

**Weber v Harman**

2017 NY Slip Op 30943(U)

May 5, 2017

Supreme Court, New York County

Docket Number: 152901/2013

Judge: Debra A. James

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and the eighth cause of action asserts fraud based upon the same conduct. The ninth cause of action seeks recovery on a quantum meruit theory as to both matters where representation was allegedly provided. The complaint also seeks punitive damages.

The court shall grant defendant's motion only to the extent of dismissing the first and fifth causes of action for conversion and the request for punitive damages and otherwise shall deny the motion. The First Department has held that "[c]onversion is an unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner's rights. Money, if specifically identifiable, may be the subject of a conversion action. However, an action for conversion cannot be validly maintained where damages are merely being sought for breach of contract." Peters Griffin Woodward, Inc. v WCSC, Inc., 88 AD2d 883, 883-84 (1<sup>st</sup> Dept 1982) (citations omitted). In this case as in Peters, the plaintiff has never had possession of the money constituting the attorney's fees and thus conversion does not lie and the plaintiff's remedy is under a contractually related remedy. The court notes that plaintiff has stated that the fourth and eighth causes of action for fraud have been withdrawn and so those are not discussed here. The court further finds that as this is a private dispute between the parties, punitive damages are not available. See New York University v Continental Ins. Co., 87 NY2d 308 (1995).

As to the breach of contract causes of action, the court disagrees with defendant's argument that the material terms of the oral agreement are insufficient to state a cause of action as the First Department has held that where it is alleged that there is an agreement to divide an attorney's fee the "fact that the agreement was oral does not make it unenforceable." Stinnett by Stinnett v Sears Roebuck & Co., 201 AD2d 362, 364 (1<sup>st</sup> Dept 1994). This case is distinguishable from John Anthony Rubino & Co. v Swartz, (84 AD3d 599 [1<sup>st</sup> Dept 2011]) as the plaintiff in Swartz never asserted that there was an agreement as to compensation. As there is a dispute between the parties as to whether there was an agreement and if so what the terms of that agreement were, the issues of contested fact must be tried and cannot be adjudicated summarily.

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With respect to the quantum meruit causes of action, the standard for sustaining such a claim is that "unjust enrichment is not a catchall cause of action to be used when others fail. It is available only in unusual situations when, though the defendant has not breached a contract nor committed a recognized tort, circumstances create an equitable obligation running from the defendant to the plaintiff. Typical cases are those in which the defendant, though guilty of no wrongdoing, has received money to which he or she is not entitled." Corsello v Verizon New York, Inc., 18 NY3d 777, 790 (2012). If the court were to find "there was no enforceable contract here, the plaintiff could recover in quantum meruit. The elements of a cause of action sounding in quantum meruit are (1) performance of services in good faith, (2) acceptance of services by the person to whom they are rendered, (3) expectation of compensation therefor, and (4) reasonable value of the services rendered." Wehrum v Illmensee, 74 AD3d 796, 797 (2d Dept 2010) (citations omitted). The plaintiff has placed in issue facts, which if accepted by the factfinder, that could establish these elements even though the defendant has contested same. Thus summary disposition is not available for the unjust enrichment claims. Furthermore defendant's purported defense of unclean hands is unsupported because "such a defense is available only when the illegal conduct of a plaintiff is directly related to the subject matter in litigation and the party seeking to invoke the doctrine was injured by such conduct." TNT Communications Inc. v Mgt. Tel. Sys., Inc., 32 AD2d 55, 58 (1<sup>st</sup> Dept 1969), affd 26 NY2d 639 (1970) (internal quotation and citation omitted). Defendant's allegations here do not relate to the transactions sued upon but rather to the conduct of this litigation and therefore cannot form the basis of the defense.

Accordingly, it is

ORDERED that defendant's motion for summary judgment dismissing the complaint is GRANTED only to extent of DISMISSING the causes of action for conversion and punitive damages; and it is further

ORDERED that plaintiff's causes of action for fraud are hereby WITHDRAWN; and it is further

ORDERED that defendant's motion for summary judgment dismissing the complaint is GRANTED only to extent of DISMISSING the causes of action for conversion and punitive damages; and it is further

ORDERED that plaintiff's causes of action for fraud are hereby WITHDRAWN; and it is further

ORDERED that defendant's motion is otherwise DENIED.

This is the decision and order of the Court.

DATE : May 5, 2017

  
JAMES, DEBRA A., JSC