SUPREME COURT : KINGS COUNTY

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WEINSTEIN, CHAYT & CHASE, p.c., and
BRUCE NEWBOROUGH,
Index No.48323/2002

Plaintiffs,

- against -

DAVID BREITBART, ESQ.,

Defendant.

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PLAINTIFFS' TRIAL MEMORANDUM

IS THE CONTRACT ENTERED INTO BETWEEN THE DEFENDANT AND AN EMPLOYEE OF THE CORPORATE PLAINTIFF TO DIVIDE A LEGAL FEE VALID AND ENFORCEABLE ?

1. The defendant denies both the authority of his associate to have entered into the contract on his behalf and his apparent authority to do so.

2. The defendant further contends that the plaintiffs did no work in the client's file and did not assume responsibility with an appropriate writing to client to the client; so that even assuming a contract, payment under the contract would be unethical - in violation of DR 2-107.

The Pertinent Facts, Both Undisputed and Disputed

In early March, 1997, Jerome Johnson, referred by his uncle, a prior client of the plaintiff Weinstein, Chayt & Chase, P.C. came to the office with a claim for false imprisonment because of mistaken identity. Although seen by both Murray Weinstein Esq., a principal of the corporate plaintiff and an associate, the co-plaintiff Bruce Newborough, it was Mr. Newborough who did the intake, and after researching the law and consultation with Mr. Weinstein, referred the client to the defendant, who he had known to be better qualified to process the case in federal court, which the circumstances required. Unable to reach and speak with Mr. Breitbart when he called this defendant's office, he was routed to and in turn sent the client to Mr. Anthony La Pinta, an associate at the Breitbart office. Mr. La Pinta mistakenly assumed that Mr. Newborough referred it on his own behalf despite a letter from Mr.Weinstein, and rejecting the joint retainer Mr. Weinstein requested, instead sent the client back to the Weinstein office to be retained by it, with the Breitbart firm to act as counsel, offering one third of the fee to referring counsel. This is confirmed by a Breitbart firm letter and the Statement of Retainer filed on behalf of the Breitbart office which gave the Weinstein firm OCA code number as its source but instead mistakenly attributed the code number to Mr. Newborough. On March 24, 1997, Mr. Johnson returned to the Weinstein firm at their office and signed a retainer, a copy of which was

given to him. Its language authorized the referral to other counsel of the Weinstein firm's choice. The defendant obtained an affidavit from the client, contradicting his prior affidavit attesting to the above facts within his knowledge. In the affidavit for the defendant, (the second affidavit) Mr. Johnson denied any retainer with Weinstein's firm and even said that he never considered the Weinstein firm to be his lawyers.

The first affidavit was obtained to oppose the defendant's first motion for summary judgment - which was withdrawn, and the second affidavit was obtained in support of the defendant's second motion for summary judgment, which was granted by Justice Laura Jacobson. In her decision she said that if she were to allow fee sharing in this instance, she would have to allow it in every case in which an attorney sent a client to another attorney. The Appellate Division reversed upon the distinguishing factor that the plaintiffs may have assumed responsibility, an issue of fact since the client's second affidavit denied signing any Weinstein retainer.

Plaintiff Bruce Newborough's role as a party is nominal. He has testified that it was the Weinstein firm on whose behalf he consulted with the Breitbart firm. However, since the Breitbart OCA Retainer Statement lists him as their source of the client, the safest course for plaintiffs procedurally was to include him, with his consent, as a plaintiff.

In addition to the Weinstein firm accepting responsibility by being retained in the matter, Mr. Newborough consulted with Mr. La Pinta as to the role of the referring firm. Mr. La Pinta said the participation required was only to keep in touch with a difficult client to reach. Despite that, Mr. Newborough requested information on the progress of the matter in the four to six months that he and Mr. La Pinta remained as associates at their respective offices, and further assisted the client in the matter. Approximately one month after being retained, the Weinstein firm was contacted by the client's girlfriend who advised that he was again arrested and as in the prior instance was mistaken for another Jerome Johnson and again was to be transferred to Schenectady where the other Johnson was wanted. On behalf of the client, Mr. Newborough communicated this information to Mr. La Pinta, to have Mr. Breitbart avoid such repetition. The defendant has denied that this second arrest information came from the Weinstein office and dates this second arrest to a time about a year later when Mr. La Pinta was no longer at his office, allegedly having been terminated for improper conduct resulting in a lawsuit brought by the defendant against Mr. La Pinta. Mr. Ivar Goldart succeeded Mr. La Pinta in processing the file which in 2001 was settled. Contributions to the settlement by the various governmental defendants came to $215,000.
Mr. Breitbart failed to notify the Weinstein firm of the settlement and even failed to file a closing statement or furnish one to the client until after its absence was called to his attention in the course of discovery in this lawsuit. That closing statement acknowledges the Weinstein OCA code number as the source of the client. The defendant contends that he did not receive written and oral inquiries about the case and had no knowledge of the existence of the Weinstein firm, much less its role in the

case, until after plaintiff Weinstein filed a complaint with the First Department Disciplinary Committee, and then started this suit. The First Department took no position on the merits, deferring to the outcome of this litigation.

Since Mr. Breitbart defends his failure to honor the terms of the contract in the letter furnished the plaintiffs by Mr. La Pinta, as his agent, on ethical as well as factual grounds, his disregard of ethics in various ways in the processing of the file and in his posture in this case are an issue as to the credibility of his defense and his versions of the facts and will be demonstrated for this reason, to demonstrate that simple greed and not ethical concerns motivated his breach of the agreement.

The Weinstein plaintiff is entitled to one-third of the net fee in accordance with the offer in the Breitbart firm letter of March 17, 1997, but excluding as a "disbursement" deduction the hundreds of dollars Mr. Breitbart gave the client while the action was pending.

POINT I: UNLIKE THE DEFENDANT, PLAINTIFFS COMPLIED WITH DR-2-106 and 2-107

DR 2-106 , 22 NYCRR § 1200.11: (a) "A lawyer shall not enter into an agreement for, charge or collect an illegal or excessive fee. (B) ... Factors to be considered as guides in determining the reasonableness of a fee include the following: ... (3) The fee customarily charged in the locality for similar legal services. ... (8) whether the fee is fixed or contingent. [and] (d) Promptly after a lawyer has been employed in a contingent fee matter, the lawyer shall provide the client with a writing stating the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter, and it there is a recovery, showing the remittance to the client and the method of its determination."

DR 2-107 , 22 NYCRR § 1200.12 "(a) A lawyer shall not divide a fee for legal services with another lawyer who is not a partner in or associate of the lawyer's law firm or office, unless : (1) The client consents to employment of the other lawyer after a full disclosure that a division of fees will be made. (2) The division is in proportion to the services performed by each lawyer or, by a writing given to the client, each lawyer assumes joint responsibility for the representation. ... "

When Mr. Johnson was given the address of the Breitbart office and sent there, he was seen by Mr. La Pinta who interviewed him and informed Mr. Newborough that the Breitbart firm would accept the matter. Mr. Weinstein's letter furnishing the information for a joint retainer agreement in compliance with both DR 2-106 and DR

2-107 (which clearly would have established joint responsibility) was rejected as not their policy and the client was referred back to be retained by the plaintiffs, who in turn would retain the defendant's firm as its counsel. This was done and the client given a copy of the retainer he signed for plaintiffs. Insofar as plaintiffs are concerned, this constituted full compliance with "a writing given to the client" assuming responsibility in accordance with DR 2-107. Moreover, the retainer authorized plaintiffs to utilize the Breitbart firm and the client knew this since he already had been sent there. By contrast, the defendant's office which agreed to share the fee, gave nothing in writing to the client and had him sign a Blumberg form retainer in blank, no date and no name of the firm retained having been inserted. This was a clear violation of App. Div 1st Dept. Rules § 603.7 (a) (4) " No attorney shall accept or act under any written retainer ... in which the name of the attorney was left blank at the time of its execution by the client." Nor did the Breitbart firm follow through on this unethical retainer by filing its existence with OCA .[1] The defendant here may argue that this too was unauthorized conduct by his associate, Mr. La Pinta. But, he has ratified that conduct in this litigation by offering that blank retainer to show Justice Jacobson that he had his own retainer and thereby made it part of the appellate record, as well. Mr. La Pinta had nothing to do with the selective adoption by the defendant of only the beneficial parts of his conduct while in the employ of Mr. Breitbart..

The plaintiff's firm is a Brooklyn prominent firm, over 45 years old in 1997, which had included two State Assembly members and a former President of the Brooklyn Bar Association, whose reputation was in tort claims. However, as the plaintiffs determined, the proper prosecution of the matter required Federal Court jurisdiction and at the time they lacked personnel familiar with the federal procedure and knowledge of the criminal law aspects involved. . The referral to the defendant and the consequent sharing of the fee in the matter was done to comply with the disciplinary rules.[2] The file was not relinquished, let alone the client - who the defendant induced to swear that he never considered the Weinstein firm to be his lawyers.

The extent to which the plaintiffs participated in the processing of the case to settlement is irrelevant, since they had assumed responsibility by being retained and furnishing the client with a writing to that effect. the same arguments in a very similar fact setting as does the defendant Breitbart here, saying:

"... plaintiff referred a potential client with a real property tax matter to

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[1] App. Div 1st Dept. Rules § 603.7 Claims or Actions for Personal Injuries (with contingent fees)

(a) Statements as to Retainers; Blank retainers

(1) Every attorney who, in connection with any action or claim for damages for personal injuries ... whereby his compensation is to be dependent or contingent in whole or in part upon the successful prosecution or settlement thereof, shall within 30 days from the date of any such retainer ... (sign and file a statement of such retainer with O.C.A.)

[2] DR 6-101 22 NYCRR § 1200.30 Failing to Act Competently

(a) A lawyer shall not:

(1) Handle a legal matter which the lawyer knows or should know that he or she is not competent to handle, without associating with a lawyer who is competent to handle it.

defendant law firm .... The firm in turn, agreed to pay plaintiff one third of any fees it earned. According to the submissions before the court, plaintiff's participation included interviewing the client, evaluating the case, discussing the matter with firm attorneys and attending a meeting between the client and a firm partner. The firm successfully completed the real estate matter for the client." page 552

* * *

" Two other important tenets that have emerged from the case law are that fee forfeitures are disfavored and that such forfeitures may be particularly inappropriate where there are other regulatory sanctions for noncompliance [cites omitted] ... As this Court stated in *Charlebois v. Weller Assocs. (supra*, at 595) the courts are especially skeptical of efforts by clients or customers to use public policy as a sword for personal gain rather than a shield for the public good." page 553

"In closing, we also note our rejection of defendants' contention that the fee-sharing agreement plaintiff seeks to enforce is invalid as a matter of professional ethic (see ... DR 2-107). It 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 [cites omitted]. Moreover, it ill becomes defendants, who are also bound by the code of Professional Responsibility, to seek to avoid on 'ethical' grounds the obligations of an agreement to which they freely assented and from which they reaped the benefits. (ABA Committee on Professional Ethics, Informal Opn No. 870)." page 556

" Here, there were undisputed statements that plaintiff had 'worked up' the case and had played a significant role in working with a 'difficult' client. <u>There were no allegations that plaintiff had been asked to do additional work and had refused</u>. [emphasis supplied] Hence, he was entitled to his share of the fee as allocated in the parties' agreement." page 556

In the Johnson case, the evidence will show that not only did Mr. Breitbart swear that he never asked the Weinstein firm to do any work, he claims that despite the correspondence and retainer in his file, he never knew of the firm's existence, so how could he have asked them to do any work. Moreover, this case is even stronger for the plaintiffs than for the plaintiff in the <u>Benjamin</u> case *(supra*). The evidence will show that plaintiffs' offers to participate more in the processing of the file were both rebuffed and ignored. Now he asserts non-participation in the work to justify his contractual obligation.

POINT II PLAINTIFFS' ACCEPTANCE OF RESPONSIBILITY ALONE SUFFICED FOR ENFORCEMENT OF THE CONTRACT

Although earlier decisions applying DR 2-107(A) dealt with its terms prior to 1990, the Code, in 1990 was "significantly revised", providing that responsibility alone,

properly assumed by the referring attorney, was sufficient basis to support an agreement to share the fee. Professor Simon in his authoritative text on attorney responsibility explains as follows:

"In 1990, New York significantly revised the Code, including DR 2-107(A). The 1990 Code (which is still in force) reverted to the old ABA Canon 34 formulation allowing a division of fees based *either* on service *or* responsibility. The 1990 Code also kept the other fee-sharing conditions from the 1970 New York version of DR 2-107(A) Thus, a lawyer may properly receive a share of the fee simply for referring a matter to another lawyer without doing any of the work, provided (1) the referring lawyer assumes "joint responsibility" for the matter, (2) the client consents after notice, and (3) the two lawyers together charge a reasonable fee."

Simon's Code of Professional Responsibility, at pages 325-326

One of the rationales that he furnishes for the change expressly applies to the instant case. At page 326, he states:

"...the new version of the rule encourages lawyers to refer matters to lawyers with greater expertise. If there were no possibility of obtaining a referral fee, many lawyers would keep matters that they were not fully competent to handle (or at least not as competent as the lawyer to whom the matter was referred). Thus, referral fees benefit clients because they obtain greater expertise for the same total fee. (Referral fees are most common in contingent fee matters, especially personal injury cases, where the client typically pays a total fee of one-third, which is the maximum fee allowed under the court rules for most personal injury cases. The referring and receiving lawyers then divide up the one-third fee between themselves, so the client does not pay anything extra for the referral."

Also on page 326, he explains that responsibility is satisfied by simply assuming financial responsibility for legal malpractice:

> "As long as solo and small firm lawyers assume the same kind of responsibility for matters referred to lawyers outside their firms that partners in large firms assume when they refer a matter to their partners and associates inside a firm - or at least assume financial responsibility for legal malpractice - the client suffers no harm."

In fact, the client gains the benefits of reduced likelihood of malpractice and an additional malpractice defendant should such occur. In the Johnson case, the client also had the additional benefit of continued participation in the matter by the corporate plaintiff for at least that period of time that its associate Bruce Newborough remained assigned to the matter.

Point III Actual authority by the defendant's agent itself is binding on the defendant, but he also had apparent authority.
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