McCallion & Assoc., LLP v Dyche

2014 NY Slip Op 32465(U)

September 16, 2014

Supreme Court, New York County

Docket Number: 157793/13

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT:HON. JOAN A. MADDEN **PART 11**
Justice

MCCALLION & ASSOCIATE, LLP,

Plaintiff,

INDEX NO. : 157793/13
MOTION DATE: 9-11-14

- v -

MOTION SEQ. NO.: 005

SANDRA DYCHE, SD ASSETS, LLC, and EMPIRE GATEWAY, LLC,

Defendants.

The following papers, numbered 1 to _____ were read on this motion for summary judgment and cross motion to dismiss as untimely and for other relief.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: [x] Yes [ ] No

Defendants Sandra Dyche and SD Assets, LLC (together "the Dyche defendants") move for summary judgment dismissing the complaint against them. Plaintiff McCallion & Associates ("M&A") cross moves "to dismiss" the summary judgment motion as untimely in light of its pending request to extend the time to conduct discovery or, in the alternative, extending its time to respond to the summary judgment motion.

In this action, M&A seeks to recover attorneys' fees arising out of its representation of Ms. Dyche in the matters of Olsen v. Dyche and An v. Dyche. Defendant SD Assets, LLC (SD Assets) is a limited liability company owned by Ms. Dyche. Defendant Empire Gateway LLC ("Empire") is an entity from which SD Assets was designated to received quarterly distributions pursuant to a settlement agreement in the matter of Olsen v. Dyche (hereafter "the Settlement Agreement").

The complaint asserts causes of action for breach of contract, quantum meruit, an accounting, declaratory relief and injunctive relief. In connection with Olsen v. Dyche , M&A

and Ms. Dyche entered into a retainer agreement providing that M&A would receive a contingency fee of 20% "of any amounts received by (Ms. Dyche) by way of settlement, judgment or award" on the counterclaim and third-party complaint, plus $250/hour for legal work related to the defense of the case. Subsequently, the contingency amount was increased to 30% as evidenced by an email exchange between M&A and Ms. Dyche. The complaint alleges that the increase in fee was "in recognition not only of the increased work load by M&A in the Olsen v. Dyche matter, but also in recognition of the tremendous amount of legal work that M&A was performing in An v. Dyche matter without compensation under the An v. Dyche fee agreement[1]" (Complaint, ¶ 36). Ms. Dyche admits in the defendants' answer that she agreed to the increase the contingency fee from 20% to 30% , but maintains she only agreed to the increase because she was afraid M&A would withdraw as counsel if she did not consent.

The dispute in Olsen v. Dyche centered on whether Ms. Dyche had an ownership interest in Empire, and the extent of such interest. Empire owns 55% of the New York City Regional Center (NYCRC), which collects investment funds from overseas investors pursuant to a program administered by the U.S. Office of Homeland Security and invests the fund in various construction projects. It is alleged that NYCRC had contracts involving four projects that would "be producing $50,187, 500 in income to NYCRC, and since Empire ...owned 55% of NYCRC, this would yield interest income and fees to Empire of $27,604,225 in five years" (Complaint, ¶ 21).

According to the complaint, the Settlement Agreement, which was entered into in June 2012, amends the Empire Operating Agreement to confirm Ms. Dyche's ownership interest in Empire, provides for cash payments to Ms. Dyche for income received by Empire in 2011 and the first two quarters of 2012, and provides for payments to Ms. Dyche (through SD Assets) of future quarterly distributions based on Ms. Dyche's percentage interest in Empire.

The complaint seeks attorneys' fees based, in part, on 30% of these quarterly distributions alleging that "the primary component of the consideration that Ms. Dyche received via the

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[1]M&A received an initial payment of $30,000 from Ms. Dyche in connection with M&A's representation of her in An v. Dyche, but M&A alleges that "it received no additional compensation from (Ms. Dyche) for over one and a half years despite the fact that M&A had a fee agreement with Ms. Dyche which entitled M&A to legal fees at its usual hourly rates." (Complaint, ¶ 34).

Settlement Agreement was a specific percentage equity interest in Empire, which entitled her to receive quarterly distributions during the five year term of the three or four identified contracts [and that] the overwhelming majority of M&A's contingency fee was linked to future quarterly payments to Ms. Dyche contemplated by the Settlement Agreement, since M&A was entitled to receive its contingency percentage of the entire amount 'of any judgment, settlement or award,' not just the initial lump payments due Ms. Dyche on a retrospective basis." (Complaint, ¶ 28).

The Dyche defendants answered the complaint and asserted affirmative defenses as well as counterclaims for breach of contract, breach of New York Judiciary Law § 487, breach of fiduciary duty, and attorney malpractice. The Dyche defendants moved for leave to amend their answer to assert counterclaims for rescission of the retainer agreement in Olsen v. Dyche, and a declaratory judgment against M&A that the firm violated certain provisions of the New York Rules of Professional Conduct, and therefore the retainer agreement is void and/or should be set aside and or modified. The Dyche defendants also sought to add allegations (1) regarding the reason that Ms. Dyche agreed to increase the contingency fee from 20% to 30%, (2) that M&A "secretly employed" non-M&A lawyers to perform work that M&A should have performed, and (3) M&A performed no legal services related to defense work in Olsen v. Dyche.

By decision and order dated August 20, 2014, this court denied the motion to amend insofar as the Dyche defendants sought to add the proposed counterclaims except with respect to the proposed counterclaim for rescission, such denial was made without prejudice to renewal within 30 days of e-fling of the decision and order.[2] Of relevance here, in denying the motion to amend to include the counterclaim for rescission the court wrote:

> Contrary to the allegations relating to proposed counterclaim for rescission, neither the complaint nor the relevant retainer agreement seek to recover a percentage of Ms. Dyche's ownership in Empire stock dividends. Instead, the contingency portion of retainer agreement bases M&A's fee on "any amounts received by (Ms. Dyche) by way of settlement, judgment or award." Moreover, the complaint seeks to recover attorneys' fees equivalent to 30% of future quarterly distributions based on Ms. Dyche's percentage interest in Empire, rather

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[2]However, the court granted the motion to the extent of permitting the Dyche defendants to add the allegations as to the reasons that Ms. Dyche agreed to increase the contingency fee from 20% to 30%, and that M&A "secretly employed" non-M&A lawyers to perform work that M&A should have performed.

[* 4]

> than 30% of "Empire stock dividends," as alleged in the proposed counterclaim. Furthermore, while there may be legal issues relating to M&A's basing its fee on the distributions from Empire, absent allegations with respect to such distributions, leave to amend to add a counterclaim for rescission must be denied.

The Dyche defendants now move for summary judgment dismissing the complaint. Although M&A does not oppose the motion on its merits but instead cross moves for discovery or for more time to respond, the motion must be denied. The Dyche defendants first argue the retainer agreement entered into in Olsen v. Dyche did not entitle M&A to "Empire's dividends." However, for the reasons stated in connection with the court's denial of the motion to amend, including that neither the complaint nor the relevant retainer agreement seek to recover a percentage of Ms. Dyche's ownership in Empire stock dividends, this argument is not a basis for granting summary judgment. The Dyche defendants also argue that Ms. Dyche "did not receive" any equity in Empire as a result of the Settlement Agreement and therefore M&A is not entitled to a contingency fee. This argument is without merit as the retainer agreement does not provide for M&A's recovery based solely on Ms. Dyche's equity interest in Empire. Instead, as indicated above, the retainer agreement provides, in part, that M&A would receive a contingency fee of 20% (which was later increased to 30%) "of any amounts received by (Ms. Dyche) by way of settlement, judgment or award" on the counterclaim and third-party complaint, plus $250/hour for legal work related to the defense of the case.

Next, insofar as the Dyche defendants argue that M&A are not entitled to a percentage of the future quarterly distributions based on Ms. Dyche's percentage interest in Empire since such distributions are not attributable to the counterclaim and third party complaint but rather are the result of the defense of the action, such argument does not provide a basis for a grant of summary judgment in their favor. First, since the Dyche defendants fail to submit the pleadings in Olsen v. Dyche, it cannot be ascertained whether Ms. Dyche's recovery under the Settlement Agreement can be said to arise exclusively out of the defense of the claims against her. Moreover, the face of the Settlement Agreement does not support this argument as a matter of law. In addition, while the Dyche defendants argue that her equity interest in Empire was reduced as a result of the Settlement Agreement and therefore she did not prevail on her counterclaims or third-party claims, the merits of this argument cannot be fully ascertained in the absence of discovery.

As for the Dyche defendants' argument that the retainer agreement should be set aside as

unconscionable or otherwise unenforceable, it is premature to make such a determination prior to the completion of discovery. As the Court of Appeals has written:

> It is inherently difficult to determine the unconscionability of contingent fee agreements because at the time of agreement, the precise amount of recovery is still unknown. As such, it is not necessarily the agreed-upon percentage of the recovery due the attorney or the duration of the recovery that makes a contingent fee agreement unconscionable (see Matter of Fitzsimons, 174 NY 15 [1903] [attorney's fee of one half of the recovery does not render the agreement unconscionable]; see also Beatie v DeLong, 164 AD2d 104 [1st Dept 1990] [contingent fee agreement fair and enforceable where attorney was to receive 30% of revenue generated by patents in futuro]), but rather the facts and circumstances surrounding the agreement, including the parties' intent and the value of the attorney's services in proportion to the fees charged, in hindsight (see Gross v Russo, 47 AD2d 655 [2d Dept 1975]).

King v. Fox, 7 NY3d 181, 192 (2006); See also, Lawrence v. Miller, 11 NY3d 588, 595 (2008)(determination of whether a contingency agreement for attorneys' fees should be rescinded depends on the circumstances surrounding the agreement which must be supported by admissible proof).

In view of the above, it is

ORDERED that the motion for summary judgment is denied without prejudice to renewal upon completion of discovery; and it is further

ORDERED that the cross motion is resolved as per the conference order dated September 11, 2014 and is otherwise moot.

Dated: September 16 2014

J.S.C. **HON. JOAN A. MADDEN**
J.S.C.

Check One: [ ] FINAL DISPOSITION [X] NON-FINAL DISPOSITION