

Exeter Law Group LLP v Wong
2016 NY Slip Op 32190(U)
October 26, 2016
Supreme Court, New York County
Docket Number: 161667/2014
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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THE EXETER LAW GROUP LLP,

Plaintiff-Counterclaim Defendant,

- and -

MITCHELL WONG, ZHEJUN "SUSAN" TAN, and
LAW OFFICE OF Z. TAN PLLC,

Counterclaim Defendants.

-against-

IMMORTALANA INC. and ROBIN FARIAS-EISNER,
SALVAREGEN, INC., and KELLY DAY,

Defendants-Counterclaim Plaintiffs.

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

Plaintiff-counterclaim defendant The Exeter Law Group LLP ("Exeter") brings suit to collect legal fees allegedly owed to it by Defendants. Exeter commenced this action against defendants Immortalana Inc. ("Immortalana") and Robin Farias-Eisner ("Eisner") by filing a Complaint on November 24, 2014 asserting six causes of action, including breach of contract (first cause of action), an account stated (second cause of action), unjust enrichment (third cause of action), quantum meruit (fourth cause of action), fraud (fifth cause of action), and tortious interference with contractual relations (sixth cause of action).

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**DECISION
and ORDER**

Mot. Seq. 005

On January 15, 2015, Immortalana Inc. and Eisner moved to dismiss portions of the complaint (Mot. Seq. #1) and, on June 30, 2015, the Court dismissed several of Exeter's causes of action, including its second cause of action for an account stated, and directed Exeter to file an Amended Complaint.

Exeter filed its Amended Complaint on July 20, 2015. The Amended Complaint is brought against Immortalana, Eisner, Salvaragen, Inc. ("Salvaragen"), and Kelly Day ("Day"). Day and Eisner are alleged to be individual defendants, and Immortalana and Salvaregen, two corporations in which Day and Eisner held shares.

Exeter claims that Day and Eisner, the "Clients," engaged Exeter on two transactions, and Exeter provided services pursuant to those engagements for approximately three years between 2011 and 2014. Exeter claims, "After uncovering irregularities and conflicts with the transactions, the Exeter Firm withdrew from the engagements." Day and Eisner refused to pay the outstanding balance of Exeter's invoices and Exeter commenced this action to recover the outstanding balance.

Day, Eisner, Immortalana and Salvaregen (collectively, "Defendants/Counterclaim Plaintiffs") have asserted "counterclaims" against Exeter, Wong, Zhejun "Susan" Tan ("Ms. Tan" or "Tan"), and Law Office of Z. Tan PLLC ("Tan Firm") (collectively, "Counterclaim Defendants") for (1) legal malpractice; (2) breach of fiduciary duty; (3) fraud; (4) violation of GBL 349; (5) fraudulent inducement; and (6) breach of contract. Defendants/Counterclaim Plaintiffs asserted a "counterclaim" against the Law Offices of Z. Tan PLLC (the "Tan Firm"), for malpractice.¹

Mot. Seq. 5

The Tan Firm moves for an order pursuant to CPLR 3211(a)(1)(documentary evidence based upon the engagement letter), (2), (3), and (7)(failure to state a claim for legal malpractice), dismissing the "third-party complaint" against Tan brought by Defendants/Counterclaim Plaintiffs and for costs and attorneys' fees pursuant to CPLR 8303-a. The Tan Firm submits inter alia the attorney affirmation of Eric Bingchen Li and the engagement letter executed by Day and Eisner.

¹ Defendants improperly label their third party claims against Wong, Ms. Tan, and the Tan Firm as "counterclaims."

Defendants/Counterclaim Plaintiffs oppose The Tan Firm's motion to dismiss and cross move for sanctions. They submit the attorney affirmation of Kenneth J. Katz; a print out of the Linked-In profile of Ms. Tan which identifies Ms. Tan as "Owner, Law Office of Z. Tan PLLC"; print out from the website for the Tan Firm which lists Ms. Tan as a Partner; print out of the "Attorney Details" for Ms. Tan in the New York State Unified Court System's Attorney Directory which lists Ms. Tan as an attorney employed at The Tan Firm; an email from Counterclaim Plaintiffs' counsel to the Tan Firm's counsel, dated September 15, 2015; and a letter from Counterclaim Plaintiffs' counsel to the Tan Firm's counsel, dated October 2, 2015.

Defendants/Counterclaim Plaintiffs interposed an Answer with Counterclaims. Their first "Counterclaim" is for legal malpractice and is asserted against the Tan Firm (as well as Exeter, Wong, and Tan). No other "counterclaim" is asserted as against the Tan Firm. The Tan Firm states, "Because the Tan Firm was never a plaintiff in this case, the claim against the Tan Firm is not a "counterclaim," but rather, third-party complaint. For the sake of clarity, this brief will refer correctly to the pleading as a Third-Party Complaint." The Court will also refer to the pleading as a third-party complaint as it relates to the Tan firm.

CPLR § 3211 provides, in relevant part:

(a) a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

(1) a defense is founded upon documentary evidence;

(7) the pleading fails to state a cause of action.

On a motion to dismiss pursuant to CPLR § 3211(a)(1), "the court may grant dismissal when documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." (*Beal Sav. Bank v. Sommer*, 8 NY3d 318, 324 [2007]) (internal citations omitted). A movant is entitled to dismissal under CPLR § 3211 when his or her evidentiary submissions flatly contradict the legal conclusions and factual allegations of the complaint. (*Rivietz*

v. Wolohojian, 38 A.D.3d 301 [1st Dept. 2007]) (citations omitted). “When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one.” (*Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 [1977]).

In determining whether dismissal is warranted for failure to state a cause of action, the court must “accept the facts alleged as true ... and determine simply whether the facts alleged fit within any cognizable legal theory.” (*People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 AD2d 91 [1st Dep’t, 2003]) (internal citations omitted) (*see* CPLR § 3211[a][7]).

As it relates to the Tan Firm, the pleading states:

148. At all times herein mentioned, Exeter, by its employees, agents, representatives, and/or servants, held itself out to the public, and in particular to Counterclaim Plaintiffs, as attorneys offering professional legal services and having the requisite level of skill, judgment, training, and knowledge necessary to properly provide legal services to its clients.

153. At all times herein mentioned, upon information and belief, Tan was an employee, principal, owner, agent, and/or partner of Tan Firm.

154. At all times herein mentioned, upon information and belief, Tan and/or Tan Firm was an independent contractor providing services to Exeter.

155. At all times herein mentioned, upon information and belief, Tan and/or Tan Firm was acting as an independent contractor to provide services on behalf of Exeter.

156. At all times herein mentioned, upon information and belief, Tan and/or Tan Firm was acting within the scope of its agreement with, and in furtherance of the business interests of, Exeter.

157. At all times herein mentioned, upon information and belief, Tan and/or Tan Firm and Exeter stood in such a relationship with each other as to make each liable for the acts and omissions of the other.

158. Exeter, Wong, Tan, and/or Tan Firm provided legal advice, services, and counseling to Counterclaim Plaintiffs relating to Immortalana and Salvaragen relating to corporate structuring and formation.

159. Exeter, Wong, Tan and/or Tan Firm each had an independent duty to counsel Immortalana and Salvaragen along with Day and Farias-Eisner in their capacity as individuals owning interests in each entity and as officers of each entity.

160. At all times herein mentioned, upon information and belief, Exeter, Wong, Tan, and/or Tan Firm, participated in, managed, supervised, directed, and controlled the legal representation of the corporate structuring and formation of Immortalana and Salvaregen, including taking steps to create each entity.

161. Upon information and belief, the legal advice and counseling provided to Counterclaim Plaintiffs was improper, untenable, and had no rational basis in law.

162. As a result of the negligent acts of Exeter, Wong, Tan, and/or Tan Firm, Immortalana and Salvaragen were structured in a manner that was inappropriate and improper for their corporate purposes and for the purposes of Day's and Farias-Eisner's ownership interests of Immortalana and Salvaragen, and Counterclaim Plaintiffs were required to retain new counsel and expend additional resources to restructure.

163. The aforesaid legal services provided by Exeter, Wong, Tan and/or Tan Firm, their employees, agents, representatives, and/or servants were rendered carelessly, unskillfully, negligently, and not in accordance with accepted standards of legal services in the community.

164. Exeter, Wong, Tan and/or Tan Firm, their employees, agents, representatives and/or servants were careless, reckless, and negligent, and committed professional legal malpractice in failing to exercise that degree of care, skill, and diligence commonly possessed by a member of the legal profession in relation to legal services rendered

for and on behalf of Counterclaim Plaintiffs, including: their failure to properly advise, counsel, and structure Immortalana and Salvaragen in a manner that fit their corporate purposes and allowed for them to avoid unnecessary taxation and taxable events; their advice on the type of structure and business entities in which to conduct their business and investments given the nature of their business and the investments they intended to and did make; their failure to properly advise Counterclaim Plaintiffs on how to structure the purchase of assets; their negligent representation in communications with UCLA regarding international patents; and their negligent representation and counseling to Day and Farias-Eisner regarding the structures of Immortalana and Salvaragen in a manner that effected their ownership interests and values in the entities.

165. The acts and/or omissions of Exeter, Wong, Tan, and/or Tan Firm were due to the carelessness and professional negligence of the Counterclaim Defendants, their employees, agents, representatives, and/or servants.

166. By reason of the above, Counterclaim Plaintiffs suffered actual ascertainable damages in the attorney's fees paid to new counsel, other professional fees, costs, and other damages for taxable events likely to occur.

The Tan Firm argues that the third party complaint for legal malpractice should be dismissed for lack of privity. The Tan Firm argues that the engagement letter is between Exeter and Day and Eisner, the Tan Firm was never part of the engagement, and there was no privity between Exeter's two former clients Day and Eisner and the Tan Firm.

In opposition, Defendants/Counterclaim Plaintiffs contend:

[T]he Tan Firm readily admits that Zhejun "Susan" Tan, member of the Tan Firm and the person for whom it is named, provided services to Counterclaim Plaintiffs. (See, e.g., Counterclaim Defendant's Memorandum of Law in Support of its Motion ("Counterclaim Defendant's Memorandum"), page 10 ("It is undisputed that, during the Exeter Firm's three year 3 professional engagement to Day and Farias-Eisner, Ms. Tan performed approximately 8 hours of work

through the Exeter Firm.”); see also Exhibit C. to Counterclaim Defendant’s Motion, admitting that Ms. Tan provided services to Counterclaim Plaintiffs.) Numerous items from Plaintiff The Exeter Law Group LLP’s (“Exeter”) invoices, attached as Exhibits J and M to the Amended Complaint, also demonstrate that the Tan Firm through Ms. Tan regularly and repeatedly undertook specific tasks for or on behalf of Counterclaim Plaintiffs, including but not limited to the 4/12/12 entry on Exhibit J and the entries dated 3/25/13, 5/11/13, 5/21/13, 5/23/13, 5/25/13, 5/30/13, 9/25/13, 10/12/13 on Exhibit M. By undertaking specific tasks, including but not limited to drafting and filing corporate documents for and on behalf of Counterclaim Plaintiffs, the Tan Firm through Ms. Tan established an attorney-client relationship with Counterclaim Plaintiffs.

The Tan Firm further argues alternatively, the third party complaint should be dismissed because the allegations of malpractice fall outside the scope of the engagement, as memorialized in the engagement letter between Day, Farias-Eisner and the Exeter Firm. The Tan Firm argues that the engagement letter provides that the engagement was for advice “on patenting and regulatory strategy.” It argues, however, the third-party complaint alleges that the Tan Firm committed malpractice in “structur[ing] Immortalana and Salvaragen in a manner that fit their corporate purposes,” helping the two corporations “avoid unnecessary taxation,” “structur[ing] the purchase of assets,” or “effect[ing] their ownership interests and values in the entities.” It contends that these allegations fall outside the scope of “patenting and regulatory strategy.”

In opposition, Defendants/Counterclaim Plaintiffs allege that Exeter’s invoices show that Ms. Tan performed legal services on their behalf “relating to corporate issues, including but not limited to drafting and filing corporate documents” and having undertaken to provide such services, “the Tan Firm by its named member Ms. Tan owed Counterclaim Plaintiffs a duty of care in the provision of such service.”

“To determine whether an attorney-client relationship exists, a court must consider the parties’ actions.” (*Pellegrino v Oppenheimer & Co., Inc.*, 49 A.D. 3d 94, 99 [1st Dept 2008] [citations omitted]). “[A]n attorney-client relationship is established where there is an explicit undertaking to perform a specific task.” (*Id.*). While the existence of an attorney-client relationship is not dependent upon the payment of a fee or an explicit agreement, a party cannot create the relationship based on his or her own beliefs or actions. (*Id.*). See *Jane St. Co. v Rosenberg &*

Estis, P.C., 192 A.D. 2d 451, 451 [1st Dept 1993] (holding “[t]here is nothing in the record to indicate that defendant law firm either affirmatively led plaintiff to believe it was acting on plaintiff’s behalf or knowingly allowed plaintiff to proceed under this misconception.”).

In order to defeat a motion to dismiss, a party must plead facts showing the privity of an attorney-client relationship, or a relationship so close as to approach privity. (*Cal. Pub. Employees Ret. Sys. v. Shearman & Sterling*, 95 N.Y.2d 427, 434 [2000] [affirming dismissal of legal malpractice claim for failure to plead actual privity or “a relationship so close as to approach that of privity”]). To show “a relationship so close as to approach that of privity,” or “near privity,” “[t]he evidence must demonstrate “(1) an awareness by the maker of the statement that it is to be used for a particular purpose; (2) reliance by a known party on the statement in furtherance of that purpose; and (3) some conduct by the maker of the statement linking it to the relying party and evincing its understanding of that reliance.” *Cal. Pub. Employees*, 95 N.Y.2d at 434. “To show ‘near privity,’ a plaintiff must allege that the attorney was aware that its services were used for a specific purpose, that the plaintiff relied upon those services, and that the attorney demonstrated an understanding of the plaintiff’s reliance.” *Candela Entertainment, Inc. v. Davis & Gilbert, LLP*, 39 Misc 3d 1232(A) [Sup Ct 2013].

Here, taking all of the allegations as true, Defendants/Counterclaim Plaintiffs have alleged an attorney client relationship with Tan and the Tan Firm, and the engagement letter with Exeter does not flatly contradict the allegations.

Wherefore, it is hereby

ORDERED that the Tan Firm’s motion to dismiss the counterclaims of Defendants/Counterclaim Plaintiffs is denied; and it is further

ORDERED that the Defendants/counterclaim plaintiffs are directed to amend the pleading to reflect the claims as against Wong and Tan and the Tan Firm as Third Party claims.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: OCTOBER 26 2016

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EILEEN A. RAKOWER, J.S.C.

HON. EILEEN A. RAKOWER