

Fadina v Meghan Beard, Inc.

2010 NY Slip Op 31677(U)

June 24, 2010

Supreme Court, New York County

Docket Number: 117097/09

Judge: Joan A. Madden

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

PRESENT: Hon. Joan A. Miller
Justice

PART 11

Fadina, Aina

INDEX NO. 117097/09

- v -

MOTION DATE _____

Morgan, Beard Inc

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached Memorandum Decision + Order:

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

FILED
JUL 02 2010
COUNTY CLERK'S OFFICE
NEW YORK

FILED
JUL 02 2010
COUNTY CLERK'S OFFICE
NEW YORK

Dated: June 24, 2010

[Signature]
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: PART 11

-----X
AINA FADINA,

Index No.: 117097/09

Plaintiff,
-against-

MEGHAN BEARD, INC.
d/b/a/ DECORUM MODEL MANAGEMENT,

Defendant.

-----X
JOAN A. MADDEN, J.

FILED
JUL 02 2010
COUNTY CLERK'S OFFICE
NEW YORK

In this action seeking to recover moneys allegedly due and owing to her from the defendant modeling agency for which she previously worked, plaintiff Aina Fadina ("Fadina") moves for an order (i) granting her summary judgment on her claims for conversion and a declaratory relief which both seek money held by defendant Meghan Beard, Inc. d/b/a Decorum Model Management ("Decorum") in escrow, (ii) granting her an immediate accounting as requesting in her fifth cause of action, (iii) dismissing Decorum's counterclaims, and (iv) awarding her costs and attorneys' fees as a result of Decorum's allegedly frivolous conduct in asserting the counterclaims. Decorum opposes the motion, which is granted only to the extent of dismissing Decorum's counterclaims.

BACKGROUND

Decorum is a modeling agency that provides various services to its models. For these services, Decorum generally charges a fee to the client and receives a commission from the model. Fadina began her relationship with Decorum in August 2006 as a freelance model. The agency did not have a written contract with Fadina. According to Decorum, after Beard told Fadina the rules of working with Decorum, Fadina verbally agreed to them and began successfully working for a number of clients that Decorum booked for her.

In April 20, 2009, Fadina notified Beard that she was leaving Decorum for another agency, Muse Management Inc. (“Muse”). After Fadina terminated her relationship with Decorum, Decorum filed a complaint against Fadina and Muse, seeking to enjoin Fadina from working with 13 clients whom Decorum claimed were introduced by Decorum to Fadina, as well as to enjoin Muse from contacting the clients on Fadina’s behalf. Decorum asserted, inter alia, a claim for breach of contract based on Fadina’s failure to honor her modeling commitments with two Decorum clients, Akris and Oscar de la Renta, and for unjust enrichment based on allegations that Fadina had been unjustly enriched at Decorum’s expense and sought to recover legal expenses from both Muse and Fadina.¹

By decision and order dated October 8, 2009, Justice Gische dismissed Decorum’s complaint in its entirety. Of relevance here, Justice Gische dismissed the breach of contract claim asserted by Decorum against Fadina, finding that there was no enforceable contract between Fadina and Decorum and also dismissed the claim for unjust enrichment on the ground that Decorum failed to show that there was money or property that had been unjustly conferred to Muse and Fadina.

Following Justice Gische’s decision, Fadina commenced this action against Decorum.² The complaint asserts causes of action for 1) breach of contract based on allegations that Decorum failed to pay \$35,125 still owed to Fadina for work she had done while employed by Decorum, 2) unjust enrichment based on allegations that Decorum accepted payment on behalf of Fadina and has retained it, 3) conversion of funds in an escrow account, 4) a declaratory

¹ Decorum also asserted claims for injunctive relief against both defendants and claims against Muse for tortious interference with the contract and for unfair competition.

² Although Justice Gische’s decision was a final disposition, plaintiff commenced this action under the same index number.

judgment that Fadina's earnings are being held in an escrow account, and 5) an accounting of unpaid sums held by Decorum that are due and owing to Fadina.

Decorum answered the complaint and asserted counterclaims for breach of contract and quantum meruit. Fadina now moves for summary judgment on her claims for conversion and declaratory relief, asserting that Decorum conceded in connection with the previously dismissed action that the escrow account contains her earnings. In support of this position, Fadina relies on the affidavit of Meghan Beard ("Beard"), the President and Managing Director of Decorum, which was submitted in opposition to Fadina's motion to dismiss, and in particular Beard's statement that "[t]here is currently a total of \$15,695,000 deposited in my attorney's escrow account on behalf of Ms. Fadina pending the outcome of this litigation." Fadina also argues that Decorum's counterclaims for breach of contract and quantum meruit are barred by res judicata based on Justice Gische's dismissal of Decorum's action against her.

Decorum opposes Fadina's motion, arguing that there are triable issues of fact regarding the moneys owed to Fadina, asserting that Fadina is claiming compensation for jobs for which she had already been paid, and in others, she had failed to subtract the agency's commission. Furthermore, Decorum argues, putting money in an escrow account pending the conclusion of litigation is not an act of conversion. Additionally, Decorum contends that as no fiduciary relationship existed between Fadina and Decorum and since any necessary information regarding money held by Decorum can be obtained during discovery, Fadina's request for an accounting should be denied.

Decorum further argues that its counterclaims for breach of contract and quantum meruit are not barred by res judicata, as Decorum is basing its claim on the theory of quantum meruit, rather than on unjust enrichment as in the prior case. Additionally, Decorum argues that it did not fully and fairly litigate the issue in the prior case, as evidenced by the fact that it appealed

Judge Gische's decision. Decorum next argues that even if assuming, *arguendo*, that res judicata applies, its new claim is based on a third booking that was never litigated in the initial suit and should not be barred by res judicata.

In reply, Fadina challenges the claim based on a third booking by providing evidence that she never performed the job.

DISCUSSION

On a motion for summary judgment, the proponent "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case..." Winegrad v. New York Univ. Med. Center, 64 NY2d 851, 852 (1985). Once the proponent has made this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which require a trial. Alvarez v. Prospect Hospital, 68 NY2d 320, 324 (1986).

Here, Fadina has not made a prima facie showing entitling her to summary judgment on her claims for declaratory judgment and conversion in connection with the moneys in the escrow account. While Fadina argues that Beard conceded that Fadina was owed the money in her attorney's escrow account, a review of Beard's affidavit indicates that Decorum disputes the amounts owed to Fadina. Moreover, in opposition, Decorum submits a further affidavit from Beard in which she indicates that in some instances, Fadina failed to deduct commissions owed to Decorum, and in other instances, Fadina is claiming moneys owed to her where she had already received payment. In addition, no discovery has been conducted in this action. Accordingly, summary judgment is not warranted with regard to Fadina's claims for declaratory relief and conversion.

With respect to the claim for an accounting, upon search of the record, the court dismisses this claim and grants reverse summary judgment. The court has “the authority pursuant to CPLR 3212(b) to search the record and grant summary judgment to a nonmoving party with respect to an issue that was the subject of a motion before the court.” Goldstein v. County of Suffolk, 300 AD2d 441, 442 (2nd Dept 2002), lv denied, 100 NY2d 509 (2003).. The purpose of such reverse summary judgment is judicial efficiency, so it is even within the court’s authority to grant summary judgment to an unsuccessful moving party. Barca v. City of New York, 13 Misc.3d 464 (Sup. Ct. 2006).

Where, as here, there is no fiduciary relationship between the parties, there can be no cause of action for an equitable accounting. Waldman v. Englishtown Sportswear, Ltd., 92 AD2d 833, 835-836 (1st Dept 1983) (dismissing claim for equitable accounting, noting that “the mere fact that defendant may owe money compensation under [an] agreement of employment does not make the defendant a fiduciary”); Michnick v. Parkell Products, Inc., 215 AD2d 462, 462 (2nd Dept 1995) (finding that an agreement between plaintiff and defendant under which defendant agreed to pay plaintiff a commission for each product he originated or evaluated did not create a fiduciary relationship which would entitle plaintiff to an accounting). Accordingly, the claim for an accounting must be dismissed.

As for Decorum’s counterclaims, they must be dismissed as barred by res judicata. “It is well settled that under the transactional approach adopted by New York in res judicata jurisprudence, ‘once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy’.” Marinelli Associates v. Helmsley-Noyes Co., Inc., 265 AD2d 1, 5 (1st Dept 2000) (quoting, O’Brien v. City of Syracuse, 54 NY2d 353, 357 (1981), citing Matter of Reilly v. Reid, 45 NY2d 24, 29-30 (1978)). “Pursuant to this approach, the doctrine bars not only

claims that were actually litigated but also claims that could have been litigated, if they arose from the same transaction or series of transactions.” Marinelli supra, at 5.

Here, Decorum’s counterclaims arise from the same transaction or series of transactions as was litigated in the prior suit. In the initial suit brought by Decorum, the third cause of action claimed breach of contract, based on Fadina’s alleged failure to honor her modeling commitments with two Decorum clients, Akris and Oscar de la Renta. Judge Gische dismissed the claim because there was no evidence “that the companies enumerated in the complaint were contractually obligated to use Decorum or could not use a different agency for their modeling talent.” (Previous action at 9). Decorum’s counterclaim in this action asserts that Fadina confirmed bookings with clients Akris and Oscar de la Renta on three separate occasions, only to perform the services for another modeling agency in violation of her obligation to Decorum. Because the allegations related to the breach of contract counterclaim arise out of the same transactions as the initial suit, *res judicata* bars it from being relitigated. Moreover, Decorum’s new claim based on the third booking must be barred since, although it was not asserted in the prior suit, it arises out of the same *series* of transactions.³

Furthermore, that Decorum’s counterclaim for quantum meruit is based on a different legal theory does not preclude the application of *res judicata*. See Reilly supra at 30 (“where the same foundation facts serve as a predicate for each proceeding, differences in legal theory and consequent remedy do not create a separate cause of action.”)

Furthermore, Decorum’s contention that it had not had the opportunity to fully litigate the issue, as evidenced by its appeal, is unavailing as a pending appeal does not preclude the application of *res judicata*. “Under New York law the mere pendency of an appeal does not

³ In addition, Fadina has put in uncontroverted evidence that the booking was cancelled and never performed.

deprive a challenged judgment of its res judicata effect.” Antonious v. Muhammad, 873 F Supp 817, 824 (SD NY 1995), citing Matter of Amica Mut. Ins. Co., 85 AD2d 727, 728 (2nd Dept 1981); 73A NYJur2d Judgments, § 387.

Accordingly, Fadina’s motion for partial summary judgment is granted to the extent of dismissing Decorum’s counterclaims.

Finally, given the nature of this action, it is transferred to the Civil Court of the City of New York.

CONCLUSION

In view of the above, it is

ORDERED that Fadina’s motion for partial summary judgment is denied; and it is further

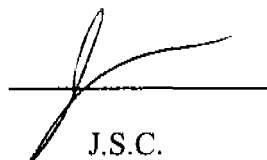
ORDERED that upon searching the record, plaintiff’s claim for an accounting (fifth cause of action) is dismissed; and it is further

ORDERED that defendant’s counterclaims are dismissed; and it is further

ORDERED that the remainder of this action is transferred to the Civil Court of the City of New York pursuant to the annexed order.

A copy of this decision and order is being mailed by my chambers to counsel for the parties.

DATED: June 24, 2010


J.S.C.

FILED
JUL 02 2010
COUNTY CLERK'S OFFICE
NEW YORK

At an Individual Assignment Part 11 of the Supreme Court of the State of New York, held in and for the County of New York, at the courthouse thereof in the County of New York, City, and State of New York, on the 24th of June, 2010

PRESENT:

HON: JOAN MADDEN
JUSTICE.

PRE-NOTE OF ISSUE

ORDER OF TRANSFER-325(d)

Aiwa Fedina
vs.
Meghan Beard Inc. d/b/a
Decorum Model Management

County Clerk's
Index No. 117097 19/20 09

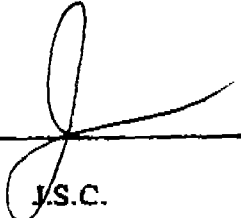
It appearing that the Civil Court of the City of New York has jurisdiction of the parties to this action and pursuant to Rule 202.13(a) of the Uniform Civil Rules for the Supreme Court and the County Court, it is

ORDERED, that this cause bearing Index Number 117097/09 be, and it hereby is, removed from this court and transferred to the Civil Court of the City of New York, County of New York, and it is further

ORDERED, that the clerk of New York County shall transfer to the clerk of the Civil Court of the City of New York, County of New York, all papers in this action now in his possession, upon payment of his proper fees, if any, and the clerk of the Civil Court of the City of New York, County of New York, upon service of a certified copy of this order upon him and upon delivery of the papers of this action to him by the clerk of the County of New York, shall issue to this action a Civil Court Index Number without the payment of any additional fees, and it is further

ORDERED, that the above-entitled cause be, and it is hereby, transferred to said Court, to be heard, tried and determined as if originally brought therein but subject to the provisions of CPLR 325(d).

ENTER,



J.S.C.

FILED
JUL 02 2010
COUNTY CLERK'S OFFICE
NEW YORK