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

PRESENT: DEBRA A. JAMES PART 59
Justice

SETH R. ROTTER,

Plaintiff,

- v -

ALAN S. RLPKA, PAUL J. NAPOLI, MARC JAY BERN, NAPOLI BERN LLP, NAPOLI BERN RLPKA LLP, and RIPKA ROTTER & KING LLP/RIPKA ROTTER KING & TACOPINA LLP, A Partnership-In-Dissolution,

Defendants.

Index No.: 600609/06

Motion Date: 09/27/11

Motion Seq. No.: 09

Motion Cal. No.: _____

The following papers, numbered 1 to 4 were read on this motion to enforce a judgment.

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause -Affidavits -Exhibits	1
Answering Affidavits - Exhibits	2, 3
Replying Affidavits - Exhibits	4

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers,

The court shall dispose of the parties' motion and cross-motion as follows.

The court has previously cautioned both sides that to the extent disputes arise as to the amount due under their May 18, 2006 Stipulation of Settlement, the court shall consider such claims only if they are asserted in a long form account, i.e., on a spreadsheet or other concise point-by-point form on a case-by-

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 ☐ REFERENCE

☐ SETTLE/SUBMIT ORDER/JUDG.

case basis and responded to in the same manner. The parties continue to burden the court with superfluous argument in a form that makes it difficult to adjudicate the very agreement the parties themselves reached. The parties are forewarned that further proceedings related to the amounts due under the Stipulation of Settlement will not be considered unless in proper form. In addition, as a judgment with respect to the enforcement of the Stipulation of Settlement was actually entered on November 17, 2010, this action has been terminated, and commencement of a plenary action on the judgment is required. Teitelbaum v Holdings v Gold, 48 NY2d 51 (1979). Nevertheless, in this instance and for reasons of judicial economy, the court shall direct entry of a supplemental judgment in accordance with the findings below. Chan v Berry, 36 AD3d 579 (2d Dept 2007).

Plaintiff initially argues that he is owed monies in four matters wherein the defendants wrongfully deducted amounts from fees remitted to him based upon disbursements that were previously paid. As defendants have raised no objection in their responsive papers, the court shall order defendants to pay amounts sought by the plaintiff in these matters (with interest through the date of this order)as follows:

Violetta Bermudez:	$492.50 with interest from October 16, 2008;
William Phillips:	$275.00 with interest from February 20, 2009;
Yvette Rodriguez:	$932.50 with interest from October 27, 2009.

Plaintiff further claims that he is owed additional amounts under the Stipulation with respect to certain cases referred to other firms. As defendants have raised no objection in their responsive papers to these items the court shall order defendants to pay amounts sought by the plaintiff(with interest through the date of this order)as follows:

Sharon Williams:	$830.15 with interest from October 16, 2008;
Ronald Wonder:	$481.91 with interest from April 15, 2010.

The court shall however deny plaintiff's application for consequential damages in the form of attorney's fees in the matter of Paul Emadu since there is no provision in the Stipulation for attorney's fees incurred in enforcement of the settlement.

With respect to the James Brown action (File No.: 9214), this action was coded in the Stipulation of Settlement as "RNS" which pursuant to Paragraph 2 of the agreement means that the parties considered him as a client whose case was not in suit and had not yet substituted counsel. Paragraph 2 states in pertinent part that "[f]or any clients of RRK/RRKT who have not yet substituted any attorney as incoming counsel . . . It is agreed that if NBR [Napoli Bern Ripka LLP] is the incoming counsel, the

Parties shall act in accordance with Paragraph 1(a) of this Agreement."

Plaintiff argues that he is entitled to one-half of the Net Fee received in the Brown action because there was no substitution of counsel. However, defendants attach as an exhibit to their papers a "Consent to Change Attorney" executed by James T. Brown on January 11, 2006, substituting Napoli Bern Ripka LLP (NBR) as his attorney in place of Ripka, Rotter, King & Tacopina, LLP. Defendants argue that because this consent was executed prior to the May 18, 2006, date of Stipulation of Settlement, it should be governed by Paragraph 1(b) of the Stipulation which would entitle the plaintiff to only six percent of the Net Fee.

However, the court finds that the terms of the Stipulation require that the Brown action be considered under Paragraph 1(a) of the Stipulation which entitles plaintiff to twenty-five percent (25%) of the net fee. Paragraph 28 (c) of the Stipulation of Settlement provides that

> Except as to the representations and warranties set forth in this Agreement, the parties understand that the facts with respect to which this Agreement is made may be other than or different from the facts now believed by each party to be true. Each party hereto accepts and assumes the risk that said facts, or any of them, may be different from the facts no believed by each party to be true and each party agrees that this Agreement, and the covenants made hereunder, shall be and will remain in effect as fully, completely and legally binding notwithstanding the discovery or existence of any

> additional or different facts, or of any claims with respect thereto.

The clear intent of the parties in inserting this clause was to undertake to end this litigation upon an agreed set of facts so as the avoid the need for a fact finding. The longstanding rule in New York is that

> Parties by their stipulations may in many ways make the law for any legal proceeding to which they are parties, which not only binds them, but which the courts are bound to enforce. They may stipulate away statutory, and even constitutional rights. They may stipulate for shorter limitations of time for bringing actions for the breach of contracts than are prescribed by the statutes, such limitations being frequently found in insurance policies. They may stipulate that the decision of a court shall be final, and thus waive the right of appeal; and all such stipulations not unreasonable, not against good morals, or sound public policy, have been and will be enforced; and generally, all stipulations made by parties for the government of their conduct, or the control of their rights, in the trial of a cause, or the conduct of a litigation, are enforced by the courts.

Matter of New York, Lackawanna & W. R.R. Co., 98 NY 447, 453 (1885). "Stipulations of settlement are favored by the courts and not lightly cast aside. . . Only where there is cause sufficient to invalidate a contract, such as fraud, collusion, mistake or accident, will a party be relieved from the consequences of a stipulation made during litigation." Hallock v State, 64 NY2d 224, 230 (1984) (citations omitted).

Here, the parties designated the James Brown file as "RNS" and the Stipulation of Settlement expressly states that where Napoli Bern Ripka LLP is substituted as counsel, paragraph 1(a)

and its 25% net fee payment to plaintiff shall apply. Where as here the parties have agreed to a set of facts and expressly agree to a set of facts and procedures to govern their agreement, there is no basis for the court to go beyond the four corners of the arrangement.

Therefore, the court holds that plaintiff is entitled to 25% of the net fee in the Brown action pursuant to the Stipulation of Settlement. As the parties apparently do not dispute that: (1) the net fee in the Brown action was $629,078.57 and (2) the defendants remitted to plaintiff $37,744.71 on March 3, 2009, the court shall direct the defendants to pay the additional sum of $119,524.93, with interest from March 3, 2009, which together with the previously remitted amount would total 25% of the net fee.

The principles applied to the interpretation of the parties' Stipulation of Settlement in connection with the Brown action should be followed by the parties with respect to other amounts due thereunder. That is, the parties characterization and classification of the various matters as set forth in the Stipulation and Exhibit A annexed thereto are controlling based upon the expressed intent of the parties. Similarly, to the extent that a case was coded as "RYS" or "RNS" in the Stipulation and such a case was later assumed by NBR as incoming counsel,

plaintiff is due 25% of the Net Fee pursuant to Paragraph 1(a) of the Stipulation.

With respect to the cases of clients Philip Bialowitz, Nilda Custodio, Ida Catnott, and Miguel Aguilar all coded "RYS" in Exhibit A to the Stipulation, defendants do not contest plaintiff's assertion that no substitution of counsel was filed in these cases and thus the court determines that plaintiff was entitled to one-half of the Net Fee as set forth in Paragraph 2 of the Stipulation. Therefore, the court shall order defendants to pay amounts sought by the plaintiff(with interest through the date of this order)as follows:

Philip Bialowitz:	$5,896.50 with interest from October 21, 2009;
Nilda Custodio:	$4,033.26 with interest from September 24, 2008;
Ida Catnott:	$1,655.44 with interest from April 14, 2009.
Miguel Aguilar:	$174.16 with interest from December 4, 2009.

The case of client Jackie Huh was coded as "RNS" and the case of Patricia Malcolm was coded "RYS" in Exhibit A to the Stipulation and the defendants have produced documents substituting (NBR) as counsel in these cases thus entitling plaintiff to 25% of the Net Fee. With respect to the Huh and Malcolm actions, plaintiff concedes that defendants have remitted to him fees in the requisite amount so that plaintiff's application seeking additional fees shall be denied as to those clients.

The case of client Elsie Martinez was designated as "RRK" in Exhibit A to the Stipulation meaning that pursuant to Paragraph 5 defendants "agree[d] to transfer to Rotter all cases wherein RRK/RRKT have been retained and the fee owing has been or shall be determined without any additional material services required on the part of any of the Parties hereto, either because such cases have been settled, or a judgment has been entered or for any other reason. Such cases include, but are not limited to, cases marked with the legend "RRK" as set forth in Exhibit A. However, in spite of the explicit classification in the Stipulation, the parties in their submissions assert that the case is an "RYS" matter and the defendants submit a Consent to Change Attorney dated October 18, 2008 substituting NBR as counsel. The court will therefore treat this action as an "RYS" matter subject to Paragraph 1(a) of the Stipulation which entitles plaintiff to 25% of the Net Fee. As plaintiff concedes that defendants remitted to him that amount, no further amount is due as to fees. However, the Stipulation provides that there are $581.00 in disbursement that must be equally shared between the parties and therefore the court shall direct defendants to reimburse plaintiff for $290.50 with interest from October 27, 2009.

The court shall deny defendants' cross-motion. As stated earlier, the parties provided in Paragraph 28 (c) of the

Stipulation of Settlement that even where the actual facts were different than those assumed in the agreement, the parties accepted such a risk and therefore the defendants' alleged unilateral mistake as to the classification of certain of the parties' clients fails to state a basis for relief. As stated by the Court

> A claim for reformation of a written agreement must be grounded upon either mutual mistake or fraudulently induced unilateral mistake. In the case of mutual mistake, it must be alleged that the parties have reached an oral agreement and, unknown to either, the signed writing does not express that agreement, whereas in the case of unilateral mistake, it must be alleged that one party to the agreement fraudulently misled the other, and that the subsequent writing does not express the intended agreement. A bare, conclusory claim of unilateral mistake, which is unsupported by legally sufficient allegations of fraud, fails to state a cause of action for reformation.

Greater New York Mut. Ins. Co. v. United States Underwriters Ins. Co., 36 AD3d 441, 443 (1st Dept 2007).

Finally, there is no provision in the Stipulation of Settlement for recovery by defendants of alleged overpayments to plaintiff nor is there any provision in such Stipulation for offsets to any alleged overpayments and therefore defendants remedy, if any, is not within the bounds of the proceeding at bar.

Accordingly, it is

ORDERED that defendants' cross-motion is DENIED; and it is further

ORDERED and ADJUDGED that plaintiff's motion is GRANTED to the extent set forth in this paragraph and plaintiff SETH R. ROTTER is to have supplemental judgment against the defendants jointly and severally in the following amounts based upon this decision as to the referenced matters, with interest as calculated by the Clerk from the date set forth until the entry of the supplemental judgment:

Client Name	Judgment Amount	Interest Date	Interest as Calculated by Clerk	Total
Violetta Bermudez	$492.50	October 16, 2008		
William Phillips	$275.00	February 20, 2009		
Yvette Rodriguez	$932.50	October 27, 2009		
Sharon Williams	$830.15	October 16, 2008		
Ronald Wonder	$481.91	April 15, 2010		
James Brown	$119,524.93	March 3, 2009		
Philip Bialowitz:	$5,896.50	October 21, 2009		
Nilda Custodio:	$4,033.26	September 24, 2008		
Ida Catnott:	$1,655.44	April 14, 2009		
Miguel Aguilar:	$174.16	December 4, 2009		
			TOTAL:	

and it is further

ORDERED that plaintiff's motion and defendants' cross-motion are otherwise DENIED.

This is the decision and order of the court.

Dated: March 12, 2012 ENTER:

DEBRA A. JAMES J.S.C.