Brill & Meisel v Brown
2014 NY Slip Op 30275(U)
January 21, 2014
Supreme Court, New York County
Docket Number: 115685/08
Judge: Paul Wooten

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

PRESENT: HON. PAUL WOOTEN Justice PART 7

BRILL & MEISEL,

Plaintiff,

- against

JAMES M. BROWN and HELEN J. ALTMAN,

Defendants.

INDEX NO. 115685/08

MOTION SEQ. NO. 008

The following papers were read on this motion by defendants for leave to amend their pleadings.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits (Memo)	
Replying Affidavits (Reply Memo)	

Cross-Motion: ☐ Yes ■ No

Motion sequence numbers 006 and 008 are consolidated for purposes of disposition.

In this action, the law firm of Brill & Meisel (plaintiff) seeks compensation for legal fees for services rendered to former clients of the firm, James M. Brown and Helen J. Altman, defendants/counterclaim plaintiffs (defendants). Plaintiff represented defendants for over two years in litigation against their cooperative corporation (Co-op) concerning leaks in defendants' master bedroom. The complaint asserts claims grounded in account stated, breach of contract and unjust enrichment theories. Defendants assert counterclaims grounded in legal malpractice, breach of contract, breach of fiduciary duty, negligence and unjust enrichment.

Now before the Court In motion sequence number 006, defendants move for an order granting leave to reargue this Court's Decision and Order dated July 10, 2012 (the Order). In motion, sequence number 008, defendants move for an order granting leave to amend their answer and counterclaims primarily to: (a) amend defendants' counterclaim for breach of

contract to include the overcharges discussed in defendants' summary judgment motion and alluded to in the July 10 Order; (b) clarify defendants' claim for the return of the fees paid to plaintiff, previously included in defendants' original answer in their counterclaim for unjust enrichment, by setting forth in the proposed answer defendants' demand for the return of fees paid in a separate cause of action for discharge for cause; and (c) conform to the facts presented on summary judgment and the July 10 order by adding certain allegations to the original counterclaims and revising defendants' affirmative defenses. Defendants also seek and order that service of these motion papers upon plaintiff constitutes proper service of the amended pleading. Plaintiff is in opposition to the defendants' motion.

STANDARD

CPLR 3025(b) provides that "[a] party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court . . .[and] [l]eave shall be freely given upon such terms as may be just . . . ." (*see Ancrum v St. Barnabas Hosp.*, 301 AD2d 474, 475 [1st Dept 2003]; *Crimmins Constr. Co. v City of New York*, 74 NY2d 166, 170 [1989]. The First Department has "consistently held, however, that in an effort to conserve judicial resources, an examination of the proposed amendment is warranted . . . " (*Ancrum,* 301 AD2d at 475; *Thompson v Cooper*, 24 AD3d 203, 205 [1st Dept 2005]). "[L]eave to amend should [be] granted in the absence of evidence of substantial prejudice or surprise or that the proposed amendments were palpably insufficient or patently devoid of merit" (*JPMorgan Chase Bank, N.A. v Low Cost Bearings NY Inc.*, 107 AD3d 643, 644 [1st Dept 2013] [internal citations and quotation marks omitted]; *Bishop v Maurer*, 83 AD3d 483, 485 [1st Dept 2011] ["Leave will be denied where the proposed pleading fails to state a cause of action, or is palpably insufficient as a matter of law]; *Thompson*, 24 AD3d at 205; *see Ancrum*, 301 AD2d at 475; *Davis & Davis v Morson*, 286 AD2d 584, 585 [1st Dept 2001]).

DISCUSSION

Defendant's motion to reargue has been fully resolved by the January 14, 2014 decision of the Appellate Division, First Department (— AD3d —, 2014 NY Slip Op 00180 [1st Dept 2014]), and as such is denied as moot and will not be addressed by the Court.[1]

As part of their motion to amend, defendants seek to amend their answer and counterclaims to add a claim for discharge for cause. As defendants were permitted to assert an unpleaded defense for discharge for cause in opposition to plaintiff's motion and in support of their motion for summary judgment, their counterclaims were essentially deemed to encompass that claim (*see id.; Rivera v New York City Tr. Auth.*, 11 AD3d 333, 333 [1st Dept 2004] ["Although defendants have not pleaded the affirmative defense of medical emergency in their answers, in view of the evidence submitted in opposition to plaintiff's motion we deem defendants' answers amended to assert the defense"]; *see also Ramos v Jake Realty Co.*, 21 AD3d 744, 746 [1st Dept 2005] [complaint deemed amended to assert a claim of vicarious liability in opposition to summary judgment]; *Weinstock v Handler*, 254 AD2d 165, 166 [1st Dept 1998] [stating, concerning an unpleaded claim, that on summary judgment,"[a]s with a trial, the court may deem the pleadings amended to conform to the proof" provided that "the opposing party has not been misled to its prejudice"]). Defendants proffer they merely seek a different remedy for the claim, which is the remedy sought under their unjust enrichment claim, and plaintiff has been aware of the essential facts underlying the proposed amendment through the prior motion, including Altman's summary judgment affidavit, discovery or documents in its possession (*see e.g.* Altman aff. [October 23, 2012], exhibit B; exhibit C).

Plaintiff contends that defendants' proposed claim lacks merit, as Altman's supporting

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[1] Familiarity with the Order and the January 14, 2014 Appellate Division decision (— AD3d —, 2014 NY Slip Op 00180 [1st Dept 2014]) is presumed. In addition, here, defendants note that in the Order the Court mentioned massive leaks in their apartment. This was not a description of the condition after the removal of defendants' neighbor's greenhouse or the March 2007 storm.

affidavit demonstrates that the discharge for cause claim is based on nothing but purported dissatisfaction with reasonable strategic choices concerning litigation, or allegations that do not demonstrate the breach of a significant legal duty. However, many of these issues were addressed on the prior summary judgment motion. In addition, while some of the alleged conduct may have involved strategy decisions,[2] or, ultimately, may not be shown to constitute the breach of a significant legal duty (*Callaghan v Callaghan*, 48 AD3d 500, 501 [2d Dept 2008]), the parties' versions of many events differ (*see e.g.* Altman aff. [October 23, 2012], exhibit C, ¶ 47), and a determination, on the limited record submitted on this motion, that, as a matter of law, all of plaintiff's strategy choices were reasonable ones, or that defendants' claim is "palpably insufficient or patently devoid of merit" is unwarranted (*JPMorgan Chase Bank, N.A.*, 107 AD3d at 644 ["[t]he sufficiency of plaintiff's proposed amendments was implicitly recognized by the court in denying the defendant-owner's motion for summary judgment dismissing the complaint"] [citation and internal quotation marks omitted]; CPLR 3025 [b], [c]).[3] Accordingly, the amendment concerning a discharge for cause claim will be permitted, without, of course, any determination on the merits that a return of legal fees previously paid by defendants ultimately will be awarded, as factual disputes remain to be resolved, and depending upon such resolution, there may be other issues to consider (*see e.g. Margrabe v*

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[2] As stated in the summary judgment motion, an attorney's mere decision to send a letter to the court, instead of filing a motion, demonstrates a difference of opinion or disagreement over strategy, as does a decision to consolidate a case for discovery. However, among other things, Altman also averred that plaintiff was untruthful about the consolidation.

[3] For example, plaintiff argues that its conduct in not submitting apartment maintenance receipts at a hearing was a strategic decision based on defendants' insistence on obtaining full maintenance, but defendants previously raised a fact issue as to whether this conduct was a mistake, and plaintiff does not demonstrate here, as a matter of law, that defendants did not suffer any recoverable damages, or that the claim is devoid of merit. Plaintiff also states that exchanging Altman's outline was strategy and that it contained only innocuous entries, but the document has not been submitted on this motion. The First Department discussed defendants' claim about the confidentiality agreement stating that plaintiff did not eliminate factual issues, that also have not been eliminated here.

Rusciano, 55 AD3d 689, 691-692 [2d Dept 2008] [concerning temporal limitations]; *see also Doviak*, 90 AD3d at 699 [stating that not all errors are "severe enough to warrant a discharge for cause and a forfeiture of fees"]; *Lupo v Pro Foods*, 2012 NY Slip Op 31207[U] [Sup Ct, NY County 2012] ["Where . . . there is substantial compliance with the disciplinary rules, relatively minor deviations will not result in fee forfeiture"]).[4] Plaintiff argues that it will incur prejudice by the amendment because it was previously unable to move for summary judgment to dismiss the discharge for cause claim on a complete record, but instead was relegated to opposing defendants' cross motion. However, as the unpleaded claim was allowed on the summary judgment motion, this argument is not persuasive.

The portion of defendants' motion seeking to add a breach of contract claim based on plaintiff's alleged billing overcharges is also granted. Altman submits an affidavit stating that the retainer agreement provided for notice of fee increases, but that hourly fees were increased without notice, and also made this averment on summary judgment (Altman aff. [October 23, 2012]; *id.*, exhibit C [Altman aff. January 21, 2011], at 107). In opposition, plaintiff argues that the proposed amendment to add allegations of overcharges is nothing more than an untimely affirmative defense to the account stated action. However, plaintiff does not claim prejudice or argue that the proposed claim lacks merit, and the basis of the claim is plaintiff's retainer agreement and the bills that plaintiff created and annexed to the complaint. Amendment of defendants' breach of contract claim will be permitted, but with the exception of those allegations that were previously dismissed on summary judgment as duplicative of the malpractice claim, for example, paragraph 122 of the proposed amended pleading. Plaintiff objects to the inclusion of the previously dismissed allegations in the amended pleading, and

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[4] Defendants' misquoted italicized text on page 3 of their reply, citing to exhibit B, ¶ 48 of Altman's affidavit, which they improperly indicate is from their original pleading, is disregarded (*see* Altman aff. [October 23, 2012], exhibit B, ¶¶ 48, 65), as is Altman's conclusory contention that plaintiff concealed the existence of a confidentiality agreement concerning the engineering report.

while defendants argue that the contract claim now includes unique allegations relating to the overcharges, they do not offer argument as to why, based on this, they would be permitted to reassert previously dismissed allegations that do not concern overcharges (*see* the Order at 24 of 25, *affd as mod* 2014 NY Slip Op 00180). Leave to amend to include the previously dismissed breach of fiduciary duty claim is also denied (*id.*).[5] Therefore, a determination that service on plaintiff of this motion, which contained the proposed amended answer in its present form, constituted proper service of the amended answer is not appropriate, and defendants are directed to conform the proposed pleading to reflect the determinations made in the recent First Department decision, as well as the determinations made in this order.

Finally, as both CPLR 3025(b) and (c) allow the court to grant leave "upon such terms as may be just including the granting of costs and continuances," plaintiff, who states that it would have asked different questions at Altman's deposition, based on the amendments, is not precluded from making an application for a limited amount of appropriate discovery (*Abdelnabi v New York City Tr. Auth.*, 273 AD2d 114, 115 [1st Dept 2000]), to be scheduled and conducted immediately, with the case remaining on the trial calendar, so that plaintiff is not prejudiced by additional delay. Any application by plaintiff for such discovery must be made at the next pre-trial conference, to be held on March 26, 2014 at 11:00 A.M. in Part 7, 60 Centre Street, Room 341.

CONCLUSION

Accordingly it is,

ORDERED that defendants' motion for leave to reargue a previous Order of this Court dated July 10, 2012 (motion sequence 006) is hereby denied as moot; and it is further,

ORDERED that defendants' motion for leave to amend their answer and counterclaims

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[5] The Court also notes that defendants' legal malpractice claim has been dismissed to the extent that it relies on allegations concerning the exchange of Helen Altman's outline (*id.*).

and for an Order that service of these motion papers upon plaintiff constitutes proper service (motion sequence 008) is hereby granted to the extent that defendants are granted leave to amend their pleading to add claims for discharge for cause and breach of contract regarding plaintiff's billing, but is otherwise denied; and it is further,

ORDERED that defendants are directed to serve a copy of their amended pleading, consistent with this Decision and Order, upon the plaintiff within 20 days of entry; and it is further,

ORDERED that this matter is remanded from the Mediation Part back to this Part, and the parties are directed to appear for a pre-trial conference on March 12, 2014 at 11:00 a.m. in Part 7, 60 Centre Street, Room 341; and it is further,

ORDERED that counsel for the defendants is directed to serve a copy of this Order with Notice of Entry upon the plaintiff.

This constitutes the Decision and Order of the Court.

Dated: 1/21/14

Paul Wooten J.S.C.

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

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