

Law Offs. of Joel J. Ziegler, PC v Stellaccio
2018 NY Slip Op 30735(U)
April 23, 2018
Supreme Court, Suffolk County
Docket Number: 21196/2014
Judge: Martha L. Luft
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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 50 - COUNTY OF SUFFOLK

PRESENT:

Hon. Martha L. Luft
Acting Justice Supreme Court

**DECISION AND FINDINGS OF
FACT IN BENCH TRIAL**

LAW OFFICES OF JOEL J. ZIEGLER, PC

Plaintiff,

-against-

FRANCIS STELLACCIO and NANCY
STELLACCIO,

Defendants.
_____x

PLAINTIFF'S ATTORNEY

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DEFENDANTS' ATTORNEY

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Plaintiff, Joel Ziegler ("Ziegler"), in this matter is the former attorney for the defendants in a medical malpractice action. He commenced this lawsuit to recover out-of-pocket disbursements and expenses stemming from the medical malpractice case. Initially, defendants filed an answer to the complaint on a *pro se* basis. However, prior to trial they retained counsel to represent them. A bench trial was held before the undersigned at which both plaintiff and both defendants testified. Post-trial submissions were received from both plaintiff and defendants.

Findings of Fact

The credible evidence presented at trial shows that the parties entered into a retainer agreement in September of 2008.¹ Defendants retained Ziegler to pursue a medical malpractice claim for personal injuries involving a retinal detachment suffered by Francis S. Stellaccio, M.D. ("Dr. Stellaccio") as a result of eye surgery as against Richard Rosen, MD and the New York Eye

¹The date on the retainer above the lines for the defendants' signatures reflects the year "2009" instead of "2008," which is the year contained in the date above the plaintiff's signature line. It is apparent that the former was a typographical error on the part of the plaintiff in having the retainer prepared.

and Ear Infirmary.

The two-page retainer agreement provides for payment to Ziegler on a contingency basis. His fee is calculated as a percentage of the sum received by way of trial or settlement, “less taxable costs (court fees) assessed and all disbursements incurred . . .” (*Emphasis in original*). Disbursements are then defined, in pertinent part, as “out-of-pocket expenses advanced by our attorneys on our behalf for such items as . . . fees to expert witnesses and doctors for testifying at our trial . . .” The final paragraph addresses the situation where no money is recovered in the case. It provides that no attorneys’ fee will be payable and further states that the attorney waives the right to seek repayment of disbursements and/or costs. The latter provision was incorporated at the Stellaccios’ request.

Dr. Stellaccio wished to have an expert from outside what he believed was a tight-knit community of retinal specialists in New York. Plaintiff identified a Harvard-trained expert in the field who practiced in Massachusetts and New Hampshire, Dr. Adam Beck. Plaintiff found Dr. Beck’s resume to be impressive and defendant visited him for an examination. Dr. Stellaccio was impressed with Dr. Beck, who immediately diagnosed the exact malpractice that he believed occurred.

Ziegler stated that three juries were picked prior to the case actually coming to trial. This added to the expert witness expense. All parties agree that, at trial, Dr. Beck proved to be a disastrous witness. He did not bring his records with him, he was unsure of himself, and he covered his mouth when he spoke. Ziegler’s evaluation of the situation was that the case was all but lost.

An offer of \$25,000 was made to settle the case. Ziegler encouraged his clients to accept the offer, pointing out that if they lost, not only would they get not money, but they could be responsible for the other side’s costs and disbursements. Ziegler offered to waive his attorney’s fees as part of the settlement. Ziegler did not discuss his own out-of-pocket expenses with Dr. Stellaccio. Ziegler and defendants met with the Justice presiding over the trial in her chambers. She encouraged them to accept the settlement, and commented that they could take a nice vacation with the proceeds. The defendants agreed to the settlement, and then were allocuted on the record in open court. Both Dr. and Mrs. Stellaccio were questioned and both agreed to the settlement. Dr. Stellaccio specifically stated that he was not coerced and was agreeing of his own free will to the settlement. He also stated that he had the opportunity to consult with Ziegler about the settlement. He stated that he understood “what happened in Court, so yes [he was agreeing to the settlement].”

Thereafter, it became apparent that the out-of-pocket expenses incurred by Ziegler, the majority of which were the fees paid to the expert, exceeded the \$25,000 settlement amount. After the deduction of a few expenses that were itemized in error, Ziegler’s disbursements amounted to \$31,386.58. Ziegler offered to accept the settlement amount in full payment for

these expenses. Dr. Stellaccio, however, refused to agree to that, and, further, refused to sign the documents necessary for release of the settlement funds. Thus, to date, the \$25,000 has not been received, and no payment has been made by the Stellaccios to Ziegler.

A Notice of Client's right to Arbitrate a Dispute Over Attorneys Fees, dated September 22, 2014, was provided to the Stellaccios. They did not file a request for arbitration within thirty days. Thereafter, Ziegler commenced the current action, alleging two causes of action - one for breach of the retainer agreement and one based upon an account stated.

These facts are essentially undisputed.² The Stellaccios contest Ziegler's entitlement to recover these disbursements based upon several theories. They rely heavily on two factors: first, that the retainer contains a provision stating that Ziegler waives any right to seek repayment for disbursements, and second, that the judge presiding over the medical malpractice case told them that they could take a nice vacation with the settlement funds. They argue that Ziegler had a conflict of interest in urging them to settle the case because he is the only one to benefit from the resolution. They also assert that Ziegler's failure to include the notice of client's right to arbitrate attorney's fees disputes with the retainer precluded him from bringing this proceeding. None of these arguments withstands legal scrutiny.

Decision

In order to receive judgment on the basis of an account stated, the plaintiff must show that statements generated in the ordinary course of business were regularly provided to the defendants and that defendants accepted them without objection. *American Exp. Centurion Bank v Williams*, 24 AD3d 577, 807 NYS2d 612 (2d Dept. 2005). Ziegler did not present sufficiently detailed evidence in this regard, and, thus, has failed to sustain his burden of proving an account stated.

In order for a plaintiff to recover damages for breach of contract, s/he "must demonstrate the existence of a contract, the plaintiff's performance pursuant to the contract, the defendant's breach of its contractual obligations, and damages resulting from the breach (*citation omitted*)."
Village of Kiryas Joel v Co. of Orange, 144 AD3d 895, 896, 43 NYS3d 51, 55 (2d Dept. 2016). Here, Ziegler has shown that he incurred the subject disbursements in pursuing his representation of the Stellaccios, that there were funds available from the settlement to recompense Ziegler for disbursements, and that Ziegler has been damaged by their refusal to take the steps necessary to recover the agreed-to settlement. The issue is whether the waiver contained in the last sentence of the retainer applies to the settlement in this matter.

The interpretation of an unambiguous contract provision is a function for the court, and matters extrinsic to the agreement may not be considered when the intent of the parties can be

²Defendants did question one of the payments Ziegler made to Dr. Beck.

gleaned from the face of the instrument. *Zalitas v Circus World Toy Stores, Inc.*, 198 AD2d 411, 603 NYS2d 897 (2d Dept. 1993). It is horn book law that a party executing a contract is presumed to know its contents and agree to them. *Nery v. Greenpoint Mortg. Funding, Inc.*, 144 A.D.3d 646, 648, 40 N.Y.S.3d 510, 513 (2016). Indeed, it has been held to be gross negligence on the part of a party to a contract not to read it. *Brian Wallach Agency, Inc. v. Bank of New York*, 75 A.D.2d 878,879, 428 N.Y.S.2d280, 282 (1980).

Here, as noted above, the retainer provided for attorney's fees to be paid as a percentage of sums "obtained through settlement or trial," less fees assessed and "all disbursements incurred." The waiver of the right to seek repayment of disbursements, by the plain terms of the retainer, only applies "in the event there is no money recovered in this case."

In this case, there was a settlement for a sum of money, so the waiver has no application to the current situation. The money would have been actually recovered, but for Dr. Stellaccio's refusal to sign the release documents. Dr. Stellaccio cannot unilaterally transform the case into one "in which there is no money recovered" but refusing to sign the release. The fact that the settlement amount was small, and that the disbursements were large, does not override the plain language of the agreement.

In addition, the retainer indicates clearly that attorney's fees and disbursements are two different categories of payment responsibility. Ziegler's agreement during settlement discussions to waive his attorney's fees cannot be interpreted as encompassing an agreement to waive out-of-pocket disbursements.

However, the retainer makes no provision for payment of disbursements other than from an amount recovered. Taken as a whole, the retainer makes clear that, no matter the outcome, the clients would not be out-of-pocket for either fees or costs and disbursements. Thus, Ziegler is not entitled to payment of a sum that is greater than the settlement amount.

The law is clear that a party who settles a case in open court is bound by such settlement. *In re Parkside Ltd. Liability Co.*, 294 AD2d 582, 742 NYS2d 580 (2d Dept. 2002). Stipulations settling a case are "favored by the courts and not lightly cast aside (*citation omitted*). This is all the more so in the case of 'open court' stipulations (*citation omitted*) within CPLR 2104, where strict enforcement not only serves the interest of efficient dispute resolution but also is essential to the management of court calendars and integrity of the litigation process. Only where there is cause sufficient to invalidate a contract, such as fraud, collusion, mistake or accident, will a party be relieved from the consequences of a stipulation made during litigation. (*citation omitted*)." *Hallock v State of New York*, 64 NY2d 224, 230, 485 NYS2d 510, 512 (1984).

The facts in this matter do not support a finding of "cause sufficient to invalidate a contract." The mere fact that the judge mentioned the idea that they might take a vacation with the settlement proceeds does not lead to the conclusion that there was any fraud, collusion or

mistake in this settlement. Dr. Stellaccio agreed that out-of-pocket disbursements would be deducted from any recovery in the case, and whether the judge was aware of the amount of such disbursements, or not, has no bearing on the viability of the settlement.

Plaintiffs' reliance on the provisions of §137.6 as support for the argument that Ziegler was required to include a notice of right to arbitrate fees along with the retainer is misplaced. The triggering event for sending the notice is "where the attorney and client cannot agree as to the attorney's fee." 22 NYCRR §137.6 (a) (1). No mention is made of providing the notice with the retainer. Even where there is consent in advance from the client to arbitrate fee disputes, it is not until the attorney and client cannot agree on the fee that the attorney must forward the request for arbitration form. 22 NYCRR §137.6 (a) (2).

Finally, defendants' reliance on *Landsman v Moss*, 180 AD2d 718, 579 NYS2d 450 (2d Dept. 1992) as authority for the proposition that Ziegler had a conflict of interest in urging Dr. Stellaccio to settle is misplaced. That case involved the provisions of a retainer agreement which accorded the attorney one hundred percent of any recovery up to \$12,000. The court found that such a provision gave the attorney too great a proprietary interest in the plaintiff's case.

By contrast, the retainer agreement in the current matter had no such provision. The Stellaccios were faced with the unfortunate situation in which their expert witness apparently performed so poorly on the stand that both counsel and the presiding judge urged them to accept the small amount offered in settlement, rather than face receiving nothing and being responsible for paying their adversary's costs and disbursements from their own pocket.

Based upon the foregoing, the court finds that plaintiff is entitled to judgment in the amount of \$25,000.00, with five percent interest from February 16, 2015 to the date of this decision, plus costs and disbursements.

Submit judgment.

ENTER

Dated: April 23, 2018
Riverhead, NY


Martha L. Luft, AJSC

FINAL DISPOSITION

NON-FINAL DISPOSITION