SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 3

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STEVEN MALLIS,

Plaintiff,

Index No. 653330/2015
Motion Seq. No. 001
Motion Date: 2/11/2016

- against -

GRAUBARD MILLER,

Defendant,

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BRANSTEN, J.:

In this action, Plaintiff Steven Mallis seeks judgment declaring that a compensation agreement entered into by the partners of Defendant-law firm Graubard Miller ("Firm") is invalid. The Firm has filed a motion to dismiss Mallis' action, pursuant to CPLR 3211(a)(l), (a)(5), & (a)(7). In addition, the Firm requests an award of attorney's fees. For the reasons that follow, the Firm's motion to dismiss is granted, while its motion for fees is denied.

I. Background[1]

Plaintiff Steven Mallis is a former equity partner of the Defendant Firm. Mallis withdrew from the partnership in mid-March 2015. This action centers on a compensation agreement that Mallis entered into shortly before his withdrawal.

[1] The allegations recited in this section are drawn from the Complaint, unless otherwise noted.

The compensation at issue derives from a $72 million contingency fee, which was received by the Firm in February 2015. In accordance with Firm practice, the Firm's Compensation Committee ("Committee") determined how the $72 million was to be allocated among the equity partners. The four members of the Committee purportedly allocated $51.7 million of the fee to themselves and the remaining $20.3 million to the Firm's remaining seven equity partners.

Before the Firm paid its partners their respective portions of the fee, the Firm required each partner to sign a three-page "Refunding and Indemnification Agreement" (the "Agreement"). Relevant to the instant dispute, Section 3 of the Agreement contained a release, which purported to:

> release and forever discharge [the Firm] and each of its partners . .. from any and every claim, demand, action or cause of action, account reckoning and liability of every kind and nature for and on account of every matter and thing whatever arising from or any way relating to the sum determined by the compensation committee of [the Firm] that is allocated to the undersigned partner and the partner's Share Percentage.

(Compl. Ex. A § 3.)

Mallis signed the Agreement on February 26, 2015 and received his $3.2 million share of the contingency fee shortly thereafter. *See* Affirmation of Steven Mallis ¶ 40. He then withdrew as an equity partner in mid-March 2015.

Mallis now brings the instant action, seeking a declaration that the Agreement is unenforceable. However, as Mallis explains in his complaint, this action does not seek any determination as to the adequacy of his compensation; instead, this request for

declaratory judgment merely is intended to set the stage for such a challenge at a later date. *See* Compl. ¶ 4 ("If the relief requested herein is granted, plaintiff, who withdrew as an equity partner of the firm in mid-March 2015, intends to mount a judicial challenge to the adequacy of his compensation against Graubard and/or members of its compensation committee.").

II. **Discussion**

The Firm now moves for dismissal of Plaintiff's Complaint, arguing that the release found at Section 3 of the Agreement bars Plaintiff's claim as a matter of law. In addition, the Firm seeks attorney's fees from Plaintiff for the maintenance of this action. Each request will be addressed in turn.

A. *Motion to Dismiss Standard*

On a motion to dismiss a complaint for failure to state a cause of action, all factual allegations must be accepted as truthful, the complaint must be construed in a light most favorable to the plaintiffs and the plaintiffs must be given the benefit of all reasonable inferences. *Allianz Underwriters Ins. Co. v. Landmark Ins. Co.*, 13 A.D.3d 172, 174 (1st Dep't 2004). "We . . . determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994). This Court

must deny a motion to dismiss, "if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law." *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 152 (2002) (internal quotation marks and citations omitted).

However, on a CPLR 3211(a)(1) motion, "[i]t is well settled that bare legal conclusions and factual claims, which are either inherently incredible or flatly contradicted by documentary evidence . . . are not presumed to be true on a motion to dismiss for legal insufficiency." *O'Donnell, Fox & Gartner v. R-2000 Corp.*, 198 A.D.2d 154, 154 (1st Dep't 1993). The Court is not required to accept factual allegations that are contradicted by documentary evidence or legal conclusions that are unsupported in the face of undisputed facts. *See Zanett Lombardier, Ltd. v. Maslow*, 29 A.D.3d 495, 495 (1st Dep't 2006) (citing *Robinson v. Robinson*, 303 A.D.2d 234, 235 (1st Dep't 2003)). Ultimately, under CPLR 3211(a)(1), "dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." *Leon*, 84 N.Y.2d at 88.

CPLR 3211(a)(5) provides for dismissal where the cause of action may not be maintained because of, *inter alia*, release. CPLR 3211(a)(5).

B. *Release*

The Firm first argues that the release contained in Section 3 of the Agreement bars this action. "As a general rule, a valid release that is clear and unambiguous on its face constitutes a complete bar to an action on a claim which is the subject of the release absent fraudulent inducement, fraudulent concealment, misrepresentation, mutual mistake or duress." *Global Precast, Inc. v. Stonewall Contr. Corp.*, 78 A.D.3d 432, 432 (1st Dep't 2010). "A release will not be treated lightly because it is a jural act of high significance without which the settlement of disputes would be rendered all but impossible." *Allen v. Riese Org., Inc.*, 106 A.D.3d 514, 516 (1st Dep't 2013) (internal quotation marks and citation omitted).

1. Larceny and Coercion

Plaintiff seeks to avoid the application of the release by arguing that the agreement in which it is contained is unenforceable, since the Firm's conduct constitutes "larceny by extortion," in violation of Penal Law § 155.05. According to plaintiff, larceny by extortion has two components: (a) the obtaining of property belonging to another (b) by means of an unlawful threat. Mallis maintains that the Firm extorted valuable rights from Plaintiff, which the extortion statute deems "property," by instilling in him a fear that, unless he signed the document in issue, the Firm would withhold the $3.2 million to

which he was entitled as an equity partner. The property extorted is the release, the indemnity and hold harmless provision, and the attorneys' fee clause, all running in favor of the Firm and its Compensation Committee members. Plaintiff contends that those rights are deemed "property" under New York's larceny statute, and that the unlawful threat was to his financial condition by withholding his share of the distribution.

Larceny is defined under Section 155.05(1) of the Penal Law as the stealing of property "with intent to deprive another of property or to appropriate the same to himself or to a third person, he wrongfully takes, obtains, or withholds such property from an owner thereof." "Larceny includes a wrongful taking, obtaining or withholding of another's property, with the intent prescribed in subdivision one of this section, committed in any of the following ways: ... (e) [b]y extortion." *Id.* § 155.05(2)(e).

Section 155.05(2)(e) then sets forth the acts constituting extortion, of which Plaintiff contends that the following applies: "[p]erform[ance of] any other act which would not in itself materially benefit the actor but which is calculated to harm another person materially with respect to his health, safety, business, calling, career, financial condition, reputation or personal relationships." *Id.* § 155.05(2)(e)(ix). Plaintiff concedes that this is the only portion of this definition that is arguably applicable is harm to financial condition. However, because of the qualifying phrase "any other act which would not in itself materially benefit the actor," harm to financial condition would not

apply to the type of monetary dispute at issue here. Compensation not paid to plaintiff increases compensation available for payment to the other partners. Ignoring the part of the phrase – "any other act which would not in itself materially benefit the actor" – would violate the "accepted rule that all parts of a statute are intended to be given effect and that a statutory construction which renders one part meaningless should be avoided." The alleged withholding of the money – and the obtaining of the Release contained in the Agreement – benefitted the Firm, rendering Penal Law § 155.05(2)(e)(ix) inapplicable.

Plaintiff also cites Penal Law § 135.60 ("Coercion in the second degree"), which defines coercion in the second degree as compelling or inducing

> a person to engage in conduct which the latter has a legal right to abstain from engaging in . . . by means of instilling in him or her a fear that, if the demand is not complied with, the actor or another will .. 9. Perform any other act which would not in itself materially benefit the actor but which is calculated to harm another person materially with respect to his or her health, safety, business, calling, career, financial condition, reputation or personal relationships.

Plaintiff argues that this statute mirrors the extortion statute, discussed above, and that the two statutes are subject to the same analysis. The Court agrees. Therefore, reliance on this statute is equally unavailing.

In connection with the foregoing analysis, it is important to note that plaintiff emphasizes that he is not claiming economic duress. The result may have been different if it were clear that plaintiff had an absolute right to the amount that was being withheld

from him pending his execution of an allegedly overreaching agreement. That, however, is not the case. According to Plaintiff, his claim of entitlement to an amount greater than was offered him is based, in large part, on Firm precedent.

2. Fiduciary Relationship

In addition, Plaintiff contends that the release is unenforceable since agreements between a fiduciary and its beneficiary are subject to strict scrutiny. This argument is unpersuasive. "A sophisticated principal is able to release its fiduciary from claims – at least where, as here, the fiduciary relationship is no longer one of unquestioning trust – so long as the principal understands that the fiduciary is acting in its own interest and the release is knowingly entered into." *Centro Empresarial Cempresa S.A. v. América Móvil, S.A.B. de C.V.*, 17 N.Y.3d 269, 278 (2011). Such is the case here. The parties do not dispute that Plaintiff – an attorney with over 33 years of experience – is a "sophisticated principal."

Moreover, Plaintiff acknowledges that he signed the Agreement, despite knowing that the Committee members were acting in their own interest when drafting the Agreement. For example, Plaintiff notes that he read the Agreement for the first time on February 25, 2015, while in his office with Edward Pomeranz, a member of the Firm's

Executive Committee. Even though Mallis purportedly did not mention the release, "Mr. Pomeranz volunteered that the reason for the release was that if refunding became necessary, they did not want anyone to be able to claim they were undercompensated and assert that as a defense to their refunding obligation." (Mallis Affirm. ¶¶ 59-60.)

Regardless of the reason for the release, the plain language of the provision is clear. The provision bars actions by the partners over the contingency fee distribution, releasing the Firm and each of its partners "from any and every claim, demand, action or cause of action, account reckoning and liability of every kind and nature for and on account of every matter and thing whatever arising from or any way relating to the sum determined by the compensation committee" and allocated to each of the receiving partners.

3. Consideration

Plaintiff next contends that the Agreement is void for want of consideration. Notwithstanding Plaintiff's assertion, the consideration offered by the Firm was the $3.2 million fee, regardless of plaintiff's challenge as to the adequacy of that amount. Moreover, under General Obligations Law Section 15-103, lack of consideration does not

invalidate the Release. *Serbin v. Rodman Principal Invs., LLC*, 87 A.D.3d 870, 870 (1st Dep't 2011).

C. *The Firm's Request for Attorney's Fees*

Finally, the Firm's claim for an award of costs and attorneys' fees is denied. The request is based on paragraph 4 of the Agreement in which Plaintiff agreed:

> To indemnify and hold harmless [the Firm] and each of its partners, their heirs, distributees, executors, representatives, administrators, successors and assigns against any and every claim, demand, action or cause of action, account reckoning and liability of every kind and nature for and on account of every matter and thing whatever arising from or any way relating to the partner's Share Percentage and the sum determined by the compensation committee of [the Firm] that is allocated to the undersigned partner, together with all costs and attorneys' fees incurred in connection therewith by [the Firm] or any partner of [the Firm].

This provision fails to provide the requisite "unmistakably clear statement of an intention to cover an attorney's fee award resulting from a claim between the parties." *Gotham Partners, L.P. v. High Riv. Ltd. P'ship*, 76 A.D.3d 203, 208 (1st Dep't 2010), *lv denied* 17 N.Y.3d 713 (2011). Instead, the provision is "typical of those which contemplate reimbursement when the indemnitee is required to pay damages on a third-party claim." *Hooper Assoc. v. AGS Computers,* 74 N.Y.2d 487, 492 (1989); *see also Tonking v. Port Auth. of N.Y. & N.J.*, 3 N.Y.3d 486, 490 (2004). Accordingly, this request is denied.

III. **Conclusion**

Accordingly it is

ORDERED that the motion by Defendant Graubard Miller to dismiss the complaint is granted and the complaint is dismissed with costs and disbursements to defendant upon submission of an appropriate bill of costs; and it as further

ORDERED that Defendant's request for attorney's fees is denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: New York, New York
June 14, 2016

ENTER

Hon. Eileen Bransten, J.S.C.