Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Andrew M. Schnier,

Plaintiff,

-against-

Fred F. Catapano, Fred J. Catapano and Rapid Waste Disposal, Inc.,

Defendants.

Motion Sequence No.: 003; MG
Motion Date: 7/3/17
Submitted: 7/5/17

Index No.: 02745/2015

Plaintiff Pro Se:

Andrew M. Schnier, Esq.
250 Park Avenue, Sixth Floor
New York, NY 10177

Defendant:

Fred J. Catapano
21 Piper Lane
Levittown, NY 11756

Pro Se Defendant:

Fred F. Catapano
146 Soundview Avenue
Port Washington, NY 11050

Clerk of the Court

Upon the following papers numbered 1 to 15 read upon this motion for an order granting summary judgment: Notice of Motion and supporting papers, 1 - 7; Answering Affidavits and supporting papers, 8 - 15; it is

ORDERED that this motion by defendant, Fred F. Catapano, for an order awarding summary judgment in his favor dismissing the complaint of plaintiff, Andrew M. Schnier, against him is granted.

Plaintiff is an attorney who commenced this action by the filing of a summons and complaint on February 19, 2015 and an amended complaint on June 22, 2015 to recover attorneys' fees in the sum of $71,733.24 which, according to paragraph "FOURTH" of the amended verified complaint, is allegedly due and owing in connection with his representation of Fred J. Catapano, Mary Ann

Nally Catapano, Fred F. Catapano and Rapid Waste Disposal, Inc. (RWD) in a lawsuit commenced in Supreme Court, Nassau County in May 2008. It is alleged in the complaint that RWD was "a company which is now and was then owned and/or controlled by Defendant Fred J. Catapano" and "[t]hat although RWD was not named as a Defendant in the Lawsuit, the Lawsuit sought relief which would have directly and negatively impacted [RWD] had it been granted." Plaintiff seeks recovery in breach of contract under the first cause of action, in quantum meruit under the second cause of action and for an account stated under the third cause of action.

The evidence before this Court shows that the 2008 action that was commenced by Rapid Waste Removal, Inc., Clean Acres, Inc. and Pronto Environmental Services, Inc., as plaintiffs, against Fred J. Catapano, incorrectly sued as Fred Catapano, Jr., Mary Ann Nally Catapano and Fred F. Catapano, incorrectly sued as Fred Catapano, Sr., sought recovery of damages for tortious interference, *prima facie* tort and other relief. Fred J. Catapano is the son of Fred F. Catapano. By order of the Supreme Court, Nassau County, dated May 13, 2014 (DeStefano, J.), summary judgment was awarded to Fred F. Catapano on the claims for damages asserted against him. The facts of the case as set forth in that order were as follows:

> Defendant Mary Ann Nally Catapano ("Mary Ann Catapano") was the owner and President of Rapid Waste Disposal, Inc. ("Rapid Disposal" and Rapid Waste Removal, Inc. ("Rapid Removal"). According to the amended complaint, some time between 2004 and 2006, Mary Ann Catapano transferred the assets of Rapid Disposal to Rapid Removal. In August 2006, following the transfer of assets, Plaintiff Clean Acres, Inc. ("Clean Acres") acquired Rapid Removal in exchange for Mary Ann Catapano's receipt of a 45% interest in Clean Acres. . . CIT Trust and James Y.A. Wang ("James Wang") owned the remaining 45% and 10% interests in Clean Acres, respectively. . . Along with Clean Acres' purchase of Rapid Removal, James Wang became the President of Rapid Removal and Clean Acres. Defendant Fred Catapano, Jr. and his wife, Mary Ann Catapano, became Executive Vice Presidents of Rapid Removal and Clean Acres and are actively engaged in the day to day operations of the companies.
>
> In January 2008, James Wang became aware of purported "significant discrepancies within Plaintiffs' corporate account in Commerce Bank" which is the bank in which Rapid Removal has an account, and further, that Fred Catapano, Jr. was withdrawing sums of money from the corporate account "without any apparent legitimate corporate purpose".

By stipulation between counsel dated November 20, 2014, the action was settled on the condition that the common stock held by Mary Ann Nally Catapano in Clean Acres, Inc. be cancelled and that she have no ownership interest in the corporation.

Defendant Fred F. Catapano now moves for an order awarding summary judgment in his favor dismissing the complaint against him. It is averred in the affidavit of Fred F. Catapano that

was submitted in support of the motion that while plaintiff had represented him in a variety of matters prior to 2008, including a matrimonial action, there was no written or verbal contract with plaintiff under which defendant agreed to be responsible for attorneys' fees in the Nassau County lawsuit. It is also defendant's contention that RWD, a company owned by Fred J. Catapano and Mary Ann Nally Catapano, hired plaintiff. Furthermore, it is asserted by Fred F. Catapano that he was not an employee, officer, director or shareholder of RWD and had no relationship with the company.

Plaintiff has opposed the application. It is plaintiff's claim that he entered into a verbal fee agreement to represent the defendants in the Nassau County action at the rate of $350.00 per hour, plus late fees at the rate of .015% per month on any unpaid monthly invoice. Plaintiff also claims that he had made it "manifestly clear" that moving defendant and his son were jointly and severally responsible for the payment of attorneys' fees because "most work performed would be performed on behalf of and benefit both of them as well as Mary Ann Nally Catapano." Although plaintiff acknowledges that he failed to provide Catapano with a written letter of engagement in accordance with 22 NYCRR Part 1215, it is plaintiff's contention that he was exempt from the requirement to provide a written explanation of attorneys' fees to be charged because his representation was "of the same general kind as previously rendered to and paid for by the client" (22 NYCRR § 1215.2). Plaintiff also claims that he did not insist on a written retainer agreement because he "knew that [Fred F. Catapano] had the wherewithal to pay my fees and had always paid them in the past."

In opposition to the motion, plaintiff has submitted copies of invoices for professional services that were addressed to "Fred Catapano" and "Fred Catapano, Jr." A review of those invoices reveals that much of the services that were billed did not relate to movant Fred F. Catapano but, instead, were for services provided to RWD, services relating to insurance, criminal matters, efforts to resolve disputes about trucks and trailers, the drafting of a petition for the "dissolution of Rapid Waste Removal and its related companies", correspondence regarding "misdirected checks", discussions about 1099 and K-1 tax forms for Mary Ann Nally Catapano, meeting with Fred J. Catapano "to discuss Jamaica Recyling [*sic*] judgment" and other matters. In addition, there are multiple references in the invoices relating to correspondence and conversations with Fred J. Catapano, as well as credit for payments made by Fred J. Catapano.

The law is well-established that summary judgment is a drastic remedy to be granted only when there is clearly no genuine issue of fact to be presented at trial (*see* ***Andre v Pomeroy,*** 35 NY2d 361, 362 NYS2d 131, 320 NE2d 853 [1974]; ***Benincasa v Garrubo,*** 141 AD2d 636, 529 NYS2d 797 [2d Dept 1988]). The function of the court in determining a motion for summary judgment is issue finding, not issue determination (***Pantote Big Alpha Foods, Inc. v Schefman,*** 121 AD2d 295, 503 NYS2d 58 [1st Dept 1986]). The courts have repeatedly held that in order to obtain summary judgment, movant must establish its claims or defenses sufficiently to warrant a court's directing judgment in its favor as a matter of law (*see* ***Gilbert Frank Corp. v Federal Insurance Co.,*** 70 NY2d 966, 525 NYS2d 793, 520 NE2d 512 [1988], citing ***Zuckerman v City of New York,*** 49 NY2d 557, 427 NYS2d 595, 404 NE2d 718 [1980]; ***Friends of Animals v. Associated Fur Mfrs.,*** 46 NY2d 1065, 416 NYS2d 790, 390 NE2d 298 [1979]). The party opposing the motion, on the

other hand, must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which the opposing claim rests (*see* ***Gilbert Frank Corp. v Federal Insurance Co.,*** *supra*).

On a motion for summary judgment the court is not to determine credibility, but whether there exists a factual issue (*see* ***S.J. Capelin Associates v Globe Mfg. Corp.,*** 34 NY2d 338, 357 NYS2d 478, 313 NE2d 776 [1974]). However, the court must also determine whether the factual issues presented are genuine or unsubstantiated (***Prunty v Keltie's Bum Steer,*** 163 AD2d 595, 559 NYS2d 354 [2d Dept 1990]). If the issue claimed to exist is not genuine but is feigned and there is nothing to be tried, then summary judgment should be granted (***Prunty v Keltie's Bum Steer,*** *supra*, citing ***Glick & Dolleck v Tri-Pac Export Corp.,*** 22 NY2d 439, 293 NYS2d 93, 239 NE2d 725 [1968]; ***Columbus Trust Co. v Campolo,*** 110 AD2d 616, 487 NYS2d 105 [2d Dept 1985], *affd*, 66 NY2d 701, 496 NYS2d 425, 487 NE2d 282).

As noted above, a significant part of the charges set forth in plaintiff's invoices are for services provided to Fred J. Catapano, Mary Ann Nally Catapano and RWD concerning matters that did not involve or relate to movant. As set forth in movant's third affirmative defense, a promise to answer for the debt, default or miscarriage of another person must be in writing and subscribed by the party to be charged pursuant to the Statute of Frauds (General Obligations Law § 5-701). Accordingly, to the extent that plaintiff claims that Fred F. Catapano verbally agreed to be responsible for payment for legal services provided to Fred J. Catapano and others, such claim is unenforceable (*see* ***Tender Loving Care Agency, Inc. v Hladun,*** 111 AD2d 162, 488 NYS2d 790 [2d Dept 1985]).

Except in limited circumstances, none of which are applicable in this case, an attorney must provide his client with a written letter of engagement or enter into a written retainer agreement explaining, *inter alia*, the scope of the legal services to be provided, the fees to be charged, and the expenses and billing practices (*see* ***Gary Friedman, P.C. v O'Neill,*** 115 AD3d 792, 793, 982 NYS2d 359 [2d Dept 2014], citing 22 NYCRR 1215.1). Having failed to provide the required written letter of engagement, the plaintiff can not recover legal fees on the theory of breach of contract under the first cause of action in the complaint (*see* ***Sidoti v Hall,*** 124 AD3d 760, 998 NYS2d 662 [2d Dept 2015]). While an attorney's noncompliance with the requirements of the rule does not preclude him from recovering the value of professional services rendered on a *quantum meruit* basis, an attorney who fails to comply bears the burden of proving the terms of the retainer and establishing that the terms of the alleged fee arrangement were fair, fully understood, and agreed to by the client (***Gary Friedman, P.C. v O'Neill,*** *supra* at 115 AD3d 793). Plaintiff has failed to sustain his burden.

An unconscionable agreement is "one such as no person in his or her senses and not under delusion would make on the one hand, and as no honest and fair person would accept on the other, the inequality being so strong and manifest as to shock the conscience and confound the judgment of any person of common sense" (***Matter of Estate of Hennel,*** 29 NY3d 487 [2017], quoting ***Christian v Christian,*** 42 NY2d 63, 71, 365 NE2d 849, 396 NYS2d 817 [1977]). Plaintiff's assertion that Fred F. Catapano agreed to be "jointly and severally responsible" for the payment of

fees for legal services provided to the officers of a company with which Catapano had no relationship in connection with a lawsuit in which Catapano bore no liability strains credulity. Furthermore, plaintiff's conduct in seeking to hold movant responsible for payment of attorney's fees charged for services that were not provided to movant, such as correspondence relating to tax forms for Mary Ann Nally Catapano and "attendance at Clean Acres Board of Directors Meeting", is unconscionable. Accordingly, plaintiff can not recover in *quantum meruit* under the second cause of action in the complaint because it can not be established that the terms of the alleged verbal fee arrangement were "fair, fully understood, and agreed to by the client."

Movant Fred F. Catapano is also entitled to summary judgment in his favor dismissing the third cause of action in the complaint for an account stated. "'An account stated is an agreement, express or implied, between the parties to an account based upon prior transactions between them with respect to the correctness of account items and a specific balance due on them' which is 'independent of the original obligation'" (***Episcopal Health Serv., Inc. v POM Recoveries, Inc.,*** 138 AD3d 917, 919, 31 NYS3d 113 [2d Dept 2016]). An essential element of an account stated is that the parties came to an agreement with respect to the amount due (***Caring Professionals, Inc. v Landa,*** 152 AD3d 738, 2017 NY Slip Op 05803 [2d Dept 2017]). The evidence before this Court demonstrates that the alleged fee arrangement was unconscionable and that the parties did not come to an agreement with respect to the amount of the balance due and, accordingly, Fred F. Catapano is awarded summary judgment on the third cause of action to recover on an account stated (*see* ***Caring Professionals, Inc. v Landa,*** *supra).*

Dated: September 19, 2017

William B. Rebolini

HON. WILLIAM B. REBOLINI, J.S.C.

_____ FINAL DISPOSITION ___X___ NON-FINAL DISPOSITION