Chuang v Chin Cheow Chin
2018 NY Slip Op 33092(U)
October 9, 2018
Supreme Court, Queens County
Docket Number: 713419/15
Judge: Janice A. Taylor

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JANICE A. TAYLOR IAS Part 15
Justice

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SAMUEL CHUANG, ESQ.,

Plaintiff(s),

- and -

CHIN CHEOW CHIN and HEONG G. CHIN,

Defendant(s).

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Index No.:713419/15

Motion Date:6/26/18

Motion Cal. No.: 9

Motion Seq. No:3

The following papers numbered 1 - 21 read on this motion by defendant for an order granting summary judgment. Plaintiff cross-moves for a motion granting summery judgment on the first cause of action.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits-Service.....	1 - 4
Plaintiff Cross Motion- Affirmation- Exhbits- Service..	5 - 8
Opposition- Exhibits- Service.....	9 - 11
Defendant's Memorandum of Law.....	12
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Plaintiff's Affidavit in Opposition. Exhibits- Service.	16 - 18
Plaintiff's Affidavit in Support- Exhibits- Service....	19 - 21

Upon the foregoing papers it is **ORDERED** that the motion is decided as follows:

Plaintiff in this breach of contract action seeks to recover unpaid legal fees. Defendants are plaintiff's former clients. Defendants own a Chinese restaurant that had been sued by former employees of the restaurant, for unpaid wages. The action, *Ke v 85 Fourth Ave et al.*, was filed in Federal District Court, Southern District of New York. Defendants originally retained Anthony Emengo, Esq., to defend the action. Emengo was paid $13,337. A year later, defendants decided to change counsel, and defendants submit, plaintiff agreed to assume representation in the *Ke* litigation for a flat fee of $100,000. Defendants state that Chuang did not provide them with either a letter of engagement or a written retainer agreement to sign. Defendants paid Chuang the

requested $25,000 retainer. During the sixteen months of representation, defendants submitted (and plaintiff has not disputed) plaintiff did not send defendants a single invoice or a statement of legal services performed. Defendant state that Chuang would periodically verbally request additional payments, which defendants would then promptly pay. An additional $50,000 was paid to Chuang.

Six months after being retained, again with no engagement letter or retainer agreement in place, Chuang advised defendants that they would have to retain co-counsel. Defendants submit that this was the first time that they were advised that Chuang would not be handling the litigation himself. In February 2009, defendants were referred to attorney Paul Battista, with whom plaintiff had co-counseled on other matters. Battista provided defendants with a letter of engagement setting forth the scope of his services and his hourly rate. Battista periodically sent statements for services rendered which invoices were paid by defendants. During his ten months of representation, Battista requested and received $49,800. Thus, to date, $124,800 has been paid by defendants, $24,800 above the $100,000 allegedly agreed upon by plaintiff.

On November 24, 2009, on the eve of the scheduled federal trial, the *Ke* litigation was settled for $300,000. The settlement was read into the record by Battista and approved by the court. The next day, plaintiff told defendants to deduct $280,024 from the $300,000 settlement amount for purported federal and state withholding taxes and to tender the Ke plaintiff a net check of $19,975. The *Ke* plaintiffs refused that payment as being contrary to the terms of the settlement, and the federal district judge directed that the trial proceed immediately. After less than a day of testimony on December 8, 2009, the case was again settled for the original $300,000 without deductions. On December 29, 2009, a stipulation of dismissal was filed and the litigation came to an end. After the filing of the December stipulation of dismissal, Chuang did not provide any additional legal services to defendants.

In February or March of 2010, after the case had ended, plaintiff allegedly asked defendants to come to his office. Defendant contend that at the meeting, Chuang told defendants that an IRS investigator had contacted him and advised that because taxes had not been withheld from the settlement, defendants were subject to severe civil and criminal penalties. Chuang allegedly told defendants that they had to sign a power of attorney to allow him to negotiate the potential penalties with the IRS investigator. Chuang allegedly handed the Chins a business card purportedly from the investigator who was conducting the criminal investigation. At the end of the one hour meeting, Chuang allegedly gave defendants what they believed to be a power of attorney to sign. The letter dated February 5, 2010, was signed by defendants at Chuang's

office. Upon arriving home that evening, defendants submit that they then read the letter and learned that it was not a power of attorney but instead a document which contained a provision that defendants were finalizing an invoice for $100,000. Defendants called Chuang and asked for a second meeting. At the second meeting in April, 2010, defendants advised Chuang that they had paid the agreed upon fee and had not agreed to pay any additional amount. Defendants allegedly did not hear again from Chuang until six months later when the instant action was filed. Defendants submit that not a single request for payment was made before this suit commenced, and that they were never contacted by the IRS regarding the *Ke* settlement nor did Chuang communicate with or enter into any negotiations with the investigator.

Discussion

The branches of the motion which seek to dismiss plaintiff's claims as time barred, are denied. "Where, as here, the claim is for payment of a sum of money allegedly owed pursuant to a contract, the cause of action accrues when the plaintiff 'possesses a legal right to demand payment' " (*Thompson v Horwitz*, 100 AD3d 864, 865 [2d Dept 2012], *quoting Matter of Prote Contr. Co. v Board of Educ. of City of N. Y.*, 198 AD2d 418, 420 [2d Dept 1993]; *Swift v New York Med. Coll.*, 25 AD3d 686, 687 [2d Dept 2006]; *see Minskoff Grant Realty & Mgt. Corp. v 211 Mgr. Corp.*, 71 AD3d 843, 845 [2d Dept 2010]). Here, defendants failed to show when the plaintiff's legal right to demand payment arose. Defendants assert that the relationship between defendants and plaintiff ended on December 29, 2009, when the settlement agreement was entered into, but the record indicates that the court did not approve the agreement until December 30, 2009, and that plaintiff was still the attorney of record at that time. The instant action was commenced on December 30, 2015, which is within the six year time period for commencement of the breach of contract/unjust enrichment action (see CPLR 213[2]). Therefore, defendants failed to establish their prima facie entitlement to judgment as a matter of law dismissing the causes of action as time-barred *(see Minskoff Grant Realty & Mgt. Corp. v 211 Mgr. Corp.*, 71 AD3d at 845; *Kuo v Wall St. Mtge. Bankers, Ltd.*, 65 AD3d 1089, 1090 [2d Dept 2009]). Defendants' failure to establish their prima facie entitlement to judgment as a matter of law on this issue requires denial of those branches of the motion, regardless of the sufficiency of plaintiff's opposition papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

The branch of the motion which seeks summary judgment in defendants' favor, dismissing plaintiff's breach of contract claim on the merits, is denied, for reasons noted below in the section which pertains to the cross motion.

The branch of the motion which is for summary judgment dismissing the cause of action for quantum meruit, is granted. 22

NYCRR 1215.1, otherwise known as the "letter of engagement rule," was promulgated by joint order of the Appellate Divisions, and applies to all civil actions where the amount in controversy is $3,000 or more. The rule requires attorneys to provide all clients with a written letter of engagement explaining the scope of legal services, the fees to be charged, billing practices to be followed, and the right to arbitrate a dispute under Part 137 of the Rules of the Chief Administrator (see 22 NYCRR 1215.1[b]; *see generally Grossman v West 26th Corp.*, 9 Misc.3d 414 [New York County 2005]). The rule is also satisfied if the attorney and client execute a formal written retainer agreement reflecting the same information as required for a letter of engagement (*see Beech v Gerald B. Lefcourt, P.C.*, 12 Misc.3d 1167(A), 2006 WL 1562085). The rule became effective on March 4, 2002 (see 22 NYCRR 1215.1[a]; *Brown Rudnick Berlack Israels LLP v Zelmanovitch*, 11 Misc.3d 1090(A) [Kings County 2006])

The language of 22 NYCRR 1215.1 contains no express penalty for noncompliance (see 22 NYCRR 1215.1; *Beech v Gerald B. Lefcourt, P.C., supra; Matter of Feroleto*, 6 Misc 3d 680, 682 [Bronx County 2004]). Indeed, the intent of Rule 1215.1 was not to address abuses in the practice of law, but rather, to prevent misunderstandings about fees that were a frequent source of contention between attorneys and clients. The purpose of the rule is to aid the administration of justice by prodding attorneys to memorialize the terms of their retainer agreements containing basic information regarding fees, billing, and dispute resolution which, in turn, minimizes potential conflicts and misunderstandings between the bar and clientele.

The court in *Seth Rubenstein, P.C. v Ganea*, 41 AD3d 54, 63 [2d Dept 2007] found 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 (*see also Matter of Feroleto, supra* at 684. While an attorney's noncompliance with 22 NYCRR 1215.1 does not preclude him or her from recovering the value of professional services rendered on a quantum meruit basis (*see Seth Rubenstein, P.C. v Ganea*, 41 AD3d 54 [2007]), an attorney who fails to comply with rule 1215.1 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 (*see id.*).

Here, plaintiff submitted a letter dated August 21, 2008, which is not signed by defendants, purporting to be a letter of engagement. Notably, this "letter of engagement" only appeared recently in the case. It is not referenced in the complaint like the February 5, 2010 letter, or anywhere else and as such, the

court is not inclined to credit it as having been created prior to the filing of the instant motion. Nonetheless, although an unenforceable writing may provide evidence of the value of services rendered in quantum meruit (*see Frank v Feiss*, 266 AD2d at 826; *Taylor & Jennings v Bellino Bros. Constr. Co.*, 106 AD2d 779, 780 [3d Dept 1984]; *see also Evans-Freke v Showcase Contr. Corp.*, 85 AD3d at 963), here, the record is devoid of evidence which would establish the reasonable value of the services Chuang provided to the defendants (*see Michaels v Byung Keun Song*, 138 AD3d at 1075; *see also Crown Constr. Bldrs. & Project Mgrs. Corp. v Chavez*, 130 AD3d 969, 971-972 [2d Dept 2015]; *Geraldi v Melamid*, 212 AD2d 575, 576 [2d Dept 1995]; *see, e.g., Bauman Assocs. v H & M Intl. Transp.*, 171 AD2d 479 [1st Dept 1991]). Plaintiff failed to adequately document the services he allegedly performed for the defendants above and beyond the $100,000 which the parties originally agreed to. Thus, the court finds that plaintiff failed to comply with 22 NYCRR 1215.1 and failed to establish that the terms of the fee arrangement for the additional monies were fair, fully understood, and agreed to by defendants (*see Gary Friedman, P.C. v O'Neill*, 115 AD3d 792, 793-94 [2d Dept 2014]). Neither the "letter of engagement" nor the affidavit of Chuang establishes the value of any services rendered by Chuang to defendants, or that the value of such services exceeded the amounts already paid by the defendants. Accordingly, the branch of the motion which is to dismiss the cause of action to recover in quantum meruit is granted.

The branch of the motion which is to dismiss the cause of action for unjust enrichment as duplicative of the quantum meruit claim is granted as unopposed, and otherwise on the merits (see *Bettan v Geico Gen. Ins. Co.*, 296 AD2d 469, 470 [2d Dept 2002]; *Walter H. Poppe Gen. Contr. v Town of Ramapo*, 280 AD2d 667, 668 [2d Dept 2001]; *see generally Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]).

Cross Motion

The cross motion by plaintiff for summary judgment in his favor is denied. Plaintiff established his prima facie entitlement to judgment as a matter of law by submitting the February 5, 2010 agreement signed by defendant[s], and evidence that the defendants retained the plaintiff's bill without objection (*see Sullivan v. REJ Corp.*, 255 AD2d 308, 308 [2d Dept 1998]; *Moses & Singer v S & S Mach. Corp.*, 251 AD2d 271, 271 [1st Dept 1998]). In opposition, however, "defendant[s] raised triable issues of fact by submitting statements alleging that the plaintiff over billed them and acted unprofessionally and unethically, and made them sign the alleged agreement under duress" (*Salamone v Cohen*, 129 AD3d 877, 879 [2d Dept 2015]). Specifically, defendants submit that they were led to believe by plaintiff that a tax issue had arisen as a result of the settlement, and that plaintiff had provided defendants with a power of attorney document to be signed in relation to the tax issue.

Even if defendants failed to timely object to plaintiff's "invoice", defendants are not bound by it as an account stated in the event of fraud, mistake, or other relevant equitable considerations (*Salamone v Cohen, supra* at 879; *see Marchi Jaffe Cohen Crystal Rosner & Katz v All-Star Video Corp.*, 107 AD2d 597, 599 [1st Dept 1985]; *Lapidus & Assoc., LLP v Elizabeth St., Inc.*, 25 Misc.3d 1226(A) [New York County 2009], *affd.* 92 AD3d 405 [1st Dept 2012]; *Lapidus & Assoc., LLP v. Elizabeth St., Inc.*, 25 Misc.3d 1226(A) [Sup.Ct., N.Y. County], *affd.* 92 AD3d 405 [1st Dept 2012]).

Conclusion

The branches of the motion which seek to dismiss plaintiff's breach of contract, unjust enrichment and quantum meruit claims as time barred, are denied.

That portion of the instant motion which seeks summary judgment in defendants' favor, dismissing plaintiff's breach of contract claim, is denied.

The branch of the motion which is to dismiss the cause of action to recover in quantum meruit is granted.

The branch of the motion which is to dismiss the cause of action for unjust enrichment is granted .

The cross motion is denied.

Dated: October 9, 2018

JANICE A. TAYLOR, J.S.C.

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