

Bender Burrows & Rosenthal, LLP v Simon
2011 NY Slip Op 32923(U)
November 4, 2011
Sup Ct, NY County
Docket Number: 100358/06
Judge: Debra A. James
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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: DEBRA A. JAMES
Justice

PART 59

BENDER BURROWS & ROSENTHAL, LLP,
Plaintiff,

Index No.: 100358/06

Motion Date: 07/26/11

- v -

Motion Seq. No.: 03

AMY SIMON,
Defendant.

Motion Cal. No.: _____

The following papers, numbered 1 to 3 were read on this motion to dismiss.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits
Answering Affidavits - Exhibits
Replying Affidavits - Exhibits

FILED

PAPERS NUMBERED	
1	_____
2	_____
3	_____

NOV 09 2011

Cross-Motion: Yes No

NEW YORK
COUNTY CLERK'S OFFICE

Upon the foregoing papers,

Plaintiff Bender, Burrows & Rosenthal, LLP (the Law Firm) moves, pursuant to CPLR 3211 (a) (6) and (7), for an order dismissing the second, third, fourth and fifth counterclaims asserted in the Amended Answer of defendant Amy Simon (Simon).

The Law Firm commenced the instant action to recover legal fees in the amount of \$58,900.36, arising from its representation of Simon during her underlying matrimonial action, entitled Simon v Simon (Sup Ct, NY County, Index No.: 303306/2001). The complaint asserts three causes of action: breach of contract (first), account stated (second), and quantum meruit (third).

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Simon interposed an Answer, asserting two counterclaims: legal malpractice (first) and the return of escrow funds alleged to have been improperly appropriated by the Law Firm (second).

The Law Firm subsequently moved to dismiss the counterclaims, and Simon cross-moved for partial summary judgment on its second counterclaim. After this court denied the parties' respective applications in its order dated July 2, 2007 (the Prior Order), the parties appealed the Prior Order. The Appellate Division modified the Prior Order, only to the extent of granting that branch of the Law Firm's motion dismissing Simon's first counterclaim for legal malpractice (Bender Burrows & Rosenthal, LLP v Simon, 65 AD3d 499 [1st Dept 2009] [the AD Decision]). Simon's subsequent motion for clarification of the AD Decision, or alternatively leave to appeal, was denied in its entirety on March 9, 2010.

Simon then served an Amended Answer, dated May 25, 2010, which asserts, inter alia, five counterclaims: return of the purportedly diverted escrow funds (first); "refund of legal fees paid to [the Law Firm]" (second); "refund of overcharges for fees fee paid to [the Law Firm]" (third & fourth); and violation of Judiciary Law § 487 (fifth).

The Law Firm now moves to dismiss the second through fifth counterclaims asserted in the Amended Answer. It argues that the allegations of Simon's newly pled counterclaims, i.e., second

through fourth, are identical to those asserted in the legal malpractice counterclaim dismissed by the Appellate Division, and, accordingly, are barred from further litigation by the law of the case doctrine. It further also contends that Simon fails to sufficiently allege a chronic or extreme pattern of legal delinquency required to sustain a Judiciary Law § 487 violation claim.

Simon opposes the Law Firm's application, claiming that she served her Amended Answer as of right on June 7, 2010, and that her second through four counterclaims, purportedly for breach of contract and fee overcharge, are different from the dismissed legal malpractice claim. She further contends that she states a valid claim for damages under Judiciary Law § 487.

In reply, the Law Firm reiterates its prior arguments and maintains that Simon's time to serve her Amended Answer as of right had expired, thus making it a legal nullity, since she did not seek, or obtain leave of this court to serve same. The court notes that this argument is improperly raised for the first time in the reply affirmation. Simon subsequently served a sur-reply without leave of this court. Pursuant to the CPLR, the court will not consider the sur-reply affirmation.

Although improperly raised for the first time in the Law Firm's reply papers, the court shall dispose of the issue of

whether the Simon's pleading was properly amended in order to reach the merits of the motion.

CPLR 3025 (a), provides that "a party may amend his pleading once without leave of court within twenty days after its service, or at any time before the period for responding to it expires, or within twenty days after service of a pleading responding to it." However, under CPLR 3211 (f), "[s]ervice of a notice of motion under subdivision [3211] (a) or (b) before service of a pleading responsive to the cause of action or defense sought to be dismissed extends the time to serve the pleading until ten days after service of notice of entry of the order." A motion to dismiss thus extends the movant's time to answer, and, accordingly, extends the time in which the opposing party may amend his pleadings as of right (see Johnson v Spence, 286 AD2d 481 [2d Dept 2001]).

Simon was entitled to amend her pleading as of right to assert claims against the Law Firm within 20 days after the service of her original answer, or prior to the expiration of the time period prescribed in CPLR 3025 (a) for responding to the original answer. Additionally, since the Law Firm's motion to dismiss the counterclaims in the original answer extended its time to interpose an answer to the counterclaims, an amended answer could have been served during the pendency of the motion to dismiss (Nimkoff Rosenfeld & Schechter, LLP v O'Flaherty, 71

AD3d 533 [1st Dept 2010]), or within ten days after service of notice of entry of the order resolving the motion to dismiss (CPLR 3025 [a]; CPLR 3211 [f]; Polish American Immigration Relief Committee, Inc. v Relax, 172 AD2d 374 [1st Dept 1991]).

The Law Firm appends a copy of the Notice of Appeal of the Prior Order to its moving papers, which states that the Prior Order was entered on July 9, 2007. The court judicially notices that the clerk's records show that the notice of entry was served on July 11, 2007.

Simon acknowledges, in her opposition papers, that her amended answer was served on June 7, 2010, almost three years after service of notice of entry of the Prior Order, thus, at a time when the Law Firm's time to reply to Simon's counterclaims had long expired. Since the Prior Order appealed from was not subject to an automatic stay (CPLR 5519 [a], see e.g. Eastern Paralyzed Veteran Association, Inc. v Metropolitan Transportation Authority, 79 AD2d 516 [1st Dept 1980]), and the parties did not seek and obtain a discretionary stay (CPLR 5519 [c]), the parties' respective filings of notices of appeal from the Prior Order did not extend the Law Firm's time to interpose a reply to the counterclaims, nor, accordingly, extend the time in which Simon could amend her pleading as of right. Thus, Simon was required to seek leave of this court, or obtain the stipulation of the parties in order to serve her amended pleading (see CPLR

3025 [b]; Nikolic v Federation Employment and Guidance Service, Inc., 18 AD3d 522 [2d Dept 2005]), neither of which occurred. Therefore, Simon's amended answer, served without leave of court, would be considered a nullity (CPLR 3025[a]; Khedouri v Equinox, 73 AD3d 532 [1st Dept 2010; Nikolic v Federation Employment and Guidance Service, Inc., 18 AD3d 522, supra).

Complicating these facts, the Law Firm was in default in replying to the surviving second counterclaim for breach of an escrow agreement, leaving the prospect of a motion for a default judgment on such claim. See Simons v Doyle, 262 AD2d 236 (1st Dept 1999). However, plaintiff failed to move a default judgment within one year of such default, imperiling such remaining counterclaim. Mejia-Ortiz v Inoa, 71 AD3d 517 (1st Dept 2010).

Plaintiff's papers do not contain a copy of a reply to Simon's second counterclaim in her original answer. Nor do Simon's opposition papers include a request for leave to amend that answer.

In the absence of a showing of prejudice or surprise to the Law Firm resulting from the delay (Anoun v City of New York, 85 AD3d 694 [1st Dept 2011]), this court may dispense with a motion for leave to amend, provided that, in opposition to the motion to dismiss, defendant sufficiently satisfies the burden required on a motion for leave to amend (Amaro v Gani Realty Corp., 60 AD3d 491 [1st Dept 2009]), i.e. it is demonstrated the additional

counterclaims added to the answer are meritorious (Nathanson v Tri-State Const. LLC, 48 AD3d 373 [1st Dept 2008]). Here, the Law Firm is unable to show prejudice given its own failure to reply to the counterclaim remaining in the original answer. Further, the Law Firm is unable to establish surprise, since, as it argues, the amended counterclaims are premised upon the same alleged facts, transactions or occurrence alleged in the dismissed legal malpractice counterclaim (see RCLA, LLC v 50-09 Realty, LLC, 48 AD3d 538 [2d Dept 2008]). Thus, this court shall consider whether the amended answer withstands a motion to dismiss under CPLR 3211.

The Law Firm's application seeks to dismiss the second through fifth counterclaims in the amended answer, pursuant to CPLR 3211 (a) (6) and (7). These sections permit the court to, respectively, dismiss counterclaims that are not properly interposed, or that fail to state a cause of action. When deciding a motion, pursuant to CPLR 3211 (a) (7), the court's task is to determine only whether the facts as alleged, accepting them as true and according the pleader every possible favorable inference, fit within any cognizable legal theory (Ladenburg Thalmann & Co., Inc. v Tim's Amusements, Inc., 275 AD2d 243 [1st Dept 2000]).

The Law Firm's initial argument seeks the dismissal of the second through fourth counterclaims, arguing that the allegations

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therein are identical or similar to the one asserted in the dismissed legal malpractice claim. The doctrine of law of the case applies only to legal determinations that were necessarily resolved on the merits (Thompson v Cooper, 24 AD3d 203 [1st Dept 2005]). Where a party has been afforded a full and fair opportunity to litigate an issue, a court's decision on that issue becomes the law of the case, precluding further litigation (Hass & Gottlieb v Sook Hi Lee, 11 AD3d 230 [1st Dept 2004]).

The Appellate Division examined the sufficiency of the pleadings (Friedman v Connecticut General Life Insurance, 30 AD3d 349 [1st Dept 2006]), and held that Simon "failed to demonstrate that she would have succeeded on the merits of the underlying action for divorce" (the AD Decision, 65 AD2d at 499), a requisite element to establish a prima facie case of legal malpractice (Maillet v Campbell, 280 AD2d 526 [2d Dept 2001]). It found that Simon was not prejudiced by the Law Firm's mid-trial motion to withdraw, based upon its determination in Simon's earlier appeal of the judgment of divorce in the underlying action (Simon v Simon, 55 AD3d 477 [1st Dept 2008]). Thus, the law of the case doctrine is applicable to the extent of the appellate court's legal determination as to the insufficiency of the legal malpractice cause of action in the original answer, and the non-prejudicial nature of the Law Firm's withdrawal in the

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underlying matrimonial action, warranting the dismissal of the attempted second and fourth counterclaims.

Simon argues that her second counterclaim states a breach of contract claim, wherein she seeks a refund of the legal funds already paid to the Law Firm. A breach of contract claim is viable against an attorney where there is a promise to achieve a particular result separate from the breach of general professional standards in his or her field (Sarasota, Inc., v Kurzman & Eisenberg, LLP, 28 AD3d 237 [1st Dept 2006]). A breach of contract claim, premised on an attorney's failure to exercise due care to abide by general profession standards, is considered a redundant pleading of a dismissed malpractice claim, and is subject to dismissal (Senise v Mackasek, 227 AD2d 184 [1st Dept 1996]).

This counterclaim alleges that the Law Firm's "time, effort and fees, both paid and the alleged unpaid balance which plaintiff is seeking in this action, were purportedly expended, in furtherance of [the Law Firm's] purported effort to prepare for and to try the [underlying] matrimonial action." It relies on the Law Firm's withdrawal and instances of its purported failure to prepare for trial, in support of this claim. This counterclaim fails in that it does not set forth any allegation that the Law Firm breached a promise to achieve a specific or assured result (Goldberg v Moskowitz, 262 AD2d 56 [1st Dept

1999]; Senise v Makasek, 227 AD2d 184, supra). Since the breach of contract claim is premised on the Law Firm's purported breach of general professional standard, it is merely redundant of the dismissed malpractice claim (Senise v Makasek, 227 AD2d 184, supra). Additionally, as previously noted, the AD Decision found that the Law Firm's mid-trial withdrawal from the matrimonial action was not prejudicial to Simon. Therefore, this court shall dismiss the second counterclaim.

The third counterclaim purportedly states a fee overcharge claim, seeking a refund of the legal funds paid to the Law Firm. It alleges that the Law Firm overcharged and collected excessive and unreasonable fees, by, inter alia, "not assigning the matter and specific tasks to the most competent and efficient staff/counsel," "spending excessive and redundant time on tasks," "utilizing three attorneys who appeared at trial," and "failing to properly prepare for trial." A party may bring a claim to recover legal fees already paid to his or her attorney on the grounds that the fees were excessive (see Boglia v Greenberg, 63 AD3d 973 [2nd Dept 2009]), and such claim is not considered duplicative of a legal malpractice claim (id.; see also Loria v Cerniglia, 69 AD3d 583 [2d Dept 2010]). Therefore, contrary to the Law Firm's argument, the mere fact that the third counterclaim is based upon similar conduct raised in the legal malpractice action does not warrant its dismissal. Thus, Simon

shall be granted leave to amend the answer to include the third counterclaim for a legal fee overcharge and the court shall deny dismissal of the counterclaim.

The fourth counterclaim also seeks a refund for overcharges of fees paid to the Law Firm. It essentially claims, that, due to the Law Firm's purported hasty withdrawal, Simons had to retain new counsel to replicate work, which resulted in her payment of additional fees of \$250,000 to new counsel. This counterclaim does not state an excessive fee claim, in that it does not seek to recover fees paid already paid to the Law Firm. It instead attempts to mimic a legal malpractice claim, which allows for the recovery of litigation expenses paid to a successor counsel to "avoid, minimize or reduce the damage caused by an attorney's wrongful conduct" (Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer, 8 NY3d 438, 443 [2007]). In view of the Appellate Division's holding that Simon was not prejudiced by the Law Firm's mid-trial withdrawal (AD Decision), Simon is unable to demonstrate that she would have not have incurred these damages but for the Law Firm's negligence in improperly withdrawing from the underlying action (see, id.; see also Theresa Striano Revocable Trust v Blancato, 71 AD3d 1122 [2d Dept 2010]). Therefore, the fourth counterclaim is dismissed.

The fifth counterclaim purports to state a Judiciary Law § 487 claim. This section provides that an attorney who:

(1) Is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party; or,

(2) Wilfully delays his client's suit with a view to his own gain; or, wilfully receives any money or allowance for or on account of any money which he has not laid out, or becomes answerable for,

Is guilty of a misdemeanor, and in addition to the punishment prescribed therefore by the penal law, he forfeits to the party injured treble damages, to be recovered in a civil action.

Judiciary Law § 487. The fifth counterclaim merely quotes the Judiciary Law, and states conclusorily that the Law Firm, "by its above-described actions, misstatements and delays, is guilty of and in violation of Judiciary Law § 487". In her opposition papers, Simon maintains that a Judiciary Law § 487 (2) claim is stated premised on those allegations, asserting that the Law Firm diverted her escrow funds, and moved to withdraw. Judiciary Law § 487 (2) permits recovery "only where there is a chronic and extreme pattern of legal delinquency" (7 NY Jur 2d, Attorneys at Law § 337, see Kinberg v Opinsky, 51 AD3d 548 [1st Dept 2008]). Assuming arguendo that the escrow funds were diverted, which the Law Firm denies, that allegation, in of itself, is insufficient to constitute a "pattern of delinquent, wrongful deceitful behavior" by the Law Firm as is required for this claim (Jaroslawicz v Cohen, 12 AD3d 160, 161 [1st Dept 2004]). Therefore, this counterclaim, which conclusory alleges a violation of Judiciary Law § 487, fails to state a cause of

action (Bernstein v Oppenheim & Co., P.C., 160 AD2d 428 [1st Dept 1990]) and shall be dismissed.

In view of the foregoing, the Law Firm's motion to dismiss the counterclaims in the amended answer shall be granted to the extent of dismissing the second, fourth and fifth counterclaims asserted in the amended complaint. Simon shall be granted leave to amend her answer to include the third counterclaim for a fee overcharge.

Accordingly, it is

ORDERED that plaintiff's motion to dismiss the second through fifth counterclaims in the amended answer and counterclaims is granted, only to the extent of dismissing the second, fourth and fifth counterclaims, and they are hereby severed and dismissed; and it is further

ORDERED that leave to amend the answer is granted only to the extent of granting leave to include defendant's third counterclaim, and to this extent the amended answer with counterclaims in the form as annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry; and it is further

ORDERED that plaintiff shall reply to the amended answer and counterclaims within 20 days from the date of such service; and it is further

ORDERED that the parties are directed to attend a pre-trial conference on January 24, 2012, in IAS Part 59, Room 103, 71 Thomas Street, New York, NY at 2:30 P.M.

This is the decision and order of the court.

FILED

Dated: November 4, 2011

ENTER: NOV 09 2011

NEW YORK
COUNTY CLERK'S OFFICE

[Handwritten Signature]
DEBRA A. JAMES J.S.C.