

Boies Schiller & Flexner LLP v Modell

2014 NY Slip Op 30569(U)

March 6, 2014

Sup Ct, NY County

Docket Number: 651456/13

Judge: Anil C. Singh

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK : IAS PART 61

-----X
 BOIES, SCHILLER & FLEXNER LLP

Plaintiff,

-against-

Index No. 651456/13

SHELBY MODELL

Defendant.

-----X
HON. ANIL C. SINGH, J.:

This is a dispute over legal fees between plaintiff Boies, Schiller & Flexner LLP (BSF) and defendant Shelby Modell (Shelby). BSF moves for a order granting summary judgment in its favor: a) in the principal amount of \$438,205.72; b) dismissing Shelby's affirmative defenses in their entirety; c) dismissing Shelby's counterclaims in their entirety; and d) awarding BSF its costs and expenses incurred in this action.

BACKGROUND

This litigation arises out of BSF's representation of Shelby in connection with a family dispute with Shelby's son, Mitchell Modell, and his conduct of the family business, Henry Modell & Company, and in connection with her husband's estate pending before the Surrogate's Court of Nassau County. BSF alleges that Shelby signed a retainer agreement with BSF on or about March 11, 2011. According to BSF, the firm represented Shelby until May 2012, when it sought permission of the Surrogate's Court to withdrew as counsel because of Shelby's failure to pay her bills. See Order to Show Cause, *Matter of Estate of William D. Modell*,

Surrogate's Court, Nassau County, index No. 350478/K/4M. BSF also represented Shelby's daughter Leslie Modell (Leslie) in connection with the family dispute and with the estate, and obtained permission from the Surrogate's Court to withdraw as her counsel in that proceeding, as well, when she failed to pay her bills.

According to BSF, it agreed to resume its representation of both Shelby and Leslie when they paid their bills and agreed to continue paying their bills going forward. When BSF resumed its representation of Shelby and Leslie, Shelby allegedly still owed \$30,525 to BSF. BSF alleges that it provided legal services to Shelby, and that it sent her monthly invoices on October 18, 2012, November 26, 2012, January 4, 2013, January 23, 2013, February 25, 2013, and March 20, 2013, which were not paid. BSF contends that neither Shelby, nor Leslie, who held a power of attorney for Shelby, objected to any of the bills. According to BSF, Shelby now owes the law firm \$438,205.72 in legal fees.

On December 31, 2012, BSF sent emails to Shelby and Leslie, indicating that if their bills were not paid, it would have to withdraw as counsel. After sending several additional such emails, on April 22, 2013, BSF filed this action seeking payment from Shelby, based upon breach of contract and account stated. On that same date, BSF filed a separate action against Leslie seeking payment of \$156,748.76, based upon invoices sent to her

on the same dates that it sent invoices to Shelby. *Boies, Schiller & Flexner LLP v Leslie Modell*, Sup Ct, NY County, index No. 651454/13.

Shelby opposes summary judgment arguing that, contrary to BSF's contention, she regularly objected to BSF's bills in telephone calls she had with one of the BSF attorneys, Karen Dyer and Ms. Dyer's assistant, Robin Pazo, within a day or two of her receipt of the bills. Affidavit of Shelby Modell, ¶¶ 4-6. Neither Dyer nor Pazo have denied Shelby's assertion.

Shelby also states that she executed a power of attorney in favor of her daughter, Leslie, so that Leslie could act as her spokesperson for the litigation. *Id.*, ¶ 2. Leslie states that she objected to each of the bills orally to Karen Dyer on behalf of her mother as well as herself, and that she also sent emails to BSF objecting to the bills. Affidavit of Leslie Modell, ¶¶ 25, 8, 15, 20-25. Those emails are submitted by Shelby in support of her opposition to BSF's motion for summary judgment.

Finally, Shelby contends that BSF failed to explain its legal strategy to her or advise her that the claims asserted on her behalf were weak.

BSF contends that the actions against Shelby and Leslie are based upon separate retainer agreements and that it represented Shelby and Leslie separately in the following litigations:

1. *Shelby Modell v Henry Modell & Co., Inc.*, index No.

651605/11, Sup Ct, NY County (derivative action on behalf of Henry Modell & Co., Inc. [HMC] against Mitchell Modell, a director and shareholder in HMC);

2. *Matter of Shelby Modell v Henry Modell & Co., Inc.*, index No. 651357/11, Sup Ct, NY County (Article 78 proceeding seeking access for Shelby, as a director of HMC, to HMC's books and records);

3. *Shelby Modell - Henry Modell & Co. Inc. and Mitchell Modell*, AAA Arbitration No. 13 196 00399 11 (arbitration proceeding seeking damages against Mitchell Modell for damages Shelby suffered as a result of his mismanagement of HMC);

4. *Matter of Estate of William Modell, supra* (BSF represented Shelby and Leslie in Surrogate's Court proceeding); and

5. Unfiled litigation on behalf of Leslie Modell against her brother Mitchell concerning an alleged oral agreement by Mitchell to provide financial support for Leslie and her daughter Shawn.

The court notes that two of those law suits were disposed prior to the dates covered by the invoices on which this litigation is based. See *Shelby Modell v Henry Modell & Co., Inc.*, index No. 651605/11, Sup Ct, NY County, disposed on May 16, 2012, by stipulation of the parties; and *Matter of Shelby Modell v Henry Model & Co., Inc.*, index No. 651357/11, Sup Ct, NY County disposed by stipulation of the parties on June 5, 2012. The

court also notes that, with the exception of five items, representing 9.3 hours billed, all of the invoices submitted by Karen C. Dyer for services during the months of June 2012 - February 2013, represented work performed after those two actions were disposed. Affirmation of Karen C. Dyer, exhibits D & E.

In the related case of *Boies, Schiller & Flexner LLP v Leslie Modell* (2013 WL 5880583, 2013 NY Misc LEXIS 5131, 2013 NY Slip Op 32801[U] [Sup Ct, NY County, October 29, 2013]), BSF sued Leslie for unpaid legal fees, based upon an account stated. Noting that Leslie asserted that she objected to the BSF invoices on behalf of her mother as well as herself, this court concluded that Leslie's objections to BSF's invoices "are more substantial than Modell merely offering 'self-serving, conclusory and unsubstantiated allegations that she orally objected to the bills'" and denied BSF's motion for summary judgment. *Id.* at *4, *6, *6. It appears that during the period of time in question Leslie held a power of attorney for Shelby.

The court also notes that many of the invoices sent by BSF to Shelby reference conversations with or emails to Leslie, raising questions of fact regarding the extent to which the legal work for, and possibly the billing to, Leslie and Shelby overlapped. The invoices set forth below constitute merely a sampling of those submitted by BSF in support of its motion for summary judgment which refer to contacts with Leslie, rather than

Shelby. See, e.g.:

"Summary of work performed by Nicholas A. Gravante in connection with Shelby Modell: Modell Sporting Goods Matter (October 2012): 10/08/12 (Mon.) Attention to correspondence with L. Model re (blacked out); ... attention to correspondence with L. Modell re same; 10/09/12 (Tue.) Attention to correspondence from Shawn Modell re (blacked out); correspondence to L. Modell, K Dyer re same ...; drafted correspondence to L, Shawn Modell re (blacked out);"

Affirmation of Karen C. Dyer, Exh. E.

"Summary of work performed by Karen C. Dyer in connection with Shelby Modell; Modell Sporting Goods Matter (October 2012): 10/05/12 (Fri) Meet with L. Modell, M. Tew, Shawn Modell and S. Froot re (blacked out)...; 10/08/12 (Mon.) Emails with L. Modell re (blacked out); 10/11/12 (Thu.) Emails with L. Modell re (blacked out) and confer with N. Gravante; meet with S. Froot re same and emails to team re (blacked out);"

Id.

"Summary of Work Performed by Richard Bettan in connection with Shelby Modell: Modell Sporting Goods Matter (October 2012): 10/08/12 (Mon.) Email correspondence w/ L. Modell, K. Dyer, S. Froot, E. Nehleber and K. Baker re (blacked out); teleconf. w/team re same; attention to (blacked out);"

Id.

"Summary of work performed by Nicholas A. Gravante in connection with Shelby Modell: Modell Sporting Goods Matter (November 2012): 11/05/12 (Mon.) Attention to correspondence; drafted correspondence to L. Modell re (blacked out), correspondence to C. Boies; M. Tew, K. Dyer, (blacked out);"

Id.

"Summary of work performed by Karen C. Dyer in connection with Shelby Modell: Modell Sporting Goods Matter (November 2012): 11/01/12 (Thu.) Emails with M. Tew re (blacked out) and prepare for and attend teleconf with L. Modell and M. Tew re same and confer with N. Gravante re same."

Id.

"[S]ummary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue." *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 (1978) (internal quotation marks and citations omitted); see also *Boies, Schiller & Flexner LLP v Leslie Modell*, 2013 WL 5880583, *4, 2013 NY Misc LEXIS 5131, *7, 2013 NY Slip Op 32801(U), *7, quoting *Hull v City of N. Tonawanda*, 6 AD3d 1142, 1142-1143 (4th Dept 2004) ("summary judgment seeking damages based on an account stated denied, because 'plaintiff failed to establish the absence of any dispute about the account and thus did not meet his initial burden'"). Based upon all of the above, sufficient questions of fact have been raised by Shelby to preclude summary judgment based upon an account stated. Therefore, the court need not reach Shelby's contention that BSF did not adequately advise her of its legal strategy.

BSF also seeks dismissal of Shelby's counterclaims. Although BSF brought separate actions against Shelby and Leslie, the mother and daughter have submitted joint papers in opposition to those actions, including a joint answer with affirmative defenses and counterclaims. Thus, Shelby too asserts counterclaims for breach of fiduciary duty, unjust enrichment and breach of contract, seeking return of approximately \$2.2 million paid to BSF, over \$1.2 million paid by Leslie and almost \$1

million paid by Shelby. As Leslie did, Shelby agrees to voluntarily withdraw her counterclaim for unjust enrichment. As this court concluded in its decision in *Boies, Schiller & Flexner LLP v Leslie Modell, supra*, Shelby's counterclaim for breach of fiduciary duty is duplicative of her counterclaim for breach of contract, and must be dismissed. *Id.* at *5, *10, *8.

With respect to her counterclaim for breach of contract, for the reasons set forth in its decision in *Boies, Schiller & Flexner LLP v Leslie Modell*, Shelby's counterclaim for breach of contract "exceed[s] the low bar of CPLR 3211(a)(7)." *Id.* at *5, * 10, *9.

Accordingly, it is

ORDERED that plaintiff Boies, Schiller & Flexner LLP's motion, pursuant to CPLR 3212, for summary judgment in its favor in the principal amount of \$438,205.72 is denied; and it is further

ORDERED that plaintiff Boies, Schiller & Flexner LLP's motion, pursuant to CPLR 3211(a)(7), to dismiss defendant Shelby Modell's counterclaims is granted to the extent of dismissing the counterclaim for breach of fiduciary duty; and it is further

ORDERED that defendant Shelby Modell's counterclaim for unjust enrichment is dismissed on consent; and it is further

ORDERED that plaintiff Boies, Schiller & Flexner LLP's motion for award of costs and expenses is denied; and it is

further

ORDERED that plaintiff shall serve and file a reply to the remaining counterclaim within 20 days of receipt of a copy of this order and notice of entry; and it is further

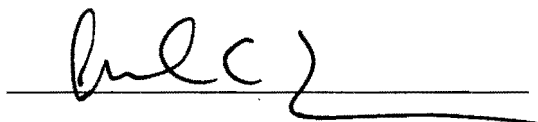
ORDERED that counsel are directed to appear for a preliminary conference in Room 320, 80 Centre Street, on

APRIL 2ND 2014, at 9:30 A.M.

Dated: MARCH 6, 2014

MAR 06 2014

ENTER:

A handwritten signature in black ink, appearing to read 'Anil C. Singh', is written over a horizontal line.

J.S.C.

HON. ANIL C. SINGH
SUPREME COURT JUSTICE