

Gorunkati v Baker Sanders, LLC
2017 NY Slip Op 33164(U)
April 28, 2017
Supreme Court, Kings County
Docket Number: 510084/2016
Judge: Leon Ruchelsman
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[* 1]

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At an IAS Term, Part COMM-8 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 28th day of April 2017

PRESENT:
HON. LEON RUCHELSMAN
Justice

SURENDER GORUNKATI, MD, Individually and on behalf of RICHIMOND MEDICAL DIAGNOSTIC, P.C.,

Plaintiffs,

- against -

BAKER SANDERS, LLC f/k/a, BAKER, SANDERS, BARSHAY, GROSSMAN, FASS, MUHLSTOCK & NEUWIRTH, LLC, LBLINY, LLC f/k/a EVOLUTION SOLUTIONS, LLC and ASTA FUNDING, INC.
Defendants.

DECISION & ORDER

Index # 510084/2016

<u>The following papers numbered 1 to 3 read on this motion:</u>	<u>Papers Numbered</u>
Notice of Motion, Memorandum of Law in Support	1
Affirmation in Opposition	2
Reply Memorandum of Law in Support	3

Plaintiff, Surender Gorunkanti (hereinafter plaintiff or Surender) is a physician licensed to practice in New York State and has sued defendant Baker Sanders et al. (hereinafter defendant

or Baker Sanders) for a total of ten causes of action against all named defendants. The parties concede that all but the causes of action (1) for accounting and (3) for malpractice should be dismissed by the court. (Reply Memorandum of Law at page 1).

Defendant moves pursuant to CPLR § 3211(a) (1) and (5) (defense founded on documentary evidence and release, respectively) as well as CPLR § 3211 (a) (7) (failure to state a cause of action) to dismiss plaintiff's complaint on plaintiff's first and third causes of action. Plaintiff opposes. For the following reasons, defendant's motion to dismiss the cause of action for accounting is denied and defendant's motion to dismiss the case of action for malpractice should be granted because it is duplicative of the fourth cause of action (breach of contract)

Findings of Facts

Plaintiff retained Baker Sanders to engage in litigation and arbitration to assist plaintiff's in the collection of outstanding no fault insurance bills that were not paid by certain motor vehicle insurance companies. Plaintiff executed releases to Baker Sanders instructing that payment be made to third parties. Baker Sanders was to remit collected proceeds to plaintiff in a timely manner. Baker Sanders commenced numerous litigations with insurance companies and the settlements and judgments were sent to Baker Sanders. Baker Sanders sent payment to defendants, Swift Funding, Gelt Funding, LBLINY and Asta Funding. Plaintiff demanded that Bakers Sanders remit the payment to him. Baker Sanders refused and continued to send the payments to the third parties.

Discussion

On a motion to dismiss pursuant to CPLR 3211 (a) (7), the complaint must be liberally construed in the light most favorable to the plaintiff and all allegations must be accepted as true.

Leon v Martinez, 84 NY2d 83, 87; *LoPinto v J.W. Mays, Inc.*, 170 AD2d 582. "Initially, the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail" *Guggenheimer v Ginzberg*, 43 NY2d 268, 275. A court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint (see *Rovello v Orofino Realty Co.*, 40 NY2d 633, 635. In his affidavit, Surrender stated (paragraph 5 of the Affirmation in Opposition) that he entered into a Revolving Credit and Security Agreement between his PC and different funding companies (the other captioned defendants). He also executed no-fault payment directives with Baker Sanders. He stated, in paragraph 8, that he received no advances from the factoring companies nor money from Baker Sanders. Based upon, this testimony, plaintiff is entitled to an accounting from Baker Sanders.

Dismissal of a complaint pursuant to CPLR 3211 (a) (7) is appropriate where "the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" See *Goshen v Mutual Life Ins. Co. of NY*, 98 NY2d 314, 326 (2002). Here, in support of their motion, defendant submitted the release that Surrender sent to them instructing Baker Sanders to mail payment to third parties. However, in stark contradiction to these documents is the document offered by plaintiff which is a letter sent to defendant, dated July 17, 2015 (Exhibit 6 of the Affirmation in Opposition) which made the initial releases null and void. Thus, construing the documents in the light most favorable to the plaintiff, defendant's motion to dismiss pursuant to CPLR 3211 (a)(1) should be denied. Further, the third cause of action (malpractice) is duplicative of a the fourth cause of action (breach of contract) which the parties concede should be dismissed.

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Conclusion

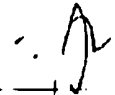
Accordingly, it is

ORDERED, that defendant Baker Sander's motion pursuant to CPLR 3211 to dismiss plaintiff's first cause of action for accounting is denied and it is;

ORDERED, that defendant Baker Sander's motion pursuant to CPLR 3211 to dismiss plaintiff's third cause of action for malpractice is granted.

This constitutes the Decision and Order of the Court.

E N T E R



HON. LEON RUCHELSTEIN
J. S. C.

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