

Reese v Richman

2019 NY Slip Op 30885(U)

April 2, 2019

Supreme Court, New York County

Docket Number: 654393/2017

Judge: Saliann Scarpulla

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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION

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MICHAEL REESE, REESE LLP	INDEX NO.	<u>654393/2017</u>
Plaintiffs,	MOTION DATE	<u>10/24/2018</u>
- v -	MOTION SEQ. NO.	<u>001</u>
KIM RICHMAN, THE RICHMAN LAW GROUP,		
Defendants.		

DECISION AND ORDER

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HON. SALIANN SCARPULLA:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 51

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, it is

In this action arising out of a dispute between former law firm partners, defendants Kim Richman (“Richman”) and The Richman Law Group (“Richman Law”, collectively, “Defendants”) move to dismiss the complaint of plaintiff Michael Reese (“Reese”) and Reese LLP’s (collectively, “Plaintiffs”) pursuant to CPLR 3211 (a)(1), (5), and (7).

Background¹

Richman and Reese were partners of the law firm, Reese Richman LLP (“the Firm”) since 2008, in which each held fifty percent equity. In or around mid-2014, dissension allegedly grew between Reese and Richman, which culminated in Richman

¹ Unless otherwise specified, all facts are taken from the complaint, *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994), or documents referenced to by the complaint

filing an action against Reese in this Court, *Kim E. Richman, et al. v Michal R. Reese*, Index No. 653742/2014 (“Prior Action”).

Reese and Richman ultimately entered into a Settlement Agreement and Agreement of Withdrawal (“Agreement”), which was effective on February 26, 2015 (“Effective Date”). Under the Agreement, Richman agreed to, *inter alia*, withdraw from the Firm and discontinue the Prior Action. After Richman withdrew from the Firm, Richman formed Richman Law and Reese changed the name of the Firm to Reese LLP.

The Agreement also divided the Firm’s existing Cases, as defined in the Agreement, as follows: (1) Cases identified in Agreement Exhibit D were transferred exclusively to Richman, subject to client approval (“Richman Cases”), Art. III.A; (2) Cases identified in Agreement Exhibit E remained exclusively with the Firm (“Reese Cases”), Art. III.B; and (3) the right to attorneys’ fees and costs for the remaining Cases were identified in Agreement Exhibit F (“Other Pending Cases”), Art. III.C. The parties represented and warranted that these were all the Cases currently being handled by the Firm, and if “either party has willfully omitted a Case from the lists . . . then that party must turn over any Fees collected in such Case to the other party.” Art. III.E.1.

Plaintiffs allege that while a partner at the Firm, Richman developed and filed cases that he concealed from the Firm and willfully failed to identify in the Agreement, as required by Art. III.E. One of the cases that Richman allegedly failed to disclose was *Martinez v Lifelock, Inc.* (“Martinez Action”), which Richman began working on with the law firm, Finkelstein, Blankinship, Frei-Pearson & Garber, LLP (“FBFG”), after withdrawing from the Firm.

Another case that Richman allegedly failed to disclose was *Hidalgo v Johnson & Johnson* (“Hidalgo Action”). Reese alleges that Jinette Hidalgo (“Hidalgo”), retained the Firm in February 2013. Richman allegedly interfered with this relationship and induced Hidalgo to terminate the Firm and retain the Richman Law. Reese alleges that Richman filed the Hidalgo action shortly after withdrawing from the Firm. Reese maintains that Agreement Art. III.E.1 requires Richman to turn over any Fees collected in the Martinez and Hidalgo Actions.

For the Richman and Reese Cases, each attorney had the exclusive right to attorney’s fees and costs and to work on their respective Cases, and Art. III.A.1 & B.1. prohibited the other attorney from filing a notice of appearance, performing any further work, or incurring expenses in the other’s Cases. Although the class action *Huyer, et al. v Wells Fargo & Co. et al.*, 08-cv-00507 (S.D. Iowa) (“WF Action”) was a Reese Case, the parties agreed that they would split any attorneys’ fees and costs awarded in WF Action, with Reese receiving sixty percent and Richman receiving forty percent.

Reese alleges that the Firm represented Hazel Navas and Carlos Castros (collectively, “Navas-Castros”) in the WF Action. Richman allegedly interfered with this relationship, induced the Navos-Castros to terminate the Firm, was retained by Navos-Castros as counsel in the WF Action in or around May 2015, and subsequently filed a notice of appearance and performed work in the WF Action. Reese maintains that these actions by Richman constitute a violation of Agreement Art. III.B.

Richman also allegedly violated Agreement Art. III.E.2, which provides that “[a]ll time records necessary to submit fee applications will be provided in a timely manner,” by not providing his time records to the Firm, which was necessary for the Firm to submit fee applications in the WF Action; rather, Richman submitted a fee application in the WF Action in December 2015 and January 2016 on behalf of the Richman Law for work done while a partner of the Firm.

By order dated February 17, 2016, the proposed settlement in the WF Action was approved – the class was awarded was awarded \$25,750,000, of which class counsel was entitled to receive \$8,794,374.71 (\$8,583,332.48 in attorneys’ fees and \$211,042.23 for costs incurred).

In March 2016, FBFG commenced an arbitration proceeding (“Arbitration”) against Reese LLP to enforce a Joint Prosecution Agreement (“JPA”) with the Firm, which provided that FBFG would receive half of the attorneys’ fees awarded to the Firm in the WF Action. Plaintiffs allege that Richman knowingly entered into the JPA on behalf of the Firm in August 2014 on terms unfavorable to the Firm to benefit Defendants in the future. Plaintiffs also alleges that Richman voluntarily assisted and participated in the prosecution of the Arbitration and provided false testimony on behalf of FBFG. This action by Richman allegedly constituted a violation of Agreement Art. V, which states that the parties “covenant not to commence, encourage, solicit, voluntarily assist, or participate in any way after the Effective Date of this Agreement in the filing, reporting

or prosecution by any third party of a suit arbitration, mediation, or claim against any other Party relating to any claim relating in any way to the Firm or this Agreement.”

On May 31, 2017, the Arbitration Panel issued a final award and found that FBFG is entitled to fifty percent of the attorneys’ fees awarded to the Firm, Reese LLP, and Richman Law in the WF Action (“Arbitration Award”). Plaintiffs allege that this award was the direct result of Richman’s actions in the Arbitration, that they incurred over one hundred thousand dollars in costs in the Arbitration, and if the award is confirmed, they will be damaged by having to distribute the attorneys’ fees to FBFG.

Based on the foregoing, Plaintiffs commenced this action alleging causes of action for: (1) breach of contract against Richman; (2) breach of fiduciary duty against Richman; (3) tortious interference against Defendants; and (4) unjust enrichment against Defendants.² Defendants now move to dismiss the complaint pursuant to CPLR 3211(a)(1), (5), and (7).

Discussion

On a motion to dismiss, “the pleading is to be afforded a liberal construction” – the Court must “accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.” *Leon*, 84 NY2d at 87–88 (internal citations omitted). “However, factual allegations that do not state a viable cause of

² The complaint also alleges a cause of action for fraud cause of action against Defendants, which Defendants moved to dismiss. Because Plaintiffs withdrew the fraud cause of action, Defendants’ motion with respect to this cause of action is denied as moot.

action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration.” *Skillgames, LLC v Brody*, 1 AD3d 247, 250 (1st Dept 2003) (citation omitted).

1. Breach of Contract

To state a breach of contract cause of action, the complaint must allege “the existence of a contract, the plaintiff’s performance thereunder, the defendant’s breach thereof, and resulting damages.” *Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 (1st Dept 2010). Where, as here, “a written agreement . . . is complete, clear and unambiguous on its face[, it] must be enforced according to the plain meaning of its terms.” *Beinstein v Navani*, 131 AD3d 401, 405 (1st Dept 2015) (citation and quotation marks omitted).

As to the allegations regarding Richman’s alleged violations of Art. III.B. & III.E. that occurred because of his actions in the WF Action – being retained by Navos-Castros, filing a notice of appearance, and failing timely to provide time records – Defendants argues that Plaintiffs failed to state a cause of action for breach of contract because they have not alleged that they suffered damages as a result of these alleged breaches.

“In the absence of any allegations of fact showing damage, mere allegations of breach of contract are not sufficient to sustain a complaint, and the pleadings must set forth facts showing the damage upon which the action is based.” *ERE LLP v Spanierman Gallery, LLC*, 94 AD3d 492, 493 (1st Dept 2012) (citations omitted). The complaint here fails to allege that Plaintiffs incurred any damages from these breaches, nor does it

contain any “allegations from which damages attributable to the defendant’s breach might be reasonably inferred.” *CAE Indus. Ltd. v KPMG Peat Marwick*, 193 AD2d 470, 473 (1st Dept 1993) (citation omitted).

To the extent that Plaintiffs allege that they were directly damaged by the Arbitration Panel’s partial reliance on the Navos-Castros retainer agreement in rejecting Reese LLP’s argument that the JPA is unenforceable, this does not sufficiently allege damages. The purported damages – an Arbitration Panel enforcing Plaintiffs’ collateral contractual obligations with FBFG, a non-party to the Agreement – “do not directly flow from and are not the ‘natural and probable consequence’ of defendants’ alleged breach, and therefore, do not qualify as general damages.” *Vista Food Exch., Inc. v BenefitMall*, 138 AD3d 535, 536 (1st Dept 2016) (dicta) (allegations that defendant breached contract by misadvising plaintiff to hire third party did not support damage allegations of plaintiff’s “potential incurment of tax penalties and other liabilities due to the third party’s failure to pay plaintiff’s taxes”).

Because the complaint has failed to allege damages as a result of the Navos-Castros retainer agreement and Richman’s representation of Navos-Castos in the WF Action, the complaint has failed to state a breach of contract cause of action based on these Agreement violations.

As to the portion of the breach of contract cause of action based upon Richman’s allegedly voluntary assistance and participation in the Arbitration by testifying, Defendants submit a subpoena ad testificandum issued to Richman by the Arbitration

Panel and argue that Richman's testimony in the Arbitration was not voluntary.

Defendants thus maintain that Richman's compliance with the subpoena did not violate Agreement Art. V.

Based on the undisputed documents submitted, Defendants have shown that Richman properly was complying with a subpoena issued by the Arbitration panel, therefore this portion of the breach of contract cause of action is dismissed pursuant to CPLR 3211(a)(1). *See Goshen v Mut. Life Ins. Co. of New York*, 98 NY2d 314, 326 (2002).

To the extent that the breach of contract cause of action is based on the vague and conclusory allegation that Richman also assisted FBFG in the Arbitration, these unsupported allegations are insufficient to state a claim. Plaintiffs fail to state how such assistance breached the Agreement, or why such assistance was prohibited by the Agreement. *See Gordon v Dino De Laurentiis Corp.*, 141 AD2d 435, 436 (1st Dept 1988) (dismissing breach of contract claim based on "vague and conclusory" allegations that defendant breached agreement by disclosing confidential information, thereby causing plaintiff damages).

The final allegations supporting the breach of contract cause of action are that Richman developed and filed the Martinez and Hidalgo Actions, which he concealed from the Firm and willfully failed to identify in the Agreement, in violation of Agreement Art. III.E.1, which provides that "[t]he Firm and Richman represent and warrant that the Cases listed in Exhibits D, E, and F represent all Cases currently being handled by the

Firm. If either party has willfully omitted a Case from the lists in Exhibits D, E, and F, then that party must turn over any Fees collected in such Case to the other party.”

Under the Agreement, Richman was entitled to keep his Investigative Files, Art. II.G, which Art. I.C. defines as “records pertaining to prospective claims and parties requiring further fact finding by the Firm and/or Richman, and in connection with which no demand has been made.” The Agreement did not require Richman to identify his Investigative Files, nor was Richman prohibited from pursuing lawsuits for matters that were not yet Cases.³

Defendants argue that, because the complaint failed to allege that any demand or lawsuit was filed in the Martinez and Hidalgo Actions, neither was a “Case,” and therefore Richman had no obligation to disclose them in the Agreement. Agreement Art. I.A. defines a “Case” as “any matter in which a demand, lawsuit, or class action law suit has been made or brought for which the Firm has any interest in any fees earned therein.” Upon review, the complaint does not state a viable breach of contract cause of action because it fails to state that the purportedly concealed Hidalgo and Martinez Actions were “Cases,” as required to allege a breach of Agreement Art. III.E.1. Based on the

³ See, e.g., Agreement Art. IV.2 (as of the Effective Date, “Richman shall be allowed to file any cases without restriction” but is prohibited from filing cases and certain types motions and petitions relating to Cases identified in Art. III); Art. IV.4 (Art. IV “shall not preclude either the Firm or Richman from representing clients in potential matters which the Firm may have previously explored, but not pursued, at the time of this Agreement.”).

foregoing, Plaintiffs' cause of action for breach of the Agreement is dismissed in its entirety.⁴

2. Breach of fiduciary duty

In the third cause of action for breach of fiduciary duty, Reese alleges that Richman engaged in misconduct and violated his fiduciary duty to the Firm when he was a partner of the Firm by: (1) using Firm assets and resources to develop relationships and cases for his sole benefit, including the Martinez and Hidalgo Actions; (2) improperly soliciting Firm clients, including Hidalgo and the Navas-Castros; and (3) entering into fee sharing and joint prosecution agreements, including the JPA, with other law firms that were unfavorable to the Firm to benefit Defendants in the future.

The elements required to establish a breach of fiduciary duty include: (1) the existence of a fiduciary relationship; (2) misconduct; and (3) damages directly caused by the misconduct. *Pokoik v Pokoik*, 115 AD3d 428, 429 (1st Dept 2014) (citation omitted).

As an initial matter, to the extent that the breach of fiduciary cause of action is based on purported misconduct by Richman *before* he withdrew from the Firm, it is barred by the general release in Agreement Art. V, in which the parties released each other from any claims that arose prior to the execution of the Agreement.⁵ To the extent

⁴ Although Defendants argue that a release contained in Agreement Art. V bars certain contract claims, I do not reach this separate ground for dismissal of the contract cause of action.

⁵ Agreement Art. V contains the following release:

Except for the obligations created by and the representations and warranties made under this Agreement and provided that the Firm, Reese and Richman comply with the material terms of this Agreement, the Firm, Reese and Richman fully and finally release and discharge each other and each of their heirs, executors, administrators,

that this cause of action alleges that Richman solicited Firm clients *after* withdrawing from the Firm, it must be dismissed because the alleged breach occurred when Richman no longer owed a fiduciary duty to the Firm. *See Morris v Crawford*, 304 AD2d 1018 (3d Dept 2003) (no fiduciary duty owed where attorney solicited firm clients occurred after dissolution of partnership).

Even if the release did not bar an action based on the purported misconduct by Richman before he withdrew from the firm, the breach of fiduciary duty cause of action would still be insufficient. As to the allegations that Richman utilized Firm assets to develop the Martinez and Hidalgo Actions, the complaint does not allege a breach of a fiduciary duty because Plaintiffs failed to plead that the Martinez and Hidalgo Actions were Cases, as explained above. Moreover, under the Agreement, Richman was expressly entitled to keep Investigative Files, Art. II.G, and to pursue most matters where there was no demand made or lawsuit filed by the Firm, Art. IV.2., including “potential matters which the Firm may have previously explored, but not pursued, at the time of

agents, attorneys, and assigns from and against any and all claims, demands, obligations, duties, liabilities, damages, expenses, indebtedness, debts, breaches of contract, trust, duty, or relationship, acts, omissions, causes of action, costs, losses and remedies therefor, rights of indemnity or liability of any type, kind, nature, description or character whatsoever, and irrespective of how, why and by reason of what facts, whether known or unknown, whether liquidated or unliquidated, whether based in tort, contract, statutory or common law, whether in law or in equity, which the Firm, Reese and Richman, their successors and assigns, and/or any persons claiming under and/or through any of the foregoing, may now or may have heretofore had or hereafter will have against such releasees arising from the beginning of the world through to the date of this release.

[the] Agreement.” Art. IV.4. For the same reasons, the allegations that Richman improperly solicited Hidalgo are insufficient to state a breach of fiduciary cause of action.

As to the allegations that Richman breached his fiduciary duties by soliciting Firm clients, Navos-Castros, while still at the Firm, it must be dismissed as duplicative of the breach of contract cause of action because it is based on the same underlying facts and the complaint does not allege damages distinct from those sought for the alleged breach of contract. *See Chowaiki & Co. Fine Art Ltd. v Lacher*, 115 AD3d 600 (1st Dept 2014).

For the remaining portion of this cause of action, which is based on Richman’s role in negotiating the JPA, Defendants argue that the Arbitration Award already determined the validity of the JPA and Richman’s actions, which Plaintiffs should be estopped from relitigating. “The doctrine of collateral estoppel, a narrower species of *res judicata*, precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same.” *Ryan v New York Tel. Co.*, 62 NY2d 494, 500 (1984) (citations omitted). Privity “is an amorphous concept not easy of application and includes . . . those who control an action although not formal parties to it [and] those whose interests are represented by a party to the action.” *Juan C. v Cortines*, 89 NY2d 659, 667-68 (1997) (citations and quotation marks omitted); *see also D’Arata v New York Cent. Mut. Fire Ins. Co.*, 76 NY2d 659, 664 (1990).

Although Reese was not a party to the Arbitration, he is the managing partner of, and in privity with, Reese LLP, which was a party to the Arbitration. *See Buechel v Bain*, 275 AD2d 65, 73 (1st Dept 2000), *affd*, 97 NY2d 295 (2001); *Hernandez v Nelson*, 143

AD2d 632, 633 (2d Dept 1988) (privity between individual defendant who was principal of corporate litigant in prior lawsuit where that defendant “failed to submit an affidavit to rebut the obvious inference that he was a principal of” the corporate defendant).

Moreover, the claims here regarding Richman’s actions in negotiating and entering the Firm into the JPA arise out of the same conduct underlying the Arbitration, in which Reese LLP litigated the circumstances surrounding the creation, as well as the validity and enforceability, of the JPA. Reese filed a motion in the WF Action to quash the Arbitration and subsequently testified in the arbitration, the attorney that represented Reese LLP in the Arbitration is the same attorney representing Plaintiffs here, and Plaintiffs have identical interests in having the JPA deemed unenforceable; therefore, Reese’s interests were represented in the Arbitration. *See Buechel*, 97 NY2d at 305.

Although there were no claims in the Arbitration seeking liability against Richman for entering into the JPA on terms allegedly unfavorable to the Firm, the Arbitration Award necessarily decided and “addressed issues identical to those raised by” Plaintiffs’ claims here. *Sanders v Grenadier Realty, Inc.*, 102 AD3d 460, 461 (1st Dept 2013); *see Hudson v Merrill Lynch & Co., Inc.*, 138 AD3d 511, 515 (1st Dept 2016), *lv denied*, 28 NY3d 902 (2016) (party estopped from relitigating “discrete factual issues” decided against that party in prior litigation). In finding that the JPA was valid and effective, the Arbitration Panel found that “Reese was directly involved in the discussions leading up to the preparation and execution of the JPA,” that Reese assisted in negotiating the terms of the JPA, and that the Firm entered into the JPA because it needed help in the WF Action.

Arbitration Award at 2-3. The Arbitration Panel also expressly rejected the Firm's arguments that the JPA was unfair. *Id.* at 13-14.

In response, Plaintiffs failed to "demonstrate[d] the absence of a full and fair opportunity to contest the" Arbitration Award. *Buechel*, 97 NY2d at 304. Therefore, Plaintiffs are precluded from relitigating the above findings, including the allegations that Richman breached duties owed to Plaintiffs by knowingly entering into the JPA on terms unfavorable to the Firm to benefit Defendants in the future.

To the extent that the breach of fiduciary duties cause of action relies on Richman entering into other agreements that were unfavorable to the firm, these allegations fail to state a cause of action for breach of fiduciary duty because they "are vague and conclusory, made without any specific instances of the alleged misconduct." *Berardi v Berardi*, 108 AD3d 406, 406 (1st Dept 2013) (citations omitted); CPLR §3016(b). For the foregoing reasons, the breach of fiduciary cause of action is dismissed.

3. Tortious interference and unjust enrichment

In the fourth cause of action for tortious interference, Plaintiffs allege that Defendants knew of the Firm's retainer agreements with clients but tortuously interfered with them by inducing Hidalgo, Navas-Castros, and other unspecified clients to terminate these agreements with the Firm. Plaintiffs argue that these inducements were wrongfully affected because Reese breached his fiduciary duties. In its fifth cause of action for unjust enrichment, Plaintiffs allege that Defendants earned fees in connection with other cases

and relationships that Richman developed while a partner at the Firm, by either using Firm assets and resources or entering into agreements that were unfavorable to the Firm.

The tortious interference and unjust enrichment causes of action are barred by the Agreement's release because they are based on acts which occurred prior to the execution of the Agreement. Art. V. To the extent that the tortious interference cause of action is based on Richman soliciting clients after withdrawing from the Firm, Plaintiffs failed to allege that Defendants used wrongful means in inducing these clients to terminate their retainer agreements with the Firm. *Cf. Dilimetin & Dilimetin v Stein*, 297 AD2d 601, 602 (1st Dept 2002) ("a law firm may prevail on a claim that a third party induced a client to cancel a retainer agreement upon a demonstration that the inducement was wrongfully effected").⁶ Therefore, the fourth cause of action for tortious interference and fifth cause of action for unjust enrichment are dismissed.

In accordance with the foregoing, it is

ORDERED that defendants' motion to dismiss the complaint is granted in part and denied in part. The first cause of action for breach of contract, third cause of action for breach of fiduciary duty, fourth cause of action for tortious interference, and fifth cause of action for unjust enrichment are dismissed in their entirety, and the branch of defendants' motion that seeks dismissal of the second cause of action for fraud is denied as moot because plaintiffs voluntarily discontinued this cause of action; and it is further

⁶ Moreover, as explained in the breach of fiduciary discussion, the Agreement does not prohibit Richman from soliciting Firm clients and pursuing matters that are not yet Cases, Art. IV.2., including those previously explored by the Firm. Art. IV.4

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.

4/2/19
DATE


SALIANN SCARPULLA, J.S.C.

CHECK ONE:

CASE DISPOSED

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE