Fundacion Fair Weather v Puccio
2014 NY Slip Op 32931(U)
November 13, 2014
Supreme Court, New York County
Docket Number: 65032/2013
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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FUNDACION FAIR WEATHER,

Plaintiff,

- v -

KATHRYN T. PUCCIO as Executor of the Estate of THOMAS P. PUCCIO, and the LAW OFFICES OF THOMAS P. PUCCIO,

Defendants.

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Index No. 650532/2013

DECISION and ORDER

Mot. Seq. 001

HON. EILEEN A. RAKOWER, J.S.C.

This is an action for fraud, breach of contract, overpayment of attorney's fees, and professional malpractice based on a retainer agreement (the "Retainer Agreement"), dated August 11, 2008, whereby plaintiff Fundacion Fair Weather ("Plaintiff") allegedly retained decedent Thomas P. Puccio ("Decedent" or "Mr. Puccio") and the Law Office of Thomas P. Puccio (the "Law Office") to represent non-party Michael Domecq ("Domecq"). Plaintiff claims that, at the time of the Retainer Agreement, Domecq was incarcerated at a low-security federal correctional facility located in Allenwood, Pennsylvania, and that Plaintiff sought Decedent's legal services in connection with Domecq's application for a transfer to a correctional facility located in Spain. Plaintiff alleges that Decedent misrepresented his qualifications and failed to perform legal services pursuant to the Retainer Agreement. Plaintiff brings this action against defendant Kathryn T. Puccio ("Ms. Puccio" or "Defendant"), as Executor of the Estate of Thomas P. Puccio and the Law offices of Thomas P. Puccio, to recover a full refund of the $250,000.00 retainer fee allegedly paid to Decedent's Law Office under the Retainer Agreement.

Plaintiff commenced this action on February 19, 2013, by summons with Notice. Plaintiff now moves, by notice of motion dated October 2, 2014, for an Order, pursuant to CPLR § 3215, directing the entry of a default judgment as against Defendant on the basis of Defendant's nonappearance in this action.

In support, Plaintiff submits the attorney affirmation of Maurice W. Heller; the affidavit of merit of Domecq, dated April 24, 2014; the affidavits of service of Plaintiff's initiatory papers upon Defendant and upon the Law Offices of Thomas P. Puccio on May 30, 2013, by personal delivery to a person of suitable age and discretion at Defendant's residence located at 61 Singing Oaks Drive, Weston, Connecticut; the affidavits of service of Plaintiff's initiatory papers upon Defendant by first class mail, one for each of her capacities, enclosed in a post-paid wrapper, marked "Personal and Confidential" on May 14, 2013; the affidavit of additional mailing, pursuant to CPLR 3215(g)(3)(i), upon Defendant on November 6, 2013; a copy of the retainer agreement (the "Retainer Agreement"), dated August 11, 2008; a copy of a demand for arbitration, dated November 28, 2012; a copy of a letter, dated January 8, 2013, addressed to Decedent, referring Plaintiff's complaint to the Joint Committee on Fee Disputes and Conciliation; a copy of a NYCEF notification, dated September 11, 2014.

No opposition is submitted.

CPLR §3215(c) states in relevant part:

> Default not entered within one year. If the plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but shall dismiss the complaint as abandoned . . . unless sufficient cause is shown why the complaint should not be dismissed.

"Where . . . a party moving for a default judgment beyond one year from the date of default fails to address any reasonable excuse for its untimeliness, courts may not excuse the lateness and 'shall' dismiss the claim pursuant to CPLR §3215(c)." (*Giglio v. NTIMP, Inc.*, 86 A.D. 3d 301, 308 [2d Dep't 2011]; *see also Brown v. Andreoli*, 81 A.D.3d 498, 498 [1st Dep't 2011]). However, "it has been recognized that '[a]s long as 'proceedings' are being taken, and these proceedings manifest an intent not to abandon the case but to seek a judgment, the case should not be subject to dismissal'". (*Brown v. Rosedale Nurseries, Inc.*, 259 A.D.2d 256, 257 [1st Dep't 1999] [quoting 7 Weinstein-Korn-Miller, N.Y. Civ. Prac. P. 3215.14]).

Here, Plaintiff concedes that Plaintiff filed the instant motion for default judgment more than one year after default. Heller affirms that Defendant was in default as of July 17, 2013, and that Plaintiff filed the instant motion for a default

judgment more than one year later, on October 2, 2014. However, Heller affirms that Plaintiff previously filed a timely application for default judgment with the Clerk, on May 6, 2014. Heller also affirms that, in November 2012, Plaintiff sought to arbitrate Plaintiff's claims before the Joint Committee on Fee Disputes and Conciliation of the New York County Lawyers Association (the "Committee"), pursuant to an arbitration clause contained in the Retainer Agreement. Heller affirms that, by notice dated January 8, 2013, the Committee advised Decedent's Law Office that the matter was referred to arbitration, and that the Law Office did not respond to the Committee's notices.

Heller affirms that the Clerk denied Plaintiff's May 6, 2014 application on September 11, 2014, via electronic notice sent from Ms. Chisolm of the Clerk's office, on the basis that Plaintiff failed to properly perfect service upon Defendant. Heller affirms that the Clerk's determination respecting Plaintiff's service was in error, and that Plaintiff's affidavits of service demonstrate that Plaintiff filed the affidavit of mailing on May 14, 2013, within ten days of the affidavit of personal service upon Defendant on May 30, 2013, by personal delivery to a person of suitable age and discretion at Defendant's residence, pursuant to CPLR § 308(2). Heller affirms:

> On September 18, 2014, I met with Ms. Chisolm at the clerk's office, and attempted to point out .her error to her. She refused to concede her error, and she said that, even if she was wrong, she would not have entered the default anyway since the action was not for a sum certain. The point about this not being an action for a sum certain was not set forth in Ms. Chisolm's message, but I told her that I disagreed with her on that point as well since, as noted above, all my client is looking for is a return of its retainer paid to Mr. Puccio of $250,000, a precise number. Ms. Chisolm told me that my only option was make a motion to the Court.

As for the merits of Plaintiff's motion, "[w]hile a default judgment constitutes an admission of the factual allegations of the complaint and the reasonable inferences which may be made therefrom, plaintiff must present some proof of liability so that the reviewing court can determine that the 'prima facie validity' of the uncontested cause of action has been established because the granting of a default judgment does not become a 'mandatory ministerial duty' upon a defendant's default." (*Gagen v. Kipany Prods.*, 289 A.D.2d 844, 845-46 [3d Dep't 2001]). In

order to sustain a claim for legal malpractice, a plaintiff must establish: (1) that the defendant attorney failed to exercise "the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession"; (2) that the attorney's failure resulted in actual damages to the plaintiff; and, (3) that the plaintiff would have succeeded on the merits of the underlying action "but for" the attorney's negligence. (*AmBase Corp. v. Davis Polk & Wardwell*, 8 N.Y.3d 428, 434 [2007]; *Darby & Darby v. VIS Int'l*, 95 N.Y.2d 308, 313 [2000]). Furthermore, an attorney does not, except by express agreement, guarantee results. (*Weinberg v. Needelman*, 226 A.D. 3, 4-5 [1st Dep't 1929]). "[A]n attorney is not held to the rule of infallibility and is not liable for an honest mistake of judgment, where the proper course is open to reasonable doubt. Thus, 'selection of one among several reasonable courses of action does not constitute malpractice.'" (*Bernstein v. Oppenheim & Co., P.C.*, 160 A.D.2d 428, 430 [1st Dep't 1990]).

In order to state a claim for breach of contract, a plaintiff must allege, "formation of a contract between the parties, performance by the plaintiff, the defendant's failure to perform, and resulting damage." (*Flomenbaum v. New York Univ.*, 2009 NY Slip Op 8975, *9 [1st Dept. 2009]). A breach of contract claim against an attorney based on a retainer agreement may be sustained where the attorney makes an express promise in the agreement to obtain a specific result and fails to do so. (*Pacesetter Communs. Corp. v. Solin & Breindel, P. C.*, 150 A.D.2d 232, 236 [1st Dep't 1989]). While a breach of contract claim need not be based on an express promise to the client, "a breach of contract claim premised on the attorney's failure to exercise due care or to abide by general professional standards is nothing but a redundant pleading of the malpractice claim." (*Sage Realty Corp. v. Proskauer Rose L.L.P.*, 251 A.D.2d 35, 39 [1st Dep't 1998]).

In a claim for fraudulent misrepresentation, a plaintiff must allege: 1) a misrepresentation or a material omission of fact; 2) which was false and known to be false by defendant; 3) made for the purpose of inducing the other party to rely upon it; 4) justifiable reliance of the other party on the misrepresentation or material omission; and, 5) injury. (*Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y.3d 173, 178 [2011]). CPLR § 3016 requires particularity in the pleading of a fraud cause of action. (CPLR § 3016[b]). A cause of action for fraud does not arise, however, when the only alleged fraud relates to a breach of contract. (*Metropolitan Transp. Authority v. Triumph Advertising Productions, Inc.*, 116 A.D.2d 526, 527 [1st Dep't 1986]). A fraud cause of action is duplicative of a breach of contract cause of action if the fraud cause of action is based on the same facts that underlie the contract cause of action, is not collateral to the contract, and does not seek damages that would not be recoverable under a contract measure of damages. (*Financial Structures Ltd. v.*

UBS AG, 77 A.D.3d 417, 419 [1st Dep't 2010]). Thus, "[a] mere misrepresentation of an intent to perform under the contract is insufficient to sustain a cause of action to recover damages for fraud." (*Gorman v. Fowkes*, 97 A.D.3d 726, 727 [2d Dep't 2012]).

Domecq avers that Plaintiff is a charitable foundation organized under the laws of Panama, and that Plaintiff retained the Law Office to represent Domecq, "solely and for the limited purpose of obtaining a transfer of [his] incarceration to a correctional facility in Spain," pursuant to the Retainer Agreement. Domecq avers that he is a dual citizen of the United States and Spain, and that, as such, Domecq, "understood that [he] was eligible to obtain a transfer to a Spanish correctional facility pursuant to the International Prisoner Transfer Program (the 'IPTP'), which is administered pursuant to treaty by the U.S. Department of Justice, International Prisoner Transfer Unit (the 'IPTU')."

Domecq further avers:

> [Domecq] knew of Mr. Puccio by his reputation. He had been a high-profile federal prosecutor and an equally high-profile criminal defense lawyer. He had told my daughter, my wife and me that (a) he was intimately familiar with the IFTP, (b) he had extensive experience in this area of legal practice, (c) he had personal contacts high up in the Department of Justice, the United States Attorney's Office, Southern District of New York and the IPTU which would assist in my request for transfer and (d) he would easily, swiftly and successfully negotiate a transfer pursuant to the IFTP.

Domecq avers that, "The identity of the Fundacion is incorrectly shown thereon as 'Fairbourn,' but it was signed by [Domecq's] daughter, Christina Domecq, who was an authorized representative of the Fundacion, and she signed the Retainer Agreement in that capacity." In addition, Domecq's affidavit states that Decedent, "demanded, and received, a retainer advance of $250,000. The Retainer agreement was signed, and the money was paid to Mr. Puccio, because [Domecq's] daughter, [Domecq's] wife and [Domecq] believed Mr. Puccio's representations as set forth above." Domecq further avers that, shortly after entering the Retainer Agreement, Domecq and his daughter, "learned that Mr. Puccio (a) not only did not have intimate knowledge of the IPTC, but that he knew virtually nothing about it, (b) had virtually no experience in the area of negotiating transfers of prisoners from the U.S. to

foreign countries, (c) had virtually no personal contacts in the IPTU or with anyone who could or would influence the IPTU to grant [Domecq's] application and (d) had no ability to achieve an easy and swift transfer of [Domecq's] incarceration to Spain." Domecq avers that his application to the IPTU was denied in 2009.

Domecq avers that he and his daughter, "had retained counsel other than Mr. Puccio to physically prepare and submit the application" and that, "Mr. Puccio's only job was to use what he represented to us was his good offices and skill to make sure that the application was granted." Domecq's affidavit states:

> Not only did Mr. Puccio fraudulently induce the Fundacion into entering the Retainer Agreement and paying him $250,000, but he did virtually nothing on my behalf after he was paid the money. The Retainer Agreement clearly contemplated that Mr. Puccio would have to devote legal time and effort in order to earn the amount paid to him up front, but he did not. Otherwise, this would have been a non-refundable retainer which, my attorneys advise me, is illegal under New York law. Since Mr. Puccio did little or no work on my behalf, the Fundacion overpaid Mr. Puccio by $250,000.

Domecq also avers that, "whatever negligible efforts Mr. Puccio did make on behalf of the Fundacion in my favor, which consisted almost exclusively of contacting Paula Wolff, the head of the IPTU, were counterproductive", and that, "During the one or two conversations that Mr. Puccio had with Ms. Wolff on [Domecq's] behalf, [Mr. Puccio] sought to bully and browbeat her. That did not go over well at all, and may have contributed to the IPTU's denial of [Domecq's] application." Domecq further avers that, "in performing little or no work for the Fundacion despite having been paid $250,000, Mr. Puccio also failed to exercise reasonable care and professional competence" and that:

> The instances of professional malpractice committed by Mr. Puccio included, but were not limited to, the fact that as a purported expert in IPTC, Mr. Puccio never advised the Fundacion or [Domecq] of that [sic] the granting of an application for transfer to a dual citizen, such as Domecq, is far less likely than had [Domecq] been solely a citizen of Spain. This fact was critical, and would have influenced [Domecq and his daughter's] decision as to whether or not

> to proceed with the IPTC application. Mr. Puccio took little or no action to advocate on [Domecq's] behalf before [Domecq's] application was denied. . . . what little action Mr. Puccio did take, such as browbeating and bullying the head of the IPTC, worked against, and not in favor, of [Domecq's] interests.

Here, even assuming that Plaintiff sufficiently demonstrates a reasonable excuse for its delay in filing the instant motion for a default judgment, Plaintiff does not provide sufficient allegations to establish the prima facie validity of its claim that Decedent is liable for $250,000 in damages resulting from Decedent's alleged legal malpractice, breach of contract, or fraud. Domecq does not state that Decedent failed to perform any legal services on Domecq's behalf, and Domecq's allegation that Decedent failed to obtain a specific outcome is insufficient, without more, to sustain a claim that Decedent failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession. Moreover, to the extent that, "the granting of an application for transfer to a dual citizen, such as Domecq, is far less likely than had [Domecq] been solely a citizen of Spain", Plaintiff does not provide facts sufficient to support an inference that Domecq's application would have been granted "but for" Decedent's purported negligence.

In addition, the Retainer Agreement does not contain any express promise respecting Domecq or Domecq's transfer. Indeed, the Retainer Agreement, which is addressed to "Fairbourn, c/o Christina Domecq," and signed by Christina Domecq on behalf of "Fairbourn", does not contain any reference whatsoever to Plaintiff, Domecq, the IPTP, or the IPTU. Plaintiff does not allege with particularity facts sufficient to establish the prima facie validity of Plaintiff's claim that Decedent fraudulently induced Plaintiff to enter into the Retainer Agreement, and Domecq's allegation that Decedent did not intend to perform under the Retainer Agreement is not enough to give rise to a cause of action for fraud that is distinct from Plaintiff's breach of contract claim.

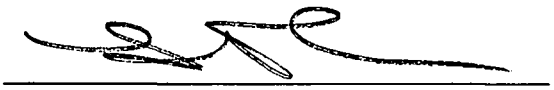
Accordingly, Plaintiff fails to provide the reviewing Court with sufficient allegations to establish a basis for Plaintiff's legal malpractice, breach of contract, or fraudulent inducement claims.

Wherefore it is hereby

ORDERED that Plaintiff's motion for default judgment is denied.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

DATED: November 13, 2014



EILEEN A. RAKOWER, J.S.C.