

Coughlin Duffy, LLP v Aguilera Del Puerto

2013 NY Slip Op 33336(U)

April 17, 2013

Sup Ct, New York County

Docket Number: 652046/2012

Judge: Eileen Bransten

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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY
PRESENT: Hon. Eileen Bransten PART 3

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COUGHLIN DUFFY, LLP,

Plaintiffs,

-against-

Index No.: 652046/12
Motion Date: 4/4/13
Motion Seq. No.: 001

LISA AGUILERA DEL PUERTO, FERNANDO J.
DEL PUERTO and JULIA AGUILERA,

Defendants.
-----X

The following papers, numbered 1 to 3, were read on this motion to dismiss.

| | <u>Papers Numbered</u> |
|---|------------------------|
| Notice of Motion/Order to Show Cause - Affidavits - Exhibits | _____1_____ |
| Answering Affidavits - Exhibits | _____2_____ |
| Replying Affidavits | _____3_____ |
| Cross-Motion: <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No | |

Defendant Fernando J. Del Puerto (“Del Puerto”) moves to dismiss the claims asserted against him. Plaintiff Coughlin Duffy, LLP (“Coughlin” or “Plaintiff”) opposes.

I. BACKGROUND

Coughlin claims that Defendants retained Coughlin to serve as their legal counsel in a matter involving the purchase of an apartment (the “Underlying Action”). Coughlin asserts that it performed \$262,212.98 worth of legal services for Defendants, but that Defendants only paid Plaintiff \$56,688.73. According to Plaintiff, \$205,524.25 in fees remains unpaid.

This motion came before the Court for oral argument on March 19, 2013. While the Court initially stated during oral argument that it was inclined to grant Defendant Del Puerto’s motion to dismiss, as well as dismiss the action in its entirety against the other Defendants, the Court now reconsiders its ruling on its own motion. *See People v. Rauf*, 90 A.D.3d 422, 422 (1st Dep’t 2011) (“A nisi prius court has the inherent power, *sua sponte*, or on motion of a party, to reconsider or vacate its prior decision before issuing an order thereon.”) Upon review of the transcript, the Court concludes that Del Puerto’s

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

motion to dismiss is denied, and the action is not dismissed as to the remaining non-moving Defendants.

II. STANDARD OF LAW

“On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction.” *Leon v. Martinez*, 84 N.Y.2d 83, 88 (1994). The court accepts the facts as alleged in the non-moving party’s pleading as true and accords the non-moving party the benefit of every possible favorable inference. *Id.*

On a motion to dismiss pursuant to CPLR 3211(a)(7), “the sole criterion is whether the pleading states a cause of action, and if from [the pleading’s] four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law, a motion for dismissal will fail.” *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 (1977). The “pleadings must be liberally construed and the facts alleged accepted as true.” *Wiener v. Lazard Freres & Co.*, 241 A.D.2d 114, 120 (1st Dep’t 1998).

III. ANALYSIS

A. Del Puerto’s Motion to Dismiss

Coughlin seeks the remaining \$205,524.25 of outstanding fees under three alternative theories: breach of contract, quantum meruit and account stated. Del Puerto moves to dismiss each of these claims as asserted against him. The court will address each cause of action in turn.

Del Puerto moves to dismiss the contract claim on the grounds that Coughlin never provided him with a retainer agreement that complies with 22 NYCRR § 1215.1. That rule requires attorneys to provide clients with a “letter of engagement” or retainer agreement addressing the scope of representation, attorney’s fees, billing practices and the right to arbitration, where applicable. 22 NYCRR § 1215.1.

The document Coughlin refers to in its moving papers as the “Retainer Agreement” does not address these topics, and clearly does not comply with § 1215.1. The complaint, however, asserts that the parties entered into a retainer agreement containing an explanation of the hourly rates Defendants were to pay Plaintiff, billing practices and the scope of legal services that Coughlin was to provide Defendants.

The allegations contained in the complaint are sufficient for the purposes of the instant motion. The sole question before the court is whether Plaintiff has stated a cause of action, which it has. Coughlin need not produce documentary evidence in support of its breach of contract claim at this time. *Guggenheimer*, 43 N.Y.2d at 275. Del Puerto’s motion to dismiss on the grounds that it did not enter into a retainer agreement with Coughlin is denied.

Even if there were no retainer agreement in place, “the firm’s failure to provide a retainer agreement does not preclude it from recovering legal fees for its services.” *Egnotovitch v. Katten Muchin Zavis & Roseman LLP*, 55 A.D.3d 462, 464 (1st Dep’t 2008). The First Department has held that, while defects in or a lack of a retainer agreement may bar recovery for breach of contract, an attorney may still recover “the fair and reasonable value of their services, computed on the basis of quantum meruit.” *Nabi v. Sells*, 70 A.D.3d 252, 253 (1st Dep’t 2009). Del Puerto’s motion to dismiss Coughlin’s quantum meruit claim is thus denied.

Coughlin has also stated an account stated cause of action. As the First Department explained in *Peterson v. IBJ Schroder Bank & Trust Co.*, 172 A.D.2d 165, 166 (1st Dep’t 1991):

where an account is rendered showing a balance, the party receiving it must, within a reasonable time, examine it and object, if he disputes its correctness. If he omits to do so, he will be deemed by his silence to have acquiesced, and will be bound by it as an account stated, unless fraud, mistake or other equitable considerations are shown.

Coughlin has alleged that it billed Defendants, including Del Puerto, for the outstanding balance of \$205,524.25, and that Defendants failed to dispute the amount. Del Puerto counters that he never received a bill from Coughlin, and that the invoice Coughlin submits in opposition to Del Puerto’s motion is insufficient to dispute Del Puerto’s assertion. As explained above, Coughlin is not required to submit documentary evidence supporting its claims in order to withstand Del Puerto’s motion to dismiss. The Court’s sole inquiry at this stage of the case is whether the complaint states a cognizable claim. *Guggenheimer*, 43 N.Y.2d at 275. Del Puerto’s motion to dismiss Coughlin’s cause of action for an account stated is denied.

B. Coughlin’s Cross-Motion for Sanctions

Coughlin moves for sanctions against Del Puerto for bringing the instant motion to dismiss.

A party’s conduct merits sanctions under 22 NYCRR §130-1.1 if “(1) it is completely without merit in 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.”

Coughlin provides no argument in support of its conclusory demand for sanctions, and has failed to show that Del Puerto’s conduct was sanctionable as frivolous under 22 NYCRR §130-1.1. Coughlin’s motion for sanctions is thus denied.

Finally, the court notes that this is a case for the collection of professional fees, it is not properly in the Commercial Division and must be transferred to a non-commercial part. *See* 22 NYCRR §202.70(c)(1).

IV. CONCLUSION

For the reasons set forth above, it is hereby

ORDERED Defendant Fernando J. Del Puerto's motion to dismiss the complaint is denied; and it is further

ORDERED that Plaintiff Coughlin Duffy, LLP's cross-motion for sanctions is denied; and it is further

ORDERED that Defendant Fernando Del Puerto is directed to serve an Answer to the Verified Complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that this matter is directed to the Trial Support office for random re-assignment to a non-Commercial Division part of the Supreme Court, New York County.

Dated: April 17, 2013



Hon. Eileen Bransten

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE SETTLE/SUBMIT ORDER/JUDG.