

Goldweber Epstein, LLP v Goldberg

2016 NY Slip Op 31211(U)

March 1, 2016

Supreme Court, New York County

Docket Number: 650807/15

Judge: Cynthia S. Kern

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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GOLDWEBER EPSTEIN, LLP,

Plaintiff,

Index No. 650807/15

-against-

DECISION/ORDER

ERIC GOLDBERG,

Defendant.

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HON. CYNTHIA KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Notice of Cross-Motion and Affidavits Annexed.....	2
Replying Affidavits.....	3
Exhibits.....	4

Plaintiff Goldweber Epstein, LLP commenced the instant action against defendant Eric Goldberg seeking to recover legal fees for work plaintiff allegedly performed on defendant's behalf. Plaintiff now moves for an Order pursuant to CPLR § 3211(b) dismissing defendant's affirmative defenses. Defendant cross-moves for an Order pursuant to CPLR § 3211(a)(7) dismissing plaintiff's cause of action for an account stated. The motions are resolved as set forth below.

The relevant facts are as follows. In or around April 2015, plaintiff commenced the instant action against defendant asserting claims for, *inter alia*, breach of contract and an account stated stemming from legal services plaintiff allegedly rendered on defendant's behalf in a divorce proceeding. Specifically, the complaint alleges that in or around January 2011, defendant hired plaintiff as his lawyer pursuant to a retainer agreement, that plaintiff performed under the agreement but that defendant failed to perform by failing and refusing to pay plaintiff the entire agreed upon sum for plaintiff's services. Plaintiff now moves to dismiss defendant's affirmative defenses and

defendant cross-moves to dismiss plaintiff's third cause of action for an account stated.

The court first turns to defendant's cross-motion for an Order pursuant to CPLR § 3211(a)(7) dismissing plaintiff's cause of action for an account stated. On a motion addressed to the sufficiency of the complaint, the facts pleaded are assumed to be true and accorded every favorable inference. *Morone v. Morone*, 50 N.Y.2d 481 (1980). Moreover, "a complaint should not be dismissed on a pleading motion so long as, when plaintiff's allegations are given the benefit of every possible inference, a cause of action exists." *Rosen v. Raum*, 164 A.D.2d 809 (1st Dept. 1990). "Where a pleading is attacked for alleged inadequacy in its statements, [the] inquiry should be limited to 'whether it states in some recognizable form any cause of action known to our law.'" *Foley v. D'Agostino*, 21 A.D.2d 60, 64-65 (1st Dept 1977) (quoting *Dulberg v. Mock*, 1 N.Y.2d 54, 56 (1956)). However, "conclusory allegations – claims consisting of bare legal conclusions with no factual specificity – are insufficient to survive a motion to dismiss." *Godfrey v. Spano*, 13 N.Y.3d 358, 373 (2009).

In the instant action, this court finds that defendant's motion to dismiss the complaint's cause of action for an account stated on the ground that it fails to state a claim must be granted. An account stated "exists where a party to a contract receives bills or invoices and does not protest within a reasonable time." *Russo v. Heller*, 80 A.D.3d 530, 532 (1st Dept 2011) (internal quotation omitted). Here, the court finds that the complaint fails to sufficiently state a claim for an account stated as the complaint merely alleges "[t]hat an account was taken and stated between the plaintiffs [and] defendant which showed a balance of Forty Nine Thousand Four Hundred Sixty Four Dollars and Sixty Five Cents (\$49,464.65) due and owing by the defendant to the plaintiffs." However, such allegation alone is insufficient to state a claim for an account stated as the complaint does not allege that plaintiff sent defendant any bills or invoices totaling said amount nor does it allege that

defendant failed to object to said bills or invoices within a reasonable time.

The court next turns to plaintiff's motion for an Order pursuant to CPLR § 3211(b) dismissing defendant's affirmative defenses. Pursuant to CPLR § 3211(b), "[a] party may move for judgement dismissing one or more defenses, on the ground that a defense is not stated or has no merit." On such a motion, defenses that consist of bare legal conclusions without supporting facts will be stricken. See *Robbins v. Growney*, 229 A.D.2d 356, 358 (1st Dept 1996). However, the First Department has made clear that the assertion of the defense of failure to state a cause of action in an answer, while surplusage as it may be asserted at any time even if not pleaded, "should not be subject to a motion to strike." *Riland v. Todman & Co.*, 56 A.D.2d 350, 353 (1977).

As an initial matter, plaintiff's motion to dismiss defendant's second and third affirmative defenses, which allege that the first and second causes of action in the complaint fail to state a claim, is denied as such affirmative defenses are not subject to a motion to strike as a matter of law. See *Riland*, 56 A.D.2d at 353. However, plaintiff's motion to dismiss defendant's fourth affirmative defense, which alleges that the third cause of action for an account stated fails to state a claim, is granted based on this court's dismissal of plaintiff's third cause of action on that basis.

Plaintiff's motion to dismiss defendant's first and sixth affirmative defenses on the ground that they are actually counterclaims because they seek monetary damages is denied as this court finds that said affirmative defenses are not counterclaims. However, plaintiff's motion to dismiss defendant's fifth affirmative defense, which asserts "[t]hat Plaintiff failed to adequately prepare for trial and failed to competently advise and protect Defendant regarding his rights and the legal implications of entering into multiple settlement agreements with his then wife, causing Defendant monetary damages," is granted on the ground that said affirmative defense is actually a counterclaim for legal malpractice. Indeed, defendant has already asserted a counterclaim for legal

