| **Apuzzo & Chase v Rattenni** |
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| 2016 NY Slip Op 30069(U) |
| January 14, 2016 |
| Supreme Court, New York County |
| Docket Number: 154180/2014 |
| Judge: Ellen M. Coin |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 63

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APUZZO & CHASE,

Plaintiff,

- against -

ALFRED NICHOLAS RATTENNI,

Defendant.

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Index No. 154180/2014
Motion Date: Oct. 28, 2015
Motion Seq.: 002

**DECISION & ORDER**

**ELLEN M COIN, J.:**

The law firm of Apuzzo & Chase (plaintiff or A&C) moves pursuant to CPLR 3212 for summary judgment against its former client, defendant Alfred Nicholas Rattenni (defendant), on its claims for breach of contract and account stated in the amount of $200,733, together with interest and costs thereon from August 2, 2012, and for dismissal of defendant's affirmative defenses.

**FACTUAL ALLEGATIONS**

The following facts are undisputed, unless otherwise noted. Defendant retained A&C in May 2008 to represent him and his companies against their former accountants and business managers, Ronald J. Mangini (Mangini) and Laurence M. Brown (Brown). Defendant signed A&C's standard written Retainer Agreement on or about May 6, 2008 and provided an initial retainer deposit of $25,000.

The Retainer Agreement provides that defendant would be billed monthly for all attorney and paralegal time spent working on his behalf and that he would pay disbursements as they were incurred. The hourly rates for A&C's two partners, William J. Apuzzo and David Chase,

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associate attorneys and paralegals were listed on exhibit A to the Retainer Agreement. Defendant would be given 30 days' advance notice of any change in those rates.

On July 29, 2008, A&C commenced, on behalf of the defendant and his companies, A.M.O. Holding Corp., Sands Mill Community Park, Inc., and Yonkers Avenue Realty Corp., an action in this court against Mangini and Brown, and the entities through which they conduct business. The lawsuit, entitled *A.M.O. Holding Corp., et al. v Marshall Granger & Company, CPAS, P.C., et al.*, Index no. 602204/2008 (the Marshall Granger action), is currently pending in the Commercial Division. Defendant stopped paying the monthly invoices on the Marshall Granger action some time in 2009, claiming that his assets were tied up in a land development project in Mexico, but allegedly assured A&C that the invoices would be paid as soon as he regained liquidity (Affidavit of William J. Apuzzo, sworn to August 4, 2014[1], ¶ 13). Although defendant now disagrees as to when A&C's legal fees would be paid (*see* Affidavit of Alfred Nicholas Rattenni, sworn to September 2, 2015, ¶ 8 [a]; Appuzo Aff., Ex. 12 [Deposition of Alfred Rateenni (Rattenni Tr.)] at 11-12), he admitted at his deposition that he told A&C that the reason he could not pay their invoices was that his money was tied up in real estate projects (Rattenni Tr. at 42-43).

While prosecuting the Marshall Granger action, the parties discovered that Mangini had, without defendant's knowledge, obtained a second mortgage from a private lender, pledging two of defendant's personal homes, a two-family home in Carmel, New York, where his sister and her children then resided, and defendant's condominium apartment in Westchester County, New York. Defendant allegedly only learned of the existence of the mortgages when he was served

[1] An apparent typographical error, as the notice of motion dated August 4, 2015

with process in a foreclosure action commenced in Putnam County Supreme Court, entitled *Oliveto Holdings LLC v Alfred Nicholas Rattenni*, Index no. 2203/2008 (the Oliveto action). Defendant admittedly asked A&C to defend the Oliveto action, because he did not have the available cash to pay off the mortgage (Rattenni Tr. at 34).

A&C prepared an answer and counterclaims, alleging, inter alia, a defense of usury and defended the action for the next three years, until July 11, 2012. A&C's attorneys spent over 462 billable hours vigorously defending the Oliveto action, conducting discovery, defending a two-day December 2010 bench trial, preparing a post-trial brief and, ultimately, perfecting an appeal to the Second Department of the trial judge's decision that rejected defendant's usury defense. Annexed to Apuzzo's affidavit are monthly invoices, dated from February 27, 2009 to August 1, 2012, detailing the legal work and time A&C spent on the Oliveto action. The invoices total $178,502.09. The invoices were mailed to defendant at his Palm Springs, California residence, and copies were transmitted by email to defendant's assistant, Joseph Fascenelli (Fascenelli), who reviewed them (Appuzo Aff., Ex. 13 [Deposition of Joseph Fascenelli (Fascenelli Tr.)] at 73-76, 99-102). Defendant later received copies via email (*id.* at 127-128).

On June 23, 2011, the trial court in the Oliveto action granted foreclosure after a bench trial. The court also denied A&C's motion to set aside its decision based on an error of law. On March 22, 2012, a judgment of foreclosure was entered against defendant for the amount of $230,722.50, and $25,050 of that amount was an award of legal fees to the mortgagee (Apuzzo Aff., Ex. 5). At this time, A&C's legal fees amounted to approximately $144,834 (*id.*, Ex. 4). Apuzzo alleges that he advised defendant that he could either pay the judgment, let the home be foreclosed upon, and seek damages in the Marshall Granger action, or he could prosecute an

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appeal from the judgment. Defendant reiterated to Apuzzo that his assets were tied up, and that he was unable to pay the judgment of foreclosure or fund the cost of an appeal (Apuzzo Aff., ¶ 19; *see also* Rattenni Tr. at 23, 42; Fascenelli Tr. at 38, 186). Apuzzo also alleges that he offered to prosecute the appeal and not charge defendant for attorney time in the event the appeal was unsuccessful (Apuzzo Aff., ¶ 19). Both defendant and Fascenelli claim that Apuzzo offered to prosecute the appeal for free, because A&C lost at the trial level (Rattenni aff, ¶ 7; Fascenelli Tr. at 54, 144, 152-154,189, 197-198).

To prevent the eviction of defendant's sister and family, A&C filed a motion with the Appellate Division to stay the foreclosure pending determination of the appeal. Although that motion was unsuccessful, A&C was successful in negotiating a stipulation with Oliveto Holdings to delay the sale pending the outcome of the appeal. In or about July 2012, A&C perfected the appeal by filing the record on appeal and appellant's brief.

In the meantime, in addition to the Marshall Granger and Oliveto actions, defendant asked A&C to work on three other legal matters. In September 2008, defendant was sued personally in Westchester County Supreme Court concerning title to a garage unit in connection with the May 2007 sale of his Westchester County condominium. That action, entitled *Jay Sexter v Alfred Rattenni*, Index no. 17672/08, was settled and A&C does not seek fees for it.

In or about February 2009, defendant asked A&C to represent him in collecting a defaulted loan which he had given to an individual by the name of Mark Cory Rooney (Rooney). A&C commenced a lawsuit against Rooney in Nassau County Supreme Court, entitled *Alfred Nicholas Rattenni v Mark Cory Rooney*, Index no. 9518/09 (the Rooney action). A&C obtained

a judgment in the amount of $938,586, and, as a result of A&C's efforts, collected roughly $200,000 of that amount.

Finally, in or about August 2009, defendant asked A&C to represent his company, Yonkers Avenue Realty Corp., in a then-pending breach of contract action in Westchester County Supreme Court, entitled *Yonkers Avenue Realty Corp. v James Fitzsimmons as administrator of the Estate of Marion R. Armento*, Index no. 9558/2006 (the Armento action). A&C appeared for Yonkers Avenue Realty Corp., successfully moved to amend the complaint, defeated a motion to dismiss, and prepared for trial. A&C sent defendant monthly invoices for its work on the Armento action, billing $22,231.49 through March 1, 2012 (*see* Apuzzo Aff., Ex. 8).

In July 2012, while the appeal of the Oliveto action was pending, A&C learned that defendant had unilaterally entered into a settlement agreement with Rooney regarding the continued enforcement of the judgment against him. Until that time, the money being collected from a New York City Marshall's levy against Rooney's assets was being held by A&C in its IOLA trust account and disbursed to pay the mounting disbursements incurred in defendant's legal proceedings, as well as to pay the fees of defendant's accountant, Karl Anderson, and Fascenelli. A&C considered defendant's action a betrayal of trust. In a letter dated August 2, 2012, A&C advised defendant that it could no longer represent him in each of the four pending legal matters, that it would be moving for leave to withdraw as counsel in all pending actions, and that all of A&C's outstanding invoices in the four legal matters were then due and payable.

Thereafter, A&C moved before the Appellate Division, the Second Department, to be relieved as counsel for defendant in the appeal of the Oliveto action, which was granted by order dated October 24, 2012. The appeal was successful even though defendant's new counsel did not

file a reply brief, apparently adopting A&C's arguments on the usury defense (*see Oliveto Holdings, Inc. v Rattenni*, 110 AD3d 969 [2d Dept Oct. 23, 2013]). The matter was remitted to the trial court for entry of judgment in defendant's favor, with costs. With the assistance of his new counsel, defendant entered into a stipulation in January 2014 settling his damage claim in the Oliveto action for the sum of $7,500. A prior motion that A&C made to the trial court to fix its lien for legal fees was apparently denied (*see* Apuzzo Aff., ¶ 24).

A&C also moved to be relieved from representing defendant in the Armento action. The Westchester County Supreme Court, by decision and order dated October 11, 2012, granted A&C's motion and fixed the firm's retaining lien in the amount of $22,231.49, the amount billed by A&C through March 1, 2012 pursuant to the Retainer Agreement (*see* Apuzzo Aff., Ex. 7). That amount remains unpaid. In the Marshall Granger action, A&C was relieved by order of the court dated October 17, 2012, and the amount of A&C's charging lien was stipulated to be deferred until the conclusion of that case.

This action was commenced on April 30, 2014. The complaint alleges three causes of action: for breach of contract, quantum meruit and account stated, seeking to recover legal fees and disbursements in the sum of $22,231 for the Armento action and legal fees and disbursements in the sum of $178,502 for the Oliveto action.

In opposition to the motion, defendant submits an affidavit in which he contends that there is no written retainer agreement governing the work that A&C is suing him for in this action. According to defendant, the written Retainer Agreement that defendant admittedly signed back in 2008 governs only the Marshall Granger action, for which he agreed to hire A&C only after it had opined that he and his companies had viable claims for damages totaling several

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million dollars (Rattenni Aff., ¶ 3). Defendant further contends that A&C was fully familiar with his "learning disability" that renders him "unable to fully comprehend business documents," and that A&C never explained the Retainer Agreement to defendant or advised him that it would apply to cases other than the Marshall Granger action (Rattenni Aff., ¶¶ 3, 8 [j]). Defendant avers that flat fees and caps were negotiated with Apuzzo for those other cases as they came up, and that A&C allegedly breached those agreements by overcharging him (*id.*, ¶ 3).

Defendant contends that Apuzzo was fully aware that he had no money, and therefore agreed to a fee cap of $50,000 in the Oliveto action (Rattenni Tr. at 52-53; Rattenni aff, ¶ 8 [g]; *see also* Fascenelli Tr. at 108-110, 177-178). The second mortgage at issue in the Oliveto action had only a principal balance of $150,000, and defendant maintains that he would never have agreed to pay legal fees in the amount A&C is suing for regarding that case (Rattenni aff, ¶ 6). Since the mortgage at issue in the Oliveto action was an element of damages that he is seeking to recover in the Marshall Granger action, defendant contends that there was no reason to handle the case the way A&C did (*id.*, ¶ 7). Defendant further argues that he gained nothing from the Oliveto action, because he is in the process of selling the property as a "short sale" due to his inability to pay the first mortgage and other carrying charges (*id.*, ¶ 5, 8 [h]). As evidence that A&C's legal fees for the Oliveto action are unreasonable, defendant points out that the mortgagor, as the prevailing party after trial, was awarded only $25,050. As for the *Armento* action, defendant claims that the case involved only $50,000 in controversy and that Apuzzo gave him a price of "20-something thousand" on that case, exclusive of disbursements (Rattenni Tr. 55-56).

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Allegedly under "a coercive threat" by Apuzzo to cease all work, defendant agreed with A&C that all of its legal fees and the issue of what actually is owed and paid to A&C would be deferred pending resolution of the Marshall Granger action, and that defendant would be only be charged 3% per annum on amounts A&C claimed it was owed (Rattenni Aff., ¶ 3; Rattenni Tr. 28:5-11; 42:8). Defendant argues that Apuzzo himself has admitted to this side agreement, citing his moving affidavit in which Apuzzo avers that the parties agreed that A&C would receive 3% interest on balances outstanding more than 30 days (*see* Apuzzo Aff., ¶ 29; Ex. 10).

## DISCUSSION

**Breach of Contract**

A breach of contract cause of action requires proof of the existence of a valid contract, plaintiff's performance under the contract, defendant's breach, and damages resulting from the breach (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). As a matter of public policy, courts pay particular attention to fee arrangements between attorneys and their clients, and an attorney has the burden of showing that the "fee contract is fair, reasonable, and fully known and understood by the client" (*see Shaw v Mfrs. Hanover Trust Co.*, 68 NY2d 172, 176 [1986]; *see also Jacobson v Sassower*, 66 NY2d 991, 993 [1985]; *Ween v Dow*, 35 AD3d 58, 63 [1st Dept 2006]).

In this case, defendant argues that there are questions of fact as to whether the written Retainer Agreement plaintiff signed in May 2008 governed A&C's legal representation of the defendant on the Oliveto and Armento actions or whether the parties negotiated a cap for those actions. A&C argues that even though the reference line in the Retainer Agreement states: "Rattenni v Mangini et al.," the first numbered paragraph of the Retainer Agreement provides:

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> We are authorized by you and the Corporation (if any) to perform any service for and on your behalf and to do all things which we consider necessary, appropriate or advisable to resolve or complete the matters for which you have requested our services. This agreement also covers any other business, advice, counsel, matters or cases which we may from time to time be requested to perform on your behalf and which we agree to represent you.

(Apuzzo Aff., Ex. 3). There is no question that defendant hired A&C to work on both the Oliveto and Armento actions (*see* Rattenni Tr. at 10, 34), and that A&C sent defendant monthly billing statements for these cases documenting the firm's hourly charges using the billing rates set forth in the Retainer Agreement. Defendant's newly minted claim that he is not responsible for A&C's legal fees in the Armento action, because the named plaintiff is his wholly-owned company, is rejected.

Nevertheless, although defendant signed the Retainer Agreement, he claims that he did not read it nor was it explained to him by A&C or any other attorney (*see* Rattenni Tr. at 62-63; Fascenelli Tr. at 181-184). Generally, one who signs a document without any valid excuse for having failed to read it is "conclusively bound by" its terms (*Gillman v Chase Manhattan Bank*, N.A., 73 NY2d 1, 11 [1988]). However, defendant claims to have a learning disability that prevents him from fully comprehending business documents (*see* Rattenni aff, ¶ 8 [j]). Defendant's assistant testified that he has to orally explain written documents to defendant, that defendant has to be told things many times before he understands them, and that A&C was aware of defendant's problem "all along" (Fascenelli Tr. at 52-53, 56-57, 172-173). Notably, the complaint verified by Apuzzo in the Marshall Granger action alleges that:

> Upon information and belief Rattenni, commencing in 2001 was suffering from debilitating illness, preventing him from observing prudent business practices and from monitoring day-to-day business affairs for himself and the plaintiff corporations.

(Marshall Granger Verified Complaint, ¶ 54).[2] While defendant admitted at his deposition to hiring other lawyers in the past and previously signing other written retainer agreements (Rattenni Tr. at 7-9), whether he, by signing the Retainer Agreement in May 2008, agreed to pay A&C on an open-ended hourly basis or whether the parties negotiated a cap for the Oliveto and Armento actions is a triable question of fact.

In addition, while A&C maintains that its fees and disbursements for the Oliveto action must be strictly governed by the terms of the Retainer Agreement, Apuzzo himself admits to an oral side agreement with respect to the firm's work on the appeal to the Second Department (Apuzzo Aff., ¶ 19). A question of fact exists as to whether A&C promised to do the appeal for free, as defendant and his bookkeeper contend, or whether Apuzzo conditioned payment on success. The fact that A&C continued to send defendant monthly invoices for the work on the appeal is persuasive evidence in A&C's favor, but not dispositive of the issue.

There is also a question of fact as to whether Apuzzo ever agreed, as defendant contends, that plaintiff's legal fees would be deferred pending resolution of the Marshall Granger action, and that defendant would only be charged 3% per annum on amounts owed. A&C has admitted to a side agreement regarding the payment of 3% interest on balances outstanding more than 30 days (*see* Apuzzo Aff., ¶ 29; Ex. 10). Moreover, A&C continued to work for a very significant period of time, even though defendant was not paying A&C's legal bills as they became due.

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[2] Although the pleadings in the Marshall Granger action are not part of the record on this motion, the court may take judicial notice of its own records (*Weinberg v Hillbrae Bldrs., Inc.*, 58 AD2d 546, 546 [1st Dept 1977], citing Richardson, Evidence §652 [10th ed] ). Since the defendants in the Marshall Granger action contend that Rattenni is and remains a knowledgeable and sophisticated businessman (*see* Marshall Granger Answer, ¶ 54), the court takes judicial notice only of the fact that it is a claim that A&C advanced on defendant's behalf.

Defendant has also challenged the reasonableness of the $178,502.09 legal fee sought for the Oliveto action, arguing that it is unreasonable compared to the $25,050 legal fee the mortgagor was awarded after trial, as well as in relation to the amount in controversy, namely a second mortgage with a principal balance due of only $150,000. Defendant testified that A&C encouraged him not to settle the Oliveto action, although he admitted that he would have needed to borrow the money to do so (Rattenni Tr. at 17-20), and then A&C proceeded to perform poorly at trial (Rattenni Tr. 18, 20-21). Defendant also claims that after A&C lost the trial, Apuzzo promised to conduct the appeal free of charge and then reneged on that promise. Apuzzo, on the other hand, avers that defendant was advised that he could pay the mortgage and, later, the judgment, and seek reimbursement in the Marshall Granger action, but defendant had no means to do so and instead asked A&C to prevent the foreclosure and eviction of his sister's family (Apuzzo Aff., ¶¶ 16-19).

The courts possess the traditional authority "to supervise the charging of fees for legal services under the court's inherent statutory power to regulate the practice of law" (*Matter of First Natl. Bank of E. Islip v Brower*, 42 NY2d 471, 474 [1977] [citation omitted]). In the absence of an account stated, the attorneys have the burden of establishing that their compensation is fair and reasonable (*see Jeffrey L. Rosenberg & Assocs., LLC v Candid Litho Print., Ltd.*, 76 AD3d 510, 510 [2d Dept 2010]; *Matter of Bizar & Martin v U.S. Ice Cream Corp.*, 228 AD2d 588, 589 [2d Dept 1996]). Thus, in addition to the questions of fact on liability, a question of fact exists as to the reasonableness of the legal fee sought by A&C for its work in the Oliveto action (*see Collier, Cohen, Crystal & Bock v MacNamara*, 237 AD2d 152, 152 [1st Dept 1997] [summary judgment not appropriate where firm was attempting to collect

$155,000 for less than six months work for defendant's interest in partnership valued at less than $30,000]).

**Account Stated**

Recovery on an account stated claim will fail if the defendant shows that he disputed the statement of account in a timely fashion or expressly refused payment (*Farley v Promovision Video Displays Corp.*, 198 AD2d 122, 123 [1st Dept 1993]). On 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 (*Boies, Schiller & Flexner LLP v Modell*, 129 AD3d 533, 534 [1st Dept 2015] [citations omitted]; *Collier, Cohen, Crystal & Bock v MacNamara*, 237 AD2d at 152, *supra*).

In the present case, both defendant and his bookkeeper testified that they repeatedly objected orally to the legal bills being issued on the Oliveto action and reminded Apuzzo of his alleged agreement to cap the fees at $50,000 and not to charge any fees for the appeal (Rattenni Tr. at 26-30, 67-69; Fascenelli Tr. at 117, 125, 129, 143 152-155; 197-198). Even Apuzzo, in his moving affirmation, admits that he spoke to the defendant on a "few occasions" about the legal costs he was incurring in the Oliveto action and that defendant complained that the legal bills were higher than had been estimated (Apuzzo Aff., ¶ 30). Although defendant's objections were never reduced to writing, a triable issue exists as to whether defendant timely objected to A&C's invoices on the Oliveto action, especially as the Retainer Agreement itself does not mandate that objections to the account be in writing.

Defendant further argues that A&C should be estopped from attempting to recover its legal fees on an account stated theory, because paragraph 14 of the Retainer Agreement does not

advise that a court order would be needed for A&C to withdraw from any pending litigations absent a voluntary consent to change attorney (*see* CPLR 321 [b]). Defendant's proffered legal authority, however, is inapposite. The relevant portion of the Retainer Agreement is appropriate. There is also no allegation that A&C engaged in any form of harassing behavior to compel defendant to accept the bills akin to the facts in *Lacher & Lovell-Taylor v Chowaiki* (131 AD3d 898, 898 [1st Dept 2015], *affg* 2013 NY Slip Op 32695 (U) [Sup Ct., NY County 2013] [continuous use of threats to resign, to leave client stranded in middle of depositions without counsel, misrepresentation of obligation of attorney of record as free to resign from case if not paid, misrepresentation of client' obligation to pay immediately]). A&C's letter of August 2, 2012 properly advised defendant that it would be filing motions for leave to withdraw as his counsel, and A&C obtained the necessary court orders to do so. Defendant's estoppel argument is rejected, and therefore, summary judgment dismissing the third affirmative defense is granted.

**CONCLUSION AND ORDER**

For the foregoing reasons, it is hereby

**ORDERED** that plaintiff's motion for summary judgment is granted to the extent of dismissing the third affirmative defense of equitable estoppel, and the motion is otherwise denied.

Dated: January 14, 2016

ENTER:

Ellen M. Coin, A.J.S.C.