

**Lazer, Aptheke, Rosella & Yedid, P.C. v Tedesco**

2018 NY Slip Op 30496(U)

March 15, 2018

Supreme Court, Suffolk County

Docket Number: 13-10165

Judge: Peter H. Mayer

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CAL. No. 17-00195CO

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 17 - SUFFOLK COUNTY

COPY

**PRESENT:**

Hon. PETER H. MAYER  
Justice of the Supreme Court

MOTION DATE 7-7-17  
ADJ. DATE 11-17-17  
Mot. Seq. # 004 MD

-----X

LAZER, APTHEKER, ROSELLA & YEDID,  
P.C.,

Plaintiff,

- against -

ADAM TEDESCO,

Defendant.

-----X

LAZER, APTHEKER, ROSELLA & YEDID, P.C.  
Attorney for Plaintiff  
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Melville, New York 11747

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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the defendant, dated May 30, 2017, and supporting papers (including Memorandum of Law dated May 29, 2017); (2) Notice of Cross Motion by the , dated , supporting papers; (3) Affirmation in Opposition by the plaintiff, dated September 11, 2011, and supporting papers; (4) Reply Affirmation by the defendant, dated November 13, 2017, and supporting papers; (5) Other plaintiff's supplemental affidavit, dated November 16, 2017; and defendant's letter, dated November 17, 2017 (and after hearing counsels' oral arguments in support of and opposed to the motion); and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

**ORDERED** that the motion by defendant for an order dismissing plaintiff's complaint pursuant to CPLR 3212 (a) is denied.

Plaintiff law firm commenced this action to recover attorney fees for legal services rendered. Plaintiff's amended complaint contains two causes of action. The first cause of action alleges breach of contract. The second cause of action seeks damages based on quantum meruit. Issue has been joined, discovery is complete, and a note of issue has been filed.

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Defendant now moves for summary judgment in his favor dismissing the plaintiff's complaint. Defendant's notice of motion provides:

1. Pursuant to CPLR Section 3212 (a), granting summary judgment dismissing plaintiff's second cause of action in the amended complaint;
2. Pursuant to CPLR section 3212 (a), granting summary judgment dismissing the plaintiffs' (sic) second cause of action in the amended complaint.

Pursuant to CPLR 2001 relating to mistakes or irregularities not affecting substantial rights, and in the interest of judicial economy, the court will consider the motion pursuant to CPLR 3212 (a) as one seeking dismissal of both plaintiff's first and second causes of action. In support of the motion, defendant submits his own affidavit, copies of the pleadings, various settlement agreements, various correspondence, defendant's affidavit in opposition to a previous motion, portions of plaintiff's billing records, and portions of the deposition transcripts of Todd M. Gardella and Allison Hall.

In opposition to the motion, plaintiff submits a document from David Lazer, a member of plaintiff law firm, which is labeled "affirmation in opposition." That document, however, fails to provide that it is "affirmed under the penalty of perjury," so it may not be considered as an affirmation (*see* CPLR 2106 [a]). Although David Lazer states that he is "duly sworn" and he refers to the document as an affidavit, his signature, is not notarized or sworn to before a notary public. While counsel attempts to correct the error in sur-reply, the Court declines to exercise its discretion pursuant to CPLR 2001 (*see Doumanis v Conzo*, 265 AD2d 296, 696 NYS2d 201 [2d Dept 1999]). Accordingly, the Court will not consider the document signed by David Lazer. Plaintiff also submits, among other things, the deposition transcripts of defendant and Allison Hall, various billing records and correspondence. To the extent that these documents are authenticated by defendant in his deposition and are in admissible form they will be considered by the Court (*Grossberg Tudanger Adver., Inc. v Weinreb*, 177 AD2d 377, 576 NYS2d 235 [1st Dept 1991]).

Defendant admits that plaintiff represented him in a Nassau County actions, entitled *Tedesco v Garden City Maintenance and Garden City Construction, Garden City Irrigation, Michael and Donna Milcetic*, Index No. 03/4580 and 03/4581. Defendant avers he paid plaintiff \$120,000.00 in legal fees and that he retained experts to protect his interests, spending an additional approximate \$100,000.00. That matter was settled by stipulation of settlement, dated May 23, 2004. Thereafter, on May 12, 2005, an action against defendant was commenced in federal court entitled *First National Insurance Company of America v Tedesco*. Defendant admits that he contacted plaintiff to discuss the action. Defendant maintains that he agreed to pay "any out of pocket expenses incurred" related to the litigation, but not legal fees. Defendant submits a retainer agreement from plaintiff to defendant, which complies with 22 NYCRR 1215. The retainer agreement, however, is unsigned and defendant maintains that it was mailed to 164 Pebble Court in Hewlett, New York 11563. Defendant avers that his correct address is 164 Pebble Lane, Hewlett, New York 11557. Defendant's moves to dismiss plaintiff's first cause of action as the retainer agreement is unsigned.

Defendant also moves to dismiss plaintiff's second cause of action alleging quantum meruit. Defendant maintains that plaintiff's complaint fails to allege that "there was an expectation of compensation" by plaintiff from defendant. Defendant admits during the seven years of litigation he made two payments of \$1,000.00 and \$2,000.00 "to cover the costs of depositions," and plaintiff's bill for legal services now exceeds \$90,000.00. Defendant admits that "[he] would occasionally receive invoices from the plaintiff, which, except as stated above for claimed expenses, [he] never paid any known invoice, and yet plaintiff continued to represent [him]." Defendant, however, also testified that he sent plaintiff a check for \$9,994.25 on November 28, 2007, "by mistake."

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 Hosp.*, 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 Town of 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*).

Defendant moves for summary judgment on plaintiff's first cause of action on the ground that the plaintiff failed to obtain a written retainer agreement from him as required by 22 NYCRR 1215.1, precluding it from recovering any unpaid legal fees based on breach of contract. Plaintiff did not sign the retainer agreement and maintains that it was mailed to an incorrect address. Defendant also moves to dismiss plaintiff's second cause of action alleging quantum meruit maintaining that the amended second cause of action fails to allege that plaintiff anticipated payment for its legal services.

The common law elements of a cause of action for breach of contract are (1) formation of a contract between plaintiff and defendant, (2) performance by plaintiff, (3) defendant's failure to perform, and (4) resulting damage (*see e.g. J.P. Morgan Chase v J.H. Elec. of N.Y., Inc.*, 69 AD3d 802, 893 NYS2d 237 [2d Dept 2010]). When the terms of a written contract are clear and unambiguous, the intent of the parties must be found within the four corners of the contract, giving practical interpretation to the language employed and the parties' reasonable expectations (*see W.W.W. Assoc., Inc. v Giancontieri*, 77 NY2d 157, 162, 565 NYS2d 440 [1990]; *Costello v Casale*, 281 AD2d 581, 723 NYS2d 44 [2d Dept 2001], *lv denied* 97 NY2d 604, 737 NYS2d 52 [2001]).

22 NYCRR 1215.1 provides that "an attorney who undertakes to represent a client and enters into an arrangement for, charges or collects any fee from a client shall provide to the client a written letter of engagement before commencing the representation, or within a reasonable time thereafter ... [which] shall address the following matters: (1) explanation of the scope of the legal services to be provided; (2) explanation of attorney's fees 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 ... [i]nstead of providing the client with a written letter of engagement, an attorney may comply with the provisions of ... this section by entering into a signed written retainer agreement ...”

It has been held that the failure of an attorney to comply with the requirements of 22 NYCRR 1215.1 bars the attorney from recovering any unpaid legal fees pursuant to a cause of action for breach of contract (*Barry Mallin & Assoc. P.C. v Nash Metalware Co. Inc.*, 18 Misc 3d 890, 849 NYS2d 752 [Civ Ct, New York County 2008]; see also *Jaffe Ross & Light, LLP v Mann*, 2013 NY Slip Op 32212[U], 2013 WL 5228095 [Sup Ct, New York County 2013], citing as example *Seth Rubinstein, P.C. v Ganea*, 41 AD3d 54, 833 NYS2d 566 [2d Dept 2007]). However, it is well settled that an attorney’s failure to obtain a written retainer agreement does not preclude the attorney from seeking to recover legal fees based on a cause of action for quantum meruit (*Roth Law Firm, PLLC v Sands*, 82 AD3d 675, 920 NYS2d 72 [1st Dept 2011]; *Utility Audit Group v Apple Mac & R Corp.*, 59 AD3d 707, 874 NYS2d 525 [2d Dept 2009]; *Seth Rubinstein, P.C. v Ganea, supra*; *Reingold & Tucker v Golia*, 38 Misc 3d 1214[A], 967 NYS2d 869 [Sup Ct, New York County 2013]; see also *Notrica v North Hills Holding Co., LLC*, 105 AD3d 826, 964 NYS2d 167 [2d Dept 2013]; *Micro-Spy, Inc. v Small*, 69 AD3d 687, 893 NYS2d 187 [2d Dept 2010]).

To recover in quantum meruit, a claimant must establish (1) the performance of the services in good faith, (2) the acceptance of the services by the person to whom they are rendered (3) expectation of compensation therefor, and (4) the reasonable value of the services (see *Miranco Contr. v Perel*, 57 AD3d 956, 871 NYS2d 310 [2d Dept 2008]; *AHA Sales, Inc. v Creative Bath Prods., Inc.*, 58 AD3d 6, 867 NYS2d 169 [2d Dept 2008]; *Atlas Refrigeration-Air Conditioning v Lo Pinto*, 33 AD3d 639, 821 NYS2d 900 [2d Dept 2006]). A cause of action for quantum meruit is grounded in quasi- contract, which only applies in the absence of an express agreement, and is not really a contract at all, but rather a legal obligation imposed in order to prevent a party’s unjust enrichment (see *Scott v Fields*, 92 AD3d 666, 938 NYS2d 575 [2d Dept 2012]).


Here, defendant has failed to establish his prima facie entitlement to summary judgment dismissing the plaintiff’s complaint. As to the first cause of action, factual issues exist as whether defendant received the retainer agreement and disputed its terms. By defendant’s own admission he received multiple invoices from plaintiff for the legal services performed. More importantly, Allison Hall, plaintiff’s billing clerk, testified that the retainer agreement was not returned by the post office as undeliverable. Contrary to defendant’s position, a signed retainer agreement does exist between the parties, dated October 22, 2002, related to the earlier litigation in Nassau County and a factual issue exists as to whether a new retainer agreement was necessary for the federal litigation. Defendant both avers and testified that the federal litigation was related to plaintiff’s earlier work. He further testified that he asked for representation from plaintiff and plaintiff agreed to represent him. If the federal litigation was “of the same general kind as previously rendered to and paid for by defendant,” a second retainer agreement may not have been required (22 NYCRR 1215.2; *Vandenburg & Felio, LLP v Interboro Packaging Corp.*, 70 AD3d 931, 896 NYS2d 111 [2d Dept 2010]). Additionally, the Appellate Division, Second Department, has held “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, particularly where clients know that the legal services they receive are not pro bono and where the failure to comply with the rule is not willful” (*Seth Rubenstein, P.C. v Ganea*, 41 AD3d 54, 833 NYS2d 566 [2d Dept 2007]). Finally, with regard to the first

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cause of action, factual issues exist as to whether defendant, by his conduct, ratified the unsigned retainer agreement (*Granto v Granto*, 75 AD3d 434, 904 NYS2d 67 [1st Dept 2010]).

As to the second cause of action, defendant admits that legal services were performed, and that he accepted them, although he maintains that the services were to be performed for costs and expenditures alone. However, defendant acknowledges that on November 28, 2007 he sent plaintiff a check for \$9,994.25, which was credited to his account. Thus, factual issues exist as to whether defendant ratified the contract between the parties. As to the third element of whether plaintiff expected compensation, defendant testified that no one from plaintiff law firm told him that he was being represented for free. Defendant also indicated in letters to plaintiff that “the only thing your firm seems good at doing is sending me invoices for work that I have no idea why it is being done, or even if it is being done, thus the reason for my disputing the charges.” In other words, defendant has established that plaintiff expected or anticipated compensation for the legal services it rendered. Finally, the reasonable value of those services remains in dispute. Accordingly, defendant’s motion for summary judgment is denied.

Dated: March 15, 2018

  
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PETER H. MAYER, J.S.C.