

Gaulsh v Diefenbach PLLC

2020 NY Slip Op 32791(U)

August 25, 2020

Supreme Court, New York County

Docket Number: 654346/2015

Judge: Barbara Jaffe

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. BARBARA JAFFE PART IAS MOTION 12EFM

Justice

-----X

SUNE GAULSH,

Plaintiff,

- v -

DIEFENBACH PLLC,

Defendant.

-----X

INDEX NO. 654346/2015

MOTION DATE _____

MOTION SEQ. NO. 007

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 007) 204-210, 215, 216, 222-224

were read on this motion to amend caption/pleadings.

By notice of motion, plaintiff moves pursuant to CPLR 3025(b) and (c) and CPLR 1003 for an order granting him leave to amend the complaint to add: (1) Gordon Price Diefenbach a/k/a Zoran Najdoski a/k/a Zoran Najdovski as a defendant; and (2) a cause of action for misconduct pursuant to Judiciary Law § 487. Defendant opposes.

In this action, as set forth in prior decisions and orders, plaintiff sues defendant, his prior law firm, for breach of contract based on the firm's alleged unreasonable and excessive fees, fraudulent inducement based on its alleged false representations intended to induce him to sign a second retainer agreement, duress in inducing him to sign the second agreement, and breach of fiduciary duty related to defendant's failure to place plaintiff's retainer funds in a separate escrow account. (NYSCEF 227). Plaintiff has been granted a default judgment against defendant, with his damages to be ascertained at an inquest. (*Id.*).

Although leave to amend a pleading is liberally granted, the proposed amendment must not be plainly lacking in merit. (*Jonke v Foot Locker Inc.*, 181 AD3d 544 [1st Dept 2020]).

I. PIERCING THE CORPORATE VEIL

Plaintiff alleges that Diefenbach dominated defendant and thus should be held personally liable, and observes that by naming him as a direct defendant, plaintiff will be able to avoid commencing a separate lawsuit to collect any unpaid judgment entered against defendant. (NYSCEF 205). Defendant denies that he may be held personally liable. (NYSCEF 222).

Having failed to allege a factual basis for piercing the corporate veil other than conclusorily alleging that Diefenbach completely dominated defendant, plaintiff does not establish that piercing the corporate veil is warranted here. That Diefenbach is the sole owner and principal of defendant is insufficient. (*See Kahan Jewelry Corp. v Coin Dealer of 47th St. Inc.*, 173 AD3d 568 [1st Dept 2019] [even if defendant completely dominated corporate form, no showing made that he used domination to commit fraud against plaintiffs or that he abused corporate form in any way; mere fact that he was sole shareholder insufficient]).

While plaintiff, in his reply papers, references a document he submitted with his motion papers to argue that Diefenbach is or will be insolvent, he does not reference the document in his initial motion papers nor does he explain its relevance until his reply papers, which is not permitted. (*See Lumbermens Mut. Cas. Co. v Morse Shoe Co.*, 218 AD2d 624, 625 [1st Dept 1995] [arguments raised for first time in reply papers entitled to no consideration]).

In any event, the document, an affirmation submitted by defendant's counsel in plaintiff's bankruptcy proceeding, does not show that defendant "will not have funds to pay a judgment against it, that a judgment will be uncollectible and that [defendant] will go out of business if a judgment is entered against it." (NYSCEF 224). Rather, counsel states that defendant has few substantial assets, ongoing liabilities, few fee-paying clients, and primarily contingency-fee clients, which do not guarantee income, and that if a judgment is rendered against defendant, it

would be unable to fund its contingency cases and its clients be obliged to find new counsel. (NYSCEF 209). Nowhere does counsel state that defendant cannot pay a judgment, that the judgment will be uncollectible, or that defendant will go out of business. Nor does plaintiff cite authority for the proposition that a corporation's veil may be pierced to save a plaintiff the time and effort of commencing a future post-judgment collection lawsuit.

For all of these reasons, plaintiff fails to establish that leave to amend should be granted to add Diefenbach as a defendant in this action. (*See Cornwell Mgt. Ltd. v Kambolin*, 140 AD3d 507 [1st Dept 2016] [allegations that individuals dominated and controlled corporation too conclusory to state claim for veil-piercing; plaintiff alleged no other factors in support of claim, such as lack of corporate formalities or undercapitalization]).

II. JUDICIARY LAW § 487

Judiciary Law § 487 is violated when an attorney is guilty of “any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party.” (*Izmirligil v Steven J. Baum, P.C.*, 180 AD3d 767, 771 [2d Dept 2020]). The essential elements of the claim include intentional deceit by an attorney and damages proximately caused by the deceit. (*Jean v Chinitz*, 163 AD3d 497 [1st Dept 2018]).

In support of this claim, plaintiff contends that by defaulting, defendant concedes liability for the actions underlying this claim, and that as the claim relates back to his original claim, it is not time-barred, nor can defendant be surprised or prejudiced by it. (NYSCEF 205). He alleges that this cause of action is based on defendant's actions, made in furtherance of financial gain, in making multiple representations to plaintiff, intending to and committing fraud and deceit, breaching its fiduciary duty to plaintiff, and willfully defaulting in answering or appearing in this action. (NYSCEF 206). Defendant denies that the allegations sufficiently set forth a claim for a

violation of Judiciary Law § 487. (NYSCEF 222).

As the new allegations are premised on those advanced in the original complaint, namely, that defendant engaged in fraud and duress in inducing him to sign a second retainer agreement and breached its fiduciary duty to him by putting his retainer funds in defendant's operating account, they do not establish a "chronic and extreme pattern of legal delinquency," nor does plaintiff allege that he sustained any damages related to this claim that are separate and distinct from the damages sought in his original claims. (*See Kaminsky v Herrick, Feinstein LLP*, 59 AD3d 1 [1st Dept 2008] [plaintiff did not establish chronic and extreme pattern of delinquency, and did not plead consequential damages resulting from violation of Judiciary Law § 487]; *Solow Mgt. Corp. v Seltzer*, 18 AD3d 399 [1st Dept 2005], *lv denied* 5 NY3d 712 [2005] [Judiciary Law § 487 claim available only if there is pattern of delinquency]).

In any event, the allegations do not sufficiently set forth a violation of Judiciary Law § 487. (*See Gleyzerman v Law Off. of Arthur Gershfeld & Assocs., PLLC*, 154 AD3d 512 [1st Dept 2017] [no pattern of delinquency or resulting damages alleged to support claim based on allegations that defendants made several misrepresentations that were intended to induce plaintiff to enter into second and third retainer agreements]; *Chowaike & Co. Fine Art Ltd. v Lacher*, 115 AD3d 600 [1st Dept 2014] [plaintiffs' section 487 claim that defendants billed them excessively for services rendered and that they were harassed, threatened, and coerced into paying excessive and overinflated fees properly dismissed as "relief under this statute is not lightly given and the conduct alleged does not establish the existence of a chronic and/or extreme pattern of legal delinquency which caused damages."]; *see also Bill Birds, Inc. v Stein Law Firm, P.C.*, 164 AD3d 635 [2d Dept 2018], *affd* 34 NY3d 173 [2020] [claim dismissed where plaintiffs alleged that defendants, knowing that plaintiffs' claims in underlying action were meritless, made false

representations to them for the sole purpose of inducing them to retain defendant’s services and pay legal fees]).

Plaintiff therefore does not demonstrate that leave to amend his pleadings to add a claim pursuant to Judicial Law § 487 is warranted.

III. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiff’s motion for leave to amend is denied.

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BARBARA JAFFE, J.S.C.

8/25/2020

DATE

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE