

**Steven J. Kaye Assocs., P.C. v Law Off. of Mitchell
N. Kay, P.C.**

2012 NY Slip Op 30041(U)

January 9, 2012

Supreme Court, New York County

Docket Number: 601443/08

Judge: Doris Ling-Cohan

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

PRESENT: DORIS LING-COHAN
J.S.C.
Justice

PART 36

Steven J. Kaye Associates
-v-
Mitchell N. Kay, P.C.

INDEX NO. 6014436a
MOTION DATE _____
MOTION SEQ. NO. 002


The following papers, numbered 1 to _____, were read on this motion to/for Summary judgment
 Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1, 2
 Answering Affidavits — Exhibits _____ | No(s). 3
 Replying Affidavits _____ | No(s). 4

Upon the foregoing papers, It is ordered that this motion ~~is~~ by plaintiff for summary judgment & to dismiss affirmative defenses / counterclaim is decided in accordance with the attached memorandum decision.

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

UNFILED JUDGMENT
 This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 1/9/12


DORIS LING-COHAN, J.S.C.
 J.S.C.

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

UNFILED JUDGMENT

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 36

-----X
STEVEN J. KAYE ASSOCIATES, P.C.,

Plaintiff,

Index No.: 601443/08
DECISION/ORDER

-against-

THE LAW OFFICES OF MITCHELL N. KAY, P.C.,
Defendant.

Motion Seq. No.: 002

-----X
HON. DORIS LING-COHAN, J.S.C.:

In this contract action between two law firms, plaintiff moves for summary judgment, both on the complaint and to dismiss defendants' affirmative defenses and counterclaims (motion sequence number 002). For the following reasons, this motion is granted in part and denied in part.

BACKGROUND

Plaintiff Steven J. Kaye Associates, P.C. and defendant Law Offices of Mitchell N. Kay, P.C. are both law firms licensed to do business in New York State as professional corporations. See Notice of Motion, Exhibit A (complaint), ¶ 1. Because of the similarities in their names, the court will simply refer to the parties as "plaintiff" and "defendant" in this decision.

Plaintiff states that it executed a contract (the contract) with defendant on May 18, 2006 by which plaintiff sold its law practice to defendant. *Id.*, ¶ 2; Exhibit A-1 (contract). The relevant portions of the contract provide as follows:

2. Transaction. Subject to the terms and conditions of this Agreement, Seller [i.e., plaintiff] shall sell, assign, convey, transfer and deliver to Purchaser [i.e., defendant], and Purchaser shall purchase, all of Seller's right, title and interest in and to the Practice. In connection therewith, Purchaser shall replace Seller as counsel for each Client Matter upon obtaining the respective Client's consent to such replacement in accordance with Section 3 below. The Parties acknowledge and agree that the purchase and sale of the Practice is subject to the right of each

Client to retain other counsel and take possession of his, her or its Client Records, and that Purchaser, unless a Client rejects Purchaser's representation or a conflict of interest exists, must represent each client.

6. Reports, Records and Accounting.

(a) Until the final disposition of each Client Matter, Purchaser shall cause to be prepared and delivered to Seller a monthly statement setting forth the status of each purchased Client Matter no later than the tenth (10th) day of each month, unless there has been no change in status since the last statement.

(b) Purchaser shall keep full and accurate books of accounts and other records showing all information necessary for Seller to ascertain and verify the Attorney Settlement Payment payable by Seller hereunder. Until the final disposition of each Client Matter, and for one year thereafter, Seller shall have the right, at any time upon ten (10) days written notice, to have an independent certified accountant of its own choosing inspect, during regular business hours, those books and other records relating to this Agreement for the purpose of verifying the accuracy of the Attorney Settlement Payment made to Seller by Purchaser. In the event that such inspection reveals an undisputed underpayment by Purchaser of the Actual Attorney Fee Payment owed Seller, Purchaser shall pay the difference, plus interest calculated at the rate per annum equal to 2% above the prime rate of interest in effect from time to time at Citibank, N.A. in New York, New York, U.S.A. from the date such payments were actually due, until paid. If such undisputed underpayment is in excess of five thousand (\$5,000.00) dollars, Purchaser shall also reimburse Seller for the cost of such inspection.

14. Miscellaneous. ...

(f) Assignment. Nothing in this Agreement shall permit Purchaser to do any of the following without the express, prior written consent of Seller: (i) assign any of its rights or obligations under this Agreement; (ii) sell, transfer or otherwise convey any Client Matter; or (iii) cease representing a Client unless due to a conflict of interest or such Client elects to reject or terminate Purchaser's representation.

Notice of Motion, Exhibit A-1, at 2-4, 9. The court notes that the contract was signed by both parties. *Id.* at 10.

Plaintiff alleges that, in approximately May of 2007, defendant ceased sending it the monthly status reports and payments specified in the contract. *See* Notice of Motion, Kaye Affirmation, ¶ 7. Plaintiff also claims that defendant settled a number of the client matters that it transferred via the contract, but did not remit any payments to plaintiff. *Id.*, ¶ 8. Plaintiff further

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claims that defendant assigned and/or transferred some of the client matters to other attorneys, all in violation of the contract. *Id.*, ¶ 9. Plaintiff has presented an affidavit from defendant, copies of e-mail correspondence and copies of financial statements, all of which show that defendant did, indeed, assign, transfer and settle a quantity of the client matters that it purchased from plaintiff. Notice of Motion, Exhibits I-1, I-2, I-3, I-4. Plaintiff has also presented copies of the demands that it made on defendant for an accounting of the fees that plaintiff claims are due from the settled matters. *Id.*, Exhibit D.

Defendant denies that it ever entered into a contract to purchase plaintiff's law practice. *See Kay*, Affidavit in Opposition, ¶ 4. Instead, and despite the clear language of the contract, defendant claims that it only purchased certain personal injury matters from plaintiff, and alleges that plaintiff improperly withheld some of the files that defendant had purchased. *Id.*, ¶¶ 4-5. However, defendant admits that it took over plaintiff's former offices in Brooklyn and hired most of plaintiff's staff. *Id.*, ¶¶ 16-17. Defendant also admits that it "has transferred all of plaintiff's files to firms experienced in the prosecution of personal injury claims." *Id.*, ¶ 12. However, defendant denies that plaintiff ever sent a request for monthly status reports and disputes the amounts that plaintiff claims defendant owes. *Id.*, ¶¶ 7-9.

Plaintiff commenced this action on May 8, 2008 by filing a complaint that sets forth causes of action for: 1) breach of contract; 2) conversion; 3) an accounting; and 4) a declaratory judgment. *See Notice of Motion*, Exhibit A. Defendant filed an answer on July 22, 2008 that includes affirmative defenses and three counterclaims for fraudulent misrepresentation. *Id.*; Exhibit B. Plaintiff now moves for summary judgment on the complaint, and to dismiss defendants' affirmative defenses and counterclaims (motion sequence number 002). Defendant opposes the motion.

DISCUSSION

When seeking summary judgment, the moving party bears the burden of proving, by competent, admissible evidence, that no material and triable issues of fact exist. *See e.g. Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985); *Sokolow, Dunaud, Mercadier & Carreras LLP v Lacher*, 299 AD2d 64 (1st Dept 2002). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action. *See e.g. Zuckerman v City of New York*, 49 NY2d 557, 560 (1980); *Pemberton v New York City Tr. Auth.*, 304 AD2d 340, 342 (1st Dept 2003). Here, as previously mentioned, the first branch of plaintiff's motion seeks summary judgment on the complaint.

Plaintiff's first cause of action alleges breach of contract. *See* Notice of Motion, Exhibit A (complaint), ¶¶ 24-25. The proponent of a breach of contract claim must plead the existence and terms of a valid, binding contract, its breach, and resulting damages. *See e.g. Gordon v Dino De Laurentiis Corp.*, 141 AD2d 435, 436 (1st Dept 1988). Here, plaintiff presents the contract, signed by both parties, and defendant's affidavit stating that he transferred client matters to other attorneys in violation of paragraph 14 (f) thereof. *See* Notice of Motion, Exhibits A-1, I-1. Defendant's only opposition is its previously noted allegation that the contract pertained only to the transfer of personal injury litigation. *See* Kay Affidavit in Opposition, ¶ 4. However, this is clearly belied by the terms of the contract itself. It is well settled that "on a motion for summary judgment, the construction of an unambiguous contract is a question of law for the court to pass on, and ... circumstances extrinsic to the agreement or varying interpretations of the contract provisions will not be considered, where ... the intention of the parties can be gathered from the instrument itself." *Maysek & Moran, Inc. v S.G. Warburg & Co., Inc.*, 284 AD2d 203, 204 (1st

Dept 2001), quoting *Lake Constr. & Development Corp. v City of New York*, 211 AD2d 514, 515 (1st Dept 1995). Therefore, the court rejects defendant's opposition, as plaintiff has demonstrated that defendant did, in fact, breach the contract by impermissibly transferring client matters to other counsel. However, plaintiff has not presented conclusive evidence of the amount of monetary damage that this breach resulted in, and therefore, the issue of damages shall be referred to a Special Referee to hear and determine, in accordance with CPLR §4317(b). Accordingly, plaintiff is entitled to partial summary judgment on the issue of liability on its first cause of action, with damages to be determined by a Special Referee.

Plaintiff's second cause of action alleges conversion. *See* Notice of Motion, Exhibit A (complaint), ¶¶ 26-27. As an initial matter, the Court of Appeals holds that the "[t]wo key elements of conversion are: (1) plaintiff's possessory right or interest in the property and (2) defendant's dominion over the property or interference with it, in derogation of plaintiff's rights." *Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 49-50 (2006)(internal citations omitted). Here, plaintiff specifically alleges that defendant has converted the monthly attorney settlement payments that were due pursuant to paragraph 5 of the contract. *See* Plaintiff's Memorandum of Law, at 8-9. Plaintiff cites the Court of Appeals' decision in *Sporn v MCA Records, Inc.* (58 NY2d 482 [1983]) for the proposition that "defendant's resale of the cases he purchased from plaintiff amounts to a kind of commercial exploitation ... which Court have declared to be a conversion." *See* Plaintiff's Memorandum of Law, at 9.

Defendant does not address plaintiff's conversion argument. Nevertheless, the court notes that, in cases involving alleged conversion of money, the Appellate Division, First Department, has long adhered to the rule that a plaintiff must identify "specified funds" that he/she entrusted to a defendant's custody only for a "particular purpose," and demonstrate that

the defendant instead improperly retained the funds without discharging his/her duty. *See Thys v Fortis Securities LLC*, 74 AD3d 546, 547 (1st Dept 2010), citing *Meese v Miller*, 79 AD2d 237 (4th Dept 1981). Here, however, plaintiff has not identified any “funds” that it entrusted to defendant, but has rather merely alleged that defendant failed to make periodic payments that were due under the contract. This does not satisfy the legal definition of a “specified fund,” and, therefore, plaintiff’s conversion claim must fail, as a matter of law. Moreover, plaintiff’s conversion claim is predicated solely on a breach of contract and the First Department has held that a claim of conversion cannot be based solely on a mere breach of contract claim; such a claim, alleging “no independent facts sufficient to give rise to tort liability”, would be “nothing more than a restatement of [the] breach of contract claim”. *Fesseha v. TD Waterhouse Investor Services*, 305 AD2d 268, 269 (1st Dept 2003); *see also Interstate Adjusters, Inc., v. First Fid. Bank, N.A.*, 251 AD2d 232 (1st Dept 1998); *Yeterian v. Heather Mills N.V., Inc.*, 183 AD2d 493 (1st Dept 1992). Therefore, the portion of plaintiff’s motion that seeks summary judgment on its second cause of action for conversion is denied.

Further, pursuant to CPLR 3212 (b), a court presented with a motion for summary judgment is empowered to search the record and grant summary judgment to any party, including a non-moving party, which is entitled to such relief. *See e.g. Levin v 117 Limited Partnership*, 291 AD2d 304 (1st Dept 2002), citing *Merritt Hill Vineyards Inc. v Windy Heights Vineyard, Inc.*, 61 NY2d 106, 110-11 (1984). Here, although defendant has not submitted a cross motion for summary judgment, defendant is entitled to summary judgment dismissing plaintiff’s second cause of action for conversion, as, pursuant to CPLR 3212 (b), a court presented with a motion for summary judgment is empowered to search the record and grant summary judgment to any party, including a non-moving party, which is entitled to such relief. *See Dunham v Hilco*

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Constr. Co., 89 NY2d 425, 429-430 (1996), *Levin v 117 Limited Partnership*, 291 AD2d 304 (1st Dep't 2002), citing *Merritt Hill Vineyards Inc. v Windy Heights Vineyard, Inc.*, 61 NY2d 106, 110-11 (1984).

Plaintiff's third cause of action requests an accounting. See Notice of Motion, Exhibit A (complaint), ¶¶ 28-30. The court notes that this is normally an equitable claim; however, plaintiff here makes its request pursuant to the terms of the contract. See Plaintiff's Memorandum of Law, at 6-7. Therefore, the court deems that plaintiff's claim is improperly pled, and should be treated as a request for a declaratory judgment, which the law defines as a discretionary remedy which may be granted "as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed." CPLR 3001; see e.g. *Jenkins v State of New York, Div. of Hous. and Community Renewal*, 264 AD2d 681, 682 (1st Dept 1999). Here, defendant oppose plaintiff's request on the ground that it "is not supported by the evidence and is, at the very least, premature." See Defendant's Memorandum of Law, at 7. However, with respect to the former point, the plain language of paragraph 6 (b) of the contract clearly entitles plaintiff to request, and defendant to furnish, an accounting upon a written demand. With respect to the latter, defendant offers no explanation as to why plaintiff's request is premature, especially in light of the fact that plaintiff has presented proof that it made several written demands for an accounting. See Notice of Motion, Exhibit D. Therefore, plaintiff is entitled to summary judgment awarding it a declaration that defendant is obligated to furnish it with an accounting. Accordingly, plaintiff's motion is granted with respect to its third claim.

Plaintiff's final cause of action specifically requests a declaratory judgment that plaintiff is entitled to an attorney's lien pursuant to Judiciary Law § 475. See Notice of Motion, Exhibit

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A, ¶ 33. Generally, such statute requires the lienor to commence a special proceeding via filing a petition and notice of petition when applying for such a lien. However, it has been held to be within the court's discretion to treat the notice of motion and its supporting and opposing affidavits as a notice of petition and pleadings. *See Flores v Barricella*, 123 AD2d 600 (2d Dept), appeal denied 69 NY2d 602 (1986). The court elects to do so here.

Plaintiff asserts that it is entitled to a lien on all of the attorney settlement payments pursuant to paragraph 5 of the contract, together with the interest charges for underpayment that are specified in paragraph 6 (b) of the contract. *See Plaintiff's Memorandum of Law*, at 5-6. Defendant opposes plaintiff's request on the ground that "plaintiff has engaged in fraud and misrepresentation," which "exonerate[s] defendant from performance under the" contract. *See Defendant's Memorandum of Law*, at 4-6. The conduct defendant refers to consists of the allegation that plaintiff misrepresented certain expenditures that it allegedly made in connection with some of the transferred litigation in order to obtain a refund for those expenditures from defendant. *See Kay Affidavit in Opposition*, ¶¶ 9-10. Plaintiff replies that this is not a defense to a lien, and that, in any case, defendant has not presented any evidence to support its allegation. *See Plaintiff's Reply Memorandum*, at 2-3. Plaintiff is correct.

It is axiomatic that "'averments merely stating conclusions, of fact or of law, are insufficient' to 'defeat summary judgment.'" *Banco Popular North America v Victory Taxi Management, Inc.*, 1 NY3d 381, 383 (2004) [internal citations omitted]. Here, defendant has offered nothing more than its own self-serving allegation that plaintiff obtained a fraudulent refund without presenting any documentary evidence to support his claim. Therefore, the court rejects defendant's argument; plaintiff is entitled to summary judgment on the issue of liability on its claim pursuant to Judiciary Law § 475. However, as is the case with plaintiff's breach of

contract claim, the issue of the amounts for which defendant is liable to plaintiff cannot presently be calculated, and that issue is therefore referred to a Special Referee to hear and determine. Accordingly, the first branch of plaintiff's motion is granted in part and denied in part, as discussed above.

The second branch of plaintiff's motion seeks summary judgment to dismiss defendant's three affirmative defenses/counterclaims for fraud and/or fraudulent misrepresentation. *See* Notice of Motion, Exhibit B (answer), ¶¶ 16-41. The proponent of a claim for fraud "must allege misrepresentation or concealment of a material fact, falsity, scienter by the wrongdoer, justifiable reliance on the deception, and resulting injury." *Zanett Lombardier, Ltd. v Maslow*, 29 AD3d 495, 495 (1st Dept 2006). The court will review each of defendant's allegations in turn.

Defendant first claims that plaintiff "misrepresented...the viability of the cases that he transferred to defendant." *See* Notice of Motion, Exhibit B, ¶ 16. Plaintiff argues that it made no such representations, and refers to paragraphs 9 ("Representations and Warranties of the Seller") and 14 (d) ("Entire Agreement") of the contract, neither of which sets forth such representations, as proof of its allegations. *See* Plaintiff's Memorandum of Law, at 11. Defendant responds that "the merger clause is not a bar to defendant's ... claim." *See* Defendant's Memorandum of Law, at 10. However, defendant cites no authority to support this position. Nevertheless, the court agrees with plaintiff that the contract does not contain any of the representations that defendant complains of. Therefore, it is clear that defendant would not have been justified in relying upon them, had they been made, and, thus, defendant's first affirmative defense/counterclaim should be dismissed on this ground.

Defendant's second claim is that plaintiff falsely represented that it had obtained permission from the landlord to release defendant from the terms of the lease governing

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plaintiff's former office space. *See* Notice of Motion, Exhibit B, ¶ 25. Defendant's third claim is that plaintiff falsely claimed that the termination date of lease for plaintiff's former office space was September 30, 2007, when in reality it was August 31, 2009. *See* Notice of Motion, Exhibit B, ¶ 38-39. With respect to both of the foregoing claims, plaintiff argues that they are belied by the terms of the lease, a copy of which it provided to defendant prior to the execution of the contract, and that defendant's alleged reliance on plaintiff's purported representations is, therefore, unjustified. *See* Plaintiff's Memorandum of Law, at 11-13. Defendant responds that it received the assignment of plaintiff's lease after it had executed the contract. *See* Defendant's Memorandum of Law, at 11. However, this argument is unsustainable in view of the fact that paragraph 1 of the assignment plainly states that defendant has received and read a copy of the original lease. *See* Notice of Motion, Exhibit F. Therefore, the court rejects defendant's argument; plaintiff is correct that defendant cannot establish the element of reasonable reliance with respect to its last two affirmative defenses/counterclaims for fraud. Accordingly, that branch of plaintiff's motion which seeks dismissal of all of defendant's affirmative defenses/counterclaims is granted.

DECISION

Accordingly, it is

ORDERED that the motion, pursuant to CPLR 3212, of plaintiff Steven J. Kaye Associates, P.C. is granted to the extent that plaintiff is awarded partial summary judgment on its breach of contract claim and on its two claims for declaratory judgment, with the issue of the calculation of damages thereon to be referred to a Special Referee to hear and determine pursuant to CPLR 4317(b); plaintiff is also awarded summary judgment dismissing defendant's affirmative defenses/counterclaims; plaintiff's motion is denied with respect to plaintiff's second

cause of action for conversion, which is dismissed; and it is further

ORDERED that within 60 days of entry of this order, plaintiff shall serve a copy, with notice of entry, upon defendant and upon the Clerk of the Judicial Support Office, to arrange a calendar date for the reference to a Special Referee; the failure to timely comply with this directive, will result in the dismissal of this case; and it is further

ORDERED and ADJUDGED that plaintiff is entitled to an accounting as provided in §6(a) and (b) of the contract, and defendant shall comply with §6(a) and (b), including providing "those books and other records relating to this Agreement for the purpose of verifying the accuracy of the Attorney Settlement Payment made to Seller by Purchaser", as provided in §6(b); and it is further

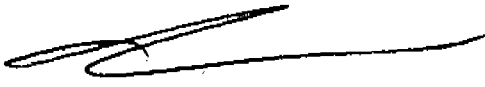
ORDERED and ADJUDGED that plaintiff is entitled to an attorney's lien, in accordance with Judiciary Law §475, in an amount to be determined by the Special Referee, on the attorney settlements pursuant to paragraph 5 of the contract, together with the interest charges for underpayment that are specified in paragraph 6(b) of the contract and defendant shall notify all appropriate entities of plaintiff's lien, with a copy to plaintiff; and it is further

ORDERED that within 30 days of entry of this order, plaintiff shall serve a copy upon defendant with notice of entry.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: New York, New York
January 9, 2012



Hon. Doris Ling-Cohan, J.S.C.