

Sanger v Bower, Sanger & Lawrence, P.C.

2010 NY Slip Op 30564(U)

March 16, 2010

Supreme Court, New York County

Docket Number: 600862/08

Judge: Richard B. Lowe

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

HON. RICHARD B. LOWE, II

PART 56

Index Number : 600862/2008

SANGER, WARREN J.

vs

BOWER, SANGER

Sequence Number : 007

DISMISS

INDEX NO. _____

MOTION DATE 11/27/09

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

C

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

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MAR 17 2010

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DECISION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION

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

Dated: 3/16/10

HON. RICHARD B. LOWE, II

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: IAS PART 56

-----X
WARREN J. SANGER,

Plaintiff,

-against-

BOWER, SANGER & LAWRENCE, P.C.,
N/K/A BOWER & LAWRENCE, P.C.,
PETER R. BOWER and GUY A. LAWRENCE,

Defendants.
-----X

RICHARD B. LOWE III, J.:

In this action for the dissolution of a law firm, defendants Bower, Sanger & Lawrence, P.C. (now known as Bower & Lawrence, P.C.) (BSL or the law firm) and its individual members, Peter R. Bower (Bower) and Guy A. Lawrence (Lawrence) move, pursuant to CPLR 3211(a)(5) and (7), to dismiss the second, third, fifth and sixth causes of action in the amended complaint.

Background

In October, 2009, this court granted plaintiff Warren J. Sanger's (Sanger) motion to amend the complaint. The amended complaint alleges that in November 1998, Sanger entered into employment and shareholders agreements with BSL's predecessor, Bower, Sanger & Futterman, P.C. The parties agree that the terms of those agreements remain in effect. The amended complaint further alleges that on February 19, 2008, BSL terminated Sanger's employment "for cause" without notice or an opportunity to cure, as defined in the employment agreement. Plaintiff contends that BSL's claim that he suffered from a physical disability that prevented him from serving as trial counsel was a pretext and that his termination was without cause. Sanger claims that defendants breached the employment and shareholders agreements by

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DECISION & ORDER

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failing to pay him termination pay, the proceeds of his life insurance policy and amounts due from BSL's 401-K.

The amended complaint adds Bower and Lawrence as defendants and states causes of action for: breach of contract against BSL (first cause of action); unjust enrichment against BSL (second cause of action); wrongful termination against BSL (the third cause of action); judicial dissolution (fourth cause of action); breach of fiduciary duty against Bower and Lawrence based on their alleged course of conduct of paying themselves high salaries and prepaying expenses to the disadvantage of the firm (fifth cause of action) and slander against Bower and Lawrence on the ground that Bower and Lawrence allegedly met with a BSL client and falsely told the client that, because of physical disabilities, Sanger was unable to function as a trial lawyer (sixth cause of action).

In support of dismissal, defendants contend that: (1) the three new causes of action for breach of fiduciary duty, wrongful termination and slander are barred by the one year statute of limitations for intentional torts; (2) the wrongful termination and breach of fiduciary duty claims are, in reality, recast allegations of breach of contract and must be dismissed; (3) the wrongful termination claim must also be dismissed because BSL's actions complied with the terms of the employment agreement; (4) there are no facts to support the breach of fiduciary duty claim and (5) there are no facts to support the slander claim.

In opposition to dismissal, Sanger argues that the second cause of action for unjust enrichment was included in the original complaint and, because defendants answered that complaint on April 14, 2008, the motion to dismiss as to the second cause of action is not timely. Sanger also contends that the breach of fiduciary duty claim was brought well within the applicable statute of limitations; that the wrongful termination claim is timely because it relates

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back to the original complaint and that the slander claim is also timely because it was interposed within a year of discovery. In addition, Sanger contends that the claims for wrongful termination, breach of fiduciary duty and slander are sufficiently stated and not subject to dismissal on the merits at this juncture.

Discussion

Second Cause of Action for Unjust Enrichment

That branch of the motion that seeks to dismiss the second cause of action for unjust enrichment is timely. Although the unjust enrichment claim was included in the original complaint, it is well established that when a complaint is amended, either by right or with the court's leave, the prior complaint is moot and the defendant's original answer and motion to dismiss have no effect and a new responsive pleading must be substituted (*Aikens Construction of Rome, Inc. v Simons*, 284 AD2d 946, 947 [4th Dept 2001]). Defendant did not previously move to dismiss the unjust enrichment cause of action, which is in substantially the same form in both pleadings, so this branch of the motion is not barred by CPLR 3211(e) which permits only one motion to dismiss the same cause of action (*see Empire Blue Cross and Blue Shield v Various Underwriters at Lloyds, London, England*, 5 Misc3d 1024[A], 2004 NY Slip Op 51528[U], *2 [Sup Ct, NY County 2004]). Accordingly, defendants are not barred from moving against the unjust enrichment claim, and upon consideration, the second cause of action is dismissed. The second cause of action which seeks payment in quasi-contract for services Sanger rendered to BSL is barred by the existence of a contract between the parties covering the same subject matter (*Schultz v Gershman*, 68 AD3d 426, 427 [1st Dept 2009]; *Goldstein v CIBC World Mkts. Corp.*, 6 AD3d 295, 296 [1st Dept 2004]).

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Third Cause of Action for Wrongful Termination

“It is a well-established principle that a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract has been violated. This legal duty must spring from circumstances extraneous to, and not constituting elements of, the contract, although it may be connected with and dependent on the contract [internal citations omitted]” (*Clark-Fitzpatrick, Inc. v Long Is. R.R., Co.*, 70 NY2d 382, 389 [1987]). If a party is only seeking to enforce its contract, a tort claim will not lie (*New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 316 [1995]).

The third cause of action states, in part, “[t]he Employment Agreement and Shareholders Agreement set forth provisions that would apply in the event Sanger became disabled, yet BSL did not follow such provisions . . .” (Cmplt, para. 34). Those allegations in the wrongful termination claim are based on BSL’s alleged breach of the employment agreement, not from a legal duty independent of the employment agreement.

The remainder of the wrongful termination claim alleges that BSL breached a legal duty independent of the contract, in that, “BSL’s actions in terminating Sanger’s employment because Bower and Lawrence believed Sanger was suffering from a disabling medical condition . . . constitutes a wrongful termination of employment in contravention of New York Law and public policy” (Cmplt, para. 35). These allegations, which are sufficient to state a cause of action for wrongful termination, are timely.

Wrongful termination claims in New York have a one year statute of limitations. Sanger was terminated in February, 2008 and the amended complaint was filed in October, 2009. Thus, the wrongful termination claim is time barred unless the original pleading, which was filed on March 13, 2008, gave notice of Sanger’s current allegation that he was wrongfully terminated

6] based on a disabling medical condition. (CPLR 203[f]; *McHale v Anthony*, 41 AD3d 265, 266 [1st Dept 2007]).

As to Sanger's termination, the original pleading alleges:

12. On February 19, 2008, BSL terminated Sanger's employment. The termination letter from BSL to Sanger stated that the termination was "for cause." BSL did not give any prior notice to Sanger of its intent to terminate his employment nor did BSL give Sanger any opportunity to "cure" the supposed basis of the termination decision.

13. The stated bases for the BSL termination decision were bogus and pretextual[sic]; in fact, the termination of Sanger's employment by BSL was without cause.¹

CPLR 3013 requires that a pleading be "sufficiently particular to give the court and parties notice of the transactions, occurrences . . . intended to be proved and the material elements of each cause of action or defense." Thus, it is necessary that the allegations in the pleading allow the defendant to determine the nature of his/her offense and the relief plaintiff seeks on account of the wrongs (*Shapolsky v Shapolsky*, 22 AD2d 91 [1st Dept 1964]). In this case, it cannot be said that the allegations in the original complaint gave the defendants notice of Sanger's claim in the amended complaint that he was terminated because of a disabling medical condition in violation of New York State law and public policy (*Certain Underwriters at Lloyd's, London v William M. Mercer, Inc.*, 7 Misc3d 1008[A], 2005 NY Slip Op 50507[U], *7 [Sup Ct, NY County 2005]). Accordingly, the new complaint is not a mere extension of the allegations in the original complaint for relation back purposes and, therefore, the allegations of a wrongful termination claim based on Sanger's alleged disability are time barred (*See Shefa Unlimited, Inc. v Amsterdam & Lewinter*, 49 AD3d 521, 522 [2d Dept 2008]). Accordingly,

¹ The original pleading, though not attached to the motion papers, is maintained in the file in the New York County Clerk's Office, Supreme Court, New York County.

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the cause of action is dismissed.

Fifth Cause of Action for Breach of Fiduciary Duty

Sanger's claim that Bower and Lawrence breached their fiduciary duties by making a decision to terminate Sanger's employment and paying themselves elevated salaries and prepaying expenses while refusing to distribute any money to shareholders is also dismissed. Here, the complaint alleges that the Employment Agreement and the Shareholder's Agreement set forth the rights of the parties. In the breach of fiduciary duty claim, Sanger is merely seeking to enforce his contract. Accordingly, an independent tort action will not lie (*Morganroth v Toll Brothers, Inc.*, 60 AD3d 596, 597 [1st Dept 2009][breach of fiduciary duty claim dismissed since it failed to allege breach of a duty independent of the contract]).

Sixth Cause of Action for Slander

To state a cause of action for slander, a plaintiff must allege: (1) a communication casting doubt on the validity of plaintiff's title; (2) that is reasonably calculated to cause harm; (3) resulting in special damages (*39 College Point Corp. v Transpac Capital Corp*, 27 AD3d 454, 455 [2d Dept 2006]). Moreover, CPLR 3016(a) states that, "[i]n an action for libel or slander, the particular words complained of shall be set forth in the complaint"

Sanger has sufficiently stated a cause of action for slander by alleging that he is a lawyer; that Bower and Lawrence met with clients for whom Sanger did substantial legal work and that they told one such client, Fred Landon, that because of Sanger's physical disabilities, Sanger was unable to function as a trial lawyer; that the statement was false and tended to prejudice Sanger's reputation and means of livelihood and that, as a consequence Sanger has suffered special damages (*Stukuls v State of New York*, 42 NY2d 272, 275 [1977]; *One Acre, Inc. v Town of Hempstead*, 215 AD2d 359 [2d Dept 1995][on a motion to dismiss, the criterion is whether

plaintiff has stated a cause of action not whether he/she will ultimately be successful on the merits]).

However, even though plaintiff has stated a slander claim, the sixth cause of action is dismissed as time barred. The applicable statute of limitations for a slander claim is one year from publication of the allegedly slanderous statement (CPLR 215[3]; *Suss v. New York Media, Inc.*, __AD3d__, 2010 NY Slip Op 00011 [1st Dept 2010]) and plaintiff does not dispute defendants' assertion that Bower allegedly made the complained of statement in or about February, 2008. The amended complaint was filed in or about October, 2009, well after the statute of limitations had run. Here, as above, the slander claim does not relate back to the original complaint. A review of the original pleading reveals that the complaint does not include even one allegation that would support a slander cause of action or provide defendants with any notice, no less adequate notice, of the transactions and occurrences forming the slander claim (*DeRossi v Rubenstein*, 233 AD2d 220 [1st Dept 1996]).

Conclusion

Accordingly, it is hereby

ORDERED that defendants' motion to dismiss the second, third, fifth and sixth causes of action is granted.

DATED: March 16, 2010

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ENTER: **RICHARD B. LOWE, III**

J.S.C.