

ParenteBeard LLC v Cohen

2011 NY Slip Op 31736(U)

June 22, 2011

Sup Ct, NY County

Docket Number: 109435/2010

Judge: Paul Wooten

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

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

PARENTEBEARD LLC, individually, and as
successor-in-interest to PARENTE RANDOLPH,
LLC and LAZAR LEVINE & FELIX, LLP,

INDEX NO. 109435/2010

Plaintiff,

MOTION DATE _____

- against-

MOTION SEQ. NO. 001

PAULINE COHEN,

MOTION CAL. NO. _____

Defendant.

The following papers, numbered 1 to 5, were read on this motion by defendant to dismiss plaintiff's second cause of action for quantum meruit, pursuant to CPLR 3211(a)(7); and cross-motion by plaintiff for declaratory relief.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ..
Answering Affidavits — Exhibits (Memo) _____
Replying Affidavits (Reply Memo) _____

FILED

PAPERS NUMBERED

1

2,3

JUN 28 2011

4,5

Cross-Motion: Yes No

NEW YORK
COUNTY CLERK'S OFFICE

This is an action by plaintiff ParenteBeard LLC, individually, and as successor-in-interest to Parente Randolph, LLC and Lazar Levine & Felix, LLP ("plaintiff") against defendant Pauline Cohen ("defendant"), to recover sums allegedly owed to it for litigation services it rendered to defendant from January 2008 through January 2009, pursuant to a retainer agreement that was executed on January 18, 2008 ("the Agreement"). Plaintiff seeks to recover the sum of \$57,766.99 plus interest, and she brings causes of action against defendant for breach of contract, quantum meruit, and account stated. Discovery has not commenced and the Note of Issue has not been filed. Before the Court is defendant's pre-answer motion to dismiss, pursuant to CPLR 3211(a)(7), seeking dismissal of plaintiff's second cause of action for quantum meruit, on the ground that plaintiff cannot recover for quantum meruit because there is

a valid contract governing the matter. Plaintiff opposes the motion and cross-moves for an order declaring that the Agreement is a valid and enforceable contract, and that defendant has waived her ability to challenge its validity since she admits that the Agreement covers the services plaintiff rendered to defendant. Defendant has filed a reply and opposition to the cross-motion.

BACKGROUND

According to the complaint, plaintiff is engaged in the business of providing professional accounting and business consultation services. On January 18, 2008, plaintiff and defendant executed the Agreement (dated December 4, 2007), pursuant to which plaintiff was retained by defendant and her then matrimonial attorneys, Sheresky Aronson Mayefsky & Sloan, LLP, to render litigation services in connection with a matrimonial dispute.¹

The Agreement provided for payment at plaintiff's standard hourly rates plus out-of-pocket expenditures, and that payment for plaintiff's services was the sole obligation of defendant. After paying an initial retainer fee of \$5,000, defendant purportedly failed to pay plaintiff for services it rendered from January 2008 through January 2009, in the amount of \$57,766.99. On June 15, 2010, plaintiff sent a monthly statement to defendant stating that she had an unpaid balance in that sum, and defendant did not contest the validity of the debt or challenge the amount stated as due within a reasonable time of receiving the statement.

Plaintiff subsequently commenced the present action seeking to recover the amount that is purportedly owed under the Agreement. Plaintiff brings causes of action for breach of contract (first cause of action), quantum meruit (second cause of action), and account stated (third cause of action). Defendant has not yet filed an answer.

¹In February 2009, subsequent to the execution of the Agreement, Lazar Levine & Felix LLP merged with Parente Randolph, LLC, and the Agreement was assigned to Parente Randolph, LLC. Thereafter, in October 2009, Parente Randolph, LLC merged with Beard Miller to become ParenteBeard LLC, and the Agreement was assigned to ParenteBeard LLC. ParenteBeard is therefore the successor-in-interest to Lazar Levine & Felix LLP and Parente Randolph, LLC.

DISCUSSION

Defendant moves to dismiss plaintiff's second cause of action for quantum meruit, pursuant to CPLR 3211(a)(7), on the basis that a party cannot recover in quantum meruit where a contract governs the relationship between the parties with respect to the subject matter at issue. Defendant argues that plaintiff's cause of action sounding in quantum meruit must therefore be dismissed, as plaintiff alleges that the Agreement is a valid and enforceable contract in its first cause of action for breach of contract.

In opposition, plaintiff argues that by seeking to dismiss the quantum meruit claim, defendant has conceded that the Agreement is valid and enforceable, and thus, has waived her ability to challenge its validity, enforceability, or scope. Plaintiff cross-moves for an order declaring that: (1) the Agreement is a valid and enforceable contract; (2) the Agreement covers the entirety of this dispute and the fees sought by plaintiff from defendant; and (3) defendant is precluded for challenging the validity, enforceability, or scope of the Agreement. To the extent that the cross-motion is denied, plaintiff argues that defendant's motion to dismiss the quantum meruit cause of action should similarly be denied.

In reply, defendant argues that plaintiff's cross-motion essentially seeks summary judgment on the issue of the validity and enforceability of the Agreement. Defendant argues that the cross-motion should therefore be denied as premature since issue has not yet been joined and no discovery has been had.

In evaluating a motion to dismiss pursuant to CPLR 3211(a)(7), the Court is "required to accept the allegations of the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*CBS Corp. v Dumsday*, 268 AD2d 350, 352 [1st Dept 2000]; see also *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). If the complaint adequately alleges a viable cause of action, the motion must be denied (see *511 West 232nd Owners Corp. v Jennifer Realty Co.*,

98 NY2d 144, 152 [2002]; *Harris v IG Greenpoint Corp.*, 72 AD3d 608, 609 [1st Dept 2010]).

“The sole criterion on a motion to dismiss is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cognizable action at law, a motion for dismissal will fail” (*Harris*, 72 AD3d at 609; *see also Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

It is well established that, ordinarily, “a party may not recover in quantum meruit or unjust enrichment where the parties have entered into a contract that governs the subject matter” (*Cox v NAP Const. Co., Inc.*, 10 NY3d 592, 607 [2008]; *see also Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]; *Terra CRG LLC v Marke*, 2010 WL 4105568, at *5 [Sup Ct Kings County 2010]). However, “where there is a bona fide dispute as to the existence of a contract or where the contract does not cover the dispute in issue, [a] plaintiff may proceed upon a theory of quantum meruit and will not be required to elect his or her remedies” (*Joseph Sternberg, Inc. v Walber 36th St., Asocs.*, 187 AD2d 225, 228 [1st Dept 1993]; *see also IIG Capital LLC v Archipelago, L.L.C.*, 36 AD3d 401, 405 [1st Dept 2007]; *Hochman v LaRea*, 14 AD3d 653, 655 [2d Dept 2005]).

Here, neither side disputes that the parties executed the Agreement, or that the Agreement established the terms under which plaintiff would be compensated for the services it provided. Indeed, plaintiff's cross-motion specifically seeks a declaration that the Agreement is valid and enforceable. Plaintiff's claim for quantum meruit cannot survive when there is no dispute that a valid contract existed between the parties (*see Cox*, 10 NY3d at 607; *Clark-Fitzpatrick*, 70 NY2d at 388; *Sheiffer v Shenkman Capital Management, Inc.*, 291 AD2d 295, 295 [1st Dept 2002]; *Liu v Beth Israel Medical Ctr.*, 2003 WL 21488081, at *4 [SDNY 2003]). Accordingly, defendant's motion to dismiss the second cause of action for quantum meruit is granted.

The Court also grants plaintiff's cross-motion to the extent that plaintiff seeks a

declaration that the Agreement is a valid and enforceable contract, as the parties do not dispute the execution of or validity of the Agreement (*see Cortland Asbestos Products, Inc. v J. & K. Plumbing & Heating Co.*, 33 AD2d 11, 12 [3d Dept 1969] ["while the existence of a contract is a question of fact, the question of whether a certain or undisputed state of facts establishes a contract is one of law for the courts"]). Since plaintiff seeks only declaratory relief in the cross-motion, the Court has elected to consider the cross-motion on its merits (*see Daley v M/S Capital NY LLC*, 44 AD3d 313, 315 [1st Dept 2007] ["While a summary judgment motion interposed prior to joinder of issue is normally premature, in an action for declaratory judgment, the court has an exceedingly broad discretion in deciding the issues"] [quotations and citations omitted]).

For these reasons and upon the foregoing papers, it is,

ORDERED that defendant's motion to dismiss plaintiff's second cause of action for quantum meruit is granted; and it is further,

ORDERED that plaintiff's cross-motion for declaratory relief is granted to the extent that the Court declares that the Agreement is a valid and enforceable contract; and it is further,

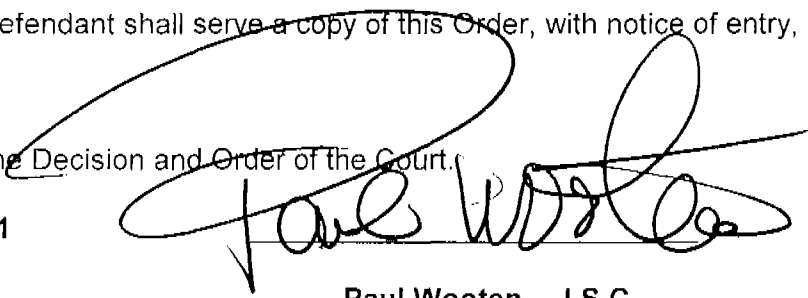
ORDERED that the remainder of the action shall continue; and it is further,

ORDERED that the parties are directed to appear at a preliminary conference on July 27, 2011, at 2:30 p.m., in Part 7, at 60 Centre Street; and it is further,

ORDERED that defendant shall serve a copy of this Order, with notice of entry, upon plaintiff.

This constitutes the Decision and Order of the Court.

Dated: June 22, 2011



Paul Wooten J.S.C.

FILED

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

JUN 28 2011