SHORT FORM ORDER

# SUPREME COURT - STATE OF NEW YORK

Present:

**HON. GEORGE R. PECK**
Supreme Court Justice

X TRIAL/IAS, PART 16
NASSAU COUNTY

**DAVID S. GOULD and DAVID S. GOULD, P.C.,**

**Plaintiffs,**

**INDEX NO. 17209-11**
**MOTION SEQ. #009 , #010, #011, #012**
**MOTION SUBMIT DATE 3-27-18**

**-against-**

**DECOLATOR, COHEN & DiPRISCO, LLP,**

**Defendants.**

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Motion by Plaintiff, DAVID S. GOULD, for an order precluding the Defendant from offering evidence in support of an affirmative defense of "payment" (Seq. 09); motion by Plaintiffs, DAVID S. GOULD and DAVID S. GOULD, P.C., for an order, pursuant to CPLR§ 3212, granting them summary judgment on the issue of liability (Seq. 10); motion by Plaintiffs for an order, pursuant to CPLR 3211(b), striking the Defendant's fifth affirmative defense of statute of limitations (Seq. 11); and motion by Defendant, DECOLATOR, COHEN & DIPRISCO, LLP, for an order, pursuant to CPLR 3212, dismissing the Plaintiffs' complaint (Seq. 12), are determined as hereinafter provided.

By summons and verified complaint, filed on or about December 8, 2011, Plaintiffs David S. Gould, P.C. (hereinafter "Gould") and its principal, sole practitioner, David S. Gould (hereinafter "David"), commenced this counsel fee action against the Defendant law firm, Decolator, Cohen & Diprisco, LLP (*see* Defendant's Notice of Motion, Exhibit "A").

Gould represented Decolator, Cohen & Diprisco, LLP (hereinafter "DCD") in litigation against the law firms of Lysaght, Lysaght and Kramer (hereinafter "LLK") and Trager, Cronin and Byczek (hereinafter "TCB"), which spanned from 1998 to 2007. Gould and DCD additionally engaged in referrals of personal injury cases, for which an unwritten fee sharing arrangement was in place, which continued until 2010.

By way of history, the sole remaining cause of action sounds in quantum meruit for work done regarding the LLK and TCB matters from 2002 to 2007, as four of Plaintiffs' causes of action regarding fraud and work done prior to 2002 have been dismissed.

Gould claims that, from 1998 to 2007, he represented DCD without a retainer or formal fee arrangement, proceeding instead under an oral agreement that he would be paid pursuant to an unstated methodology, at an unspecified time. Gould and DCD eventually entered into negotiations over his fee, resulting in an agreement which was memorialized by a February 15, 2002 facsimile/letter (hereinafter the "2002 Fax Agreement") drafted by Gould's attorney, Steven L.

Salzman.

The 2002 Fax Agreement lists payments totaling $180,000.00 to be made to Gould (see Defendant's Notice of Motion, Exhibit "L"). It is undisputed that the $180,000.00 of payments were paid, and that they were for the purposes of covering Gould's services representing DCD in the LLK/TCB matters prior to 2002.

Immediately following the list of payments, the 2002 Fax Agreement states, "[t]he above (payment) applies to work already done by [Gould] and does not apply to any work done after 1/1/02. All work done after 1/1/02 is to be compensated on a case by case basis, to be agreed by the parties in advance" (*Id*). The following paragraph states "[t]he parties agree that any new cases that were to go to [Gould] will still go to [Gould], with the fee determined, in writing, by agreement of the parties, before the case is tried" (*Id*).

Based upon the foregoing, the Plaintiffs' remaining claim to be considered here sounds in quantum meruit. In order to make out a claim in quantum meruit, a claimant must establish (1) the performance of the services in good faith, (2) the acceptance of the services by the person to whom they are rendered, (3) an expectation of compensation therefor, and (4) the reasonable value of the services (*see Matter of Alu*, 302 A.D.2d 520 [2d Dept. 2003]). However, a party may not recover in quantum meruit where a valid and enforceable contract governs the relationship between the parties with respect to the subject matter for which the party seeks to recover (*see Ross v. DeLorenzo*, 28 A.D.3d 631 [2d Dept. 2006]; *see also Battery Park Realty, Inc. v. RKO Del., Inc.*, 18 A.D.3d 680 [2d Dept. 2005]).

A party moving for summary judgment must make a *prima facie* showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issue of fact (*see Winegrad v. New York Univ. Med. Center*, 64 N.Y.2d 851 [1985]). Once the moving party has made a *prima facie* showing, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form which establishes the existence of a material issue of fact (*see Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]; *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 [1986]).

In support of its motion for summary judgment against the Plaintiffs (Seq. 12), DCD submits the 2002 Fax Agreement, affidavits of DCD partners Dominic DiPrisco and Joseph L. Decolator, and various communications between DCD and Gould.

Based on DCD's submissions, this Court finds that the Defendant has established *prima facie* entitlement to judgment as a matter of law.

Specifically, as noted above, the language in the 2002 Fax Agreement regarding the payments for "work already done... and does not apply to work done after 1/1/02," covers work done on LLK/TCB matters. In conjunction with the following sentence, stating that "work done after 1/1/02 is to be compensated on a case by case basis, to be agreed upon by the parties in advance," DCD argues that an express agreement existed regarding future work on LLK/TCB matters, requiring advance agreement over fees before the work was to be performed.

Further, DCD partners describe a workload that was winding down at the time of the 2002 Fax Agreement, in addition to an increasingly strained relationship between their firm and Gould, as the

impetus for their settlement. Mr. Decolator stated in his affidavit that Gould had demanded huge amounts of fees when negotiations began, and that the goal of the settlement resulting in the 2002 Fax Agreement was to resolve any dispute over work done before 2002 as well as to see if the parties could avoid surprises or inflated fee demands in the future (*see* Mr. Decolator's Affidavit annexed to Defendant's Notice of Motion). Mr. Decolator did not have any expectation that Gould would demand fees for work done after January 1, 2002, because most of the work was done prior to 2002 and the LLK/TCB matters primarily required repeating arguments on appeal that were crafted before 2002 (*Id.* at p. 4-5).

In Mr. DiPrisco's affidavit, he stated that his understanding of DCD's settlement with Gould, as described in the 2002 Fax Agreement, was that the advance agreement on fees was specifically included as a precondition to DCD's obligation to pay Gould for work done after January 1, 2002 (*see* Mr. DiPrisco's Affidavit annexed to Defendant's Notice of Motion). He adds that the vast majority of work on the LLK/TCB matters was completed prior to January 1, 2002, and that Gould did very little after that point in time, so he did not expect fees to be owed to Gould (*Id*). Mr. DiPrisco believed the minimal work done by Gould after January 1, 2002, for which he did not bill DCD, were favors typical to the unique nature of the relationship between Gould and DCD, which has included DCD handling private litigation for Gould, hiring Gould's sister, allowing Gould to use DCD offices, and referring personal injury cases to Gould (*Id*).

Defendant has demonstrated that the 2002 Fax Agreement is an express agreement intended to cover fees owed to Gould for work performed on the LLK/TCB matters after January 1, 2002. Defendant has further demonstrated that it had no reasonable expectation to pay for work done by Gould without first agreeing to a fee, based on the 2002 Fax Agreement and based on the relationship and history of exchanging favors between the parties.

Having made a *prima facie* showing of an enforceable contract between the parties regarding work done by Gould on LLK/TCB matters after January 1, 2002, the burden shifts to the Plaintiffs to come forward with evidence to overcome the Defendant's submissions by demonstrating a triable issue of fact.

Here, in opposition to DCD's summary judgment motion, Gould argues that the intention of his oral agreement with DCD was that Gould would work for a reasonable fee on LLK/TCB matters and had no right to demand payment until either the LLK/TCB matters were completed, or until Gould ceased representation of DCD in the LLK/TCB matters.

Here, Gould essentially argues that 1- the 2002 Fax Agreement provides a specific structure for payments on LLK/TCB matters before January 1, 2002, 2- the 2002 Fax Agreement is then silent on payment for work on the LLK/TCB matters after January 1, 2002, and therefore, such work is to be compensated pursuant to the parties' oral agreement, and 3- despite the understanding between the parties that Gould would continue to work on LLK/TCB matters, the 2002 Fax Agreement refers only to unrelated matters going forward beyond January 1, 2002. Therefore, Gould argues, the provision of his oral agreement with DCD delaying his right to demand a reasonable fee controls, rather than the provision of the 2002 Fax Agreement calling for

an advance agreement in order for fees to be owed. In support of this position, Gould submits his own affidavit and the affidavit of Mr. Salzman, who is Gould's longtime personal attorney as well as the drafter of the 2002 Fax Agreement, who reiterates Gould's position as the individual who negotiated on behalf of Gould and drafted the 2002 Fax Agreement.

Plaintiffs' submissions are insufficient to raise an issue of fact, let alone to establish Plaintiffs' entitlement to summary judgment. A plain reading of the language in the 2002 Fax Agreement makes clear its intention to include work done on the LLK/TCB matters after January 1, 2002. It would be illogical to conclude, as Plaintiffs suggest, that the reference to "work already done" was in regard to LLK/TCB matters, yet in the very same sentence, "work done after 1/1/02" referred only to unrelated matters. In fact, all language in the 2002 Fax Agreement regarding any matters going forward contains accompanying language specifying that the fee is either "to be agreed by the parties in advance," or "with the fee determined, in writing, by agreement of the parties, before the case is tried." Nothing in the record indicates that work could be done by Gould prior to fee negotiations, or that Plaintiffs' lacked the right to demand a fee.

Plaintiffs have failed to rebut Defendant's evidence of the existence of a contract which speaks to work performed on the LLK/TCB matters after January 1, 2002. As no agreement was ever entered into for any work done after January 1, 2002, Defendant was never required to pay Gould any fees pursuant to the 2002 Fax Agreement. In addition, even if the contract didn't speak to the work at issue here, Plaintiffs have failed to provide adequate documentary evidence of the services he allegedly performed. Plaintiffs rely on general statements and fail to include a breakdown of tasks for which he seeks compensation, the time spent on said tasks, or even a single invoice. Further, even if Plaintiffs had provided adequate proof of services performed and accepted by DCD, the record is devoid of evidence which would establish the reasonable value of those services (*see Geraldi v. Melamid*, 212 A.D.2d 575 [2d Dept. 1995]).

Accordingly, it is hereby

**ORDERED**, that the Plaintiffs' motions to preclude evidence (Seq. 09), for summary judgment (Seq. 10), and to strike an affirmative defense (Seq. 11) are each **DENIED**; and it is further

**ORDERED**, that the Defendant's motion, pursuant to CPLR §3212, granting it summary judgment dismissing Plaintiffs' complaint is **GRANTED**.

The foregoing constitutes the decision and order of the Court. All applications not specifically addressed are denied.

Dated: June 12, 2018
Mineola, New York

ENTER:

Honorable George R. Peck