SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. EMILY MORALES-MINERVA** **PART** **42M**

Justice

----------X

JOEL R. BRANDES,

Plaintiff,

- v -

SYD M HUSSAINI,

Defendant.

----------X

INDEX NO. 653010/2022

MOTION DATE 04/02/2024

MOTION SEQ. NO. 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

APPEARANCES:

The Law Firm of Joel R. Brandes, New York, New York (Joel R. Brandes, Esq., of counsel) for Plaintiff.

A. Cohen Law Firm, P.C. Valley Stream, New York (Avinoam Cohen, Esq., of counsel) for Defendant.

HON. EMILY MORALES-MINERVA:

In this action to recover unpaid attorney's fees, plaintiff JOEL R. BRANDES moves, pursuant to CPLR § 3212, for (1) an order granting it summary judgment on the complaint against defendant SYD M. HUSSAINI, or in the alternative, for (2) an order granting it partial summary judgment on liability and scheduling a trial on damages. Defendant opposes the motion, and cross-moves for (1) an order, pursuant to CPLR § 3211, dismissing the complaint, or in the alternative, for (2) an order, pursuant to CPLR § 3212, granting defendant summary judgment and attorneys'

fees "in an amount no less than $10,000.00 (see Rules of the Chief Administrative Judge [22 NYCRR] § 130-1.1 [governing the award of costs or imposing of sanctions]. Plaintiff submits a reply to the defendant's cross motion.

For the reasons set forth below, both plaintiff's motion and defendant's cross-motion are denied.

BACKGROUND

At or around 2020, defendant Syd M. Hussaini was experiencing a divorce, and he entered into a retainer agreement with non-party Robert G. Smith ("Smith, Esq.") for representation in that matter.[1] Among other things, as to billing, the retainer agreement between non-party Smith, Esq. provided: "to reduce the total legal fees charged . . ., whenever Mr. Smith works on the client's case with another professional staff member, the client will be billed at a 'blended rate', i.e., only for Mr. Smith's time" (see NY St Elec Filing [NYSCEF] Doc. No. 26, exhibit 1, p 4).

Thereafter, defendant received a final judgment of divorce, and perfected two appeals with Smith, Esq. representing him as counsel of record. During the appeals, Smith, Esq., sought the

[1] Batool M. Hussaini v. Syed Moinuddin Hussaini, Index No. 707985/2020

assistance of plaintiff Joel R. Brandes, Esq., to prepare appellate briefs (see [NYSCEF] Doc. No. 102, exhibit D). Smith, Esq., did not inform defendant that he was working with plaintiff on the appeal, paying plaintiff an initial $5,000.00 check for [their] collaboration" (NYSCEF Doc. No. 102, exhibit D, at 4). Non-party Smith, Esq., affirms that he did not seek defendant's approval, as he intended to pay plaintiff "out of my [Smith, Esq.'s] pocket" (NYSCEF Doc. No. 25, affidavit of Robert Smith, at 8).

Thereafter, Smith, Esq., informed defendant of plaintiff's role in the representation and provided plaintiff all documentation relevant to defendant's appeal in the matrimonial action.

Plaintiff rendered services in this context and, on September 17, 2021, e-mailed only Smith, Esq. a statement listing 66.2 hours of work and seeking $36,410.00 in legal fees (see [NYSCEF] Doc. No. 7, exhibit F). Receiving no response from Smith, Esq., plaintiff continuously attempted to contact Smith, Esq. Then, On October 4, 2021, Smith, Esq. replied in an e-mail that plaintiff not "do anything" and that he would follow up on the matter in a week (see [NYSCEF] Doc. No. 17, exhibit 2). Instead, it appears that Smith, Esq. ceased communication with plaintiff.

Consequently, plaintiff filed the subject complaint against defendant, setting forth causes of action in quantum meruit and account stated, and seeking a judgment of $31,410.00 against defendant. Plaintiff alleges that the "agreed reasonable value of [his legal] services is $36,410.00, no part of which has been paid, except the sum of $5,000 [that non-party Smith, Esq. paid], despite due demand therefore" (see [NYSCEF] Doc. No. 2, Plaintiff Complaint, p 3). Plaintiff reasoned that defendant is responsible for payment, as Smith, Esq., is defendant's agent and received an "accurate statement of the transactions between the defendant and plaintiff" on three separate occasions "without objection" (id. at 3-4).

Defendant filed an answer, denying the allegations within the complaint and affirming: "I never had any retainer with [plaintiff] Joel M. Brandes. My retainer was with [non-party] Attorney Robert G. Smith" (see [NYSCEF] Doc. No. 12, Defendant Answer).

Thereafter, plaintiff filed a motion (seq. no. 001), pursuant to CPLR § 3212 for an order granting it summary judgment, awarding plaintiff a judgment as a matter of law. The court (N. Bannon, J.S.C.) denied said motion, reasoning that plaintiff's submissions -- an unsworn affidavit and two emails from 2021 -- fell "far short" (see Decision and Order, January 24, 2023, N. Bannon J.S.C.).

Plaintiff filed a motion (seq. no. 002) to reargue the court's decision and order, and to "remove Robert Smith, Esq. from electronic participation in this action." Upon review, the Court (N. Bannon, J.S.C.) issued an order, denying plaintiff's motion entirely (see Decision and Order, June 30, 2023, N. Bannon J.S.C.).

Now, Plaintiff moves (motion seq. no. 005) -- essentially a third time -- pursuant to CPLR § 3212, for an order granting it summary judgment on the complaint against defendant or in the alternative, partial summary judgment on liability. Defendant opposes the motion, and cross-moves for an order pursuant to CPLR § 3211, granting it dismissal of plaintiff's complaint. In the alternative, defendant moves for an order, pursuant to CPLR § 3212, granting him summary judgment and award him "an amount no less than $10,000.00 in counsel fees, costs and/or sanctions" (Rules of the Chief Administrative Judge [22 NYCRR] § 130-1.1 [governing costs and sanctions]).

ANALYSIS

Plaintiff's Motion for Summary Judgment

As this is essentially plaintiff's third application for summary judgment, let it be known that "[s]uccessive summary judgment motions should only be entertained where there is a

showing of newly discovered evidence or other justification such as an intervening appellate decision in the same case that clarifies or changes the controlling law" (Amill v Lawrence Ruben Co., Inc., 117 AD3d 433, 433-34 [1st Dept 2014]). As no such showing exists here, plaintiff's repeated summary judgment motion is dismissed without consideration.

Defendant's Cross-Motion

The Court will first address defendant's application for an order, pursuant to CPLR § 3211 (a) (7), dismissing plaintiff's complaint for failure to state a claim.

It is well-settled that, on a motion to dismiss for failure to state a cause of action, the complaint must be liberally construed, and courts must provide a plaintiff with every favorable inference (see 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144, 152 [2002]; Leon v Martinez, 84 NY2d 83, 87 [1994]; CPLR 3026 [governing construction of pleadings]; see also Held v Kaufman, 91 NY2d 425 [1998] [providing "every favorable inference must be afforded the facts alleged in the complaint and in the various motion papers" plaintiff submits]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in

determining a motion to dismiss" (EBC I, Inc. v Goldman, Sachs & Co., 5 NY3d 11, 19 [2005]).

"[T]he criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one" (Leon, 84 NY2d at 88 [internal quotation marks and citations omitted]; see also Carlson v American Intl. Group, Inc., 30 NY3d 288, 297-298 [2017] [restating the standard]). Unless a claimed material fact is shown to be "not a fact at all and unless it can be said that no significant dispute exists" dismissal is generally not warranted (Guggenheimer v Ginzburg, 43 NY2d 268, 275 [1977]; see also Foley v D'Agostino, 21 AD2d 60, 64-65, [1964]).

Here, defendant's contention that a dismissal is warranted because he did not have a contract with plaintiff is misplaced. Plaintiffs two causes of action are for quantum meruit and account stated, which are "quasi contract theor[ies] of recovery, and '[are] obligation[s] imposed by equity to prevent injustice, in the absence of an actual agreement between the parties concerned'" (see Georgia Malone & Co, Inc. v. Rieder, 86 AD3d 406, 408 [1st Dept 2011] [emphasis added]; citing IDT Corp. v. Morgan Stanley Dean Witter & Co., 12 NY3d 132, 142 [2009]).

Defendant's motion, in the alternative, for an order, pursuant to CPRL § 3212, granting it summary judgment is also unavailing.

On a motion for summary judgment, the moving party must 'make a prima facie showing of entitlement to judgment as a matter of law, tendering [evidentiary proof in admissible form] to demonstrate the absence of any material issues of fact'" (Nomura Asset Capital Corp. v Cadwalader, Wickersham & Taft LLP, 26 NY3d 40, 49 [2015], citing Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]; CPLR 3212[b]; Friends of Animals v Associated Fur Mfrs., 46 NY2d 1065, 1066, [1979] [providing movant must support the subject application with "'evidentiary proof in admissible form'"]). It is black letter law that such proof shall include the "affidavit" of a person having personal knowledge of the facts, "a copy of the pleadings" and "other available proof, such as depositions and written admissions" (see CPLR 3212 [b]).

The court must view the facts in the light most favorable to the non-movant, giving it the benefit of all reasonable inferences (see De Lourdes Torres v Jones, 26 NY3d 742 [2016]). If the moving party makes the requisite showing, the non-moving party then has the burden "'to establish the existence of [factual issues] which require a trial of the action'" (id. at 763, citing Vega v Restani Constr. Corp., 18 NY3d 499, 503 [2012], quoting Alvarez, 68 NY2d at 324).

Here, the complaint is premised upon the law of agency, and allegations that Smith, Esq., retained plaintiff as counsel for

defendant, making defendant responsible to pay for plaintiff's assistance of Smith, Esq., in perfecting the appeals in defendant's matrimonial action. "[W]here [as here] the circumstances raise the possibility of a principal-agent relationship, but no written authority of the agent has been proven, questions of agency and of its nature and scope ... are questions of fact" (Bostany v Trump Org. LLC, 73 AD3d 479 [1st Dept 2010], quoting Fogel v. Hertz, Intl., 141 AD2d 375, 376, [1988]).

Factual determinations and their relative weight are for the trier of fact and preclude the issuance of summary judgment (see generally Friends of Thayer Lake LLC v Brown, 27 NY3d 1039, 1044 [2016], citing Adirondack League Club v Sierra Club, 92 NY2d 591, 600 [1998]).

Finally, the Court declines defendant's request for sanctions in the form of attorney's fees. "The Rules of the Chief Administrator of the Courts grant the court discretion to impose financial sanctions and/or costs on a party or the party's attorney for engaging in frivolous conduct" (Grozea v. Lagoutova, 67 AD3d 611, 611 [1st Dept. 2009], citing 22 NYCRR § 130-1.1 [a], [c]). "Frivolous conduct" is described as conduct that is "completely without merit in law and cannot be supported by a reasonable argument . . . is undertaken primarily to delay or prolong the resolution of the litigation, or to

harass or maliciously injure another" (22 NYCRR § 130-1.1[c] [1-3]).

Applying these principles, defendant's contention that plaintiff presents "no legal or factual justification warranting the commencement of this action" do not warrant sanction (see [NYSCEF] Doc. No. 98, Memorandum of Law in Support of Cross-Motion, p 10). Further, while plaintiff filed successive motions for summary judgment, neither that nor plaintiff's commencement of this action, amount to abuse of the judicial process (see Sarkar v Pathak, 67 AD3d 606 [1st Dept 2009] [providing that the imposition of sanctions requires a persistent pattern of repetitive or meritless motions].

However, let it be clear that a further meritless, careless, misguided, and hence wasteful motion, on any ground, for any relief, may result in sanctions (see 22 NYCRR § 130-1.1(a) and (c)(1); see also Zappin v Comfort, 146 AD3d 575, 575 [1st Dept 2017].

Accordingly, it is

ORDERED that plaintiff JOEL R. BRANDES' motion (seq. no. 005) is DENIED in its entirety; it is further

ORDERED that defendant SYD M. HUSSAINI's cross-motion is also DENIED in its entirety; and it is further

ORDERED that the clerk shall mark the file accordingly.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT

7/25/2024
DATE

EMILY MORALES-MINERVA, J.S.C.

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