

**Cowan, DeBaets, Abrahams & Sheppard, LLP v
Lituchi**

2007 NY Slip Op 31018(U)

April 23, 2007

Supreme Court, New York County

Docket Number: 0603242/2006

Judge: Rolando T. Acosta

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: NON ROLANDO T. ACOSTA
Justice

PART 61

Index Number : 603242/2006
COWAN DEBAETS ABRAHAM
vs
LITCHY, BARRY
Sequence Number : 002
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

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

PAPERS NUMBERED

see

attached

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED
MAY 02 2007
NEW YORK
COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE
WITH THE ATTACHED MEMORANDUM DECISION.

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

Dated: 4/23/07

SO ORDERED
[Signature]
ROLANDO T. ACOSTA
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: PART 61

Cowan, Debaets, Abrahams & Sheppard, LLP,

Plaintiff,

– against –

Barry Lituchi,

Defendants.

DECISION/ORDER

Index No. 603242/06

Seq. No. 2

Present:

Rolando T. Acosta
 Supreme Court Justice

FILED
 MAY 02 2007
 NEW YORK
 COUNTY CLERK'S OFFICE

The following documents were considered in reviewing plaintiff's motion for an order granting it summary judgment against defendant on its breach of contract claim:

Papers	Numbered
Corrected Notice of Motion, Affirmations & Memorandum of Law	1-4 (Exhibits 1-10)
Affidavit in Opposition	5
Reply Affidavits	6-7 (Exhibits A-H)

In July 2005, defendant retained plaintiff law firm Cowan, Debaets, Abrahams & Sheppard, LLP ("CDAS") to represent him and others (collectively, the "Memory Film" plaintiffs) in connection with a copyright infringement matter in the United States District Court for the Eastern District of New York entitled Memory Film Productions et al. v. Makara et al., Docket No. 05 Civ. 3735(RJD). From July 2005 to March 2006, CDAS represented the Memory Film plaintiffs in the action, including, *inter alia*, filing various copyright applications, moving for and obtaining injunctive relief, and negotiating settlements with Kingsborough Community College and Peter Makara. As of March 1, 2006, defendant owed CDAS approximately \$100,000.

Given the outstanding balance, CDAS told defendant that it should retain new counsel. As a court-ordered settlement conference was scheduled for March 3, 2006, Mr. DeBaets (a partner at CDAS) explained to defendant that CDAS needed security that

defendant would pay the outstanding balance. Consequently, DeBaets told defendant that CDAS would require him to enter into a restated fee agreement. See Plaintiff's Exhibit 9. In the restated fee agreement defendant acknowledged that he owed CDAS \$102,850.17. The agreement also set up a monthly payment schedule, and defendant agreed to execute an affidavit of judgment by confession, which CDAS could enforce if defendant failed to make any monthly payment. Both the restated fee agreement and the affidavit of judgment by confession contained language that defendant "acknowledged that CDAS ha[d] zealously represented [the Memory Film plaintiffs]'s interest during the litigation of the [Federal Court] Action," and that the "work performed was necessary and proper." Id.

Following the execution of the restated fee agreement, defendant made three payments to CDAS totaling approximately \$40,000.

According to defendant, he was pressured into signing the restated fee agreement, and that based on his conversations with Mr. DeBaets, he was certain that the case would be "defaulted on" unless he signed the restated fee agreement and the judgment by confession. He also avers that neither Mr. DeBaets, Mr. Kaplan nor any other attorney at CDAS explained the practical implications of the language in these documents, in particular the release of claims language. Thus, defendant executed the documents on March 1, 2006, two days before the scheduled settlement agreement. Defendant also claims that based on his review of the billing statements, he believes that he was "doubled-billed" approximately \$60,000.

In its complaint, plaintiff asserted two causes of action, breach of contract and quantum meruit. Defendant answered and raised several counterclaims, including malpractice. CDAS now moves for summary judgment against defendant based on defendant's alleged breach of the restated fee agreement.

It is well settled that the proponent of a motion for summary judgment must establish that "there is no defense to the cause of action or that the cause of action or defense has no merit," (C.P.L.R. §3212[b]), sufficiently to warrant the court as a matter of law to direct judgment in his or her favor. Bush v. St. Claire's Hospital, 82 N.Y.2d 738, 739 (1993); Winegrad v. New York University Medical Center, 64 N.Y.2d 851, 853 (1985). This standard requires that the proponent of the motion "tender[] sufficient evidence to eliminate any material issues of fact from the case," id., "by evidentiary proof in admissible form." Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). Thus, the motion must be supported "by affidavit [from a person having knowledge of the facts], by a copy of the

pleadings and by other available proof, such as depositions." C.P.L.R. §3212(b).¹

To establish a breach of contract claim, plaintiff must establish (1) the formation of a contract, (2) performance by plaintiff, (3) defendant's failure to perform, and (4) resulting damage. Furia v. Furia, 116 A.D.2d 694 (2nd Dept. 1986). A contract, however, may be repudiated on the ground that it was procured by duress, which requires a showing of both a wrongful threat and the preclusion of free will. Fred Ehrlich, PC v. Tullo, 274 A.D.2d 303, 304 (1st Dept. 2000). A law firm's threat to cease representing a client unless it were paid is not wrongful since the threatened exercise of a legal right is not economic duress. Id.; see also Wujin Nanxiashu Secant Factory v. Ti-Well International Corp., 14 A.D.3d 352 (1st Dept. 2005). In finding that defendant had failed to establish that a stipulation had been procured by duress, the Court in Fred Ehrlich also noted that the retainer agreement expressly permitted the attorney to withdraw in the absence of payment and "in any event, given the status of the case at the time, defendant would not have been prejudiced had her attorney actually withdrawn." Fred Ehrlich, PC v. Tullo, 274 A.D.2d at 304. Furthermore, an agreement purportedly procured under duress must be promptly repudiated. Wujin Nanxiashu Secant Factory v. Ti-Well International Corp., 14 A.D.3d at 353.

Last, "[w]here a contract contains both lawful and unlawful objectives, the illegality may be severed and the legal components enforced to avoid unjust enrichment." NY CJI 4:1, Comments at p. 630, citing to Paulus v. Kutchler, 214 A.D.2d 608 (2nd Dept. 1995); McCally. Frampton, 81 A.D.2d 607 (2nd Dept. 1981). "A court may enforce the legal aspects of an agreement when the illegal aspects of the agreement are incidental to the legal aspects and are not the main objective of the agreement." Lopez v. 121 St. Nicholas Avenue HDFC, 28 A.D.3d 429, 429-30 (2nd Dept. 2006).

Here, CDAS established its prima facie entitlement to summary judgment as to liability on the restated fees agreement, and accordingly the burden shifted to defendant to raise triable issues of fact. Viewing the facts in the light most favorable to defendant, the non-moving party, Fundamental Portfolio Advisors v. Tocqueville Asset Management, 7

1. Plaintiff's motion was not supported by affidavits, but rather by affirmations from attorneys in CDAS, who is appearing pro se, thus rendering the initial papers insufficient. See LaRusso v. Katz, 30 A.D.23d 240 (1st Dept. 2006). Moreover, the pleading were not attached to the motion. CPLR 3212 (b). CDAS submitted the required affidavits and pleadings in its Reply Affidavit. Inasmuch as this type of inadvertent error can be cured with a motion to renew, Ramos v. Dekhtyar, 301 A.D.2d 481, 429 (1st Dept. 2003), the Court decided the instant motion on the merits rather than have CDAS waste judicial resources and file a renewal motion.

N.Y.3d 96, 106 (2006), defendant has failed to raise triable issues of fact with respect to the validity of the restated fee agreement. His primary contention is that he signed the agreement under duress. But, as the Second Department held in Fred Ehrlich, PC v. Tullo, *supra*, 274 A.D.2d at 304. “a firm’s threat to cease representing a client unless it were paid is not wrongful since the threatened exercise of a legal right is not economic duress.” It should also be noted that defendant made several monthly payments under this agreement, which precludes a duress claim. Wujin Nanxiashu Secant Factory v. Ti-Well International Corp., *supra*, 14 A.D.3d at 353.

Defendant also argues that the agreement is void since contains language which appears to release CDAS of any malpractice claims, which is improper and against public policy. DR 6-102(A) [22 NYCRR 1200.31 (“A lawyer shall not seek, by contract or other means, to limit prospectively the lawyer's individual liability to a client for malpractice, or, without first advising that person that independent representation is appropriate in connection therewith, to settle a claim for such liability with an unrepresented client or former client.”); *see also* Swift v Choe, 242 A.D.2d 188, 192 (1st Dept. 1998) (“While a violation of a disciplinary rule “does not, in itself, generate a cause of action” (Brainard v Brown, 91 AD2d 287, 289; *see also*, Mergler v Crystal Props. Assocs., 179 AD2d 177, 183), a release obtained in violation of a disciplinary rule should not serve to shield a lawyer from liability before the facts and circumstances surrounding the execution of the document are fully examined.”); National Council of Young Israel v Wolf, 963 F. Supp 276, 282 (SDNY 1998); Mergler v. Crystal Properties Assocs., 179 A.D.2d 177, 181 (1st Dept. 1992). Assuming for the sake of argument that defendant is correct, this Court can nonetheless sever that portion of the agreement to avoid unjust enrichment since that portion of the agreement is incidental to CDAS right to be compensated and is not the main objective of the agreement.² Lopez v. 121 St. Nicholas Avenue HDFC, *supra*, 28 A.D.3d at 429-30.

Last, CDAS is seeking \$106,335.17 in fees, and defendant only challenges certain “duplicative” charges contained therein. Since this Court has the authority to “supervise the charging of fees for legal services under the Courts’ inherent and statutory power to regulate the practice of law,” Solow Management Corp. v. Tanger, 19 A.D.3d 225(1st Dept. 2005), *citing* Matter of First Nat’l Bank of E. Islip v. Brower, 42 N.Y.2d 471, 474 (1977), the amount of fees owed by defendant will be established at an attorneys fees hearing.

Accordingly, based on the foregoing, it is

2. In a previous order (Seq. No. 1), this Court granted defendant’s motion to amend his answer and counterclaims to plead properly his malpractice claim.

ORDERED that plaintiff's motion for summary judgment against defendant on its breach of contract claim is granted to the extent of setting this matter down for an attorneys fees hearing to be held after trial on the remainder of the action; and it is further

ORDERED that a preliminary conference is scheduled for May 30, 2007, at 9:30 a.m. in Part 61.

This constitutes the Decision and Order of the Court.

Dated: April 23, 2007

ENTER

SO ORDERED
Rolando T. Acosta

Rolando T. Acosta, J.S.C.

ROLANDO T. ACOSTA
J.S.C.

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