

Cascone & Collyer v Schwerdt

2014 NY Slip Op 30492(U)

February 28, 2014

Sup Ct, New York County

Docket Number: 653017-2012

Judge: George J. Silver

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. George J. Silver
Justice

PART 10

CASCONE & COLLYER

INDEX NO. 653017-2012

- v -

MOTION DATE

RUDOLF SCHWERDT

MOTION SEQ. NO. 002

The following papers, numbered 1 to 5, were read on this motion for

Table with 2 columns: Description of papers and No(s). Includes rows for Notice of Motion/ Order to Show Cause, Notice of Cross-Motion, and Answering Affirmation(s).

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

In this action to recover unpaid legal fees, Defendant Rudolf Schwerdt ("Defendant") moves to dismiss Plaintiff Cascone & Collyer's ("Plaintiff") complaint pursuant to CPLR §3211(a)(1), (3), (7), and (10), which Plaintiff opposes.

In support of his motion to dismiss, Defendant argues that Plaintiff, as Cascone & Collyer, lacks the capacity to sue, where a party must either be a person or a corporation and a law firm is not a recognized legal entity. Defendant argues it is impossible to determine who is asserting ownership of the claim for unpaid legal fees as it stands.

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

- 1. Check one: CASE DISPOSED (checkbox) NON-FINAL DISPOSITION (checkbox)
2. Check as appropriate: MOTION IS: GRANTED (checkbox) DENIED (checkbox) GRANTED IN PART (checkbox) OTHER (checkbox)
3. Check as appropriate: SETTLE ORDER (checkbox) SUBMIT ORDER (checkbox) DO NOT POST (checkbox) FIDUCIARY APPOINTMENT (checkbox) REFERENCE (checkbox)

Defendant. Under its claim for unjust enrichment, an express contract exists and therefore Plaintiff may not recover under a theory of unjust enrichment. Finally, Defendant argues there is no valid cause of action for fraud, where the only real breach under the contract is the failure to pay for legal services.

In opposition to Defendant's motion to dismiss, Plaintiff refutes each of Defendant's arguments in its motion to dismiss. First, Plaintiff argues that Defendant already moved to dismiss, on the same grounds, which was denied by this Court on May 31, 2013. Additionally, Plaintiff argues that at the time the Retainer agreement was entered into, the law firm was a partnership and still is a partnership. Plaintiff argues it left out no indispensable parties, where prior-partner Cole submitted an Affidavit disclaiming any interest in the claim for unpaid legal services, stating that he did not work on Defendant's case. Additionally, the argument that Plaintiff does not have the capacity to sue is without merit and is a non-issue. Further, Plaintiff argues there was no violation of Rule 1.8 of the Rules of Professional Conduct, which was raised in Defendant's first motion which was denied by this Court. The two roles that Plaintiff played (finder and attorney) were complimentary, not conflicting, and thus no rule was violated. Additionally, Plaintiff argues that under the terms of the retainer agreement, Plaintiff has earned the legal fees, where the work was done in a non-contingent basis and Defendant was properly billed.

Plaintiff cross-moved for a default judgment against Defendant, where Defendant failed to answer Plaintiff's complaint. Plaintiff argues that as a consequence for two motions to dismiss, Defendant has failed to answer the complaint served on August 8, 2012 or the amended complaint served on June 3, 2013. As such, Plaintiff argues it is entitled to the entry of a default judgment against Defendant.

Analysis

Defendant moves on four grounds, under CPLR §3211(a), in order to dismiss Plaintiff's claim. In relevant part, CPLR §3211(a) states, "A party may move for judgment dismissing one or more causes of action asserted against him on the ground that: (1) a defense is founded upon documentary evidence; or (3) the party asserting the cause of action has not legal capacity to sue; or (7) the pleading fails to state a cause of action; or (10) the court should not proceed in the absence of a person who should be a party." Further, on a motion to dismiss pursuant to CPLR §3211, the "pleading is to be afforded a liberal construction (*see*, CPLR 3026). We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." (*Leon v. Martinez*, 84 N.Y.2d 83, 87-88, 638 N.E.2d 511, 513 (1994)).

First, Defendant's argument that Plaintiff lacks the legal capacity to sue lacks merit. The question for the Court is whether Plaintiff is the real party in interest, with the power to bring the grievance before the Court. (*See generally, Silver v. Pataki*, 96 N.Y.2d 532, 537, 730 N.Y.S.2d 482, 755 N.E.2d 842 [2001]) It is undisputed that a Retainer Agreement was entered into between Defendant and Kenneth T. Cascone, on behalf of Cascone Cole and Collyer, on February 25, 2008. Plaintiff has indicated to the Court that Collyer passed away and the Court has an affidavit from Michael Cole, dated October 8, 2012, that he has "no interest or claim to Cascone & Collyer's invoice owed by Defendant Rudolf Schwerdt. I did not work on such matter." Further, where Plaintiff is clearly identified in the Complaint as Principal of the law firm (Cascone & Collyer), and where Cascone is the party who signed the Agreement on behalf of the law firm, he is the real party in interest seeking the fees and has the power to bring the grievance, whether in his name or the law firm of which he is a Principal. (*See generally, Equestrian Assocs. v. Freidus*, 192 A.D.2d 572).

Second, Defendant's argument that Plaintiff failed to join necessary parties fails, where all necessary parties are joined. Plaintiff presented evidence that Collyer passed away and is a member of the law firm in name only and Plaintiff attached an Affidavit from Michael Cole, former partner of the law firm, dated October 8, 2012, that he has "no interest or claim to Cascone & Collyer's invoice owed by Defendant Rudolf Schwerdt. I did not work on such matter." As such, there are no other parties that

must be joined to properly and fairly litigate this matter.

Third, Defendant's argument that Plaintiff violated Rule 1.8 of the Rules of Professional Conduct is without merit. Rule 1.8 codifies a lawyer's special conflict of interest rules that he/she owes to its clients. The only relevant portion of the Retainer Agreement that is the subject of this litigation is Paragraph 2, which states, "A non-contingent fee for the preparation of documents, negotiation, and handling of each date on time- expended basis at \$400 to \$500 per hour plus related expenses. This portion of the fee is to be paid as billed and must be fully paid at the closing(s) or upon consummation of each transaction." The rest of the Retainer Agreement is about transactional fees and investment opportunities between Plaintiff and Defendant for a deal which ultimately fell through. Plaintiff has properly plead that he earned his fees under paragraph 2 of the Retainer Agreement, which was calculated based upon an hourly rate times the amount of hours Plaintiff worked on a non-contingent basis. Defendant's argument that payment is only required once a deal is closed or a transaction consummated is unavailing, where the Retainer Agreement states the fee is for "preparation of documents, negotiation and handling of each deal on time-expended basis...this portion of the fee is to be paid as billed and must be fully paid at the closings or upon consummation of each transaction." As such, transactions were in fact consummated and fully outlined in detail in the bills provided by Plaintiff.

Defendant's argument to dismiss Plaintiff's first cause of action fails, where it is unclear to the Court whether Plaintiff's cause of action is for breach of contract or for account stated. Under either theory, the pleadings are "to be afforded a liberal construction (*see*, CPLR 3026). We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." (*Leon v. Martinez*, 84 N.Y.2d 83, 87-88, 638 N.E.2d 511, 513 (1994)). The pleadings fit within a cognizable theory for either breach of contract (where Plaintiff plead that a contract exists and by failing to pay the legal fees, Defendant breached the contract) or under account stated (where Plaintiff plead the total bill was rendered and accepted on multiple occasions by Defendant, where Defendant made one payment of \$7,500).

Defendant's argument to dismiss Plaintiff's fourth cause of action for fraud is also without merit. "Essential to the statement of a fraud claim premised upon a purported promise, then, are factual allegations from which the misrepresentation of an inconsistent present intention can be inferred... and it is clear that the required inference is not permissibly drawn simply from the circumstance that the promise or assurance ultimately was not made good upon..." (*Internal citations omitted*) (*Braddock v Braddock*, 60 AD3d 84, 98 [1st Dept 2009]). Plaintiff, with detail, contained specific factual misrepresentations in its pleading and, taken as true, fit within the cognizable legal theory of fraud.

Defendant's argument to dismiss Plaintiff's 3rd cause of action for unjust enrichment is granted, where "unjust enrichment is not a catchall cause of action to be used when others fail. It is available only in unusual situations when, though the defendant has not breached a contract nor committed a recognized tort, circumstances create an equitable obligation running from the defendant to the plaintiff...An unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim." (*Corsello v Verizon New York, Inc.*, 18 NY3d 777, 790-91 [2012] rearg denied, 19 NY3d 937, 973 NE2d 187 [2012]) Where it is undisputed that a contract existed and the only questions remaining are whether the contract was breached. Plaintiff cannot plead unjust enrichment in addition to breach of contract, as the claim for unjust enrichment duplicates the conventional breach of contract claim.

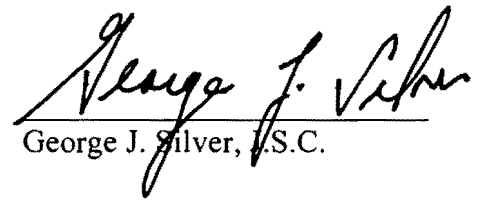
Plaintiff's cross-motion for a default judgment is denied, where, "Service of a notice of motion under subdivision (a) or (b) before service of a pleading responsive to the cause of action or defense sought to be dismissed extends the time to serve the pleading until ten days after service of notice of entry of the order." (CPLR 3211(f)). As such, Defendant may Answer within 10 days of the entry of this Order. Accordingly, it is hereby

ORDERED that Defendant's motion to dismiss is denied, except as to Plaintiff's cause of action for unjust enrichment, which is granted; and it is further

ORDERED that Plaintiff's cross-motion for a default judgment is denied; and it is further

ORDERED that all parties are directed to appear for a preliminary conference on April 8, 2014 at 9:30AM in Room 422, 60 Centre Street, New York, New York; and it is further

ORDERED that the movant shall serve a copy of this order, with Notice of Entry, upon all parties, as well as upon the Clerk of the Trial Support Office (60 Centre Street, Room 158) within thirty (30) days of entry.



George J. Silver, J.S.C.

Dated: FEB 28 2014
New York County