For Publication

IN THE SUPERIOR COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

SMITH & WILLIAMS, **Plaintiff,** **v.** **LEE BOK YURL,** **Defendant.**	**Civil Action No. 04-0107E** **ORDER RE: COMPENSATION FOR LEGAL SERVICES AND REIMBURSEMENT OF ADVANCED COSTS**

THIS MATTER came before the Court pursuant to Plaintiff, Smith & Williams' (hereafter "Plaintiff") Complaint for legal fees and reimbursement of advanced costs. Antonio Atalig appeared for Lee Bok Yurl (hereafter "Defendant"). Eric Smith appeared for Plaintiff.

I. BACKGROUND

On November 3, 2000, Defendant claimed that he was injured after slipping and falling at the Guangdong Hardware store. Having suffered alleged injuries, on July 5, 2001, Defendant sought Plaintiff's legal services in a personal injury case against Guangdong Development Co. Ltd. (hereafter "Guangdong Development"), the owner of the hardware store. To that end, Plaintiff and Defendant entered into a contingent-fee representation agreement (hereafter "Agreement"). The agreement awarded Plaintiff a one-third contingent fee if the case was settled, one third of net

recovery if the case went to trial, and 40% recovery if the case went on appeal. In addition to the contingency amount, Defendant would also be responsible for all of Plaintiff's costs and fees. The Agreement also provided that Plaintiff would advance costs, to be reimbursed from the gross proceeds of any recovery, and if there was no recovery, Defendant would still be liable for all costs. The Agreement further provided that Plaintiff was entitled to the attorney's full contingent share of any settlement or judgment, even if the client discharged Plaintiff or substituted another attorney for Plaintiff before a settlement or judgment was achieved.

After the parties entered into the Agreement, an attorney associated with Plaintiff expended time and resources pursuing Defendant's claim, including investigating the facts and circumstances of the case, researching the legal issues, interviewing witnesses, arranging doctor consultations, making court appearances, conducting discovery, and engaging in negotiations with Guangdong Development. Plaintiff also arranged for Defendant to be examined and treated by two doctors. Treatment included at least five visits to a Dr. Salzberg and an April 10, 2002, surgery. The cost of the five visits and surgery totaled approximately $10,000. On January 25, 2002, Plaintiff filed a Complaint on Defendant's behalf against Guangdong Development alleging negligence resulting in damages that included Defendant's injury, hospitalization, surgery, past and future medical expenses, mental and physical suffering, and attorney fees.

Thereafter, Plaintiff negotiated a settlement offer from Guangdong Development for an amount between $40,000 and $50,000. Defendant disagreed with Plaintiff over the sufficiency of the amount, citing *inter alia* the cost of his past and future medical expenses. Defendant expressed his desire to proceed toward trial rather than accept the offered settlement. Plaintiff, however, believed Defendant should accept the offered settlement. Consequently, there was a breakdown in communication between the parties and Defendant chose to discharge Plaintiff, thereafter seeking

the services of Antonio Atalig as his counsel, effective on or about February 20, 2004. To date, Defendant has not secured a settlement from or judgment against Guangdong Development.

On December 10, 2004, Plaintiff filed suit against Defendant in the Commonwealth Superior Court seeking to enforce the contingency-fee Agreement, citing Sections 8 and 11 of the Agreement. Section 8 of the Agreement provided that should Defendant discharge Plaintiff as his attorney, Plaintiff would still be entitled to the contingency amount. Section 11 provided that should Plaintiff fail in obtaining recovery on Defendant's behalf, Defendant would be liable for all litigation expenses.

In its Complaint against Defendant, Plaintiff alleges that while some jurisdictions limit recovery of a discharged attorney employed on a contingency fee to that of *quantum meruit*, "other jurisdictions, particularly Illinois," allow a discharged attorney the option of choosing whether to seek *quantum meruit* recovery or proceed on a breach of contract theory "because the discharge made it impossible for the attorney to perform his contract of employment." *See Plaintiff's Complaint*, ¶¶ 15 -16 (*citing Warner v. Basten*, 255 N.E.2d 72 (Ill. App. Ct. 1969) (*superseded by statute as stated in Thomas C. Valenti, P.C. v. Swanson*, 690 N.E.2d 1031 (Ill. App. Ct. 1998)).

Defendant contends that the Agreement is unenforceable as related to a discharged attorney, with Plaintiff's recovery limited to that of *quantum meruit*. The parties do not dispute Plaintiff's cost or the total hours Plaintiff spent on the case, thirty-nine point nine hours (39.9), except that both parties contend they were directly billed for Defendant's medical bills.

II. DISCUSSION

Plaintiff argues that when a client agrees to a contingent fee arrangement, the attorney and the client have entered into a contract, which the client breaches if he discharges the attorney prior to disposition of the case because it becomes impossible for the attorney to perform. Such an

approach is based on the theory that the client not only bargains for the performance of the attorney's services, but also for the fee to be paid for the services. The attorney's failure to perform actual services does not constitute a failure of the consideration underlying the promise to represent the client. Such reasoning, however, would have a chilling effect on the attorney-client relationship.

The most critical aspect of the professional relationship between an attorney and a client is the trust and confidence of the person being represented. If the client were liable for the full contract price when he or she no longer has confidence in his attorney's handling of a case, the right to discharge the attorney would be of little value. Under the rule of *quantum meruit,* the client and the attorney are both protected. Dissatisfaction with the quality of the service rendered is not always the cause of discharge, rather, the discharge may result from the client's lack of faith and trust or confidence in the attorney. Under *quantum meruit*, the client need not show cause or present evidence sufficient to constitute legal malpractice or negligence before he can discharge the attorney without full contract price liability. Without a *quantum meruit* approach, a dissatisfied client is forced to pursue a malpractice claim if he loses confidence in his attorney.

Furthermore, the fact that an attorney-client contract is contingent does not mean the attorney has been vested with an interest in the case, nor does it affect the client's right to discharge the attorney. *Fox & Assocs. Co., L.P.A. v. Purdon*, 541 N.E.2d 448, 450 (Ohio1989)*; see also, Kaushiva v. Hutter*, 454 A.2d 1373 (D.C.1983); *MacInnis v. Pope*, 285 P.2d 688, (Cal. Ct. App. 1955) (attorney may be discharged, even on the courthouse doorsteps.). It would be inequitable to force a client who has received incomplete service from the discharged attorney to pay the full price of the contract. Clearly, a breach of contract view must be abandoned in favor of the rule of law followed by the vast majority of jurisdictions, that of *quantum meruit*.

In his Complaint, Plaintiff relies on the 1969 case of *Warner v. Basten* to assert that Illinois continues to follow the breach of contract theory, as should this Court. However, *Thomas P. Valenti, P.C. v. Swanson*, which specifically names *Warner* as antiquated law, has since held:

> [i]n Illinois, clients may discharge their attorney at any time, with or without cause. *Warner v. Basten,* 118 Ill. App.2d 419, 255 N.E.2d 72 (1969). In the past, the discharged attorney was entitled to full contract fees if the dismissal was without cause. See *Town of Mt. Vernon v. Patton,* 94 Ill. 65 (1879); *Warner*, 118 Ill. App. 2d 419, 255 N.E.2d 72; *Miller v. Solomon,* 49 Ill. App. 2d 156, 199 N.E.2d 660 (1964). However, awarding full contract fees to a discharged attorney encouraged the unseemly practice of "ambulance chasing." . . .
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> Subsequently, in 1979 our supreme court rejected the old rule that a discharged attorney is entitled to full contract fees if the dismissal was without cause. *Rhoades v. Norfolk & Western Railway Co.*, 78 Ill.2d 217, 399 N.E.2d 969, 35 Ill. Dec. 680 (1979). Instead, an attorney discharged without cause may only be entitled to recovery under [the common law] a theory of *quantum meruit. Rhoades,* 78 Ill.2d at 230, 399 N.E.2d at 975.

Thomas P. Valenti, P.C. v. Swanson, 690 N.E.2d 1031,1032 (Ill. App. Ct. 1998). See also the Illinois cases, *Leroy's Horse and Sports Place v. Racusin*, 21 Fed. Appx. 716, 718 (9th Cir. 2001) (holding that under Illinois law, '[w]hen a client terminates her attorney, the contingent-fee contract ceases to exist, and the contingnecy term in no longer operative. In such circumstances, the proper fee for the attorney is the quantum meruit value of the services."); *Rhoades v Norfolk & W. Ry. Co.*, 399 N.E.2d 969 (Ill. 1979) (an attorney discharged without cause after a contingent-fee agreement had been executed was not entitled to collect the full stipulated fee, but rather was limited to a *quantum meruit* recovery for the value of services rendered prior to the discharge).[1]

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[1] Like Illinois, the vast majority of jurisdictions today employ the modern approach to attorney recovery upon termination of a contingent fee contract, that of the attorney only being entitled to recover the reasonable value of services rendered the client prior to discharge on the basis of *quantum meruit*. *See e.g., In re Complaint of Cap'n Rick Corp.,* 525 F. Supp. 31, (S.D.N.Y. 1981); *Marquam v Vachon,* 7 F.2d 607 (9th Cir. 1925); *Sutton v. Subaru of Am., Inc*., 771 F. Supp. 321 (D. Kan. 1991); *Gaines, Gaines & Gaines, P.C. v. Hare, Wynn, Newell & Newton,* 554 So. 2d 445 (Ala. Civ. App. 1989); *Rosenberg v Levin,* 409 So. 2d 1016 (Fla. 1982); *Salem Realty Co. v Matera,* 426 N.E.2d 1160 (Mass. 1981); *Morris v. City of Detroit,* 472 N.W.2d 43 (Mich. Ct. App. 1991); *Plaza Shoe Store, Inc. v Hermel, Inc.,* 636 S.W.2d 53 (Mo. 1982); *Glick v. Barclays De Zoete Wedd, Inc.,* 692 A.2d 1004 (N.J. Super. Ct. App. Div. 1997); *Jaslow v United States,* 308 F. Supp. 1164 (E.D.N.Y. 1970).

Quantum meruit means literally "as much as deserved." BLACK'S LAW DICTIONARY 1243 (6th ed. 1990). The equitable doctrine of *quantum meruit* is based on an implied promise on the part of the defendant to pay the plaintiff *as much as he* reasonably *deserved* to have for his labor. Pursuant to the majority view, even if an attorney is discharged without cause, and even if a contingent fee agreement is in effect at the time of the discharge, the discharged attorney recovers on the basis of *quantum meruit*, and not pursuant to the terms of the agreement.[2] The *quantum meruit* rule "strikes the proper balance by providing clients greater freedom in substituting counsel, and in promoting confidence in the legal profession while protecting the attorney's right to be compensated for services rendered."*Purdon*, 541 N.E.2d at 450; *Rosenberg v. Levin*, 409 So. 2d 1016, 1020 (Fla. 1982) (*quantum meruit* recovery limitation is necessary to avoid placing restrictions on client's right to discharge an attorney); *see also* MODEL RULES OF PROF'L CONDUCT R. 1.16 (2002), Comment 4 ("A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services.").

Here, Defendant discharged Plaintiff as his attorney prior to a disposition of his case. He does not allege malpractice and has not expressed dissatisfaction with the legal services provided by Plaintiff. However, there was a break down in communication, at which time Defendant had a right to discharge Plaintiff. Because the discharge occurred prior to disposition of the case, Plaintiff had no vested right to recover on the contingency agreement. Furthermore, the guaranty modifying that agreement is unenforceable and cannot have the effect Plaintiff intended it to have - that should the Defendant disagree with his attorney and exercise his right to select a new attorney, he will be punished for exercising his choice and pay his attorney for that which he did not accomplish.

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[2] *See* Sloan, *Quantum Meruit: Residual Equity in Law*, 42 DEPAUL L. REV. 399, 439 (1992) (rule in most jurisdictions today is that discharged attorney may recover only on a quantum meruit basis).

Therefore, the *quantum meruit* recovery rule may properly be applied.

Having determined that Plaintiff's recovery from Defendant should be subject to the equitable doctrine of *quantum meruit*, we now address how the amount of recovery should be measured. As an initial observation, the Court joins those jurisdictions that have held that when an attorney representing a client pursuant to a contingent-fee agreement is discharged, the attorney's cause of action for a fee recovery on the basis of *quantum meruit* arises upon the successful occurrence of the contingency. This approach furthers the principle of protecting the clients right to discharge his attorney if he chooses.

The California Supreme Court, in *Fracasse v. Brent*, 494 P.2d 9 (Cal. 1972), gave two reasons for following such a theory. First, two significant considerations in deciding whether an attorney fee is reasonable, the amount involved and the result obtained, cannot be determined until the contingency occurs. Second, a client of limited means, for whom the contingent-fee agreement is the only real hope of recovering an award, would be improperly burdened by an absolute obligation to pay his or her former attorney if no award is ever won. "[S]ince the attorney agreed initially to take his chances on recovering any fee whatever, we believe that the fact that the success of the litigation is no longer under his control is insufficient to justify imposing a new and more onerous burden on the client." *Id.* at 14, *see also*, *Rosenberg,* 409 So. 2d at 1022 (any resulting harm to attorney is minimized because the attorney fee under original contingent agreement depended on contingency's occurrence).

That is not to say that contingency-fee agreements must always await disposition of the case. When the Court is called upon to determine the reasonable value of a discharged contingent-fee attorney's services in *quantum meruit*, it must consider the totality of the circumstances involved in the situation. The Court will look at the number of hours worked by the attorney before the

discharge, the recovery sought, the skill demanded, the results obtained, and the reasonableness of the client in the attorney-client relationship itself.

In the present matter, Plaintiff was discharged because Plaintiff believed a settlement amount between $40,000 and $50,000 was appropriate while Defendant believed it was not, given past and future medical expenses. Plaintiff does not allege bad faith discharge, nor does Defendant allege dissatisfaction with the legal services provided. As such, Plaintiff is entitled to his costs and reasonable fees up until the time of discharge. All monies are due and payable upon Defendant achieving either a trial or non-trial disposition of his case against Guangdong Development in the Commonwealth Superior Court and as further detailed below.

III. CONCLUSION

For the foregoing reasons, Defendant is Ordered to pay Plaintiff for the reasonable value of his services upon the trial or non-trial disposition of his case against Guangdong Development, Civil Action No. 02-0047B in the Commonwealth Superior Court, subject to the following conditions:

1. In the event Defendant prevails in Civil Action No. 02-0047B and obtains a money judgment, then Defendant shall pay to Plaintiff the sum of $7,381.50, reflecting 39.9 attorney hours at a rate of $185 per hour;
2. In the event said money judgment is insufficient to cover the attorney fees, the Defendant shall pay to Plaintiff a pro rata amount. If the parties cannot agree on a pro rata amount, either party may notice a hearing for the Court to decide the issue;
3. Defendant shall pay Plaintiff's costs of $2,368.72 upon a jury or non-jury disposition of the case in the Commonwealth Superior Court regardless of whether or not Plaintiff obtains a money judgment.

Both parties allege they are receiving the medical bills from the doctors that treated

Defendant. As such, the Court further orders that the parties appear before this Court on April 21, 2005, at 1:30 p.m. in Courtroom 223A to clarify the medical bill issue.

So ORDERED this 12thday of April 2005.

/s/_____
David A. Wiseman, Associate Judge