

**Goldberg Weprin Finkel Goldstein LLP v
Wertzberger**

2022 NY Slip Op 33497(U)

October 12, 2022

Supreme Court, New York County

Docket Number: Index No. 650056/2020

Judge: Nancy M. Bannon

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 42

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GOLDBERG WEPRIN FINKEL GOLDSTEIN LLP,

Plaintiff,

- v -

JOEL WERTZBERGER, HORIZON BLUE CHELSEA LLC,
CHELSEA W28 I LLC, CHELSEA W28 II LLC, BHMS W28,
LLC, BHJD W28, LLC, and BH CHELSEA HOLDINGS,
LLC,

Defendants.

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INDEX NO. 650056/2020

MOTION DATE 05/13/2022

MOTION SEQ. NO. 004

**DECISION + ORDER ON
MOTION**

HON. NANCY M. BANNON:

The following e-filed documents, listed by NYSCEF document number (Motion 004) 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 114, 130, 131, 132, 133, 134, 135, 136, 137, 138

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

I. INTRODUCTION

In this action wherein the plaintiff law firm seeks to recover \$90,425.50 in unpaid attorneys' fees, the defendants Joel Wertzberger (Wertzberger), Horizon Blue Chelsea, LLC (Horizon Blue), Chelsea W28 I, LLC (Chelsea W28 I), Chelsea W28 II, LLC (Chelsea W28 II), BHMS W28, LLC (BHMS), and BHJD W28, LLC (BHJD) move pursuant to CPLR 3212 for summary judgment dismissing the amended complaint in its entirety as against them. The plaintiff opposes the motion. For the following reasons, the motion is granted.

II. BACKGROUND

The gravamen of the parties' dispute in this matter is whether the plaintiff represented Wertzberger, Horizon Blue, Chelsea W28 I, Chelsea W28 II, BHMS, and/or BHJD (collectively, the Wertzberger defendants) in connection with a transaction or series of transactions for the purchase of five individual cooperative units (the units) located at 253 West 28th Street in Manhattan (the cooperative) in 2014, such that the plaintiff is entitled to collect unpaid attorneys' fees from the Wertzberger defendants.

According to the plaintiff, it was retained in late 2013 to represent a group of investors, including Wertzberger, engaging in a joint venture to consolidate ownership of the cooperative, with the ultimate aim of selling, redeveloping, or converting the cooperative. The plaintiff further avers that it created and represented non-appearing defendant BH Chelsea Holdings, LLC (BH Chelsea), which was intended to be the vehicle for purchasing the units. Due to unforeseen issues, including litigation commenced by one of the unit owners against BH Chelsea, the sale was not completed for approximately two years. The plaintiff alleges that at some point after the litigation against BH Chelsea was commenced, Wertzberger bought out Klugman's and Hirsch's interests in the venture and changed counsel.

The Wertzberger defendants dispute the plaintiff's characterization of its relationship with them and of the purported "joint venture." They state that in late 2013, Joel Hirsch (Hirsch) and Samson Klugman (Klugman), through a real estate firm that Hirsch and Klugman operated, Quality Capital (Quality), retained the plaintiff in connection with their intended purchase of the units. Subsequently, Hirsch and Klugman approached Wertzberger for assistance in financing their purchase. In negotiating the financing, the Wertzberger defendants maintain that the plaintiff represented Hirsch and Klugman, but that Wertzberger retained separate counsel.

Subsequently, when litigation was commenced against BH Chelsea, Wertzberger retained separate litigation counsel and paid such counsel personally to defend BH Chelsea.

The record before the court on the instant motion renders certain facts beyond dispute.

First, the only written document directly evidencing the plaintiff's retainer in connection with the work at issue is a "New Matter Memorandum" dated December 18, 2013, prepared by Gillian Kessler, Esq. (Kessler), an attorney who worked for the plaintiff during the relevant period. The New Matter Memorandum is a prepared template filled in by Kessler. Under "Name of Client (include all principals)," Kessler writes, "Samson Klugman – Quality Capital USA." The "Matter Name" is "253 West 28th Street" and the "Matter Type" is "Purchase of Coop." The New Matter Memorandum further reflects that the matter did not involve a new client. While the New Matter Memorandum indicates a retention letter was also prepared by Kessler, no such letter or other formal retainer agreement has been produced. Nor has the plaintiff alleged that any written retainer exists. At her deposition, Kessler explained that she had, in fact, never dealt with the actual retention of a client and that she was not aware of any written retainer applicable to the New Matter Memorandum. Kessler further stated that "Samson Klugman – Quality Capital USA" *was* a new client, contrary to what is indicated in the New Matter Memorandum. Finally, Kessler stated that in December 2013, Wertzberger was not a client of the plaintiff.

Second, pursuant to a letter agreement dated March 5, 2014 (the letter agreement), non-appearing defendant BH Chelsea and Chelsea W28 I agreed "to endeavor to acquire" four units of the condominium and "enter into an operating agreement for BH Chelsea" that would split the membership interests of BH Chelsea such that 50% of the interests would be owned by Chelsea W28 I and 50% would be owned by an unspecified "[KLUGMAN ENTITY]," of which 10%

was to be owned by Chelsea W28 II. The letter agreement further describes BH Chelsea's entrance into contracts of sale for the units, which contracts required BH Chelsea to fund deposits, and provides that Chelsea W28 I is to reimburse and/or fund the deposits and to fund the balance of the purchase prices for each of the units in the event BH Chelsea proceeds to closing. The letter agreement also contains provisions granting Klugman purchase options in the event BH Chelsea does not enter contracts of sale for some of the units. Finally, the letter agreement dictates how the profits of any sale of the units to a third-party prior to closing would be shared. Wertzberger signed the letter agreement on behalf of Chelsea W28 I and Klugman signed on behalf of BH Chelsea. The unit sale contracts, which are appended to the letter agreement, are all signed by Klugman on behalf of BH Chelsea, with the plaintiff listed as BH Chelsea's attorney.

Third, Wertzberger was represented in the parties' negotiations of the letter agreement by a separate attorney, Jeffrey Zwick, Esq. (Zwick), who specializes in real estate transactions. In Zwick's role as counsel to Wertzberger and the corporate entities Wertzberger controlled, Zwick attended a meeting at the plaintiff's offices that culminated in the execution of the letter agreement.

Fourth, in connection with the work the plaintiff performed, the plaintiff prepared an invoice dated October 23, 2014, in the sum of \$90,425.50 (the invoice). The invoice is addressed to Klugman, Hirsch, Benjamin Hirsch, and Quality. The plaintiff sent an email to Klugman, Hirsch, and Wertzberger dated October 26, 2018, indicating that, at Klugman and Hirsch's direction, the plaintiff began sending its bills to Wertzberger after "about a year of monthly statements." However, the earliest invoice addressed to Wertzberger that the plaintiff has produced is dated December 1, 2018.

III. DISCUSSION

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any triable issues of fact. See Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 (1985). In opposition, the nonmoving party must demonstrate by admissible evidence the existence of a triable issue of fact. See Alvarez v Prospect Hospital, 68 NY2d 320 (1986); Zuckerman v City of New York, 49 NY2d 557 (1980).

In support of their motion, the Wertzberger defendants submit, *inter alia*, the verified pleadings; Wertzberger's affidavit; Zwick's affirmation; a transcript of Kessler's deposition; the New Matter Memorandum; the letter agreement; email correspondence between Zwick, Kessler, and other attorneys employed by the plaintiff; the subject invoice and subsequent invoices sent to Wertzberger; the email dated October 26, 2018, seeking payment of the invoice; a letter from the plaintiff to Wertzberger, Klugman, and Hirsch dated December 14, 2018, likewise seeking payment of the invoice; and entity formation documents attributable to the corporate Wertzberger defendants.

A. First Cause of Action

The Wertzberger defendants' submissions establish, *prima facie*, entitlement to dismissal of the plaintiff's first cause of action sounding in breach of contract. The proof shows that the plaintiff never provided Wertzberger or any other entity with a written retainer agreement, as required under 22 NYCRR 1215.1. Moreover, Wertzberger avers that he has never engaged the plaintiff as counsel on behalf of himself or any entity. The record, including the testimony of Kessler, the New Matter Memorandum, and email correspondence wherein Wertzberger is represented by separate counsel, support Wertzberger's assertions. Indeed, Kessler admits that

she never saw any retainer agreement between the plaintiff and Wertzberger and that Wertzberger never told her that such an agreement existed. She also fails to describe the specific terms of any purported agreement, written or otherwise, for her provision of legal services. Since there was no retainer agreement governing the legal work the plaintiff performed, the plaintiff's breach of contract claim fails as matter of law. See Frechtman v Gutterman, 140 AD3d 538, 538 (1st Dept. 2016).

In opposition, the plaintiff does not raise a triable issue. While the law is clear that the absence of a written retainer agreement between an attorney and her client is not a bar to the recovery of attorneys' fees, the plaintiff misinterprets such law for the erroneous proposition that an oral retainer agreement may support a breach of contract claim. That is not the case. Rather, an attorney who fails to comply with 22 NYCRR 1215.1 may seek recovery of her fees in *quantum meruit*. See Seth Rubenstein, P.C. v Ganea, 833 AD3d 54, 64 (2nd Dept. 2007); see Frechtman v Gutterman, supra at 538; Ferst v Abraham, 140 AD3d 581, 582 (1st Dept. 2016); Miller v Nadler, 60 AD3d 499, 499-500 (1st Dept. 2009). Further, the plaintiff's suggestion that it represented Wertzberger in a prior transaction and has a pre-existing retainer agreement with him, stated in conclusory fashion in the plaintiff's unsworn memorandum of law, is wholly unsupported by any admissible evidence and flatly denied by Wertzberger in a second affidavit. It is not a basis for denial of the Wertzberger defendants' motion.

The first cause of action is therefore dismissed.

B. Second Cause of Action

The Wertzberger defendants also demonstrate entitlement to dismissal of the second cause of action, sounding in *quantum meruit*. An attorney seeking to recover fees absent a written retainer agreement on a *quantum meruit* basis "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, 115 AD3d 792, 793 (2nd Dept. 2014); see Ferst v Abraham, supra at 582; Seth Rubenstein, P.C. v Ganea, supra at 64. The attorney must also show that she “performed services in good faith with an expectation of compensation, and that the services were accepted by” the client. Ferst v Abraham, supra at 582. The Wertzberger defendants have submitted evidence showing that there simply was no agreement between them and the plaintiff to pay for legal fees incurred by Klugman, Hirsh, or Quality. Indeed, as the court has observed, Wertzberger avers that he never retained the plaintiff to perform any legal work for his benefit or the benefit of any entity he controls and produces evidence that he was represented by Flick in connection with the underlying transaction. Kessler further states that Wertzberger was not a client of the plaintiff when she filled out the New Matter Memorandum and admits that Wertzberger never affirmatively represented to her that he was a partner of Klugman or Hirsch, or otherwise legally affiliated with those individuals or Quality. Indeed, the plaintiff did not send a single legal invoice to Wertzberger until 2018, about four years after it completed the work it seeks payment for.

Insofar as Kessler avers that she subjectively believed Wertzberger to be a partner of Klugman, Hirsch, and Quality, Kessler states that the bases for her belief were the representations of Klugman and Hirsch and the fact that she had meetings and emails with Klugman, Hirsch, and Wertzberger, notwithstanding that Wertzberger was represented by Flick in many of those exchanges. Kessler states that because Wertzberger said he was funding money for the purchase of the units, it was “apparent” to her that Wertzberger, Klugman, and Hirsch had all agreed among themselves to a joint venture with respect to the acquisition, development, and sale of the cooperative. Kessler also opines, without any stated basis for her opinion, that

“[Wertzberger] and [Klugman] had an agreement, not necessarily in writing, that Joel would fund the legal fees” for the venture. None of the foregoing presents a sufficient basis for the imposition of liability on Wertzberger for the plaintiff’s fees.

While partners in a joint venture may be held liable for the venture’s debts to third parties, the proof submitted does not establish that a joint venture existed. “The elements of a joint venture are ‘acts manifesting the intent of the parties to be associated as joint venturers, mutual contribution to the joint undertaking through a combination of property, financial resources, effort, skill or knowledge, a measure of joint proprietorship and control over the enterprise, and a provision for the sharing of profits and losses.’” Lebedev v Blavatnik, 193 AD3d 175, 185 (1st Dept. 2021) (quoting Slabakis v Schik, 164 A D 3d 454, 455 [1st Dept. 2018]). Here, Kessler, in her deposition, and the plaintiff’s partner, Matthew Hearle (Hearle), in an affidavit, state in a conclusory manner that a partnership among Klugman, Hirsch, and Wertzberger existed to acquire the cooperative. However, Kessler and Hearle’s testimony is based almost exclusively on inference and speculation, with a heavy dose of hearsay. The record is totally devoid of any statement by Klugman or Hirsch tending to support Kessler and Hearle’s assertions. Notably, while discovery has been ongoing since 2021, during which period the court conducted four discovery conferences and extended the Note of Issue deadline from May 21, 2021, to March 3, 2022, the plaintiff never saw fit to depose Klugman or Hirsch. Moreover, even if the court were to credit the hearsay statements purportedly made by Klugman and Hirsch, none of those statements are sufficient to establish all elements of a joint venture. Certainly, the law does not authorize the imposition of joint and several liability merely because a party states to his attorney, “[W]e have a partner...[and] he is going to be funding most of the money for this project.”

The plaintiff also points to the letter agreement as proof of the joint venture. Indeed, Hearle refers to the letter agreement as “memorializ[ing] the terms of [Klugman, Hirsch, and Wertzberger’s] partnership,” and Kessler describes it as “set[ting] forth the terms for the future JV.” However, the letter agreement fails to establish a joint venture. First, the letter agreement is silent as to certain requisite elements of a joint venture, namely, explicit provisions for the sharing of profits and losses. See Lebedev v Blavatnik, *supra* at 185-86; Shionogi Inc. v Andrx Labs, LLC, 187 AD3d 422, 424 (1st Dept. 2020); Slabakis v Schik, 164 AD3d 454, 455 (1st Dept. 2018). Second, as Kessler acknowledges, the letter agreement set forth terms of a *future* arrangement between the parties. Proof that the proposed arrangement was consummated, including the referenced operating agreement for BH Chelsea granting Wertzberger an interest therein, is conspicuously absent from the parties’ submissions. As the plaintiff knows, an agreement to agree is not an enforceable contract. See Dragon Head LLC v Elkman, 118 AD3d 424, 425 (1st Dept. 2014); Prospect Street Ventures I, LLC v Eclipsys Solutions Corp., 23 AD3d 213, 213 (2005).

Finally, the court notes that there is no indication in the record that the plaintiff represented to anyone that it viewed itself as performing legal work for the joint venture rather than for Klugman, Hirsch, and Quality alone. This distinction would have been significant not only with respect to liability for fees but also to ensure that the plaintiff was conducting itself ethically by guarding against potential conflicts of interest and protecting client confidences. For example, all parties acknowledge that in negotiating the letter agreement, the plaintiff and Wertzberger’s own counsel sat across the table from each other. The interests of Quality, Klugman, and Hirsch, on the one hand, and Wertzberger and his own entities, on the other, were apparently not aligned in that instance.

To be sure, the plaintiff appears to recognize the implicit conflicts attendant to its representation inasmuch as it has objected, in discovery, to the production to Wertzberger of numerous communications related to the work it performed, citing attorney-client privilege. Such objection would be unfounded if the work was, in fact, performed for Wertzberger as client, as the plaintiff contends. Nonetheless, the plaintiff has never explained how it differentiated between work being done for Quality, Klugman, and Hirsch, and work being done for the purported venture as a whole. Clearly, this falls far short of establishing that the terms of the retainer and alleged fee arrangement were fair, fully understood, and agreed to by the plaintiff's client.

For the foregoing reasons, the plaintiff fails to demonstrate a triable issue as to the second cause of action. While there is no doubt that the plaintiff performed work that it has not been paid for, the plaintiff provides no basis for finding an attorney-client relationship with Wertzberger or for holding him or any of the Wertzberger defendants liable for its fees. The plaintiff's second cause of action is dismissed.

IV. CONCLUSION

Accordingly, and upon the foregoing papers, it is

ORDERED that the motion of the defendants Joel Wertzberger, Horizon Blue Chelsea, LLC, Chelsea W28 I, LLC, Chelsea W28 II, LLC, BHMS W28, LLC, and BHJD W28, LLC, pursuant to CPLR 3212 for summary judgment dismissing the amended complaint is granted; and it is further

ORDERED that the amended complaint is dismissed as against Joel Wertzberger, Horizon Blue Chelsea, LLC, Chelsea W28 I, LLC, Chelsea W28 II, LLC, BHMS W28, LLC, and BHJD W28, LLC, and the Clerk shall enter judgment accordingly; and it is further

ORDERED that, the amended complaint having been dismissed as against defendant BH Chelsea Holdings, LLC, by decision and order dated March 21, 2022, the Clerk shall mark the matter disposed.

This constitutes the Decision and Order of the court.

DATED: October 12, 2022



NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON