

Smith v Schoolcraft
2018 NY Slip Op 31536(U)
July 3, 2018
Supreme Court, New York County
Docket Number: 654344/2017
Judge: Anthony Cannataro
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

Nathaniel B. Smith and John Lenoir,
Plaintiffs,

Index No. 654344/2017

against

DECISION & ORDER

Adrian P. Schoolcraft,
Defendant.

Anthony Cannataro, J.:

Plaintiffs Nathaniel B. Smith and John Lenoir bring this action to recover legal fees from the proceeds of the settlements of their former client's, defendant Adrian P. Schoolcraft (Schoolcraft), federal civil rights action. Plaintiffs now move to dismiss certain counterclaims and affirmative defenses as barred by documentary evidence and based on a failure to state a cause of action.

Schoolcraft hired plaintiffs as part of a team of lawyers to represent him in a 2010 federal civil rights action commenced in the Southern District of New York (the federal action). Pursuant to their August 13, 2013 retainer agreement, the parties agreed that attorneys' fees would be equal to the greater of either: (1) one-third of the total value of any recovery, or (2) the amount awarded by the court in the federal action. The retainer agreement also contained a standard merger clause providing that the agreement could only be modified by a writing signed by the parties.

In advance of the federal action, Schoolcraft retained Norinsberg, Cohen and Fitch (NCF)—a law firm previously hired and fired by Schoolcraft—to serve as lead trial counsel, in addition to keeping plaintiffs as counsel. Schoolcraft settled with the City on September 29, 2015 pursuant to an Offer of Judgment. During discussions on whether to accept the settlement from the City, plaintiffs and NCF agreed on September 29, 2015 to

“contribute a sum of \$250,000.00 to Adrian Schoolcraft out of the legal fees recovered in connection with the Offer of Judgment.” Neither party disputes that plaintiffs’ “contribution” is \$125,000 of the aforementioned sum. Under the terms of this agreement, attorneys’ fees would be paid for by the City.

Plaintiffs then entered settlement discussions with the City to resolve the issue of legal fees in the federal action. On April 4, 2016 the City offered plaintiffs \$1,370,000 for attorneys’ fees and costs, which plaintiffs rejected in favor of having the Court determine the amount due. Plaintiffs ultimately received an award of \$528,119.51 for legal fees and \$94,665.01 for expenses. Defendant also settled his claims against the remaining non-City defendants in 2015. The total amount of Schoolcraft’s settlement with both the City and non-City defendants is not disclosed in the pleadings, however, ostensibly one-third of the aggregate of the settlements would exceed the amount awarded by the Court. After resolving the underlying action, plaintiffs commenced the instant action seeking additional legal fees pursuant to the terms of the retainer agreement.

In response to plaintiffs’ motion for legal fees, Schoolcraft’s answer primarily alleges that no additional legal fees are owed as the parties orally modified the retainer agreement. Specifically, Schoolcraft claims that plaintiffs agreed to seek their attorney’s fees solely by way of the court in the federal action in exchange for Schoolcraft’s acceptance of the City’s Offer of Judgment. Schoolcraft also interprets the September 29, 2015 agreement as a promise by plaintiffs to pay him \$125,000. Schoolcraft further alleges that plaintiffs breached their duty of loyalty by failing to inform Schoolcraft of an initial settlement offer by the City for \$1,370,000. Thus, Schoolcraft asserts six counterclaims premised on these allegations: breach of contract, promissory estoppel, fraudulent inducement, breach of fiduciary duty, and anticipatory repudiation. Schoolcraft also asserts affirmative defenses of fraud, bad-faith, and misrepresentation. Schoolcraft seeks damages including punitive damages, expenses, attorneys’ fees as well as specific performance on the obligation to pay \$125,000 plus interest.

Plaintiffs now move to dismiss the above counterclaims and affirmative defenses. Plaintiffs contend that these counterclaims and affirmative defenses are barred by the terms of the retainer agreement, the Statute of Frauds, and the parol evidence rule. Plaintiffs assert that the tort-based claims are duplicative of the breach of contract claim and that there is no basis in law for punitive damages or attorneys' fees. Notably, plaintiffs do not seek dismissal of the second counterclaim for failure to perform under the contract by reducing their legal fees by \$125,000.

In opposition, Schoolcraft argues that the retainer agreement was modified both orally and in writing and that Schoolcraft's decision to accept the Offer of Judgment constituted partial performance under the agreement. Schoolcraft contends that the tort-claims are not based on or duplicative of the contract claim and that punitive damages and attorneys' fees are recoverable. Schoolcraft also asserts that the retainer is void based on an unrelated termination provision.

On a motion to dismiss pursuant to CPLR R. 3211, the pleadings are to be afforded a liberal construction, the facts alleged in the complaint are to be accepted as true, the plaintiffs are to be accorded the benefit of every possible favorable inference, and a determination is to be made only as to whether the facts as alleged fit within any cognizable legal theory (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). A motion to dismiss on the ground that the action is barred by documentary evidence "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mut. Life Ins. Co. of New York*, 98 NY2d 314, 326 [2002]).

A written agreement banning oral modification "cannot be changed by an executory agreement unless such executory agreement is in writing and signed by the party against whom enforcement is sought" (*Eujoy Realty Corp. v Van Wagner Communications, LLC*, 22 NY3d 413, 425 [2013]). An oral modification can be enforced if

either the oral modification has been acted upon to completion or if there is partial performance that is unequivocally referable to the alleged oral modification (*id.*).

Here, the retainer agreement included a merger clause stating that the agreement could only be modified in writing signed by all parties. Thus, any oral modification could only be enforced if there was partial performance unequivocally referable to the modification. It cannot be determined at this stage that the alleged partial performance in this case, Schoolcraft's acceptance of the City's settlement offer, was or was not unequivocally referable to plaintiffs' alleged oral agreement to waive their right to a one-third fee. Further, plaintiffs do not move to dismiss the second counterclaim for breach of contract based on failure to perform, and the Court assumes without deciding that the alleged oral modification occurred for purposes of this motion. As such, the breach of contract claims cannot be dismissed at this stage of litigation.

Schoolcraft's claims for promissory estoppel and fraudulent inducement are not independent of his contract claims. "A simple breach of contract claim may not be considered a tort unless a legal duty independent of the contract—i.e., one arising out of circumstances extraneous to, and not constituting elements of, the contract itself—has been violated" (*Brown v Brown*, 12 AD3d 176, 176 [1st Dept 2004]). "A fraud-based cause of action is duplicative of a breach of contract claim when the only fraud alleged is that the [party] was not sincere when it promised to perform under the contract" (*Manas v VMS Assoc., LLC*, 53 AD3d 451, 453 [1st Dept 2008]). In this case, Schoolcraft primarily advances the theory that plaintiff orally agreed to modify the contract to seek legal fees solely through the court. There are also no allegations that plaintiffs were insincere at the time they promised to perform under the contract. Therefore, the tort-based counterclaims for promissory estoppel and fraudulent inducement as well as the affirmative defenses are dismissed.

Schoolcraft sufficiently alleges a cause of action for breach of fiduciary duty. A claim for breach of fiduciary duty is also duplicative if it "fails to allege breach of any

fiduciary duty independent of the contract itself" (*Morgenroth v Toll Bros., Inc.*, 60 AD3d 596, 597 [1st Dept 2009]). "It is axiomatic that the relationship of attorney and client is fiduciary" (see *Ulico Cas. Co. v Wilson, Elser, Moskowitz, Edelman & Dicker*, 56 AD3d 1, 8 [1st Dept 2008]). Moreover, "it is well settled that the relationship of client and counsel is one of unique fiduciary reliance and that the relationship imposes on the attorney the duty to deal fairly, honestly and with undivided loyalty . . . including maintaining confidentiality, avoiding conflicts of interest, operating competently, safeguarding client property and honoring the clients' interests over the lawyer's" (*id.* at 9).

Unsurprisingly, the attorney-client relationship between Schoolcraft and plaintiffs in the federal action was fiduciary in nature. Further, the operative allegation of the fiduciary duty counterclaim is that plaintiffs failed to inform Schoolcraft of the City's offer to settle the attorneys' fee claims for significantly more than the amount awarded by the court. This counterclaim is premised on a totally separate set of facts than the allegations underlying the breach of contract counterclaims, it survives the instant motion.

Schoolcraft has not sufficiently demonstrated entitlement to punitive damages and attorneys' fees. Punitive damages are not recoverable for a breach of contract unless a fraud aimed at the public generally is involved (*Rocanova v Equit. Life Assur. Soc. Of U.S.*, 83 NY2d 603, 613 [1994]). As the tort-based claims are dismissed and only the breach of contract claims remain and no public harm is involved, punitive damages are not available. Additionally, Schoolcraft's claim for attorneys' fees, based solely on plaintiffs' choice to bring this fee dispute in court rather than arbitration, is dismissed. Insofar as plaintiffs' opposition fails to state a cause of action for anticipatory repudiation it also is dismissed. Accordingly, it is

ORDERED that plaintiffs' motion to dismiss is granted in part and the third, fourth, fifth, and sixth counterclaims and nineteenth and twenty-first affirmative defenses are dismissed; and it is further

ORDERED that the parties are directed to appear for a preliminary conference in Room 490, 111 Centre Street on July 18, 2018 at 2:15 P.M.

This constitutes the decision and order of the Court.

Dated:

7/3/18

ENTER:

A handwritten signature in black ink, appearing to read 'Anthony Cannataro', written over a horizontal line.

Anthony Cannataro, JSC