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SHORT FORM ORDER

INDEX No. 12-35962
CAL. No. 13-01162CO

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 50 - SUFFOLK COUNTY

PRESENT:

Hon. ANDREW G. TARANTINO, JR.
Acting Justice of the Supreme Court

MOTION DATE 8-8-13 (005)
MOTION DATE 9-26-13 (006)
MOTION DATE 10-17-13 (007)
ADJ. DATE 3-31-14
Mot. Seq. # 005 -Mot D
006 - XMot D
007 - XMot D

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LAW OFFICES OF J. STEWART MOORE, P.C.,

Plaintiff,

- against -

SHERMAN TRENT, et al., JOYCE ANDERSON, ARTHUR J. ANDERSON III, ARTIE & CORBY, L.P., PORTER W. TRENT and MARIE TRENT, ESAW LANGHORNE and JUANITA LANGHORNE, TERRY T. HATCHER, ALAN C. HATCHER, KIM HATCHER STEPHENS and TROY D. HATCHER and ROBERTO SALCEDO,

Defendants.

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Upon the following papers numbered 1 to 31 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-9 ; Notice of Cross Motion and supporting papers 10-18, 19-25 ; Answering

Affidavits and supporting papers 26-28 ; Replying Affidavits and supporting papers 29-31 ; Other ____ ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that these motions are consolidated for purposes of this determination; and it is further

ORDERED that the motion by plaintiff Law Offices of J. Stewart Moore, P. C. ("Moore") for an order, pursuant to CPLR 3212, granting summary judgment in its favor on the complaint is granted to the limited extent set forth below and is otherwise denied; and it is further

ORDERED that the cross motion by defendants Joyce Anderson, Arthur Anderson III, Artie & Corby, L.P., Terry T. Hatcher, Alan C. Hatcher, Kim Hatcher Stevens and Troy D Hatcher ("the Anderson /Hatcher defendants") for an order, pursuant to CPLR 3212, granting summary judgment dismissing the complaint against them is granted to the extent set forth below and is otherwise denied; and it is further

ORDERED that the cross motion by defendant Sherman Trent ("Trent") for an order, pursuant to CPLR 3212, granting summary judgment dismissing the complaint against him is granted to the extent set forth below and is otherwise denied; and it is further

ORDERED that the parties and their attorneys shall appear before the undersigned for a hearing on May 16, 2014 at 10:00 A.M. at 1 Court Street Annex, Riverhead, New York.

Plaintiff moves for summary judgment awarding damages for breach of contract with regard to his representation of the defendants in a civil action filed in the Supreme Court of Suffolk against the Town of Riverhead and the County of Suffolk for damages caused by the flooding of their real property by storm water runoff. The plaintiff having failed to submit with the motion, a copy of the complaint in that matter, the particulars of the action are not before this court. In this action, plaintiff seeks payment of contingent legal fees which he alleges are due and owing pursuant to retainer agreements signed by the defendants herein. Plaintiff also sought to file notices of pendency against the defendants' property, but that issue was disposed by a stipulation between the parties dated and filed January 23, 2013. The defendants oppose this motion and cross-move for summary judgment dismissing the complaint.

In support of the motion plaintiff submits, *inter alia*, his affirmation, the pleadings, the verified bill of particulars, the retainer agreement, and a release signed by the defendant Joyce Anderson. In support of their cross-motion the Anderson/Hatcher defendants submit, *inter alia*, their attorney's affirmation, the affidavit of Kim Hatcher Stephens, sworn to on September 17, 2013, the affidavit of Arthur Anderson III, sworn to on September 17, 2013, plaintiff's response to these defendants' first set of interrogatories and a document entitled "Account Stated" attached thereto, their answer and a letter from plaintiff to defendant Kim Hatcher Stephens dated September 26, 2012. In support of his cross-motion, defendant Trent submits his attorney's affirmation, his answer to the complaint, the plaintiff's response to the Anderson/Hatcher defendants' first set of interrogatories, and the affidavit of Sherman Trent, sworn to on October 17, 2013.

The affidavits filed by the parties in support of and in opposition to the motion establish that in March 2010, runoff from a storm caused flooding, which damaged a number of homes on Horton Avenue in the Town of Riverhead. The defendants herein and a number of other residents/owners of homes on

Horton Avenue retained the plaintiff as counsel to represent them in an action against the Town of Riverhead ("Town") and the County of Suffolk for property damage to their houses and personal possessions due to the flooding. At that time these clients signed retainer agreements prepared by the plaintiff.

The first paragraph of the retainer agreements, which are the subject of this action, confirms "that you have retained this firm to represent you with your legal matters incident to flooding damages to your real property." The next paragraph states, in relevant part, that in order for the representation to begin the client must pay a minimum retainer amount of $3,000.00. The next paragraph states in part that "[i]f your matter is concluded, whether by settlement (separation agreement or stipulation of settlement) or by judicial determination, with the expenditure of fewer hours by the law firm [than] would exhaust the fee...the law firm retains the minimum fee nonetheless." This paragraph also sets plaintiff's hourly rate at $300 and a rate of $150 per hour for services rendered by a legal assistant.

Here, the main point of contention, however, is the paragraph of the agreements which covers contingency fees which states that "[t]his office has agreed to accept this matter with the understanding that the balance of this case will be on a contingency basis. This office will be entitled to a percentage not to exceed twenty (20) percent of any award you are granted. Our percentage will be reduced by any funds which have been paid as a part of the retainer."

Plaintiff filed an action in the Supreme Court, Suffolk County, entitled *Sherman Trent et al v Town of Riverhead and County of Suffolk*, under Index No. 11-19376. The exact details of the complaint are unknown, the plaintiff having failed to attach a copy as part of his motion papers. Court records indicate that the matter was never assigned to a justice and no court appearances were made by the plaintiff. Plaintiff did, however, appear at five hearings held pursuant to General Municipal Law 50-h. Two of these were on behalf of parties to this action. Discussions were held with the Town with regard to the potential purchase of defendants' properties by the Town, using funds obtained from the Federal Emergency Management Agency ("FEMA"). A stipulation of discontinuance of the action was signed by the parties on November 30, 2011, but was not filed by the plaintiff until December 30, 2013. A document entitled "Settlement Agreement" was entered into by counsel on December 1, 2011. This is, in fact, an escrow agreement with regard to the stipulation of discontinuance and the releases signed by the defendants, pending "the property owner FEMA closing". No actual purchase agreement is contained therein. The agreement was never submitted to the court. Defendants allege that plaintiff was terminated in January of 2012, but plaintiff alleges that he was never terminated. Plaintiff does allege that, after a proposed plan was entered into for the Town to purchase the properties, the defendants met "secretly", without counsel, with the Town Attorney's office. Defendants then entered into agreements with the Town to sell the properties to the Town for their full market value. The meetings and purchases took place in 2012. Plaintiff has also served upon the defendants a document entitled "Account Stated", which sets forth the hours allegedly worked by the plaintiff and legal fees which would be due at the $300/$150 rate set forth in the retainer agreement.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Sillman v Twentieth Century-Fox Film Corp.***, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v New York Univ.***

Med. Ctr., 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v New York Univ. Med. Ctr.***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form . . . and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212 [b]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). As the court's function on such a motion is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see* ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

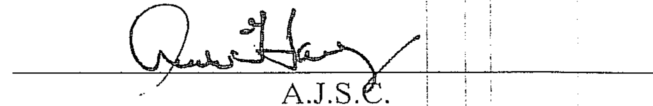
The reasonableness of legal fees is always subject to court scrutiny (***Bizar & Martin v US. Ice Cream Corp.***, 228 AD2d 588, 644 NYS2d 753 [2d Dept 1996]). While the law generally construes equivocal contracts against the drafters, courts, as a matter of public policy, give particular scrutiny to fee arrangements between attorneys and clients, casting the burden on attorneys who have drafted retainer agreements to show that the contracts are fair, reasonable, and fully known and understood by their clients (***Shaw v Manufacturers Hanover Trust Co.***, 68 NY2d 172, 507 NYS2d 610 [1986]; ***Jacobson v Sassower***, 66 NY2d 991, 499 NYS2d 381 [1985]; ***Bizar & Martin v US. Ice Cream Corp.***, *supra*). An agreement to pay a legal fee may be invalid if it appears the attorney got the better of the bargain unless [he or she] can show that the client was fully aware of the consequences and there was no exploitation of the client's confidence in the attorney (***Jacobson v Sassower***, *supra)*. Factors considered in determining whether a fee agreement is excessive include the work done, the compensation received or claimed, and the risk undertaken by the attorney (***Gordon v Credno***, 102 AD3d 584, 960 NYS2d 360 [1st Dept 2013]; ***King v Fox***, 7 NY3d 181, 818 NYS2d 833 [2006]. A contingent fee may be disallowed as between attorney and client in spite of a contingent fee retainer agreement, where the amount becomes large enough to be out of all proportion to the value of the professional services rendered. (***King v Fox***, *supra*).

Here, plaintiff has failed to establish his entitlement to the 20% fee he alleges is due and owing to him pursuant to the retainer agreement. As noted by the defendants, no "award" was granted to the defendants. Black's Law Dictionary (9th edition 2009) contains two definitions of award. The first is "[t]o grant by formal process or judicial decree." The second is "[a] final judgment or decision, esp. one by an arbitrator or jury assessing damages". Since the court must construe this agreement against the plaintiff and in favor of the defendants, the court finds that no award was granted to the plaintiffs which would trigger the contingent fee under the terms of the retainer agreement. It is further noted that the portion of the retainer agreement which sets forth the agreed upon hourly rates states what will occur if the matter is concluded by settlement or by judicial determination. Plaintiff could have placed similar language in the contingency fee portion of the agreement, but did not do so. Furthermore, the action brought by plaintiff sought to recover flooding damages to the defendants' properties. There is no evidence that the defendants were aware of the possibility that plaintiff might be seeking 20% of the full market value of their residential properties as a fee. In the absence of clear language in the retainer agreement, the plaintiff was required to establish the defendants understood that these were the terms of the agreement (*see* ***Bizar & Martin v US. Ice Cream Corp.***, *supra*). Plaintiff has failed to provide such proof. Thus, that portion of the defendants' motions which seek dismissal of plaintiff's claim for a 20% contingency fee is granted.

Plaintiff, according to his account stated, claims to have earned $43,650 in fees acting on behalf of the defendants and the other property owners who are not part of this action and claims to have put in many hours on their behalf. However, neither the 118 hours of legal work nor the 54 hours of administrative work set forth in plaintiff's account stated are properly itemized or supported by contemporaneous time records. Furthermore, a minimum of 41 of the hours (and a minimum of 10 administrative hours) are not attributable to these defendants at all. In fact, only 8.5 legal hours (and zero administrative hours) are directly attributable to these defendants, pursuant to the account stated. These defendants paid an advanced retainer to plaintiff of $12,000.00 (plaintiff received a total of $27,000.00) which he is allowed to keep under the retainer agreements. Without proper proof, this court cannot ascertain whether or not any fees may be due and owing to plaintiff based upon the hourly rates set forth in the retainer agreements. Thus a hearing is necessary to determine what, if any, legal fees may be due and owing to the plaintiff.

In light of the foregoing, the plaintiff's motion for summary judgment is granted only to the extent that a hearing will be held at which the plaintiff will be given the opportunity to set forth proof as to any further legal fees which may be due and owing from the defendants herein.

Dated: 4.4.2014



A.J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION