Warshaw Burstein Cohen Schlesinger & Kuh, LLP v Birnbaum
2011 NY Slip Op 33761(U)
May 5, 2011
Supreme Court, New York County
Docket Number: 109752/2009
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: CAROL EDMEAD J.S.C.

PART 35

Index Number : 109752/2009
WARSHAW BURSTEIN
vs.
ARTHUR BIRNBAUM
SEQUENCE NUMBER : 003
DISMISS

INDEX NO. ______
MOTION DATE 4/12/11
MOTION SEQ. NO. ______
MOTION CAL. NO. ______

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

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the branch of defendants' motion to for summary judgment dismissing the third and fifth causes of action for unjust enrichment and promissory estoppel against Mrs. Birnbaum is granted as to the third cause of action for unjust enrichment as asserted against her, and denied as to the fifth cause of action for promissory estopppel as asserted against her, and the third cause of action for unjust enrichment as asserted against Mrs. Birnbaum is severed and dismissed; and it is further

ORDERED that the branch of defendants' motion to dismiss plaintiff's fourth cause of action for fraud and punitive damages as against both defendants for failure to state a cause of action is granted as asserted against Mr. Birnbaum, and denied as asserted against Mrs. Birnbaum, and the fourth cause of action for fraud and punitive damages as asserted against Mr. Birnbaum is severed and dismissed; and it is further

ORDERED that the branch of defendants' motion for sanctions is denied; and it is further

ORDERED that the branch of defendants' motion for leave to serve the Amended Answer in the form attached to its motion is granted, except as to their proposed 7th and 13th affirmative defenses.

Dated: This constitutes the decision and order of the Court.
5/5/11

HON. CAROL EDMEAD J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

--X

WARSHAW BURSTEIN COHEN
SCHLESINGER & KUH, LLP,

Index No. 109752/2009

Plaintiff,

-against-

ARTHUR BIRNBAUM and
BETH BIRNBAUM,

Defendants.

--X

HON. CAROL EDMEAD, J.S.C.

MEMORANDUM DECISION

In this action to recover for attorneys' fees allegedly due and owing, defendants Arthur ("Mr. Birnbaum") and Beth Birnbaum ("Mrs. Birnbaum") (collectively, "defendants") move for summary judgment dismissing the third and fifth causes of action for unjust enrichment and promissory estoppel against Mrs. Birnbaum, to dismiss plaintiff's fourth cause of action for fraud and punitive damages as against both defendants for failure to state a cause of action, for leave to amend defendants' Answer, for sanctions and a hearing on costs and disbursements and reasonable attorneys' fees against plaintiff for engaging in frivolous conduct during the course of this proceeding and for asserting frivolous causes of action for fraud and punitive damages.

Factual Background

In October 2007, Mr. Birnbaum retained plaintiff Warshaw Burstein Cohen Schlesinger & Kuh, LLP ("plaintiff") pursuant to a written retainer agreement (the "Retainer Agreement") to represent him in an action by Scarola Ellis LLP for failure to pay legal fees (the "underlying

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action").[1] Plaintiff later withdrew as counsel on January 22, 2009 upon Mr. Birnbaum's consent, at which time, Mr. Birnbaum allegedly owed $60,756.00 in attorneys' fees and $878.01 in disbursements, totaling $61,634.01 plus interest for the services rendered and disbursements incurred from May 2007 through in or about February 2009.

Consequently, plaintiff alleges five causes of action as against Mr. Birnbaum for breach of contract, account stated, unjust enrichment, fraud and promissory estoppel, and three causes of action as against Mrs. Birnbaum for unjust enrichment, fraud, and promissory estoppel based upon her alleged promises to pay plaintiff for the legal services rendered to Mr. Birnbaum.

In support of their motion, defendants argue that plaintiff's fourth cause of action for fraud seeking punitive damages fails to state a cause of action. A breach of a contract for a failure to pay a debt owed is not a tort and does become a cause of action in fraud supporting an award of punitive damages, unless the fraud is separate and independent from the breach of contract. Moreover, any causes of action for fraud based upon a failure to pay a debt owed, are merely duplicative of the breach of contract claim and should be dismissed.

Further, the unjust enrichment claim should be dismissed against Mrs. Birnbaum, as there is no issue of fact that Mr. Birnbaum, and not his wife, Mrs. Birnbaum was party to the underlying action. As illustrated by her sworn affidavit, the Retainer Agreement and the pleadings in the underlying action, there is no issue of fact that: (1) Mrs. Birnbaum never requested plaintiff to perform for her benefit any legal services, (2) plaintiff never provided any legal services to Mrs. Birnbaum, (3) Mrs. Birnbaum never executed a personal guaranty agreeing

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[1] The underlying action was entitled *Scarola Ellis LLP v Arthur Birnbaum, Diamlink Jewelry, Digico Holding Ltd., and Nehal Doe, (fictitious name, true name unknown, party intended being the principal of the corporate defendant and the employer of Arthur Birnbaum on or about January 1, 2006).*

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to pay her husband's legal fees, (4) the legal services performed by plaintiff were not for necessities in which a wife is legally obligated to pay, and (5) plaintiff never entered into a retainer agreement with Mrs. Birnbaum to represent her in any capacity.

Defendants also argue that plaintiff's fifth cause of action for promissory estoppel against Mrs. Birnbaum should also be dismissed since there is no issue of fact that she never agreed in writing to pay her husband's debts to the plaintiff and that any oral promises to pay her husband's debt are unenforceable by the General Obligations law ("GOL") which requires that special promises to pay the debts of another must be in writing.

Defendants also seek to correct certain deficiencies in their *pro se* pleadings and in their counterclaims as shown in their proposed Amended Verified Answer and to assert additional counterclaims and affirmative defenses that defendants were unaware existed.

In support of their request for sanctions, defendants contend that they requested that plaintiff voluntarily discontinue its fraud, unjust enrichment, and promissory estoppel claims as against Mrs. Birnbaum to no avail. Further, plaintiff engaged in a lengthy course of conduct of fraud, misrepresentation, and deception using their superior legal knowledge to harass and attempt to extort defendants into paying a completely unjust legal fee for services that were not even rendered to the defendants. On February 4, 2009, Martin Lee, a partner of plaintiff ("Lee"), wrote a letter to defendants falsely advising them that defendants' repeated failure to pay their legal fees would result in claims of fraud and punitive damages being assessed against them. Lee further misrepresented that if either of them filed for bankruptcy protection that a bankruptcy court would not discharge them from any debt owed to plaintiff. Plaintiff's further attempted to deceive defendants that Mrs. Birnbaum is liable for her husband's legal fees despite the fact that

the GOL expressly prohibits enforcement of oral promises to pay the debts of another. These false and misleading statements made by Mr. Lee were made with the intention of maliciously harassing and deceiving defendants and to make them believe that if they did not pay $20,000.00 to plaintiff that they would somehow be subject to punitive damages and that defendants would be barred from exercising their right to seek relief in the bankruptcy court. Mr. Lee also signed and verified the Complaint containing the frivolous causes of action described herein. As an attorney who has been practicing litigation for over 50 years, Lee must be aware that merely failing to pay a debt pursuant to a written contract is not a fraud and that merely breaching a contract does allow punitive damages. He must also be aware that if defendants filed for bankruptcy that a bankruptcy court would discharge any debt owed to plaintiff. Thus, the only reason Lee would have written his letter was to maliciously harass and intimidate defendants.

In opposition, plaintiff argues that the alleged fraudulent representations were made during the period from July 10, 2008 (more than nine months after the retainer was signed, through early January 2009 -- at the outset of which period Mr. Birnbaum already owed plaintiff approximately $31,000 in unpaid legal fees and disbursements totaling approximately $13,000). During that period both Mr. and Mrs. Birnbaum falsely represented that they would pay all the outstanding legal fees, if plaintiff continued to provide legal services in the underlying action. Defendants made these promises in order to induce plaintiff to continue providing legal services to Mr. Birnbaum instead of seeking to withdraw as counsel for nonpayment. Plaintiff reasonably relied on such promises (such as Ms. Birnbaum's email stating that " . . .we aren't running away from our obligations" and, on Mrs. Birnbaum's promises to pay the fees from funds from the sale of her mother's house and her mother's estate) from July 2008 through the end of January 2009

(the "Reliance Period"), to the extent of an additional $30,504.85 in outstanding legal fees and disbursements. Mrs. Birnbaum made two payments by either defendant to plaintiff after Mr. Birnbaum paid a $7,500 retainer in October 4, 2007: she signed and delivered two checks to plaintiff (drawn on defendants' joint account), each in the sum of $2,000, dated June 12, 2008 and July 10, 2008, respectively, immediately prior to the beginning of the Reliance Period.

The allegations underlying the fourth cause of action against both defendants, are not the same as those underlying the first cause of action for breach of contract, which are asserted only against Mr. Birnbaum, and therefore, are deemed "collateral or extraneous" to those underlying the contract claim. The representations underlying the fourth cause of action occurred after the parties entered into the retainer agreement, when Mr. Birnbaum already owed more than $30,000 to plaintiff, and induced plaintiff to continue to provide legal services to Mr. Birnbaum instead of withdrawing as counsel on grounds of nonpayment. Accordingly, termination of the engagement would have been an act that plaintiff could have performed without breach, and plaintiff's continued provision of legal services in reliance on both defendants' post-contractual promises of payment was not the performance of a duty plaintiff was already required toperform.

Further even if the fraud claim against Mr. Birnbaum is deemed duplicative of the contract claim against him, the claim against Mrs. Birnbaum is collateral to the contract by definition, because there is no contract claim against her. Moreover, the promises she made to pay Mr. Birnbaum's outstanding legal fees are neither set forth in the Retainer Agreement, nor the same as the promises made by Mr. Birnbaum in that Agreement.

Even assuming that plaintiff's services were rendered only to Mr. Birnbaum, and that Mrs. Birnbaum received no direct economic benefit from them, Mrs. Birnbaum received a

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"benefit" from plaintiff s services as a legal matter, and, therefore, that plaintiff has a valid cause of action against Mrs. Birnbaum for unjust enrichment and in *quantum meruit*. A defendant who requests that services be performed, like Mrs. Birnbaum, is considered to have a legal "benefit" conferred on her for purposes of these claims if the performance is rendered at her request, even if that performance is rendered to a third person (*i.e.*, Mr. Birnbaum), and even where, unlike here, the defendant does not make express promises of payment.

Further, whether plaintiff's services were for necessities is irrelevant, as no economic "benefit" to Mrs. Birnbaum is required to state a cause of action against her for unjust enrichment. In any event, her liability for unjust enrichment is based not on her status as Mr. Birnbaum's wife, but on the allegations that plaintiff continued to perform legal services for Mr. Birnbaum at her request and based on her promises of payment. Additionally, legal services rendered for a spouse or child are considered 'necessaries' for which the other spouse may be held liable. There is, in fact, a "rebuttable presumption in the creditor's favor that any necessaries furnished were presumed to be on the credit of the spouse. In any event, plaintiff did render the services at issue on the credit of Mrs. Birnbaum -- specifically, based on her separate promises of payment, as well as her express representations that the source of payment would be the proceeds of sale of her mother's house, and, after her mother's death in October 2008, her mother's estate and defendants have submitted no evidence to rebut that presumption.

As to the fifth cause of action against Mrs. Birnbaum, unconscionable injury is not an element of a promissory estoppel claim except when the Statute of Frauds applies to bar any contract claim based on the alleged promise. Mrs. Birnbaum's emails, which are clearly and unequivocally referable to her payment promises and her promise to use her late mother's estate

as her source of funds, and which were "subscribed" within the meaning of the Statute of Frauds, raise triable issues of fact on the applicability of the Statute of Frauds. Even if there were no issue as to the applicability of the Statute of Frauds here, defendants' motion to dismiss the promissory estoppel claim asserted against Mrs. Birnbaum is still unwarranted because defendants failed to establish that plaintiff s alleged damages are insufficient as a matter of law to constitute the "unconscionable injury" which is necessary to circumvent the Statute of Frauds in the promissory estoppel context. And, the "question of whether the circumstances of this case are so egregious as to render it unconscionable to permit defendants to invoke the Statute of Frauds," "is one that should not be determined on the pleadings" or on summary judgment without any depositions.

Because plaintiff's claims are not subject to dismissal, defendants' request that sanctions be imposed must be denied. And, there was nothing false or misleading about plaintiff's letter.

Plaintiff further argues that defendants' motion for leave to amend their Answer should be denied in part on the ground that defendants' seventh and thirteenth proposed affirmative defenses fail to state viable defenses, and, therefore, leave to assert them would be futile.

In reply, Mrs. Birnbaum attests that she never requested that plaintiff represent her husband or promised on her own behalf to pay plaintiff. Mrs. Birnbaum communicated with plaintiff on behalf of her husband due to her husband's international traveling schedule which prevented him from speaking to plaintiff during working hours due to the differing time zones. That Mrs. Birnbaum was speaking on behalf of her husband was made clear to plaintiff. Mrs. Birnbaum also denies agreeing to pay plaintiff from the proceeds of the sale of her mother's house, which was bequeathed to others. Plaintiff was not paid because of the dispute as to the

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reasonableness and propriety of its fees.

Discussion

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action . . . has no merit" (CPLR § 3212[b]), sufficient to warrant the court as a matter of law to direct judgment in his or her favor (*Bush v St. Claire's Hosp.*, 82 NY2d 738, 739 [1993]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Wright v National Amusements, Inc.*, 2003 N.Y. Slip Op. 51390 [U] [Sup Ct New York County, 2003]). Thus, the proponent of a motion for summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, *supra*; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinder*, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11, 751 NYS2d 433, 434 [1st Dept 2002]). A party can prove a *prima facie* entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman, supra*; *Prudential Securities Inc. v Rovello*, 262 AD2d 172 [1st Dept 1999]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR §3212[b]). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman*,

supra at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 765 NYS2d 326 [1st Dept 2003]).

In determining a motion to dismiss, the Court's role is ordinarily limited to determining whether the complaint states a cause of action (*Frank v DaimlerChrysler Corp.*, 292 AD2d 118, 741 NYS2d 9 [1st Dept 2002]). The standard on a motion to dismiss a pleading for failure to state a cause of action is not whether the party has artfully drafted the pleading, but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained (*see Stendig, Inc. v Thom Rock Realty Co.*, 163 AD2d 46 [1st Dept 1990]; *Leviton Manufacturing Co., Inc. v Blumberg*, 242 AD2d 205, 660 NYS2d 726 [1st Dept 1997] [on a motion for dismissal for failure to state a cause of action, the court must accept factual allegations as true]). When considering a motion to dismiss for failure to state a cause of action, the pleadings must be liberally construed (*see*, CPLR § 3026), and the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit into any cognizable legal theory" (*Nonnon v City of New York*, 9 NY3d 825 [2007]; *Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972 [1994]). "In deciding such a preanswer motion, the court is not authorized to assess the relative merits of the complaint's allegations against the defendant's contrary assertions or to determine whether or not plaintiff has produced evidence to support his claims" (*Salles v Chase Manhattan Bank*, 300 AD2d 226, 228 [1st Dept 2002]).

As to plaintiff's fourth cause of action against defendants for fraud, plaintiff alleges that defendants "repeatedly promised to Plaintiff, both orally as well as in writing, to pay Plaintiff the legal fees owed to Plaintiff"; their "representations to Plaintiff were false when made," in that

they "never intended to pay Plaintiff the legal fees ...; defendants "knew the falsity of their representations to Plaintiff when they were made.," defendants "made said representations, and concealed their intention not to pay Plaintiff, with the intent of deceiving and defrauding Plaintiff, and inducing Plaintiff to continue to defend Arthur Birnbaum" and "Plaintiff reasonably and justifiably relied on their representations, and was thereby induced to continue to provide legal services to Arthur Birnbaum ...."

The Court notes that in the context of a breach of contract case, "a cause of action for fraud arising out of a contractual relationship may be maintained only where the plaintiff alleges a breach of duty separate from, or in addition to, a breach of the contract" (*Levine v American Intern. Group*, 16 AD3d 250, 792 NYS2d 35 [1st Dept 2005]). A fraud claim should be dismissed as redundant when it merely restates a breach of contract claim, *i.e.,* when the only fraud alleged is that the defendant was not sincere when it promised to perform under the contract (*J.A.O. Acquisition Corp. v. Stavitsky*, 192 Misc 2d 7, 745 NYS2d 634 [Sup. Ct. New York County 2001], *citing*, *First Bank of the Americas v Motor Car Funding, Inc.* 257 AD2d 287, 291-92, 690 NYS2d 17 [1st Dept 1999]; *New York University v Continental Ins. Co.*, 87 NY2d 308, 662 NE2d 763 [1995] ("A general allegation that a party entered into a contract with the intention not to perform it is insufficient to support a claim for fraud")). By contrast, a cause of action for fraud may be maintained where a plaintiff pleads a breach of duty separate from, or in addition to, a breach of contract. For example, if a plaintiff alleges that it was induced to enter into a transaction because a defendant misrepresented material facts, the plaintiff has stated a claim for fraud even though the same circumstances also give rise to the plaintiff's breach of contract claim (*J.A.O. Acquisition Corp. v Stavitsky*, 192 Misc 2d 7 *supra, citing*, *First Bank of*

the Americas v Motor Car Funding, Inc. supra]).

As to Mr. Birnbaum, none of plaintiff's allegations in its complaint constitute a breach of any duty which is collateral or extraneous to the written retainer agreement with Mr. Birnbaum to pay for legal fees. Plaintiff's allegation that he did not intend to honor his contractual obligations is not collateral or extraneous to the contract and does not convert its breach of contract action into an action for fraud. Likewise, plaintiff's claim that Mr. Birnbaum lied about his intention to pay plaintiff, is not collateral or extraneous to the Retainer Agreement and does not state a valid cause of action for fraud.

Backer v Lewit (180 AD2d 134, 136-137, 584 NYS2d 480 [1st Dept 1992]) on which plaintiff relies, is distinguishable. In *Backer*, plaintiff signed an employment agreement by which defendant, Trendstar Inc., a manufacturer of men's clothing, hired plaintiff on a commission basis--on all net sales made directly by him--as a salesman of men's apparel for a six-month period. The commission was not to become due or owing until payment by Trendstar's customers. The agreement further provided: "Nothing contained herein shall be construed or be deemed to obligate either party to extend the term of this Agreement or to enter into a new agreement for the services of [plaintiff] after the expiration of such term. Any such extension of term or the entering into of a new agreement shall be by another express written, duly executed agreement by the same parties." However, plaintiff claimed that he was induced to leave his prior employment and to continue his marketing efforts in reliance upon "the representations that Trendstar was an ongoing business, that the individual defendants would produce a fall 1989 line, when, in fact, defendants at all times only wanted plaintiff to liquidate the inventory existing in October 1988, all of which, plaintiff claims, led to a loss of reputation in the industry due to

his inability to fulfill sales orders." Thus, the court found that the misrepresentations did "*not* relate to the nonperformance of an alleged contract. Since plaintiff's fraud claim does not seek to enforce any promise made to plaintiff, only to compensate him for damages flowing from his reliance upon the false representations which he alleges, it is truly a tort claim." (Emphasis added).

Here, the damages plaintiff seeks flow directly from work he performed under the Retainer Agreement, and the obligation to pay plaintiff was created in the Retainer Agreement. That Mr. Birnbaum allegedly made oral promises to pay plaintiff does not render his duty to pay plaintiff extraneous to his then existing duty under the Retainer Agreement to pay plaintiff for the legal services performed. Thus, plaintiff's reliance on post-contractual representations is misplaced, as such representations, which plaintiff solely alleges were knowingly false when made or that Mr. Birnbaum had no present intention when they made those representations to pay the outstanding legal fees, were not "collateral" to the Retainer Agreement. Therefore, plaintiff's fourth cause of action for fraud and punitive damages as against Mr. Birnbaum is dismissed for failure to state a cause of action.

However, defendants motion to dismiss the fourth cause of action as asserted against Mrs. Birnbaum is denied. Plaintiff's motion to dismiss the fourth cause of action is based on the argument that the alleged fraud is not separate and independent from the breach of contract, and that the alleged fraud based upon a failure to pay a debt owed, is merely duplicative of the breach of contract. Since there is no breach of contract claim against Ms. Birnbaum, it cannot be said that the fraud claim against Mrs. Birnbaum is duplicative of the breach of contract claim.

As to the unjust enrichment claim against Ms. Birnbaum, plaintiff must establish that its

services were performed at the request or behest of the defendant and that it performed services for the defendant which resulted in the defendant being unjustly enriched (*Hamlet on Olde Oyster Bay Home Owners Ass'n, Inc. v Holiday Org., Inc.*, 12 Misc 3d 1182 [2006], *citing Clark v Daby,* 300 AD2d 732, 751 NYS2d 622 [3d Dept 2002] and *Kagan v K-Tel Entertainment, Inc.*, 172 AD2d 375, 568 NYS2d 756 [1st Dept 1991]; *Prestige Caterers v Kaufman*, 290 AD2d 295, 736 NYS2d 335 [1st Dept 2002]). Further, plaintiffs must establish that Mrs. Birnbaum "reaped the benefit, and equity and good conscience require restitution" (*Korff v Corbett*, 10 AD3d 248 [1st Dept 2005]).

It is uncontested that plaintiff never provided any legal services to Mrs. Birnbaum, or for Mrs. Birnbaum, and that the legal services were never intended to benefit her personally. The Retainer Agreement was only between plaintiff and Mr. Birnbaum as they are the only signatories and parties named in the Agreement, and does not reference any other services that were performed or were to be performed for Mrs. Birnbaum. Mrs. Birnbaum was never a party or a litigant in the underlying action and was never represented by plaintiff in that action. And, none of plaintiff's services were for necessities for the comfort, care, and well-being of the family, which a wife can be legally obligated to provide for her husband *(cf. Medical Business Assoc. v Steiner*, 183 AD2d 86; 588 NYS2d 890 [2d Dept 1992] ("a spouse who has incurred a debt for necessary goods or medical treatment is primarily liable for that debt")).[2] Moreover,

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[2] In this regard, plaintiff's reliance on *Merrick v Merrick (*163 Misc 2d 929, 622 NYS2d 852 [Sup. Ct. New York County 1995]) is misplaced. First, the Court notes that the Court in *Merrick* stated that "legal services rendered for a wife or child are considered 'necessaries' for which a husband or father *may* be held liable" (emphasis added). Second, *Merrick* involved expenses incurred in the context of a matrimonial/adoption proceeding; the legal services in the adoption proceedings were "necessaries" since the proceedings were necessary to protect the rights of the children and the wife after defendant took affirmative action in Surrogate's Court challenging the basis of his liability to support the children. Third, the case cited by *Merrick* for the above quoted proposition, *Elder v Rosenwasser* (238 NY 427 [1924]) involved a wife arrested on a criminal charge, and the Court stated that such

even assuming Mrs. Birnbaum requested that plaintiff continue to represent Mr. Birnbaum, it cannot be said that *she* was unjustly enriched by the legal services plaintiff performed. Therefore, there is no basis for an unjust enrichment claim against Mrs. Birnbaum.

Plaintiff's reliance on *Farash v Sykes Datatronics, Inc.* (59 NY2d 500, 465 NYS2d 917 [1983]) for the proposition that Mrs. Birnbaum need not have received an economic benefit in order to be liable for unjust enrichment is misplaced. In *Farash*, plaintiff was entitled to seek recovery against defendant for unjust enrichment for the value of the work plaintiff performed in reliance on statements by and at the request of defendant. Plaintiff and defendant entered an agreement for defendant to lease plaintiff's building, and for plaintiff to complete its renovation and make certain modifications on an expedited basis. Defendant, however, never signed any contract and never occupied the building. The Court's decision was based, in part, on the theory that "plaintiff may recover for those expenditures he made in reliance on defendant's representations . . . and *that he otherwise would not have made*." (Emphasis added). However here, plaintiff's work was performed for the direct benefit of Mr. Birnbaum, who, unlike Mrs. Birnbaum, received the benefit of plaintiff's work. It also cannot be said that plaintiff incurred expenses on reliance on Mrs. Birnbaum's alleged representations to pay plaintiff.

Therefore, the unjust enrichment claim against Mrs. Birnbaum is unwarranted.

As to the fifth cause of action for promissory estoppel against Mrs. Birnbaum, to maintain such a cause of action, a plaintiff must allege (1) a clear and unambiguous promise, (2)

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footnote 2 cont'd

action "may result in her incarceration, where 'the necessity for a lawyer may be as urgent and as important as the necessity for a doctor when she is sick.'" The underlying civil action against Mr. Birnbaum seeking attorneys' fees, for which plaintiff was hired to defend, would not result in incarceration and did not "require" counsel to protect the rights of a minor.

reasonable reliance by the promisee, and (3) an injury sustained in reliance on the promise (*Brown v Brown*, 12 AD3d 176 [1st Dept 2004]; *Emigrant Bank v UBS Real Estate Securities, Inc.*, 49 AD3d 382, 854 NYS2d 39 [1st Dept 2008]; *see Esquire Radio & Elecs. v Montgomery Ward & Co.*, 804 F 2d 787, 793 [2d Cir1986]). The doctrine of equitable or promissory estoppel is to prevent the infliction of an "unconscionable injury" and loss upon one who has relied on the promise of another (*see American Bartenders School, Inc. v 105 Madison Co.*, 59 NY2d 716 [1983]). Plaintiffs' submissions support plaintiff's claim that (1) Mrs. Birnbaum promised during the period between July 2008 and February 2009 to pay plaintiff's outstanding legal fees in order for plaintiff to continue rendering legal services to Mr. Birnbaum in the underlying action, and that two contemporaneous payments were made totaling $4,000 towards the outstanding fees, and (2) plaintiff continued to render legal services to Mr. Birnbaum.

Further, it is uncontested that Mrs. Birnbaum's promise involves a promise to pay the debt of another, and GOL § 5-701 (a)(2) requires that, "Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking" including, " ... a special promise to answer for the debt, default or miscarriage of another person." The Statute of Frauds is satisfied by a writing which must contain substantially the whole agreement, and all its material terms and conditions, so that one reading it can understand from it what the agreement is (*Kobre v Instrument Systems Corp.*, 54 AD2d 625, 626 [1st Dept 1976], affd., 43 N.Y.2d 862 [1978]).

Defendant established that the Retainer Agreement is signed by plaintiff and Mr. Birnbaum, and that there is no equivalent signed writing by Mrs. Birnbaum agreeing to pay her

husband's debts to the plaintiff, so as to satisfy the Statute of Frauds.

However, in opposition, plaintiff sufficiently raised an issue of fact in this regard. Plaintiff relies on a series of email communications to establish the writing requirement of the SOF: (1) a November 6, 2008 letter plaintiff sent Mr. Birnbaum, enclosing an invoice covering the period May 1, 2008 through October, 2008 in the sum of $19,000.00 (for a total amount of $47,123.12), and advising that plaintiff would seek to be relieved as counsel unless the invoice was paid in full in 10 days (Lee Aff. Ex. A.); (2) Mr. Birnbaum's November 10, 2008 (Lee Aff. Ex. I) that he was "preparing a payment to you," and plaintiff's November 14, 2008 (Lee Aff. Ex. J) email with wire instructions; (3) Mrs. Birnbaum's November 14, 2008 email to plaintiff signed "Beth," stating "[w]e will be in touch next week." (Lee Aff. Ex. J.); (4) Mr. Lew's November 19,2008 (Lew Aff. Ex. A) email to Mr. Lee stating that "Beth called today [i.e., on November 19,2008] to advise us that she was sending the firm a check for $20,000." No such check has been received, to date. (Lee Aff. 38); (5) Mrs. Birnbaum's December 1, 2008 email to plaintiff (Lee Aff. Ex. K) stating that "Unfortunately, I was unable to access the money on my last trip; it's still tied up, but will be able to do so before the end of December .... I apologize and thank you for your patience. Beth Birnbaum"; (6) Mrs. Birnbaum's December 1, 2008 email to plaintiff (Lee Aff. Exhibit K), stating "Was waiting for the death certificates. Have them now. Taken together, Mrs. Birnbaum's emails to plaintiff refer to the fees earned by plaintiff, and may constitute a signed writing for purposes of the Statute of Frauds (*Naldi v Grunberg*, 80 AD3d 1, 2010 N.Y. Slip Op. 07079 at 1, 4 [1st Dept 2010]; *Stevens v Publicis S.A.*, 50 AD2d 253,255-256, 854 NYS2d 690 [1st Dept 2008] ("The e-mails ... constitute 'signed writings' within the meaning of the statute of frauds, since plaintiffs name at the end of his e-mail signified his intent to

authenticate the contents")).

Nor can it be said that the recovery of attorneys' fees is not subject to a promissory estoppel claim due to the absence of an "unconscionable" injury, in that courts have permitted law firms to recover fees due and owing under this theory (*see Arfa v Zamir*, 55 AD3d 508, 869 NYS2d 390 [1st Dept 2008] ("cause of action for promissory estoppel was correctly sustained since the pleadings and counsel's affirmation allege a clear and unambiguous promise by the Property LLCs to pay for legal services rendered on their behalf by Mintz, Mintz's reasonable reliance upon this promise in performing the requested legal work, and injury to Mintz by the Property LLCs' refusal to make payment on the invoices for legal services rendered")).

Therefore, dismissal of plaintiff's claim against Mrs. Birnbaum for promissory estoppel is denied.

Sanctions

22 NYCRR § 130-1.1 gives the Court, in its discretion, authority to award costs "in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees" and/or the imposition of financial sanctions upon a party or attorney who engages in frivolous conduct." 22 NYCRR § 130-1.1 © states that 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, should have been apparent, or was brought to the attention of counsel or the party.

In light of the Court's determination denying dismissal of plaintiff's fraud and promissory estoppel claims against Mrs. Birnbaum, it cannot be said that sanctions against plaintiff is warranted. Likewise, plaintiff's letter asserting the merits of such claims cannot be deemed frivilous or demonstrates an intent to harass or maliciously injure defendants, in light of the possibility that defendants may be found liable for the fees sought herein. Therefore, defendants' request for sanctions is denied.

Amend Answer

CPLR §3025(b) allows "a party to amend his pleadings, or supplement it by setting forth additional or subsequent transactions or occurrence, at any time by leave of Court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just. .. " It is well settled that leave to amend an answer pursuant to CPLR §3025(b) should be freely granted provided there is no prejudice to the nonmoving party (*Crimmins Contr. Co. v City of New York*, 74 NY2d 166 [1989]; *Eighth Ave. Garage Corp. v H.K.L. Realty Corp.*, 60 AD3d 404, 405 [1st Dept 2009]; *McCaskey, Davies & Assocs. v New York City Health & Hosps. Corp.*, 59 NY2d 755 [1983]; *Lambert v Williams*, 218 AD2d 618, 631 NYS2d 31 [1st Dept 1995]). Although leave to amend should be freely granted, the movant must make some evidentiary showing that the proposed amendment has merit, and a proposed pleading that fails to state a cause of action or is plainly lacking in merit will not be permitted (*Eighth Ave. Garage Corp. v H.K.L. Realty Corp.* at 405; *Hynes v Start Elevator, Inc.*, 2 AD3d 178, 769 NYS2d 504 [1st Dept

2003]; *Tishman Constr. Corp. v City of New York,* 280 AD2d 374 [1st Dept 2001]; *Bencivenga & Co. v Phyfe,* 210 AD2d 22 [1st Dept 1994]; *Bankers Trust Co. v Cusumano,* 177 AD2d 450 [1st Dept 1991], *lv dismissed* 81 NY2d 1067 [1993]; *Stroock & Stroock & Lavan v Beltramini*, 157 AD2d 590 [1st Dept 1990]). Further, leave to amend "may not be granted upon mere request, without appropriate substantiation. There must be compliance with the required procedure to permit the court to pass upon the merits of the leave for amendment" (*Brennan v City of New York*, 99 AD2d 445, 446 [1st Dept 1984], *citing East Asiatic Co. v Corash*, 34 AD2d 432 [1st Dept 1970]).

The party "opposing a motion to amend a pleading must overcome a presumption of validity in the moving party's favor, and demonstrate that the facts alleged and relied upon in the moving papers are obviously unreliable or insufficient to support the amendment" (*Peach Parking Corp. v 346 West 40th Street, LLC*, 42 AD3d 82, 86 [1st Dept 2007], *citing Daniels v Empire-Orr, Inc.*, 151 AD2d 370, 371 [1st Dept 1989]). However, those facts do not need to be proved at this juncture (*Daniels v Empire-Orr* at 371).

Counterclaims and Affirmative Defenses

Plaintiffs do not oppose the branch of defendants' motion seeking leave to amend their Answer to assert counterclaims for (1) rescission of the retainer agreement (alleging plaintiff's misrepresentation of the terms and conditions of the retainer agreement), (2) breach of fiduciary duty (based on the claim that plaintiff owed Mr. Birnbaum an undivided duty of loyalty and the retainer agreement benefitted one client over the interests of another client), and (3) negligence (based upon claims that plaintiff either intentionally or negligently failed to provide proper advice and counsel to Mr. Birnbaum as to the terms and conditions of the Retainer Agreement

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before he signed it). Therefore, the branch of defendants' motion to assert such counterclaims is granted.

Plaintiff also does not oppose defendants' request to assert the affirmative defenses of: (1) payment (based upon certain payments he made to Plaintiff); (2) unclean hands (based upon plaintiff's misrepresentations of the terms and conditions of the Retainer Agreement and plaintiff's breach of its fiduciary duty to Mr. Birnbaum; (3) estoppel, equitable estoppel, laches, and waiver (based upon plaintiff's misrepresentations that the $7,500.00 legal fee would cover plaintiff's expenses and plaintiff's failure to timely and properly bill Mr. Birnbaum pursuant to the Statement as to Billing Procedures); (4) Statute of Frauds codified in the GOL (which requires that all promises to pay the debts of another to be made in writing); (5) failure to mitigate (alleging that plaintiff continued to excessively charge Mr. Birnbaum for legal fees after he disputed the legal fees instead of seeking to immediately withdraw as his attorney); (6) unconscionability (in that the terms and conditions contained within the retainer agreement obligating Mr. Birnbaum to pay his prior employer's legal fees were unconscionable and the result of plaintiff's misrepresentations to Mr. Birnbaum and (7) violation of the New York Rules of Professional Conduct (alleging that the legal fees charged by plaintiff are excessive and unreasonable and fraudulent). As such, leave to assert such affirmative defenses is granted.

However, plaintiff objects to defendants' purported defenses of lack of privity of contract (7th affirmative defense), based on the claim that there is no contract between plaintiff and Mrs. Birnbaum for any legal services. Plaintiff contends that it alleges no breach of contract claim against Mrs. Birnbaum, and, as demonstrated above, none of the causes of action which plaintiff does allege against her, *i.e.*, fraud and promissory estoppel, is dependent upon, or requires proof

of, privity of contract between plaintiff and Mrs. Birnbaum. Defendants do not challenge the assertions made by plaintiff, and the absence of privity of contract does not bar the existing claims of fraud and promissory estoppel against Mrs. Birnbaum. Therefore, the lack of privity does not constitute a valid defense, and leave to assert this defense is denied.

Plaintiff also objects to the proposed 13th affirmative defense that plaintiff's causes of action are barred, in whole or in part, because plaintiff failed to either obtain a signed retainer agreement from Mrs. Birnbaum or to provide her with a valid written letter of engagement, pursuant to 22 NYCRR §1215.l and Part 137 of the Rules of the Court relating to fee disputes. Plaintiff argues that such rules apply to "clients," and neither plaintiff nor defendants allege that Mrs. Birnbaum was ever a client of plaintiff. Further, agreements or arrangements with third parties to pay clients' legal fees were, at the time of Mrs. Birnbaum's payment promises, governed by the then-New York Code of Professional Responsibility, DR 5-107(A)(1) (22 NYCRR § 1200.26) (now Professional Conduct Rule 1.8(f)), providing that an attorney may accept compensation for legal services from one other than the client only with the informed consent of the client. The evidence demonstrates that the two defendants acted jointly at all times and in all respects with respect to plaintiff, they do not and cannot claim that Mr. Birnbaum was anything other than fully aware of Mrs. Birnbaum's two payments to plaintiff in June and July 2008, or her unfulfilled promises of further payment.

Defendants do not challenge the assertions made by plaintiff, and Section 1215.1 provides that "an attorney who undertakes to represent *a client* and enters into an arrangement for, charges or collects any fee from *a client* shall provide to the *client* a written letter of engagement before commencing the representation." This Section clearly applies to "clients"

and Mrs. Birnbaum was not a client of plaintiff. Thus, the proposed 13th affirmative defense is legally insufficient, and leave to assert this defense is likewise denied.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the branch of defendants' motion to for summary judgment dismissing the third and fifth causes of action for unjust enrichment and promissory estoppel against Mrs. Birnbaum is granted as to the third cause of action for unjust enrichment as asserted against her, and denied as to the fifth cause of action for promissory estopppel as asserted against her, and the third cause of action for unjust enrichment as asserted against Mrs. Birnbaum is severed and dismissed; and it is further

ORDERED that the branch of defendants' motion to dismiss plaintiff's fourth cause of action for fraud and punitive damages as against both defendants for failure to state a cause of action is granted as asserted against Mr. Birnbaum, and denied as asserted against Mrs. Birnbaum, and the fourth cause of action for fraud and punitive damages as asserted against Mr. Birnbaum is severed and dismissed; and it is further

ORDERED that the branch of defendants' motion for sanctions is denied; and it is further

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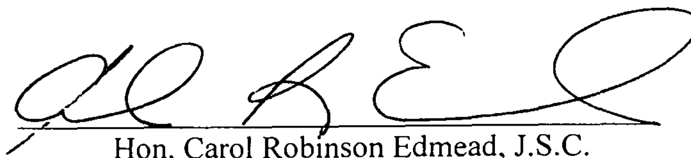
ORDERED that the branch of defendants' motion for leave to serve the Amended Answer in the form attached to its motion is granted, except as to their proposed 7th and 13th affirmative defenses.

This constitutes the decision and order of the Court.

Dated: May 5, 2011



Hon. Carol Robinson Edmead, J.S.C.