SHORT FORM ORDER

INDEX No. 07-2599

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

***PRESENT:***

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 7-8-08 (#003)
MOTION DATE 8-22-08(#004)
ADJ. DATE 8-22-08
Mot. Seq. #003 MOT D
Mot. Seq. #004 XMD

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JENNIFER A. MENDELSOHN,

Plaintiff,

- against -

STEVEN B. FERBER, GARY L. SIBEN, SIBEN & FERBER, LLP and STEVEN B. FERBER, P.C.,

Defendant.

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MICHAEL A. MARKOWITZ, ESQ.
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Upon the following papers numbered 1 to 59 read on this motion for summary judgment; cross motion for summary judgment, etc. : Notice of Motion/ Order to Show Cause and supporting papers 1 - 29 ; Notice of Cross Motion and supporting papers 30 - 41 ; Answering Affidavits and supporting papers _____; Replying Affidavits and supporting papers 42 - 51; 52 - 58 ; Other 59 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

***ORDERED*** that those portions of plaintiff's motion (#003) for an order granting summary judgment in her favor on the first and third causes of action contained in the amended complaint, is denied; and it is

***ORDERED*** that those portions of plaintiff's motion (#003) for an order dismissing the first, second, third and fourth counterclaims, is granted only to the extent that the first, third and fourth counterclaims are dismissed and denied without prejudice as to the second counterclaim; and it is further

***ORDERED*** that those portions of defendants' cross motion (#004) for an order dismissing the complaint is denied; and it is further

***ORDERED*** that those portions of defendants' cross motion (#004) for an order to amend the second counterclaim is denied without prejudice to a new application made within 20 days of the date of service of a copy of this order.

In March 1995, plaintiff Jennifer Mendelsohn, an attorney, was hired as an associate by the law firm of Siben & Ferber, which was operating under a general partnership agreement between defendants Gary Siben and Steven Ferber. Defendants allegedly agreed to pay plaintiff a base salary and a share of any fees earned from clients she referred to the firm, however, no written employment agreement was entered into by the parties. Five years later, defendants Siben and Ferber formed a limited liability law firm partnership, defendant Siben & Ferber, LLP. Plaintiff continued to work as an associate for defendant law firm, handling cases involving matrimonial and family law issues, until her employment was terminated on October 29, 2004. Subsequently, plaintiff opened her own law office, and more than 60 clients who had retained defendant Siben & Ferber to perform legal services on matrimonial or family law matters allegedly ended their relationship with the firm and hired plaintiff to represent them.

Thereafter, in January 2005, the assets of defendant Siben & Ferber, LLP allegedly were transferred to defendant Steven B. Ferber, P.C. Meanwhile, during the months following her termination from defendant law firm, plaintiff allegedly made numerous verbal requests that defendants forward to her any unused retainer fees paid to defendant Siben & Ferber by clients for whom she had been substituted as counsel. By letter to defendant Ferber dated March 24, 2006, plaintiff demanded that he pay her the retainer balances belonging to those clients within 10 days, stating that each of the clients listed on sheets attached thereto "has demanded that you pay over to me said sums," and that "[a]s this money belongs to the clients, and not to you, your refusal to return said sums would be considered conversion and a violation of the Canons of Ethics." The Court notes that the list contains the names of 69 clients and calculates the unused retainer fees of such clients as totaling $118,468 as of October 29, 2004. A dispute also arose between the parties after plaintiff's termination regarding money defendants allegedly owed plaintiff under the terms of the employment agreement.

In March 2007, plaintiff commenced the instant action against defendants for compensatory and punitive damages. The first cause of action alleges that at the time plaintiff's employment agreement was terminated, defendants held retainer fees for certain clients totaling $118,468; that after plaintiff's termination from defendant law firm, such clients discharged defendants and hired plaintiff to perform legal services on their behalf; and that defendants failed to comply with plaintiff's demand that such fees be forwarded to her.

Alleging that defendants are liable for failing to "forward unearned retainer fees received and held for matrimonial or family law work," the first cause of action seeks judgment against defendants in the sum of $118,468, plus interest from October 24, 2004. The second cause of action alleges that

when plaintiff was hired as an associate of defendant Siben & Ferber, the parties had agreed that her compensation would consist of a base salary plus "40% of all fees earned from [plaintiff's] clients and 33.33% of any fee earned from an outside attorney that referred a client to [plaintiff]." It alleges that defendants breached such agreement by failing to pay her the full amount owed for cases she referred to defendant law firm, and seeks damages in the sum of $39,992, plus interest from October 24, 2004. The third cause of action alleges that defendants violated fiduciary duties owed to plaintiff and to those clients that changed attorneys after she left the defendant law firm, as well as Code of Professional Responsibility DR 9-102 (22 NYCRR § 1200.46), "by failing to forward unearned retainer fees received and held for matrimonial or family law work" to plaintiff, and seeks $118,466 in compensatory damages, plus interest, and $355,404 in punitive damages.

Defendants' answer asserts as affirmative defenses that plaintiff is not a proper party to the action, that the claims against them are barred by the applicable statute of limitations, and that there was an accord and satisfaction. It also interposes counterclaims sounding in breach of contract, conversion, and unjust enrichment, as well as a counterclaim seeking an accounting.

Plaintiff now moves for summary judgment in her favor on the first and third causes of action, arguing there are no triable issues of fact as to her claim that defendants refused to comply with her demand that unearned retainer fees totaling $114,686 paid by certain clients who had discharged defendant Siben & Ferber and engaged her to perform legal services be transferred to her. Plaintiff also seeks summary judgment dismissing the first four counterclaims asserted in the answer.

Defendants oppose the motion, and cross move for an order dismissing the complaint and granting leave to amend the answer. Defendants assert, among other things, that plaintiff and defendant Ferber reached an accord and satisfaction settling the parties' dispute over money allegedly owed to plaintiff, and submit printouts of e-mail communications, an excerpt of plaintiff's deposition testimony, and an affidavit of Renee Weingarten, the bookkeeper for defendant law firm, as proof that all financial obligations to plaintiff have been discharged. As to the application to amend their pleading, defendants seek permission to include as part of the second counterclaim an allegation that plaintiff converted more than $60,000 in funds belonging to defendant law firm. Defendants allege that the information as to the amount of money allegedly converted by plaintiff was uncovered during the disclosure process and that plaintiff, who provided such information, will suffer no prejudice if such amendment is permitted.

Plaintiff opposes the cross motion, which was served one day before the August 22, 2008 submission date set by the Court, on the ground that it was untimely. Plaintiff also argues that any agreement between the parties reached after she left defendant law firm applied only to her claim for money due under the terms of the employment contract, not to her claim for unearned retainer fees, and that defendants are using financial information obtained during settlement negotiations to defeat plaintiff's application for dismissal of the counterclaims for conversion and an accounting.

Defendants' cross motion for an order dismissing the complaint and granting leave to amend the answer is decided as herein indicated below. Although a court may consider untimely motions (*see* CPLR 2004), defendants failed to comply with the service requirement of CPLR 2214 and did not request an extension of time for making a cross motion (*see* ***Alden Personnel, Inc. v David***, 38 AD3d 697, 833 NYS2d 136 [2d Dept 2007]). Moreover, even if the Court considered the merits of the cross motion, defendants' submissions were insufficient to demonstrate prima facie their entitlement to summary judgment dismissing the claims against them based on an accord and satisfaction.

To establish the affirmative defense of an accord and satisfaction, a litigant must demonstrate that there is a disputed unliquidated claim between the parties, and that the parties reached a new agreement that a stipulated performance will be accepted, in the future, in satisfaction of all or part of the obligations under the original contract (*see* ***Denburg v Parker Chapin Flattau & Klimpl***, 82 NY2d 375, 604 NYS2d 900 [1993]; ***Merrill Lynch Realty/Carll Burr, Inc. v Skinner***, 63 NY2d 590, 483 NYS2d 979 [1984]; ***Pothos v Arverne Houses, Inc.***, 269 AD2d 377, 702 NYS2d 392 [2d Dept 2000]; ***Patel v Orma***, 190 AD2d 782, 593 NYS2d 851 [2d Dept 1993]).

A litigant asserting this affirmative defense also must show satisfaction of the new agreement, namely, that the bargained for performance was tendered (*see* ***Denburg v Parker Chapin Flattau & Klimpl***, 82 NY2d 375, *supra*; ***Reilly v Barrett***, 220 NY 170, 115 NE 453 [1917]; ***Bank of N.Y. v Murphy***, 230 AD2d 607, 645 NYS2d 800 [1st Dept 1996], *lv dismissed* 89 NY2d 1030, 658 NYS2d 245 [1997]; ***Albee Truck, Inc. v Halpin Fire Equip., Inc.***, 206 AD2d 789, 615 NYS2d 118 [3d Dept 1994], *lv denied* 85 NY2d 810, 629 NYS2d 724 [1995]). "The distinctive feature of an accord and satisfaction is that the obligee does not intend to discharge the existing claim merely upon the making of the accord; what is bargained for is the performance, or satisfaction. If the satisfaction is not tendered, the obligee may sue under the original claim or for breach of the accord" (***Denburg v Parker Chapin Flattau & Klimpl***, 82 NY2d 375, *supra*).

In addition, as with any contract, the material terms of the accord must be reasonably certain for it to be binding on the parties (*see* ***Altamuro v Capoccetta***, 212 AD2d 904, 622 NYS2d 155 [3d Dept], *lv denied* 85 NY2d 808, 628 NYS2d 51 [1995]). Here, defendants' submissions are insufficient to establish, as a matter of law, that plaintiff and defendant Ferber mutually agreed that payment to plaintiff of any fees recovered by Ronald Snyder, Esq. on "collection work" that he was performing for plaintiff would discharge plaintiff's claims against defendant law firm for unearned retainer fees and co-counsel fees, or that defendants fully performed their obligations under the alleged accord (*see* ***Denburg v Parker Chapin Flattau & Klimpl***, 82 NY2d 375, *supra*; ***Ognenovski v Wegman***, 275 AD2d 1013, 713 NYS2d 594 [4th Dept 2000]; ***McKesson Corp. v Gabe's Pharm.***, 248 AD2d 445, 669 NYS2d 518 [2d Dept 1998]; ***Telmark, Inc. v Mills***, 199 AD2d 579, 604 NYS2d 324 [3d Dept 1993]).

Furthermore, while leave to amend pleadings "shall be freely given upon such terms as may be just" (CPLR 3025 [b]), a proposed amendment that would cause prejudice to the opposing party should be denied (*see* ***Surgical Design Corp. v Correa***, 31 AD3d 744, 819 NYS2d 542 [2d Dept 2006]; ***Voyticky v Duffy***, 19 AD3d 685, 798 NYS2d 494 [2d Dept 2005], *lv dismissed in part, denied in part* 6 NY3d 800, 812 NYS2d 33 [2006]; ***ALD Holding Corp. v F&O Port Corp.***, 15 AD3d 508, 790 NYS2d 514 [2d Dept 2005]), as should a proposed amendment that is "palpably insufficient or patently devoid of merit" (***G.K. Alan Assoc., Inc. v Lazzari***, 44 AD3d 95, 840 NYS2d 378 [2d Dept 2007], *affd* 10 NY3d 941, 862 NYS2d 855 [2008]; *see* ***Tornheim v Blue & White Food Prod.Corp.***, __ AD3d __, 2008 WL 5005171 [2d Dept, Nov. 25, 2008]; ***Scofield v DeGroodt***, 54 AD3d 1017, 864 NYS2d 174 [2d Dept 2008]; ***Lucido v Mancuso***, 49 AD3d 220, 851 NYS2d 238 [2d Dept 2008]).

As defendants failed to submit a copy of the proposed amended answer, the Court is unable to determine whether the proposed amended counterclaim is sufficient to state a cause of action for conversion (*see* ***Fernandez v HICO Corp.***, 24 AD3d 110, 804 NYS2d 246 [1st Dept 2005]; ***Sirohi v Lee***, 222 AD2d 222, 634 NYS2d 119 [1st Dept1995], *lv dismissed in part, denied in part* 88 NY2d 897, 646 NYS2d 979 [1996]; ***Branch v Abraham & Strauss Dept. Store***, 220 AD2d 474, 632 NYS2d 168 [2d Dept 1995]; *cf.*, ***Tornheim v Blue & White Food Products Corp.***,__ AD3d __, 2008 WL 5005171, *supra*; ***Lucido v Mancuso***, 49 AD3d 220, *supra*). However, the denial of defendants' application for leave to amend the answer is without prejudice to a new application, made within 20 days of service of a copy of this order, for leave to amend their counterclaim for conversion.

The portion of plaintiff's motion seeking summary judgment in her favor on the first and third causes of action is denied. It is well settled that a contract entered into between two parties may be enforced by a third party if the contract was made for the direct benefit of the third party (*see* ***Fourth Ocean Putnam Corp. v Interstate Wrecking Co.***, 66 NY2d 38, 495 NYS2d 1 [1985]; ***Port Chester Elec. Constr. Corp. v Atlas***, 40 NY2d 652, 389 NYS2d 327 [1976]; ***Crown Wisteria, Inc. v F.G.F. Enters. Corp.***, 168 AD2d 238, 562 NYS2d 616 [1st Dept 1990]). However, absent an intent by the contracting parties that the contract directly benefit the third party, such third party is regarded as an incidental beneficiary with no right to enforce such contract (*see* ***Fourth Ocean Putnam Corp. v Interstate Wrecking Co.***, 66 NY2d 38, *supra*; ***Port Chester Elec. Constr. Corp. v Atlas***, 40 NY2d 652, *supra*; ***H.R. Moch Co. v Rensselaer Water Co.***, 247 NY 160, 159 NE 896 [1928]).

As to the first cause of action, plaintiff failed to demonstrate, or even allege, that she was the intended beneficiary of the retainer agreements between defendant law firm and the clients at issue and, as such, is entitled to recover any unearned retainer fees belonging to such clients directly from defendant law firm (*see* ***Breen v Law Office of Bruce A. Barket, P.C.***, 52 AD3d 635, 862 NYS2d 50 [2d Dept 2008]; ***BDG Oceanside, LLC v RAD Term. Corp.***, 14 AD3d 472, 787 NYS2d 388 [2d

Dept], *lv dismissed* 5 NY2d 783, 801 NYS2d 802 [2005]; ***Amin Realty, LLC v K&R Constr. Corp.***, 306 AD2d 230, 762 NYS2d 92 [2d Dept], *lv denied* 100 NY2d 515, 769 NYS2d 201 [2003]).

As to the third cause of action, which alleges defendants' refusal to forward to plaintiff the unearned retainer fees of the former clients that retained her after she left defendant law firm constituted a breach of a fiduciary duty owed to her and a violation of Code of Professional Responsibility DR 9-102 (22 NYCRR § 1200.46), plaintiff failed to present evidence showing that the retainer fees at issue belonged to her or that defendant law firm owed her a fiduciary duty with respect to such fees (*see* ***Vitale v Steinberg***, 307 AD2d 107, 764 NYS2d 236 [1st Dept 2003]; ***Freedman v Pearlman***, 271 AD2d 301, 706 NYS2d 405 [1st Dept 2000]). The Court notes that plaintiff failed to submit competent evidence showing that such clients had advised defendant law firm prior to the commencement of this action to forward the unused retainer fees to plaintiff.

Finally, plaintiff's application for summary judgment dismissing the first through fourth counterclaims in the answer is granted as to the first and fourth counterclaims, without opposition. Dismissal of the third counterclaim, which alleges simply that "defendants demand an account of plaintiff to defendants of any and all sums wrongfully obtained by plaintiff," also is granted absent any allegations that a fiduciary relationship existed between the parties (*see* ***Moore v Microsoft Corp.***, 293 AD2d 587, 741 NYS2d 91 [2d Dept 2002]; ***Michnick v Parkell Prods.***, 215 AD2d 462, 626 NYS2d 265 [2d Dept 1995]). However, in view of the Court's determination denying, without prejudice, defendants' application for leave to amend its answer with respect to the counterclaim for conversion, summary judgment in plaintiff's favor on the second counterclaims is denied at this time, without prejudice.

Dated: 12/11/08

THOMAS F. WHELAN, J.S.C.