

Balestriere PLLC v Banxcorp
2014 NY Slip Op 32941(U)
November 17, 2014
Supreme Court, New York County
Docket Number: 650919/10
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

-----X
BALESTRIERE PLLC,

Plaintiff,

-against-

Index No. 650919/10

BANXCORP and NORBERT MEHL,

Defendants.

-----X
JOAN A. MADDEN, J.:

Defendants move, pursuant to CPLR 3025(b), to amend their answer to include four proposed affirmative defenses. Defendants also “cross move” pursuant to CPLR 5015(a)(3) to vacate this court’s decision and order dated June 6, 2014 (“the June 6 order”) which granted plaintiff’s motion to compel defendants to turn over the deposition transcript of defendant Norbert Mehl (“Mehl”) in a related action pending in the Federal District Court of New Jersey entitled *BanxCorp v. Bankrate Inc.* (hereinafter “the New Jersey action”). Plaintiff Balestriere PLLC (hereafter “the plaintiff” or “the Firm”) opposes the motion and “cross motion” and cross moves for sanctions based on defendants’ failure to provide it with the transcript of Mehl’s deposition testimony in accordance with the June 6 order. Defendants oppose the cross motion for sanctions.

Background

The Firm was retained by defendants in or about 2007, in connection with the New Jersey action, which is an antitrust suit arising out of Bankrate’s alleged misconduct, including price fixing and profit sharing agreements with competitors. This action arises out of the refusal of defendants BanxCorp and Mehl to pay for legal services provided by plaintiff on their behalf in

the New Jersey action.

In support of its motion to compel defendants to produce the transcript of Mehl's testimony in the New Jersey action, plaintiff argued that such transcript is relevant to the issue of the value of the services the Firm provided to defendants in the New Jersey action, and the issue of whether it was terminated for cause. Plaintiff also noted that the judge in the New Jersey action informed counsel during a conference call that he would take no action with respect to the transcript until he received an order from this court compelling its production.

Defendants opposed the motion to compel arguing, *inter alia*, that the transcript was the subject to the confidentiality order in the New Jersey action and was not relevant to the issues in this action. In the alternative, defendants argued that if the motion were granted, they should be able to amend their answer to reinstate their defense of termination for cause based on the Firm's argument that the transcript was relevant to this issue.

In its June 6 order, the court granted plaintiff's motion to compel the production of the transcript of Mehl's deposition testimony in the New Jersey action, subject to the relevant provisions of the confidentiality order in the New Jersey action with respect to the transcript. The court also denied defendants' request to assert its defense of termination for cause, without prejudice to renewal within 30 days of the date of the order upon a proposed amended pleading containing such defense.

Defendants' Motion to Amend Answer

Defendants now seek to serve a proposed amended answer which, in addition to a proposed first affirmative defense seeking to bar plaintiff's claim for quantum meruit based on allegations of termination for cause, also seeks to add a second affirmative defense that it has

been damaged by the Firm's alleged incompetence and poor work product, and a third and fourth defense alleging that certain evidence supporting plaintiff's claims constitutes hearsay.

The Firm opposes the motion, arguing that defendants now seek to add affirmative defenses not allowed by the June 6 order, which only gave defendants leave to renew with respect to the first of the four proposed affirmative defenses. The Firm also argues that the proposed affirmative defenses are without merit, noting that in its decision and order dated October 11, 2011, this court dismissed affirmative defenses and counterclaims based on the same or similar allegations made in support of the proposed affirmative defenses. As for the proposed third and fourth affirmative defenses, which allege, respectively, that plaintiff's bill for services constitute inadmissible hearsay, and that plaintiff's claim against Mehl is based on inadmissible hearsay, plaintiff argues that these affirmative defenses are improper as they relate to evidentiary issues.

"Leave to amend a pleading should be 'freely given' (CPLR 3025[b]) as a matter of discretion in the absence of prejudice or surprise." Zaid Theatre Corp. v. Sona Realty Co., 18 AD3d 352, 355-356 (1st Dept 2005)(internal citations and quotations omitted). That being said, however, "in order to conserve judicial resources, an examination of the underlying merits of the proposed [pleading] is warranted." Eighth Ave. Garage Corp. v. H.K.L Realty Corp., 60 AD3d 404, 405 (1st Dept), lv dismissed, 12 NY3d 880 (2009). At the same time, leave to amend will be granted as long as the proponent submits sufficient support to show that proposed amendment is not "palpably insufficient or clearly devoid of merit." MBIA Ins Corp. v. Greystone & Co., Inc., 74 AD3d 499 (1st Dept 2010)(citation omitted).

The proposed first affirmative defense alleges various facts supporting defendants'

position that the Firm was terminated for cause. By decision and order dated October 14, 2011, this court dismissed various affirmative defenses and counterclaims asserted by defendants, including their fourth counterclaim for a declaratory judgment that the Firm “was terminated for cause, and as a result is not entitled to any fee,” finding that as the counterclaim related to past events, it was not the proper subject of a request for declaratory relief. However, the first proposed affirmative defense does not seek declaratory relief, and in its order dated November 14, 2011, this court noted that the dismissal of the affirmative defenses and counterclaims as per the October 14, 2011 decision and order was without prejudice.

The court also rejects the Firm’s argument that termination without cause is not a proper affirmative defense as plaintiff must show that it was not terminated for cause as part of its prima facie claim for recovery on the basis of quantum meruit. To state a cause of action for quantum meruit, a plaintiff must allege “(1) the performance of services in good faith, (2) the acceptance of the services by the person to whom they are rendered, (3) an expectation of compensation therefor, and (4) the reasonable value of the services.” Fulbright & Jaworski, LLP v. Carucci, 63 AD3d 487, 489 (1st Dept 2009). While the reasons for the Firm’s termination may relate to the first element of the claim, the court finds that defendants should be permitted to assert termination for cause as an affirmative defense, particularly as such defense is not prejudicial to plaintiff. See generally Butler v. Cantinella, 58 AD3d 145 (2d Dept 2008); but see American Horse Show Ass’n Inc v. Ward, 186 Misc2d 571 (Sup Ct NY Co. 2000).

The court reaches a different conclusion, however, with respect to the three other proposed affirmative defenses. The second proposed affirmative defense is essentially a counterclaim for malpractice as it seeks damages based on allegations as the Firm’s alleged

incompetence and poor work product. In its October 14, 2011 decision and order, the court dismissed the counterclaim writing that:

Counterclaim-plaintiffs fail to state a cause of action for professional negligence, as they have alleged the required elements of the claim in only the most conclusory and speculative fashion. For example, counterclaim-plaintiffs' main allegation in support of this cause of action is the statement that "the Firm's and Balestriere's tortious acts directly caused and unfairly brought about the occurrence of the very condition precedent upon which the Firm relied to subsequently prosecute BanxCorp and Mehl" (Verified First Amended Answer and Counterclaim, ¶ 69). The tortious acts listed are "irreversible loss of trust," "fail[ure] to provide 'superior legal services,' and "lack of familiarity with the [2007] Action and the relevant case law" (*id.*, ¶ 30). Counterclaim-plaintiffs do not set forth any facts supporting these boilerplate assertions. Counterclaim-plaintiffs also fail to specify the damages that they have sustained, alleging only that, "[a]s a result, BanxCorp and Mehl have been damaged in an amount to be determined at trial, but no less than \$616,710.63 and up to 22.5% of any cash recovery in the Bankrate Action" (*id.*, ¶ 72).

The proposed second affirmative defense is likewise insufficient to meet the pleading requirements for professional malpractice, and defendants will not be permitted to add it. The court also denies leave to add the proposed third and fourth affirmative defenses since they relate to evidentiary issues and are not the proper subject of an affirmative defense.

Defendants' Request to Vacate

Next, defendants' request, pursuant to CPLR 5015(a)(3)¹, to vacate the June 6 order directing Mehl to turn over his deposition transcript in the New Jersey action on the ground that it was procured by fraud and/or misconduct is without merit. Defendants argue that the June 6

¹CPLR 5015(a)(3) provides, that:

The court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interested person with such notice as the court may direct, upon the ground of: 3. fraud, misrepresentation, or other misconduct of an adverse party....

order was procured by fraud as the attorneys for the Firm in this action did not inform this court or the Federal District Court in New Jersey that counsel was not licensed to practice law in New Jersey including in connection with their arguments made to the judge presiding over the New Jersey action.

As counsel for plaintiff notes in opposition to the request to vacate the June 6 order, when addressing the court in the New Jersey action, counsel indicated that it represented plaintiff in this action and did not seek to appear in the New Jersey action. Notably, defendants do not argue that plaintiff sought relief from this court without knowledge of the New Jersey court. In fact, the record reveals otherwise. Accordingly, since defendants have not shown that the June 6 order was procured by fraud or misconduct, there is no basis for vacating the June 6 order under CPLR 5015(a)(3). See e.g. Jericho Group, Ltd. v. Midtown Dev., L.P., 47 AD3d 463 (1st Dept 2008)(vacatur of judgment under CPLR 5015(a)(3) is inappropriate in the absence of a showing that alleged fraud goes to the “very means by which the judgment is procured”)(internal citations omitted); Aames Capital Corp. v. Davidsohn, 24 AD3d 474 (2d Dept 2005)(defendant in foreclosure action not entitled to vacatur of default judgment where he offered only unsubstantiated allegations of fraud by plaintiff).

Finally, the Firm’s cross motion for sanctions is denied, without prejudice to renewal in the event defendants fail to turn of the transcript as directed below.

Conclusion

In view of the above, it is

ORDERED that defendants’ motion to amend their answer is granted to the extent of permitting them to file and serve an amended answer including the affirmative defense of

termination for cause and is otherwise denied; and it is further

ORDERED that defendants shall file and serve the amended answer within 30 days of the e-filing of this decision and order; and it is further

ORDERED that defendants' "cross motion" to vacate the June 6 order is denied and it is further

ORDERED that within 30 days of the date of the e-filing of this decision and order, defendants shall turn over the transcript of Mehl's deposition testimony in the New Jersey action subject to the relevant provisions of the confidentiality order in the New Jersey action with respect to the transcript; and it is further

ORDERED that plaintiff's cross motion for sanctions is denied, without prejudice to renewal in the event defendants fail to turn of the transcript in accordance with the immediately proceeding paragraph.

DATED: November 17, 2014


HON. JOAN A. MADDEN
J.S.C.