SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 15

Present: HON. WILLIAM R. LaMARCA
Justice

MARCUS & COMPANY, LLP,

Plaintiff/Counterclaim-Defendant,

-against-

GIDEON ABRAHAM,

Defendant/Counterclaim-Plaintiff,

Motion Sequence #1
Submitted July 29, 2009

INDEX NO: 2864/09

The following papers were read on this motion:

Notice of Motion.....1
Affidavit in Opposition.....2
Reply Affirmation.....3

Requested Relief

Counsel for plaintiff, MARCUS & COMPANY, LLP (hereinafter referred to as "MARCUS"), moves for an order, pursuant to CPLR §3211(a)(1)(5) and (7), dismissing defendant's counter-claim in its entirety. Counsel for defendant, GIDEON ABRAHAM, opposes the motion which is determined as follows:

Background

This litigation was commenced by MARCUS, on February 18, 2009 with the filing of the summons and verified complaint, and seeks to recover the sum of $39,481.75 for professional consulting and valuation services rendered to the defendant in connection with

a matrimonial action, based upon breach of contract, unjust enrichment and an account stated. Moving counsel states that, in accordance with the February 20, 2006 Retainer, ABRAHAM agreed to pay MARCUS for the work, labor and services performed on an hourly basis, and to reimburse MARCUS for out of pocket expenses. By verified answer, dated April 3, 2009, ABRAHAM asserted a counter-claim for professional negligence. In essence, ABRAHAM alleged that MARCUS failed and neglected to perform his services in a proper and skillful manner and negligently failed to make known defendant's full liabilities in the divorce action, which resulted in a greater burden to defendant as a result of plaintiff's negligence. He claimed damages in the sum of $500,000.

Moving counsel alleges that the Retainer, in pertinent part, provided that "[a]ny action proceeding or claim by you arising out or in relation to this agreement or the services performed hereunder, must be brought, if at all, within twelve (12) months after the claim accrued or the termination of the firm's services, whichever shall sooner occur". Exhibit "C" to the moving papers ¶7.3. It is plaintiff's position that the counter-claim is untimely and that ABRAHAM is contractually barred from asserting same. It is alleged that MARCUS' representation of defendant terminated on September 4, 2007 and that any cause for professional malpractice had to have been commenced prior to September 4, 2008. The counter-claim herein was interposed on April 3, 2009.

Additionally, counsel for plaintiff claims that ABRAHAM has no standing to bring the counter-claim because he failed to disclose said "asset" in the bankruptcy proceeding that he commenced on September 20, 2007. It appears that ABRAHAM filed a voluntary petition for bankruptcy protection under Chapter 11 of the U.S. Bankruptcy Code in the United States Bankruptcy Court, Southern District, and listed his assets and liabilities as

of September 20, 2007, which did not include a claim for professional negligence. Counsel for MARCUS asserts that the failure to list the malpractice claim as an asset deprived ABRAHAM of legal capacity to later pursue the malpractice action, citing *Whelan v Longo*, 7 NY3d 821, 822 NYS2d 751 (2006). Counsel points out that, while ABRAHAM listed MARCUS as a creditor in the bankruptcy proceeding, he failed to list any claim against MARCUS, despite the fact that the facts comprising the claim existed at the time of the bankruptcy petition. It is MARCUS' position that, despite the dismissal of the bankruptcy action in December 2008, the failure to disclose the malpractice claim on the bankruptcy petition, a sworn petition under the penalty of perjury, deprives him of a later right to sue on it.

Finally, counsel for MARCUS contends that the complaint fails to state a cause of action. Counsel states that claimant must plead and then prove how MARCUS departed from commonly accepted accounting standards and the manner in which the departure proximately caused the injuries, citing *Herbert H. Post & Co. v Sidney Bitterman, Inc.*, 219 AD2d 214, 639 NYS2d 329 (1st Dept. 1996); *Hamilton Textiles v Estate of Mate,* 269 AD2d 214, 703 NYS2d 451 (1st Dept. 2000); *Estate of Burke v Peter J. Repetti & Co.,* 255 AD2d 283, 680 NYS2d 645 (2nd Dept. 1998). Counsel asserts that the counter-claim against MARCUS is so devoid of the necessary factual predicates for professional malpractice that the counter-claim must be dismissed.

In opposition to the motion to dismiss, ABRAHAM claims that he relied upon his matrimonial attorney in the selection of a forensic accountant, and that he was told that MARCUS was highly skilled and experienced in the field and that he signed the Retainer

without reading it. He urges that MARCUS should be equitably estopped from asserting the statute of limitations or relying on the retainer letter. ABRAHAM contends that, contrary to plaintiff's claim that his services ended on September 4, 2007, the retainer required that a written letter be sent terminating services, which notice was never given. Next, ABRAHAM suggests that the filing of the Bankruptcy Petition stays all deadlines and, therefore, his year to assert a counter-claim commenced in December 2008 (when the Bankruptcy action was dismissed), and would have ended in December 2009 (one year statute of limitations), which makes his counter-claim of April 2009 timely. Further, ABRAHAM states that he is advised that the dismissal of the Bankruptcy Petition, re-vests all property and claims to him, which continue as if he never filed bankruptcy, including his claim against MARCUS. Finally, ABRAHAM asserts that the three (3) elements of negligence-- a duty of care, an act comprising negligence and damages-- can be found in his complaint. In his affidavit in opposition to the motion, not in the pleadings, he claims that he personally borrowed $400,000.00 from HSBC, which MARCUS failed to disclose as a liability to the Court appointed forensic accountant in the divorce proceeding. As a result, ABRAHAM states that the Court at trial refused to permit this liability to be introduced into evidence, resulting in a much larger judgment and ongoing liability to ABRAHAM, which he claims was MARCUS' fault. Also in his affidavit, ABRAHAM requests that, if the Court finds that the counter-claim is insufficiently plead, that he be granted leave to amend his counter-claim and plead same as an affirmative defense and counter-claim.

Afer a careful reading of the submissions herein, the Court rejects the arguments made by ABRAHAM in opposition to the motion. ABRAHAM does not contest that all services rendered by MARCUS ended in September 2007. As the retainer agreement

provided that all claims against MARCUS had to be brought "within twelve (12 months after the claim accrued or the termination of the firm's services, whichever shall sooner occur" (emphasis supplied), the failure of MARCUS to send a termination of services letter is not dispositive. A claim accrues when the malpractice is committed, not when the client discovers it (*Williamson v Price Waterhouse Coopers LLP*, 9 NY3d 1, 840 NYS2d 530, 872 NE2d 842 [C.A. 2007]; *see also, Ackerman v Price Waterhouse*, 84 NY2d 535, 620 NYS2d 318, 644 NE2d 1009 [C.A.1994]). Therefore, the one (1) year statute of limitations as provided in the Retainer required that any claim against MARCUS be commenced no later than September 4, 2008, the last day malpractice, if any, could have been committed. The cross-claim is, therefore, untimely.

Additionally, ABRAHAM misconstrues the protection afforded by filing a Bankruptcy Petition, which shields the debtor from claims brought against him, but does not address actions brought by the debtor. *Breeden v Bennet*, 367 B.R. 302, 2007 Bankr. LEXIS 1848 (NDNY 2007). The Court finds that the contractual statute of limitations herein was not stayed. Nor can ABRAHAM rely upon an estoppel argument to toll the statute of limitations, as no evidence has been alleged or presented that he was induced by fraud, misrepresentation of deception to refrain from timely commencing a suit. *Jones v Safi,* 58 AD3d 603, 871 NYS2d 647 (2nd Dept. 2009); *Ramsay v Mary Imogene Bassett Hospital,* 113 AD2d 149, 495 NYS2d 282 (3rd Dept. 1985). A party is responsible for his signature and is bound by the contacts he or she signs, even if he later claimes that he misunderstood it. *See, Worcester Ins. Co. v Hempstead Farms Fruit Corp*, 220 AD2d 659, 633 NYS2d 66 (2nd Dept. 1995); *Sofia v Hughes*, 162 AD2d 518, 556 NYS2d 717 (2nd Dept.

1990).

ABRAHAM's claim that his failure to disclose the malpractice claim in the Bankruptcy action is irrelevant because the action was dismissed, is contradicted by *Matter of Best v Metlife Auto & Home Ins.*, 7 Misc. 3d 242, 793 NYS2d 682 (Supreme Richmond Co. 2004), which held that, notwithstanding that the bankruptcy petition had been adminsitrately dismissed uner 11 USC §349, the failure to disclose a cause of action bars the debtor from asserting capacity and standing to sue on such cause of action.

However, more importantly, even if ABRAHAM had standing to sue and it was not barred by the statute of limitations, it is the judgment of the Court that the counter-claim fails to state a cause of action. It is well settled that on a motion to dismiss for failure to state a cause of action pursuant to CPLR § 3211 (a)(7), the Court must accept the plaintiff's factual allegations as true and liberally construe the complaint in favor of the plaintiff. *EECP of AM, Inc. v Vasomedical, Inc.*, 265 AD2d 372, 696 NYS2d 837 (2nd Dept.1999); *Smuker v 12 Lofts Realty Inc.*, 156 AD2d 161, 548 NYS2d 437 (1st Dept. 1989); *Foley v D'Agostino*, 21 AD2d 60, 248 NYS2d 121 (1st Dept. 1964). On said motions, the Court looks to the substance of the motion rather than to the form. Such a motion is solely directed to the inquiry of whether or not the pleading considered as a whole fails to state a cause of action or whether any cause of action can be spelled out from the four corners of the pleadings. *Foley v D'Agostino, supra.* Although the statutory provision authorizing amendment of pleadings reflects a liberal attitude in its discretion, that leave to amend "shall be freely given" (CPLR § 3025, subd.[b]), defendant's failure to file and serve an a proper cross-motion precludes the Court from granting any affirmative

relief. *Vanek v Mercy Hospital*, 135 AD2d 707, 522 NYS2d 607 (2nd Dept. 1987).

Conclusion

Therefore, based on the foregoing, after giving the non-moving party every favorable inference, it is the judgment of the Court that plaintiff is entitled to the requested relief. It is therefore

ORDERED, that plaintiff's motion to dismiss the defendant's counter-claim is granted; and it is further

ORDERED, that the parties shall appear for a Preliminary Conference on November 10, 2009, at 9:30 A.M. in Differentiated Case Management Part (DCM) at 100 Supreme Court Drive, Mineola, New York, to schedule all discovery proceedings. A copy of this order shall be served on all parties and on DCM Case Coordinator Richard Kotowski. **There will be no adjournments**, except by formal application pursuant to 22 NYCRR §125.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: October 6, 2009

WILLIAM R. LaMARCA, J.S.C.

TO: Wilson, Elser, Moskowitz, Edelman & Dicker LLP
Attorneys for Plaintiff
150 East 42nd Street
New York, NY 10017

Nathan M. Ferst, Esq.
Attorney for Defendant
350 Fifth Avenue, Suite 1000
New York, NY 10118

marcus-abraham,#1/dismiss