Whitiingham v Thomas
2019 NY Slip Op 30563(U)
March 6, 2019
Supreme Court, New York County
Docket Number: 152395/2018
Judge: Alexander M. Tisch

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ALEXANDER M. TISCH **PART** IAS MOTION 18EFM

Justice

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KAYLIN L. WHITTINGHAM

Plaintiff,

- v -

LESLIE JONES THOMAS

Defendant.

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INDEX NO. 152395/2018

MOTION DATE 11/29/2018

MOTION SEQ. NO. 002

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 002) 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing papers, plaintiff moves to dismiss defendant Leslie Jones Thomas's ("Thomas") counterclaim pursuant to CPLR Rule 3211 (a)(7) on the ground that it fails to state a cause of action, and moves for summary judgment pursuant to CPLR Rule 3212 (b) on its second cause of action as to an account stated for the sum of $30,337.50.

This action arises out of a retainer agreement executed by plaintiff and Thomas on February 1, 2017 wherein plaintiff was to represent the latter with respect to two matters filed with the Attorney Grievance Committee of the Supreme Court of the State of New York. The retainer fee was $15,000 and plaintiff's hourly rate was $375, deductible from the retainer fee.

Plaintiff began sending Thomas invoices, and Thomas did not object to them. Thomas failed to make timely or full payments on the invoices and thus, on May 20, 2017, plaintiff filed an Order to Show Cause seeking to be relieved as the attorney on record for Thomas. On July 24, 2017, the order was granted. From February 2 through July 31, 2017, Thomas made seven payments towards the balance totaling $7,500, making the final balance owed to plaintiff $30,337.50. On August 14, 2017, plaintiff served Thomas a Notice of Client's right to arbitrate by

certified mail, but Thomas failed to request an arbitration. Plaintiff sent Thomas a final statement of account on September 9, 2017.

I. Motion to Dismiss Counterclaim

On a motion to dismiss pursuant to CPLR 3211 (a)(7), "the facts as alleged in the complaint [are] accepted as true, the plaintiff is [given] the benefit of every possible favorable inference," and the court must determine simply "whether the facts as alleged fit within any cognizable legal theory" (Mendelovitz v Cohen, 37 AD3d 670, 671 [2d Dept 2007]). However, "bare legal conclusions as well as factual claims flatly contradicted by the record are not entitled to any such consideration" (Silverman v Nicholson, 110 AD3d 1054, 1055 [2d Dept 2013]) (internal quotation marks and citation omitted).

In an action to recover damages for legal malpractice, a plaintiff must establish that the attorney "failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession and that the attorney's breach of this duty proximately caused plaintiff to sustain actual and ascertainable damages" (Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer, 8 NY3d 438, 442 [2007] quoting McCoy v Feinman, 99 NY2d 295, 301–302, [2002] [internal quotation marks and citation omitted]). A legal malpractice cause of action will be dismissed pursuant to CPLR 3211 (a)(7) where "it fails to plead specific factual allegations demonstrating that, but for the ... defendant['s] alleged negligence, there would have been a more favorable outcome in the underlying proceeding or that the plaintiff would not have incurred any damages" (Maroulis v Friedman, 153 AD3d 1250, 1251 [2d Dept 2017]).

Here, construing the counterclaim liberally, accepting the facts alleged in the counterclaim as true, and according the non-movant the benefit of every possible favorable inference, Thomas fails to plead specific factual allegations showing plaintiff's negligence. The counterclaim merely

states that "plaintiff departed from accepted legal practice in the investigation and preparation of documents and the legal representation of the defendant" (NYSCEF Doc. No. 18). Thomas does not specify any conduct by plaintiff that would constitute a departure from accepted legal practice. While Thomas is entitled to every favorable inference "bare legal conclusions" are not accorded such consideration.

Further, in opposition to the motion, Thomas submitted an affirmation by her attorney stating that plaintiff missed a deadline imposed by the disciplinary committee. While Thomas correctly notes that a court may consider affidavits submitted to "preserve inartfully pleaded, but potentially meritorious claims" (Rovello v Orofino Realty Co. Inc., 40 NY2d 633, 635 [1976]), the same is not true for affirmations. Thomas's counsel demonstrated no personal knowledge of the underlying matter and as such, the affirmation is devoid of any evidentiary value and must be disregarded (see Zuckerman v City of New York, 49 NY2d 557, 563 [1980]). Accordingly, plaintiff's motion to dismiss the counterclaim is granted.

II. Motion for Summary Judgment for Account Stated

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law" (Dallas-Stephenson v Waisman, 39 AD3d 303, 306 [1st Dept 2007]). Upon proffer of evidence establishing a prima facie case by the movant, "the party opposing a motion for summary judgment bears the burden of produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact" (People v Grasso, 50 AD3d 535, 545 [1st Dept 2008] [internal quotation marks and citation omitted]).

"An account stated is an agreement between the parties to an account based upon prior transactions between them with respect to the correctness of the separate items composing the

account and the balance due, if any, in favor of one party or the other" (Chisholm-Ryder Co., Inc. v Sommer & Sommer, 70 AD2d 429, 431 [4th Dept 1979]). An agreement may be implied or be express (see Gurney, Becker & Bourne v Benderson Dev. Co., 47 NY2d 995 [1979]). "An agreement may be implied if a party receiving a statement of account keeps it without objecting to it within a reasonable time because the party receiving the account is bound to examine the statement and object to it, if objection there be. Silence is deemed acquiescence and warrants enforcement of the implied agreement to pay" (Chisolm-Ryder, 70 AD2d at 431, citing Rodkinson v Haecker, 248 NY 480 [1928]). An implied agreement may also be found where the debtor makes partial payment (id.). "In the absence of fraud, mistake or other equitable considerations making it improper to recognize the agreement, it is conclusive" (id.).

In the instant matter, plaintiff has made out a prima facie case of an account stated having submitted evidence that she provided Thomas with invoices from February 2017 until September 2017, without objection, and that Thomas made seven partial payments. In opposition, Thomas argues that plaintiff's motion is premature because it was made before discovery commenced. Additionally, Thomas argues that there is a dispute of fact as to whether there was malpractice, and that the billed amount was unreasonable. The Court finds Thomas's arguments unavailing.

As a preliminary matter, because Thomas's counterclaim is dismissed, there is no dispute of fact with respect to the malpractice. The lack of discovery here is insufficient to warrant denial of the motion as Thomas does not need discovery to ascertain if they ever protested the invoices because that matter "is within their own knowledge" (Duane Morris LLP v Astor Holdings Inc., 61 AD3d 418, 419 [1st Dept 2009]). Moreover, Thomas fails to show that facts essential to opposition to the motion are within plaintiff's exclusive knowledge (see id.).

With respect to reasonableness, it is not necessary to establish whether the fee was reasonable or not because Thomas held the invoices without objection and such action is construed as "acquiescence to its correctness" (Cohen Tauber Spievak & Wagner, LLP v Alnwick, 33 AD3d 562, 563 [1st Dept 2006]). Even though Thomas is now objecting by virtue of the opposition, objection must be done within a reasonable time and cannot otherwise contradict her actions (see Darby & Darby v VSI Intl., 95 NY2d 308 [2000]). Thomas was provided with invoices beginning in February 2017 along with the final account statement in September 2017 and fails to offer any evidence indicating that she had previously objected to the amount billed. Thomas therefore, has not met her burden showing a genuine dispute as to a material fact.

Accordingly, it is hereby

ORDERED that the plaintiff's motion for summary judgment is granted as to the second cause of action; and it is further

ORDERED that the Clerk shall enter judgment in favor of plaintiff and against defendant in the amount of $ 30,337.50; and it is further

ORDERED that the first cause of action is dismissed; and it is further

ORDERED that defendant's counterclaim is dismissed.

This constitutes the decision and order of the Court.

HON. ALEXANDER M. TISCH

3/06/2019
DATE

ALEXANDER M. TISCH, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
	X	GRANTED	☐	DENIED	GRANTED IN PART	☐	OTHER
APPLICATION:	☐	SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:	☐	INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT	☐	REFERENCE