

Gelwan v Youni Gems Corp.
2015 NY Slip Op 30916(U)
June 2, 2015
Supreme Court, New York County
Docket Number: 653656/2013
Judge: Manuel J. Mendez
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ
Justice

PART 13

LLOYD A. GELWAN,
Plaintiff,
-against-

INDEX NO. 653656/2013
MOTION DATE 05-27-2015
MOTION SEQ. NO. 010
MOTION CAL. NO. _____

YOUNI GEMS CORPORATION, YOUNATAN AHARON, DAVID AHARONI, and YOSSEFAHARONI,
Defendants.
-and-

SABHARWAL & ASSOCIATES,
Nominal Defendant

The following papers, numbered 1 to 6 were read on this motion for to dismiss counterclaims.

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1 - 3,</u>
Answering Affidavits — Exhibits _____	<u>4</u>
Replying Affidavits _____	<u>5 - 6</u>

Cross-Motion: Yes No

Upon a reading of the foregoing cited papers, it is Ordered that nominal defendant's motion under Motion Sequence 010 dismissing the counterclaims asserted in defendants' answer is granted, defendants' motion under Motion Sequence 011 for leave to serve an amended answer is denied.

All the parties to this action entered into a retainer agreement on September 28, 2005. Pursuant to the retainer agreement, plaintiff and nominal defendants were to provide legal services to the defendants in an action involving a joint venture brought against non-parties, Bassco Creations, Incorporation, Efraim Basalel, and Eliahu Basalel, all d/b/a Bassco Creations (herein "Bassco Defendants"). Plaintiff and nominal defendant provided services and on July 17, 2007, obtained a judgment in favor of defendants in the amount of \$1,097,724.73.

The Bassco Defendants sought to vacate the judgment and filed appeals. A dispute arose between plaintiff and nominal defendant concerning expenses. Defendants did not sign a retainer agreement related to the appellate work, or a Separation Agreement prepared by plaintiff and nominal defendant related to attorney fees. On July 28, 2009, defendants retained other attorneys to represent them on appeals against the Bassco defendants. The defendants were successful on the appeals, but continued to be involved in litigation against a holdover tenant and have not obtained possession of the seized asset.

On October 22, 2013, plaintiff commenced this action asserting causes of action for breach of the retainer agreement contract derived from failure to pay on the contingent fee agreement; for breach of contract for failure to pay on an oral appellate fee agreement; for promissory estoppel; quantum meruit; unjust enrichment; account stated; fraudulent conveyance; on an attorney's charging lien and seeking a declaratory judgment stating that defendants are obligated to pay plaintiff and nominal defendant thirty three and one third percent of the value of any seized property related to a judgment obtained in the joint venture action.

On December 17, 2013, the nominal defendant served an answer and asserted cross-claims against the defendants for breach of contract, promissory estoppel; quantum meruit; unjust enrichment; on an attorney's charging lien; and for a declaratory judgment that the defendants are obligated to pay the nominal defendants sixteen and two-thirds percent of the value of the seized property under the contingent fee agreement with no deductions related to expenses incurred by the defendants.

Defendants moved pursuant to CPLR 7503(a) for an Order compelling arbitration, directing that binding arbitration proceed before the American Arbitration Association (herein "AAA"), and for costs. In an Order dated August 4, 2014, this Court severed and dismissed the nominal defendants' cross-claims for breach of contract, for an attorney's charging lien, and for a declaratory judgment, and the defendant's claims for breach of contract, account stated, fraudulent conveyance, attorney's charging lien, and for a declaratory judgment. The Court ordered that the parties proceed to arbitration as to the severed causes of action.

The Court held that the remaining causes of action related to subsequent appellate work, which was not covered under the retainer agreement, and directed the defendants and nominal defendant to serve an Answer to the Complaint and an Answer to the remaining cross-claims.

Prior to this Court's decision severing and dismissing certain causes of action and compelling arbitration of those causes of action, plaintiff served an Amended Complaint dropping the nominal defendant as a defendant and adding the nominal defendant as a plaintiff, and asserting the same causes of action which were severed and dismissed by this Court's August 4, 2014 decision. Plaintiff moved under Motion Sequence 005 pursuant to CPLR section 305(c) for leave to amend the Summons to conform to the Amended Complaint.

Defendants' Answer to the Complaint asserts counterclaims for attorney deceit, attorney misrepresentation, breach of fiduciary duty for conflict of interest, excessive fee demand and coercion, deprivation of rights pursuant to 22 NYCRR 137, refusal to arbitrate reimbursement of related costs and for violations of Judiciary Law Section 487, the New York State Rules of Professional conduct, and the violation of client rights.

Defendants moved under Motion Sequence 006 to dismiss the Amended Complaint arguing that plaintiff realigned the parties without leave of the court, and that the Amended Complaint asserts causes of action that were severed and dismissed and compelled to arbitration.

The nominal defendant moved under Motion Sequence 007 for legal fees, costs, and sanctions against defendants. Plaintiff moved under Motion Sequence 008 to dismiss defendants' counterclaims as asserted against plaintiff.

In an Order dated March 19, 2015, this Court denied plaintiff's motion for leave to amend the summons to conform to the amended complaint; denied as moot defendants' motion to dismiss the amended complaint; denied the nominal defendants' motion for costs and sanctions; and granted plaintiff's motion dismissing the counterclaims asserted in the answer and severed and dismissed the counterclaims, but only as to the plaintiff-movant.

A Preliminary Conference was held on April 1, 2015. The day before the Preliminary Conference was held, defendants filed an Amended Answer asserting the same causes of action previously dismissed by this Court, and asserting new causes of action. This Court dismissed the Amended Complaint for failure to seek leave of the Court to serve and file an Amended Complaint, and for filing an Amended Complaint asserting causes of action previously dismissed by this Court. At the Preliminary Conference, defendants refused to withdraw the counterclaims asserted against the nominal defendant, which this Court previously dismissed as against plaintiff.

The nominal defendant now moves under Motion Sequence 010 to dismiss the counterclaims asserted by defendants that were dismissed as against plaintiff. Defendants move under Motion Sequence 011 for leave to amend their answer asserting counter claims and cross-claims for fraud, and asserting affirmative defenses for failure to enter into a written retainer agreement; deceit and misconduct; accord and satisfaction; and setoff and recoupment.

In its decision dated March 19, 2015, this Court reasoned that the counterclaims for violations of Judiciary Law § 487 were improperly pled; duplicative of the legal malpractice claims; and pled as a means to circumvent the expired three-year statute of limitations governing the legal malpractice claims. This Court dismissed the counterclaims for attorney deceit, attorney misrepresentation, breach of fiduciary duty for conflict of interest, excessive fee demand and coercion, deprivation of rights pursuant to 22 NYCRR 137, refusal to arbitrate reimbursement of related costs, and for violations of Judiciary Law Section 487, the New York State Rules of Professional conduct, and the violation of client rights.

In opposition to nominal defendant's motion to dismiss defendants' counterclaims, defendants argue that the continuous representation doctrine tolled the statute of limitations for the counterclaims. However, defendants does not offer any proof to substantiate this claim. For the reasons stated in this Court's March 19, 2015 decision, and because of defendants' lack of proof to substantiate that the continuous representation doctrine tolled the statute of limitations governing the counterclaims asserted against nominal defendant, the counterclaims asserted by defendants against the nominal defendant are severed and dismissed.

Defendants' motion for leave to serve an amended answer is denied.

CPLR 3025(a) allows a party to amend their pleadings 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." Leave to amend pleadings pursuant to CPLR 3025 (b) should be freely given "absent prejudice or surprise resulting directly from the delay" (Anoun v. City of New York, 85 A.D.3d 694, 926 N.Y.S.2d 98, 99 [1st Dept., 2011] citing to, Fahey v. County of Ontario, 44 N.Y.2d 934, 935, 408 N.Y.S.2d 314, 380 N.E.2d 146 [1978]), "or if the proposed amendment is palpably improper or insufficient as a matter of law" (McGhee v. Odell, 96 A.D.3d 449, 450, 946 N.Y.S.2d 134, 135, [1st. Dept., 2012] citing to, Shepherd v. New York City Tr. Auth., 129 A.D.2d 574, 574, 514 N.Y.S.2d 72 [2nd Dept., 1987]).

The basic elements of fraud are "a representation of material fact, the falsity of that representation, knowledge by the party who made the representation that it was false when made, justifiable reliance by the plaintiff, and resulting injury" (Centro Empresarial Cempresa S.A. v. America Movil, S.A.B. de C.V., 17 N.Y.3d 269, 276, 929 N.Y.S.2d 395, 2 N.E.2d 995, 1000 [2011]).

The Amended Answer annexed to defendants' moving papers do not add substantive amendments (see Moving Papers, Mot. Seq. 11, Exhibits 1 and 2). Defendants merely deletes previously dismissed counterclaims and rephrases them as a counterclaim for fraud, and fail to allege nominal defendant's knowledge that his alleged misrepresentations were false when he made them.

Accordingly, it is ORDERED, that nominal defendant's motion under Motion Sequence 010 dismissing the counterclaims asserted in the Answer is granted, the counterclaims asserted in the Answer are severed and dismissed, and it is further,

ORDERED, that defendants' motion under Motion Sequence 011 for leave to serve an amended answer is denied, and it is further,

ORDERED, that within 10 days from the date of entry of this Order the moving parties serve a copy of this Order with Notice of Entry upon all parties, and the Clerk of the Court who is directed to enter judgment accordingly, and it is further,

ORDERED, that the parties appear for a Conference in IAS Part 13 located at 71 Thomas Street, Room 210, New York, New York on June 24, 2015 at 9:30AM.

ENTER: **MANUEL J. MENDEZ**
J.S.C.

Dated: June 2, 2015



MANUEL J. MENDEZ
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE