

SCAN

SHORT FORM ORDER

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SUPREME COURT - STATE OF NEW YORK

Present:

HON. UTE WOLFF LALLY,

Justice

TRIAL/IAS, PART 5  
NASSAU COUNTY

LAW OFFICE OF SEAN SABETI, P.C.,

Plaintiff(s),

MOTION DATE: 6/3/09

INDEX No.: 1652/09

MOTION SEQUENCE NO: 1,2

-against-

VALIOLLAH AZMOODEH, "JOHN DOE" and  
"RICHARD DOE" (as Iranian Investors),

Defendant(s).

The following papers read on this motion:

Notice of Motion/ Order to Show Cause.....	1-4
Notice of Cross Motion.....	5-7
Answering Affidavits.....	8-10
Replying Affidavits.....	11-13
Briefs: .....	

Upon the foregoing papers, it is ordered that this motion by defendants for an order pursuant to CPLR 3211(a)(8) dismissing plaintiff's complaint with regard to defendants "John Doe" and "Richard Doe" (as Iranian Investors) is granted. Cross-motion by the plaintiff for an order pursuant to CPLR 305 and 3025(b) granting plaintiff leave to serve a supplemental summons and amended complaint is granted. The balance of plaintiff's cross-motion for an order dismissing defendants' counterclaim pursuant to CPLR 3211; granting summary judgment in favor of the plaintiff pursuant to CPLR 3212; and directing plaintiff to deposit the sum of \$5,000 in cash into his IOLA Escrow Account and immediately thereafter transferring the money in to the Escrow Account with the Clerk of the Court is determined as hereinafter set forth.

The underlying action is to recover legal fees allegedly due

and owing. It is not disputed that the initial summons and complaint naming Valiollah Azmoodeh, "John Doe" and "Richard Doe" (as Iranian Investors) was served on defendant Valiollah Azmoodeh at his resident at 10 Columbine Drive, Hampton Bays, New York 11946 by nail and mail pursuant to CPLR 308(4). Therefore, this court has personal jurisdiction over the individual defendant Valiollah Azmoodeh. Defendants bring this motion to dismiss the complaint as to defendants "John Doe" and "Richard Doe" (as Iranian Investors) on the ground that co-defendants "John Doe" and "Richard Doe" referred collectively as "Iranian Investors" or "Investors" reside and domicile in Tehran, Iran with no address for service in New York State. Plaintiff has cross-moved to amend the complaint and caption as follows:

Law Office of Sean Sabeti, P.C.,

Plaintiff,

-against-

VALIOLLAH AZMOODEH, individually, VALIOLLAH  
AZMOODEH as Trustee on behalf of Iranian Investors &  
"JOHN DOE" AND "RICHARD DOE" (as Iranian Investors)

Defendants.

It is necessary to review the history of prior litigation involving defendant Valiollah Azmoodeh (hereinafter referred to as Val) and the Iranian Investors. In doing so, this court has relied extensively on the decision after trial of the Hon. Emily Pines, J.S.C., Suffolk County Supreme Court, Index No. 028705/99. In or about December 1999 Val's wife Wanda L. Azmoodeh (Wanda) commenced a divorce action against Val seeking equitable distribution of the parties' property acquired during the marriage. Two years after commencing the divorce action, two Iranian nationals commenced an action in the Federal District Court for the Eastern District of New York (Docket # CV 01-2415) claiming, on behalf of themselves and other listed Iranian investors that they had an interest in the property in dispute in the divorce action pending in Supreme Court, Suffolk County. By stipulation dated November 13, 2001, the parties to the divorce action agreed that the plaintiffs (Iranian Investors) in the federal action would be permitted to intervene

and assert their claims in Supreme Court, Suffolk County in the action for divorce. The stipulation, signed by attorneys for all parties, granted the interveners broad authority to act on behalf of other investors, whom they represented, waived all defenses the husband and wife might have asserted regarding personal jurisdiction, specifically waived all objections to introduction of evidence at trial on grounds of hearsay concerning the interveners' claims; and provided for the imposition of an order of confidentiality concerning the identity of the interveners.

When both cases came before the court for trial, the court ruled that the interveners' action should proceed first, since its resolution either in favor or against them would necessarily affect the equitable distribution issues in the action for divorce. The counsel for the parties agreed. During fifteen days, the court heard testimony from six witnesses and allowed introduction into evidence of numerous exhibits, constituting documentary evidence of the parties' intentions. The court considered the credibility and manner of each witness as well as to read hundreds of documents, including agreements, bank records, wire transfers, and the parties' letters and other written statements (Decision after Trial, Hon. Emily Pines, J.S.C., Suffolk County Supreme Court, Index No. 028705/99). The interveners presented the testimony of one of their alleged investors, who, under an agreement signed in Iran by all ten petitioners, designated the witness to act as their attorney and agent with regard to the litigation. The witness identified himself as Seyed Hossein Hashemi, a seventy-nine-year-old Iranian lawyer, still engaged in the private practice of law in Iran. According to Mr. Hashemi, who held several high level legal positions in the Shah's government, including Chief Justice of the Supreme Court and Deputy Attorney General, he met Val in Tehran approximately thirty years ago through a mutual acquaintance. Mr. Hashemi stated that following the Iranian Revolution, he approached Val who was then engaged in an international import-export business and asked if he could invest money on his behalf in the United States. He also claims that he referred the other investors to Val for the same purpose. He alleges that all investors provided Val with Iranian currency, with the understanding that Val would invest it for them in the United States and that Val would in that way keep the funds safe for them. He asserted further that the funds were given to Val in cash over a period commencing in 1979 and

ending in the mid 1990s. During this period, he claims that Val kept him and the other investors apprised of his land purchases and procured their agreement for his various investments on their behalf. From time to time, they would request that Val send cash to their relatives, residing in the United States. Mr. Hashemi states that he gave Val over one million dollars in Iranian currency to invest on his behalf.

Mr. Hashemi testified that under the parties' verbal agreement, Val and his wife were permitted to utilize the investment money to cover their living expenses, including payment for the carrying charges on the marital residence which he stated were purchased with investor's funds. Hashemi testified that the marital residence, a parcel of vacant land, certain land in a subdivision and a commercial garage, were all purchased with the investor's funds.

Mr. Hashemi asserted that he met Val's wife before the couple relocated to the United States. He claims that he became aware in the early 1980's that there existed some marital strife between them. Thereafter, he and the other investors asked Val and Wanda to sign an agreement conceding that any properties purchased with the investors' funds be considered their property and neither separate nor marital property for purposes of a future equitable distribution between them. On April 18, 1983, Wanda and Val entered into a written agreement that provided that Wanda recognized that Val had been entrusted with sums of money which he invested for Iranian investors, and that any property held in the husband's name was presumed to constitute property owned and accruing to the Iranian investors.

Val's testimony in no way contradicted the testimony of Mr. Hashemi, but rather supported Mr. Hashemi's statements. During the early years of the marriage Val was engaged in business as a broker for products for which he received a commission. His work allowed him to be engaged in international travel throughout Europe and the United States. Following the Iranian Revolution, he remained for several years in Iran and operated this business on two levels. He continued to act as a broker. In addition he aided people who he identified as being of certain religious and ethnic origin out of favor with the revolutionary regime and whose property was being

confiscated by the new leaders. Val accomplished this by transferring the funds of Iranian nationals first to "off shore countries" such as the United Arab Emirates, where the funds were forwarded to European banks and ultimately transferred to the United States. Val testified at the trial that at the request of Mr. Hashemi, Val invested funds on behalf of Mr. Hashemi in the United States, with the understanding that the funds belonged to Mr. Hashemi, and other investors, brought to him while still in Iran. Val indicated that between 1979 and 1992, Mr. Hashemi forwarded to him for investment over one million dollars. He stated that over a twenty-year period, he received approximately \$2.3 million from Iran. In addition to forwarding some of the money, on instructions, to relatives of the investors, Val testified that he utilized the funds to purchase real property in New York, mostly on Long Island. He stated that he consulted regularly with Mr. Hashemi regarding the investments and always sought and received the approval of Mr. Hashemi.

Wanda returned to the United States in late 1981 and Val remained in Iran until the end of 1982 in order to close down his import business. He claims that he arrived in the U.S. with almost no funds and the parties settled in Suffolk County, near a friend of his wife. In 1983 he purchased the "marital residence" in his own name at a cost of nearly \$200,000 with funds belonging totally to the investors. Following some acrimony in the marriage at about this time, Val consulted a local attorney, who prepared the agreement referred to in Mr. Hashemi's testimony, in which the wife relinquished any interest in properties purchased by the husband for the investors, specifying any real property purchased in the husband's name. With regard to properties held in the joint names of husband and wife, the agreement states that such property "[s]hall, as between the parties hereto, be presumed to be the joint property of the parties hereto."

In the late 1980s Val asked another local attorney to set up corporations, which would act to purchase and develop local properties with the funds sent to Val by the investors. According to Val the parties lived in an extremely frugal manner since their entire income during most of the marriage came from the Iranian investors. Thus, while the investors permitted Val and his wife to cover their basic family living expenses during the marriage, there

was no other money coming in from employment although Val stated that he tried from time to time, unsuccessfully, to obtain leads to broker sales in his old import export business.

Val provided a list of all the properties allegedly purchased with investors' funds. He stated that there remained four properties at the time of trial, including the marital residence (in his name alone); a vacant lot adjacent to the marital residence (in the name of husband and wife); one lot in a subdivision which was purchased and developed by one of the husband's corporations; and a commercial garage which was held in Val's brother's name and the subject of a litigation before a different court. According to Val all the property he purchased on behalf of the investors was purchased with the aid of an attorney, who was aware of the investors' existence. Val offered into evidence business records setting forth banking transactions of the various corporations, as well as lists of purchases, funds coming in and expenditures from the mid 1980s through the mid 1990s. According to Val, his wife kept the records for him so he would be able to account to the investors at some point in the future. Val also testified that he involved his brother in some of his transactions, when he gave him a power of attorney, authorizing the brother to transfer monies from the various corporate accounts. He asserts that his brother took funds from the corporations and converted the investors' monies by transferring property and funds into his own name. At the trial, testimony describing Val's relationship with the investors was also corroborated by testimony of two (2) attorneys and an accountant who represented Val for over the past ten years, apparently in connection with the acquisition of the real estate holdings.

Justice Pines found that Mr. Hashemi was indeed one of the investors. Further, it was overwhelmingly demonstrated that the investors were entitled to an equitable trust on the properties held in the name of Val, Wanda and Val's corporations. There was a fiduciary relationship with Val and the investors since 1979. Val by word and action promised to keep the investors' funds secure through the various real estate investment in the United States. Justice Pines also determined that the investors had a constructive trust in five (5) properties owned by Val and/or his wife. The third-party action before Justice Pines lasted nearly two years

from October 1, 2003 until April 8, 2005. In the decision after trial, she appointed a receiver to sell the marital home and other properties of the Iranian investors, and in accordance with U.S. Code Federal Rules Part 560.517 to transfer the Iranian investors' money out of the United States in "one lump sum."

The investors also put property in the name of Val and his brother Abbas Ali Aram (Aram) and various corporations established by Val as the Iranian investors' agent and representative. In 1994, a dispute arose between the brothers, Val and Aram, in which Aram made claims of ownership interest against various properties that were titled under Val, Aram, Wanda and/or various corporations established by Val as the agent and representative for the Iran investors. Plaintiff alleges that after Justice Pines' decision, the investors and Val also retained the plaintiff in May 2005 to represent them in the action commenced in 1994 by Val's brother, Aram (the action *Aram v Azmoodeh, et al.*, Index No. 242/94, Supreme Court, Suffolk County referred to hereinafter as the Brothers' case). The Brothers' action related to 38 real estate properties purchased and sold, various corporations, as well as business and personal bank accounts, opened and closed by the brothers from 1978 to 1994. Aram demanded 50% ownership interest in the corporation and real properties. Val as an "individual" represented the interests of the Iranian investors in the Brothers' action from 1995 until 2007. After a five (5) week jury trial according to the unrefuted submissions before the court, Val and the Iranian investors, with the legal representation of the plaintiff, successfully maintained an ownership interest in 37 of the 38 entities. The jury verdict substantially favored Val and the investors.

Plaintiff did not require Val to sign a retainer agreement in 2001, when first retained in the third-party action, or in 2005 when retained in the Brothers' action. It was not until October 29, 2007 that the plaintiff submitted a retainer agreement for Val to sign. The retainer agreement signed by Val on October 29, 2007 states:

2. LEGAL FEES:

A. In order for the Firm to begin our representation you have agreed to pay us and

we have agreed to accept an initial retainer payment of \$10,000 (\$10,000 of which is hereby acknowledged by the Firm as having been received). This retainer payment does not necessarily represent the amount of the overall fee which client may incur by virtue of Firm's service. The client hereby acknowledges and accepts that the legal fees of the Firm has accumulated to the sum of \$850,000 (Eight Hundred Fifty Thousand Dollars) which represents the total legal fees rendered by the Firm in connection with trial of the Third Party Constructive Trust action for the Iranian Investors as Interveners before Justice Emily Pines in the Suffolk County Supreme Court and the trial of the case of Aram v Azmoodeh before Justice Peter Mayer, J.S.C. in the Suffolk County Supreme Court. Clients fully acknowledge that the Firm has earned the fees in connection with the above stated cases and Iranian Investors and Mr. Azmoodeh will be fully responsible for the payment of the legal fees. The legal fees shall be deducted from the proceeds of the sale of any property(s) of the investors and/or Mr. Azmoodeh. Furthermore, the legal fees shall be immediately due at the closing or settlement of any of the properties or accounts. In addition, Clients acknowledge that the above stated amount does not include the cost and out-of-pocket disbursements in connection with both trials. (Emphasized in original).

4. ADDITIONAL LEGAL FEES:

Intentionally Deleted since the Iranian Investors are Citizens of Iran and communications with Clients from time to time may become extremely difficult to accomplish.



14. **SIGNATURES:**

You and the Firm have read and agreed to this Agreement. The Firm has answered all of your questions and fully explained this Agreement to your satisfaction. You have been given a copy of this Agreement and you have indicated that you are authorized to sign this on behalf of the Iranian Investors (emphasis added).

I HAVE READ AND UNDERSTAND THE ABOVE AGREEMENT, HAVE RECEIVE A COPY AND ACCEPT ALL OF ITS TERMS. I AM ALSO AUTHORIZED TO SIGN THIS RETAINER AGREEMENT ON BEHALF OF THE IRANIAN INVESTORS (EMPHASIS ADDED).

/s/ \_\_\_\_\_  
VALIOLLAH AZMOODEH

In the amended pleadings, plaintiff seeks to name Val as a trustee or agent for the Iranian investors. When facts relied on to establish the existence of an agency are not disputed, and conflicting inferences cannot be drawn from them, the question of the existence of the agency is one of law (*Royal Bank & Trust Co. v Weintraub, Gold and Alper*, 68 NY2d 124; *Hederman v Fairbanks, Morse & Co.*, 286 NY 240).

Agency is a fiduciary relationship that results from the manifestation of consent by one person to another so that the other acts on his behalf and subject to his control (*See Smirlock Realty Corp. v Title Guarantee Co.*, 70 AD2d 455). An agency relationship can arise not only out of actual authority but also apparent authority. In creating apparent authority there must be words or conduct to establish that the agent possesses authority to enter into a transaction. A third party who deals with the agent may rely on the appearance of authority only to the extent that such reliance is reasonable (*See Empire Communications, Inc. v Pay TV of Greater New York*, 126 AD 598, 601).

For substituted service on Val, as agent for the Iranian

investors to be valid there must be a relationship between Val and the Iranian investors that would induce prompt delivery of the summons and complaint, so that service was reasonably calculated pursuant to CPLR 308(2) to apprise the Iranian investors of the within action. Plaintiff has presented probative evidence to establish a sufficient relationship that Val acted as an apparent agent for the Iranian investors when retaining the plaintiff and executing the retainer agreement [See *Ascencio-Sutphen v McDonald's Corp.*, 26 Misc3d 184 (Sup. Ct. Bronx County 2007); *Glasser v Keller*, 149 Misc2d 875 (Sup. Ct. Queens County 1991)]. If a defendant has been misnamed in the caption of the summons and complaint but has nevertheless been properly served, the amendment of the summons and complaint should be allowed in the absence of demonstrated prejudice to a substantial right. (See *Connor v Fish*, 91 AD2d 744; Alexander, Practice Commentaries, McKinney's Consolidated Laws of NY, Book 7B; CPLR 305:4 at 418-420). This court has acquired jurisdiction over Val, individually and as trustee/agent for the Iranian investors. The misnomer in the original pleadings could not have possibly misled Val concerning who in fact the plaintiff was seeking to sue.

Estoppel rests on the word or act of one party upon which another rightfully relies and so relying, changes his position to his detriment. One may not, even innocently, mislead and then claim the benefit of the deception. (See *Triple Cities Construction Co. v Maryland Casualty Co.*, 4 NY2d 443). Val's own admissions as set forth in the findings in the After Trial Determination of Justice Pines in the third-party intervener action, Val's conduct in pursuing the claim against his brother on behalf of the investors, and the execution of the Retainer Agreement demonstrated that Val held himself out as representing the Iranian investors *vis a vis* the plaintiff. For example, he testified before Justice Pines that he purchased all the property on behalf of the Iranian investors with the aid of an attorney, who was aware of the investors' existence. Rather than refute his relationship with the Iranian investors as alleged by the plaintiff, Val's submission supports the assertion that he acted on behalf of the Iranian investors. Val states "I always discuss with at least one of the defendants investors before acting on anything involving the defendants Iranians." Val acknowledges he gave a check to the plaintiff for \$18,311.38 on account of plaintiff's legal fees. Val also

acknowledges he paid additional legal fees to the plaintiff.

Pursuant to CPLR 3025 leave to amend or supplement the pleadings shall be "freely given upon such terms as may be just." CPLR 305(c) provides that at any time in its discretion the court may allow a summons or proof of service of a summons to be amended if a substantial right of a party against whom the summons is issued is not prejudiced.

The amended pleading, a copy of which is annexed to the plaintiff's cross motion, is deemed served.

Defendant Val interposed a counterclaim against the plaintiff for the return of \$5,000.00 (cash) allegedly deposited with the plaintiff for the purpose of having plaintiff safeguard the monies for defendant's sole and exclusive use and to be returned by plaintiff on demand. Val alleges demand was made and plaintiff refused to return the \$5,000. On a motion to dismiss pursuant to CPLR 3211(a)(7), the court must accept as true the facts "alleged in the complaint and submissions in opposition to the motion, and accord plaintiffs the benefit of every possible favorable inference, 'determining only' whether the facts as alleged fit within any cognizable legal theory" (*Sokoloff v Harriman Estates Development Corp.*, 96 NY2d 409, 414 [2001]; see *Polonetsky v Better Homes Depot*, 97 NY2d 46, 54 [2001]; *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Plaintiff's application to dismiss the counterclaim pursuant to CPLR 3211 is denied. The court finds no reason to require the plaintiff-attorney to deposit the \$5,000.00 in dispute with the Nassau County Clerk pending final resolution of the within action. Rather, the plaintiff-attorney is directed to keep the \$5,000.00 in his IOLA escrow account pending further order of this Court, or written stipulation of the parties.

In the complaint the plaintiff seeks the sum of \$742,000 plus interest for the balance of legal fees allegedly due and owing. Val does not deny that legal services were performed by the plaintiff. However, the defendant asserts that the plaintiff countenanced undue delay in the litigation, resulting in pecuniary loss. Further, a written retainer agreement was not executed until October 29, 2007. Annexed to defendants' opposition papers is a copy of a bill from the Law Office of Sean Sabeti, P.C. The

detailed bill (consisting of 55 pages) of alleged legal services allegedly performed from August 28, 2001 to December 16, 2008 shows a total of 2078.67 billable attorney's hours. Val asserts prior to December 2008 he never received any legal bills from the plaintiff. Val does not recall reading the retainer agreement before signing it.

Summary judgment is a drastic remedy which may be granted only where there is no clear triable issue of fact (*Andre v Pomeroy*, 35 NY2d 361 [1974]; *Mosheyev v Pilevsky*, 283 AD2d 469). Indeed, "[e]ven the color of a triable issue forecloses the remedy" (*In re Cuttitto Family Trust*, 10 AD3d 656; *Rudnitsky v Robbins*, 191 AD2d 488, 489).

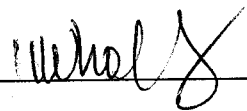
It is well settled that "[t]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact" (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). Moreover, the "[f]ailure to make . . . [a] prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*Alvarez v Prospect Hospital*, *supra*, at 324; *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]; *Offman v Singh*, 27 AD3d 284; *Stahl v Stralberg*, 287 AD2d 613). "Long tradition and just about a universal one in American practice is for the fixation of lawyers' fees to be determined on the following factors: time and labor required, the difficulty of the questions involved, and the skill required to handle the problems presented; the lawyer's experience, ability and reputation; the amount involved and benefit resulting to the client from the services; the customary fee charged by the Bar for similar services; the contingency or certainty of compensation; the results obtained; and the responsibility involved" (*Matter of Freeman*, 34 NY2d 1, 9).

There are issues of fact including but not limited to the value of the legal services, if any, due and owing to plaintiff precluding the granting of plaintiff's motion for summary judgment. Defendant's motion to dismiss the within action for lack of jurisdiction is denied. Respective motions regarding the return of the \$5,000.00 are denied. The \$5,000 shall be deposited in the

plaintiff-attorney's IOLA account as directed herein.

A preliminary conference (see 22 NYCRR 202.12) shall be held at the Preliminary Conference part, located at the Nassau County Supreme Court on September 24, 2009, at 10:00 a.m. This directive, with respect to the date of the conference, is subject to the discretion of the clerk to fix an alternate date should scheduling require. The attorneys for the plaintiff shall serve a copy of this order on the Preliminary Conference Clerk and the attorneys for defendants.

Dated: AUG 27 2009

  
\_\_\_\_\_  
J.S.C.

**ENTERED**  
AUG 31 2009  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE