

Morrison Cohen Singer & Weinstein, LLP v Brophy
2004 NY Slip Op 30098(U)
December 29, 2004
Supreme Court, New York County
Docket Number: 0060069/2003
Judge: Walter B. Tolub
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **HON. WALTER B. TOLUB**
Justice

PART 15

MORRISON COHEN SINGER & WEINSTEIN, LLP.,

INDEX NO . 600699/2003

Plaintiff,

MOTION DATE 9/17/04

- v -

MOTION SEQ. NO . 003

B. GILES BROPHY,

MOTION CAL. NO .

Defendant.

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits _____

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the accompanying memorandum decision

This constitutes the decision and order of the court.

Dated: 12/29/04



WALTER B. TOLUB, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

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MORRISON COHEN SINGER & WEINSTEIN, LLP,

Plaintiff,

Index No. 600699/03

Mtn Seq. 003

-against-

B. GILES BROPHY,

Defendant.
-----x

WALTER B. TOLUB, J.:

By this motion, Defendant B. Giles Brophy ("Brophy") moves for leave to amend his answer pursuant to CPLR 3025(b).

Facts

Plaintiff, Morrison Cohen Singer & Weinstein, LLP ("Morrison Cohen"), is a New York City limited liability law partnership. On May 2, 1994, defendant Brophy retained Morrison and Cohen as his legal counsel in a matrimonial action commenced in Supreme Court, New York County. Brophy executed a retainer agreement whereby he agreed to pay Morrison Cohen a retainer in the amount of \$20,000 which was to be used to pay attorneys fees and disbursements incurred on his behalf.

Morrison Cohen initially represented Brophy solely on his matrimonial action. The firm later began rendering additional legal advice with respect to three other actions: the matter of Sanwa Bank litigation, the matter of Ryan, and the matter of Gemma. With respect to these legal matters, Morrison Cohen paid all

necessary disbursements for the benefit of Brophy.

From January 24, 1995 until October 3, 2002, Morrison Cohen billed Brophy for its legal services (Verified Complaint, Exhibit B). Of the \$345,133.41 billed, \$216,193.63 has been paid. Plaintiff presently seeks payment of the remaining monies (\$128,939.78).

On March 4, 2003, Morrison Cohen commenced the instant litigation asserting causes of action for (1) breach of contract, (2) account stated, (3) quantum meruit, and (4) unjust enrichment. On April 2, 2003, Brophy provided a verified answer, responding to the allegations, and asserting eight affirmative defenses.

On September 3, 2003, this court granted Plaintiff's motion for summary judgment on its cause of action for account stated, further directing severance of Defendant's counterclaims along with the remainder of the complaint (*Morrison Cohen Singer & Weinstein, LLP v Brophy*, Index No. 600699/2003, Decision dtd. 9/3/03).

On December 5, 2003, this court issued a preliminary conference order whereby the parties were directed that "all documentary discovery/disclosure be completed by 3/31/04" (Preliminary Conference Order, ¶6) and that the end date for all discovery be 7/9/04 (Preliminary Conference Order, ¶7). A compliance conference was set for May, 28, 2004.

On May 28, 2004, a so-ordered stipulation was entered into establishing that (1) discovery was to be completed by July 30,

2004, (2) depositions of all parties were to be completed by August 27, 2004, and (3) all discovery was to be completed in this matter by September 17, 2004.

On August 2, 2004, counsel for defendant contacted counsel for plaintiff by letter to ask whether plaintiff would be willing to accept service of his amended answer with counterclaims, or whether defendant should file a formal motion with the court. Counsel for plaintiff on August 16, 2004 advised defendant that his request for leave to amend was refused. The instant application ensued.

Defendant has submitted for this court's review, the proposed amended answer and the original answer. The two documents differ in that (1) the defendant's affirmative answers reflect certain changes, and (2) the amended complaint includes five counterclaims, none of which were included in the original answer.

Discussion

CPLR 3025(b) states in pertinent part that a "party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court [...] Leave shall be freely given upon such terms as may be just." The policy under this rule, is to permit amendment for almost any purpose, so long as it does not lead to undue prejudice or unfair surprise to the adverse party (Barr, Altman, Lipshie and Gerstman, *New York Civil Practice Before Trial*, §15:981 [James

Publishing 2001-2003]). Whereas the motion may be brought before the court at any time, it should, of course, be made at the earliest possible moment to avoid the assertion of the defense of laches. Where the court determines that no prejudice is suffered by any of the parties, the amendment is allowed, provided that the asserted claims are not barred by any applicable statutes of limitation.

It has long been settled that if the opposing party can show that they will be prejudiced by the proposed amendment to the pleadings, the amendment will be denied. This includes those situations where the party seeking the amendment attempts to add a claim or defense that was not part of the original pleading, or where the addition severely delays litigation (see, *O'Hara v Tidewater Oil Co.*, 23 AD2d 870 [2nd Dept 1965] (motion to amend answer denied where defendants failed to include a counterclaim until almost one year after joinder of issue and plaintiff's motion for trial preference)). Additionally, where the facts on which a late motion to amend is based were known to the movant at the start of the litigation, and the only information absent were minutiae, such as the exact amount of damages sustained, the courts are reluctant to allow the amendment (*L.B. Foster Co. v. Terry Contracting, Inc.*, 25 AD2d 721 [1st Dept. 1966]). Lastly, if an action is barred by an applicable statute of limitation, leave to amend will be denied.

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In the instant case, defendant requests leave to amend his answer to include five counterclaims. On September 3, 2003, this court granted plaintiff's motion for summary judgment to recover legal fees based on its cause of action for account stated. In that decision, this court also ordered the severance of the remainder of the complaint and the defendant's counterclaims.

Defendant contends that until now, he has never asserted any counterclaims, claiming that to have done so would have been premature. However, in 2003 this court ascertained that plaintiff's affirmative defenses, including those containing allegations of negligence/malpractice (first, second, and seventh affirmative defenses), failure to properly collect fees (fourth affirmative defense), and improper charges (fifth affirmative defense), were in fact counterclaims, based upon the content of the statements and not their caption.

Plaintiff's argument in opposition to the instant motion is threefold: (1) the counterclaims defendant seeks to interpose are barred by the doctrine of *res judicata*, and (2) even if the proposed amendments were not barred by this doctrine, plaintiffs are prejudiced by the delay or (3) are barred by applicable statutes of limitation.

Defendant's affirmative defenses, which were made in April, 2003, are virtually indistinguishable from the five proposed counterclaims included in this motion. Much like the first and

second affirmative defenses of defendant's answer, the first and second proposed counterclaims sound in malpractice and breach of fiduciary duty. The proposed third counterclaim alleges violation of the Judiciary Law, the proposed fourth counterclaim sounds in fraud and perhaps malpractice, and the fifth counterclaim makes assertions with respect to improper charges and credits in connection with the Sanwa Bank litigation (not unlike the asserted fourth and fifth affirmative defenses). Given the flexibility within the CPLR's requirements for pleading, both as to the construction of the pleading (CPLR 3026) and as to the demand for relief (3017(a)), the failure to affix the appropriate label to the pleadings is not immediately prejudicial to an opposing party.

However, even if this court were to allow the interposition of these counterclaims, the first and second counterclaims, both of which sound in malpractice, would be barred by CPLR 214(6), as plaintiff ceased representation of defendant in August, 1999 and defendant did not assert any counterclaims and/or affirmative defenses until April, 2003 - well after the expiration of the three-year statute of limitations. Were this court to interpret the second counterclaim as one for breach of fiduciary duty, the claim would again be barred, as CPLR 213, which establishes a three-year statute of limitations period, governs causes of action asserting breach of duty that are compensable by monetary damages (*Kaufman v. Cohen*, 307 A.D.2d 113 [1st Dept 2003]). Inasmuch as

neither cause of action succeeds, defendant's proposed third counterclaim, intertwined with the allegations of malpractice, also fails (see, *Alicanti v Bianco*, 2 AD3d 373 [2nd Dept 2003]; *Henry v Brenner*, 271 AD2d 647 [2nd Dept 2000]).

Defendant's proposed fourth counterclaim is dismissed as duplicative of the proposed counterclaim legal malpractice (*Sage Realty Corp. v. Proskauer Rose LLP*, 251 A.D.2d 35 [1st Dept 1998] a "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" *Id.* at, 38-39). Defendant's proposed fifth counterclaim, which claims that the firm overcharged defendant during their representation of defendant in the Sanwa Bank matter, is denied, as it is both barred by the doctrine of *res judicata*, and the applicable statutes of limitation governing accounts stated.

Having resolved the issue of the monies owed to plaintiff by this court's decision dated September 3, 2003, the instant matter is resolved.

Accordingly, it is

ORDERED that defendant's motion to amend his answer and counterclaims in the instant matter is denied; and it is further

ORDERED that the Clerk of Court enter judgment in favor of plaintiff in the amount of \$128,939.78 plus interest from the date of commencement of this action.

Settle Judgment on Notice.

This memorandum opinion constitutes the decision and order of the Court.

Dated: *12/27/09*

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HON. WALTER B. TOLUB, J.S.C.