SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JUDITH J. GISCHE Justice

PART 10

Index Number : 110893/2010
DANIEL R.WOTMAN & ASSOCIATES
vs.
CHANG, JANET
SEQUENCE NUMBER : 003
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

cc 9/6/12
nor 9/7/12

FILED
JUL 16 2012
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: JUL 09 2012

HON. JUDITH J. GISCHE, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10

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Daniel R. Wotman & Associates, PLLC,

Plaintiff (s),

-against-

Janet Chang,

Defendant (s).

----------x

DECISION/ ORDER
Index No.: 110893-2010
Seq. No.: 003

PRESENT:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

Papers	**Numbered**
Chang n/m (3211) (sep back) w/JC affid w/exhs	1,2
Wotman x/m (3212) w/DRW affid, exhs (3 volumes)	3,4,5,6
Chang opp and reply w/MG affirm (sep back), JC affid (sep back), exhs	7,8
Wotman reply w/DRW affid, exhs	9
Corresp (DRW) 3/5/12 w/App Div decision	10
Various stips of adj	12
Steno 5/10/12 OA	13

Upon the foregoing papers, the decision and order of the court is as follows:

GISCHE J.:

This is an action by the law firm of Daniel R. Wotman & Associates, PLLC for legal fees. Defendant Janet Chang has answered the complaint and counterclaimed for legal malpractice. Chang moves for an order dismissing the complaint on the basis that it is time barred, the claim for fraud is against public policy and failure to provide discovery. The law firm has cross moved for summary judgment on its complaint. Since the requirements of CPLR § 3212 [a] have been satisfied, summary judgment

relief is available (Brill v. City of New York, 2 NY3d [2004]).

Regardless of which subsection of CPLR 3211[a] a motion to dismiss is brought under, the court must accept the facts alleged in the pleading as true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*see* Goshen v. Mutual Life Ins. Co. of N.Y., 98 N.Y.2d 314, 326 [2002]; Leon v. Martinez, 84 N.Y.2d 83, 87 [1994]).

On the other hand, a motion for summary judgment is the functional equivalent of a trial, with the movant having the burden of tendering sufficient evidence to eliminate any material issues of fact from the case (Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 [1985]).

Although Chang seeks "dismissal" of the complaint, she has not specified whether she is moving under CPLR 3211 or 3212. However, having answered the complaint, asserted counterclaims and provided evidence that she is asking the court to consider in connection with the merits of plaintiff's claims against her, clearly Chang's motion is pursuant to CPLR 3212, not CPLR 3211, meaning she is seeking summary judgment dismissing the complaint. Neither party has moved with respect to Chang's counterclaim. Therefore, the issue presently before the court to decide is whether either party is entitled to summary judgment on the plaintiff's complaint.

Applying these legal principles, the court's decision and order is as follows:

Facts and Arguments

Unless otherwise stated, the following facts are either established, unrefuted or undisputed:

Plaintiff is a law firm named after its principal, Daniel R. Wotman, Esq. Chang was a 50% shareholder in 207 Second Avenue Realty Corp. ("corporation"). The other shareholders (Ruby and Wilson Chang) held the remaining 50% interest. The corporation owned the building located at 207 Second Avenue, New York, New York.

The law firm contends it is owed legal fees by Chang in the principal amount of $438,311.19 for legal services rendered in pursuit of three related cases involving Chang as follows: Citidress II Corp. v. 207 Second Avenue Realty Corp., Index No.121848/99 ("Citidress"), Gold City Commercial Bank v. 207 Second Avenue Realty Corp., Index No. 104319/93 ("Gold City") and Janet Chang, as assignee of 207 Second Avenue Realty Corp. v. Laraine Botsacos, as Executrix of the Estate of Thomas Cartelli, Index No. 2242/86 ("Cartelli").

Citidress and Gold City were each foreclosure actions. In Citidress, Chang brought a cross claim against her fellow shareholders (Wilson and Ruby Chang), alleging that they obtained a mortgage secured by the building without her knowledge. Chang subsequently bought the mortgage from Gold City, but was apparently never substituted as named plaintiff. In September 2007, Chang sold the building for $5,000,000 and Hon. Alice Schlessinger, the judge presiding over the Citidress case, dealt with various issues resolving that action. The Cartelli case is for legal malpractice. Chang alleges that Thomas Cartelli, Esq. (now deceased), assisted the other shareholders in obtaining the mortgage through fraudulent means, including phony board minutes.

Chang, Individually and as Officer and Director of the corporation, entered into two (2) separate retainer agreements with the law firm. One retainer agreement dated

March 22, 2001 ("flat fee retainer") states as follows:

> Re: 207 Second Avenue
>
> Dear Janet [Chang] and Kevin [Cahill]:
>
> I want to thank you again for allowing Daniel R. Wotman & Associates, LLC[1] to have the opportunity to represent you in connection with your transactions for the establishment of a restaurant at [207 Second Avenue]...
>
> As we discussed, it is our firm's policy to confirm in writing the scope and terms of our engagement. Our clients have both encouraged this practice and have found it to be useful...
>
> This is to confirm that we have agreed to represent Janet Chang, 207 Second Avenue Realty Corp. and Kevin Cahill in connection with the following:
>
> (1) Contemplated agreement between 207 Seventh Avenue Realty Corp, Janet Chan and Kevin Cahill in a related Cahill entity regarding potential restaurant lease and management of 207 Second Avenue, New York, New York and contemplated construction and operation of a restaurant (the "Chang-Cahill Agreement"); and
>
> (2) Gold City Commercial Bank v. 207 Second Avenue Realty Corp., et al., Supreme Court of the State of New York, County of New York Index No. [104319/93], including proceedings to terminate receivership and prosecution of any claims against Receiver Michael Zapson; and
>
> (3) Citidress II Corp. v. 207 Second Avenue Realty Corp et al., Supreme Court of the State of New York, County of New York, Index No. 121848/99; and
>
> (4) removal of laundromat as tenant at 207 Second Avenue premises; and

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[1]Although the firm is identified in this action as being a "PLLC" but the retainer identifies the firm as an "LLC," there is no practical difference between the two.

(5) all other matter necessary to effectuate the transactions contemplated by the Chang-Cahill Agreement

You will be charged and agreed to pay for our services on the basis of a flat fee of $15,000, payable in three equal installments of $5,000 on March 15, 2001, April 15, 2001 and June 15, 2001. I hereby acknowledge receipt of $3,000 from Kevin Cahill on Friday March 9, 2001 towards the $5,000 March 15, 2001 installment payment. The above representation shall not include any legal services on your behalf for any appeals.

The above provisions outline in reasonable detail our agreement as to this representation. If you find these arrangements satisfactory, please have the enclosed copy of this letter signed and return it to us...Our representation will conform to the terms of this agreement....

The second retainer agreement, also dated March 22, 2001 ("malpractice retainer"), states as follows:

Re: Janet Chang v. Wilson Chang, Thomas Cartelli, et al., Supreme Court of the State of New York, County of New York, Index No. 2242/86 and

207 Second Avenue Realty Corp. v. Salzman, et al., Supreme Court of the State of New York, County of New York, Index No. 106387/00 (the "Malpractice Actions")

Dear Janet:
I want to thank you again for allowing Daniel R. Wotman & Associates, LLC ("Wotman") to have the opportunity to represent you in connection with the above-referenced Malpractice Actions... As we discussed, it is our firm's policy to confirm in writing the scope and terms of our engagement... This is to confirm that we have agreed to represent Janet Chang and 207 Second Avenue Realty Corp. (collectively "Chang") in connection with the above-referenced Malpractice Actions upon the following terms and conditions:

> Chang agrees to pay Wotman for legal services rendered in connection with the Malpractice Actions a sum equal to twenty percent (20%) of any Net Amounts Recovered or Received by Chang in the Malpractice Actions pursuant to settlement, judgment, trial or otherwise. "Net Amounts Recovered or Received" shall mean the gross amount recovered or received by Chang pursuant to settlement, judgment, trial or otherwise, less any and all disbursements.
>
> Chang hereby represents and warrants that she has not granted any other attorney or person, corporation, partnership or entity any right to receive any of the amount received or recovered in the Malpractice Actions.
>
> Chang agrees not to make any settlement or compromise in the Malpractice Actions except with the approval of Wotman. Wotman agrees not to make any settlement or compromise in the Malpractice Actions except with the approval of Chang. Chang agrees that Wotman is hereby granted a first and priority lien on any proceeds received or recovered in the Malpractice Actions. Chang shall pay attorneys' fees necessary incurred to collect amounts due under this Agreement.
>
> In addition to the Contingency Fee, Chang shall be responsible for payment of any and all disbursements required in connection with the representation in the above-referenced matters. Disbursements include, but are not limited to, expert fees, computer legal research charges, xerox...
>
> Wotman shall furnish Chang a statement of the disbursements advanced on a monthly basis...
>
> In the event that payment of any disbursement charges are not received within thirty (30) days after receipt of any statement, it is understood and agreed that Wotman will make a motion to be relieved as counsel from any further representation in the above referenced litigations without objection from Chang...

The malpractice retainer is, like the flat fee retainer, signed by Chang Individually and in her capacity as Officer and Director of the corporation.

Following a ten day trial on the Cartelli malpractice claim, at which Chang was represented by Wotman, on October 10, 2002, the jury returned a verdict in favor of Chang. The award consisted of $1,930,491 on the malpractice claim, $3,000,000 in punitive damages and $176,000 in legal fees. The jury found that Thomas Cartelli had been negligent and assisted the other shareholders (Wilson and Ruby Chang) in obtaining a mortgage without Janet Chang's written consent, etc., and that Cartelli's negligence had resulted in the diversion of the mortgage proceeds. Judgment was not immediately entered by Wotman in the Cartelli action.

A few months later, on June 13, 2003, Cartelli's malpractice insurance carrier, The Home Insurance Company, was declared insolvent and The Superintendent of Insurance took possession of its property and assets (Supreme Court Index No. 402671-2003). Wotman did not enter judgment in the Cartelli malpractice action until several years later, on August 10, 2010. After serving the judgment on the Superintendent of Insurance, Wotman was notified (on August 19, 2010) that the Liquidation Bureau had rejected the judgment on the basis that "it was not entered in accordance with applicable law." The Cartelli judgment was appealed and affirmed on appeal (Chang v. Botsacos, 92 A.D.3d 610 [1st Dept 2012]). No portion of the Cartelli judgment has been satisfied to date.

Wotman presents two main arguments for why he agreed to the terms of the first retainer agreement involving the Chang-Cahill matters and foreclosure matters. He claims that Chang told him a settlement in the Cartelli matter was imminent. Neither party disagrees that an offer of $500,000 was extended to Chang before trial by the malpractice carrier. It is also unrefuted that Chang turned down the offer and Wotman

took the case to trial. Wotman claims, however, that by failing to settle the Cartelli matter, as she had promised she would, he was defrauded into agreeing to a flat fee retainer agreement in the foreclosure matters that he would not have otherwise agreed to.

It is unrefuted that the law firm brought motions on behalf of Chang and/or the corporation in the Citidress and Golden City actions. One motion was to vacate the default judgment entered against Chang in Citidress. Another motion was for an order directing the receiver (Zapson) to release the sum of $25,000 to Wotman. That motion was denied and, thereafter, Chang began sending Wotman checks in small amounts. In a letter dated June 6, 2002, Chang states that she is sending a check as part of the $25,000 that the law firm had asked for, but been denied. She also states that "It was agreed that the payment will be deducted from the contingent fee you will [receive] when Cartelli's insurance company compensates me for my malpractice claim." In a subsequent letter dated April 26, 2004, Chang states that it is "Another small amount (Check #1299, dated April 23, 2009) ... made towards the payment for legal service under the retainers dated March 22, 2001. Because of the slowness of completion of our claims and receiving compensation, I have been making small payments as advancement whenever I can. I regret the delay in resolving our claims as well as my inability to make bigger payments. Thank you for all you have done."

Wotman denies these payments were "advancements" towards the monies that they believed he would recover on a contingency basis in the Cartelli action. He contends these were small payments she was making on the firm's ever mounting unpaid legal fees. He presents invoices from 2002 - 2006 that he claims to have sent

Chang in connection with his representation in the three cases. Chang, however, provides correspondence that Wotman sent her on behalf of the firm. That letter, dated January 26, 2002, states in part that:

> This will confirm our agreement that upon termination of the Zapson receivership...you hereby agree on behalf of 207 and yourself that Zapson shall be directed and authorized to pay our law firm $25,000 in legal fees out of the receivership funds. The $25,000 will be applied in reduction of the contingency fee earned in the Chang v. Cartelli action.

The rest of this letter by Wotman sets forth a schedule of the litigation work left to be accomplished, including negotiating and concluding a lease for the ground floor restaurant.

Wotman also brought a motion on Chang's behalf regarding Zapson's performance as a receiver. Specifically, the issue was whether he had performed appropriately with regard to renting the apartments and commercial spaces at the building and collected all rents due and owing to the corporation. The framed issues were referred to Referee Lowenstein who recommended that Zapson had collected rents, account for them and otherwise "duly fulfilled his legal obligations as a temporary receiver" (Report 3/11/05). The Report was confirmed by the court.

Meanwhile, in August 2004, Wotman moved to be relieved as counsel in the Citidress and Golden City motions, stating that Chang was "ignoring" his legal advice and pursuing that case and others "merely for the purpose of harassing and maliciously injuring other parties, including [the law firm]." Wotman also stated that mandatory withdrawal by his firm was necessary because "Chang and [the corporation] are out of control. Our law firm cannot bring these clients under control ... They are not following

our advice and instructions..."

The motion was argued before Justice Heitler on the record (Steno Minutes 10/6/04)[2] and Chang stated that relieving Wotman would prejudice her case because he had taken it on a contingency basis "with a flat charge for some other matters because he knew that I was not able to pay [legal fees] after many, many lawyers sort of like given up because I was not paying." Chang also stated that Wotman, who had recently left a "big law firm" was "[putting] quite a bit of pressure for me to give up the malpractice case, which is something that he did not have experience [with]..." According to Chang, once Wotman was no longer with that "big firm," he started "[asking] me to give money to him, which I did not have. In fact, then he suggested that he should use the money in the receiver's account and I agreed to allow him to apply to the Judge to have the use of that money, which would be deducted against the final payment of the contingency fee and fortunately, Judge Lebedeff declined to allow him use [of] that money."

Justice Heitler, noting that the retainers were not a part of the record, asked whether Wotman was owed any legal fees. He responded that he was and that his retainer agreement had "expired a while ago–back in April of 2001, it was a limited fee retainer..." The issue of whether there it was a conflict of interest for the corporation and Chang to have been jointly represented by Wotman was also raised during that oral argument. According to Wotman, that conflict had been "waived."

Wotman's motion to be relieved was granted by Justice Heitler with instructions

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[2]The steno minutes which were so-ordered by Justice Heitler are available on SCROLL which is the electronic equivalent of the county clerk's file.

that the corporation had to appear by an attorney and that when hiring a new lawyer, Chang had to deal with the issue of whether it was a conflict of interest for one attorney to represent her individually and as an officer of the corporation (Steno Minutes, 10/6/04).

Following more litigation, Chang agreed to sell the building, thereby resolving the foreclosure proceedings. The sum of $675,000 was placed in escrow pursuant to the August 1, 2007 order of Hon. Emily Jane Goodman and on October 1, 2007, Chang moved to vacate the attorney's fees lien filed by Wotman. Chang's new and current attorneys (Vernon & Ginsburg, LLP) and Wotman stipulated in writing that:

> 1. Vernon & Ginsberg would hold $475,000 in escrow from the proceeds of the sale of the building "until such time as the Court determines Wotman's proceeding to fix the amount of its legal fees and disbursements and orders Vernon & Ginsburg, LLP to pay the amount of such legal fees and disbursements determination out of the Down Payment Escrow to Wotman.
> 2. Wotman hereby withdraws its previously filed charging lien filed in the above-referenced action under New York's Judiciary Law section 475...

Hon. Alice Schlesinger so-ordered that stipulation dated October 25, 2007 on November 1, 2007. Justice Schlesinger issued a "long form order" dated October 22, 2007, stating that "the claims raised by Daniel R. Wotman shall be determined in a separate proceeding. This court has been assured that adequate monies have been set aside to cover those claims once they have been determined." Subsequently, Chang brought a motion for release of the escrow monies and it was denied based upon the terms of the parties' so-ordered stipulation (Order, Schlesinger, 3/31/10).

Wotman contends that Justice Schlesinger has determined that Wotman is

entitled to his legal fees and, therefore, the only issue is the amount he is entitled to.

Alternatively Wotman contends that Chang turned down bona fide offers by Carelli's insurance carrier and she turned down each offer, contrary to his advice and contrary to her specific representation in April 2001 that she would settle the case. Wotman claims Chang was deceitful by making these representations, thereby committing a fraud (3rd cause of action).

Discussion

The doctrine of the law of the case applies only to legal determinations that were necessarily resolved on the merits in the prior decision (Baldasano v. Bank of New York, 199 A.D.2d 184 [1st Dept 1993]). A related, but different doctrine, is that of res judicata. Res Judicata precludes a party or another in privity from re-litigating claims already decided in a prior proceeding (Ryan v. New York Telephone Co., 62 NY2d 494 [1984]; Gramatan Home Investors v. Lopez, 46 NY2d 481 [1979]). As a general rule, "once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based on different theories or if seeking a different relief" (O'Brien v City of Syracuse, 54 NY2d 353, 357 [1981]; In re Reilly v. Reid, 45 NY2d 24, 30 [1978]).

Justice Schlesinger's October 2007 is neither the law of the case nor res judicata. She did not, as the law firm argues, decide the merits of Wotman's claims for legal fees. Justice Schlesinger only ordered that the motions before her regarding Wotman's lien were resolved in accordance with a stipulation between the parties. Her subsequent order in March 2010 merely references the parties' agreement as a reason to deny Chang's (and later the motion by Wilson and Ruby Chang) for the release of

monies from escrow. Justice Schlesinger has never evaluated, reached the merits of or decided the parties' claims. They are now presently before the court to decide. Any other comments that Justice Schlesinger is alleged to have made about the bona fides of Wotman's claims are not recorded in any decision or stenographic minutes and have no force or effect.

Wotman has asserted three causes of action ("__COA"). The 1st COA is for an account stated, the 2nd COA is for quantum meruit and the 3rd is for fraud. All claims arise from the same facts. The court begins its analysis with the claim based on quantum meruit.

The elements of a claim for quantum meruit are: (1) the performance of services in good faith; (2) the acceptance of services by the person to whom they are rendered; (3) an expectation of compensation; and (4) the reasonable value of the services (Georgia Malone & Co., Inc. v. Ralph Rieder, 86 A.D.3d 406, 410 [1st Dept 2011]). The existence of a valid and enforceable written contract governing the disputed subject matter precludes plaintiffs from recovering in quantum meruit (Sheiffer v. Shenkman Capital Management, Inc., 291 A.D.2d 295 [1st Dept 2002]).

In connection with this particular cause of action, Wotman makes no claim that the March 22, 2001 flat fee retainer is invalid or should be invalidated. It is unrefuted that the contract obligates Chang "to pay for our services on the basis of a flat fee of $15,000" payable in 3 installments. It is unrefuted that she did, in fact, pay that fee. It is also unrefuted that Kenneth Cahill, the person who intended to open a restaurant at the building, paid a part of the fee, although not a signatory to that retainer. The flat fee retainer states that it is "in connection with your transactions for the establishment of a

restaurant at [207 Second Avenue]..." referencing an agreement between Chang and Cahill. The retainer also states that the firm has "agreed to represent Janet Chang and Kevin Cahill in connection with the following . . ." Cahill is not, however, a signatory to the flat fee retainer.

By the time that this flat fee retainer was signed, the Citidress and Golden City foreclosure actions were well underway, but not close to completion. Reference to the "removal of the laundromat" apparently means some kind of commercial holdover proceeding. The flat fee retainer identifies some of the work the law firm agreed to do for Chang to effectuate her agreement with Cahill and refers generally to other matters "necessary to effectuate the transactions contemplated by the Chang-Cahill Agreement." The flat fee retainer also specifically references the firm's commitment to do work in the Citidress action, having nothing to do with the Chang/Cahill venture. Despite the extensive nature of the legal work undertaken by the law firm, the law firm accepted a flat fee of only $15,000. The $15,000 is not identified as a "retainer" or specify that Chang would thereafter be billed on an hourly basis. There is no provision for the law firm to charge for its disbursements.

There are different types of billing arrangements that an attorney and client agree to, depending on the type of legal services being rendered and the nature of the case. Chang and Wotman had a contingency arrangement for the malpractice action, but agreed that a "flat fee" would be charged for the foreclosure actions and to bring the Chang/Cahill restaurant agreement to fruition. In a flat fee arrangement, as the words suggest, all work is done for a set, agreed to amount. In setting the flat fee, it is expected that an attorney has evaluated the complexity of the work required and set his

or her fee accordingly. If it turns out the work needed is less than anticipated, then the attorney may benefit from the arrangement in the sense that he or she recoups more than his or her customary hourly rate. On the other hand, if the work turns out to be more complex than anticipated, the attorney has no basis to collect more than the agreed to amount, unless the retainer so provides (compare: Manufacturers & Traders Trust Co. v. Dougherty, 11 A.D.3d 1019 [4th Dept 2004] although retainer indicated work would be done for a flat fee of $1,250, the mortgage allowed plaintiff to recover "all reasonable legal fees" from defaulting defendant; Webbe v. Webbe, 267 AD2d 764 [3rd Dept 1999] in divorce action, defendant's attorney had a flat fee retainer of $2,500, but was able to seek legal fees from plaintiff).

The flat fee retainer at bar contains no limitations, conditions, caveats or an expiration date. The $15,000 is not identified as a retainer to be replenished. The only additional monies that the law firm could recover under the flat free retainer were for "any appeals." Therefore, any argument by Wotman that the retainer agreement regarding the foreclosure matters really means anything other than what it expressly provides is without any factual or legal basis. There is no indication within the four corners of this retainer agreement that it was intended to expire or the parties anticipated to receive or make additional payment. Since there is no ambiguity in the retainer agreement, Wotman's effort to create an ambiguity where none exists is unavailing (In re Koppel, 95 A.D.3d 453 [1st Dept 2012]). The issue of whether Wotman complied with the requirements of Part 1215 of Title 22 of the Official Compilations of Codes, Rules and Regulations of the State of New York ("22 NYCRR § 1215") has been addressed by the parties in connection with the parties' arguments about whether

the retainer expired. Since the flat fee retainer was signed before this rule became effective (March 4, 2002), 22 NYCRR § 1215.2 does not apply to the flat fee retainer. Even if it did, noncompliance with the requirements of 22 NYCRR § 1215.1 would not bar the law firm from recovering in quantum meruit under certain circumstances (Nabi v. Sells, 70 A.D.3d 252 [1st Dept 2009]).

Chang has proved the flat fee retainer is valid, enforceable and unambiguous, thereby meeting her burden and shifting it to the plaintiff law firm to demonstrate the existence of a triable issue of fact (Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 [1986]; Zuckerman v. City of New York, 49 N.Y.2d 557 [1980]). The law firm has not met its burden of showing, as it claims, that the flat fee retainer agreement expired or that it is ambiguous. Therefore, Chang is entitled to summary judgment dismissing the quantum meruit cause of action in the complaint to the extent that the law firm's claims fall within the ambit of the work subject to the flat fee agreement and such work was performed before the firm was permitted to withdraw as counsel by Justice Heitler. However, for work allegedly performed after Wotman withdrew as counsel, or any work not within the terms of the flat fee agreement, the quantum meruit action remains to be decided. These issues and distinctions are discussed at greater length later in this decision in connection with the court's decision on plaintiff's claim for an account stated.

Although at oral argument, plaintiff's principal stated he was not challenging the contingency fee agreement the law firm is, in fact, doing just that. Wotman states in his February 17, 2012 affidavit that "I am entitled to the quantum meruit value of my services in the Chang v. Cartelli case. Chang has unreasonably refused to settle the Cartelli case for the maximum limits of Cartelli's policy of $500,000 despite her

representations that she would accept such amount once offered, despite 4 offers to settle at $500,000..." Elsewhere plaintiff states that Wotman relied on these misrepresentations in agreeing to represent her in three cases. Thus the law firm contends that it is entitled to its fees based upon quasi contractual principles because it was induced and defrauded into signing the flat free retainer with Chang. The law firm contends that had it known Chang had no intention of settling the Cartelli case immediately or ever, it would not have taken the other matters on a flat fee basis and would have made a different agreement with Chang her in connection with the Citidress and Golden City matters. Phrased differently, anticipating an effortless recovery of a 20% contingency fee in the malpractice action, Wotman agreed to take the foreclosure cases on for a modest fee. These arguments blur the distinctions between plaintiff's 2nd COA for quantum meruit and its 3rd COA for fraud.

Regardless of which factual claims are true, Wotman has no claim against Chang for legal fees in the Cartelli action, other than for the 20% contingency fee of the amount - if any- Chang eventually recovers on the judgment entered against the Cartelli estate. By its very nature a contingency fee is "contingent" on a successful result. Although Chang prevailed in the Cartelli action, and the $8,708,490 judgment was affirmed on appeal, it is unclear whether she will ever recover any part of that judgment. This uncertainty is the subject of Chang's malpractice counterclaim against the law firm. Since Chang and the law firm entered into a retainer agreement for a contingency fee, Wotman cannot assert a valid claim against his client for quantum meruit in the Cartelli action. Georgia Malone & Co., Inc. v. Ralph Rieder, 86 A.D.3d 406, 410 [1st Dept 2011]). The existence of a valid and enforceable written contract governing the

disputed subject matter precludes the law firm from recovering in quantum meruit (Sheiffer v. Shenkman Capital Management, Inc., supra).

The law firm contends it was defrauded by Chang because Chang lied to Wotman about her eagerness and willingness to settle the Cartelli case for $500,000. This claim presents complicated issues about an attorney's fiduciary duties to his or her client and the nature of retainer agreements.

The unique relationship between an attorney and his or her client is based upon "the elements of trust and confidence on the part of the client and of undivided loyalty and devotion on the part of the attorney..." (Demov, Morris, Levin & Shein v. Glantz, 53 N.Y.2d 553 [1981]). An attorney has a fiduciary duty to his or her client and this duty transcends those prevailing in the commercial market place (Ulico Cas. Co. v. Wilson, Elser, Moskowitz, Edelman & Dicker, 56 A.D.3d 1,8 [1st Dept 2008] *internal citations omitted*). It is well established law that an agreement between an attorney and his or her is subject to close scrutiny and in the event of any ambiguity, it must be construed in a manner most favorable to the client (Shaw v. Manufacturers Hanover Trust Co., 68 N.Y.2d 172 [1986]).

A "deliberate misrepresentation of present intent made for the purpose of inducing another to enter a contract will normally constitute actionable fraud if there is a reliance by the party to whom the misrepresentation was made" (Demov, Morris, Levin & Shein v. Glantz, 53 N.Y.2d at 557). Where, however, it is a client who made a misrepresentation to an attorney to induce him to take the case, that misrepresentation, even if deliberate, will not, as a matter of public policy, support a fraud cause of action against the client (Demov, Morris, Levin & Shein v. Glantz, supra).

[* 20]

Applying the legal principles of Demov, plaintiff's claim fails because he has not established a material element of his fraud claim: reliance. Although in Demov the client discharged the attorneys after she had promised them they would be substitute ias counsel on another, more financially lucrative matter, the underlying type of promise in this case is indistinguishable. Wotman's fraud claim is based on his expectation of fees which have not materialized. Therefore, plaintiff cannot, as a matter of public policy assert a fraud claim against Chang, its client.

Even were the court to decide that the firm's claim is valid, plaintiff's claims skirt dangerously close to the prohibitions set forth in DR 5-101 [1200.20] pertaining to conflicts of interest and a lawyer's own interests. An attorney must deal fairly, honestly with his or her client and with undivided loyalty, avoiding conflicts of interest, operating competently, safeguarding his or her client's property and honoring the client's interests over the lawyer's own interests (Matter of Cooperman, 83 N.Y.2d 465 [1994]). DR 5-101 [1200.20] provides that:

> A. A lawyer shall not accept or continue employment if the exercise of professional judgment on behalf of the client will be or reasonably may be affected by the lawyer's own financial, business, property, or personal interests, unless a disinterested lawyer would believe that the representation of the client will not be adversely affected thereby and the client consents to the representation after full disclosure of the implications of the lawyer's interest.

The contingency fee agreement references the 20% fee in connection with "any Net Amounts Recovered or Received by Chang in the Malpractice Actions pursuant to settlement, judgment, trial or otherwise..." Chang did not retain the firm to settle the case for her. The law firm was hired to represent her in the case, even if it went to trial.

Although an attorney may not settle a case without his or her client's approval, the contingency fee agreement states that Chang could not settle the Cartelli action without Wotman's approval. Neither side has addressed whether this requirement is enforceable or even ethical (see In re Snyder, 190 NY 66 [1926]).

There are conflicting facts whether Wotman was "pressuring" Chang into settling the Cartelli matter so the firm could realize its contingency fee, or "advising" her to do so because the law firm believed it was in their client's best interest to collect the policy amount, rather than try to satisfy a money judgment. It is unclear what kind of assets, if any, the deceased attorney had. Some of the statements Wotman has made support both viewpoints as they can be construed either way: "Chang acted in a wonton and reckless manner, showing a conscious disregard and utter disregard for the interests of Wotman" (Complaint ¶89).

After carefully examining this record, the court finds that Chang has met her burden of proving she is entitled to summary judgment dismissing, as a matter of law, the fraud claim. Plaintiff's cross motion for summary judgment on the fraud claim is denied.

The law firm has asserted a cause of action for account stated. Where a law firm has provided legal representation and rendered legal services to the client and the firm submits: 1) copies of actual itemized bills reflecting total unpaid charges for legal services rendered and disbursements incurred; 2) detailed narrative descriptions; 3) the sworn affidavit of the attorney setting forth and explaining the precise legal services performed and specific disbursements incurred; and 4) proof of the receipt and retention by the defendant, without objection within a reasonable length of time, of the

invoices that plaintiff seeks payment of, the law firm has established a prima facie cause of action for an account stated (Ruskin, Moscou, Evans, & Faltischek, P.C. v. FGH Realty Credit Corp., 228 A.D.2d 294 [1st Dept 1996]). An account assumes the existence of some indebtedness between the parties and may arise based upon legal services performed by the attorney (Gurney, Becker & Bourne v. Benderson Dev. Co., 47 NY2d 995 [1979]; Zanani v. Schvimmer, 50 A.D.3d [1st Dept., 2008]).

It is unrefuted that Chang hired the plaintiff and paid the firm $15,000. The retainer agreement does not identify the $15,000 as a "retainer fee" but as a "flat fee" for the scope of the work identified in that agreement Excluded from that retainer are "legal services on your behalf for any appeals." There are conflicting facts as to whether the law firm sent Chang the scores of invoices it has provided on these motion, whether she objected to them and what the invoices were for. The invoices span the years 2002 through 2006. Some of the invoices indicate they are for appeals undertaken in connection with Citidress. Other invoices identify different matters altogether.

Although Chang argues there is no proof provided by the plaintiff that it sent her these invoices, she has not, on the other hand, provided the court with any evidence that, if they were sent, she objected to them. The plaintiff has established a prima facie case that the invoices were mailed to Chang's correct address. Many of these invoices are dated and are alleged to have been sent after Justice Heitler allowed Wotman to withdraw as counsel. If Chang retained these invoices, or made partial payments towards them, as the law firm claims, it is unclear why she did so. Although Chang claims these payments were advancements of the contingency fee in the Cartelli action,

this is disputed.

It is not inconsistent for an account stated claim to survive, but a quantum meruit claim to fail (Fennell & Minkoff v. Wall Street Transcript Corp., 239 A.D.2d 160, 657 N.Y.S.2d 46 [1st Dept 1997]). Although the court has granted Chang summary judgment on plaintiff's claim for quantum meruit, it is to the extent that the quantum meruit claims is for services rendered by the firm under the flat fee agreement and before the law firm was allowed to withdraw as counsel. In other words, the aspect of the quantum meruit claim dismissed was raised in connection with an otherwise valid, enforceable and unambiguous flat fee retainer that did not expire.

With respect to the account stated claim, however, there is evidence that Wotman may have continued to do work for Chang, after he was permitted by Justice Heitler to withdraw as counsel and sent Chang invoices for his work (see Mataresse v. Wilson, 202 Misc. 994 [Sup Ct., Bx Co. 1952]). It is unclear whether the parties continued an attorney/client relationship thereafter. If so, he may have a claim in quantum meruit for the value of those services rendered to Chang, the corporation and/or other nonparties at Chang's request thereafter. Consequently, neither side has met its burden of proving that there are no triable issues of fact with respect to plaintiff's account stated claim and, to the extent that this claim survives, so does the corresponding branch of his claim for quantum meruit.

Issues about whether the invoices are barred by applicable six (6) year statute of limitations set forth in CPLR § 213 [2] cannot be resolved until the factual disputes are decided. As has already been stated, the plaintiff's failure to comply with the requirements of Part 1215 does not preclude it from seeking recovery of legal fees

under quasi contract principles (Roth Law Firm, PLLC v. Sands, 82 A.D.3d 675 [1st Dept 2011]).

Therefore, the motion and cross motion for summary judgment on the 1st COA for an account stated is denied.

Chang has raised the issue of discovery in her motion. She claims that the law firm did not provide discovery despite her request for same and at least one order requiring the law firm to turn over its files on the Cartelli matter. Chang seeks to have the court impose the discovery sanction of striking the complaint. That motion is denied. A movant seeking to compel disclosure is must serve and file "an affirmation that counsel has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion" (22 NYCRR 202.7[a]). The failure to file that affirmation or a deficiency in that affirmation may justify denial of a motion to compel on that basis alone, unless the party seeking to enforce can show that any effort to resolve the discovery dispute non-judicially would have been futile (Yargeau v. Lasertron, 74 A.D.3d 1805 [4th Dept 2010]).

Chang has not provided an affirmation of good faith. Furthermore, Wotman states he and Chang's attorney agreed to hold off on discovery. In any event, a motion for summary judgment stays discovery. Chang has not shown her attorney made efforts to resolve this dispute before bringing a motion and the relief sought – the sanction of striking the complaint– is unwarranted. Therefore, Chang's motion pursuant to CPLR § 3126 is denied.

Conclusion

Chang's motion for summary judgment dismissing the claim for fraud (3rd cause

of action) is granted and that claim is severed and dismissed. Chang's motion for summary judgment on the quantum meruit (2nd cause of action) is granted in part and denied in part for the reasons stated. Chang's motion for summary judgment on the account stated (1st cause of action) is denied as to any claims for post-withdrawal as counsel work allegedly performed by the plaintiff.

The cross motion by the plaintiff is denied in all respects.

Chang's motion for discovery sanctions is also denied.

The parties have a compliance conference scheduled for **September 6, 2012.** The court intends that this shall be a trial certification conference. Therefore, any remaining discovery shall be completed no later than **August 31, 2012.** The note of issue is extended to **September 7, 2012.**

Ay relief requested but not specifically addressed is hereby denied. This constitutes the decision and order of the court.

Dated: New York, New York
July 9, 2012

So Ordered:

Hon. Judith J. Gische, JSC