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STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

TIMOTHY A. ROULAN,

Plaintiff,

vs.

THE COUNTY OF ONONDAGA and
THE ASSIGNED COUNSEL PROGRAM, INC.,

Defendants.

Index No. 08-2382
RJI No. 33-09-4418

DECISION

BACKGROUND

This is an action pursuant to NY CPLR § 2221(e) to renew two motions previously brought by the plaintiff, Timothy Roulan against defendants, Onondaga County ("County") and the Assigned Counsel Program, Inc. ("ACP"). The first of these renewal motions asks this Court to issue a Declaratory Judgment finding the plan of the Onondaga County Bar Association Assigned Counsel Program (hereinafter referred to as "the plan") to be unlawful in light of County Law Art. 18-b, as well as the Sixth Amendment to the United States Constitution. Plaintiff's second motion is to renew his motion for summary judgment on his breach of contract claim, previously denied without prejudice.

Plaintiff is an attorney who formerly was a member of the assigned counsel panel of the ACP. He brought suit against the County as well as the ACP, alleging that the plan put in place by the ACP for the assignment of counsel to indigent defendants was unconstitutional as well as in conflict with NY County Law Art. 18-b. Furthermore, plaintiff claims that the County and the ACP breached their contract with plaintiff by allegedly preventing him from billing for all the services that he would have liked to have

billed for. Defendants counter that the ACP plan was approved by Chief Administrative Judge Jonathan Lippman, and upheld by the Appellate Division, Fourth Department, and thus is in conformity with the Constitution and the laws of the State of New York. Defendants also contend that plaintiff's breach of contract claim is a restatement of his declaratory judgment action, and that he has failed to make out the basic elements necessary to show that the defendants breached any contract.

For the foregoing reasons, both of plaintiff's motions are DENIED. Additionally, defendants' cross-motion for summary judgment dismissing plaintiff's complaint is GRANTED and the plaintiff's complaint is DISMISSED in its entirety.

PLAINTIFF'S MOTION TO RENEW AND REARGUE

Section 2221(e) of the CPLR requires that a motion for leave to renew be "based on new facts not offered at the prior determination or... a change in law that would change the prior determination." NY CPLR § 2221(e)(2). Moreover, the moving party must demonstrate a "reasonable justification" for the failure to present such facts on the prior motion. NY CPLR § 2221(e)(3). Where the motion to renew is based on an alleged change in the law, the court should deny the motion if the purported change would not have an effect on the outcome of the earlier motion. *See* Rosenberger v. Rosenberger, 63 A.D.3d 898, 900 (2nd Dept. 2009); *C.f.* Sheila Properties, Inc. v. A Real Good Plumber, Inc., 904 N.Y.S.2d 709, 711 (2nd Dept. 2010).

Plaintiff's motion to renew his motion for a declaratory judgment declaring the ACP plan to be unlawful and unconstitutional is apparently pursuant to the change in law prong of § 2221(e)(2). Plaintiff notes that he could not have raised the issue in his

previous motion because the law was literally changing as his motion was pending. Specifically, plaintiff points to two cases which he claims are determinative in the current matter: the first is the Third Department case of Goehler v. Courtland County, 70 A.D.3d 57 (3d Dept. 2009), decided on November 25, 2009; the second case is the Court of Appeals Decision in Hurrell-Harring v. State, 15 N.Y.3d 8 (NY 2010), decided on May 6, 2010. The Court will address each of these cases in turn.

As defendants point out, the Goehler case is simply irrelevant to the matter at hand. Goehler involved a defendant, Cortland County, that had adopted a law allowing for the appointment of a public defender; a 'conflict attorney' appointed by the County Legislature, should the public defender have a conflict with his client; and a panel of attorneys if the 'conflict attorney' also had a conflict. Several judges from Family, County and Surrogate's Courts in Cortland County issued a standing decision that this local law violated County Law § 722 because it did not conform to one of the four options for providing counsel to indigent defendants. The Third Department upheld the standing decision issued by the judges declaring the law invalid, and also upheld the judges' actions in assigning counsel to indigent defendants in lieu of following the law.

Nothing in Goehler is determinative in the present matter. The issue there was that Cortland County had enacted a law providing counsel for the indigent that did not conform with any of the four options in County Law § 722. Section 722 sets forth that the County shall establish plans to provide assigned counsel pursuant to one of the following options: (1) a public defender appointed pursuant to County Law Article 18-A; (2) a private legal aid bureau or society; (3) a plan of the county bar association approved by the state administrator of the courts; or (4) a combination of the three preceding options. County Law § 722(1)-(4). Because Cortland County had not utilized

one of these four options, the judges were authorized in exercising their power to assign counsel.

Plaintiff here insists that in light of Goehler, this Court has a "judicial duty" to declare the plan a nullity as it is not in compliance with the County Law. However, contrary to plaintiff's contentions, the plan used here by Onondaga County and the ACP was enacted in conformity with County Law § 722. Specifically, the plan falls under subsection (3): a plan of the county bar association approved by the state administrator of the courts. It was approved by Chief Administrative Judge Lippman and upheld by the Fourth Department against a similar challenge in Parry v. Country of Onondaga, 51 A.D.3d 1385 (2008) (noting that Onondaga County had met its burden under County Law § 722, and that the plan had been approved by the Chief Administrative Judge of New York). Plaintiff's arguments become even more wanting when one considers that his attorney, Mr. Parry, was the plaintiff in that case. Moreover, the plaintiff does not point to any specific sections of the Goehler case that are supposedly applicable here, rather, the majority of plaintiff's arguments are based on his own interpretations of the case, and discussions of the role of the judiciary. Such general arguments, though supplemented with abstracts from the Federalist Papers, do not call into question the plan's validity. More importantly, they do not rise to a "change in the law" as so required for a motion for leave to renew. NY CPLR § 2221(e)(2).

Nothing in Goehler provides any basis for this Court to undermine the determinations of the Chief Administrative Judge, nor the Fourth Department. Not only is there no "judicial duty" to declare the plan a nullity, based on these prior decisions, this Court is precluded from doing so - as it has explicitly stated in prior decisions in this and Mr. Parry's own actions.

Notwithstanding Goheler's inapplicability to the present matter, plaintiff urges that the Hurrell-Harring case, as recently decided by the Court of Appeals, has some bearing here. Mr. Roulan is again mistaken in his reliance on this case, as the holding was somewhat narrower than plaintiff concedes. In Hurrell-Harring, the Court of Appeals held that plaintiffs, several criminal defendants raising claims of ineffective assistance of counsel while their cases were pending, had made out a "claim for constructive denial of the right to counsel by reason of insufficient compliance with the constitutional mandate of Gideon." Hurrell-Harring, 15 N.Y.3d at 23. In overturning the Third Department's dismissal of such claims, Judge Lippman noted that these cases typically arise post-conviction, but that fact alone did not mean that "they are not cognizable apart from the post-conviction context." Id. at 24. The Court was careful to limit its holding to cases where the defendant had been *actually denied* counsel, and noted that this holding was not meant to apply to cases where the defendant was merely alleging *ineffective* assistance stemming from the individual attorney's performance. Id. at 24-5. [1]

Hurrell-Harring reaffirms the importance of the Sixth Amendment's guarantee of assistance of counsel by recognizing a defendant's right to challenge an actual deprivation of such a right while his or her case is pending. In doing so, the Court of Appeals stressed the importance of meaningful representation throughout the criminal justice process, and noted that the right to assistance of counsel is not implicated merely upon conviction. *See* Hurrell-Harring, 15 N.Y.3d at 20.

[1] The Court of appeals also stated, "The basic, unadorned question presented by such claims where, as here, the defendant-claimants are poor, is whether the State has met its obligation to provide counsel, not whether under all the circumstances counsel's performance was inadequate or prejudicial." Hurrell-Harring, 15 N.Y.3d at 23.

Nowhere in Hurrell-Harring is there any reference whatsoever to the right of a criminal-defense attorney to bring a claim against the State. Mr. Parry infers a cause of action for Mr. Roulan, a defense attorney, against Onondaga County alleging that counsel is being denied; however, nothing in Hurrell-Harring gives rise to such an implication. The Sixth Amendment's guarantee of assistance of counsel is a right that belongs to the criminally-accused; it is not a double-edged sword meant to cut in favor of both the indigent defendant, *and* defense counsel's right to represent indigent defendants. The right is meant to ensure a fair trial and to be a protection against the *denial* of counsel by the state. *See* Strickland v. Washington, 466 U.S. 668, 686 (1984); *See also,* Hurrell-Harring, 15 N.Y.3d at 17, (noting that "effective assistance [of counsel] is a judicial construct designed to do no more than protect an individual defendant's right to a fair adjudication; it is not a concept capable of expansive application to remediate systemic deficiencies"). Defense counsel, as agents of the state, can trigger a denial of that right through constitutionally deficient performance *(see* id.), but a defense attorney's "sworn duty to insure (sic) that adequate counsel be provided" - (*See* Plaintiff's supplementary memorandum of law, p. 5) – does not give defense counsel a cause of action against the State when he did not bill for all of the work that he would have preferred. Though plaintiff would seemingly prefer the luxury of such an expansive interpretation, nothing in Hurrell-Harring provides such a basis.

More telling of plaintiff's fateful reliance on that case is his inability to cite to any particular portions of the Hurrell-Harring decision in support of his position. As with his reliance on Goehler, plaintiff's reliance on Hurrell-Harring is just as hollow, as he is only able to assert his own interpretations of the meaning of the decision coupled with general arguments about the importance of defense counsel. Plaintiff cites little

authority to support his arguments, save for Judge Lippman's opening paragraph of Hurrell-Harring, which offers little, if any, guidance. Plaintiff's claims, though passionate, are lacking the sound legal basis this Court requires in order to grant leave to renew the previously denied motion for declaratory judgment. *See* Rosenberger, 63 A.D.3d at 900.

Plaintiff's motion to renew is DENIED.

STANDARD FOR SUMMARY JUDGMENT

Summary judgment is a drastic remedy which shall be granted only when the movant has established that there are no triable issues of fact. Andre v. Pomeroy, 35 N.Y.2d 361. Once the movant has established a *prima facie* entitlement to judgment as a matter of law, the party opposing the motion must come forward with proof, in evidentiary form, establishing the existence of triable issues of fact or must demonstrate an acceptable excuse for its failure to do so. Zuckerman v. City of New York, 49 N.Y.2d 557; Davenport v. County of Nassau, 279 A.D.2d 497.

The main function of the court in deciding a motion for summary judgment is to determine if triable issues of fact exist. Matter of Suffolk County Dep't of Social Services v. James M, 83 N.Y2d 178; Silman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395. A motion for summary judgment must be denied if the court has any doubt as to the existence of a triable issue of fact. Freese v. Schwartz, 203 A.D.2d 513.

When deciding a motion for summary judgment, the court must view the evidence in a light most favorable to the non-moving party and must give the non-moving party the benefit of all reasonable inferences which can be drawn from the

evidence. Negri v. Stop & Shop, Inc., 65 N.Y.2d 625. However, mere conclusions of law or fact are insufficient to defeat a motion for summary judgment. Banco Popular North America v. Victory Tax Management, Inc., 1 N.Y.3d 381.

PLAINTIFF'S BREACH OF CONTRACT CLAIM

Turning now to plaintiff's breach of contract action, this Court finds that the plaintiff has been unable to satisfy the elements of a breach of contract claim, and thus, denies his motion for summary judgment as a matter of law. Accordingly, plaintiff's motion for summary judgment on plaintiff's breach of contract claim is DENIED and defendants' cross-motion for summary judgment dismissing plaintiff's breach of contract claim is GRANTED.

In order to make out a successful breach of contract claim in New York, a plaintiff must prove three elements: (1) that a valid contract was formed; (2), that the plaintiff performed his/her end of the deal; and (3), that the defendant failed to perform his/her end of the deal. *See* Furia v. Furia, 116 A.D.2d 694 (2nd Dept. 1986).

Here, as defendants point out, plaintiff is unable to make out the most basic elements of this claim. Nowhere in plaintiff's papers is there reference to a specific contractual provision that was violated by the defendants, rather, plaintiff's claims seem to be simply that the defendants breached the contract by unfairly constraining the plaintiff from billing as he would have liked. Specifically, plaintiff alleges that defendants:

> [I]nterfered and prevented [plaintiff] from billing as the law requires, that they obstructed his bills from going to the trial court judge, that they enormously delayed his billing

> both as punishment and to induce him to leave out line items and services that they found objectionable, that they attempted to prevent him from practicing law in an ethical manner, that to practice in an ethical manner he was forced to do work for free and that, in an attempt to receive at least partial compensation and remain in business, plaintiff *was forced to greatly reduce his bill so as to receive at least some payment for his efforts*. (Affidavit of Jeffrey R. Parry, attorney for plaintiff, p. 2 ¶ 9)(*emphasis added).*

Additionally, Mr. Roulan stated in his own deposition, "When I make out a voucher, *I have never vouchered (sic) the work I have done,* I voucher so I can get paid and then I hope I can get paid. And I hope I can get paid within a reasonable time." (*See* Exhibit C, attached to Parry affidavit, pg. 10-11)(*emphasis added).*

It seems that plaintiff's breach of contract claim is more accurately stated as a claim to recover monies that he could have received had he chosen to include these services on his vouchers. Plaintiff presents no evidence, nor does he even claim, that a specific portion of the ACP plan was violated. His breach of contract claim is based on the fact that he was allegedly constrained from billing for more money. Plaintiff cannot sue the County and the ACP under the guise of a breach of contract claim for money that he would be entitled to had he chosen to bill for it. To allow such a suit would require great speculation by this Court into the damages that should be afforded, if any, to the plaintiff. Furthermore, the Court would have little more to go on than the plaintiff's word that he performed the work alleged, and is therefore entitled to compensation. This Court declines to reach so far.

Plaintiff contends that he was "induced" by the defendants into reducing the amounts he billed for, but provides no evidence of this inducement, nor any specific instances when such inducement allegedly took place. In response, defendants have provided the affidavit of Renee S. Captor, the Executive Director of the ACP, who

includes ninety-two copies of the voucher requests for which plaintiff requests payment, each one indicating that plaintiff was paid the full amount requested by the plaintiff in the voucher. Plaintiff fails to identify even one instance where he submitted a voucher and for which he was not paid the full amount stated in the voucher. In addition, defendants point out that the ACP plan provides that "[a]cceptance of payment, in full or in part, on any voucher or case shall be deemed a waiver of any further objection or appeal of that voucher." *See* ACP plan, p. 27. Thus, if any party is in breach of contract, it would appear to be the plaintiff, who has brought suit to recover monies on vouchers that were already submitted and paid.

Plaintiff also notes that the contract should be nullified as it violates County Law Art. 18-b and the United States Constitution. As defendants point out, this argument is essentially the same as plaintiff's declaratory judgment claim. As has been repeatedly noted throughout these proceedings and prior proceedings in plaintiff's counsel's own action against the County, that the ACP plan has been approved by the Chief Administrative Judge, and upheld by the Fourth Department. For the plaintiff, and in particular, plaintiff's counsel, Mr. Parry, to continue to allege this claim in the face of decision after decision to the contrary verges on sanctionable conduct.

PLAINTIFF'S REMAINING CAUSES OF ACTION

Notwithstanding the dismissal of plaintiff's breach of contract and declaratory judgment actions, plaintiff has several remaining causes of action, which defendants cross-move to dismiss and which this Court will now examine in turn.

Regarding plaintiff's second cause of action, for alleged breach of fiduciary duty, the plaintiff has not met his burden with respect to the elements of this claim, and it is dismissed accordingly. A fiduciary relationship exists "between two persons when one is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relationship." Restatement (second) of Torts §874 (a). Plaintiff merely alleges that the defendants entered into a fiduciary relationship with plaintiff when they entered into a contract. *See* Plaintiff's Complaint at ¶ 13. A fiduciary duty does not arise solely because there is a contract between the parties; it exists because there is a special relationship between them. *See* Northeast General Corp. v. Wellington Advertising Inc., 82 N.Y.2d 158, 172 (1993)(citing Restatement (second) of Torts §874 *comment b*). Plaintiff has not alleged any such relationship beyond the existence of the contract. This claim seems to be little more than another attempt by the plaintiff to argue his breach of contract action, and cannot survive a motion for summary judgment.

Plaintiff's fourth cause of action claims negligence and gross negligence by the defendants. This is yet another attempt to cloak plaintiff's breach of contract action in a separate tort claim. New York Courts have long held that a plaintiff may not convert a breach of contract action into a tort action. *See* Massena Town Center Associates v. Sear Brown Group, Inc., 255 A.D.2d 893; *See also* Scott v. Keycorp, 247 A.D.2d 722. New York Courts do not allow a cause of action for negligent breach of contract. See 22A N.Y.Jur.2d, Contracts, Section 248.

With respect to plaintiff's fifth cause of action, allegations of fraud against the defendants, that claim is also dismissed. "The essential elements of a cause of action for fraud are 'representation of a material existing fact, falsity, scienter, deception and injury.'" New York Univ. v. Continental Insurance Co., 87 N.Y.2d 308, 318 (1995)

(quoting Channel Master Corp. v. Aluminum Ltd. Sales, Inc., 4 N.Y.2d 403, 407 (1958)).

Moreover,

> [A] fraud cause of action may not be maintained when the only fraud charged relates to the breach of contract ... Here, the fraud claim arises out of the identical facts and circumstances, and even contains the same allegations, as the cause of action alleging breach of contract ... Moreover, the plaintiff has not claimed that the fraud arises from representations that are collateral or extraneous to the parties' contract ... Finally, there are no damages that would not be recoverable under the contract measure of damages, and therefore, the fraud cause of action is simply redundant. 34-35th Corp. v. 1-10 Indus. Assoc., 2 A.D.3d 711, 712 (2003)*(citations omitted)*.

The fraud claim fails for the same reasons that the rest of plaintiff's derivative tort claims fail: he has failed to provide the necessary support for the required elements, and it is more accurately characterized as an attempt to have his breach of contract claim heard.

With regard to plaintiff's sixth cause of action of economic duress against the defendants, the plaintiff again has failed to meet his burden on the elements. Under New York law economic duress can become a cause of action and asserted against an opposing party to a contract where

> [t]he theory on which the Plaintiff seeks recovery permits a complaining party to void a contract and recover damages when it establishes that it was compelled to agree to the contract terms because of a wrongful threat by the other party which precluded the exercise of its free will. The existence of economic duress is demonstrated by proof that one party to a contract has threatened to breach the agreement by withholding performance unless the other party agrees to do some further demand. 805 Third Avenue Co. v. M.W. Realty Associates, 58 N.Y.2d 447.

Plaintiff has failed to make such a showing.

Plaintiff's seventh cause of action for interference with legal remedies against the defendants is also dismissed. Again, the plaintiff has failed to provide the necessary support for the elements of this claim to overcome a motion for summary judgment.

Plaintiff's eighth cause of action for conversion against the defendants is also dismissed. In order to prove conversion, a plaintiff is required to show "the unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner's rights." Thyroft v. Nationwide Mutual Ins. Co., 8 N.Y.3d 283, 288-89 (2007). The Court of Appeals has held that the two elements of conversion are "(1) plaintiff's possessory right or interest in the property, and (2) the defendants dominion over the property or interference with it, to the derogation of plaintiff's rights." Colavito v. New York Organ Donor Network, Inc., 8 N.Y.3d 43, 50 (2006)*(citations omitted)*.

Plaintiff has failed to provide support for this claim that would defeat a motion for summary judgment. Plaintiff claims a property interest in a determination of fees by the trial judge, and further, that defendants interfered with this property interest through the implementation of the ACP program; however, in response to plaintiff's allegations, the defendants have provided the affidavit of Renee Captor, the Executive Director of the Onondaga County ACP, which contains 92 voucher requests indicating that the plaintiff was fully paid for the work he submitted to the ACP. Plaintiff cannot claim a theoretical property interest in a determination of higher fees for work that he admittedly did not include in the vouchers submitted to the ACP. Plaintiff's claim of a property interest in the right to a determination of fees, if one even exists, certainly would not include payment for work that was not documented nor properly submitted.

Plaintiff's ninth cause of action for interference with contractual relations against the defendant is also dismissed. This claim is yet another attempt by the plaintiff to litigate his breach of contract action. This Court has already held, repeatedly, that such

a claim cannot go forward. Plaintiff has failed to state a cause of action for tortuous interference with contractual relations with regard to the defendants.

Plaintiff's tenth cause of action for injurious falsehood against the defendants is also dismissed. Injurious falsehood, or trade libel "requires the knowing publication of false and derogatory facts about the plaintiff's business of a kind calculated to prevent others from dealing with the plaintiff, to its demonstrable detriment." Banco Popular North America v. Lieberman, 75 A.D.3d 460, 462 (2010).

In what seems to be a pattern, plaintiff has yet again failed to support his claim, and seems to have confused the legal requirements of injurious falsehood. Plaintiff claims that the defendants have, "as part of a scheme to defraud," made "false and fraudulent statements, promises and assertions of authority." *See* Plaintiff's Complaint at ¶ 79. Plaintiff further alleges that he relied on these assertions to his detriment. Plaintiff's assertions sound more in fraud than injurious falsehood, but it is of no consequence as his tenth cause of action is also dismissed.

CONCLUSION

In light of all of the above, plaintiff's motion to renew and reargue his declaratory judgment action is DENIED. Plaintiff's motion for summary judgment on his breach of contract claim is also DENIED.

Finally, defendant's motion for summary judgment dismissing the plaintiff's complaint in its entirety is GRANTED.

Counsel for the defendants is directed to submit in Order in keeping with this Decision, and attaching a copy of this Decision thereto.

DATED: September 27, 2010.

Hon. John C. Cherundolo, A.J.S.C.