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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. JOSEPH COVELLO

Justice

ISAAC M. ZUCKER,

Plaintiff,

-against-

RICHARD A. ROTH,

Defendant.

TRIAL/IAS, PART 24
NASSAU COUNTY

Index No.: 003957/04

Motion Seq.No.: 001

Motion Date: 07/12/04

The following paper read on this motion:

Notice of Motion	1
Memorandum of Law in Opposition	2
Memorandum of Law in Reply	3

Upon the foregoing papers, the motion by defendant, Richard A. Roth, for an Order, pursuant to CPLR §3211(a)(2) dismissing plaintiff, Isaac M. Zucker's complaint is determined as follows.

Plaintiff's complaint asserts claims for breach of contract, unjust enrichment, and conversion regarding legal fees he contends defendant owes him regarding a securities action by Mr. Alfred Feldman.

In the Spring of 2002, Alfred Feldman contacted Herman M. Koenigsberg, Esq. about a claim for damages against his stockbroker and brokerage firm. Mr. Koenigsberg advised Mr. Feldman that he did not have expertise in the area of securities arbitration and recommended that Mr. Feldman go to his son-in-law, plaintiff, Isaac M. Zucker (Zucker). Mr. Feldman then contacted Zucker. After reviewing documents relating to Mr. Feldman's trading activity, Zucker advised Mr. Feldman that he possessed a viable

claim. The two parties negotiated a fee whereby Zucker would be compensated with a contingency fee of 33%, payable in the event of an award or settlement. Due to other pending matters, plaintiff realized that he would not be able to dedicate his full attention to Mr. Feldman's matter. Subsequently, Zucker referred Mr. Feldman to two separate attorneys, one being defendant, Richard A. Roth, Esq. (Roth). Due to the efforts of plaintiff, Mr. Feldman selected Mr. Roth to represent him. Prior to Mr. Feldman's selection, Zucker and Roth agreed that Zucker would receive one third of Roth's third as a referral fee. This agreement was re-confirmed by a subsequent phone conversation. However, Mr. Feldman and Roth then agreed that Roth would receive a 25% contingency fee.

Zucker asserts, and Roth does not deny, that during the summer of 2002, Zucker reviewed and commented on the Statement of Claim prepared by Roth and contacted Roth on a regular basis to check the status of the case and to offer assistance. In addition, Zucker states that he recommended the mediator used by the Roth. Zucker further asserts that by coincidence he saw Roth and Mr. Feldman at the NASD's office, at which time he learned of a settlement between Mr. Feldman and the brokerage house First Albany. Zucker then sent an e-mail to Roth, requesting his fee relating to the first settlement. Roth acknowledged that the referral fee was owed, but wished to renegotiate the contract, which Zucker refused to do. When Roth refused to pay Zucker his portion of the fee on Mr. Feldman's case, which settled for an aggregate amount of $580,000.00, plaintiff commenced this action.

It is well settled that "[o]n a motion to dismiss pursuant to CPLR §3211, we must accept as true the facts as alleged in the complaint and submissions in opposition to the motion, accord plaintiff's the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory." **Sokoloff v. Harriman Estates, 96 NY2d 409, 414 (1985).** The court is not authorized to assess the merits of the complaint, but only to determine if the complaint states the elements of a cognizable cause of action. See **Guggenheimer v. Ginzburg, 43 NY2d 268 (1977).**

Defendant, Roth, first argues that plaintiff, Zucker, is suing the wrong party. Defendant claims that he acted as an attorney in his capacity as a member of The Roth Law Firm while representing Mr. Feldman and accordingly he is not a proper party to this action. Defendant also contends that he cannot be held personally liable for the alleged breach of contract pursuant to New York's Limited Liability Law. This may be true, however, it is unsupported as defendant, Roth, has not provided a retainer agreement, employment contract, or any other relevant documentation to show that he did not represent Mr. Feldman in his individual capacity. Accordingly, in accepting as true the facts alleged in the complaint, plaintiff has asserted a cognizable claim against defendant.

Defendant also maintains that a fee-sharing agreement is unenforceable because it violates the Code of Professional Responsibility, Section DR 2-107(a)(2). However, a fee-sharing agreement is not invalid as a matter of professional ethics. See **Benjamin v. Koeppel 85 NY2d 549, 556 (1995).** Further, "[i]t has long been understood that in

disputes among attorneys over the enforcement of fee-sharing agreements the courts will not inquire into the precise worth of the services performed by the parties as long as each party actually contributed to the legal work and there is no claim that either 'refused to contribute more substantially'". **Id.** In such actions, both parties are bound by the Code of Professional Responsibility to fulfill the obligations of a freely assented to agreement that benefits both parties. **See Id.**

In this case, the fee-sharing agreement is not necessarily void. Plaintiff, Zucker, asserts (and it is not denied) that he contributed to the legal work of the case when he analyzed and reviewed Mr. Feldman's documents, commented on the Statement of Claim, and recommended mediators. Moreover, defendant does not claim that the plaintiff refused to contribute, but rather admits that he called frequently to check the status of the case and to offer assistance.

Defendant also claims that plaintiff fails to plead facts sufficient to establish an action for conversion. It is well settled that "[i]n order to establish a cause of action for conversion, plaintiff must establish legal ownership of a specific identifiable piece of property and the defendant's exercise of dominion over or interference with the property in defiance of the plaintiff's rights." **Ahles v. Aztec Enterprises, Inc., 120 AD2d 903 (3rd Dept. 1986).** In the instant action, plaintiff alleges legal ownership of the funds being withheld by the defendant. Accepting these allegations as true, the claim for conversion must withstand a motion to dismiss.

Defendant further maintains that an action for unjust enrichment is inappropriate.

Defendant claims that awarding plaintiff a referral fee would constitute unjust enrichment, because defendant drafted all the pleadings, all the motions and opposition to motions, all discovery requests and responses, and all correspondence. It is undisputed that plaintiff performed a majority of the work on this case. However, plaintiff asserts in the complaint that he initially reviewed Mr. Feldman's documents and first determined that he possessed a valid claim, gave professional feedback on the Statement of Claim, and played a significant role in the assigning of the mediator. Taking these facts as true, plaintiff pleads a cognizable claim for unjust enrichment.

As to the fourth cause of action, plaintiff sets forth that he withdraws that cause of action for fraud.

Therefore, it is hereby

ORDERED, that defendant, Richard A. Roth's motion to dismiss plaintiff, Isaac M. Zucker's complaint is denied. It is further

ORDERED, that the defendant, Richard A. Roth, shall interpose an answer to the complaint within, twenty (20)days of entry of this Order. It is further

ORDERED, that all parties are directed to appear on **September 21, 2004 at 2:30 p.m.**, before Justice Joseph Covello at 100 Supreme Court Drive, Mineola New York 11501, AT THE **PRELIMINARY CONFERENCE DESK, LOWER LEVEL (Not Chambers) for a PRELIMINARY CONFERENCE.** It is further

ORDERED, that a representative from each parties office fully familiar with the

(Not Chambers) for a PRELIMINARY CONFERENCE. It is further

ORDERED, that a representative from each parties office fully familiar with the case must appear for the Preliminary Conference. In the event of actual engagement (Court Rule 125.1) you must contact a DCM Case Coordinator prior to the PC date. Service may not answer on DCM matters. No motions are to be made without prior authorization of the DCM Dept.

Failure to appear may result in the imposition of sanctions and a case management plan being ordered in your absence.

If you have any questions, please call DCM Dept. At (516) 571-3511.

***NOTE: At the Preliminary Conference, bills of particulars must be submitted for review by the court.

This constitutes the decision and Order of the Court.

This concludes this special proceeding.

Dated: August 12, 2004

JOSEPH COVELLO, J. S. C.