Fishkin v Taras
2006 NY Slip Op 30646(U)
November 30, 2006
Supreme Court, New York County
Docket Number: 600989/02
Judge: Carol R. Edmead
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SCANNED ON 12/5/2006

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD Justice

PART 35

Fishkin, Howard

- v -

Taras, Bert

INDEX NO. 600989/02

MOTION DATE 8/14/06

MOTION SEQ. NO. 006

MOTION CAL. NO. ____

The following papers, numbered 1 to ____ were read on this motion to/for ____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that Defendants' motion for summary judgment dismissing the complaint in its entirety is granted, and the complaint is dismissed; and it is further

ORDERED that the Plaintiffs' cross-motion to compel discovery is denied; and it is further

ORDERED that the Clerk enter judgment accordingly; and it is further

ORDERED that Defendants' serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

FILED
DEC 05 2006
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 11/30/06

HON. CAROL EDMEAD J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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HOWARD FISHKIN and MARTIN MARLOW,

Plaintiffs,

-against-

BERT TARAS and BERT TARAS, P.C.,

Defendants.

----------x

Index No. 600989/2002

DECISION/ORDER

FILED
DEC 05 2006
COUNTY CLERK'S OFFICE
NEW YORK

HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM OF DECISION

Before this court is the motion of Defendants in the above-captioned action for summary judgment pursuant to CPLR 3212 and Plaintiff's cross-motion to compel discovery. For the reasons set forth below, the motion is granted and the cross-motion is denied.

BACKGROUND

The above-captioned action was commenced on March 12, 2002. It is a fee dispute between attorneys in which Howard Fishkin and Martin Marlow ("Plaintiffs")[1] claim that they were allegedly hired, as outside counsel, by Bert Taras and Bert Taras, P.C. ("Defendants") pursuant to an oral agreement to render legal services on personal injury cases in which Defendants were retained by the client on a contingency fee basis. The verified complaint contains nine (9) causes of action against Defendants, one for each personal injury case in which non-payment of legal fees is claimed. Fishkin claims non-payment in of fees in all nine (9) cases and Marlow claims non-payment in the first three (3) cases. Plaintiffs demand judgment against

[1] Plaintiffs have filed separate opposition papers to Defendants' motion for summary judgment. As such, the court will take their arguments in turn. Any reference to "Plaintiffs" refers to joint filings and any reference to "Fishkin" or "Marlow" refers to their individual filings.

Defendants as follows:

a. On the first ("Brooks") cause of action in the sum of $153,000;

b. On the second ("Colon") cause of action in the sum of $30,000;

c. On the third ("McClusky") cause of action in the sum of $10,300;

d. On the fourth ("Mishko") cause of action in the sum of $41,600;

e. On the fifth ("Brown") cause of action in the sum of $7,400;

f. On the sixth ("Petri") cause of action in the sum of $13,200;

g. On the seventh ("Quarto") cause of action in the sum of $32,400;

h. On the eighth ("Gancarz") cause of action in the sum of $16,800;

i. On the ninth ("Kley") cause of action in the sum of $4,333.

Defendants move pursuant to CPLR 3212 for summary judgment dismissing the complaint in its entirety on the grounds that: (1) Plaintiffs failed to file retainer statements in all of their causes of action pursuant to 22 N.Y.C.R.R. § 603.7(a)(3), which precludes them from recovering any legal fees herein; (2) Marlow lacks standing to sue for breach of contract on the first ("Brooks"), second ("Colon"), and third ("McClusky") causes of action and has thus, failed to state a cause of action; (3) Fishkin lacks standing to sue for breach of contract on the fourth ("Mishko") and fifth ("Brown") causes of action and thus, failed to state a cause of action; (4) Fishkin is not entitled to seek relief based on *quantum meruit* in the sixth ("Petri"), seventh ("Quarto"), and eighth ("Gancarz") causes of action and thus, failed to state a cause of action; (5) Fishkin is not entitled to seek relief on the eighth ("Gancarz") cause of action because under the parties' agreement, he is not entitled to legal fees on cases that are not successfully completed.

DISCUSSION

To obtain summary judgment, the movant must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor (CPLR 3212 [b]). It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action ... has no merit"(CPLR 3212 [b]) sufficient to warrant the court as a matter of law to direct judgment in his or her favor (*Bush v St. Claire's Hosp.*, 82 NY2d 738, 739 [1993]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Wright v National Amusements, Inc.*, 2003 N.Y. Slip Op. 51390(U) [Sup. Ct. New York County, Oct. 21, 2003]). This standard requires that the proponent of a motion for summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinder*, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11, [1st Dept 2002]). Thus, the motion must be supported "by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions" (CPLR 3212 [b]). A party can prove a *prima facie* entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman, supra*; *Prudential Securities Inc. v Rovello*, 262 AD2d 172 [1st Dept 1999]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR 3212 [b]). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden

shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman, supra*, 49 NY2d at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546 [1st Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman, supra* at 562). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Alvord and Swift v Steward M. Muller Constr. Co*, 46 NY2d 276, 281-82, [1978]; *Fried v Bower & Gardner*, 46 NY2d 765, 767 [1978]; *Platzman v American Totalisator Co.*, 45 NY2d 910, 912 [1978]; *Mallad Const. Corp. v County Fed. Sav. & Loan Assn.*, 32 NY2d 285, 290, [1973]; *Plantamura v Penske Truck Leasing, Inc.*, 246 AD2d 347 [1st Dept 1998]).

I. Retainer Statement

Defendants argue that they are entitled to summary judgment because Plaintiffs did not file retainer statements with the New York State Office of Court Administration ("OCA") as required by 22 N.Y.C.R.R. § 603.7(a)(3) and, thus, are not entitled to payment of legal fees.

In Plaintiffs' response to Defendants' interrogatories, Plaintiffs maintain that the filing of a retainer statement is not a condition precedent to receiving a legal fee (Q. 4-5). Yet, in response to the motion, Marlow contends that retainer statements were filed in all three causes of action to which he is a party, namely the Brooks, Colon, and McClosky matters. And, Fishkin now concedes that he was required to file retainer statements for the cases in which Defendants retained him (Opp. ¶3). As such, Fishkin maintains that he filed retainer statements in five of the

nine causes of action, namely, the first ("Brooks"), second ("Colon"), third ("McClusky"), seventh ("Quarto"), and ninth ("Kley") causes of action, and that retainer statements were not filed in the remaining four causes of action because Defendants did not advise him of the filing of their retainer statements or code numbers.

The Appellate Division in each Department is authorized to promulgate rules regarding the conduct of attorneys and law firms (22 N.Y.C.R.R. §§ 603.1 et seq.). Accordingly, the First Department regulates contingent fee arrangements concerning actions for personal injuries, property damage, wrongful death, loss of services resulting from personal injuries, and claims in connection with condemnation or change of grade proceedings (22 N.Y.C.R.R. § 603.7). Under § 603.7(a)(3):

> An attorney retained by another attorney, on a contingent fee basis, as trial or appeal counsel or to assist in the preparation, investigation, adjustment or settlement of any such action, claim or proceeding shall, within 15 days from the date of such retainer, sign personally and file with [OCA] a written statement of such retainer in the manner and form as [set forth in subsection (a)(2)], which statement shall also contain particulars as to the fee arrangement, the type of services to be rendered in the matter, the code number assigned to the statement of retainer filed by the retaining attorney and the date when said statement of retainer was filed.

Thus, pursuant to the rules of the First Department, an attorney who is retained by another attorney on a contingency fee basis in a personal injury action must file a retainer statement with OCA within 15 days of being retained.[2] The purpose of requiring the filing of retainer statements in the aforementioned actions is to protect the public from excessive and unconscionable agreements (1B Carmody-Wait 2d § 3:429).

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[2] Similar rules concerning contingent fees have been promulgated by the Second Department (22 N.Y.C.R.R. § 691.20); the Third Department (22 N.Y.C.R.R. § 806.13); and the Fourth Department (22 N.Y.C.R.R. § 1022.31).

Additionally, this is not a new rule with which members of the bar may not yet be familiar.[3]

Courts have held that the failure of an attorney [or firm] to file a retainer statement pursuant to § 603.7(a)(3) is grounds for rejecting that attorney's [or firm's] claim for a share of the ultimate fee (*see Rabinowitz v Cousins*, 219 AD2d 487, 487 [1st Dept 1995]; *see also Klein Calderoni & Santucci, LLP v Bazerjian*, 800 NYS2d 348, 348 [NY Sup Ct 2005]; 7 N.Y. Jur. 2d Attorneys at Law § 213). Additionally, the Court notes that § 603.7(a)(3) is silent as to an attorney's ability to cure. Moreover, a violation of the appellate division rules has been held to be a violation of the rules of professional conduct subjecting attorneys to a range of punishments from censure to disbarment (*see In re Aranda*, 32 AD3d 58 [1st Dept 2006]; *In re Schmell*, 27 AD3d 24 [1st Dept 2006] [attorney disbarred for, among other things, failing to file retainer statements pursuant to 22 N.Y.C.R.R. § 603.7]; *In re Lenoir*, 287 AD2d 343 [1st Dept 2001]; *Matter of Wright*, 110 AD2d 274 [1st Dept 1985] [attorney disbarred for, among other things, failing to file retainer statements pursuant to 22 N.Y.C.R.R. § 603.7]; *Aponte v Raychuck*, 140 Misc 2d 864, 868 [Sup Ct New York County 1988], affd. 559 NYS2d 255 [stating that the appellate division may find a violation of the rules of professional conduct where an attorney has violated the appellate division's rules]; *Matter of Laskorski*, 630 NYS2d 561 [2d Dept 1995] [attorney suspended from the practice of law for, among other things, failing to prepare retainer statement for filing with OCA in a personal injury case pursuant to 22 N.Y.C.R.R. § 691.20]; *Matter of Benjamin*, 611 NYS2d 258 [2d Dept. 1994] [attorney who failed to file certain retainer

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[3] *See* 22 N.Y.C.R.R. § 603.7 Historical Note: Sec. repealed, new filed Feb. 18, 1975; amds. filed: Nov. 10, 1977; Jan. 13, 1987; June 29, 1989; June 24, 1993; March 27, 1995; May 6, 1998; July 6, 2004; Nov. 1, 2004 eff. Nov. 1, 2004. Amended (a)(2), (b)(2).

statements with OCA was guilty of serious professional misconduct]; *Matter of Kuriakose*, 576 N.Y.S.2d 293 [2d Dept. 1991] [attorney's failure to file retainer statement with OCA for personal injury action he was retained to handle as required by 22 N.Y.C.R.R. § 691.20, among others charges, supported disbarment]; *see also Ethics for Personal Injury and Mass Tort Lawyers*, 90 PLI/NY 145 [2000]).

It is a well-settled principle in New York that rules and regulations designed to protect the public should be strictly enforced (*Rabinowitz v Cousins*, 219 AD2d 487, *supra* [stating that the primary purpose of 22 NYCRR 603.7 is protection of the public]). Upon a plain reading of § 603.7(a)(3) it is apparent that the ultimate burden is on the attorney being retained to take all necessary steps in order to comply with the rule. The language, "[a]n attorney retained by another attorney, on a contingent fee basis, ... shall, within 15 days from the date of such retainer, sign personally and file with [OCA]..." makes it abundantly clear that Plaintiffs, not Defendants, had an affirmative duty to act.

The submissions indicate that Fishkin filed retainer statements in the Brooks (first cause of action), Colon (second cause of action), and McClusky (third cause of action) matters. Unlike these Brooks, Colon and McClusky matters, however, the retainer statement relating to the Kley (ninth cause of action) matter does not bear any filing stamp from OCA. And, Fishkin failed to submit any evidence indicating that a retainer statement in support of the Quarto (seventh cause of action) matter was filed. Of the Brooks, Colon, and McClusky matters for which retainer statements were filed by Fishkin, none were filed within the 15-day period as required by § 603.7(a)(3). The amended retainer statement in the Brooks matter, the retainer statement and the amended retainer statement in the Colon matter, as well as the retainer statements in the

McClusky matter, were all filed several *years* after Plaintiffs commenced the within action. Notably, the amended retainer statements in the Brooks and Colon matters, as well as the retainer statement in the third McClusky matter were all filed on June 14, 2006, *after* Defendants' instant motion for summary judgment was filed. Fishkin fails to offer any explanation for the late filings, other than to say that he misinterpreted the law (Opp. 3). However, such excuse is belied by the fact that a retainer statement was filed in the Brooks cause of action on October 31, 1994, thereby evidencing Fishkin's awareness of the rule. The subsequent filings *nunc pro tunc* demonstrate a disregard for the Appellate Division's rules and quite simply, sloppy lawyering. Thus, since retainer statements were not timely filed in the Brooks, Colon, and McClusky matters and in light of the absence of any proof that retainer statements were timely filed in connection with the Quarto and Kley matters, the first, second, third, seventh, and ninth causes of action may not be maintained.

Furthermore, Fishkin did not address whether he filed retainer statements in the fourth ("Mishko"), fifth ("Brown"), sixth ("Petri"), and eighth ("Gancarz") causes of action. Rather, in a subsequent cross-motion to compel discovery, Fishkin conceded that he did not file retainer statements in those causes of action (Cross Mtn. 2). He maintains that his failure to file was because Defendants did not advise him that they filed retainer statements [pursuant to § 603.7(a)(1)] or provide him with the retainer code numbers (Cross Mtn. 2). However, Fishkin neither alleges that he sought this information when his association with Defendants began, nor that Defendants refused to provide it during the course of the association. Rather, Fishkin alleges that this information has not been provided during discovery in the instant case (Cross Mtn. 2-3). Defendants deny this and maintain that all records have been provided to and copied by Plaintiffs

(Affirmation in Opp. to Cross Mtn.).

The issue of whether Defendants have complied with discovery is irrelevant because Fishkin was required to file retainer statements within 15 days of being retained by Defendants. It was incumbent upon Fishkin to obtain the necessary information from Defendants, the clients, or by an order of the court when the association with Defendants began. As to the fourth ("Mishko"), fifth ("Brown"), sixth ("Petri"), and eighth ("Gancarz") causes of action, Fishkin has not alleged facts to indicate that he attempted to comply with the First Department's rules prior to the start of the instant litigation. Thus, in light of the absence of any proof that retainer statements were timely filed in connection with the Mishko, Brown, Petri, and Gancarz matters, the fourth, fifth, sixth, and eighth causes of action may not be maintained.

The following chart represents the Court's findings for matters in which Fishkin was retained by Defendants and when the retainer statements were filed by Fishkin.

Cause of Action	**Date Retained by Defendants**	**Date Retainer Statement was Filed**	**Known Code Numbers**
1. Brooks	March 1993	• October 31, 1994 (amended June 14, 2006 to include Marlow)	3966522 (original filing number) 3159833 (amended filing number)
2. Colon	March 1993	* July 29, 2005 (amended June 14, 2006 to include Marlow)	3159832 (amended filing number)
3. McClusky	March 1993	* June 14, 2006	3159831

4. Mishko	February 1994	• Not filed	
5. Brown	November 1994	• Not filed	
6. Petri	July 1999	• Not filed	
7. Quarto	July 1993	* Not filed	
8. Gancarz	July 1993	• Not filed	
9. Kley	July 1994	* July 29, 2005 (allegedly)	Not provided
see Verified Complaint 1-17	*see* Verified Complaint 1-17	* *see* Opp. Exhibit A • *see* Opp. 2	*See* Opp. Exhibit A

Similarly, Marlow states that he has filed retainer statements in the first ("Brooks"), second ("Colon"), and third ("McClusky") causes of action, yet he provides no documentary evidence of such filings or indications of when such filings took place (Marlow Opp. ¶4). Notably, the retainer code numbers that he provides are within the same sequence of retainer code numbers issued to Fishkin on June 14, 2006.[4] Since the Court concludes that Fishkin did not timely file retainer statements for the causes of action to which Marlow is a party, it may be reasonably inferred that Marlow's filings were also untimely since they appear to be so close sequentially to Fishkin's filings.

Although not cited by Plaintiffs, *Matter of Estate of Abreu*, (168 Misc2d 229 [Surrogate Court Bronx County 1996]) provides an instance where the untimely filing of retainer statements did not preclude a claim for attorneys' fees. In *Abreu*, a fee dispute between attorneys centered on the objectant's failure to timely file a retainer statement in the case. In one instance, the

[4] Fishkin: Brooks (3159833); Colon (3159832); McClosky (3159831)
Marlow: Brooks (3159830); Colon (3159828); McClosky (3159829)

objectant filed the retainer statement at least three months late, and in another instance, six years after the objectant discovered that it was inadvertently placed in the case's litigation file instead of being mailed to OCA. The court held this was a reasonable excuse for the late filing (*Abreu*, 168 Misc 2d at 234). Relying on CPLR 2004, the court reasoned that it had the discretion "except where otherwise prescribed by law ... (to) extend the time fixed by any ... rule ... upon such terms as may be just and upon good cause shown, whether the application for extension is made before or after the expiration of the time fixed." Further, the court cited to CPLR 2005, which provides that law office failure may be a justifiable excuse for delay in an appropriate case, and noted that the retainer statement filing requirements are not interpreted as creating a rigid statute of limitations. The Surrogate Court expressly distinguished *Rabinowitz v Cousins, supra*, stating that counsel had not been suspended from practicing law, filed a retainer statement prior to the hearing date of its claim for a fee, "*and it has established a justifiable excuse for the failure to timely file*" (emphasis added), in that the failure to timely file the retainer statement resulted from an inadvertent placement of the retainer statement in its litigation file instead of being mailed.

No similar excuse is provided herein. While it is understandable that mistakes happen and documents can be misplaced, the instant case is entirely dissimilar than *Abreu*. In the instant case, Plaintiffs never plead any sort of mistake or error, and failed to establish any good cause for failing to timely file the retainer statements. Rather, the submissions indicate a neglect to comply with the regulatory scheme set in place to monitor the legal profession. As such, the court recognizes no basis to apply the exception provided in *Abreu* beyond its own unique circumstances to the matter at hand.

CONCLUSION

Plaintiffs do not provide an adequate explanation for their failure to conform to the First Department's rules. Nor do Plaintiffs contend that acceptance of the late filings by OCA constituted an administrative determination that such retainer statements could be filed *nunc pro tunc*. Plaintiffs' failure to file the retainer statements timely is inexcusable.

In light of the above, the Court does not reach Defendants' remaining arguments for summary judgment.

Accordingly, Defendants' motion for summary judgment dismissing the complaint is granted, and Plaintiffs' cross-motion is denied as moot.

Based on the foregoing, it is hereby

ORDERED that Defendants' motion for summary judgment dismissing the complaint in its entirety is granted as to all of Plaintiffs causes of action, and the complaint is dismissed; and it is further

ORDERED that Plaintiff's cross-motion to compel discovery is denied; and it is further

ORDERED that the Clerk enter judgment accordingly; and it is further

ORDERED that Defendants' serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: November 30, 2006

Hon. Carol Robinson Edmead, J.S.C.

FILED
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