

Retainer Provision For Attorney Collection Fees Void

BY LAZAR EMANUEL

Writing for a unanimous court, Judge Eugene L. Nardelli has set forth the Court's reasons for voiding a provision in a lawyer's retainer agreement. The provision was intended to enable the lawyer to recover "costs, expenses and attorneys' fees" in any action by the lawyer to collect his legal fees. *Ween v. Dow*, Docket No. 7754, AD 1st (October 5, 2006). The provision at issue read in part:

If client does not pay the charges for legal services and disbursements within 30 days of the date of the statement for the charges, law firm shall have the right to (a) terminate this agreement and cease representation of client and (b) collect from client interest at the rate of 1% per month on any amounts not paid within 30 days of the statement date, as well as to seek payment of any charges due.

If client fails to pay for charges due under this agreement and the law firm takes legal action and is awarded such charges, client shall owe to law firm costs, expenses and attorneys' fees (including but not limited to the reasonable value of the law firm's own work) attributable to law firm's collection proceedings and/or action.

Attorney Jeffrey Ween was retained by Defendant Dow to contest the refusal of a Manhattan co-op board to permit Dow to sublet a commercial study within the building. As these disputes are wont to do, the litigation ultimately expanded into claims by the defendant to abate noise, vibration and fumes from a garage and carpentry shop in the building, as well as an action by defendant to compel the board to repair damage caused by a water leak in an upper floor apartment.

The Housing Court litigation continued for four years and was finally settled.

Ween described the litigation as complex. Defendant Dow described it as protracted by the poor quality of Ween's services. Eventually, Ween sued for \$74,373.65 in legal fees and accrued interest, on the basis of an account stated.

In one cause of action, Ween alleged that Dow was obligated to pay the costs and attorneys' fees of his fee-collection action. Ween moved for summary judgment on all counts. Dow opposed the motion and cross-moved to dismiss Ween's claims for costs and counsel fees.

In support of his account-stated claim, Ween argued that Dow had made part payments on account of his fees over a period of four years and had never objected to any invoice.

Dow argued that she had repeatedly objected to the fees, both orally and in writing, and had stated in one letter, "I feel your bills are not at all honest...coming up with the money to pay you has been challenging. I would not mind doing so if only I were to see results. ..." Dow also claimed that she had felt intimidated

by Ween, that Ween had told her that she could not retain another lawyer until Ween's fee was paid, and that she was being charged for Ween's shoddy work and mistakes.

The motion court (Supreme Court, New York County, Jane S. Solomon, J.) denied the motions of both parties, citing the many conflicts in the facts. As to Dow's motion to dismiss Ween's claim for costs and counsel fees, the court found that the motion was premature and that Dow had not established that the provision for costs and attorneys' fees violated New York law. Both parties appealed.

The Appellate Division affirmed the decision of the motion court, with the exception that it granted Dow's motion to dismiss Ween's claim for costs and attorneys' fees incurred in the collection action.

Failure to Recite Hourly Rate & Time

As explained in Judge Nardelli's opinion, the Court found that inescapable issues of fact had been raised in the papers submitted by the parties. Exercising its prerogative to search the record on a motion for summary judgment, it also found that Ween's motion for summary judgment was properly denied because he had failed to make a prima facie showing of an account stated. The invoices on which the account was based were defective in that they did not recite his hourly rate, the number of billable hours devoted to the Dow matter, or the particular services rendered in Dow's behalf. [Editor's note - this determination by the Court should serve as a warning to lawyers to include these items in their bills.] The Court cited *Kaye, Scholer, Fierman, Hays & Handler LLP v. L.B. Russell Chems., Inc.*, 246 AD2d 479 (1998).

Further, Judge Nardelli said, Ween's failure to rebut Dow's claim that he had told her she could not retain another lawyer until he was paid in full, raised an additional issue of fact as to whether Dow's partial payments were made voluntarily and whether her retention of Ween's bills indicated that she was satisfied with their accuracy.

Provision for Costs & Fees Unenforceable.

Turning to the provision in the retainer agreement requiring payment by Dow of Ween's costs and attorneys' fee, Judge Nardelli reviewed the arguments of both parties. Ween argued that the provision was valid under general contract law; Dow argued that it was void as against public policy.

Judge Nardelli looked for the core or "essence" of the attorney-client relationship. He found it in a quotation from Sir Francis Bacon:

[t]he greatest Trust, between Man and Man, is the Trust of Giving Counsell. For in other Confidences, Men commit the parts of life; their Lands, their Goods, their Children, their Credit, some particular Affaire: But to such as they make their Counsellors, they commit the whole: By how much the more, they are obligated to all Faith and integrity...

Looking to a more modern source of support, Judge Nardelli quoted the opinion of Judge Bellacosa in *Matter of Cooperman*, 83 NY2d 465 (1994).

This unique fiduciary reliance, stemming from people hiring attorneys to exercise professional judgment on a client's behalf-"giving counsel"-is imbued with ultimate trust and confidence. ...The attorney's obligations, therefore, transcend those prevailing in the commercial market

place. The duty to deal fairly, honestly and with undivided loyalty superimposes onto the attorney-client relationship a set of special and unique duties, including maintaining confidentiality, avoiding conflicts of interest, operating competently, safeguarding client property and honoring the clients' interests over the lawyer's. To the public and clients, few features could be more paramount than the fee--the costs of legal services [see, *Jacobson v Sassower*, 66 NY2d 991 (1985)].

As Judge Nardelli indicated, the Court was especially concerned about Ween's fee. Relying on their public-policy power to pay "particular scrutiny to the reasonableness of the fee arrangement between attorneys and clients" and their general interest in the regulation of lawyers, the courts impose upon the legal profession the duty to demonstrate that "a fee contract is fair, reasonable and fully known to the client" (quoting *Sassower*).

[e]ven in the absence of fraud or undue influence, an agreement to pay a legal fee may be invalid if it appears that the attorney got the better of the bargain, unless [he] can show that the client was fully aware of the consequences and that there was no exploitation of the client's confidence in the attorney, *Smitas v. Rickett*, 102 A.D.2d 928, 929 [1984].

Judge Nardelli continued:

In this matter, we find that the very nature of the provision, which permits the recovery of attorneys' fees by the attorney should he prevail in a collection action, without a reciprocal allowance for attorneys' fees should the client prevail, to be fundamentally unfair and unreasonable. Aside from its lack of mutuality, the clause, even if not so designed, has the distinct potential for silencing a client's complaint about fees for fear of retaliation for the nonpayment of even unreasonable fees.... That being so, such a provision is not entitled to judicial sanction and is, therefore, unenforceable.

On the issue of Ween's interest charge of one percent per month on unpaid balances, Judge Nardelli acknowledged - as the defendant had - that an interest charge was proper, but he insisted that the charge must be fair and reasonable.

He quoted an Ethics Opinion of the ABCNY Committee on Professional and Judicial Ethics:

In response to the third inquiry - concerning the appropriate interest rates that can be charged - we note that the fee charged a client shall not be 'illegal or excessive' and shall be 'reasonable,' see DR 2-106; EC 2-17. Though interest is not part of the fee, but rather compensation for delay in payment of the fee, the rate of interest should be subject to the same reasonableness requirement. Furthermore, any interest charged must also comply with all applicable laws, including usury laws.

The Court did not decide whether the interest sought by Ween satisfied these standards. As Judge Nardelli said:

While at this juncture it is not possible to ascertain exactly what interest rate plaintiff is attempting to charge, or how it was compounded, due to the lack of documentation, we advise

Supreme Court to bear the foregoing reasonableness standard in mind when, and if, plaintiff is able to establish his entitlement to recover fees.

Conclusion

Lawyers seem often to overreach in their retainer agreements and letters of engagement. This gives clients - even those with satisfying results - a weapon to use when a dispute over fees arises - as it often does. How much better to deal with the substance of the fee dispute than the court's aversion to the lawyer 's overreaching.

Courts look askance at any effort by a lawyer to take unfair advantage of the client in a retainer agreement or letter of engagement. They do not hesitate to declare an offending provision void and unenforceable. In *Larrison v. Scarola Reavis & Parent LLP*, Sup. Ct. N.Y. County, NYPRR February 2006, Judge Zweibel refused to enforce a provision in a letter of engagement which failed to follow the rules controlling arbitration of fee disputes under 22 NYCRR Part 137. Judge Zweibel said, "...the Court finds that SRP is attempting to enforce an agreement that is patently unethical and therefore illegal."