership as the defendant Kaston & Aberle, LLP (K&A), which continued the prosecution of the Banigan action. Eventually, K&A settled the Banigan action and received the net sum of $87,291.47 representing its legal fees and expenses.

The plaintiffs now move for summary judgment on the grounds that they are entitled to one-third of the net fee recovered by K&A in the Banigan action as they have contributed to the legal work in the action and did not fail to so contribute when requested, and regardless of the fee agreements made between any successive attorneys. In support of the motion, Pelle submits, among other things, the pleadings, the affidavit of the plaintiff David D. Pelle, its retainer and retainer statement in the Banigan action, and the purported fee-sharing agreement dated August 15, 2006. The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see* ***Alvarez v Prospect Hospital***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). Furthermore, the parties' competing interest must be viewed "in a light most favorable to the party opposing the motion" (***Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.***, 168 AD2d 610, 563 NYS2d 449 [2d Dept 1990]). However, mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 427

NYS2d 595 [1980]; ***Perez v Grace Episcopal Church***, 6 AD3d 596, 774 NYS2d 785 [2d Dept 2004]; ***Rebecchi v Whitmore***, *supra*).

In his affidavit, the plaintiff David D. Pelle (Pelle Esq.) swears that, after the plaintiffs were retained in this matter, he had a conversation with Banigan wherein they discussed retaining Wiss as trial counsel, and that no additional legal fee would be due. He states that Banigan agreed to the change. Pelle Esq. further swears that he and Wiss agreed to a fee sharing agreement, that he mailed a copy of the agreement to Wiss memorializing the agreed terms, and that, thereafter, Wiss handled the Banigan action. He states that he and his partner remained available to assist trial counsel at any time if called upon, and that K&A has breached the fee sharing agreement.

It is well established that, in a dispute among attorneys, an agreement pertaining to the division of a legal fee is valid and enforceable in accordance with the terms set forth in the agreement so long as the attorney who seeks his share of the fee has contributed some work, labor or service toward the earning of the fee (***Benjamin v Koeppel***, 85 NY2d 549, 626 NYS2d 982 [1995]; ***Weinstein, Chayt & Chase, P.C. v Breitbart***, 65 AD3d 587, 884 NYS2d 452 [2d Dept 2009]; ***Samuel v Druckman & Sinel, LLP***, 50 AD3d 322, 855 NYS2d 90 [1st Dept 2008], *mod on different grounds* 12 NY3d 205, 879 NYS2d 10 [2009]; ***Reich v Wolf & Fuhrman, P.C.***, 36 AD3d 885, 828 NYS2d 562 [2d Dept 2007]). In addition, provided that the party contributed to the legal work and there is no claim that the party refused to contribute more substantially to the work, the courts will not inquire as to the relative worth of the legal services provided (***Benjamin v Koeppel***, *supra*; ***Weinstein, Chayt & Chase, P.C. v Breitbart***, *supra*; ***Reich v Wolf & Fuhrman, P.C.***, *supra*; ***Graham v Corona Group Home***, 302 AD2d 358, 754 NYS2d 362 [2d Dept 2003]). Based upon a fee-sharing agreement, a party is entitled to recover its share of the amount recovered in a matter regardless of the fee arrangements made between successive law firms (***Samuel v Druckman & Sinel, LLP***, *supra*; ***Borgia v City of New York***, 259 AD2d 648, 685 NYS2d 628 [2d Dept 1999]; ***Gair, Gair & Conason v Stier***, 123 AD2d 556, 507 NYS2d 1 [1st Dept 1986]), and a hearing to determine its fee based on quantum meruit is not necessary (***Mills v Chauvin***, 103 AD3d 1041, 962 NYS2d 412 [3d Dept 2013]; ***Graham v Corona Group Home***, *supra*).

Accordingly, the plaintiffs have established their prima facie entitlement to summary judgment herein, and it is incumbent upon the nonmoving parties to produce evidence in admissible form sufficient to require a trial of the material issues of fact (***Roth v Barreto***, *supra*; ***Rebecchi v Whitmore***, *supra*; ***O'Neill v Fishkill***, *supra*).

In opposition to the motion, K&A contends, among other things, that there is no contract between the parties as Wiss did not sign the fee-sharing agreement, and that, if there is an agreement, it is not enforceable pursuant to DR2-107. Here, K&A's contention that there is no contract between the parties is without merit. In their complaint, the plaintiffs allege at paragraph 18 that "[o]n August 15, 2006 a contract was entered into between the firm of Pelle and Pelle and Wiss P.C., in which Wiss P.C. agreed to act as trial counsel and was to receive Sixty Seven (67%) Percent of the fee earned on any amount recovered by suit[,] settlement or otherwise." The verified answer served by Wiss and the Law Office of Scott L. Wiss, P.C., verified by Wiss, at paragraph 6 admits "each and every allegation" in paragraph 18 of the complaint. It is well settled that an unsigned contract is enforceable provided there is objective evidence establishing that the parties intended to be bound (***Flores v Lower E. Side Serv.***

Ctr., Inc., 4 NY3d 363, 795 NYS2d 491 [2005]; ***Gallagher v Long Is. Plastic Surgical Group, P.C.***, 113 AD3d 652, 978 NYS2d 334 [2d Dept 2014]; ***Priceless Custom Homes, Inc. v O'Neill***, 104 AD3d 664, 960 NYS2d 455 [2d Dept 2013]). Here, there is objective evidence that the relevant parties entered into a contract, and that Wiss as well as the plaintiffs intended to be bound thereby. It is undisputed that Wiss continued to handle the matter and intended to compensate the plaintiffs after the transmittal of the fee-sharing agreement on August 15, 2006.

The Court now turns to K&A's contention that the fee-sharing agreement is not enforceable as it violates an ethical rule, DR2-107. Specifically, K&A alleges that Pelle never provided Banigan with a writing indicating that they would continue to assume joint responsibility with trial counsel in the Banigan action, resulting in Pelle being limited to only collecting a legal fee for the value of the legal services it provided. The former Code of Professional Responsibility, at DR2-107, provided in pertinent part that a lawyer could not divide a legal fee with another lawyer who was not a member of his or her law office, unless "[t]he division [was] in proportion to the services performed by each lawyer or, by a writing given the client, each lawyer assume[d] joint responsibility for the representation" (former Code of Professional Responsibility DR 2–107[A] [22 NYCRR former 1200.12]).[1]

The Court of Appeals has expressly rejected a party's defense in a dispute over legal fees that the fee-sharing agreement the plaintiff seeks to enforce is invalid pursuant to DR 2–107 where the party freely assented to the agreement and from which it reaped the benefits (***Benjamin v Koeppel***, 85 NY2d at 556, 626 NYS2d at 985; *see also* ***Samuel v Druckman & Sinel, LLP***, 12 NY3d at 210, 879 NYS2d at 13; ***Mills v Chauvin***, 103 AD3d at 1048, 962 NYS2d at 420; ***Law Offs. of K.C. Okoli, P.C. v Maduegbuna***, 62 AD3d 477, 880 NYS2d 230 [1st Dept 2009]; *contra* ***Hirsch v Bashian & Farber, LLP***, 79 AD3d 971, 912 NYS2d 906 [2d Dept 2010] [failing to cite or discuss the Court of Appeals decision in Benjamin]; (***Ford v Albany Med. Ctr.***, 283 AD2d 843, 724 NYS2d 795 [3d Dept 2001] [distinguished by *Wagner & Wagner, LLP v Atkinson, Haskins, Nellis, Brittingham, Gladd & Carwile, P.C.*, 596 F3d 84 [2d Cir 2010] as pertaining only to an infant's compromise situation]). In addition, K&A does not allege, and there is no indication in the record, that Banigan was in any way deceived or misled by the plaintiffs retaining trial counsel in the Banigan action (***Samuel v Druckman & Sinel, LLP***, *supra*).

K&A also contends that the plaintiffs' motion for summary judgment is premature as it has served discovery demands to ensure that the plaintiffs do not later "discover" a letter to Banigan assuming joint responsibility for the Banigan action, and that said demand remains outstanding. Here it is determined that summary judgment is not premature as there is no evidentiary basis offered to suggest that discovery could lead to relevant evidence. "[S]ummary judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence" (***Williams v D & J School Bus***, 69 AD3d 617, 893 NYS2d 133 [2d Dept 2010]; ***Panasuk v Viola Park Realty***, 41 AD3d 804, 939 NYS2d 520 [2d Dept 2007]; ***Gasis v City of New York***, 35 AD3d

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[1] The Rules of Professional Conduct were adopted in place of the Code of Professional Responsibility on January 7, 2009, effective April 1, 2009. The Code was in effect at the time of the making of the alleged agreement.

533, 828 NYS2d 407 [2d Dept. 2006]). In light of the determinations herein, whether the plaintiffs delivered such a letter to Banigan is irrelevant.

In opposition to the motion, Wiss submits his affidavit wherein he swears that Pelle contacted him to act as trial counsel in the Banigan action, and that he agreed to "handle the file as trial counsel and to keep Pelle and Pelle updated as to the status of the case. In said discussions a specific fee agreement was never discussed." It is determined that Wiss' affidavit does not raise an issue of fact regarding the existence and terms of the fee-sharing agreement admittedly received by him. Accordingly, the plaintiffs' motion for summary judgment is granted on its cause of action for breach of contract.

K&A now cross-moves for summary judgment on the grounds that there is no contract between the parties as Wiss did not sign the fee-sharing agreement, and that, if there is an agreement, it is not enforceable pursuant to DR2-107. For the reasons set forth above, the motion is denied.

Wiss and Wiss P.C. now move, without designating an applicable rule or statute, to dismiss the complaint against Wiss, individually, on the grounds that the fee-sharing agreement was addressed to Wiss P.C. and that Wiss can not be held liable under the contract. Regardless whether the motion is deemed made pursuant to CPLR 3212 or 3211 it is denied. It is undisputed that Wiss was the sole shareholder of Wiss P.C., and that the corporation ceased to exist in late 2006 or early 2007 when Wiss began employment at another firm or shortly thereafter. It is also beyond cavil that, if any legal fee is due Wiss for his work in the Banigan action it will be paid to Wiss and not to Wiss P.C. Under the circumstances, the Court can see no prejudice to Wiss and, in fact, finds that it is possible that complete relief cannot be afforded to all parties without his presence.

The plaintiffs have established their entitlement to summary judgment in their favor. However, it appears that they have calculated the amount of the fee payable to them on the gross amount recovered upon settlement of the Banigan action rather than the net fee available for distribution amongst the attorneys who provided legal services therein according to the relevant retainer agreement. In addition, it appears that the plaintiffs have mistakenly calculated the fee due to them based on their entitlement to one-third of the net fees available and not based on the thirty-three (33%) percent set forth in the fee-sharing agreement.

The parties and their attorneys, if any, shall appear for a hearing on December 3 2014 at 9:30 a.m. at IAS Part 9 of the Supreme Court, One Court Street, Riverhead, New York, the limited purpose of which shall be to determine the net amount of the legal fees available to the parties and the amount of the fee payable to the plaintiffs on their cause of action for breach of contract.

Dated: October 15, 2014

A.J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**