

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ORIN R. KITZES IA Part 17
Justice

<u>BRIAN JONES, ESQ., etc.</u>	x	Index Number <u>17502</u> 2003
- against -		Motion Date <u>March 1,</u> 2006
<u>DANIEL P. BUTTAFUOCO, ESQ., et al.</u>		Motion Cal. Number <u>50</u>
	x	

The following papers numbered 1 to 16 read on this motion by defendants for summary judgment dismissing the complaint and for sanctions pursuant to Rule 130-1.1; and a cross motion by plaintiff for leave to amend the complaint.

	<u>Papers Numbered</u>
<u>Notice of Motion - Affidavits - Exhibits.....</u>	1-4
<u>Notice of Cross Motion - Affidavits - Exhibits..</u>	5-9
<u>Reply Affidavits.....</u>	10-16

Upon the foregoing papers it is ordered that the motion is determined as follows:

Upon the substitution of defendant Law Offices of Buttafuoco & Associates for plaintiff as attorneys for personal injury plaintiffs Richard and Yolanda Querni, the incoming and outgoing attorneys entered into a fee agreement dated July 22, 2000, whereby plaintiff would receive not less than one-third of any legal fee realized on the Querni case. In said agreement, plaintiff represented that, from the time of his retainer until the substitution and execution of the change of attorney agreement, he had been the only attorney who had represented Richard and Yolanda Querni and provided legal services for them in the prosecution of their personal injury lawsuit. Despite this affirmative representation, plaintiff now admits that when he was retained by

Richard and Yolanda Querni on February 1, 1996, he entered into a fee-sharing agreement with Michelle Mulvey, an attorney who had referred the Querni case to plaintiff and who also was Richard Querni's sister. This agreement, by which Mulvey was to receive one-third of plaintiff's legal fee, was reaffirmed in a writing dated September 11, 1997, in which plaintiff also acknowledged Mulvey's ongoing participation in the preparation of the case. Upon settlement of the personal injury action, defendants, having received a formal request from Mulvey that they honor her fee arrangement with plaintiff and pay to her one-third of the fee to which plaintiff was entitled, issued a check payable to both plaintiff and Mulvey for the total amount of plaintiff's fee. The check has been negotiated and an affirmation from Mulvey indicates that plaintiff has paid her the portion of the fee due to her under their fee agreement.

In this action, plaintiff claims that he was entitled to the full one-third share of the legal fee realized on the case, as contemplated by his agreement with defendants upon substitution, and that Mulvey should receive a separate one-third share of the total legal fee from defendants. In addition, alleging that defendants breached the agreement with him by including Mulvey as a payee on the check for the one-third share of the fee, and forcing him to resort to legal action to determine apportionment of the fee, plaintiff now seeks to disavow the agreement for a one-third share and instead be paid in quantum meruit at an estimated 50 to 80 percent of the total legal fee.

Plaintiff's claims are unfounded. Since there was never any agreement between defendants and Mulvey, defendants were not obligated to share any part of their legal fee with Mulvey. Furthermore, by issuing the check in the manner that they did, defendants merely gave effect to the agreement between plaintiff and Mulvey. Plaintiff promised to pay Mulvey one-third of the net fee he realized from the personal injury action, and that is what has occurred. Thus, plaintiff has not suffered any damages and cannot prevail on a claim based upon defendants' alleged breach of contract. (See generally, Standard Federal Bank v Healy, 7 AD3d 610, 612 [2004]; Alpha Auto Brokers, Ltd. v Continental Ins. Co., 286 AD2d 309 [2001].) Moreover, by misrepresenting his status as the sole attorney representing the personal injury plaintiffs, not advising defendants of the involvement of Mulvey, and urging that Mulvey's payment be made from the share of the fee due to defendants, plaintiff breached the covenant of good faith and fair dealing implicit in every contract and cannot prevail in this action. (See generally, 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144 [2002]; Dalton v Educational Testing Serv.,

87 NY2d 384 [1995].)

Accordingly, defendants' application for summary judgment is granted and the complaint is dismissed. Plaintiff's cross motion is denied as moot. All other requests for relief are denied. The court finds that sanctions are not warranted under Uniform Rules for Trial Courts (22 NYCRR) § 130-1.1.

Dated: May 22, 2006

J.S.C.
