

Holmes v Griffith

2013 NY Slip Op 31299(U)

June 12, 2013

Sup Ct, NY County

Docket Number: 154678/2012

Judge: Eileen A. Rakower

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

PRESENT: Hon. EILEEN A. RAKOWER

PART 15

Justice

EDWIN HOLMES,

Plaintiff,

- v -

**GREGORY H. GRIFFITH
GREGORY H. GRIFFITH, ESQ., P.C.,**

Defendants.

INDEX NO. 154678/2012

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. 001

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

Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...

Answer – Affidavits – Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1, 2

3, 4

5

Edwin Holmes (“Plaintiff”) brings this action seeking damages for alleged breach of contract, breach of covenant of good faith and fair dealing, and unjust enrichment by his attorney Gregory H. Griffith and Gregory H. Griffith, Esq., P.C. (collectively “Defendants”). Defendants move for an Order pursuant to CPLR §§3211(a)(1) and (a)(7) dismissing the first, third and fourth causes of action and transferring the remaining cause of action to the Civil Court of the City of New York. Plaintiff opposes.

Plaintiff’s Verified Complaint alleges four causes of action: the first cause of action asserts that Defendant breached its retainer agreement by only performing legal services in the amount of \$1,500 and failing to return all unearned portions of the \$5,000 retainer; the second cause of action contends that Defendant breached his contractual obligation to pay back and satisfy a loan from Plaintiff of \$17,500; the third cause of action asserts that Defendant breached his implied covenant of good faith and fair dealing by willfully and intentionally avoiding the obligation to pay

back the loan depriving plaintiff of his right to receive repayment on that loan; and the fourth cause of action states that Defendant was unjustly enriched by Plaintiff's loan which was used by the Defendant to alleviate a lien on his home and other dire financial matters.

Under CPLR §3211(a) “a party may move for a judgment dismissing one or more causes of action asserted against him on the ground that: (1) a defense is founded upon documentary evidence; or ... (7) the pleading fails to state a cause of action.” A motion to dismiss based on documentary evidence may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law. (*Goshen v. Mut Life Ins Co.*, 98 NY2d 314 [2002]).

In determining whether dismissal is warranted for failure to state a cause of action, the court must “accept the facts alleged as true ... and determine simply whether the facts alleged fit within any cognizable legal theory.” (*People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 AD2d 91[1st Dept. 2003]) (internal citations omitted) (*see* CPLR §3211[a][7]).

Breach of Contract

In order to prevail on a breach of contract claim, a Plaintiff must establish each of the following four elements: (1) existence of a valid contract; (2) plaintiff's performance of the contract; (3) defendant's material breach of the contract; and (4) damages. (*Noise In The Attic Productions, Inc. v. London Records*, 10 AD3d 303, 782 NYS2d 1 [2004]).

Here, Plaintiff's first cause of action pleads: (1) the existence of a retainer agreement between Plaintiff and Defendant; (2) Plaintiff's performance of the contract by paying Defendant \$5,000 as an initial retainer to be applied “against hourly fees as they are incurred;” (3) Defendant's breach of the contract by “draft[ing] only one agreement . . . amounting to approximately \$1,500 in legal services and fees;” and (4) damages in that Defendant “failed to return the unearned portion of the retainer.” Plaintiff has sufficiently laid out a claim for breach of contract.

The second cause of action also alleges breach of contract, although it is based on a separate agreement. The second cause of action alleges that plaintiff wired to “Defendant’s business account the sum \$17,500 as a loan.” Defendant promised to repay the loan, but never did. Defendant does not move to dismiss this cause of action. However, Defendants do move to dismiss the Third and Fourth causes of action, which relate to the loan.

Breach of Good Faith and Fair Dealing

Under New York law, every contract implies good faith and fair dealing between the parties to it. (*511 West 232nd Owners Corp. v. Jennifer Realty Co.*, 98 NY2d 144, 746 NYS2d 131, 773 NE2d 496 [2002]). When the relief sought by the Plaintiff in the claim for a breach of the covenant of good faith is “intrinsically tied to the damages alleged resulting from [the] breach of contract,” there is no separate and distinct wrong that would give rise to an independent claim. (*Canastar v. JA Jones Contr. Co.*, 212 AD2d 452 [1st Dept 1995]).

The conduct asserted by Plaintiff in his third cause of action for the breach of the covenant of good faith and fair dealing as to Defendant’s alleged failure to repay the \$17,500 loan is “intrinsically tied” to the second cause of action for breach of contract, which alleges that Defendant breached a contract with Plaintiff when it failed to repay the \$17,500 loan. As such, the third cause of action for breach of covenant of good faith and fair dealing is dismissed.

Unjust Enrichment

Unjust enrichment is a quasi-contract cause of action viable only in the absence of a written contract. (*Clark-Fitzpatrick, Inc. v. Long Island R.R. Co.*, 70 NY2d 382 [1987]). It is an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties concerned. (*IDT Corp. v. Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 879 NYS2d 355, 907 NE2d 268 [2009]). “Where the parties executed a valid and enforceable written contract governing a particular subject matter, recovery on a theory of unjust enrichment for events arising out of that subject matter is ordinarily precluded.” (*Clark-Fitzpatrick, Inc. v. LIRR Co.*, 70 NY2d 382, 516 NE2d 190, 521 NYSd 653

[1987]).

Here, Plaintiff maintains a cause of action for unjust enrichment due to the \$17,500 loan he allegedly gave to Defendant, while simultaneously alleging the existence of an express contract entered into with Defendant on August 22, 2007. Defendant disputes that there was an express contract entered into as to the \$17,500 loan, or that such a loan ever was made. While Plaintiff claims he emailed Defendant inquiring about the loan, and “Defendant responded to the Plaintiff’s email acknowledging the loan and that he would repay the loan within a week,” there is no assertion that the response wa in writing. “Where there might be a dispute as to the existence of a contract, a Plaintiff is entitled to proceed in the alternative on an unjust enrichment claim against Defendant.” (*Forman Guardian Life Ins. Co. Of Am.*, 76 AD3d 886, 908 NYS2d 27 [1st Dept 2010]). Accordingly, the unjust enrichment cause of action remains as to the \$17,500 loan only.

Transfer to Civil Court

Defendant also moves to transfer this case to the Civil Court. Pursuant to CPLR §325(d), the Supreme Court may transfer claims to the Civil Court , the Court declines to do so in this matter.

Here, Plaintiff has alleged damages in the amount of approximately \$17,500 from Defendant for the loan and in the amount of \$3,500 for the alleged breach of the retainer agreement. Including statutory interest at nine percent per annum, assuming Plaintiff prevails on all claims, the amount alleged would total more than \$25,000.

Wherefore it is hereby,

ORDERED that Defendant’s motion to dismiss is granted to the extent that the Plaintiff’s third cause of action for breach of covenant of good faith and fair dealing is dismissed; and it is further,

ORDERED that the first cause of action for breach of contract, the second cause of action for breach of contract remain and the fourth cause of action for unjust enrichment remain.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: June 12, 2013



HON. EILEEN A. RAKOWER
U.S.C.

Check one: **FINAL DISPOSITION** **NON-FINAL DISPOSITION**

Check if appropriate: **DO NOT POST** **REFERENCE**