Lazer, Aptheker, Rosella & Yedid. P.C. v Duffy
2012 NY Slip Op 33626(U)
August 9, 2012
Nassau Dist Ct
Docket Number: CV-000019-11
Judge: Fred J. Hirsh
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DISTRICT COURT OF NASSAU COUNTY
FIRST DISTRICT: CIVIL PART 3

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LAZER, APTHEKER, ROSELLA & YEDID, P.C.,

Plaintiff,

against

JAMES P. DUFFY III,

Defendant.

---x

INDEX NO. CV-000019-11

Present:

Hon. Fred J. Hirsh

DECISION AFTER TRIAL

FACTS

Plaintiff, Lazer, Aptheker, Rosella & Yedid, P.C. ("LARY") is a law firm. It sues to recover the balance due on a legal fee.

James P. Duffy, III ("Duffy") is an attorney and a former client of Duffy.

On April 24, 2009, the Hon. William R. LaMarca issued an order in an action captioned We're Associates Company against James P. Duffy, Esq. ("We're Action) adjudging Duffy to be in criminal contempt. Justice LaMarca's order fined Duffy and directed his immediate arrest and incarceration for a period of one week..

Upon being served with a copy of Justice LaMarca's order, Duffy contacted several law firms including LARY. Duffy wanted to make an application to vacate Justice LaMarca's order adjudging him to be in criminal contempt..

Justice LaMarca's order that adjudged Duffy to be in contempt was granted without opposition.

Duffy believed Justice LaMarca's contempt order should be vacated because the motion papers served by We're' Associate's attorney were mailed to Duffy at his wife's address and at the address of his old, dissolved law firm. Duffy claimed he did not receive mail at either address. He asserts the attorneys for We're Associates could have properly served him because he had provided them with his mailing address at a deposition conducted in supplementary proceedings in the We're Action. He also asserts the

attorneys for We're knew exactly where to find him because they served him personally with a copy of Justice LaMarca's contempt order within one week of its being entered.

Duffy also claims he had a meritorious defense to the contempt application.

We're Associates had obtained a money judgment against Berg & Duffy, LLP for unpaid rent for office space Berg & Duffy had rented at 3000 Marcus Avenue, Lake Success, New York. Berg & Duffy, LLP was a law firm in which Duffy had been a member. The judgment was not satisfied.

Berg & Duffy, LLP relocated from the premises leased from We're Associates to another location. Berg & Duffy, LLP dissolved in 2007.

Duffy testified at a deposition in supplementary proceedings in the We're Action. The subpoena served upon Duffy directed him to appear with and produce documents relating to Berg & Duffy, LLP.

Duffy appeared at the deposition without any documents. Duffy testified many of the documents We're sought had been discarded when Berg & Duffy moved from 3000 Marcus Avenue. The remaining documents were in storage. Duffy had not looked in storage to determine which if any of the documents that had been placed in storage were responsive to We're's demand.[1]

The deposition was adjourned to permit Duffy to review and produce the documents that had been placed in storage. When the deposition re-commenced, Duffy advised We're attorney none of the requested documents existed. Duffy advised We're's attorneys any documents that may have existed had been destroyed in a flood in the basement of his wife's home. He provided We're's attorney with an affidavit to that affect.

By retainer agreement dated May 12, 2009, Duffy retained LARY to represent him in connection with an application to vacate the order of Justice LaMarca adjudging Duffy

[1]Duffy claims he advised We're's attorneys he did not have any of Berg & duffy's banking records. However, he provided We're's attorneys with the name and address of the bank at which Berg & Duffy maintained its accounts. He asserts We're's attorneys could have obtained Berg & Duffy's banking records via subpoena from the bank.

Duffy further testified that he did not have copies of Berg & Duffy's income tax returns. The returns had been retained by the firms accountant who was deceased. Duffy claims We're's attorneys never requested he execute an authorization permitting them to obtain copies of the tax returns directly from the IRS.

to be in contempt. The agreement set forth the hourly rates Duffy would be charged and outlined the disbursements for which reimbursement would be sought.

The retainer agreement provided that if the retainer amount was exhausted, Duffy would be billed monthly in accordance with the terms of the retainer.

On May 20, 2009, LARY prepared and filed an order to show cause seeking to vacate Justice LaMarca's April 24, 2009 order. The order to show cause provided for a stay of enforcement of Justice LaMarca's April 24, 2009 order pending the hearing and determination of the order to show cause. Plaintiff in the We're Action vigorously opposed the motion. LARY prepared, served and filed a reply. Justice Lamarca issued an order dated September 9, 2009 vacating his April 24, 2009 order in its entirety and directing that all further applications seeking hold Duffy in contempt be made by order to show cause.

LARY claims based upon the time expended and the disbursements incurred it expended the $10,000 retainer. LARY claims it is owed $2669.90 for legal fees and disbursements incurred in its representation of Duffy.

David Lazer ("Lazer") testified to the services provided, the time expended and the disbursements incurred. He also testified to LARY's billing procedures and practices.

Lazer first met with Duffy at Duffy's Manhattan office on May 12,2012. Duffy and Lazer both testified the meeting was held late in the day at Duffy's office because Lazer was in New York on other business that day.

Duffy testified he was impressed with Lazer and decided to retain his firm. At the time, Duffy said he was advised LARY would require at $10,000 retainer. Duffy testified he did not object to the retainer amount but asked Lazer to speak with him about the fee should the entire retainer be expended. Duffy testified Lazer assured him he would call and discuss fee should the fee exceed $10,000.

Lazer did not recall having a conversation with Duffy regarding consulting with Duffy on the fee should the amount exceed $10,000. Lazer testified the retainer did not cap the fee and did not make the fee contingent upon the outcome the matter.

Even though Duffy reviewed the retainer before signing it, he did not request the retainer contain a cap on the fee or a provision regarding consultation should the fee exceed $10,000.

LARY sent Duffy a bill dated June 25, 2009 in the sum of $1303.98. This bill indicated the retainer amount had been fully expended. Duffy paid this bill on July 24, 2009.

Duffy testified that upon receiving this bill he called Lazer to discuss further billing above the retainer amount. Duffy testified Lazer never returned his calls.

Lazer testified to LARY's billing practices. An attorney working on the matter is supposed to enter his or her time in the computer on a daily basis. The computer prepares a pre-bill which contains the name of the attorney who performed the work, the date the work was performed, the nature of the work and the time expended. The information on the pre-bill is reviewed by the partner responsible for billing the file and the information is then merged into the bill.

Lazer testified that all the time reflected on the bills is accurate and the charges are correct.

Duffy asserts he was billed $1950 for work performed by Robin Abramowitz and Lazer prior to the time LARY was retained. Duffy claims he was not advised that he would be billed for work prior to the time he executed the retainer.

Duffy also claims LARY did a significant amount of work that was unnecessary. He claims the matter was a simple application to vacate an order that had been entered on default. The crux of the application was Duffy had not been served with the motion papers that had resulted in the issuance of the order adjudging him to be in contempt and he had a meritorious defense to the action. He asserts LARY raised extraneous and unnecessary issues in the papers submitted in support of the original order to show cause. This resulted in We're"s attorneys filing voluminous opposition to the motion addressing the extraneous issues. This resulted in LARY spending additional time reviewing the papers and preparing the reply.

Duffy also claims he was billed for unnecessary services. Lazer testified he asked his partner Joseph Savino to speak with We're's attorneys in because Savino had a good relationship with them, Lazer hoped that having Savino speak with We're's attorneys might smooth over some of the animus between Duffy and We're's attorneys.

Duffy claimed there was no need for this. Duffy testified We're's attorneys were overly aggressive in pursuing this matter and had engaged in "sharp practice" bordering on the unethical. Nothing anyone could do would change the situation.

Duffy also believed he was overbilled because the matter was far more straightforward than LARY made it. Duffy testified that he believed much of the legal research LARY performed was unnecessary given the issues involved in this matter.

Duffy also asserted he should not have been billed for settlement discussions between LARY and We're's attorney. Duffy testified he told Lazer at the very outset he would not pay anything to settle the We're Action. The judgment had been obtained a Berg & Duffy, LLP. He had not been a party to the action. He did not have any personal liability. He would not pay even a nominal amount to settle the matter. Duffy believed Lazer should have advised We're's attorneys at the very outset Duffy was unwilling to settle the matter.

Duffy never gave LARY any settlement authority. Therefore, there was no need to discuss settlement.

Lazer countered by stating he could not prevent We're's attorneys from calling or discussing proposing settlement of the We're Action.

Duffy also believed the court could trust the accuracy of LARY's billing or pre-bills. Lazer testified that if he or Abramowitz were discussing the matter, after the discussions were complete, they would decide who would bill and/or how much time each attorney would bill. Similarly, if Lazer and Abramowitz had a telephone conversation with Duffy, after the telephone call, they would decide which of the attorneys would bill what amount for the telephone call. For example, if Duffy had a half an hour telephone call with Lazer and Abramowitz, at the end of the call, Lazer and Abramowitz would decide whether both would bill for the entire call, one would bill for the entire call or whether they would allocate the time between them. Duffy could be billed up to one hour - ½ an hour for both - ½ an hour for either - or some combination. Duffy could be billed different amounts for the same service on different days depending upon the manner in which Lazer and Abramowitz chose to allocate the time.

Duffy also testified that Lazer did not contact him to discuss the matter after the fee exceed the $10,000 retainer. Duffy claims when he received the bill for $1303.98, which he paid, he called to speak to Lazer regarding this matter and Lazer never returned the call.

Lazer countered that he had no recollection of this "understanding". The retainer specifically states the fees could exceed $10,000 and if the fees did exceed this amount, Duffy would be billed for this amount. Duffy never made any changes to the retainer provided to him by LARY and never called to revise the retainer to include such a provision.

While Duffy believed the charges were improper, he could not point to a single

instance where the work for which he was billed was not performed or where he was billed in a manner not in accordance with the retainer.

DISCUSSION

As of March 4, 2002, an attorney who expects a fee on a matter to be in excess of $3000 must provide the client with a written letter of engagement or obtain a written retainer before commencing representation or within a reasonable time thereafter. 22 NYCRR Part 1215. The written letter of engagement or written retainer must explain (1) the scope of the legal services to be provided, (2) the attorneys' fees to be charged, expenses and billing practices and (3) where applicable, the client's right to arbitrate fee disputes. 22 NYCRR 1215(1)(b)(1)(2). There is no dispute as to LARY's compliance with the requirements that they advise the client of the right to arbitrate or that Duffy did not request fee dispute arbitration.

As a matter of public policy, courts must pay particular attention to fee arrangements between attorneys and their clients. Jacobson v. Sassower, 66 N.Y.2d 991 (1985). The attorney must show the retainer agreement is fair and reasonable and the terms are fully known and understood by the client. *Id.* See, Shaw v. Manufacturers Hanover Trust Co., 68 N.Y.2d 172 (1986).

The reasonableness of an attorney's fee is always subject to court scrutiny. Bizar & Martin v. U.S. Ice Cream Corp., 228 A.D.2d 588 (2nd Dept. 1996). Even in the absence of fraud or undue influence, a legal fee agreement may be invalid if it appears the attorney got the better of the bargain. Smitas v. Ricket, 102 A.D.2d 928 (3rd Dept. 1984).

The terms of the retainer agreement must be construed most favorably for the client. Shaw v. Manufactures Hanover Trust Co., supra; Jacobson v. Sassower, *supra*; and Bizar & Martin v. U.S. Ice Cream Corp.,

In billing a client, an attorney must exercise billing judgment. Francis v. Atlantic Infiniti, Ltd., 34 Misc.3d 1221(A) (Sup.Ct. Queens Co 2012). A client should not be required to pay for excessive, unnecessary or redundant services. *Id.* The court must also consider whether the work was "legal work" that had to be performed by an attorney or whether the services could be provided by a non-lawyer. *Id.*

The court is not required to accept the attorney's time records at face value when determining a fee. Matter of Vitole, 215 A.D.2d 765 (2nd Dept. 1995).

The court has fully reviewed the pre-bills and bills and finds a limited number of items for which Duffy should not have been billed.

Lazer should not have billed Duffy for the initial consultation. Duffy was not advised that there would be a fee for the consultation. The retainer does not provide that Duffy would be charged for the initial consultation. Lazer would have met with Duffy even if Duffy had not retained LARY. If Lazer wanted to charge for the consultation, he should have advised Duffy there would be a fee for the consultation before the parties met. Therefore, Duffy should not have been required to pay for this consultation. The amount due is reduced by the amount Duffy was billed for this consultation, $975.

There was also no reason to have brought Joseph Savino into this matter. Duffy made it very clear from the outset that he had not interest in settling this matter. The history of the We're Action and the subsequent supplementary proceedings and contempt application should have made it clear to LARY that this matter was going to have be judicially determined. Duffy should not have been charged $195 for Savino's time.

Finally, Duffy advised Lazer at the very outset of LARY's representation that he was unwilling to settle the We're Action. LARY could not prevent We're's attorneys from calling or suggesting settlement. However, the Abramowitz and Lazer should have advised We're's attorneys Duffy was not amenable to settlement of the matter on any terms. This would have resulted in little or no time being spent on settlement discussions.

The pre-bill time records reflect several telephone calls between attorneys at LARY and We're's attorneys on May 14, 2009 and May 15, 2009 at which settlement proposals were discussed. Given Duffy's position, these phone calls should not have been made. Duffy should not be required to pay for these items. The amount due is reduced $250 to reflect these unnecessary settlement discussion.

The court finds the balance of the work was performed and was appropriate.

The work performed by Abramowitz prior to being retained would have been performed after LARY was retained. Abramowitz performing this work prior to actually being retained gave LARY a head start on the application. Performing a billing for work prior the actual retainer being signed is not a violation of 22 NYCRR Part 1215. An attorney is required to obtain a written retainer before commencement of the action or with a reasonable time thereafter. 22 NYCRR 1215(a). The retainer was prepared the same

day Duffy consulted with Lazer. Given the nature of the order LARY was being retained the vacate, time was a critical factor. Abramowitz would have had to perform the services she performed on May 12, 2009 once LARY was retained had she not done that on that day. Duffy offers no proof the work Abramowitz did on May 12, 2009 was excessive, redundant or unnecessary.

Duffy could not point to any other matters for which the bills were not in accordance with the terms of the retainer. Even had Duffy and Lazer consulted regarding the work to be performed, the work would have had to have been performed by LARY to properly represent Duffy. Duffy could point to no additional specific items for which he was billed which involved excessive, unnecessary or redundant legal services.

Lazer sued to recover $2669.90. The court reduces this amount by $1425. LARY is awarded $1244.90.

The clerk is directed to enter judgment in favor of the plaintiff and against the defendant in the sum of $1244.90 together with interest at the statutory rate from April 21, 2010 to the date of entry of judgment together with costs and disbursements as taxed by the clerk.

Submit judgment.

SO ORDERED:

Hon. Fred J. Hirsh
District Court Judge

Dated: August 9, 2012

cc: Silverman & Acampora LLP
James P. Duffy, III, Pro se