

Szpilzinger v Danzig Fishman & Decea

2017 NY Slip Op 30452(U)

March 2, 2017

Supreme Court, New York County

Docket Number: 650091/2016

Judge: Arthur F. Engoron

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 37

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ISAAC SZPILZINGER,

Index Number: 650091/2016

Plaintiff,

Sequence Number: 001, 002

-against-

Decision and Order

DANZIG FISHMAN & DECEA; FISHMAN & DECEA;
RICHARD A. DANZIG; THOMAS B. DECEA; and
THOMAS B. DECEA L.L.C.,

Defendants.
-----X

Arthur F. Engoron, Justice

In compliance with CPLR 2219(a), this Court states that the following papers, numbered 1 to 8, were used on (1) plaintiff's motion, pursuant to CPLR 3212, for partial summary judgment; and (2) certain defendants' motion, pursuant to CPLR 3211, to dismiss:

Papers Numbered:

<u>Plaintiff's Motion for Partial Summary Judgment (Seq. 001)</u>	
Notice of Motion - Affirmation - Affidavit - Exhibits	1
Defendant Danzig's Affirmation in Partial Opposition to Motion	2
Decea Defendants' Affirmation in Opposition - Exhibits	3
Reply Affirmation to Decea Defendants - Exhibit	4
Reply Affirmation to Defendant Danzig	5
 <u>Decea Defendants' Motion to Dismiss (Seq. 002)</u>	
Notice of Motion - Affirmation - Affidavit - Exhibits	6
P's Affirmation in Opposition to Motion - Affidavit - Exhibits	7
Reply Affirmation - Affidavit	8

Upon the foregoing papers, plaintiff's motion for partial summary judgment is denied, and Decea Defendants' motion to dismiss is partially granted.

Background

Plaintiff, Isaac Szpilzinger, an attorney admitted in New York, alleges that on December 22, 2008, defendant law firm, Danzig Fishman & Decea ("DFD"), contacted him about providing part-time legal services to DFD as an independent contractor. Defendants Richard A. Danzig and Thomas B. Decea, as DFD's managing members, interviewed plaintiff. Decea alleges that plaintiff was recommended to him by a long-standing DFD client. Plaintiff further alleges that on January 7, 2009, plaintiff, Danzig, and Decea agreed that plaintiff would provide legal services to DFD at a rate of \$150 per hour, with plaintiff to submit monthly time sheets/invoices ("Oral Agreement"). The parties further agreed that on any request for plaintiff to offer legal services, he was to work with Decea, Danzig, or the DFD attorney handling the day-to-day matters of that case. The parties did not memorialize the Oral Agreement in writing.

On June 9, 2009, Danzig and Decea allegedly asked plaintiff to consider reducing his hourly rate to \$100. Plaintiff alleges that in a June 9, 2009 email he received from Decea, Decea expressed to him that "both Richard and I are very pleased with your work and you are a luxury to have as a resource." Decea, on the other hand, alleges he does

not recall ever having made that statement. The parties agree that plaintiff refused to reduce his hourly rate, but dispute as to whether the Oral Agreement continued.

The record contains extensive information about the legal services plaintiff performed for DFD, specifically for Danzig and Decea, dating back to January 2009. Plaintiff alleges, and the invoices he submits reflect, that as of 2010, Danzig owes him an outstanding balance of \$10,964, and Decea owes him \$7,920, for a total of \$18,884, plus interest.

From hereon, due to the subject matter of the current motions, this Court will focus on the legal services plaintiff performed specifically for Decea. As plaintiff and Decea do not dispute that by August 2010 Decea had paid in full for each of plaintiff's invoices from January 2009 to April 2010, the Court will address the legal services plaintiff provided to Decea in May, June, and July of 2010 ("Unpaid Invoices"), the months for which plaintiff alleges his invoices were not paid. For each of these months, plaintiff alleges that he prepared and submitted his invoices to DFD by email to its legal assistant, and that DFD and Decea accepted the Unpaid Invoices without objection, but has, to date, failed to pay. On the other hand, Decea argues that these payments were not made because defendants repeatedly objected to the Unpaid Invoices. In the Decea Defendants' opposition to plaintiff's motion for partial summary judgment, Decea alleges that from the beginning, neither he nor Danzig were satisfied with plaintiff's work, but agreed to give him additional time to acclimate only because he was referred by an important DFD client. Decea states that plaintiff's work began to improve, but not to the level where he was worth \$150 an hour, and that he was taking too long to complete certain tasks, and his time often had to be written off and not billed to the client for whom the work was being performed.

Particularly disputed is plaintiff's proffered services on DFD's Egloff matter. The Egloff matter is a 2010 case in which DFD appeared on Egloff's behalf, pro bono, to resolve a tax foreclosure action against him for unpaid property taxes in the Town of Lewisboro ("Town"). When the Town's law firm, Wormser, Keily, Galef & Jacob LLP ("Wormser"), denied DFD's offer to pay Egloff's unpaid tax arrears, DFD sued the Town and Wormser in tort. While DFD ultimately prevailed on the merits against the Town, the lower court saw fit to assess against DFD more than \$45,000 in legal fees, payable to Wormser, because it determined that the case against Wormser was frivolous. In a June 21, 2010 email to plaintiff, Decea asked for plaintiff's "thoughts" on whether DFD should appeal or not. Decea alleges that plaintiff advised him that the appeal was "frivolous," that "there was no likelihood of success," and that "an appeal would be a waste of time," to which Decea expressed his strong disagreement with plaintiff's conclusion. DFD subsequently filed a notice of appeal of the order awarding sanctions. In preparation of the appeal, Decea alleges that he asked plaintiff to prepare a memorandum of the best arguments to pursue on appeal; Decea alleges that he never received the memorandum. Plaintiff, on the other hand, contends: (1) that Decea's allegation about plaintiff's purported oral statements negatively characterizing the appeal ("frivolous," etc.) is unsubstantiated, as Decea does not specify when these statements were made; (2) that Decea did not express any disagreement or concern with plaintiff's advice on the Egloff matter until a year later; and (3) that Decea did not ask plaintiff to prepare a research memorandum as Decea stated in his June 21, 2010 email that no decision to pursue an appeal had been reached. In a Decision & Order dated November 9, 2011, the Appellate Division affirmed the lower court's finding of frivolous conduct, but modified the sanction amount to \$7,500. The Decea Defendants allege that had Decea followed plaintiff's advice and not perfected the appeal, DFD would have lost more than \$37,500.

Thereafter, the parties vehemently disagree as to the extent of their communications with each other. Plaintiff alleges that after July 2010, telephone calls to DFD were not returned until March 2011. Decea, on the other hand, alleges that he spoke to plaintiff by telephone on several occasions between July 2010 and March 2011. Decea specifically alleges that on September 7, 2010, he made it clear to plaintiff that plaintiff was overpaid for the work he had performed, and that DFD would not pay any additional amounts. The parties do not dispute that in an email dated March 23, 2011, Decea stated, "I would like a discount on the Egloff matter as it was personal to the firm of which we considered you a part." The record is unclear as to whether plaintiff and Decea ever reached an agreement on a discount.

The Instant Action

On January 8, 2016, plaintiff commenced this action, on the theories of account stated, breach of contract, and quantum meruit, against defendants to recover \$18,884, plus statutory interest, costs, and disbursements. On March 11, 2016, Danzig e-filed his answer with counterclaims, alleging (1) that plaintiff breached the contract by overbilling for his services and allowing his work performance to fall below the applicable standard of care; and (2) that plaintiff was unjustly enriched by receiving compensation for sub-par performance. On March 24, 2016, plaintiff replied to Danzig's counterclaims. On May 31, 2016, defendants DFD, Fishman & Decea ("F&D"), Decea, and TBD LLC (collectively, "Decea Defendants") e-filed their answer with counterclaims, also alleging breach of contract and unjust enrichment, demanding \$25,000 (to recoup \$50 an hour for each hour plaintiff worked and was paid \$150), statutory interest, punitive damages, attorneys' fees, costs, and disbursements. On June 15, 2016, plaintiff replied to the Decea Defendants' counterclaims. To date, DFD has failed to answer or otherwise appear in this action or move against the complaint.

On May 31, 2016, the Decea Defendants served plaintiff with a notice of deposition. The purpose of requesting plaintiff to submit to a deposition was (1) to ascertain how legal research was conducted by plaintiff and sent to DFD; and (2) to describe oral communications between the parties, particularly with regards to plaintiff's invoices from after May 2010. On or around June 18, 2016, the Decea Defendants served plaintiff with document demands, inter alia: (1) research memoranda for the Egloff matter; (2) all documentation of billable work produced by plaintiff during the period; and (3) all documents and communications supporting the allegation that during June and July 2010 plaintiff was asked to perform work for DFD on the Egloff matter.

Plaintiff now moves, pursuant to CPLR 3212, for partial summary judgment against the Decea Defendants. On July 23, 2016, Danzig partially opposed the motion. On August 11, 2016, the Decea Defendants opposed the motion. On September 1, 2016, plaintiff replied. By letter correspondence to the Court dated September 2, 2016, the Decea Defendants request that the aforementioned letter be considered part of the record or, alternatively, for leave to file a formal sur-reply. In a letter to the Court dated September 6, 2016, plaintiff opposed the request, and on the same date, the Decea Defendants sent another letter in support of it.

The Decea Defendants now move, pursuant to CPLR 3211, to dismiss the complaint in its entirety as against the Decea Defendants for failure to state a cause of action. The Decea Defendants argue that: (1) there is no privity of contract between plaintiff and F&D, and F&D is not the successor of DFD; (2) there is no privity of contract between plaintiff and TBD LLC, and TBD LLC is not a surety of DFD; and (3) there is no privity of contract between plaintiff and Decea, and plaintiff fails to allege any cognizable theory of liability against him individually.

Discussion

I. Plaintiff's Motion for Partial Summary Judgment is Hereby Denied

As a preliminary matter, the Decea Defendants' request to have its September 2, 2016 letter to the Court be considered part of the record, given that plaintiff raised new matters for the first time in his reply affidavit dated August 31, 2016, is hereby granted. In the interest of reaching the merits of this case, the Court, in its discretion, finds that there is no prejudice to either party to consider all parties' letters to the Court, dated August 31, 2016 and September 6, 2016, on the merits. See Allstate Ins. Co. v Raguzin, 12 AD3d 468, 468 (2d Dept 2004) ("the Supreme Court providently exercised its discretion in considering the sur-reply letter that plaintiff's attorney submitted in response to a new issue raised in the defendant's reply papers"); see also Gluck v New York City Tr. Auth., 118 AD3d 667, 668 (2d Dept 2014) ("Arguments raised for the first time in reply may be considered if the original movant is given the opportunity to respond and submits papers in surreply").

A court may grant summary judgment where there is no genuine issue of material fact, and the moving party has made a prima facie showing of entitlement to a judgment as a matter of law. See Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986); see generally American Sav. Bank v Imperato, 159 AD2d 444, 444 (1st Dept 1990) ("The presentation of a shadowy semblance of an issue is insufficient to defeat summary judgment"). The moving party's burden is to tender sufficient evidence to demonstrate the absence of any material issue of fact. See Ayotte

v Gervasio, 81 NY2d 1062 (1993). Once this initial burden has been met, the burden then shifts to the party opposing the motion to submit evidentiary proof sufficient to create material issues of fact requiring a trial; mere conclusions and unsubstantiated allegations are insufficient. See Zuckerman v City of New York, 49 NY2d 557, 562 (1980). To prove breach of contract, a plaintiff must show: (1) the existence of a contract; (2) plaintiff's performance thereunder; (3) defendant's breach thereof; and (4) resulting damages. See Harris v Seward Park Housing Corp., 79 AD3d 425, 426 (1st Dept 2010).

Plaintiff has failed to establish entitlement to partial summary judgment as against the Decea Defendants. On the record before the Court, questions of fact exist as to, inter alia: (1) whether DFD timely objected to the Unpaid Invoices; (2) whether plaintiff's legal work amounted to performance under the Oral Agreement; (3) what work plaintiff was asked to perform on the Egloff matter; and (4) the timing and substance of the parties' communications with each other. See F. Garofalo Elec. Co. v New York Univ., 300 AD2d 186, 189 (1st Dept 2002) ("The question of whether there has been substantial performance—or a breach—is to be determined, whenever there is any doubt, by the trier of fact"). Given the conflict between plaintiff and Decea Defendants' affidavits and recollections of fact, summary judgment at this stage would be premature and inappropriate. See Quiles v Greene, 291 AD2d 345, 346 (1st Dept 2002) ("The conflicting versions provided by [plaintiff] and [defendant] reveal issues of disputed material fact"). Defendants are entitled to due process, and without further discovery, including the emails, documents, and records of telephone conversations exchanged by and among the parties, defendants are prejudiced in that they cannot fully and completely defend against plaintiff's allegations. See CPLR 3212; see also Bingham v Wells, Rich, Greene, Inc., 34 AD2d 924, 925 (1st Dept 1970) ("[party] has demonstrated that facts essential to justify opposition may exist and he should be afforded the opportunity to avail himself of disclosure devices").

Accordingly, plaintiff's motion for partial summary judgment as against the Decea Defendants is hereby denied.

II. The Decea Defendants' Motion to Dismiss is Hereby Partially Granted

Dismissal of a complaint, pursuant to CPLR 3211(a)(7), is only warranted if, accepting the facts alleged as true and according plaintiff the benefit of every possible favorable inference, the court determines that the allegations do not fit within any cognizable legal theory. See Leon v Martinez, 84 NY2d 83, 87-8 (1994); Morone v Morone, 50 NY2d 481, 484 (1989). The court's inquiry is limited to whether plaintiff has stated a cause of action and not whether it may ultimately be successful on the merits. See Stukuls v State of New York, 42 NY2d 272, 275 (1977); EBC I, Inc. v Goldman, Sachs & Co., 5 NY3d 11, 19 (2005) ("[w]hether a plaintiff can ultimately establish its allegations is not part of the calculus" in determining a motion to dismiss for failure to state a cause of action). A complaint survives a motion to dismiss for failure to state a cause of action if it gives the court and the parties "notice" of what is intended to be proved and the material elements of a cause of action. See CPLR 3013; Rodgers v Earl, 249 AD2d 990 (4th Dept 1998).

F&D is an improper party to this action because it has no privity of contract with plaintiff, and plaintiff has failed to demonstrate that it was an intended third-party beneficiary of the Oral Agreement. See Aetna Health Plans v Hanover Ins. Co., 116 AD3d 538, 539 (1st Dept 2014) ("Nor may [plaintiff] assert a breach of contract claim against [defendant], since it is not in privity of contract with [defendant], and there has been no showing that it was an intended third-party beneficiary of the contract"). Plaintiff alleges that he entered into the Oral Agreement with DFD, Decea, and Danzig, but does not allege that F&D was a party to that agreement, nor that F&D was an intended beneficiary of that agreement. In fact, it is patently impossible for F&D to have been considered a third-party beneficiary of the Oral Agreement made in 2008; F&D was not formed until 2014. Plaintiff's argument that F&D should be treated as the successor to DFD and, therefore, be liable for DFD's debts, fails. In order to allege successor liability in New York, plaintiff needed to plead at least one of the following four scenarios: (1) F&D expressly or impliedly assumed DFD's contract liabilities; (2) there was a consolidation or merger of F&D, as purchaser, and DFD, as seller; (3) F&D was a mere continuation of DFD; or (4) the transaction was fraudulently entered into to escape such obligations. See Schumacher v Richards Shear Co., 59 NY2d 239, 245 (1983). Plaintiff has failed to plead any of the above. Moreover, New York Partnership Law § 72 does not apply; this

statute attributes successor liability if the business is continued *without* liquidation. Here, Decea claims, which plaintiff does not dispute, that DFD was dissolved and liquidated, and concluded all its affairs in 2012. Lastly, plaintiff cannot succeed against F&D on an account stated cause of action. There are no allegations that plaintiff ever sent invoices to F&D, and, accordingly, F&D could not have accepted or retained any such invoices.

As for TBD LLC, although it, like F&D, has no privity of contract with plaintiff, it is less clear whether it was an intended third-party beneficiary of the Oral Agreement or a surety of DFD. See Citytrust v Atlas Capital Corp., 173 AD2d 300, 304 (1st Dept 1991) (“the IAS court determined that, although there was no contractual privity between [the parties], a triable issue of fact nevertheless existed as to whether plaintiff Citytrust was, in fact, a third-party beneficiary of the ... agreement between 4D and [defendant]”). Plaintiff alleges that at the time Decea was a partner in DFD and the sole member of TBD LLC, TBD LLC made voluntary payments of DFD’s debts. It is unclear to the Court, at this point, the nature of the relationship between DFD and TBD LLC. Hence, plaintiff has sufficiently plead facts that preclude dismissing the complaint against TBD LLC at this time.

Plaintiff has sufficiently plead causes of action for breach of contract, or, in the alternative, quantum meruit, and account stated against Decea. Plaintiff alleges that the parties entered into an oral contract (i.e. the Oral Agreement), that plaintiff did in fact perform and provide Decea legal services, that Decea breached by failing to pay for three months worth of services, and that plaintiff has consequently been damaged in the sum of \$7,920. See Kelley v Galina-Bouquet, Inc., 155 AD2d 96, 99 (1st Dept 1990) (“plaintiff has sufficiently plead causes of action for breach of contract, or, in the alternative, quantum meruit, in view of the fact that plaintiff alleges that defendant ... orally requested her to perform services for defendant corporation, for which she would be compensated, and she performed and expected to be paid for said services, and the defendants have failed to compensate her”). The complaint also alleges that Decea received the Unpaid Invoices, held them without objection, and failed to pay the balanced owed against them. See Morrison Cohen Singer & Weinstein v Ackerman, 280 AD2d 355, 356 (1st Dept 2001) (“The receipt and retention of an account, without objection, within a reasonable period of time . . . gives rise to an account stated”). Decea’s argument that he has no privity of contract with plaintiff, and that he did in fact object to the Unpaid Invoices, does not demonstrate the complaint’s failure to state a cause of action.

The Court has considered the parties’ other arguments and finds them unavailing.

Accordingly, the Decea Defendants’ motion to dismiss is partially granted, to wit, as to F&D only.


The Court encourages the parties to use it as a resource to attempt settlement. A call to (646) 386-3181 can get the ball rolling.

Conclusion

Plaintiff’s motion for partial summary judgment is hereby denied. The Decea Defendants’ motion to dismiss is hereby partially granted as to Fishman & Decea only. The clerk is hereby directed to enter judgment accordingly.

The Court, in light of denying plaintiff’s partial summary judgment motion in this Decision and Order, and thereby lifting the stay on discovery in this action, hereby directs plaintiff to respond to Decea Defendants’ outstanding discovery demands dated May 31, 2016 and June 18, 2016 within ~~30~~ days of the date of entry of judgment.

Dated: March 2, 2017



Arthur F. Engoron, J.S.C.