Clay v Simpson
2019 NY Slip Op 30110(U)
January 3, 2019
Supreme Court, New York County
Docket Number: 652399/17
Judge: Doris Ling-Cohan

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 36

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HENRY J. CLAY, JR., P.C.,

Plaintiff,

-against- Index No. 652399/17

BEATRICE SIMPSON, GEORGE DEMENOCAL and PETER DEMENOCAL, Motion Sequence: 001 & 002

Defendants.

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DORIS LING-COHAN, J:

Motion sequence numbers 001 and 002 are consolidated for disposition. In motion sequence number 001, defendants George and Peter de Menocal move, pursuant to CPLR 3211 (a) (7), to dismiss the complaint as against them. In motion sequence number 002, defendant Beatrice Simpson ("Simpson") moves, pursuant to CPLR 3212 (a), for summary judgment dismissing the complaint, as against her.

Defendant Simpson is 105 years old and resides in an assisted living facility.[1] The complaint against Simpson alleges that she signed a retainer agreement (Retainer) with plaintiff for legal services, but refused to pay plaintiff for work he allegedly performed, except for an initial payment of $10,000. Plaintiff asserts the following four causes of action against Simpson: (1) breach of contract; (2) quantum meruit; (3) unjust enrichment; and (4) account stated. The

[1] Due to the advanced age of defendant Simpson and, in the interest of justice, this Court attempted to settle this matter (which involves a claim for legal fees in the amount of $37,416), prior to the disposition of the within motions. By order dated July 2, 2018, this Court directed the exchange of settlement letters amongst the parties, which, to date, has yet to result in a settlement.

claims asserted against George and Peter de Menocal (Simpson's nephews), are for tortious interference with contractual relations and an attorney-client relationship. Plaintiff seeks damages in the amount of $33,615.53, plus punitive damages against defendants George and Peter de Menocal in the amount of $100,000.00.

Defendant George and Peter de Menocal's Motion to Dismiss (Sequence Number 001)

On a motion to dismiss pursuant to CPLR §3211(a) (7), the movant has the burden to demonstrate that, based upon the four corners of the complaint liberally construed in favor of the plaintiff, the pleading states no legally cognizable cause of action. *See Leon v. Martinez*, 84 NY2d 83, 87-88 (1994); *Guggenheimer v. Ginzburg*, 43 NY2d 268, 275(1997); *Salles v. Chase Manhattan Bank*, 300 AD2d 226, 228 (1st Dept 2002).

Here, in seeking dismissal of the claims asserted against them, defendants George and Peter de Menocal argue, *inter alia*, that plaintiff fails to state a cause of action for tortious interference with a contract/attorney-client relationship, since at all relevant times, they were acting solely in the best interest of their aunt and not for self-gain.[2] In opposition, plaintiff argues that George and Peter de Menocal interfered with his contractual relation with Simpson by persuading her to stop using his services and to refrain from paying his fees, beyond the initial $10,000 payment. Plaintiff alleges that George and Peter de Menocal did so, in order to protect their own economic interests.

As a contract for legal services, the Retainer was terminable by Simpson at will. *See*

[2] It is noted that while defendants George and Peter de Menocal also seek dismissal of a defamation claim, it does not appear that such cause of action is being asserted herein.

Steinberg v Schnapp, 73 AD3d 171, 176 (1st Dept 2010) (citation omitted); *Lowenbraun v Garvey*, 60 AD 3d 916 (2nd Dept 2009); *Atkins & O'Brien, L.L.P. v ISS Intl. Serv. Sys.*, 252 AD2d 446, 447-448 (1st Dept 1998). As such, to state a cause of action for tortious interference, plaintiff must assert that the alleged interfering conduct was wrongful, which includes the committing of a crime or an independent tort, such as "fraudulent representations, threats, or a violation of a duty of fidelity owed to plaintiff by reason of a confidential relationship between the parties" (citations omitted). *Lowenbraun,* 60 AD3d at 917; *see also Steinberg v Schnapp*, 73 AD3d at 176 (1st Dept 2010) . "Allegations of mere self-interest or economic motivation will not suffice." *Steinberg v Schnapp*, 73 AD3d at 176.

Accepting the facts as alleged as true as this Court must on this CPLR 3211 motion to dismiss, plaintiff failed to assert sufficient facts as to defendants George and Peter de Menocal's alleged wrongful conduct, to support a claim for tortious interference with a contract. Notably, George and Peter de Menocal are family members of Simpson, and, even assuming the truth of plaintiff's assertions, at best, they merely provided advice to their elderly aunt, which can hardly rise to the level of an independent tort, nor a crime.

Additionally, defendant George de Menocal, who was acting under a Power of Attorney issued by his aunt, was certainly within his legal authority to recommend termination and/or terminate the Retainer and professional relationship between plaintiff and Simpson. In fact, George de Menocal had a fiduciary duty to his aunt to protect her and her assets and advise her accordingly, in particular, if he sensed that Simpson was being overbilled by plaintiff, as is claimed. *See In the Matter of Ferrara*, 7 NY 3d 244, 254 (2006)(fiduciary duties have been imposed by courts on attorneys-in-fact as, "a power of attorney...is clearly given with the intent

that the attorney-in-fact will utilize that power for the benefit of the principal); *Arens v Shainswit*, 37 AD2d 274 (1st Dept 1971)("any of the powers of attorney authorizes the agent to act as alter ego of the principal with respect to any and all possible matters and affairs"). As such, the claims asserted against defendants George and Peter de Menocal, including plaintiff's claim for punitive damages, are dismissed in their entirety. Further, with respect to punitive damages, there has been no assertion or showing of a legal basis to support the imposition of punitive damages.

Defendant Simpson's Motion for Summary Judgment (Sequence Number 002)

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action "sufficiently to warrant the court as a matter of law in directing judgment." *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). "Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers." *Winegrad v NYU Med Ctr*, 64 NY2d 851, 853 (1985). A party opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which would require a trial. *See Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). On a motion for summary judgment, the court should draw all reasonable inferences in favor of the non-moving party and issues of credibility are best reserved for the trier of fact, not the Court. *See Rodriguez v. Parkchester South Condominium, Inc.*, 178 AD2d 231 (1st Dept 1991); *Garcia v. J.C. Duggan, Inc.*, 180 AD2d 579, 580 (1st Dept 1992).

In applying such principles to the within case, summary judgment of dismissal is granted with respect to plaintiff's quantum meruit, unjust enrichment and account stated claims. The

Court is constrained, however, to deny defendant Simpson's motion with respect to the breach of contract claim, as there are factual issues, including whether the Retainer is a binding contract, as detailed below.

Quantum meruit and unjust enrichment are quasi-contractual remedies. Accordingly, they are unavailable where, as here, they arise out of the same subject matter as is governed by a written contract. *MG W. 100 LLC, v St Michael's Prot. Episcopal Church*, 127 AD3d 624, 626 (1st Dept 2015). Moreover, plaintiff's account stated cause of action must fail, as it is undisputed that defendants promptly objected to plaintiff's. See *Rockefeller Group, Inc. v Edwards & Hjorth*, 164 AD2d 830 (1st Dept 1990) (An account stated is established by a defendant's "receipt and retention of [plaintiff's] invoices, seeking payment for services rendered . . . *without objection within a reasonable time*")(emphasis supplied); *cf. Rosenman Colin Freund Lewis & Cohen v Neuman*, 93 AD2d 745, 746 (1st Dept 1983).

In seeking summary judgment of dismissal of the breach of contract cause of action, Simpson, who, as indicated above, is 105 years old, avers that she does not remember having signed the Retainer. She also argues that the Retainer is not binding because its execution was procedurally unconscionable and its terms are substantively unconscionable. As to the former, Simpson argues, and plaintiff attorney Henry J. Clay ("Clay") does not dispute, that they were alone when she signed the retainer, and that he did not leave a copy with her. Simpson also maintains that Clay knew that she habitually did not read statements presented to her, since, prior to the execution of the Retainer, Clay had assisted her, for a number of years in her estate planning.

The Retainer at issue relates to an incident in which plaintiff and George de Menecal,

discovered that Simpson's physical therapist, Lyon Marcus ("Marcus"), appeared to have stolen more than $300,000 from her. The Retainer provided that plaintiff would assist in bringing the matter to the attention of the police and the Westchester County District Attorney, and to pursue civil remedies against Marcus.

Clay avers in his affidavit in opposition that he "vehemently take[s] issue with the purported facts [as asserted by defendants]...relating to...the...retainer agreement with [Simpson] and her signing of it". ¶10, Clay Affidavit in Opposition. Clay maintains that:

> "[he] explained to [Simpson] the need for the Retainer Agreement. She acknowledged that [his] work on the matter had been and would be quite different from any [he] had previously done for her. [He] handed her the three-page Retainer Agreement to read. [He] sat with her as she did to answer any questions she might have. She didn't ask any questions relating to it. When she was finished reading, she signed it. This was the same procedure [he] followed with [Simpson] in reviewing for signature the numerous other legal documents [he] had previously prepared for her, as well as those she signed in [his] presence thereafter".

Id. at ¶11. Clay further asserts that he and Simpson agreed that, for the sake of her safety, no copy of the Retainer would be left with her, inasmuch as Marcus had been observed routinely entering her apartment in the assisted living facility where she lives, when she was out. Clay further maintains that while defendants indicate that Simpson uses eyeglasses and hearing aids, notably, she does not claim any lack of mental acuity and, indeed, in January 28, 2016, when she was tested, scored 30 out of 30 on the Folstein Mental Status exam. *See* Clay Affidavit in Opposition, Exhibit 10.

As there are material factual differences in this relating to, *inter alia*, the Retainer, whether it is a binding contract and with respect to the circumstances surrounding the signing of

it, and, since issues of credibility are not to be determined by the Court on a motion for summary judgment, Simpson's motion for summary judgment of dismissal of plaintiff's breach of contract claim is denied.

Additionally, with respect to Simpson's argument, that the terms of the Retainer are substantively unconscionable, she relies upon the following sentence in the Retainer:

> "[i]n connection with the services [to be] performed, it is difficult and impossible at this time to specify the exact nature, extent and difficulty of the contemplated services and attorney's time involved"

(Joyce Affidavit, Exhibit 4, at 1). According to Simpson, it was impossible for her to become aware of her financial exposure based upon such language in the Retainer. However, the Retainer did include plaintiff's hourly fees, as well as those of an associate, and a paralegal. The Retainer recites that plaintiff will "assist in [the then-ongoing criminal investigation of Marcus] and to seek recovery of any money or other property misappropriated from [Simpson] to the extent possible and prudent. I shall exert effort at all times to represent your interests and rights and, if possible, to seek an amicable resolution of your claims." Clay Affidavit in Opposition, Exhibit 4, at 1. Defendants cites no case, and the Court is not aware of any, that requires, as a matter of law that a retainer agreement has to specify anything more in relation to fees. Thus, summary judgment of dismissal on such basis is not warranted.

Finally, Simpson's argument that plaintiff's failure to leave a copy of the Retainer with her constitutes a violation of 22 NYCRR §1215.1 and warrants the granting of summary judgment of dismissal in her favor is also without merit. 22 NYCRR §1215.1 provides, in relevant part that, "an attorney who . . enters into an arrangement for charges . . . from a client shall provide to the client a written letter of engagement before commencing the representation or

within a reasonable time thereafter." Since Simpson does not appear to dispute that, in view of Marcus's access, at that time, to her apartment and her papers, she agreed with plaintiff that a copy of the Retainer should not be left with her, dismissal *as a matter of law* is not warranted for the failure to supply a copy of a retainer agreement.

Accordingly, it is

ORDERED that the motion of defendants George de Monecal and Peter de Monecal to dismiss the complaint, as against them (motion sequence number 001) is granted and any and all causes of action asserted upon such defendants are severed and dismissed from this action; and it is further

ORDERED that the motion of Beatrice Simpson for summary judgment (motion sequence number 002) is granted with respect to the causes of action for quantum meruit, unjust enrichment and account stated and denied, as to plaintiff's breach of contract claim; and it is further

ORDERED that, within 30 days of entry of this order, defendants George and Peter de Menocal shall serve a copy upon all parties, with notice of entry.

Date: January 3, 2019

Hon. Doris Ling-Cohan, J.S.C.

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