

Matter of Seaman

2010 NY Slip Op 31749(U)

June 30, 2010

Sur Ct, Nassau County

Docket Number: 348202/H

Judge: John B. Riordan

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SURROGATE’S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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Proceeding to Discovery Property and Obtain
Information in the Possession of the Coalition of
Landlords, Homeowners & Merchants, Inc., in the Estate of

File No. 348202/H
Dec. No. 26605

HENRY BOGART SEAMAN,

Deceased.

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The Coalition of Landlords, Homeowners & Merchants, Inc.,
Cross-Claim Petitioner,

-against-

Farrell Fritz, P.C., Eric Penzer, Individually,
Robert Harper, Individually,

Cross-Claim Respondents.

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In this turnover proceeding commenced pursuant to SCPA 2103, the petitioner is the Bank of America as the executor of the estate of Henry Bogart Seaman, Jr. The respondent is The Coalition of Landlords, Homeowners & Merchants, Inc. (referred to herein as “respondent” or “the Coalition”), identified by the petitioner as an advocacy group. The petitioner alleges that the respondent collected over \$123,000.00 from decedent, purportedly for its representation of the decedent in, among other things, litigation involving the use of his property in Nassau County. Petitioner contends that it appears that the services provided to the decedent may have been for legal services which the respondent is not licensed to provide and therefore any such fees collected should be returned to the estate.

After considerable delay, an answer was filed which contained nine affirmative defenses,

six counterclaims against the petitioner, and six cross-claims against the petitioner's attorneys. An amended answer and second amended answer were subsequently filed in which it appears the Coalition abandoned some of its original claims. The affirmative defenses, counterclaims, and cross-claims include: (1) a defense based on documentary evidence; (2) collateral estoppel, res judicata, laches, and issue preclusion; (3) failure to state a cause of action; (4) lack of personal and subject matter jurisdiction; (5) failure to satisfy a condition precedent; (6) fraud, collusion, conspiracy, contribution and contributory negligence; (7) account stated and/or breach of contract and tortious interference with contract; (8) sanctions, attorneys' fees, costs, sanctions and punitive damages; (9) unjust enrichment; (10) tortious negligence; and (11) loss of profit. All of this arises from petitioner's attempt to question a principal of respondent Coalition regarding the fees paid by the decedent and obtain document discovery in connection therewith. Respondent seeks damages of nearly \$5 million, much of it from partners and associates in the law firm representing the petitioner.

The Motion to Dismiss the Petition

The Coalition has moved to dismiss the petition on grounds that: (1) the petition is facially defective; (2) there is a lack of personal jurisdiction; and (3) a defense is founded on documentary evidence (CPLR 3211[a][1]). The petitioner opposes the motion and cross-moves to dismiss the counterclaims, cross-claims and affirmative defenses and for the imposition of sanctions.

Respondent claims that the amended petition should be dismissed because of a defective verification in that the petition indicates that it was verified on July 21, 2009, but signed on July 24, 2009. If the Coalition intended to treat the petition as a nullity based on a defective verification, it was required to promptly notify petitioner of its intention to do so or the objection

is deemed waived (*Matter of Rouson*, 32 AD3d 956 [2d Dept 2006]). Promptness in this context usually means within 24 hours of receipt of the defectively verified pleading (*State v McMahon*, 78 Misc 2d 388 [Sup Ct, Albany County 1974]). The branch of the motion to dismiss the petition based on a defective verification is accordingly denied.

The Coalition's counsel also contends that the petition must be dismissed because the court lacks personal jurisdiction over the Coalition in that service of process was made on the Secretary of State, but no effort was made to serve the Coalition at its offices nor was any effort made to serve counsel on its behalf. The Coalition is a not-for-profit corporation. As such, pursuant to Not-For-Profit Corporation Law § 304, the Secretary of State is the agent of the corporation upon whom process may be served (*see Warren's Heaton on Surrogate's Court Practice*, § 6.29, 7th ed). Accordingly, the branch of the motion to dismiss the petition based on lack of personal jurisdiction is also denied.

Finally, the Coalition moves to dismiss based on documentary evidence. The documentary evidence upon which the Coalition relies is a one-page, handwritten instrument, purportedly signed by the decedent, referred to in the moving papers as "The Indemnity Agreement" which provides as follows:

"Agreement between H. Bogart Seaman Jr. and The Coalition of Landlords Homeowners and Merchants, Inc. (hereafter "The Coalition"). I, Henry Bogart Seaman, Jr., agree to the following: in consideration of my membership in The Coalition and other valuable consideration included but not limited to all the free time and work expended on my behalf and the everlasting gratitude for all the unselfish help The Coalition gave me in my times of need and help. I agree to the following, I indemnify and hold harmless The Coalition, its officers, directors, employees, board members and staff from any all demands, actions, suits, claims, proceedings, costs, attorneys fees and liability arising out of, connected with or resulting from my membership in The Coalition, or assistance and aid that The Coalition provides. Included is any and all monies I give to The Coalition for membership and fees now and in the future, I expressly waive any right I or my

estate may have to assert claims, demands, actions, damages anticipated or unanticipated of any and all monies paid to The Coalition.”

To prevail on a motion to dismiss based on documentary evidence, “such documentary evidence must resolve all factual issues as a matter of law such that it conclusively disposes of the plaintiff’s claim” (7 Weinstein-Korn-Miller, NY Civ Prac ¶ 3211.06 [2d ed]). As indicated above, petitioner contends that the fees paid to the Coalition appear to be for legal services which the Coalition is not licensed to provide. The Coalition concedes that it is not licensed to practice law, but disputes the petitioner’s allegation that it provided legal services to the decedent. If it is determined that the Coalition was providing legal services to the decedent, the so-called Indemnity Agreement may indeed be unenforceable on that ground alone (*see Ween v Dow*, 35 AD3d 58 [1st Dept 2006]). Furthermore, if the agreement is, in fact, an enforceable indemnity contract, it merely obligates the decedent’s estate to make the Coalition whole in the event of a loss (*see Black’s Law Dictionary*); it does not preclude the commencement of a legal action or proceeding. If the agreement be deemed a covenant not to sue, the estate is still not foreclosed because “[a] covenant not to sue is not a release since it is not a present abandonment of a right or claim, but merely an agreement not to enforce an existing cause of action. Such distinction although technical is nevertheless clear.

Thus, the party possessing the right of action is not precluded thereby from thereafter bringing suit; however, he may be compelled to respond in damages for breach of the covenant” (*Colton v New York Hospital*, 53 AD2d 588, 589 [1st Dept 1976]). Thus, the Indemnity Agreement relied on by the Coalition does not conclusively dispose of the petitioner’s claim and the motion to dismiss the petition on grounds of documentary evidence is also denied.

The Cross-Motion to Dismiss the Counterclaims, Cross-Claims, and Affirmative Defenses

As indicated above, the petitioner and the attorneys named as additional respondents, identified in the papers as the Farrell Fritz parties or simply the FF parties, have moved to dismiss entirely the counterclaims, cross-claims, and affirmative defenses advanced by the Coalition. To the extent that the cross-motion seeks a determination that the Indemnity Agreement is void and unenforceable, it is denied at this time, as it has not been developed at this stage of the litigation what the services were that were provided to the decedent. In opposition to the cross-motion to dismiss, the Coalition has opposed the cross-motion only to the extent that it seeks to dismiss the Coalition's counterclaims, cross-claims, or affirmative defenses of: (1) deceit and collusion; (2) conspiracy; (3) contribution; (4) comparative negligence; (5) breach of contract; (6) tortious interference with contract; and (7) unjust enrichment, as well as the cross-motion's prayer for the impositions of sanctions against the Coalition and/or its attorneys. To the extent the Coalition has not interposed opposition to the cross-motion to dismiss, it is granted.

The deceit and collusion claim (*see* Judiciary Law § 487) appears to be based solely on the contention by the Coalition's staff attorney that the petitioner and or the FF parties allegedly withheld from the court the fact that the Coalition had completely complied with the document discovery demands served on the Coalition. It is not at all clear to the court that the Coalition has, in fact, complied with the discovery demands, and even if it has, the conduct complained of does not state a cause of action for deceit and collusion (*see Matter of Malone*, 105 AD2d 455 [3d Dept 1984]). The cross-motion is accordingly granted on this issue.

The conspiracy claim is purportedly based on two or more of the FF parties conspiring to violate Judiciary Law § 487. As with the deceit and collusion claim, this is a very serious allegation to raise against an attorney and it appears to the court is it utterly baseless. The cross-

motion is accordingly granted on this issue as well.

The Coalition has failed to state a cause of action for contribution and/or comparative negligence against the petitioner or the FF parties and the cross-motion is also granted on this issue.

On the other hand, if the court determines that the Indemnification Agreement is valid and enforceable, and that it contains a covenant not to sue, the petitioner may be liable for damages for the breach of that contract. To the extent that the cross-motion seeks to dismiss the breach of contract claim against the petitioner, it is denied. To the extent it seeks to dismiss the breach of contract claim against the FF parties, it is granted, as the FF parties are not parties to the original contract nor to the discovery proceeding at issue here.

The Coalition's tortious interference with contract claim must also fail as to the petitioner because there is no cause of action by one party to a contract against the other for conspiracy to breach the agreement between them (*North Shore Bottling, Co., v C. Schmidt & Sons, Inc.*, 22 NY2d 171 [1968]). Nor does such a claim lie against the petitioner's counsel where they were acting within the scope of their employment (*see Kartiganer Assoc., P.C. v Town of New Windsor*, 108 AD2d 898, 899 [1985] [agent cannot be held liable for inducing his principal to breach a contract with a third person, at least where he is acting on behalf of his principal and within the scope of his authority]). The cross-motion to dismiss is also granted on this issue.

The cross-motion to dismiss the unjust enrichment claim is denied. It is possible that the petitioner may prevail in its claim that the Indemnity Agreement is unenforceable, even though some of the services provided to the decedent were not legal services, and to that extent the decedent may have been be unjustly enriched.

“An action to recover on the theory of unjust enrichment is for restitution or on quasi

contract and is based on the equitable principles that a person shall not be allowed to enrich himself unjustly at the expense of another (50 N.Y.Jur., *Restitution and Implied Contracts* § 3). Where the express contract has been rescinded, is unenforceable or abrogated, a recovery may be had on an implied promise to pay for benefits conferred thereunder” (*Waldman v Englishtown Sportswear Ltd.*, 92 AD2d 833, 836 [1983]).

Sanctions

The Coalition’s motion to dismiss the discovery proceeding also seeks sanctions pursuant to 22 NYCRR §130-1.1 for what it claims is frivolous conduct of bringing the instant discovery proceeding which in turn is based on the Coalition’s belief that the Indemnity Agreement bars the bringing of the proceeding. As indicated above, there is no bar to the petitioner’s commencement of the discovery proceeding and it is clear that the commencement of the proceeding does not satisfy any of the other criteria necessary to support an award of sanctions under 22 NYCRR §130-1.1; accordingly, the Coalition’s motion for sanctions for frivolous conduct against the petitioner and the FF parties is denied.

Petitioner has also cross-moved for sanctions against the Coalition and its attorney, Judith N. Berger, Esq. In pertinent part, 22 NYCRR §130-1.1, provides:

“a) The court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defined in this Part. In addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct as defined in this Part, which shall be payable as provided in section 130-1.3 of this Part. (c) For purposes of this Part, conduct is frivolous if:

- (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;
- (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or
- (3) it asserts material factual statements that are false.

Frivolous conduct shall include the making of a frivolous motion for costs or sanctions under this section. In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, or should have been apparent, or was brought to the attention of counsel or the party...

(d) An award of costs or the imposition of sanctions may be made either upon motion in compliance with CPLR 2214 or 2215 or upon the court's own initiative, after a reasonable opportunity to be heard. The form of the hearing shall depend upon the nature of the conduct and the circumstances of the case.”

It appears clear to the court that many of the Coalition’s affirmative defenses, cross-claims, and counterclaims were either completely without merit in law and could not be supported by a reasonable argument for an extension, modification or reversal of existing law, or were undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another, as evidenced by the failure to oppose the dismissal of several of them. The malicious injury of another is particularly evident in the claims made against the petitioner’s attorneys. Furthermore, the court’s file contains correspondence from the petitioner’s attorneys to the Coalition’s attorney detailing the legal insufficiency of the Coalition’s affirmative defenses, cross-claims and counterclaims and affording counsel and the Coalition an opportunity to withdraw those claims prior to petitioner’s motion for dismissal and the imposition of sanctions.

Accordingly, the court finds that a sanction in the sum of \$1,000.00 against Judith N. Berger, Esq. is appropriate in this case, payable to The Lawyers’ Fund for Client Protection pursuant to 22 NYCRR §130-1.3 within 30 days after entry of the order herein. In addition, the court finds that the petitioner should be awarded costs in the form of reimbursement for actual

expenses reasonably incurred and reasonable attorney's fees, resulting from the frivolous conduct as defined in 22 NYCRR § 130-1.1. A hearing to determine the amount of the expenses and reasonable attorneys' fees incurred will be held on September 15, 2010 at 11:00 a.m.

This matter will appear on the court's calendar for conference on August 4, 2010 at 9:30 a.m. to chart any remaining discovery and to enter another discovery order.

Settle order.

Dated: June 30, 2010

JOHN B. RIORDAN
Judge of the
Surrogate's Court