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

PRESENT: RAKOWER Justice PART 15

Index Number : 603665/2009
STROUGO & BLUM, ESQS.
VS.
ZALMAN & SCHNURMAN, ESQS.
SEQUENCE NUMBER : 001
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

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 THE ACCOMPANYING MEMORANDUM DECISION.

Dated: 4/5/10

HON. EILEEN A. RAKOWER

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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STROUGO & BLUM, ESQS.,

Plaintiff,

Index No.603665/09

Mot. Seq.: 002

- against -

DECISION/ORDER

ZALMAN & SCHNURMAN, ESQS., 12-14 EAST 64TH OWNERS CORP.,GOODMAN MANAGEMENT CO., INC, and MONTROSE ADJUSTMENT CO.,

Defendants.

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HON. EILEEN A. RAKOWER, J.S.C.

Plaintiff brings this action for tortious interference with contract and civil conspiracy for the alleged acts of defendants arising out of the signing of a General Release by non-party, Verina Hixon, on December 7, 2006. Defendant Zalman & Schnurman, Esqs. ("Zalman") now moves to dismiss plaintiff's complaint pursuant to CPLR 3211 (a) (1) and (a) (7). Plaintiff opposes and cross-moves to amend its complaint if the Court is inclined to grant defendant's motion. Defendants 12-14 East 64th Street Owners Corp., ("building owner") Goodman Management Co., Inc. ("building manager"), and Montrose Management Co., Inc.[1] ("Montrose") do not submit papers.

On August 23, 2002 Ms. Hixon retained plaintiff law firm to prosecute her claim against the building owner and manager[2] for damages to her property that allegedly occurred when her co-op apartment, located at 12-14 East 64th Street in the County and State of New York, was flooded with raw sewage. The retainer agreement provided that the legal fees would be payable on a contingency basis, and would

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[1]Montrose was the adjuster in the 2002 Hixon Case, and is alleged to have participated in the inducement of the breach of the retainer agreement by referring Ms. Hixon to Zalman.

[2]The suit also named the plumber and the architect, who were employed by the building owner.

consist of 1/3 of any recovery in the action. Plaintiff commenced an action and served a summons and complaint demanding $400,000, plus punitive damages ("2002 Hixon action"). Plaintiff served the summons and complaint on or about October 3, 2002. The 2002 Hixon action was transferred to Civil Court pursuant to CPLR 325. Sometime thereafter, Hixon retained defendant law firm Zalman, to represent her in a separate negligence action as against the owner and manager[3] ("2004 Hixon action"). On December 7, 2006, Ms. Hixon executed a General Release in the 2004 Hixon action, which released the building owner, the building manager and the Adams' from:

> all actions, causes of action, suits . . . specifically with respect to damages that RELEASOR sustained which were the subject of a lawsuit pending in the Supreme Court . . .

The defendants in the 2002 Hixon action moved to amend their answer to add the release as an affirmative defense, and to dismiss the 2002 Hixon action on *collateral estoppel* and *res judicata* grounds. By Order entered August 12, 2009, Judge Jose A. Padilla, Jr. granted all aspects of the motion and dismissed as to all defendants.[4] Thereafter, plaintiff brought the instant action against Zalman alleging that it fraudulently induced Ms. Hixon to sign the General Release by reassuring her that it would not effect the 2002 Hixon action. As such, plaintiff alleges, Zalman tortiously interfered with the retainer agreement between plaintiff and Ms. Hixon.

Zalman, in support of its motion, argues that plaintiff has failed to state a cause of action for tortious interference because it does not allege facts that, if proven true, would reveal that Zalman, without justification, intentionally induced Ms. Hixon to breach her retainer agreement. Further, plaintiff cannot show that the retainer was breached or rendered impossible as a result of Zalman's acts or that it sustained any damages. Indeed, Zalman asserts, plaintiff filed a Notice of Appeal, dated September 1, 2009, regarding Judge Padilla's decision. Zalman points to the Notice of Appeal as evidence that plaintiff was still representing Ms. Hixon and that the retainer agreement was not breached. Zalman also asserts that the cause of action sounding in civil

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[3]The action was also commenced as against Charles and Ruth Adams, Ms. Hixon's upstairs neighbors.

[4]The 2002 Hixon action was dismissed as to the plumber and architect on statute of limitation grounds.

conspiracy must be dismissed because New York does not recognize it as an individual cause of action.

Plaintiff, in opposition, argues that the filing of a Notice of Appeal does not evidence that it is still representing Ms. Hixon. Rather, plaintiff asserts, it only filed the appeal to give Ms. Hixon the "opportunity to retain other counsel to pursue the appeal if she chooses to do so." Plaintiff submits an affidavit by Ms. Hixon, dated June 23, 2009, wherein she states:

> This is to solemnly state that the release I executed December 7, 2006 in the case under Index No. 117371/04 . . . pertained only to my claim against the defendants in the said matter . . . before signing attorney Ben Zalman assured me that all my other lawsuits against defendants 12-14 East 64th Street Owners Corp and Goodman . . . would be preserved . . .

On a motion to dismiss pursuant to CPLR 3211(a)(1) "the court may grant dismissal when documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." (*Beal Sav. Bank v. Sommer*, 8 NY3d 318, 324 [2007]) (internal citations omitted). "On a motion to dismiss under CPLR 3211(a)(7) "...the court's task is to determine only whether the facts as alleged, accepting them as true and according plaintiff every possible favorable inference, fit within any cognizable legal theory." (*Ladenburg Thalmann & Co., Inc. v. Tim's Amusements, Inc.*, 275 AD2d 243, 245[1st Dept. 2000]).

Generally, "[t]ortious interference with contract requires the existence of a valid contract between the plaintiff and a third party, defendant's knowledge of that contract, defendant's intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom." (*Lama Holding Company v. Smith Barney, Inc.*, 88 NY2d 413,424[1996]). When alleging tortious interference with a contract that is terminable at will, plaintiff must also show that the alleged interference was achieved through "wrongful means," such as fraudulent misrepresentations (see *Guard-Life Corporation v. S. Parker Hardware Manufacturing Corp., 50 NY2d 183).* A retainer agreement between an attorney and a client is terminable at will because the client has an "absolute right . . . to terminate the attorney client relationship at any time without cause . . ." *(Demov, Morris, Levin & Shein v. Glantz*, 53 NY2d 553,556-557[1981]).

Viewing plaintiff's allegations as true, as they must be on a motion to dismiss, plaintiff has alleged all of the elements required to establish tortious interference with a contract, albeit, a contract that is terminable at will. Plaintiff alleges the existence of a valid retainer agreement between itself and third party Hixon; defendant knew of the 2002 lawsuit, and thus, plaintiff alleges defendant's knowledge of the underlying retainer agreement in that lawsuit; and plaintiff alleges defendant intentionally encouraged Hixon's signing of a release which affected that 2002 lawsuit. Assuming the 2004 settlement resulted in an amount intended to compensate the abandoning of the 2002 lawsuit, such additional compensation might be subject to the contingency arrangement contained in the underlying retainer agreement. Failure to share those proceeds pursuant to the agreement would constitute an actual breach of the retainer agreement with resulting damages. Finally, plaintiff alleges that the interference was achieved through wrongful means in that defendant, contrary to the language of the release, advised Hixon that the release would not affect the 2002 lawsuit. The release language releases the owner and manager from all claims, etc. "from the beginning of the world to the . . . date of this release . . . and more specifically with respect to the damages that RELEASOR sustained which were the subject of a lawsuit pending in the Supreme Court, New York County Index # 11737 [illegible][5].

Civil conspiracy is not recognized in New York as an independent tort, but may be viable if connected with other actionable torts. (see *Alexander & Alexander of New York, Inc. v. Fritzen*, 68 NY2d 968[1986]).

Plaintiff, in support of its cross motion to amend, fails to propose an amended pleading. The cross motion is denied without prejudice to a proper motion to amend.

Wherefore it is hereby

ORDERED that the motion to dismiss is denied; and it is further

ORDERED the cross motion to amend is denied.

DATED: April 5, 2010

EILEEN A. RAKOWER, J.S.C.

[5]Although the remainder of the Index Number is illegible, it is clearly referring to the 2004 Hixon action. The 2002 action's Index Number originated as 118897/02 and was later assigned the Civil Court Index Number 502 [illegible] 2003.