

Scarola Ellis LLP v Birnbaum
2008 NY Slip Op 32258(U)
August 6, 2008
Supreme Court, New York County
Docket Number: 0106199/2007
Judge: Barbara R. Kapnick
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: BARBARA R. KAPNICK

PART 12

Justice

Scarola Ellis

INDEX NO.

106199/07

MOTION DATE

- v -

MOTION SEQ. NO.

02

Burbaum A

MOTION CAL. NO.

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

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

FILED

AUG 11 2008

COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 8/6/08



BARBARA R. KAPNICK /SG

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 12

-----X
SCAROLA ELLIS LLP,

Plaintiff,

-against-

ARTHUR BIRNBAUM, DIAMLINK
JEWELRY, DIGICO HOLDING, LTD., and
NEHAL DOE (fictitious name, true
name unknown, party intended being
the principal of the corporate
defendants and the employer of
Arthur Birnbaum on or about
January 1, 2006),

Defendants.
-----X

DECISION/ORDER

Index No. 106199/07

Motion Seq. No. 002

FILED

AUG 11 2008

COUNTY CLERK'S OFFICE
NEW YORK

BARBARA R. KAPNICK, J.:

This action arises out of defendant Arthur Birnbaum's retention of the plaintiff law firm, Scarola Ellis LLP, or its predecessor, to provide legal representation in connection with various matters relating to his then-current employment relationship with Dreamstone International LLS ("Dreamstone"). Defendant Birnbaum had used the services of Richard J. J. Scarola, Esq. of Scarola Ellis LLP since 1991 in connection with his various business endeavors.

Birnbaum's employment with Dreamstone ended in late 2005. Plaintiff thereafter agreed to pursue arbitration on behalf of Birnbaum, on a 45% contingency fee basis, based upon claims for severance payments and related damages in a claimed amount of \$516,500.00.

The contingency fee arrangement was memorialized in a letter agreement dated December 10, 2005 sent by plaintiff to Birnbaum. The agreement provides, in relevant part, as follows:

Computation of Fees: SE will be compensated on what is commonly known as a "contingent fee" basis in the matter, on the following terms: (i) SE will receive 45% of amounts determined to be due to you as severance or other benefits, before and without deduction for any set-off or counter-claim that may be asserted against you; (ii) in consideration of this agreement, SE will waive other bills you have incurred to date; (iii) SE will defend you in the arbitration to be commenced against any counterclaims asserted in the arbitration; and (iv) you will pay the out-of-pocket expenses of the arbitration, including the fees of the American Arbitration Association.

* * *

Acceptance: Careful review of this letter and enclosure will assure your understanding of the terms of the Firm's representation. Please raise and discuss any questions with us. If this letter accurately summarizes the Agreement between us, please indicate approval and acceptance by signing the enclosed letter, making a copy of it for your records, and returning it to me.

There appears to be no dispute that the agreement was never counter-signed by Birnbaum, although there is also no dispute that plaintiff thereafter commenced the arbitration and submitted a mediation statement on behalf of Birnbaum. Plaintiff also claims to have actively participated in a settlement mediation with the arbitrator.

On or about December 21, 2005, plaintiff received a communication from Dreamstone's attorney that Birnbaum was terminating the arbitration and withdrawing his claims, based upon the fact that he had found new employment with another company, i.e., Defendant Digico Holding, Ltd. ("Digico"), which was allegedly a member and one-half owner of Dreamstone, and/or its purported affiliate, Diamlink Jewelry ("Diamlink").

Plaintiff did not recover a contingency fee, although plaintiff claims that Birnbaum received valuable employment at high compensation and other valuable benefits in exchange for his dropping the arbitration which plaintiff commenced on his behalf.

In the Amended Complaint, plaintiff seeks to recover damages against defendant Birnbaum for fraud in the inducement and fraudulent concealment and omission based on plaintiff's failure to disclose his offer of new employment (first cause of action), breach of contract (second and third causes of action),¹ an account

¹ In the second cause of action, plaintiff alleges that defendant Birnbaum "is liable to Scarola Ellis LLP for breach of the Agreement in the full amount of Scarola Ellis LLP's contingent fee interest under the Agreement in the consideration Mr. Birnbaum received for consideration of dropping his claim in arbitration, in an amount to be determined at trial - or, in the alternative, the amount that Mr. Birnbaum should have ... collected upon completion of the arbitration had Mr. Birnbaum not unilaterally decided to terminate it - but at least \$232,425, plus associated interest."

In the alternative, plaintiff alleges in the third cause of action that defendant Birnbaum "is liable to Scarola Ellis LLP

stated 'in an amount to be determined at trial' (fourth cause of action), and quantum meruit and unjust enrichment on the ground that Birnbaum knowingly requested and received the benefit of its legal services that, among other things, led to the very valuable consideration he received (fifth cause of action).

Plaintiff also seeks to recover damages against defendants Diamlink, Digico, and Nehal Doe (fictitious name, true name unknown, party intended being the principal of the corporate defendants and the employer of Arthur Birnbaum on or about January 1, 2006) for tortious interference with contract and tortious interference with economic relations (sixth cause of action).

Defendant Birnbaum now moves for an order pursuant to CPLR §§ 3211(a)(1) and (7) and 3016(b) dismissing plaintiff's Amended Complaint on the grounds that it is barred by the documentary evidence, for failure to state a cause of action upon which relief can be granted and for failure to plead fraud claims with specificity.

for breach of the Agreement for the full amount of the Scarola Ellis LLP time charges and disbursements both before and after the agreement to pursue severance on the contingent fee basis - in excess of \$21,000 for the amount before that point in time and in excess of \$24,000 for the work done after that point in time; for a total in excess of \$45,000 in an amount to be determined more precisely at trial, plus interest."

Specifically, defendant argues that the retainer agreement did not require any payment of attorneys' fees in the event that there was no recovery in the arbitration.

Plaintiff argues in opposition that defendant Birnbaum cannot rely on this documentary evidence, since Birnbaum concedes he never signed the agreement. Moreover, plaintiff argues that defendant is misinterpreting the agreement to mean that plaintiff would not have been entitled to any fees in the event the case was settled in mediation.

Defendant Birnbaum next argues that plaintiff's first cause of action must be dismissed because no cause of action for fraud in the inducement and fraudulent concealment lies where the representation involves a future intent. See *Eastman Kodak Co. v Roopak Enterprises, Ltd.*, 202 AD2d 220 (1st Dep't 1994); *Sandra Greer Real Estate v Johansen Org.*, 182 AD2d 468 (1st Dep't 1992).

Plaintiff, however, claims that Birnbaum knew at the time he entered into the agreement, but failed to disclose to plaintiff, that he had already been offered the employment and that he was considering accepting the offer.

Defendant also argues that plaintiff has failed to plead with specificity any material misrepresentation of a present fact, and

has failed to establish the existence of a special or fiduciary relationship which would create a duty to disclose.

Plaintiff, on the other hand, contends that Birnbaum had a duty to disclose the facts and circumstances to plaintiff regarding the employment offer, because he possessed superior knowledge concerning the subject matter not available to plaintiff, and knew plaintiff would act, in entering into the contingency fee agreement, based upon the incomplete and allegedly misleading information. See *P.T. Bank Cent. Asia, N.Y. Branch v ABN AMRO Bank N.V.*, 301 AD2d 373 (1st Dep't 2003).

Based on the papers submitted and the oral argument held on the record on April 16, 2008, this Court finds that plaintiff has stated a claim sounding in fraud against defendant Birnbaum. Accordingly, that portion of defendant Birnbaum's motion seeking to dismiss plaintiff's first cause of action is denied.

Defendant next argues that plaintiff's second cause of action for breach of contract must be dismissed because there is no cause of action for potential damages in a contingency fee agreement claim.

Plaintiff argues that it is entitled to recover a contingency fee where, as here, the client dropped his claim in exchange for

valuable consideration, albeit consideration other than a monetary award. See e.g., *Unger v Greenhut*, 183 F2d 381 (2nd Cir. 1950).

This Court finds that the Amended Complaint, which specifically alleges that defendant Birnbaum received employment in exchange for dropping the arbitration which plaintiff commenced on his behalf, states a claim for breach of the December 10, 2005 agreement. That portion of defendant's motion seeking to dismiss the second cause of action is, therefore, denied.

Defendant next argues that plaintiff's third cause of action for breach of contract which seeks to recover attorneys' fees based on hourly charges must be dismissed on the ground that plaintiff waived its right to recover hourly legal fees by entering into the contingency fee agreement.

Plaintiff argues that this claim is validly stated because plaintiff dropped his claim notwithstanding the agreement in which plaintiff agreed, inter alia, to provide legal representation in connection with Birnbaum's effort in arbitration.

However, the Amended Complaint specifically alleges, that plaintiff agreed to accept the contingency fee in lieu of hourly fees. Accordingly, that portion of defendant's motion seeking to dismiss the third cause of action is granted.

Defendant next argues that the fourth cause of action for an account stated must be dismissed on the grounds that said claim would be inconsistent with a contingency fee agreement, and the Complaint fails to allege that plaintiff presented timely invoices to Birnbaum.

The Amended Complaint does, in fact, allege that Scarola Ellis LLP rendered bills to Mr. Birnbaum for services rendered in connection with his relationship with Dreamstone. It further alleges that

13. Mr. Birnbaum paid those bills in part, but not in full; Mr. Birnbaum did not protest the amount of the bills, and in fact frequently reaffirmed his intention to pay them as soon as it would be economically feasible for him to do so.

However, plaintiff specifically waived those fees in the December 10, 2005 letter agreement.

Therefore, this Court finds that the fourth cause of action fails to state a cause of action. This branch of defendant's motion is accordingly granted.

Finally, defendant Birnbaum argues that the fifth cause of action must be dismissed because there is no valid claim for quantum meruit or unjust enrichment, since no award, settlement or

consideration was ever received by Birnbaum in the context of the arbitration proceeding.

However, the Amended Complaint specifically alleges that Birnbaum received a substantial settlement in exchange for his dropping his claims.

Moreover, defendant Birnbaum's decision to discontinue the arbitration does not automatically deprive plaintiff of the "right to be compensated for the reasonable value of [its] services". *Mahan v Mahan*, 213 AD2d 458, 461 (2nd Dep't 1995).


Accordingly, that portion of defendant's motion seeking to dismiss the fifth cause of action is denied.

Defendant Birnbaum shall serve an Answer to the Amended Complaint (with the exception of the third and fourth causes of action) within 20 days of service of a copy of this order with notice of entry.

This constitutes the decision and order of this Court.

Dated: August 6, 2008

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 BARBARA R. KAPNICK
 J.S.C.

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 J.S.C.