

Bender Burrows & Rosenthal, LLP v Simon
2007 NY Slip Op 32050(U)
July 2, 2007
Supreme Court, New York County
Docket Number: 0100358/2006
Judge: Debra A. James
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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: DEBRA A. JAMES
Justice

PART 59

BENDER BURROWS & ROSENTHAL, LLP,
Plaintiff,

Index No.: 100358/06

Motion Date: 02/20/07

- v -

Motion Seq. No.: 01

AMY SIMON,
Defendant.

Motion Cal. No.: 10

The following papers, numbered 1 to 10 were read on this motion to dismiss.

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

PAPERS NUMBERED	
1 - 4	
5, 6	
7 - 10	

Cross-Motion: Yes No

FILED
JUL 09 2007
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Upon the foregoing papers,

The court shall deny the motion and cross-motions presented before it. This action by plaintiff law firm is for attorney's fees allegedly due and owing from the defendant who is a former client of the firm in a matrimonial action. Defendant has answered and has asserted counterclaims seeking the return of escrowed funds alleged to have been improperly appropriated by the plaintiff and for legal malpractice. Plaintiff moves to dismiss the counterclaims and for summary judgment on its cause of action for account stated. Defendant cross-moves for partial summary judgment seeking the return of the escrow allegedly

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

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION
Check If appropriate: DO NOT POST REFERENCE

cross-moves for partial summary judgment seeking the return of the escrow allegedly withheld by the plaintiff.

The court shall deny plaintiff's motion for summary judgment on the account stated cause of action. With respect to a claim of account stated as regards legal fees, the First Department has held that

"An account stated is an agreement between the parties to an account based upon prior transactions between them with respect to the correctness of the separate items composing the account and the balance due, if any, in favor of one party or the other." In this regard, "receipt and retention of plaintiff's accounts, without objection within a reasonable time, and agreement to pay a portion of the indebtedness, [gives] rise to an actionable account stated, thereby entitling plaintiff to summary judgment in its favor." Further, an attorney may contract with his client on the cost of his past or future services, and an account stated may exist between them.

Shea & Gould v Burr, 194 AD2d 369, 370 -371 (1st Dept 1993)

(citations omitted). Plaintiff now seeks unpaid fees for the period prior to plaintiff's withdrawal. However, on its Order to Show Cause before the trial judge to be relieved as defendant's counsel in the matrimonial action, plaintiff, by her affirmation dated June 4, 2004, concedes that there was a dispute between the parties as to the application of certain funds to the payment of fees arising from an arrangement made before the Court on May 5, 2004. In light of plaintiff's own statements before the matrimonial action judge, it cannot be said as a matter of law that there is no issue of fact as to whether the defendant

objected to plaintiff's bills as of that date where the plaintiff acknowledges that there was a disagreement between the parties as to the application of the disputed monies to the plaintiff's fees.

The transcript of the Court's hearing on plaintiff's Order to Show Cause to withdraw reveals that the main issue was the application of the escrow money to the payment of the plaintiff's legal bills. The court must note that plaintiff's application to withdraw came in the middle of an adjourned divorce trial in an action that had been commenced some three years prior. The court in the matrimonial action while granting plaintiff's application to withdraw denied plaintiff's request for a charging lien stating "with respect to the lien, there is obviously a dispute about your fees, so I can't impose a charging lien. That's got to be adjudicated." (Simon v Simon, Sup Ct, NY County, Gische, J., Index No.: 303306/2001, June 15, 2004, Tr. at 21).

Even assuming that defendant had not objected to the bills of plaintiff law firm prior to the irretrievable breakdown between the parties in May 2004 as cited in plaintiff's withdrawal application, there is an issue of fact as to defendant's acceptance of plaintiff's bills in that month. Based upon plaintiff's May 6, 2004, and May 27, 2004 bills, there were over \$67,000 of current charges not past due itemized in those bills alone. Based upon the above facts, there is an issue of

fact as to at least this amount which is larger than the amount that plaintiff seeks in satisfaction of its claim for partial summary judgment. Therefore, summary judgment is not appropriate on plaintiff's account stated claim. This conclusion is supported by the Court's decision in Greenfield, Eisenberg, Stein & Senior v Tallering (200 AD2d 609, 610 [2d Dept 1994]). In that case, the Court held that account stated was not available to a discharged attorney in a matrimonial action and ordered discovery so that the amount of fees could be determined "based upon quantum meruit." Id. The court further stated that "[w]e conclude, however, that under the circumstances of this case, the legal billings to the wife are not amenable to summary resolution, given the lack of detailed support in this record, and our precedential holdings approving quantum meruit as an appropriate remedy for a discharged attorney. Given this conclusion, we find that the wife is entitled to discovery and inspection of the time sheets and disbursement records of her former attorneys." Id. at 611.

With respect to plaintiff's motion to dismiss defendant's counterclaims for legal malpractice, the court finds that based upon recent authority, the counterclaims are cognizable. "In order to establish a prima facie case of legal malpractice, a plaintiff must demonstrate that the plaintiff would have succeeded on the merits of the underlying action but for the

attorney's negligence." Davis v Klein, 88 NY2d 1008, 1009-1010 (1996). As further elucidated by the First Department in Dweck Law Firm, LLP v Mann (283 AD2d 292, 293 [1st Dept 2001]),

[I]n order to prevail in an action for legal malpractice, the plaintiff must plead factual allegations which, if proven at trial, would demonstrate that counsel had breached a duty owed to the client, that the breach was the proximate cause of the injuries, and that actual damages were sustained. Unsupported factual allegations, conclusory legal argument or allegations contradicted by documentation, do not suffice. Attorneys may select among reasonable courses of action in prosecuting their clients' cases without thereby committing malpractice, so that a purported malpractice claim that amounts only to a client's criticism of counsel's strategy may be dismissed. Moreover, the client must plead specific factual allegations establishing that but for counsel's deficient representation, there would have been a more favorable outcome to the underlying matter.

Dweck, 283 AD2d at 293 (citations omitted). In analyzing a complaint alleging legal malpractice "[o]n a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction (see, CPLR 3026). We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. . . [D]ismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." Arnav Industries, Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner, L.L.P., 96 NY2d 300, 303 (2001) (citations omitted); see also Rosner v Paley, 65 NY2d 736, 738 (1985) ("whether the pleading was

sufficient to state a cause of action for legal malpractice posed a question of law which could be determined on a motion to dismiss").

Defendant alleges that the manner and fact of plaintiff's withdrawal in the middle of the trial of her matrimonial action, allegedly based solely upon the alleged misappropriation of escrow monies by plaintiff, caused such prejudice to defendant's case as to severely affect the award to plaintiff. Typically, such allegations by a plaintiff, that a judgment for a party was reduced because of counsel's conduct, would not be sufficient to meet the pleading requirements for attorney malpractice because of the failure to demonstrate "but for" causation in a circumstance where the tribunal was fully apprised of the parties' conduct. However, the First Department recently applied the "but for" causation rule in the matrimonial attorney malpractice context and found that summary dismissal was inappropriate where the alleged result of the litigation was so unfair to the party that vacatur was warranted. The Court stated that

Despite the detailed on-the-record settlement of plaintiff's matrimonial action, the Second Department subsequently found that plaintiff's allegations seeking to rescind such stipulation were sufficient to create an inference of duress and intimidation exercised by her former husband and the Law Guardian as to the issue of custody and an inference that the former husband may not have fully disclosed his financial assets, that the former husband's pension and other assets were overlooked in arriving at the stipulation and that, as a result of

those circumstances, the terms of the agreement were so inequitable as to be manifestly unfair to plaintiff (see Cruciata v Cruciata, 10 AD3d 349, 350 [2004]). Given the foregoing, as well as the subsequent reopening of the matrimonial action for a de novo determination of all issues except for the actual divorce, the allegations in the amended verified complaint sufficiently state causes of action for legal malpractice and related relief against plaintiff's attorney in the matrimonial action.

Cruciata v Mainiero, 31 AD3d 306 (1st Dept 2006). Although the underlying matrimonial judgment in this action has not been overturned, Cruciata stands for the proposition that if it is alleged that the underlying matrimonial judgment or stipulation is "so inequitable as to be manifestly unfair to the" party to the matrimonial action, the attorney malpractice action is not subject to dismissal on causation grounds. Accordingly, the court shall deny plaintiff's motion to dismiss defendant's malpractice claims.

Finally, the parties' motion and cross-motion for dismissal and summary judgment as to the claims for return of the allegedly escrowed funds shall be denied as there are issues of fact as to what agreement, if any, the parties had reached as to the disposition of those funds.

Accordingly, it is

ORDERED that the plaintiff's motions and the defendant's cross-motion are DENIED; and it is further

ORDERED that the parties are directed to attend a preliminary conference on August 7, 2007, at 9:30 A.M., in IAS Part 59, Room 1254, 111 Centre Street, New York, New York 10013.

This is the decision and order of the court.

Dated: July 2, 2007

ENTER:

~~Debra A. James~~
J.S.C.
DEBRA A. JAMES
J.S.C.

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