[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: LOUIS B. YORK J.S.C. Justice

PART 2

Index Number : 106470/2010
KALIR, ESQ., DORON M.
vs.
OTTINGER, ESQ., ROBERT
SEQUENCE NUMBER : 004
PARTIAL SUMMARY JUDGMENT

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 ACCOMPANYING MEMORANDUM DECISION.

FILED
MAY 28 2013
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 5/22/13

LOUIS B. YORK, 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

----------x

DORON M.KALIR,

Plaintiff,

Index No. 106470/2010

-against-

ROBERT OTTINGER, ESQ. and THE OTTINGER FIRM, P.C.,

Defendants.

----------x

YORK, J.:

Defendants Robert Ottinger ("Ottinger") and The Ottinger Firm, P.C. ("Firm"), move for an order, pursuant to CPLR 3212, granting defendants partial summary judgment (a) dismissing the first cause of action of the complaint to the extent it pertains to relief sought in connection with the D.S. case[1]; (b) limiting relief – if any- under the second and third causes of action of the complaint for compensation at a reasonable hourly rate; and (c) dismissing all claims in the complaint against defendant Ottinger, individually. Plaintiff opposes the motion and cross-moves for partial summary judgment on the first, second and third causes of action related to the D.S. case.

BACKGROUND

Plaintiff Doron Kalir started working for The Ottinger Firm, P.C. on February 4, 2009 and was fired on July 6, 2009. Kalir describes his role at the firm as an independent contractor. Defendants variously call him an "at-will employee", "of counsel," (Ottinger Deposition, P.5,

[1] The court will refer to this and other cases on which plaintiff worked at the firm using the initials of the firm's clients.

Hershenson Aff., Exh. A) an 'independent contractor" (Answer to the Complaint, at ¶5, Rubin Aff,. Exh.B) and a "freelance attorney" (Ottinger e-mail of July 6, 2009, Ottinger Aff., Exh.T). While at the firm, Kalir worked on an anti-trust case, paid at an hourly rate of $75.00 and a number of other litigation matters. The manner of compensation for Kalir's work on these matters and the amount allegedly due to him are in dispute in this action. On June 10, 2009 Ottinger sent an e-mail to Kalir, memorializing an agreed-upon compensation scheme:

> Dear Doron,
>
> As we discussed, we are trying to come up with a fee structure that fairly compensates you for the excellent work that you do and which rewards you for originating cases. We have agreed to the following fee structure with the understanding that it may be necessary to change this structure. But for now, we have agreed to the following:
>
> You will receive one-third of the fees received from cases that you work on while at the firm. If you originate a case, then you will be paid 50% of the fees generated in that case. But if other lawyers in the firm work on a case that you originate (meaning that you are not the only lawyer working on the case [I do not count as a lawyer working on such case], in such cases, your percentage will be reduced to 1/3 of the fees generated in that case while at the firm.
>
> The H. matter is a case that you originated and the fee agreement on that case is that you receive $200 per hour for your time billed and collected on that case.
>
> Also, to the extent possible, you will have a balance of hourly and contingency cases to work on so that you have adequate cash flow.
>
> (Kalir Aff., Exh. A)

On June 25, 2009, defendants abrogated the agreement in an e-mail from Ottinger to Kalir:

> Hey – while you are out, I am going to need to have other lawyers work on some of the cases such as Z. and R.
>
> I cannot pay you 1/3 of the recovery and pay others as well. This 1/3 thing just does not work. I cannot have anyone else work on anything you touch because of the 1/3 thing. We need to come up with another compensation structure that works for you and the firm.
>
> I think I need to pay you for your time on those cases to date at an hourly rate.
>
> (Kalir Aff., Exh. C).

On May 17, 2010 Kalir started this action. The three first causes of action are based on the June 10, 2009 fee agreement: the first cause is for breach of contract, the second for quantum meruit, and the third for unjust enrichment. On June 24, 2010, Kalir moved for summary judgment for the unpaid legal fees, which was granted on the issue of liability due to defendants' deficient opposition papers. Defendants' motion to renew was granted on December 23, 2011, and, upon renewal, plaintiff's motion for summary judgment was denied. The court determined that the parties raised numerous triable issues of fact, and that plaintiff had not satisfied his evidentiary and other burdens to refute defendants' argument.

The present motion and cross-motion are limited to Kalir's work on the D.S. case, a sexual harassment matter. D.S., represented by the firm on a contingency basis, won an arbitration award in September 2009, and attorney fees were additionally awarded in January 2010. The Firm received a total of $161,161.16 for its legal services (1/3 of D.S.'s recovery). Ottinger argues that at most Kalir is entitled to be remunerated for 2.5 hours of his work on the matter while the fee agreement was in force (from June 10 till June 25, 2010). Kalir, for his part, claims either 1/3 of the sum received by the firm, $53,720.39, or the "reasonable value" of his legal services. The latter is based on how Ottinger himself evaluated Kalir's contribution in his application for attorneys fees, submitted to the arbitrator - $113,700.00. The arbitrator awarded $52,662.50 for Kalir's work on the matter (Ottinger Reply Aff., Exh. EE, P.5). The dispute turns on the parties' understanding of their mutual relationship, and in particular on the meaning of the June 10, 2009 e-mail (the "fee agreement" or "agreement").

A. Fee agreement between parties

Defendants' argument

Defendants argue that Kalir was an at-will employee, and that the firm could unilaterally change the terms of his employment, which it did by revoking the June 10, 2009 agreement. Kalir implicitly accepted the new terms, since he continued working at the firm until July 6, 2009. Even if Kalir were an independent contractor, he remained subject to at will employment principles. The terms of the agreement applied only prospectively, thus were valid for work done between June 10 and June 25. The firm emphasizes the words "for now," and the present tense in "cases you work on…" (not "have worked on") (Def. Reply Memo of Law, P. 11). By "fees" defendants mean specifically attorney fees, not an overall recovery for the firm received in contingency fee cases (Def. Reply Memo of Law, P. 15, no. 6). This distinction is particularly relevant to the D.S. case, where an arbitrator granted D.S. attorneys fees in addition to her damages. In the defendants' opinion, the agreement is clear that Kalir is entitled to fees received "while at the firm." The firm received the relevant D.S.'s fees six months after Kalir's termination. Defendants do not see any ambiguity in the agreement, and Kalir's competing interpretation, in their opinion, is utterly unreasonable: it would allow him recovery of $53,720.39 for slightly more than two hours of work. In the alternative, the reasonable value of Kalir's services under the quasi-contract theories of quantum meruit and unjust enrichment should be limited to his customary hourly rate. At times, Kalir was paid at $75.00 per hour, at others at $25.00. Subsequent to his dismissal from the firm, Kalir performed hourly work at the rate of $20.00 per hour for a law firm in Cleveland.

Plaintiff's argument

Plaintiff remarks that a bilateral agreement such as the fee agreement may not be changed by one of the parties unilaterally without consent of the other party (Pl. Memo of Law, P.5). He denies that he ever consented to changes in his compensation after the fee agreement was signed (*id.*, P. 6). Plaintiff admits that an at-will employee or contractor can be terminated unilaterally, but stresses that an employer cannot deprive him of compensation for services rendered and covered by the fee agreement (*id.*, P.7). In his view, the agreement was not limited to future services, but was to compensate him for cases on which he has already worked on while at the firm. He emphasizes the present tense in the phrase "that you [plaintiff] work on while at the firm." The D.S. case was the one he was working on at the time of the June 10 e-mail. The agreement also explicitly refers to the H. case, for which he was promised retrospective compensation. (*id.*, PP. 6-7).

Discussion

Both parties concur that the June 10, 2009 e-mail is an agreement that governed the fee arrangements between Kalir and the firm, and both claim that the meaning of the agreement is not ambiguous. However, they disagree about how long this agreement was in force, whether it is a bilateral contract or a unilateral employment contract, whether it is prospective or both prospective and retrospective, and whether it covers the D.S. case.

> Whether a contract is ambiguous is a question of law and extrinsic evidence may not be considered unless the document itself is ambiguous. 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. Mere assertion by one that contract language means something to him, where it is otherwise clear, unequivocal and understandable when read in connection with the whole contract, is not in and of itself enough to raise a triable issue of fact.

Kasowitz, Benson, Torres & Friedman, LLP v Reade, 98 AD3d 403, 406; 950 N.Y.S.2d 8 [1st Dept 2012] (internal quotation marks omitted).

Some issues can be resolved looking at the four corners of the e-mail.

First, "while at the firm" refers both to work done and fees generated "while at the firm." On defendants' reading, fees generated "while at the firm" means fees received while plaintiff is at the firm. It follows that Kalir cannot claim any money from the D.S. case received 6 months after he left the firm. This reading is unreasonable given the nature of legal practice. Even when clients pay legal fees based on regular invoices, there is a time gap between services rendered and money received. This gap may be particularly wide in case of contingency arrangements. Payments to Kalir were not fixed wages, and were dependent on collections from clients. "Generated" in the agreement means ultimately payable by clients, but accounted for on an accrual basis.

Second, it is clear that the agreement is bilateral ("we have agreed"), and that there is an understanding between the parties that it can be changed in the future. However, the e-mail does not specify how this agreement can be revoked, and whether consent of the other party is required. If the agreement concerns only the future, as defendants insist, and is an employment agreement, then an employer has a unilateral right to change the terms of employment. If the agreement refers to services that were partly rendered in the past, as plaintiff contends, then it creates vested rights that cannot be revoked unilaterally. Gebhardt v. Time Warner Entertainment–Advance/Newhouse, 284 A.D.2d 978, 979, 726 N.Y.S.2d 534 [4th Dept 2001] (the employer of an at-will employee is entitled to change the terms of the employment agreement only prospectively, subject to the employee's right to leave the employment if the new terms are unacceptable), accord Scott v Harris Interactive, Inc., 851 F Supp 2d 631, 641 [SDNY 2012] affd in part, vacated in part, remanded, 12-1414-CV, 2013 WL 616489 [2d Cir Feb. 20,

2013](an at-will employee can prevail on a breach of contract claim against his employer arising out of an employment agreement; an employer may terminate an at-will employee, but cannot retroactively change the terms of the employment agreement entered into with that employee).

The text of the e-mail is silent on several crucial issues. The language does not allow the confident interpretation that the agreement covers work done in the past. In favor of plaintiff's interpretation is the fact that the arrangement on the H. case is retrospective – it increases remuneration for the work already done and at least partially paid. However, the D.S. case is not mentioned, and there is no direct support for plaintiff's contention that all recovery on this case is subject to a 1/3 distribution in his favor. Defendants do not deny that the D.S. case is included prospectively, without explaining how they would allocate 1/3 of the recovery only to future efforts when the fee is contingent on success. They argue that past work on the D.S. case is outside the agreement. Finally, the term "fee received from cases" is not defined. No distinction is made between an hourly rate and a contingency fee. It is not clear whether the term refers to all potential recovery, as plaintiff contends (Kalir Deposition, P.176, Rubin Aff., Exh. I) or to "attorneys fees" specifically designated as such, as defendants maintain.

The agreement in inherently vague, and allows more than one interpretation. The court will need to use extrinsic evidence to determine its meaning. Fed. Ins. Co. v Americas Ins. Co., 258 AD2d 39, 43; 691 N.Y.S.2d 508 [1st Dept 1999] (where there are internal inconsistencies in a contract pointing to ambiguity, extrinsic evidence is admissible to determine the parties' intentions). The conduct of the parties subsequent to the execution of the contract is relevant to show what the parties intended at the time of contracting. In the June 25 e-mail Ottinger uses the term "recovery" rather than "fees" in referring to Kalir's remuneration. In addition, he writes of cases on which Kalir worked prior to his paternity leave, but to which he did not contribute while

on leave. Nevertheless, by the terms of the agreement, Kalir would still be entitled to a 1/3 of the overall recovery on these cases, which Ottinger finds unsustainable. Unlike the H. case, on which Kalir was to be paid a proportion of what the firm billed for his services to the client, 1/3 of recovery refers to the overall contingency fees received by the firm. This indirectly confirms that the agreement covered contingency fees arrangements, and could include the D.S. case. However, again, the D.S. case is not explicitly mentioned.

Defendants correctly state that Kalir does not identify any agreement before the June 10, 2009 e-mail that would govern any payment terms between Kalir and the firm (Def. Reply Memo of Law, P. 13). However neither do defendants. The record does not contain any information on how Kalir was to be compensated on the H. case prior to June 10, or on any of the contingency-fee cases, of which the D.S. case is one. The documentary evidence indicates that Kalir was paid $25 an hour for his work on the D.S. case, and that it was not part of his regular pay as an employee (Rubin Aff., Exh. G). The fact that the payment was listed on a 1099 form means that he was compensated as an independent contractor. The terms of this contract were not revealed by either party. Competing inferences could be drawn from the fact that Kalir was paid. One, which would favor defendants' position is that it represents the hourly rate at which Kalir contracted to work on the case. The other, favoring plaintiff, is that it is an advance on Kalir's share of the contingency fee.

As a moving party, defendants did not meet their burden of showing that the D.S. case was part of a separate contract and was not encompassed by the June 10 agreement. Where the intent of contracting parties must be determined by disputed evidence or inferences outside the written words of the instrument a question of fact is presented which precludes the grant of

summary judgment. Mallad Const. Corp. v County Fed. Sav. & Loan Ass'n, 32 NY2d 285, 291 [1973].

B. Reasonable value of plaintiff's services

Plaintiff and defendants are in agreement that the reasonable value of legal services under the quantum meruit and unjust enrichment claims (the second and third cause of action) is to be measured by a reasonable hourly rate multiplied by the number of hours worked. Thus the court does not need to address this part of defendants' motion. What defendants really want this court to do is to accept, as a matter of law, that Kalir's services are worth as much as the firm already paid him on the D.S. case, $25 an hour. Kalir, for his part, is guided by the firm's application to the arbitrator, in which his services were evaluated at $500 an hour. This sum was found by the arbitrator to be excessive, and Kalir agrees (Kalir Deposition, P. 202, Rubin Aff., Exh. I). Kalir's time was compensated at $275 an hour.

Defendants are correct that statutory attorneys fees awarded for an employee's services reflect what a client would pay to a firm, not what a firm would pay to an at-will employee (Def. Reply Memo of Law, P.22). The latter is determined by an employment contract. Given that Kalir worked on the D.S. case as an independent contractor, as pay stubs reveal, and The Ottinger Firm, P.C. presented no contract covering work on this case, the estimate of the value of Kalir's services is an issue in dispute. The arbitrator's award is one piece of evidence to be presented at trial. At that point the firm can introduce evidence about customary practices in remuneration of independent legal contractors. Whether a 91% share of attorneys fees ($250 out of $275) of an independent contractor taken by a law firm is a reasonable arrangement is to be assessed by a jury.

C. Action against Robert Ottinger as an individual

Plaintiff commenced this action both against Robert Ottinger as an individual and The Ottinger Firm, P.C. Defendants move to dismiss the action against Robert Ottinger as an individual. "The party seeking to pierce the corporate veil must establish that the owners, through their domination, abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against that party such that a court in equity will intervene." Morris v New York State Dept. of Taxation and Fin., 82 NY2d 135, 142, 603 N.Y.S.2d 807 [1993] (internal quotations omitted). In the present case, plaintiff did not attempt to show that Robert Ottinger impermissibly dominated his law firm, and did not consider a single factor that would have demonstrated such domination. *See*, Fantazia Intern. Corp. v CPL Furs New York, Inc., 67 AD3d 511, 512; 889 N.Y.S.2d 28 [1st Dept 2009]. It is insufficient for Kalir just to say that in his eyes Robert Ottinger and his firm were one and the same. He failed to rebut defendants' *prima facie* case that Robert Ottinger at all times acted as a principal of the firm, and not as an individual. This part of defendants motion for summary judgment is granted.

Plaintiff's cross-motion for summary judgment

Plaintiff 's previous motion for summary judgment was denied by this court. Though the current cross-motion is limited to the D.S.case, this case was at the centre of the first motion for summary judgment. Repeated motions for summary judgment in the absence of new factual assertions or other sufficient cause shown for making the second motion are discouraged by courts. 11 Essex St. Corp. v Tower Ins. Co. of New York, 81 AD3d 516; 917 N.Y.S.2d 164 [1st Dept 2011]. For this reason alone plaintiff's cross-motion must be denied. Even if it were plaintiff's first application for relief, the triable issues of fact that preclude summary judgment for defendants are relevant for the plaintiff's cross-motion as well. If the agreement is reasonably

susceptible to more than one interpretation, and the difficulty is not resolved by reading the agreement as a whole, neither side is entitled to summary judgment construing it as a matter of law. The correct interpretation of the agreement in light of all relevant circumstances is to be determined at trial. LoFrisco v Winston & Strawn LLP, 42 AD3d 304, 307-08; 839 N.Y.S.2d 481 [1st Dept 2007].

CONCLUSION

For the foregoing reasons it is

ORDERED that the part of defendants' motion for summary judgment to dismiss plaintiff's first cause of action as related to the D.S. case is denied; and it is further

ORDERED that the part of defendants' motion to determine the reasonable value of plaintiff's services as a matter of law is denied; and it is further

ORDERED that the part of defendants' motion to dismiss the action against Robert Ottinger as an individual is granted; and it is further

ORDERED that plaintiff's cross-motion for summary judgment is denied in all respects.

FILED

MAY 28 2013

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 5/22/13

ENTER:

J.S.C.

LOUIS B. YORK
J.S.C.