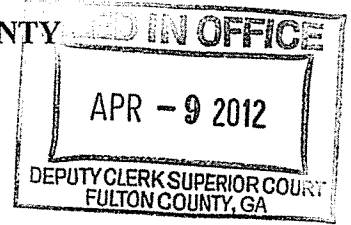


FINAL ORDER

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA



GREGORY COSBY,)
)
 Plaintiff,)
)
 v.)
)
 MILTON BROWN AND)
 ASSOCIATES, INC.,)
 d/b/a EASTCHESTER FAMILY)
 SERVICES and MILTON)
 BROWN,)
 Defendants.)

Civil Action File No. 2010-CV-184389

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court makes the following findings of fact and conclusions of law after consideration of the pleadings, the testimony and the evidence presented at trial.

I. Statement of the Case

This is an action brought by Plaintiff Gregory Cosby (hereinafter "Cosby") against Milton Brown and Associates, Inc., d/b/a Eastchester Family Services (hereinafter "Eastchester") and Milton Brown (hereinafter "Brown). Cosby filed his Complaint on April 15, 2010 and his Amended Complaint on October 17, 2011. In the Amended Complaint Plaintiff plead claims for Breach of Contract (Count I); Quantum Meruit (Count II); Promissory Estoppel (Count III); and Stubbornly Litigious Behavior pursuant to O.C.G.A. § 13-6-11 (Count IV). This matter came before the Court for a bench trial on March 22, 2012.

II. Stipulated Facts

The Parties stipulated to the following facts in the Pre-Trial Order:

1. Defendant Milton Brown and Associates/ Eastchester Family Services hired Plaintiff to perform Assessments required by DFCS.
2. Plaintiff performed Assessments on behalf of Defendant Milton Brown and Associates/Eastchester Family Services.
3. Defendant Milton Brown and Associates/Eastchester Family Services agreed to pay Plaintiff for his services.

III. Findings of Fact

At trial, the Court heard testimony from Cosby, counsel for Plaintiff Charles R. Bridgers (as to attorney's fees and costs), Brown, Mildred Brown, Lillian Castro, Tamara Latimore, Carol Robinson and Laura Cobourne. Counsel for the parties stipulated to the admission into evidence of Exhibits 1-217 and 219-221. Upon consideration of the evidence presented at trial and weighing the credibility of the witnesses, the Court finds that the following facts have been proven by a preponderance of the evidence:

1. Eastchester is a Georgia corporation which provides Comprehensive Child and Family Assessments (hereinafter "CCFAs"), counseling, wraparound services, transportation, supervised visitation and other services as requested by the Department of Family and Children Services (hereinafter "DFCS").
2. CCFAs are performed at the direction of DFCS whenever it has a child in its custody for more than 30 days.
3. The purpose of a CCFA is to conduct an expert and comprehensive evaluation of the child, his family and other relevant factors for the purpose of developing recommendations for placement and/or therapeutic measures.
4. DFCS requires that all CCFAs be performed and/or supervised and signed off by a person who is an Licensed Clinical Social Worker ("LCSW"), a Psychologist or an Advanced Licensed Mental Health Professional. In addition, DFCS requires that the educational portion of an assessment be performed and signed off by a person who holds a M. Ed.

5. Cosby is an LCSW and holds a Master's degree in Education.
6. Cosby meets the requirements to sign off on DFACS Assessments.
7. Eastchester hired Cosby as an independent contractor to perform and/or supervise and sign off on CCFAs.
8. At all times relevant to this action, Cosby was the only person Eastchester engaged who met the DFCS criteria to sign off on a CCFA.
9. Cosby's signature on a CCFA represented to DFCS that he had supervised, proofread and edited a CCFA, and that the CCFA was performed within professional standards.
10. Beginning on February 7, 2004, Cosby performed and/or supervised and signed off on CCFAs for Eastchester pursuant to a written agreement (Plaintiff's Exhibit 5).
11. The written agreement provided that Cosby would be paid \$900.00 for each CCFA.
12. The written agreement was limited in duration, and expired pursuant to its own terms on June 30, 2004.
13. On or about July 1, 2004, Eastchester and Cosby entered into an oral agreement (hereinafter "the Agreement") concerning the performance and/or supervision of CCFAs.
14. Pursuant to the Agreement, Eastchester agreed to pay Cosby for each CCFA based on a percentage of the revenue it received from DFCS for the CCFA as follows:
 - a. Eastchester agreed to pay Cosby 70% of the revenue it received from DFCS for each CCFA that Cosby performed by himself.
 - b. If Eastchester and Cosby used other independent contractors to perform part(s) of a CCFA under Cosby's supervision, Eastchester agreed to pay Cosby 75% of the revenue it received from DFCS, less the amount paid to the other independent contractors. The amounts paid to the other independent contractors was set forth on a to a document styled "Pay Scale" and admitted as part of Plaintiff's Exhibit 5)
15. Cosby continued to perform and/or supervise and sign off on CCFAs pursuant to the Agreement from July 1, 2004 through May 2009.
16. The parties did not enter into a novation affecting the Agreement between July 1, 2004 and May 31, 2009.
17. In 2007, Eastchester paid Cosby \$39,264.49 for CCFAs that he performed and/or supervised and signed off on (Exhibit 2).

18. Pursuant to the Agreement, Eastchester should have Cosby \$68,215.51 in 2007 for CCFAs that he performed and/or supervised and signed off on (Exhibit 217).
19. In breach of the Agreement, Eastchester underpaid Cosby by \$28,946.02 in 2007.
20. In 2008, Eastchester paid Cosby \$28,389.09 for CCFAs that he performed and/or supervised and signed off on (Exhibit 2).
21. Pursuant to the Agreement, Eastchester should have Cosby \$54,863.50 in 2008 for CCFAs that he performed and/or supervised and signed off on (Exhibit 217)..
22. In breach of the Agreement, Eastchester underpaid Cosby by \$26,024.41 in 2008.
23. In 2009, Eastchester paid Cosby \$15,000.00 for CCFAs that he performed and/or supervised and signed off on (Exhibit 2).
24. Pursuant to the Agreement, Eastchester should have Cosby \$11,460.00 in 2009 for CCFAs that he performed and/or supervised and signed off on (Exhibit 217)..
25. Eastchester overpaid Cosby \$3,540.00 in 2009.
26. Pursuant to the Agreement, Eastchester should have paid Cosby \$134,539.01 for CCFAs that he performed and/or supervised and signed off on from 2007 through 2009.
27. Eastchester paid Cosby \$82,658.58 for CCFAs that he performed and/or supervised and signed off on in from 2007 through 2009.
28. Eastchester failed to pay Cosby in accordance with their Agreement.
29. Eastchester is liable to Cosby for \$51,880.43 for the period of 2007 through 2009.
30. The Court awards damages to Cosby from Eastchester in the amount of \$51,880.43 for breach of contract and/or quantum meruit.
31. Eastchester acted in "bad faith within the meaning of O.C.G.A. § 13-6-11 in the performance of its obligation to pay Cosby under the Agreement.
32. Eastchester failure to compensate Cosby in accordance with the Agreement was "stubbornly litigious" and caused Cosby "unnecessary trouble and expense" within the meaning of O.C.G.A. § 13-6-11.
33. There was not a bona fide dispute as to the amount Eastchester owed Cosby for CCFAs that Cosby performed and/or supervised on its behalf.
34. Plaintiff's counsel charged fees for themselves and their staff at \$300 per hour for Mr. Fitzpatrick and Mr. Bridgers; \$85 per hour for their paralegal Mr. Sorrenti and \$45 per hour for their legal assistant, Sarah Toenes.

35. The Court finds these rates are reasonable based on the testimony of Mr. Bridgers and the Court's own experience.
36. The effort incurred by Plaintiff's counsel was set out in detailed billing records submitted as Plaintiff's Exhibit 219 and described by Mr. Bridgers in oral testimony.
37. The Court finds that this effort incurred was reasonable and necessary to prosecute this action.
38. The Court therefore awards attorney's fees and costs in the amount of \$31,594.50 (\$22,294.50 documented in Exhibit 219 and an additional \$9,300 as established by Bridgers' testimony at trial).

IV. Discussion

A. Breach of Contract

As set out above, the Court finds that an oral contract (i.e., the Agreement) existed between Cosby and Defendant Eastchester from July 1, 2004 through May 31, 2009. The Agreement governed the relationship of the parties from the expiration of their written agreement through the time that Cosby stopped providing services to Eastchester in 2009. See, O.C.G.A. § 13-1-11. Under the Agreement, Eastchester agreed to pay Cosby for each CCFA that he performed at 70% of the revenue that DFCS paid to Eastchester for the CCFA. In addition, where Eastchester and Cosby used other contractors to perform part(s) of a CCFA, Eastchester agreed to pay Cosby 75% of the revenue DFCS paid to Eastchester for that CCFA, less the amount that Eastchester paid to the other contractor(s). The amounts to be paid to such other contractors is set forth a document styled "Pay Scale" and admitted as part of Plaintiff's Exhibit 5).

Eastchester disputed the 75% element of the agreement, claiming that it had only agreed to pay Cosby "32-34%" of the revenue that DFCS paid it for a CCFA when other contractors were used. Cosby, however, introduced evidence in Brown's handwriting in

which Brown made express calculations of amounts due Cosby using the 75% less costs of other contractors formula. See Exhibit 221.

Brown claimed that in March 2008, the parties entered into a novation, whereby Eastchester would henceforth reduce its payments to Cosby to 15% of the revenue provided by DFCS for a CCFA. Brown asserted that novation was reached because of Cosby's poor work performance and his lack of availability after Cosby took a full time position with another employer. Defendants submitted neither written evidence of the alleged novation nor any accounting setting forth the relationship of its payments to Cosby and the individual CCFAs. Cosby denied that the Agreement was ever modified. Throughout 2008 and 2009 Cosby continued to submit invoices based on the percentages contained in the Agreement, and inconsistent with the alleged novation that was urged by Defendants.

Brown's testimony that Cosby's work product was inadequate was uncorroborated. It was also inconsistent with Eastchester's obligations to DFCS to produce professionally certified CCFAs. This testimony was not credible.

Mr. Cosby's alleged unavailability to perform and/or supervise and sign off on CCFAs is not a logical reason for a novation. Cosby was an independent contractor who was paid on the basis of the CCFAs that were assigned to him. If Cosby performed or supervised and signed off on fewer CCFAs, the Agreement already contemplated that he would receive less money from Eastchester.

The evidence shows that beginning in December 2007, all of Eastchester's payments to Cosby were in thousand dollar increments (Exhibit 2). Brown testified that these amounts reflected the percentage agreement of the Agreement, and were rounded up to

the nearest thousand dollar amount as an altruistic gratuity to Cosby. The Court finds that this testimony is not credible.

Cosby testified that from 2007 through May 2009, Eastchester fell further and further behind in its obligations to him. The fact that Eastchester began to pay in thousand dollar increments corroborates this testimony.

The Court finds, therefore, that a novation did not occur. See O.C.G.A. § 13-4-5. The Court finds that Plaintiff's evidence as to the contractual relationship between the Parties and the money he claims to be owed by Eastchester is credible. The Court finds that Eastchester's evidence to the contrary was not credible.¹ The Court finds that Cosby set out a reasonable and logical description of the work he performed and how much he was entitled to be paid. For these reasons, the Court finds that Eastchester failed to pay Cosby in accordance with their Agreement and Eastchester is liable to Cosby for \$51,880.43.

B. Quantum Meruit

Cosby alleged in Count II of his Amended Complaint that Eastchester was also liable to him under a theory of quantum meruit or "as much a person deserves." "Quantum Meruit" is an action for work and labor founded on an implied promise on the part of the defendant to pay the plaintiff as much as is reasonably deserved for labor performed. It refers to obligations imposed by law without regard to the intention or assent of the parties dictated by reason or justice. See O.C.G.A. § 9-2-7; *Nelson & Hill, PA, v. Wood*, 245 Ga. App. 60, 537 S.E.2^d 670 (2000).

¹ The Court finds the testimony presented by Mildred Brown, Lillian Castro, Tamara Latimore, Carol Robinson and Laura Cobourne was completely irrelevant to any legal or factual issue in this case.

In the alternative, even if a contract between Cosby and Eastchester did not exist, the value of Cosby's services to Eastchester would be \$51,880.43 for the period of 2007 through 2009. Eastchester would also be, therefore, liable to Cosby in the amount of \$51,880.43 under an alternate theory of quantum meruit.

C. Promissory Estoppel

Cosby alleged in Count III that Eastchester was liable to him based on a claim of promissory estoppel. "A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce action or forbearance is binding if injustice can be avoided only by enforcement of the promise." O.C.G.A. § 13-3-44.

Cosby continued to dun Brown to bring Eastchester's arrearage up to date. In response Brown continued to promise Cosby that Eastchester would erase the arrearage. Brown represented to Cosby that he was helping his nephew, a professional football player, secure a contract and that Brown would be able to pay Cosby in full when that contract was reached. These promises were designed to insure that Cosby would continue to append his professional certification to CCFAs for the benefit of Eastchester.

The Court finds that Eastchester's promises under the Agreement and its promises to pay its arrearage to Cosby were done to keep Cosby generating CCFAs upon which Eastchester realized revenue.

D. Attorney's Fees and Costs

In Count IV of his Amended Complaint, Cosby plead that Eastchester was liable for his reasonable attorney's fees and costs pursuant to O.C.G.A. § 13-6-11. That statute provides:

The expenses of litigation generally shall not be allowed as a part of damages; but where the Plaintiff has specifically pleaded and has made prayer therefore and where the defendant has acted in bad faith, has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense, the jury may allow them.

Id.

A defendant is "stubbornly litigious" or causes "the plaintiff unnecessary trouble and expense" within the meaning of O.C.G.A. § 13-6-11, where no "bona fide controversy" exists. See, *Buffalo Cab Co. v. Williams*, 126 Ga. App. 522, 525 (1972); *Associated Software Consultations Org. v. Wysocki*, 177 Ga. App. 135, 136 (1985).

Before and after Cosby ceased performing and supervising CCFAs, he sent multiple invoices and demands for payment to Brown. Those demands sought virtually the same amount as Cosby seeks in this action. Brown never responded to these demands. See, O.C.G.A. § 24-3-36 (Acquiescence or silence, when the circumstances require an answer, a denial, or other conduct, may amount to an admission).

Based on the preponderance of the evidence and on its own determinations of credibility, the Court finds that no "bona fide" controversy existed. Eastchester effectively took a "so sue me" attitude toward Cosby.

In addition to the "no bona fide controversy" prong of O.C.G.A. § 13-6-11 a defendant may also be liable for a plaintiff's attorneys' fees when it has in bad faith in the underlying transaction. *Rice v. Lost Mt. Homeowners Assoc.*, 269 Ga. App. 351, 356 (2004). If there is bad faith in the making or performance of the contract, attorney fees

are authorized regardless of whether a bona fide controversy otherwise existed between the parties. *Id.* (citing *McDonald v. Winn*, 194 Ga.App. 459 (1990)). Bad faith cannot be prompted by an honest mistake as to one's rights or duties but must result from some interested or sinister motive. See, *Mayor & Aldermen of Savannah v. Batson-Cook Co.*, 310 Ga.App. 878, 885 (2011).

Based on the preponderance of the evidence and on its own determinations of credibility, the Court finds that Eastchester acted in "bad faith" within the meaning of O.C.G.A. § 13-6-11. This determination is based on the evidence including, but not limited to, the failure of Eastchester to respond and deny the invoices and dunning submitted by Cosby over the course of their dealings², the repeated and hollow promises by Eastchester to catch up the amounts owed to Cosby when other business deals related to a professional football players contract were consummated, and the fact that Eastchester was motivated to mislead Cosby about future payments because it needed Cosby³ to continue certifying the CCFAs that Eastchester was obligated to produce for DFCS.

As set out above, the Court received both written and oral testimony as to the reasonability of the both the rates and the efforts required by Plaintiff's counsel to prosecute this matter. Based on this evidence and the Court's own experience, the Court

² See, OCGA § 24-4-23 (In the ordinary course of business, when good faith requires an answer, it is the duty of the party receiving a letter from another to answer within a reasonable time. Otherwise he is presumed to admit the propriety of the acts mentioned in the letter of his correspondent and to adopt them.)

³ It is undisputed that Cosby was the only person connected with Eastchester during the relevant who met the minimum requirements specified by DFCS to sign on a CCFA, i.e., licensure as an LCSW and possession of a Master's Degree in Education.

finds that the rates charged by counsel and their staff were reasonable and the efforts of counsel to prosecute this matter were both reasonable and necessary. The Court finds, accordingly, that Eastchester is liable to Cosby in the amount of \$31,594.50 for attorney's fees and costs pursuant to O.C.G.A. § 13-6-11.

E. Individual Liability

The Court finds that Milton Brown, as an individual, was not a party to the contract between Cosby and Eastchester. The Court finds in favor of Milton Brown as an individual and dismisses Plaintiff's claims against him. The Court declines to reduce the amount of attorneys' fees and costs of litigation awarded despite this finding because the Court finds that effort required by Plaintiff's counsel in prosecuting this matter as to both Defendants was not materially different than if the matter had been prosecuted only as to Defendant Eastchester.

F. Sealing of the Exhibits and Testimony

As set out above, Cosby and Eastchester performed CCFAs of children in the custody of DFCS and their families. The testimony at trial and the exhibits submitted are replete with the names, personal situations and identifying information of both adults and children. This information is highly confidential and no public purpose would be served by making this information public.

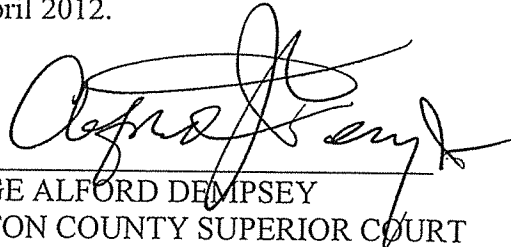
V. Conclusion

For the foregoing reasons:

IT IS HEREBY ORDERED that Plaintiff Gregory Cosby is hereby awarded \$51,880.43 against Defendant Milton Brown and Associates, Inc., d/b/a Eastchester Family

Services in damages for Breach of Contract (Count I) and Quantum Meruit (Count II); \$31,594.50 as reasonable attorney's fees and costs pursuant to O.C.G.A. § 13-6-11; as well as costs of this action. The total judgment to be entered against Defendant, Milton Brown and Associates, Inc., d/b/a/ Eastchester Family Services is \$83,474.93 plus costs of the action. IT IS FURTHER ORDERED that all claims set forth against Defendant Milton Brown are DISMISSED. IT IS FURTHER ORDERED that the testimony and all exhibits submitted by the Parties shall be SEALED pending further Order of this Court.

SO ORDERED this 9 day of April 2012.



JUDGE ALFORD DEMPSEY
FULTON COUNTY SUPERIOR COURT

Prepared and Submitted by:
Kevin D. Fitzpatrick, Jr.,
Charles R. Bridgers,
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Reviewed for form by:
Constance McManus
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