

Sayid & Assoc., LLP v Clark St. Capital, Inc.
2007 NY Slip Op 30727(U)
April 10, 2007
Supreme Court, New York County
Docket Number: 0104207/2006
Judge: Judith J. Gische
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JUDITH J. GISCHE
Justice

PART 10

Sayid & Assoc

INDEX NO.

104207/06

MOTION DATE

Clark Street Capital, Inc
et al

MOTION SEQ. NO.

001

MOTION CAL. NO.

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

*Preliminary Conference scheduled for
6/5/07 @ 9:30 am in Part 10, 80 Centre Street*

FILED

APR 16 2007

NEW YORK
COUNTY CLERK'S OFFICE

Dated: April 10, 2007

HON. JUDITH J. GISCHE *J.S.C.*

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

-----X
Sayid and Associates, LLP,

Plaintiff

-against-

Clark Street Capital, Inc.
Executedirect.com, Inc.
Marco Alfonsi and
Basic Investors, Inc.,

Defendants.

DECISION/ORDER

Index No.: 104207/04

Seq. No.: 001

Present:

Hon. Judith J. Gische

J.S.C.

-----X
Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of
this/these motion(s):

Papers	Numbered
Defs n/m (§3211), w/MA affid, MPG affirm in support, exhs	1,2,3
Pltff x/motion (amend complaint) w/MDS affid in opp, exhs	4
Defs reply w/MPG affirm	5
MA reply affid	6
Order, Gische J., 1/11/07	

FILED

APR 16 2007

NEW YORK
COUNTY CLERK'S OFFICE

-----X
Upon the foregoing papers the court's decision is as follows:

GISCHE, J.

This is an action by plaintiff Sayid and Associates, LLP, a law firm, to recover legal fees from the three corporate defendants and the named individual. The court has before it defendants' pre-answer motion to dismiss this action on several bases, including that there are two actions pending in the District Court of Clark County,

[* 3]

Nevada¹ ("Nevada actions"). Plaintiff has cross moved to amend its summons and complaint.

At oral argument, the parties stipulated that plaintiff could amend and serve its complaint; therefore all references herein are to complaint, as amended. The parties also agreed that to the extent the motion to dismiss was based upon an other action pending, it is withdrawn. Order, Gische J., 1/11/07.

Background

Plaintiff contends that the named defendants have failed to pay legal fees in the amount of \$126,612 in connection with the Nevada actions against Alfonsi, Execute and Clark. Basic is also a named defendant because plaintiff claims it has a secured interest in Clark's stock and Clark fraudulently conveyed its assets to Basic so that Clark's principal, Alfonsi, could render himself judgment-proof. Debtor Creditor Law § 276-a.

On a pre-answer motion to dismiss, the complaint is to liberally construed. Moreover, the facts as alleged by plaintiff will be accepted as true, and afforded the benefit of every possible favorable inference (EBCI, Inc v Goldman, Sachs & Co., 5 NY3d 11, 19 [2005]; Sokoloff v Harriman Estates Development Corp., 96 NY2d 409, 414 [2001]; P.T. Bank Central Asia v ABN AMRO Bank NV, 301 AD2d 373, 375-6 [1st Dept 2003]), unless clearly contradicted by evidence submitted by the moving party in connection with the motion (see Zanett Lombardier, Ltd v Maslow, 29 AD3d 495 [1st

¹The two cases are: Edward Kowlowitz v. Executedirect.com Corp., Case No. A440454 and Edward Kowlowitz v. Marco Alfonsi, an individual; Clark Street Captial, Inc., a Georgia corporation; Does I-IV; Roe Corporations I-V, Case No. A458383.

Dept 2006]). In that regard, where, as in this case, the parties submit affidavits and other evidentiary materials in support of the motion, the court may consider such documents and affidavits to remedy any defects in the pleading. Leon v Martinez, 84 NY2d 83, 88 [1994].

The amended complaint sets forth 6 causes of action based upon the following allegations, as amplified by the sworn affidavit of M. David Sayid, Esq., plaintiff's managing partner:

There is a written retainer agreement dated October 26, 2001 among plaintiff, Execute direct.com, Corp. ("Execute") and Clarke² Street Capital, Inc. ("Clark"). Execute and Clark are referred to in the retainer agreement collectively as "the Company." The retainer is signed in the following manner with the X's representing crossed out language. The signature is that of Alfonsi:

"Agreed Upon By:
_____/s/_____
Executedirect and ~~XXXXX~~
Authorized Signatory"

Plaintiff's 1st cause of action is against Execute and Alfonsi based upon the retainer agreement, and plaintiff's claim that Alfonsi is the principal of Execute and individually liable for the unpaid fees. Plaintiff's 2nd cause of action is against the same two defendants, but under the theory of *quantum meruit*. The 3rd cause of action, also against these two defendants, is based upon an account stated. Plaintiff claims it sent monthly statements to Alfonsi which he received and retained, without objection.

Plaintiff also alleges that it can recover its legal fees from Clark, Basic and

²The retainer uses this spelling ("Clarke"), whereas this case is brought against "Clark." The court will continue to employ the name "Clark," as used in the complaint.

[* 5]

Alfonsi, based upon a repurchase agreement dated December 2, 2003 executed by Alfonsi, individually, plaintiff, and Mr. Sayid, individually and as partner of Sayid & Associates ("repurchase agreement"). In the repurchase agreement, Alfonsi acknowledges "corporate and personal debts with [M. David Sayid, Esq.] in the development of his various business ventures in an amount approximating \$120,000 ("debt") . . ." The agreement further provides that because Alfonsi has been unable to pay the debt, he has "facilitated the transfer of entire stock ownership in Clark Street Capital ("Stock") as partial payment for this Debt . . ." and Mr. Sayid has agreed to "resell the Stock to the majority owner of Clark Street Capital of the Debt from any related source." Plaintiff filed a UCC-1 perfecting its interest.

Thereafter, however, Clark transferred all its assets to Basic. In light of the repurchase agreement, the filed UCC, and Alfonsi's interest (as principal, etc.) in Clark and Execute, plaintiff claims that the conveyance of the assets to Basic was made with the intent to defraud creditors (5th cause of action), and a breach of Alfonsi and Clark's fiduciary duties to the plaintiff (6th cause of action).

This case was commenced with the filing the summons and complaint on March 28, 2006. Sayid & Associates brought a motion to be relieved as counsel for Alfonsi and the other defendants in the Nevada action in July 2006. In that action, Sayid & Associates seeks an attorney lien upon being relieved in the amount of \$120,000 (the same as the "debt" in this case), plus additional legal fees incurred by local counsel who it retained to jointly represent the defendants in Nevada.

Discussion

The thrust of defendants' motion is that the written retainer agreement does not

comply with the requirements of Part 1215, some of the defendants are not parties thereto, and therefore the retainer agreement is not a basis for the recovery of plaintiff's legal fees.

The requirements of Part 1215 ("Written Letter of Engagement") are applicable to all attorneys and became effective March 4, 2002. Although the retainer agreement in controversy predates the change in the court rules, many of the parties' disputes require a broader look at plaintiff's claims.

In relevant part, § 1215 requires that an attorney who undertakes to represent a client "shall provide to the client a written letter of engagement before commencing the representation, or within a reasonable time thereafter (i) if otherwise impracticable or (ii) if the scope of services to be provided cannot be determined at the time of the commencement of representation." There are, however, certain exceptions to these requirements:

§1215.2 Exceptions

This section shall not apply to [. . .] (2) representation where the attorney's services are of the same general kind as previously rendered to and paid for by the client [. . .] or (4) . . . no material portion of the services are to be rendered in New York."

Part 1215 also does not apply to fee disputes in excess of \$50,000, the threshold amount excepted from arbitration under Part 137. 22 NYCRR § 137.1

Strict adherence to the requirements of Part 1215, however, is not a complete bar to the recovery of legal fees by an attorney. Seth Rubenstein, P.C. v. Cynthia

[7]
Ganea, ___AD3d___, 2007 Slip Op 02923 (2nd Dept 2007); Grossman v. West 26th Corp., 9 Misc.3d 414 (N.Y.City Civ.Ct.,2005); In re Estate of Feroletto, 6 Misc.3d 680 (N.Y.Sur. 2004). Nor does it preclude recovery by a law firm in *quantum meruit* for the fair value of its services. Seth Rubenstein, P.C. v. Cynthia Ganea, supra.

Plaintiff has set forth facts to support its claims against each (and any one) of the named defendants. In doing so, it defeats their motion to dismiss the amended complaint. Whether plaintiff can ultimately prove its fee arrangements with any of the defendants is not for the court to decide to decide at the pleading stage, but remains to be decided on dispositive motions or at trial. Defendants' motion to dismiss is denied in its entirety. Defendants shall serve their answer within ten (10) days of being served with notice of entry of this decision. Plaintiff may reply as per the CPLR.

Conclusion

Defendants' motion to dismiss this action at the pleading stage is denied and they are to serve their answer as directed. Plaintiff's cross motion was resolved by agreement between the parties.

The parties shall appear for the preliminary conference on June 5, 2007 at 9:30 a.m. in Part 10, 80 Centre Street.

Any relief not expressly addressed has nonetheless been considered and is hereby denied.

This shall constitute the decision and order of the Court.

Dated: New York, New York
April 10, 2007

So Ordered:
Hon. Judith J. Gische, S.C.

