SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LAURENCE L. LOVE** **PART** **IAS MOTION 63M**

Justice

----------X

KOSTER, BRADY & NAGLER, LLP, WARREN KOSTER, BRUCE BRADY, WILLIAM BRENNAN, VINCENT NAGLER

Plaintiff,

- v -

PAUL CALLAN, MARTIN EDELMAN, EDELMAN & EDELMAN, P.C.,

Defendant.

----------X

INDEX NO. 654117/2015

MOTION DATE 12/17/2020

MOTION SEQ. NO. 008

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 008) 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417

were read on this motion to/for JUDGMENT - DECLARATORY.

Upon the foregoing documents, the decision on Plaintiffs' motion seeking a Declaratory Judgment, pursuant to CPLR § 3001, declaring that the contingency fee sharing agreement ("CFSA") between Paul F. Callan ("Callan") and Koster, Brady & Nagler, Warren Koster, Bruce Brady, William Brennan and Vincent Nagler, ("KB&N") is valid as a matter of law and enforceable and Paul F. Callan's cross-motion, seeking an Order pursuant to CPLR 3212(e) and § 3001, granting partial summary judgment on Callan's cause of action for declaratory judgment in the DJ Action, declaring the alleged oral contract described in paragraph 36 of the original and amended complaints to be unenforceable and void as a matter of law is as follows:

On December 9, 2015, the KB&N filed a Complaint against Callan, Martin W. Edelman ("Edelman") and Edelman & Edelman, PC ("E&E") under Index No. 654117/2015 ("Action No. 1"). Said Complaint alleges a CFSA as follows:

> Throughout the existence of the firm, it was explicitly agreed among the partners that upon the withdrawal of any partner, the fee

> on any contingency-fee case on which the partnership or any individual partner had been retained on or before the effective date of the partner's withdrawal would be distributed at the time the fee was realized and received by the partnership. This was to occur regardless of whether the fee was received after the partner's withdrawal, regardless of the amount of time, if any, the withdrawing or remaining partners worked on the case, and regardless of which partner originated the retainer. Said distribution would be made on a pro rata basis based upon the percentage of capital ownership of the withdrawing partner on the effective date of withdrawal, whether or not the client remained a client of the partnership or became a client of the withdrawing partner after the effective date of withdrawal.

On March 4, 2016, Callan filed his Answer to the Complaint. On October 19, 2016, KB&N filed a motion in Action No. 1 to amend the Complaint, which included a Proposed Amended Complaint. Said motion was granted and the Complaint deemed served. On June 13, 2017, Callan filed his Answer to the Amended Complaint. On May 18, 2018, Callan filed a Complaint seeking a declaratory judgment under Index No. 652512/2018 ("Action No. 2"). Said action seeks a declaration that the CSFA is against public policy, unenforceable and void as a matter of law, only to the extent that it obligates Callan to remit to KB&N his share of the settlement of a case that was realized after Callan withdrew from the firm. On August 27, 2018, KB&N filed a pre-answer motion to dismiss the Complaint in Action No. 2. and on September 21, 2018, Callan filed a cross-motion seeking a declaration that the CSFA is unenforceable and void as a matter of law. On May 8, 2019, this Court denied both motions and ordered that Action No. 2 be consolidated into Action No. 1. On November 12, 2019, Callan and Edelman filed a motion for summary judgment, which was denied as premature and KB&N were ordered to file an answer to Callan's Declaratory Judgment action, which was filed on May 14, 2020.

In January 2001, KB&N was known as Callan, Regenstreich, Koster & Brady, LLP. A former partner, Bruce Regenstreich, withdrew from the firm, allegedly resulting in the CFSA at

issue in this action. In an agreement signed by all of the firm's partners dated August 3, 2001 ("Regenstreich Agreement"), said partners agreed as follows: "Bruce Regenstreich's equity share of the partnership is 22%" as of the date of withdrawal." "All plaintiffs' cases of the firm in suit or in process (in the case of UM/UlM claims) at the time of Bruce Regenstreich's withdrawal will be handled in the following manner: Within 15 days of the receipt of any recovery in each case, the parties will share in the recovery [.] Bruce Regenstreich will receive 22% of the recovery and the firm will receive 78% of the recovery." "Before September 1, 2001, a net balance of the amounts owed by the firm to Bruce Regenstreich … plus the recoveries on plaintiff's cases remaining with the firm and received after March 9, 2001, against the amounts owed by Bruce Regenstreich to the firm for the recoveries on firm plaintiff's cases taken by him upon his withdrawal and received after March 9, 2001 … will be determined. Upon such determination, payment will be made accordingly." KB&N allege that payments were made by Bruce Regenstreich to Callan, Regenstreich, Koster & Brady, LLP pursuant to the Regenstreich Agreement and that payments were made by Callan, Regenstreich, Koster & Brady, LLP to Bruce Regenstreich pursuant to same.

In early October 2014, Callan announced his intention to withdraw from the firm, effective January 1, 2015. Plaintiffs allege in their Memorandum of Law that "Shortly before announcing his withdrawal from the firm, Callan became involved in a wrongful conviction/imprisonment matter with Defendant, Martin W. Edelman ("Edelman") on behalf of Jonathan Fleming ("Fleming"). Thereafter, Callan participated in the efforts to obtain Fleming's retention and worked extensively on the matter while still a member of the firm. Callan and Edelman fraudulently misrepresented Callan's involvement in the Fleming matter to the KBN Parties as an hourly consultancy to Edelman on 'criminal law and procedure as it relates to homicide

investigations.' Callan and Edelman then delayed Callan's formal retention to avoid the effect of the CSFA. One day after Callan's withdrawal from the firm became effective, Edelman obtained Fleming's consent to add Callan to the retainer statement and agreed to share 50% of any recovery with Callan. Ultimately, the Fleming claims were settled for a total sum of $9,650,000.00."

The Court notes that the Regenstreich Agreement concerns only the withdrawal of Bruce Regenstreich from Callan, Regenstreich, Koster & Brady, LLP. Said agreement does not in any way raise the issue of the valuation and apportionment of fees in contingency fee cases as they apply to the hypothetical future withdrawal of an equity partner. Prior to the withdrawal of Callan, no equity partner had withdrawn from the firm other than Bruce Regenstreich. Further, it is undisputed that at the time of Callan's withdrawal from KB&N, there was no written agreement setting forth the procedure for apportioning fees in a contingency fee case upon the withdrawal of an equity partner and that KB&N are alleging an Oral agreement.

The sole written agreement relating to the retirement of an equity partner is contained in Section 10 of KB&N's Partnership Agreement, which at the time of Callan's retirement provides in relevant part as follows:

> 10.1 (a) After becoming 60 years of age a partner may elect to retire by giving a 90-day notice to become effective either on the first day of the next fiscal year, or on the first day of the second half of the fiscal year in which the election to retire is made;
>
> 10.2 The yalue of the interest of any partner withdrawing under (a) or (b) of section 10.1 shall be the sum of the following: (a) Any unpaid loan due him; (b) His capital account; (c) Any balance in his income account; (d) 100% of the accounts receivable of the partnership at the effective date of the retirement or incapacity, times the last agreed participation percentage of the respective partner, subject to the limitation set forth in Section 10.13. (e) Less any obligations owed to the partnership by the partner.

A court may render declaratory relief where the issue in controversy involves pure matters of law and no question of fact is presented. *Dun & Bradstreet, Inc. v. City of New York*, 276 N.Y.

198 (1937); *Vanilla v. Moran*, 188 Misc. 325 (Sup. Ct., Albany 1947), affirmed 272 A.D. 859 (3rd Dep't 1947), appeal dismissed 297 N.Y. 593 (1947), affirmed 298 N.Y. 796 (1949). Further, the question of the legality or validity of a contract is well within the courts' powers to determine by way of declaratory judgment. *Buller v. Goldberg*, 40 A.D.3d 333 (1st Dep't 2007); *Blake v. Frick*, 10 Misc.2d 520 (Sup. Ct., New York 1959) appeal dismissed 9 A.D.2d 893 (1st Dep't 1959).

Plaintiffs argue, citing *Benjamin v. Koeppel*, 85 N.Y.2d 549 at 556 (1995); *Marin v. Constr. Realty, LLC*, 28 N.Y.3d 666, 672 (2017); *Samuel v. Druckman & Sinel, LLP*, 12 N.Y.3d 205, 210 (2009); and *Law Offices of K.C. Okoli, P.C. v. Maduegbuna*, 62 A.D.3d 477, 478 (1st Dep't 2009), that Callan should be estopped from denying the validity of the CFSA based upon his acceptance of his share of a legal fee based upon his equity share of the firm at the time of his withdrawal, which Callan was notified of on May 12, 2015 (the "Costello" Case). Plaintiff further argue that such an agreement is permissible based upon New York's public policy regarding the division of legal fees as codified in Rule 1.5 of the Rules of Professional Conduct. Pursuant to Rule 1.5(g) "A lawyer shall not divide a fee for legal services with another lawyer who is not associated in the same law firm unless: (1) the division is in proportion to the services performed by each lawyer or, by a writing given to the client, each lawyer assumes joint responsibility for the representation; (2) the client agrees to employment of the other lawyer after a full disclosure that a division of fees will be made, including the share each lawyer will receive, and the client's agreement is confirmed in writing; and (3) the total fee is not excessive." Rule 1.5(h) further provides "Rule 1.5(g) does not prohibit payment to a lawyer formerly associated in a law firm pursuant to a separation or retirement agreement." Based upon the plain text of Rule 1.5, Callan was entitled to accept payments from KB&N based upon his retirement from the firm, however there is no equivalent

provision allowing KB&N to within the Ethical Rules make a claim to, in this case, 78.75% of Callan's fees arising from the Fleming case.

Further, the alleged CFSA expressly disclaims any and all consideration of the legal requirements for the splitting of attorney's fees that are explicitly required by Rule 1.5(g) KB&N are specifically attempting to enforce a provision which allegedly states that for all cases, the same pro rata distribution "was to occur … regardless of the amount of time, if any, the withdrawing or remaining partners worked on the case" Such language makes the alleged oral contract "a division of legal fees without regard to services actually rendered" and as such is void as against public policy." *See, Matter of Silverberg (Schwartz),* 75 A.D.2d 817 (2d Dept. 1980); *In re Thelen LLP*, 24 N.Y.3d 16 at 29 (2014) (New York courts have never awarded a law firm "any fee not earned by the law firm's own work"). As such, the alleged CFSA, if it exists is void as against public policy.

Even if the CFSA was not void as against public policy, it would violate the Statute of Frauds. Pursuant to General Obligations Law section 5-701(a)(1), any "agreement, promise or undertaking" whose terms cannot "be performed within one year from the making thereof" must "be in writing, and subscribed [i.e., signed] by the party to be charged therewith," or else it "is void" As discussed in *McCoy v. Edison Price, Inc*., 186 A.D.2d 442, 443 (1st Dept 1992), "The agreement, by its terms, was to last for as long as the defendant remained in business, and thus was incapable of performance within one year, rendering it voidable absent a writing signed by the party to be charged or his duly authorized agent (Polykoff Adv. Inc. v. Houbigant, Inc., 43 N.Y.2d 921, 922, 403 N.Y.S.2d 732, 374 N.E.2d 625; Zupan v. Blumberg, 2 N.Y.2d 547, 552, 161 N.Y.S.2d 428, 141 N.E.2d 819)." "Contracts that have indefinite durations are considered

incapable of performance within a year and fall within the ambit of the Statute of Frauds." *Grayson v. Ressler & Ressler*, 271 F. Supp. 3d 501, 522 (S.D.N.Y. 2017).

As such, it is hereby

ORDERED that Plaintiffs' motion seeking a Declaratory Judgment, pursuant to CPLR § 3001, declaring that CFSA is valid as a matter of law and enforceable is DENIED in its entirety; and it is further

ORDERED that Paul F. Callan's cross-motion, seeking an Order pursuant to CPLR 3212(e) and § 3001, granting partial summary judgment on Callan's cause of action for declaratory judgment in the DJ Action, declaring the alleged oral contract described in paragraph 36 of the original and amended complaints to be unenforceable and void as a matter of law is GRANTED in its entirety.

2/4/2021
DATE

LAURENCE L. LOVE, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED		GRANTED IN PART	X OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE