Law Offices of Ira H. Liebowitz & Ira H. Liebowitz, Esq. v Landmark Ventures, Inc.
2012 NY Slip Op 33819(U)
October 1, 2012
Supreme Court, Suffolk County
Docket Number: 32984/2011
Judge: William B. Rebolini
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Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

The Law Offices of Ira H. Liebowitz and Ira H. Liebowitz, Esq.

Plaintiff,

-against-

Landmark Ventures, Inc.,

Defendant.

Motion Sequence No.: 001; MOT.D
Motion Date: 6/28/12
Submitted: 7/18/12

Index No.: 32984/2011

Attorney for Plaintiff:

The Law Offices of Ira H. Liebowitz
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Attorney for Defendant:

William B. Flynn, Esq.
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Clerk of the Court

Upon the following papers numbered 1 to 40 read upon this motion for summary judgment: Notice of Motion and supporting papers, 1 - 29; Answering Affidavits and supporting papers, 30 - 35; Replying Affidavits and supporting papers, 36 - 40; it is

ORDERED that this motion by plaintiff Ira H. Leibowitz is granted only to the extent it seeks an order awarding summary judgment in his favor on the first cause of action in the complaint for breach of contract and an order dismissing the counterclaim of defendant Landmark Ventures, Inc. (Landmark); and it is further

ORDERED that plaintiff shall have judgment against defendant in the amount of $4,760.00 with interest from July 1, 2011, plus judgment against defendant in the amount of $9,776.33 with interest from August 1, 2011, plus costs and disbursements, and in all other respects the motion is denied.

Plaintiff Ira H. Leibowitz is an attorney who commenced this action to recover his legal fees for services allegedly rendered on behalf of the defendant in connection with two matters. Prior to the commencement of this action plaintiff served a Notice of Client's Right to Arbitrate in accordance with Rule 137 of the Rules of the Chief Administrator of the Courts. Plaintiff seeks recovery in breach of contract under the first cause of action, upon an account stated under the second cause of action, and in *quantum meruit* under the third cause of action. It is alleged in the complaint that defendant requested plaintiff's legal services, and on June 7, 2011 plaintiff sent an e-mail to Landmark confirming in part a discussion held the previous day and setting forth that the hourly rate for legal services would be $350 per hour. In the e-mail plaintiff also stated that he "estimated that the Summons and Complaint may require less than $3,500 in order to properly prepare it." The response by Ralph Klein, the managing director of defendant Landmark, to Leibowitz was ". . .You estimated at 2.5k-3k. I understand and I need the Summons today as discussed. . ." Numerous additional e-mails were exchanged prior to the commencement of the action on June 10, 2011, when the action entitled ***Landmark Ventures, Inc. v Gallucci*** was commenced in Supreme Court, New York County. On July 15, 2011, plaintiff sent an e-mail to Landmark with attachments that included Gallucci's answer with counterclaim and five deposition notices, to which Klein responded, "Ira, we need to talk. Please do not do any further work on my cases until we speak . . ." Plaintiff now seeks recovery of $4,760.00 in legal fees and disbursements in connection with services provided on the matter. In opposition to plaintiff's request for recovery for legal services rendered on the ***Gallucci*** matter, defendant does not dispute having agreed to payment at a rate of $350.00 per hour. Instead, defendant claims that the fees are excessive and that plaintiff "wrote lengthy and unnecessary e mails, when a short note or telephone call would be sufficient."

It is also alleged in the complaint that by e-mail on Feb 24, 2011, Landmark requested plaintiff to provide collection services on its behalf against Reflex Photonics. Plaintiff accepted the assignment and by e-mail on March 30, 2011 he stated that his fee would be "a nonrefundable retainer of $5,000 payable at $1,000 per month" and "a 25% contingency fee in addition to the $5,000 retainer." Klein responded with an e-mail that said, "This is acceptable but what if the case is settled without any court activity/papers after summons filed? I suggest $2,500.00 plus 10%. OK?" The following day, plaintiff sent an e-mail response which stated, ". . . upon the service of the Summons and Complaint the action has been commenced and I am entitled to my entire fee." Landmark paid plaintiff $1,000 on April 22, 2011 in partial payment of the retainer for services in connection with Landmark's claim for recovery of $40,000 against Reflex Photonics. An e-mail from plaintiff to defendant on May 6, 2011 indicates that the complaint had not yet been prepared and it acknowledged that, "Should you receive any payments [from Reflex Photonics] prior to my instituting a lawsuit, it would only be fair and reasonable for me to make Landmark an accommodation." In the e-mail, plaintiff further indicated that the balance of the "non-refundable retainer of $5,000" would become due and payable if the claim against Reflex Photonics were settled prior to the commencement of an action, but that if an action were commenced the retainer of $5,000 plus 25% of funds collected would be due for the attorney's fee. A summons and complaint were prepared and forwarded to defendant on May 19, 2011 for verification, and Klein responded to plaintiff with an e-mail stating that the papers were "fine." It is contended that the summons and

complaint in the action entitled ***Landmark Ventures, Inc. v Reflex Photonics, Inc.*** were filed and served in Supreme Court, New York County, and that a stipulation of settlement thereafter was prepared, signed and filed with the Court. Although defendant asserted as a second affirmative defense that the case against Reflex Photonics "was never commenced," Klein acknowledged in his affidavit submitted in opposition to the motion that an action to recover damages for breach of contract was commenced under New York County index number 106288/2011. The action was resolved by stipulation of settlement dated June 14, 2011 for a total of $40,000.

By letter to counsel for Reflex Photonics dated July 29, 2011, plaintiff requested that settlement payments be made to "Ira H. Leibowitz, Esq., as attorney for Landmark Ventures, Inc." rather than to the defendant directly. In its answer to the complaint, defendant alleges that plaintiff is liable to it for tortious interference with its contract rights under the terms of the settlement agreement by requesting that Reflex Photonics make its monthly payments directly to counsel. The elements of a tortious interference with contract claim are: (1) the existence of its valid contract with a third party, (2) defendant's knowledge of that contract, (3) defendant's intentional and improper procuring of a breach, and (4) damages (***White Plains Coat & Apron Co., Inc. v Cintas Corp.,*** 8 NY3d 422, 867 NE2d 381, 835 NYS2d 530 [2007], citing ***Lama Holding Co. v Smith Barney,*** 88 NY2d 413, 668 NE2d 1370, 646 NYS2d 76 [1996]). Viewing the allegations of the counterclaim in the light most favorable to the defendant, the evidence demonstrates that plaintiff's communications with representatives of Reflex Photonics were neither wrongful nor motivated by malice (*see* ***Advanced Global Tech., LLC v Sirius Satellite Radio, Inc.,*** 44 AD3d 317, 843 NYS2d 220 [1st Dept 2007]). Furthermore, there was no improper procurement of a breach and full payment was made on the settlement. Thus, the counterclaim must be dismissed.

To establish the existence of an enforceable agreement, a plaintiff must establish an offer, acceptance of the offer, consideration, mutual assent, and an intent to be bound (***Kasowitz, Benson, Torres & Friedman, LLP v Duane Reade,*** ___ AD3d ___, 950 NYS2d 8 [1st Dept 2012], quoting ***Kowalchuk v Stroup,*** 61 AD3d 118, 121, 873 NYS2d 43 [2009]). An exchange of e-mails may constitute an enforceable agreement if the writings include all of the agreement's essential terms, including the fee, or other cost, involved (***Kasowitz, Benson, Torres & Friedman, LLP v Duane Reade,*** *supra,* ___ AD3d ___, 950 NYS2d 8). Here, defendant does not dispute having entered into an agreement to pay plaintiff a legal fee at the rate of $350 an hour for his services in the Gallucci matter, nor does it dispute that plaintiff rendered legal services on its behalf. No expert testimony has been proffered to support defendant's claims that plaintiff's charges are excessive or that plaintiff performed unnecessary services. Furthermore, any claim by defendant that plaintiff limited his fee to $3,000 is not supported by the evidence before this Court. While the evidence is clear that plaintiff provided an estimate that the hourly fee to prepare the summons and complaint "*may* require less than $3,500" (*emphasis supplied*), there is nothing in the record to suggest that such estimate was intended by either party to cover all legal services provided by plaintiff or that it was meant to limit plaintiff's fee for services. Accordingly, plaintiff has demonstrated his entitlement to recover $4,112.50 for 11.75 hours of legal services, plus $287.50 for 2.7 hours of paralegal services, plus $360.00 for reimbursement of disbursements on the matter against Gallucci and defendant failed to raise a triable issue of fact.

A contract is unambiguous if the language it uses has "a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion" (***Kasowitz, Benson, Torres & Friedman, LLP v Duane Reade,*** *supra,* quoting ***Breed v Insurance Co. of N. Am.,*** 46 NY2d 351, 355, 385 NE2d 1280, 413 NYS2d 352). In connection with the defendant's claims against Reflex Photonics, the agreement between the parties was clear that once an action was commenced, the legal fee of a $5,000 retainer plus 25% of recovery was to be paid. Furthermore, Klein's response, "This is acceptable . . ." indicates a meeting of the minds about the legal fee, and there is no evidence whatsoever of any agreement by both parties to modify the attorney's compensation. Although defendant asserts that a non-refundable legal retainer is unenforceable (*see* ***In re Cooperman,*** 83 NY2d 465, 633 NE2d 1069, 611 NYS2d 465 [1994]), it paid the $5,000 retainer in full plus an additional $1,000, as defendant's claim against Reflex Photonics was resolved successfully. Under the circumstances, this Court finds that the additional fee based on 25% of recovery is reasonable and not unconscionable and that it was knowingly agreed to by the managing director of the defendant corporation (*see* ***Orix Credit Alliance, Inc. v Grace Indus., Inc.,*** 261 AD2d 521, 690 NYS2d 651 [2d Dept 1999]). Accordingly, plaintiff has demonstrated his entitlement to recover an additional $9,000 as part of the contingency fee due and owing, plus $776.33 for reimbursement of disbursements on the matter against Reflex Photonics.

Dated: 10/1/12

William B. Rebolini

HON. WILLIAM B. REBOLINI, J.S.C.

__X__ FINAL DISPOSITION_____ NON-FINAL DISPOSITION