

Batista v KLS-Kachroo Legal Servs., P.C.
2012 NY Slip Op 32016(U)
July 23, 2012
Supreme Court, New York County
Docket Number: 104295/2010
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. EILEEN A. RAKOWER
Justice

PART 15

Index Number : 104295/2010
BATISTA, PAUL
vs.
KLS-KACHROO LEGAL SERVICES,
SEQUENCE NUMBER : 005
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s) 1, 2
Answering Affidavits — Exhibits _____ | No(s) 3, 4
Replying Affidavits _____ | No(s) _____

Upon the foregoing papers, It is ordered that this motion is

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

**DECIDED IN ACCORDANCE WITH
ACCREDITED PRACTICE / ORDER**

FILED

JUL 31 2012

NEW YORK
COUNTY CLERK'S OFFICE



_____, J.S.C.
HON. EILEEN A. RAKOWER

Dated: 7/23/12

- 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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

-----X
PAUL BATISTA and PAUL BATISTA, P.C.,

Plaintiffs,

- against -

KLS-KACHROO LEGAL SERVICES, P.C.,
GAYTRI D. KACHROO, and PATRICIA COHEN,
Defendants.

-----X
HON. EILEEN A. RAKOWER

Index No.
104295/10

**DECISION
AND ORDER**

Mot. Seq.
005

FILED

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This is an action to enforce an attorneys' lien under N.Y. Judiciary Law 475. Presently before the Court is a motion by plaintiffs Paul Batista and Paul Batista, P.C., pursuant to CPLR §3212 for an order dismissing defendant Patricia Cohen's ("Cohen") counterclaims and affirmative defenses. Cohen cross-moves pursuant to CPLR §3212 for an order granting summary judgment in her favor and dismissing plaintiff's Complaint. Defendants KLS-Kachroo Legal Services, P.C. and Gaytri D. Kachroo do not oppose.

Cohen executed a retainer agreement dated April 21, 2009 (the "Retainer Agreement") with Batista. As per the Retainer Agreement, Batista "agreed to prepare, file and prosecute a complaint and action in the United States District Court for the Southern District of New York against [Steven] Cohen" that would "allege that [Steven] Cohen violated [RICO] based on the scheme to defraud" Cohen. In exchange for Batista's services, Cohen agreed to the following compensation terms:

"A \$75,000 "one-time payment for legal services to be made at the time of the signing of this agreement; and

27% of any recovery from a settlement, judgment or other transfer from [Steven] Cohen, directly or indirectly, to [Cohen] or to [Cohen's] heirs,

executors, trustees, children, agents, designees, or anyone else receiving payment as a result of [Batista's] efforts on [Cohen's] behalf. The 27% contingent fee will constitute a lien in [Batista's] favor on any recovery from [Steven] Cohen. Moreover, the 27% will be calculated on the value of the recovery whether it is received in the form of cash, securities, real estate, or other tangible things of value."

The Retainer Agreement also provided that other than the "one-time \$75,000 legal fee and the 27% contingency for legal fees," plaintiffs would "receive no other payment for legal services in connection with the prosecution of claims against [Steven Cohen]."

In Batista's affidavit, he claims that following the execution of the Retainer Agreement, he devoted significant effort to the investigation and preparation of the complaint filed in the federal action on behalf of Cohen. Batista asserts that without cause, Cohen stopped communicating with him and retained Kachroo, another counsel, to represent her. Batista contends that he was contacted by Kachroo on December 30, 2009 and Kachroo demanded that he "transfer the file" relating to Cohen. Batista states that no reason was given by Kachroo for the demand. Batista states that Cohen's allegations that he was "discharged" or "terminated for cause" lack merit. Batista claims that the subsequent amended complaints filed by Kachroo and a third lawyer retained by Cohen were substantially identical to the December 2009 Complaint that he had prepared on her behalf. Cohen's federal claims are still pending according to Batista. Cohen's most recent lawyer recently argued before the United States Court of Appeals for the Second Circuit for reversal of the 2011 dismissal of the federal action.

In her affidavit, Cohen does not dispute that she entered into the Retainer Agreement to pursue a claim against her former husband and that plaintiff filed a RICO Complaint on her behalf. Cohen alleges that she later learned from other lawyers that the RICO Complaint filed by Batista was deficient and would not withstand a motion to dismiss. Cohen claims that she advised plaintiff that she wanted him to amend the RICO Complaint but that he refused to do so. Cohen alleges that Kachroo agreed to take over representation of her case. Cohen contends that plaintiff was discharged for cause. In her Verified Answer, Cohen alleged the following affirmative defenses:

- [*4]
1. Plaintiffs have failed to state a claim upon which relief can be granted.
 2. Plaintiffs were discharged as counsel for Patricia Cohen for cause, and are not entitled to any fee for legal fees rendered.
 3. If it is determined that Plaintiffs were not discharged for cause, then Plaintiffs are only entitled to recover or retain, in quantum meruit, the reasonable value of the legal services rendered for Patricia Cohen, and are entitled to no fee under the circumstances in any event.
 4. Plaintiffs improperly demanded, sought and retained a non-refundable retainer fee of \$75,000 all contrary to the Rules of Professional Conduct and existing law.
 5. Plaintiffs are not entitled to any contingency recovery.
 6. Plaintiffs are not entitled to any statutory or common law lien on any cause of action, claim or counterclaim of Patricia Cohen.
 7. Plaintiffs improperly disclosed privileged and confidential communications with Patricia Cohen in this Complaint are not entitled to any legal fee for services rendered.
 8. Plaintiffs improperly disclosed privileged and confidential communications with Patricia Cohen to the news media and are not entitled to any legal fee for services rendered.

Additionally, Cohen asserted three Counterclaims against plaintiffs.

Cohen's first Counterclaim alleges that the Complaint filed by Batista "was deficient" and demands a judgment of \$75,000 and an order precluding the collection of the contingency. Cohen alleges that Batista's services were deficient on the basis that Batista did not draft an "executive summary"; that Batista did not draft or prepare the Complaint against Cohen's former husband for nearly six months after being retained, that the action filed by Cohen was deficient insofar as the Complaint failed to allege sufficient unlawful conduct under RICO; and that

her former husband's counsel threatened sanctions in the federal action against Batista.

In response, Batista states that Cohen has pointed to no deficiency in the complaint he filed and that the original complaint functioned as the prototype for the two amended complaints filed by the two lawyers that followed him. Batista further states that he "declined to make allegations to advance as to Steven Cohen's personality, family and other relationships and other personal matters that were not appropriate for inclusion in the complaint." Batista also states that the decision of the Judge Holwell to dismiss the second amended complaint "does not conclude that there were deficiencies in the racketeering claims. Judge Holwell dismissed the case on the ground that it was barred by RICO's four-year Statute of Limitations because of his view that defendant Cohen long ago knew or should have known of her RICO injury and the basis for her claim." Batista also states that "[a]ny rational comparison of the 'Executive Summary' when the complaint in the Federal Action demonstrates that it is nonsense for Cohen to allege that he 'copied' the 'Executive Summary.'" Batista further states that no motion for sanctions was ever filed against him by defendant Cohen's attorneys.

Cohen's second Counterclaim asserts that Batista "unlawfully and maliciously disclosed confidential and privilege communications with Cohen . . ." and demands a judgment of \$2 million. No additional allegations are set forth with respect to this Counterclaim. Batista states that "[a]ny communications I released when filing this action were released because Cohen had repeatedly, publicly and falsely claimed that I was discharged for cause and had already sought to evade her responsibility under the retainer agreement and to demand the forfeiture of the \$75,000 paid to me under the agreement."

Cohen's third Counterclaim asserts, "Even if it is determined that [p]laintiffs were not discharged for cause, they are not entitled to any fee, and the retention of the \$75,000 is unlawful."

Cohen states that plaintiff has failed to provide any documents in the discovery which are "highly relevant to [her] affirmative defense and counterclaims." Cohen does not state or otherwise specify what discovery remains needed to prove her claims.

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The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. (*Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*, 145 A.D.2d 249, 251-52 [1st Dept. 1989]).

Judiciary Law § 475, “which is a statutory codification of the common-law charging lien,” provides:

From the commencement of an action, special or other proceeding in any court . . . the attorney who appears for a party has a lien upon his client's cause of action, claim or counterclaim, which attaches to a verdict, report, determination, decision, judgment or final order in his client's favor, and the proceeds thereof in whatever hands they may come; and the lien cannot be affected by any settlement between the parties before or after judgment, final order or determination. The court upon the petition of the client or attorney may determine and enforce the lien.

Cabukyuksel v Ascot Props., LLC, 2011 N.Y. Misc. LEXIS 4220 at *15 (N.Y. Sup. Ct. Aug. 24, 2011)(citing to Judiciary Law § 475).

There are three prerequisites to the creation of a charging lien: as a result of the attorney's efforts, (1) the client must assert a claim (2) which results in proceeds (3) payable to or for the benefit of the client. *Tunick v. Shaw*, 6 Misc. 3d 1014A at *7 (N.Y. Sup. Ct. 2004) (citations omitted).

“A client may discharge an attorney at any time with or without cause. However, when a client discharges an attorney without cause, the attorney is entitled to recover compensation from the client measured by the fair and reasonable value of the services rendered whether that be more or less than the amount provided in the contract or retainer agreement.” *Morrison Cohen Singer & Weinstein v. Zuker*, 203 A.D. 2d 119, 119-20 (1st Dept 1994). “If an attorney

7] has been dismissed for cause, he is not entitled to compensation for a retaining lien, regardless of the terms of the retainer agreement.” *Teichner v. W & J Holsteins*, 64 N.Y. 2d 977 (1985). A discharge for cause refers, generally, to an attorney’s impropriety or misconduct, or the attorney’s abandonment of the client’s case. (*Klein v. Eubank*, 87 NY2d 459 [1996]; *Teichner by Teichner v. W&J Holsteins, Inc.* 64 NY2d 977 [1985]). “An attorney is discharged for cause when his or her conduct falls ‘below the ordinary and reasonable skill and knowledge commonly possessed by a member of the profession.’” *Peirce v. Neuman*, 2011 N.Y. Misc. Lexis 3288 (N.Y. Sup. Ct. July 1, 2011) (citing *Morrison Cohen*, 203 A.D. 2d. at 119-20).

Furthermore, “[u]nder New York law, a client has an affirmative cause of action for rescission of an invalid retainer agreement and restitution or recoupment of legal fees paid in excess of the reasonable amount due to the attorney for services actually rendered.” *Levisohn, Lerner, Berger & Langsam v. Medical Taping Systems, Inc.*, 20 F. Supp. 2d 645, 650 (S.D.N.Y. 1998) (citations omitted). See Rule 1.5(d)(4) of the New York Rules of Professional Conduct and Responsibilities; *In re Cooperman*, 83 N.Y. 2d 465, 474 (1994).

In the instant matter, there are issues of fact regarding the nature of the retainer agreement, the circumstances surrounding plaintiff’s termination, and the disclosure of certain communications which preclude the Court’s granting of plaintiff’s motion for summary judgment to dismiss Cohen’s affirmative defenses and first and second Counterclaims and defendant’s cross-motion. Summary judgment is appropriate with respect to Cohen’s third Counterclaim which asserts, “Even if it is determined that [p]laintiffs were not discharged for cause, they are not entitled to any fee, and the retention of the \$75,000 is unlawful.” While Cohen attempts to characterize the \$75,000 payment as a non-refundable fee, such characterization is not supported by the plain language of the agreement. Even if plaintiffs were not discharged for cause, plaintiffs would be entitled to a quantum meruit assessment of the services rendered.

It is hereby,

ORDERED that plaintiffs' Paul Batista and Paul Batista, P.C.'s motion for summary judgment is granted to the extent that defendant Patricia Cohen's third Counterclaim is dismissed; and it is further

ORDERED that defendant Patricia Cohen's cross-motion for summary judgment is denied.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

DATED: 7/23/12



EILEEN A. RAKOWER, J.S.C.

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FILED

JUL 31 2012