

Meister Seelig & Fein, LLP v Hornick

2013 NY Slip Op 31325(U)

June 19, 2013

Sup Ct, New York County

Docket Number: 155685/2012

Judge: Carol R. Edmead

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD
Justice

PART 35

Index Number : 155685/2012
MEISTER SEELIG & FEIN LLP
vs.
HORNICK, LOUIS
SEQUENCE NUMBER : 003
DISMISS

INDEX NO.
MOTION DATE 5 10 2013
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).
Answering Affidavits — Exhibits No(s).
Replying Affidavits No(s).

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

Motion sequence 003 is decided in accordance with the annexed Memorandum Decision. It is hereby

ORDERED that the motion of the plaintiff Meister Seelig & Fein, LLP and the third-party defendants Bluming Freiman & Franco, P.C., Freiman Franco, P.C., Sidney Bluming and Jeffrey Kimmel, pursuant to CPLR 3211(a)(7) and 3016 (b), to dismiss the counterclaims by defendants Louis Hornick and Louis Hornick & Co., Inc. against plaintiff Meister Seelig & Fein, LLP and the third-party complaint by defendant/third-party plaintiff Louis Hornick & Co., Inc., against the third-party defendants is granted in its entirety and said counterclaims and the third-party complaint are hereby severed and dismissed. And it is further

ORDERED that the parties shall appear for a status conference at Room 438, Part 35, 60 Centre Street, New York, New York, on July 23, 2013, at 2:30 p.m.; and it is further

ORDERED that counsel for said plaintiff shall serve a copy of this order with notice of entry within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: 6 19 2013

HON. CAROL EDMEAD, J.S.C.

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

- 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 35

-----X
MEISTER SEELIG & FEIN, LLP,

Plaintiff/Counterclaim Defendant,

Index No.: 155685/2012

-against-

DECISION AND ORDER
Motion sequence #003

LOUIS HORNICK and LOUIS HORNICK & CO., INC.,

Defendants/Counterclaim Plaintiff.

-----X
LOUIS HORNICK & CO., INC.,

Defendant/Third-Party Plaintiff

-against-

BLUMING FREIMAN & FRANCO, P.C., FREIMAN
FRANCO, P.C., SIDNEY BLUMING and JEFFREY KIMMEL,

Third-Party Defendants.

-----X
CAROL R. EDMEAD, J.S.C.:

MEMORANDUM DECISION

In this action for legal fees, plaintiff/counterclaim defendant Meister Seelig and Fein, LLP (“Meister”) and third-party defendants Bluming Freiman & Franco, P.C., Freiman Franco, P.C., Sidney Bluming (“Bluming”) and Jeffrey Kimmel (“Kimmel”) (collectively, the “Bluming defendants”) (collectively, with Meister, the “Attorneys”), move pursuant to CPLR 3211 (a)(7) and 3016 (b), for an order dismissing counterclaims asserted by the defendants/counterclaim plaintiffs Louis Hornick and Louis Hornick & Co., Inc. (“Hornick & Co.”) (collectively, the “Hornicks”), and the third-party complaint by defendant/third-party plaintiff Hornick & Co.¹

¹ The Attorneys sought dismissal of the first counterclaim against Meister and the first third-party claim against the Bluming defendants for *breach of contract* as facially insufficient and time-barred. However, during the pendency of the instant motion, pursuant to the parties' stipulation dated March 26, 2013, the Hornicks withdrew

Background Facts

It is alleged that in 2008, the Hornicks retained the Bluming defendants for representation in potential international arbitration. On the advice of the Bluming defendants, the Hornicks also retained Meister, and sometime thereafter, a local British counsel. The Bluming defendants remained the leading counsel in the case. Meister and the Bluming defendants performed their services and regularly sent invoices to the Hornicks. The Hornicks failed to pay any of the bills and as of February 2009, owed \$71,332.48 to the Bluming defendants and \$128,931.45 to Meister, none of which has been paid. On or about August 21, 2012, the Bluming defendants assigned all claims against the Hornicks to Meister. Thereafter, Meister commenced this suit against the Hornicks for breach of contract, account stated and *quantum meruit*, seeking to recover the total sum of \$200,263.93.

In *lieu* of Answering Meister's complaint, the Hornicks unsuccessfully moved to dismiss² and thereafter, filed the Answer, asserting two counterclaims for breach of contract and fraud against Meister, and also filed a third-party complaint against the Bluming defendants for the same relief, alleging that both Meister and the Bluming defendants misrepresented their expertise in the international arbitration matters and overbilled them for services, which were provided

footnote 1, cont'd.

such claims. Therefore, the Hornicks' first counterclaim and the third-party breach of contract claim against the Bluming defendants are dismissed as moot.

Also, although the movants' cited to CPLR 3211(a)(1) (dismissal based on a defense founded upon documentary evidence) in their affirmation in support and reply papers, no such arguments are made in support thereof. Nor is this section addressed by the non-movants the Hornicks. Therefore, the Court does not address dismissal pursuant to this section.

² See this court's Order dated December 11, 2012. The Hornicks subsequently moved to reargue, but the court, upon granting the motion, adhered to its prior decision (see Order dated March 1, 2013).

incompetently (Counterclaims ¶¶29-33; Third-Party Complaint ¶¶33-37). The Attorneys now move to dismiss the counterclaims and the third-party complaint.

In support of dismissal, Meister and the Bluming defendants argue that the remaining fraud claims against them should be dismissed for failure to state a cause of action. The Hornicks also failed to plead fraud with particularity, as required by CPLR 3016 (b), since the pleadings do not indicate the identity of the individual to whom the representations were allegedly made, the content of what specifically was said, or when and by whom it was said. And, the Hornicks cannot allege that as a result of such “misrepresentation,” they suffered any damages since [to date] they did not pay any legal fees. In any event, the fraud claims are duplicative of the breach of contract claims.

Further, it appears that the Hornicks are essentially asserting a legal malpractice claim. And, the Hornicks cannot avoid the three-year Statute of Limitations applicable to such time-barred legal malpractice claim by disguising such claim as one for breach of contract.³ In any event, the Hornicks fail to state a cause of action for legal malpractice, since the claim herein involves a billing dispute for the alleged overcharging and the Hornicks fail to allege the type of “but for” causation required or any ascertainable damages allegedly caused by the Attorneys’ wrongful acts.

In opposition, the Hornicks deny asserting a legal malpractice claim and acknowledge

³ The movants argue that the legal malpractice claim is time-barred because it was commenced more than three years after the alleged accrual, arguably in February 2009, when the Hornicks terminated Meister and the Bluming defendants. Therefore, any claim for malpractice must have been brought three years thereafter, by February 2012. However, the Hornicks’ counterclaims were not filed until August 22, 2012, and the third-party complaint were not filed until January 2013.

that the Statute of Limitations on such claim has expired.⁴

The Hornicks contend that they properly pleaded the fraud claims by alleging that the Attorneys misrepresented their qualifications and abilities in order to be retained; and such misrepresentations occurred *prior* to the existence of any attorney-client relationship. In or about late 2007, Bluming represented that his firm had successfully handled several UNCITRAL arbitrations and was familiar with the requisite procedures and the English law; that he was an "expert" and had "extensive experience in international arbitration"; that Meister's attorneys were leading experts in international arbitrations, had the appropriate licenses and admissions, and could competently represent the Hornicks in the arbitration (Counterclaims ¶¶7-11, Third-Party Complaint ¶¶11-15).

The Hornicks detrimentally relied on such statements and were damaged by being charged inflated fees, which "would be significantly less if the matter had been handled by competent counsel" with relevant experience, who did not require "time to learn about UNCITRAL and the English law" (Counterclaims ¶¶25; 29; 37-38; Third-Party Complaint ¶¶29; 33; 41-42).

Furthermore, the damages the Hornicks seek in their fraud claims, *i.e.*, the difference between the number of hours billed by an experienced lawyer and the time billed by the Attorneys in order to "get up to speed" and become familiar with the relevant areas of law, are different from those which would be available in a legal malpractice action. And, the alleged false statements were made about the past, and not the future legal representation, and are

⁴ The Hornicks also aver that had the legal malpractice claim not expired, they would seek over \$8 million in damages.

sufficiently particular to satisfy CPLR 3016.

In any event, whether the Attorneys had the UNCITRAL and English law expertise is a factual issue and cannot be determined on a motion to dismiss. Thus, discovery should be conducted to determine whether the Attorneys' representations rise to the level of fraud or whether they are mere puffery.

In reply, the movants argue that the Hornicks' claims for fraud/fraudulent inducement must fail because the alleged false promises relate to performance of the contract [the retainer agreement], and the claims, are therefore duplicative of the breach of contract claims based on the alleged overbilling. And, even though the Hornicks withdrew their claims for breach of contract, such claim still remains as the fifth affirmative defense in their Answer.

In any event, courts consider such allegations of exaggerated experience by a lawyer mere puffery, not actionable as fraud.

Discussion

On a motion to dismiss pursuant to CPLR 3211 (a)(7), the facts pleaded are presumed to be true and are accorded every favorable inference (*see Nonnon v City of New York*, 9 NY3d 825 [2007]; *Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972 [1994]). However, allegations which fail to state a viable cause of action, that consist of bare legal conclusions, as well as factual claims inherently incredible or flatly contradicted by documentary evidence are not entitled to such consideration (*Leder v Spiegel*, 31 AD3d 266, 819 NYS2d 26 [1st Dept 2006]; *Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81, 692 NYS2d 304 [1st Dept 1999], *aff'd* 94 NY2d 659, 709 NYS2d 861 [2000]). The court's inquiry is limited to determining whether the [claim] states any cause of action, not whether there is evidentiary support for it

(*Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-636, 389 NYS2d 314 [1976]).

Fraud

“The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages” (see *Eurycleia Partners LP v Seward & Kissel, LLP*, 12 NY3d 553, 559, 883 NYS2d 147, 150 [2009], citing *Ross v Louise Wise Servs. Inc.*, 8 NY3d 478, 488, 836 NYS2d 509 [2007]; *Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421, 646 NYS2d 76 [1996]).

In addition, pursuant to CPLR 3016 (b), a claim rooted in fraud must be pleaded with the requisite particularity under CPLR 3016 (b), sufficient to permit a “reasonable inference” of the alleged misconduct (*Eurycleia v Seward & Kissel*, 12 NY3d 553, 883 NYS2d 147).

The court finds that the Hornicks’ fraud claims must be dismissed.

A cause of action for fraud may be maintained where a claimant pleads a breach of duty separate from, or in addition to, a breach of contract,⁵ *i.e.*, if a claimant alleges that it was induced to enter into a transaction because a defendant misrepresented material facts (*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, 690 NYS2d 17 [1st Dept 1999]). Although the Hornicks plead that it was induced to enter into the attorney representation agreement based on representations the Attorneys made about their expertise, such fraud claims cannot be maintained as they are legally insufficient as a matter of law.

Courts have held that misrepresentations of one’s expertise are opinions or puffery not

⁵ It has been held that “[u]nlike a misrepresentation of future intent to perform, a misrepresentation of present [or past] facts is collateral to the contract ... and therefore involves a separate breach of duty” (*First Bank of the Americas v Motor Car Funding, Inc.*, 257 AD2d 287, *supra*, at 292).

actionable as a matter of law (*see Jacobs v Lewis*, 261 AD2d 127, 127-128, 689 NYS2d 468 [1st Dept 1999])[finding complaint failed to state cause of action for fraud where defendant's alleged misrepresentations of its expertise were opinions and puffery]; *Bellinson Law, LLC v Iannucci*, 951 NYS2d 84 [Sup Ct, New York County 2012], *aff'd* 102 AD2d3d 563, 958 NYS2d 383 [1st Dept 2013], *citing Schonfeld v Thompson*, 243 AD2d 343, 663 NYS2d 166 [1st Dept 1997][attorney's alleged misrepresentations as to how many trials he had taken to completion in the Federal courts held puffery not actionable as fraud]).

Here, the Attorneys' alleged statements that they could competently represent the Hornicks in the international arbitration "amount to no more than opinions or ultimately unfulfilled promises" (*Jacobs v Lewis*, at 127-128). Likewise, Bluming's alleged representations that his firm "successfully handled" several UNCITRAL arbitrations, and that Meister, including Jeffrey Kimmel, were "leading experts" and had "significant experience" in international arbitration, amount to little more than "mere puffery" that does not constitute actionable fraud⁶ (*id.*; *Bellinson Law, LLC v Iannucci*, *supra*; *Schonfeld v Thompson*, *supra*; *see Laddcap Value Partners, LP v Lowenstein Sandler PC*, 2009 WL 727781 [Trial Order][Sup Ct, New York 2009][client's allegations of the law firm's representations that client should retain the law firm for purposes of certain litigation, *inter alia*, because the lawyers who would be assigned to the case were specialists in the relevant area of law, amounted to mere puffery, opinions and future expectations, not actionable as fraud], *citing Schonfeld v Thompson*, 243 AD2d 343, *supra*; *see*

⁶ The court notes that even though the Attorneys' representations of their qualifications and expertise are statements of present or past facts, and not promises of future performance, they are still not actionable as a matter of law as opinion and puffery (*see Jacobs v Lewis*, *supra*; *Bellinson Law, LLC v Iannucci*, *aff'd* 102 AD2d3d 563; *Schonfeld v Thompson*, *supra*).

also *Newmark & Co. Real Estate, Inc. v Gallo Vitucci Klar Pinter & Cogan, LLP*, 2010 WL 4682652 [Sup Ct, New York County 2010][Trial Order]). Thus, any potential discovery yielding evidence with respect to whether the Attorneys had relevant experience or expertise is inconsequential. As such, the Hornicks' asserted need for discovery "to see if it was puffery or outright lies" is unwarranted.

Furthermore, the court finds that these allegations lack the particularity required by CPLR 3016. Although the court is mindful that at this pleading stage, plaintiff need not produce absolute proof of fraud (*Eurycleia*, at 559, 883 NYS2d 147, 910 NE2d 976), under the facts of this case, the Hornicks' vague and conclusory allegations that neither Bluming nor Kimmel had any "significant experience" in the areas alleged and were "not familiar with the rules, policies and procedures of UNCITRAL," do not give rise to a reasonable inference that the Attorneys committed fraud (*see Bress v Weiser LLP*, 2007 WL 2175877 (Trial Order) [Supreme Court, New York 2007])[dismissing allegations of fraud as vague and conclusory, since plaintiff did not assert that defendant *promised to bring along a particular client, and failed to do so*, or that he said to have *a specific skill or degree, that he later turned out not to possess*]).

Here, the Hornicks do not allege any concrete, existing facts which would contradict the representations claimed to have been made by Bluming and Kimmel as to their expertise and ability to handle the necessary work, other than general assertions that the Hornicks were "charged hundreds of thousands of dollars" for work that was not completed, or was unnecessary or would have been unnecessary if the lawyers were competent and had requisite experience.⁷

⁷ The court notes that, contrary to the Attorneys' arguments, the Hornick's claims are not for malpractice as there are no allegations that the Attorneys acted negligently such that the negligence was the proximate cause of the Hornicks' damages; and that "but for" the Attorneys' malpractice, the Hornicks would have received a more

Accordingly, the Hornicks' counterclaim and third-party claim for fraud are dismissed.

Conclusion

Based on the foregoing, it is hereby

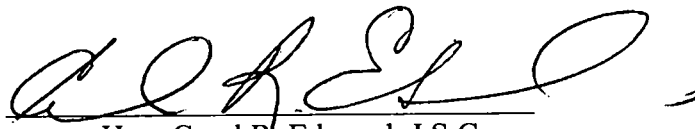
ORDERED that the motion of the plaintiff Meister Seelig & Fein, LLP and the third-party defendants Bluming Freiman & Franco, P.C., Freiman Franco, P.C., Sidney Bluming and Jeffrey Kimmel, pursuant to CPLR 3211(a)(7) and 3016 (b), to dismiss the counterclaims by defendants Louis Hornick and Louis Hornick & Co., Inc. against plaintiff Meister Seelig & Fein, LLP and the third-party complaint by defendant/third-party plaintiff Louis Hornick & Co., Inc., against the third-party defendants is granted in its entirety and said counterclaims and the third-party complaint are hereby severed and dismissed. And it is further

ORDERED that the parties shall appear for a status conference at Room 438, Part 35, 60 Centre Street, New York, New York, on July 23, 2013, at 2:30 p.m.; and it is further

ORDERED that counsel for said plaintiff shall serve a copy of this order with notice of entry within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: June 19, 2013



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

HON. CAROL EDMOAD

footnote 7, cont'd.

advantageous result, would have prevailed in the underlying action or would not have sustained some actual and ascertainable damage (*see Tydings v Greenfield, Stein & Senior, LLP*, 43 AD3d 680, 682 [1st Dept 2007]; *Bishop v Maurer*, 33 AD3d 497, 498 [1st Dept 2006], *aff'd* 9 NY3d 910 [2007]). Instead, the Hornicks' allegation is that the "extent" of the Attorneys' experience in the UNCITRAL arbitration turned out to be insufficient to prosecute the matter using fewer billable hours.