| **Mo v Zhou** |
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| 2020 NY Slip Op 31069(U) |
| April 27, 2020 |
| Supreme Court, New York County |
| Docket Number: 156545/2018 |
| Judge: W. Franc Perry |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART IAS MOTION 23EFM

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HUGH MO

Plaintiff,

- v -

LIBO ZHOU,

Defendant.

**INDEX NO.** 156545/2018

**MOTION DATE** 06/06/2019

**MOTION SEQ. NO.** 001

**DECISION + ORDER ON MOTION**

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HON. W. FRANC PERRY:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32

were read on this motion to/for DISMISS.

This is an action by Plaintiff Hugh Mo against Defendant Libo Zhou for defamation stemming from alleged statements made by Defendant after he had discharged Plaintiff as his attorney in a criminal matter. Defendant filed a Verified Answer with eight counterclaims. (NYSCEF Doc No. 11.) Pending before the court is Plaintiff's motion to dismiss counterclaims 2 through 7 for failure to state a cause of action for which relief can be granted. (NYSCEF Doc No. 22.) The motion has been fully briefed. (NYSCEF Doc Nos. 27, 29, 31.)

## BACKGROUND

The basis of the current lawsuit stems from a separate criminal matter. On January 18, 2017, Defendant and another individual were pulled over and arrested in Nassau County and charged with criminal possession of a firearm and possession of crack cocaine. That same day and while in police custody, Defendant retained Plaintiff to represent him in the criminal proceeding. Plaintiff attended Defendant's arraignment and Defendant was released on bail.

Defendant submits two retainer agreements provided by Plaintiff. The first is dated February 1, 2017 and Defendant's signature was provided by his wife, Jie Hu. (NYSCEF Doc No. 12.) The second is dated February 3, 2017 and was also signed by Jie Hu. (NYSCEF Doc No. 13.) The only difference between the retainer agreements is that the February 1 version includes a clause fixing Plaintiff's trial fee at $500,000, while the February 3 version provides that the trial fee would be calculated by the parties in the future. Both retainer agreements, however, provide that Defendant would pay Plaintiff a $200,000 pre-trial fee "not based on billable time", which was deemed to be "fully earned upon receipt of payment, regardless of the amount of hours incurred and either the case [sic] is dismissed or resulted in a plea." (*Id.*)

Plaintiff was retained for 5 months before he was discharged by Defendant in June 2017. Plaintiff alleges that he was discharged for his "refusal to accede to [Defendant's] demands and expectations over defense strategy" (NYSCEF Doc No. 1 at ¶ 36), while Defendant alleges that the termination was due to Plaintiff's legal fees and conflicts of interest relating to "other individuals who were involved with the Nassau County Charges." (NYSCEF Doc No. 11 at ¶ 46.)

Defendant retained another lawyer, Stephen Scaring, to represent him in the criminal matter. Mr. Scaring succeeded in getting the charges against Defendant dismissed. Mr. Scaring also sent two letters, dated June 11, 2018 and June 25, 2018, to Plaintiff requesting that he return the unearned portion of the retainer. (NYSCEF Doc Nos. 14-15.) The June 25, 2018 letter discusses a June 22, 2018 email from Plaintiff in response to the June 11, 2018 letter. However, that email has not been submitted to this court.

On June 28, 2018, Defendant published a blog post online titled "The Truth of Zhou Libo's Incident". (NYSCEF Doc No. 3.) Plaintiff seemingly responded on July 4, 2018 by publishing a "Solemn Notice" online, wherein Plaintiff stated, in pertinent part, that "[t]he truth is not as what

was described by Zhou Libo. When it is necessary, I will reveal the whole truth of this incidence." (NYSCEF Doc No. 11 at ¶ 70.) However, the full publication has also not been submitted to this court. Defendant responded in turn the next day by posting his own "Solemn Statement," wherein Defendant made various accusations about Plaintiff, his legal practice, and his business strategies. (NYSCEF Doc No. 5.)

Plaintiff filed his Verified Complaint on July 14, 2018 alleging that Defendant defamed him. (NYSCEF Doc No. 1.) Defendant filed his Verified Answer with eight counterclaims on September 13, 2018. (NYSCEF Doc No. 11.) Plaintiff filed his motion to dismiss counterclaims 2-7 on January 18, 2019. (NYSCEF Doc No. 22.)

**DISCUSSION**

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. We accept the facts as alleged in the [pleading] as true, accord plaintiffs [or defendants] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994] [internal citations omitted].) However, "allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence are not entitled to such consideration." (*Kliebert v McKoan*, 228 AD2d 232, 232 [1st Dept 1996].) In assessing a motion to dismiss, "a court may freely consider affidavits submitted by the plaintiff [or defendant] to remedy any defects in the [pleading] and the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one." (*Leon*, 84 NY2d at 88 [internal citations omitted].)

Here, the counterclaims at issue are numbers: (2) violation of the Rules of Professional Conduct; (3) breach of fiduciary duty; (4) conversion; (5) disclosure of attorney-client

communications; (6) disclosure of attorney-client communications in the publication of the July 4, 2018 "Solemn Notice"; and (7) including irrelevant and gratuitous information in the complaint to expose the Defendant to "harassment and physical harm". Defendant has consented to the dismissal of counterclaim 2 after agreeing with Plaintiff that a violation of the Rules of Professional Conduct by an attorney does not bestow a private right of action upon a client. (NYSCEF Doc No. 29 at 11-12.)

## I. Counterclaims 3 and 4

Plaintiff moves to dismiss counterclaims 3 and 4 on the grounds that they are both duplicative of counterclaim 1, which Plaintiff argues is a claim for breach of contract. (NYSCEF Doc No. 27 at 11-14.) Defendant responds that this argument fails because it is based on Plaintiff's erroneous interpretation of counterclaim 1 being a breach of contract claim, while Defendant argues that it is actually a "common law claim for the return of all or part of the $200,000 retainer payment" and distinguishable from the counterclaims for breach of fiduciary duty and conversion. (NYSCEF Doc No. 29 at 14.) Specifically, Defendant clarifies that "[t]he First Counterclaim does not allege that the plaintiff was obligated under the terms of the retainer agreement itself to return all or part of the $200,000" but rather, "it alleges that [the refusal to do so] is a violation of [the attorney's] general fiduciary obligations to his client as well as a violation of multiple Rules of Professional Conduct." (*Id.* [underline and third brackets in original] [internal quotation marks omitted].)

Courts have categorized claims seeking the return of unearned retainers as being claims for breaches of contracts. (*See Dubrow v Herman & Beinin*, 157 AD3d 620, 621 [1st Dept 2018] ["Plaintiff has sufficiently alleged a claim for breach of contract based on defendants' failure to return the unearned balance of his retainer"]; *Goldfarb v Hoffman*, 139 AD3d 474, 475 [1st Dept

2016] [plaintiff sufficiently plead breach of contract claim based on defendants' failure to return the unused portion of their retainer]; *Henry v Brenner*, 271 AD2d 647, 648 [2d Dept 2000] ["the plaintiff's motion papers establish that he has a breach of contract claim insofar as he seeks to recover a portion of the retainer fee"]; *see also Gleyzerman v Law Offices of Arthur Gershfeld & Associates, PLLC*, 154 AD3d 512, 513 [1st Dept 2017].)

Further, claims for conversion and breach of fiduciary duty which are duplicative of a claim for breach of contract must be dismissed. (*Gleyzerman* 154 AD3d at 513 ["The conversion cause of action alleges no facts independent of those underlying the breach of contract cause of action and was therefore correctly dismissed as duplicative"]; *Fesseha v TD Waterhouse Inv. Servs.*, 305 AD2d 268, 269 [1st Dept 2003] ["A cause of action for conversion cannot be predicated on a mere breach of contract"]; *William Kaufman Org. v Graham & James*, 269 AD2d 171, 173 [1st Dept 2000] ["A cause of action for breach of fiduciary duty which is merely duplicative of a breach of contract claim cannot stand"]; *Brinen & Associates v Krippendorff*, 2016 NY Slip Op 31803[U], *6 [Sup Ct, NY County 2016] ["Under CPLR 3211(a)(7), a cause of action for breach of fiduciary duty whose allegations are merely duplicative of a breach of contract claim cannot stand"].) In making such a determination, courts examine whether the claims are "premised upon the same facts and seek identical damages[.]" (*Chowaiki & Co. Fine Art Ltd. v Lacher*, 115 AD3d 600, 600 [1st Dept 2014]; *Gleyzerman*, 154 AD3d at 513; *William Kaufman Org.*, 269 AD2d at 173.)

The court finds that counterclaim 1 is a claim for breach of contract. A retainer agreement is "a contract for legal services" (*Clay v Simpson*, 2019 WL 185765, *2 [Sup Ct, NY County 2019, No. 652399/17]) and Defendant is alleging that Plaintiff breached that contract by "failing to return the unused portion of the retainer[.]" (*Goldfarb*, 139 AD3d at 475.)

Defendant's attempts to argue otherwise are unpersuasive and illogical. Defendant argues that the alleged non-refundability of the retainer agreement makes it clear that the Plaintiff "was under no contractual obligation to return all or any part of the retainer" but then argues that such agreements are prohibited and unenforceable. (NYSCEF Doc No. 29 at 13.) Defendant himself is also unable to categorize the counterclaim. He argues that it is "a common law claim for the return [of the retainer]" that is based on a breach of fiduciary duty and the violation of multiples Rules of Professional Conduct. (*Id*. at 14.) However, the breach of fiduciary duty that he alleges partially forms the basis for counterclaim 1 already encompasses the entirety of counterclaim 3. Further, Defendant has already conceded that a violation of the Rules of Professional Conduct does not confer a private right of action upon the client and against the attorney. (*Id*. at 8-9, 14.)

The court further finds that counterclaims 3 and 4 are duplicative of counterclaim 1. Those counterclaims are premised on the same facts as counterclaim 1 and seek identical damages of $200,000, the full amount of the retainer. (*See Chowaiki & Co. Fine Art Ltd.*, 115 AD3d at 600.) Counterclaim 3 states that the "refusal to return any part of the $200,000 retainer to Zhou constitutes a breach of his fiduciary duty" and that Defendant has "been damaged in the sum of $200,000." (NYSCEF Doc No. 11 at ¶¶ 60-61.) Counterclaim 4 reasserts those same paragraphs and concludes that Defendant "has been damaged in the sum of $200,000." (*Id*. at ¶ 64.) The counterclaim for breach of fiduciary duty arises out of the contract (*William Kaufman Org.*, 269 AD2d at 173) and the counterclaim for conversion is "predicated on a mere breach of contract." (*Fesseha*, 305 AD2d at 269.)

In short, after accepting the alleged facts as true and according Defendant every possible favorable inference, the court finds that counterclaims 3 and 4 "allege no facts independent of those underlying the breach of contract cause of action," and will therefore dismiss them.

(*Gleyzerman*, 154 AD3d at 513.) The validity and enforceability of the retainer agreement will be the subject of ongoing discovery in this matter.

## II. Counterclaims 5 and 6

Defendant's fifth and sixth counterclaims both allege the disclosure of attorney-client communications. In counterclaim 5, Defendant vaguely alleges that Plaintiff "improperly disclosed to third-parties [sic] attorney-client communications," while in counterclaim 6, Defendant specifically alleges that the Plaintiff's publication of the "Solemn Notice" "necessarily involved the disclosure of attorney-client communications[.]" (NYSCEF Doc No. 11 at ¶¶ 66, 71.)

Plaintiff moves to dismiss these counterclaims on the grounds that Defendant fails to plead any specific factual allegations and fails to adequately assert damages. (NYSCEF Doc No. 27 at 14-16.) Defendant responds by restating the facts underlying the counterclaims and inexplicably concludes that "such conduct clearly constitutes, on its face, defamation per se" and that damages for defamation per se are presumed. (NYSCEF Doc No. 29 at 19-20 [underline in original].)

The court finds that counterclaims 5 and 6 are mere "allegations consisting of bare legal conclusions" and will therefore dismiss them. (*Kliebert*, 228 AD2d at 232.) In counterclaim 5, Defendant fails to specify what attorney-client communications Plaintiff improperly disclosed. Counterclaim 6 also fails to include such information, despite the fact that Defendant includes a paragraph of the "Solemn Notice" as support. Neither counterclaim alleges sufficient facts to fit within any cognizable legal theory.

## III. Counterclaim 7

Finally, Plaintiff moves to dismiss counterclaim 7, wherein Defendant alleges that, in his Verified Complaint, Plaintiff "makes various allegations concerning purchases of real property by

[Defendant]" that are "unnecessary and irrelevant to his claims" but that result in damage to Defendant's reputation and expose him to physical harm. (NYSCEF Doc No. 11 at ¶¶ 73-79.)

The court finds that these facts as alleged clearly do not give rise to any cognizable legal claim. Defendant notably cites to no authority even remotely suggesting that including such information in a complaint gives rise to a cause of action.

**CONCLUSION**

Accordingly, it is hereby

ORDERED that Plaintiff's motion to dismiss Defendant's counterclaims is granted and counterclaims 2 through 7 are hereby dismissed.

Any requested relief not otherwise discussed herein has nonetheless been considered by the court and is hereby denied and this constitutes the decision and order of the court.

4/27/2020
DATE

W. FRANC PERRY, J.S.C.

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