Ital Assoc. v Axon
2016 NY Slip Op 30858(U)
May 6, 2016
Supreme Court, New York County
Docket Number: 153449/2014
Judge: Ellen M. Coin
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[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 63

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ITAL ASSOCIATES, et al.,

Plaintiffs,

- against -

THOMAS AXON, 185 FRANKLIN STREET CORP., HARRISON STREET REALTY CORP., RMTS LLC, and AXON ASSOCIATES, INC.,

Defendants,

-and-

RANDY ASHENFARB, SALVATORE SOMMELLA and EUGENE KAROL,

Additional Defendants.

---X

Index No.: 153449/2014
Mot. Subm.: October 14, 2015
Motion Seq.: 003

DECISION AND ORDER

ELLEN M. COIN, J.:

In this settled action among the partners of 185 Franklin Street Development Associates, L.P. (the Partnership), plaintiffs move for an order awarding attorney's fees and expenses to plaintiffs' counsel, the law firm of Samuel Goldman & Associates (SGA), from additional defendants Salvatore Sommella and Eugene Karol in the amounts of $65,357.59 and $32,683.31, respectively. Sommella and Karol oppose the motion, arguing that plaintiffs do not have standing to bring this application, that SGA violated Rule 1.7 of the New York Rules of Professional Conduct by failing to advise them of actual and potential conflicts of interest and failing to get a written waiver of those conflicts, and that SGA never sent Karol notice of his right to arbitrate pursuant to Part 137 of the Rules of the Chief Administrator before it attempted to collect fees from Karol through this litigation. Additionally, Sommella and Karol argue that

there can be no recovery for breach of contract since neither of them agreed to have SGA represent then and neither agreed to the terms of SGA's Retainer Agreement.

FACTUAL ALLEGATIONS

After almost 30 years of silence, no return on their investment and a $1.6 million buyout offer that was later withdrawn, several limited partners of the Partnership retained SGA in early 2013 to pursue their legal rights and remedies against its general partner, 185 Franklin Street Corp. (the general partner) and the general partner's principal, Thomas Axon (Axon). The partnership owned and operated a fully-leased office and commercial building located at 185 Franklin Street (the Building) in Tribeca, an area of New York City that had shown some of the greatest redevelopment and appreciation over the past three decades. SGA agreed to take the case on a contingency basis.

Pursuant to a written "Legal Services Contingent Fee Agreement" (the Retainer Agreement), 26 of the 28 limited partners who were not affiliated with Axon agreed to a graduated contingent fee scale, presently equal to 35% of their recovery, plus their pro-rata share of case expenses. It is undisputed that the remaining two limited partners, Sommella and Karol, were each sent the Retainer Agreement, but refused to sign it.

Initially representing five of the limited partners, SGA commenced a special proceeding in this court on April 15, 2013, entitled *Matter of Martin O'Neil, et al. v Thomas Axon and 185 Franklin St. Corp.*, Index No. 651542/13, asserting both direct and derivative claims against the general partner and Axon. However, on July 10, 2013, the proceeding was dismissed without prejudice. The current action was commenced on April 10, 2014. The plaintiffs are 25 of the 28 non-Axon-affiliated limited partners of the partnership who retained SGA as counsel. The three

other non-Axon-affiliated limited partners are Randy Ashenfarb, Somella and Karol, who were named additional defendants.[1] The 28 non-Axon-affiliated limited partners together owned 72.875% of the partnership's equity, with the balance owned by the general partner and Axon.

After more than two years of litigation and settlement negotiations, Axon agreed to sell the Building, which went on the market in early 2014. In October 2014, the partnership signed a contract to sell the Building for approximately $9 million. Under the settlement agreement reached on March 6, 2015, the limited partners received approximately $6.6 million of the $8.2 million in net proceeds (after payment of closing expenses) from the sale. Of this $6.6 million, the 28 non-Axon-affiliated limited partners, including Somella and Karol, received approximately $4.8 million (the Payout), in accordance with their 72.875% equity ownership, and $1.8 million went to Axon, on account of his 26% limited partnership interest. The Payout funds have been allocated among non-Axon-affiliated limited partners, based upon each partner's individual ownership interest. SGA retained 35% of the Payout as a contingency fee, with the litigation expenses allocated equally among plaintiffs.

Paragraph 9 of the Settlement Agreement provides that SGA "reserves the right to seek an award of attorney's fees and disbursements by the Court from the Non-Plaintiff limited partners" (Affidavit of Salvatore Sommella, sworn to June 4, 2015, Ex. C). Paragraph 10 (b) of the Settlement Agreement provides that counsel to the partnership for the sale, Sonnenschein, Sherman & Deutsch LLP, will "pay to each Non-Plaintiff LP 60% of such Non-Plaintiff LP's share of the Payout, with the remaining 40% remaining in escrow . . . pending an order of the Court or further instructions from both the Non-Plaintiff LP and [SGA]" (*id.*).

[1] Randy Ashenfarb eventually signed the Retainer Agreement.

The Settlement Agreement was executed by all parties to the litigation, including Sommella and Karol. The sale of the property closed on April 8, 2015. The stipulation discontinuing the action was filed with the court on April 14, 2015, to be so-ordered. It was signed by SGA on behalf of plaintiffs and counsel for defendants. It was not signed by anyone on behalf of additional defendants Sommella and Karol. The Court did not "so order" this stipulation (NYSCEF Doc. 43).

Samuel Goldman submits an affirmation in support of this motion, in which he claims that while both Sommella and Karol did not sign the Retainer Agreement with SGA, "[e]ach had indicated orally that they would pay its fees" (Affirmation of Samuel Goldman, dated January 21, 2015, ¶ 4). Goldman contends that Sommella was located through his son on or about July 3, 2013 (id., ¶ 26). After Goldman spoke with Sommella, SGA emailed him a copy of the Retainer Agreement (*id.*, ¶ 26 and Ex. C). Goldman alleges that he spoke with Sommella several times about the case, and that Sommella "fully supported the litigation and would help" (*id.*, ¶ 27). Sommella even offered to contact another limited partner, John McCaffrey, to try to convince him to join the plaintiffs. McCaffrey did join and signed the Retainer Agreement (*id.*). When Goldman asked Sommella why he would not sign the Retainer Agreement, Sommella said that Axon had done him a favor in the past and that he did not want to appear adversarial to him (*id.*). However, Sommella allegedly told Goldman that he was not averse to paying SGA's fees as specified in the Retainer Agreement (*id.*, ¶ 28). Goldman avers that he continued to speak with Sommella about the litigation and that the latter "acted in all respects as if he were a client," complimenting Goldman's efforts, offering encouragement, and even pleading not to let the settlement break down (*id.*, ¶ 29).

On January 16, 2015, with the matter approaching a conclusion, SGA asked Sommella to confirm in writing his statement that he would pay SGA's fees as set forth in the Retainer Agreement (Goldman Aff., ¶ 31, Ex. D). Although Sommella declined, he allegedly acknowledged to Goldman that he owed him a fee, "but would like to let the Judge decide how much" (*id.*).

McCaffrey also submits a supporting affidavit in which he confirms that it was Sommella who contacted him in July 2013 and urged him to join the group of limited partners organizing to assert their rights concerning the partnership (Affidavit of John P. McCaffrey, sworn to April 8, 2015, ¶ 2). When McCaffrey learned in 2014 that Sommella had not signed the Retainer Agreement with SGA, he called Sommella and urged him to reconsider signing (*id.*, ¶ 6). Sommella allegedly told McCaffrey that he would pay something, but not at the level the rest of the plaintiffs were paying, and that once he was named as an additional defendant, he was willing to have the judge decide (*id.*, ¶ 10). McCaffrey proposed to plaintiffs that they make up the difference by chipping in to cover Sommella and Karol's share of the legal fee, but Goldman declined, stating that he believed that each limited partner should pay his own fees (*id.*, ¶ 9). McCaffrey further avers that but for the efforts of SGA, the non-Axon-affiliated limited partners would be still waiting to receive any return from the partnership and that Sommella and Karol were each direct beneficiaries of SGA's efforts as counsel to the plaintiffs (*id.*, ¶ 10).

Finally, plaintiffs submit an affidavit from a paralegal at SGA, Christina Lenaghan, who describes the efforts SGA made to locate all of the limited partners. Lenaghan explains that the firm did not have accurate contact information for four of the remaining five limited partners still not joined in the action (Affidavit of Christina Lenaghan, sworn to April 13, 2015, ¶ 2). "Once

[the firm] did [locate the partners], they each agreed to become [p]lainitffs, retain [the firm's] services and sign the Legal Services Contingent Fee Agreement for the matter" (*id.*). Lenaghan finally managed to locate Karol in Florida on December 24, 2014 (*id.*, ¶ 5). After explaining about the litigation and settlement, Karol allegedly asked many questions and said he was pleased that SGA had located him and happy that the firm was pursuing the matter (*id.*, ¶¶ 6, 7). Lenaghan explained that Karol needed to decide whether he was going to be a plaintiff, in which case she could send him the complaint and Retainer Agreement by email, and, if not, SGA would need to serve the complaint on him at his home address (*id.*). Karol gave her his email address and she sent him the documents that day; she also put him on the email distribution list for the case and began including him on all client communications (*id.*, Ex. A). When Karol did not return a signed copy of the Retainer Agreement, Lenaghan called him again, and Karol said he had not received it. Thus, she sent another copy to him on December 29, 2014 and again on January 5, 2015 (*id.*, Exs. B, C). SGA sent a complete copy of the settlement documents by email to Karol on March 6, 2015 (*id.*, ¶ 10). When Lenaghan spoke to him afterwards, Karol questioned why his payout was lower than what had been projected, and Lenaghan explained that it was due to an increase in the closing costs, applied across the board to all the partners (*id.*, ¶ 11). Karol signed the Settlement Agreement on March 9, 2015 (*id.*, Ex. D).

In opposition to the motion, Sommella avers that Goldman contacted him in July 2013 and asked him to join a petition filed by five other limited partners in the partnership seeking legal redress against the general partner (Sommella Aff., ¶ 3). Although Goldman urged him to sign the Retainer Agreement on that occasion and others, Sommella declined. He denies that he ever told Goldman or anyone at SGA that he agreed to retain the firm or agreed to the terms of

the Retainer Agreement (*id.*, ¶¶ 4, 5). Goldman asked him to speak with Larry Italiano, another limited partner, to whom Sommella reiterated his unwillingness to join the petition (*id.*, ¶ 6). Sommella insists that throughout SGA's representation of the plaintiffs, he did not approve of Goldman's strategies (*id.*, ¶ 12). When during settlement negotiations Sommella attempted to ask Goldman questions about the settlement, Goldman told him that he was not his attorney and that Sommella should seek other counsel (*id.*, ¶ 14). Sommella claims he obtained legal advice about the settlement in August 2014 from the law firm of Borchert & LaSpina, P.C. (*id.*, ¶ 15).

Sommella admits receiving an email on January 16, 2015 from Lenaghan at SGA, asking him to confirm that even though he had not signed the Retainer Agreement, he would agree to pay SGA legal fees and expenses as set forth in that document (*id.*, ¶ 16). Sommella called Lenaghan, objecting to being contacted by any method other than by certified mail (*id.*, ¶ 17). He claims that he did not approve of the settlement, and expressed that to SGA (*id.*, ¶ 20). Sommella then received emails from other limited partners that SGA represented, threatening legal action against him in the event he did not sign the Settlement Agreement and blocked the sale (*id.*). In the end, he signed the Settlement Agreement and agreed to the sale (*id.*, ¶ 21).

Karol also submits an affidavit in opposition to the motion. Karol admits that someone at SGA contacted him in December 2014 and asked whether he would consider being represented by SGA in connection with this lawsuit (Affidavit of Eugene Karol, dated June 5, 2015, ¶ 3). Karol said he needed to look at the various filings in the lawsuit and the Retainer Agreement before making any decision (*id.*). He claims he was never advised that he had been already been named as an additional defendant (*id.*). After Karol received the documents from SGA, he decided not to become involved in the lawsuit or to have SGA represent him and thus did not

sign the Retainer Agreement (*id.*, ¶ 4). SGA contacted him for a second time in early March 2015, offering for signature various documents to effectuate a sale of the building and dissolution of the partnership (*id.*, ¶ 5). Karol avers that without the assistance of SGA or any other legal counsel, he reviewed and then executed these documents (*id.*, ¶ 6). He contends that he recently learned of this application for an award of legal fees from his limited partnership distribution (*id.*, ¶ 7). Karol alleges that he never received a written "Notice of Client's Right to Arbitrate," by certified mail, personal service or otherwise (*id.*, ¶ 7).

In reply, Goldman clarifies that Sommella initially agreed to pay SGA's legal fees as set forth in the Retainer Agreement (Reply Affirmation of Samuel Goldman, dated June 30, 2015, ¶ 3), but that after the settlement was consummated and before this motion was made, Sommella called Goldman's office, offering to pay him half of what the other limited partners had paid (*id.*, ¶ 4). Sommella allegedly never objected to SGA's strategy, never once suggested a different course of action, never asked any questions about the settlement, and Goldman never advised him to seek other counsel or threatened to sue him if he didn't approve the settlement (*id.*, ¶¶ 5-7). Finally, Goldman rejects the allegation of an adversarial relationship, noting that Sommella came to his office to deliver his signed copy of the Settlement Agreement (*id.*, ¶ 8). As to Karol, Goldman avers that Lenaghan told him that Karol had agreed to sign the retainer, but had questions. He claims that he called Karol and answered his questions (*id.*, ¶ 10).

DISCUSSION

The notice of motion formally designates plaintiffs as the movants seeking legal fees for SGA. Sommella and Karol argue that as such, the motion is defective, because plaintiffs do not have standing to assert SGA's claims for its attorneys' fees and expenses and will neither gain

nor lose anything, regardless of whether this application is granted. Plaintiffs, in turn, argue that they have standing because they would suffer some monetary harm based on Sommella's and Karol's refusal to contribute to the expense of this litigation, with each paying 1/26th share of expenses, instead of 1/28th. [2] This argument, however, does not sufficiently address the procedural defect of this motion.

Plaintiffs, as movants, need to have a viable cause of action or claim underlying the relief requested in the notice of motion, i.e. to require Sommella and Karol to shoulder plaintiff's legal fees and expenses. None appears in the complaint. While SGA, in its own right, may move on its claim for attorney's fees against Sommella and Karol, it has not done so. Therefore, plaintiffs' motion in its current procedural posture may be denied on this ground alone.

Attorney's Fees Provision under New York Partnership Law § 115-a (5)

The sole statutory legal basis for the plaintiffs' application is New York Partnership Law § 115-a (5), which provides as follows:

> If the action on behalf of the limited partnership was successful, in whole or in part, or if anything was received by the plaintiff or plaintiffs or a claimant or claimants as a result of a judgment, compromise or settlement of an action or claim, the court may award the plaintiff or plaintiffs, claimant or claimants, reasonable expenses, including reasonable attorneys' fees, and shall direct him or them to account to the partnership for the remainder of the proceeds so received by him or them. This paragraph shall not apply to any judgment rendered for the benefit of injured limited, additional or substituted limited partners only and limited to a recovery of the loss or damage sustained by them.

[2] Plaintiffs also rely on the stipulation of discontinuance, which provides that the Court will retain jurisdiction for resolution of any disputes over disbursement of the settlement proceeds, specifically mentioning this application for an award of attorneys' fees. While neither remaining defendant signed the stipulation, they each signed the Settlement Agreement in which they explicitly agreed to a fee application by SGA and for the filing of the stipulation. In addition, they each agreed that 40% of their share of the Payout would be held in escrow pending voluntary settlement of the fee dispute or order of this court. While their present counsel simply asks that the application be denied, there is no question that a court order is necessary to determine the proper recipients of the funds remaining in escrow.

Section 115-a (5) applies only when there is a derivative recovery on behalf of the partnership itself, and is expressly inapplicable to recoveries by individual limited partners (see *Schlomchik v Richmond 103 Equities Co.*, 763 F Supp 732, 744-745 [SD NY 1991] [Section 115-a (5) is not fee-shifting statute; it contemplates that attorneys' fee award will be paid out of common fund recovered on behalf of partnership]).

While the complaint in this action asserted both individual claims on behalf of the non-Axon-limited partners as well as derivative claims on behalf of the partnership pursuant to Partnership Law § 115-a (*see* Cmplt., ¶¶ 166-173, 174-177, 178-182, 191-196), the monetary settlement satisfied only plaintiffs' individual claims. The common fund recovered from the sale of the partnership's main asset was approximately $9 million, yet the Court is not being asked to carve out a reasonable attorney fee for SGA to be paid from such funds. Instead, plaintiffs seek to enforce the terms of SGA's 35% contingency fee agreement on the $4.8 million Payout.

Further, the settlement agreement was not approved by the Court and may legally be viewed only to have provided for satisfaction of the non-Axon-affiliated limited partners' individual claims, with the derivative portion of the complaint having been effectively abandoned (*see* Partnership Law § 115-a [4]).[3] Therefore, the attorney's fees provision in Partnership Law § 115-a (5) is inapplicable.

Notwithstanding the lack of any legal basis for plaintiffs' motion, the Court, in the interest of judicial economy, will consider whether SGA is owed any legal fees for which it could have moved in its own right.

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[3] In fact, Paragraph 12 of the Settlement Agreement provides for the release by the Partnership of its claims.

Attorney-Client Relationship

While the parties argue at length over SGA's failure to comply with the engagement letter rule under 22 NYCCR §1215.1 and the requirement of fee arbitration under Part 137 of the Rules of the Chief Administrator (22 NYCRR §137 *et seq.*),[4] this discussion is mostly misplaced, because Sommella and Karol were never SGA's clients. Section 1215.1(a) requires attorneys to provide all clients with a letter explaining the scope of the legal representation, the fees to be charged, the firm's billing practices and the client's right to arbitrate. This rule is also satisfied if a formal written retainer agreement is executed containing the same information. SGA argues that the rule was satisfied by the sending of the Retainer Agreement to both Sommella and Karol, and that the plain language of the rule does not require that they actually have signed it. Thus, SGA relies on the proposition that evidence of a client's oral assent to the terms of a written letter of engagement may be sufficient to establish a binding contract to perform legal services (*accord Pryor Cashman LLP v U.S. Coal Corp.*, 2013 WL 482132 [Sup Ct, NY County Feb. 4, 2013]; *see also Goldberg, Weprin & Ustin, LLP v Pearlman*, 83 AD3d 554 [1st Dept 2011] [fact that client did not sign letters of engagement sent by law firm did not prohibit the firm from seeking to recover its legal fees on quantum meruit or account stated theory]).

This proposition is applicable, however, where an attorney in fact performs legal services for a client, and the client accepts the services. In this case, there is simply no evidence that Karol ever orally agreed to be bound by the terms of the Retainer Agreement or to pay SGA a

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4 Part 137 of the Rules of the Chief Administrator (22 NYCRR § 137 *et seq.*) provides that, absent an agreement at the outset of the attorney-client relationship, when an attorney and his or her client cannot agree on the attorney's fee that is less than $50,000 but more than $1,000, the attorney is required to forward to the client a written "Notice of Client's Right to Arbitrate" by certified mail or personal service (22 NYCRR §§ 137.1[b] [3], 137.6 [a] [1]). However, there are certain statutory exceptions to this requirement, one being a dispute "where the fee to be paid by the client has been determined pursuant to statute or rule and allowed as of right by a court; or where the fee has been determined pursuant to a court order" (22 NYCRR § 137.1 [b] [5]).

contingency fee equal to 35% of his payout, and thus there is no basis for a breach of contract claim against him. With respect to Sommella, SGA's allegation that he orally agreed to retain SGA is rebutted by SGA's repeated attempts to have him execute the agreement and his repeated refusal.

Most significantly, the Court may not overlook the main procedural reality of this litigation: in addition to suing the general partner and its principal, plaintiffs sued Sommella and Karol, naming them additional defendants. SGA now argues that it concurrently represented parties on opposite sides of the same litigation: plaintiffs and additional defendants Sommella and Karol. Doing so creates an irreconcilable conflict of interest in violation of Rule 1.7(a) and Rule 1.7(b)(3) of the Rules of Professional Conduct.

22 NYCRR §1200.0 Rule 1.7, which governs conflict of interest with respect to current clients, provides:

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that either: (1) the representation will involve the lawyer in representing differing interests; or (2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.
>
> (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if: (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and (4) each affected client gives informed consent, confirmed in writing.

"'[A]dverse representation is prima facie improper. . . and the attorney must be prepared to show, at the very least, that there will be no actual or *apparent* conflict in loyalties or diminution in the vigor of his representation'" (*HRH Constr. LLC v Palazzo*, 15 Misc 3d 1130(A)

*3 [Sup Ct, New York County 2007] [emphasis in text; citation omitted]; *In re T'Challa D.*, 3 AD3d 569, 570 [2d Dept 2004]; *Aerojet Props., Inc. v State of New York*, 138 AD2d 39, 41 [3d Dept 1988], quoting *Cinema 5, Ltd. v Cinerama, Inc.*, 528 F2d 1384, 1386 [2d Circ 1976]). "[T]he burden of showing that there will be no diminution of representation is a 'heavy burden'... [A]ttorneys have a responsibility to 'avoid not only the fact, but even the appearance, of representing conflicting interests.'" (*HRH Const.*, 15 Misc 3d 1130(A) at *3-4, quoting *Cinema 5*, 528 F2d at 1387). As the lawyer who would sue his own client hoping to balance competing interests is treading on thin ice, the burden he carries is so heavy that it will be rarely met. Therefore, were the Court to find that Sommella and Karol were SGA's clients, SGA would have to have been disqualified, possibly from being involved in this litigation entirely and from deriving any compensation (*see e.g. Cinema 5, Ltd. v Cinerama, Inc.*, 528 F2d 1384, 1387 [2d Cir 1976]).

The Court understands the challenges that plaintiffs faced in procuring counsel willing to undertake representation on a contingent fee arrangement in order to vindicate the interests of limited partners, who were excluded by the controlling general partner and its principal. However, SGA, unlike its clients, is bound by the ethical rules of the legal profession and must be guided not only by the financial benefit to some of its clients and itself, but also by the requirement to avoid any limitations on its ability to advise each client on his/her best interest. Here, SGA contacted Sommella and Karol, not to discuss legal steps that would be in the best interests of either potential client, but to get them "[t]o join the limited partner group seeking to cause a distribution of the partnership's assets" (Goldman Aff., Ex. C; Lenaghan Aff., Ex. A). While without joining the suit, neither Sommella nor Karol might have ever recouped the value

of his respective partnership equity interest, nevertheless, SGA could not compel anyone to retain it as counsel. Once SGA joined Sommella and Karol in the action as defendants, it foreclosed the possibility of being their legal representatives. Thus, SGA is not entitled to recover legal fess from them.

Common-Fund and Substantial Benefit Basis for Recovery of Legal Fees

Citing *Matter of Kantrowitz Goldhammer & Graifman, P.C. v New York State Elec. & Gas Corp.* (27 AD3d 872, 874 [3d Dept 2006]), plaintiffs argue that an attorney who recovers a "common fund" or produces a "substantial benefit" that also benefits certain non-clients may recover from such non-clients even in the absence of statutory authority. However, as the Appellate Division, Third Judicial Department, made clear, such a recovery "is limited to 'exceptional cases' in which 'dominating reasons of justice' require the allowance of counsel fees" (27 AD3d at 875, quoting *Sprague v Ticonic Natl. Bank*, 307 US 161, 167 [1939]). In Kantrowitz, the appellate court found that the fact that the petitioning law firms received remuneration in the form of a contingency fee pursuant to a written retainer agreement militated against an equitable allowance of more fees. Since SGA has already been paid $1.7 million in fees, and refused an offer from one of the plaintiffs to pay what SGA claims Sommella and Karol would owe, there is no basis to depart from the general rule that "an attorney may not recover legal fees from persons other than his client merely because such other persons might have benefited from his services" (*Builders Affiliates v North Riv. Ins. Co.*, 91 AD2d 360, 366 [1st Dept 1983]).

Unjust Enrichment

SGA also requests a legal fee from Sommella and Karol on the basis of quantum meruit and unjust enrichment. To state such a claim for quantum meruit, SGA must establish: "(1) the performance of services in good faith, (2) the acceptance of the services by the person to whom they are rendered, (3) an expectation of compensation therefor, and (4) the reasonable value of the services" (*Soumayah v Minnelli*, 41 AD3d 390, 391[1st Dept 2007] [citations omitted]). "[T]he performance and acceptance of services gives rise to the inference of an implied contract to pay for the reasonable value of such services" (*Moors v Hall*, 143 AD2d 336, 338 [2d Dept 1988]).

Unjust enrichment "is an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties concerned" (*IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009]). The plaintiff must show that the other party was enriched, at plaintiff's expense, and that "it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered" (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011] [internal quotation marks and citation omitted]). Although privity is not required for an unjust enrichment claim (*Sperry v Crompton Corp.*, 8 NY3d 204, 215 [2007]), the nature of legal professional services is such that SGA has to prove that it performed legal services at the specific behest of Sommella and Karol, a claim that will not be supported unless there is an attorney-client between them (*see Steinberg v Schnapp*, 73 AD3d 171, 174-75 [1st Dept 2010]).

Here, despite what Goldman characterized as an amicable relationship with Sommella, SGA cannot establish even a quasi-client relationship, specifically because of the ethical

considerations discussed above. While Karol and Sommella approved the settlement and admittedly benefitted from SGA's legal work, they never solicited SGA's services. It was SGA that attempted to impose itself on them. When SGA sued Karol and Sommella as additional defendants, it sought to benefit plaintiffs and bind the additional defendants to any outcome of the litigation. The economic necessity for non-Axon-affiliated limited partners to hire joint counsel to incentivize a contingency fee arrangement does not justify an extension of the current law on the attorney-client relationship.[5] Karol and Sommella received financial benefit from the settlement incident to SGA's strategy to force liquidation of the partnership in an attempt to benefit its own clients. This type of indirect benefit cannot form the basis of an attorney-client relationship (*accord Atrinsic, Inc. v Mother Nature, Inc.*, 2011 WL 11101026, *5, 2011 NY Misc LEXIS 7027, *11-12 [Sup Ct, NY County Dec. 28, 2011] [indirect benefit to parent corporation of contracting party cannot form basis of recovery in quantum meruit against parent]). Thus, SGA may not recover legal fees against Karol and Sommella on the basis of quantum meruit or unjust enrichment.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that plaintiffs' motion is denied, and the law firm of Sonnenschein, Sherman & Deutsch LLP is directed, upon service of a copy of this order with notice of entry, to immediately disburse in full the escrowed portion of the remaining amounts, representing 40% of the payout disbursements withheld under Paragraph 10 (b) of Section II of the Settlement

[5] Even in the context of class action suits, individual class members must be given an opportunity to opt out, and class counsel may not separately seek legal fees from such class members.

Agreement, to Salvatore Sommella and Eugene Karol.

This constitutes the Decision and Order of the Court.

Dated: May 6, 2016

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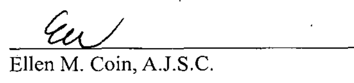

Ellen M. Coin, A.J.S.C.