

Davidoff Hutcher & Citron LLP v Goodstein
2021 NY Slip Op 30896(U)
March 22, 2021
Supreme Court, New York County
Docket Number: 654190/2020
Judge: Arlene P. Bluth
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE P. BLUTH PART IAS MOTION 14

Justice

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INDEX NO. 654190/2020

DAVIDOFF HUTCHER & CITRON LLP

MOTION DATE 03/19/2021

Plaintiff,

MOTION SEQ. NO. 001

- v -

SHARI GOODSTEIN, fka SHARI ROSSI

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28

were read on this motion to/for DISMISS.

The motion by plaintiff to dismiss defendant's counterclaims is granted.

Background

Plaintiff brings this case for the payment of unpaid legal bills; plaintiff claims that it represented defendant in connection with a matrimonial action in Westchester. It argues that defendant owes plaintiff \$624,511.86.

In her answer, defendant raises five counterclaims: fraudulent inducement, fraud, breach of contract and the implied covenant of good faith and fair dealing, breach of fiduciary duty, and unjust enrichment.

Plaintiff moves to dismiss these counterclaims. It argues that it represented defendant for three years related to her divorce action and post-judgment disputes, including custody issues involving her children. Plaintiff contends that in early 2020, it terminated its relationship based on defendant's outstanding unpaid legal bills.

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 [the proponent of the pleading] 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, 614 NYS2d 972 [1994] [citations omitted]). “At the same time, however, allegations consisting of bare legal conclusions . . . are not entitled to any such consideration” (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 141, 75 NE3d 1159 [2017] [citation and internal quotations omitted]).

Fraudulent Inducement

In order to plead a viable fraudulent inducement claim “it must be demonstrated that there was a false representation, made for the purpose of inducing another to act on it, and that the party to whom the representation was made justifiably relied on it and was damaged” (*Perrotti v Becker, Glynn, Melamed & Muffly LLP*, 82 AD3d 495, 498, 918 NYS2d 423 [1st Dept 2011]). “To make out the basic elements of a fraudulent inducement claim, a plaintiff must establish that the reliance on the false representation was justified” (*Gonzalez v 40 W. Burnside Ave. LLC*, 107 AD3d 542, 544, 968 NYS2d 50 [1st Dept 2013])

Plaintiff moves to dismiss the first counterclaim for fraudulent inducement on the ground that these allegations do not meet the heightened pleading standard of CPLR 3016(b). It emphasizes that the counterclaims do not show that there was justifiable reliance. Plaintiff emphasizes that defendant admitted that she signed a retainer agreement with plaintiff and she paid the \$25,000 retainer herself. It argues that defendant’s reference to some sort of arrangement whereby a third-party trust would pay the legal bills is belied by the written

agreement she signed. Plaintiff also points out that defendant failed to show that she suffered harm from the fraud.

In opposition, defendant does not specifically oppose this branch of the motion. Instead, defendant argues that discovery will reveal more about the factual circumstances that support each counterclaim. She insists that she terminated plaintiff as her counsel because she was unhappy with their work.

The Court grants this branch of the motion. Plaintiff established its prima facie burden to dismiss this cause of action; it successfully pointed out that the allegations do not sufficiently plead justifiable reliance or damages. There is no dispute that defendant entered into an agreement to hire plaintiff as her attorney and used their services for several years. Even if she was unsatisfied with their performance, she has not successfully opposed the portion of the motion to dismiss her claim that she was fraudulently induced to hire them, and this counterclaim is dismissed.

Fraud

The Court dismisses this cause of action as well. Plaintiff argued that this claim appears to allege that plaintiff violated the New York Rules of Professional Conduct, which (plaintiff denies the conduct occurs) which cannot support a cognizable cause of action. “[T]here is no private right of action against an attorney or law firm for violations of the Code of Professional Responsibility or disciplinary rules” (*Weinberg v Sultan*, 142 AD3d 767, 769, 37 NYS3d 13 [1st Dept 2016]).

As stated above, defendant did not offer specific opposition to this argument and offered a “general” opposition to the instant motion. That is not sufficient to raise an issue of fact on this branch of the motion, and the fraud counterclaim is dismissed.

Breach of Contract

Plaintiff claims that defendant's dissatisfaction with plaintiff's performance under the retainer agreement does not support a breach of contract claim. It also points out that defendant failed to allege what provision was breached or what damage was incurred.

The Court agrees and dismisses this counterclaim. This counterclaim asserts that plaintiff's "performance of the Agreement was questionable at best" (NYSCEF Doc. No. 4, ¶ 67). The remaining paragraphs related to this counterclaim detail disagreements with case strategy and defendant's unhappiness with a settlement that she claims was "forced" upon her. Nothing supports a breach of contract cause of action. And defendant did not offer anything in opposition to counter plaintiff's argument, and this counterclaim is dismissed.

Breach of Fiduciary Duty

Plaintiff moves to dismiss the counterclaim for breach of fiduciary duty on the ground that defendant failed to articulate any specific misconduct by plaintiff. It emphasizes that defendant is vague about what damages she has suffered from the alleged misconduct by plaintiff. Plaintiff argues that this counterclaim is essentially identical to the previous counterclaim for breach of contract and argues that it is duplicative.

The Court dismisses this counterclaim. The allegations relating to this counterclaim do not offer any specific examples of how plaintiff breached its fiduciary duty and instead evidences defendant's unhappiness with plaintiff's legal counsel. But dissatisfaction with how plaintiff handled the case is not a basis for a breach of fiduciary duty claim, and the counterclaim is dismissed.

Unjust Enrichment

The Court dismisses this counterclaim. As plaintiff points out, defendant admits that she signed a retainer agreement. That forecloses her ability to recover under a quasi-contract theory of recovery.

Summary

The Court observes that defendant’s opposition consisted solely of an affirmation from her attorney; defendant did not bother to offer an affidavit in opposition to address potential deficiencies in her pleading. And the affirmation did not offer any specific rebuttals to the detailed arguments offered by plaintiff. Rather, it contained a generalized opposition to the motion and sophomoric personal attacks against plaintiff. That is not sufficient to defeat a motion to dismiss defendant’s counterclaims. The Court cannot speculate as to what arguments defendant might make with respect to each counterclaim; it can only evaluate the issues raised in the papers and, here, defendant did not make any arguments.

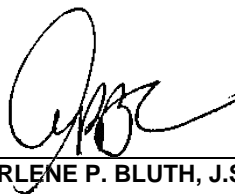
Accordingly, it is hereby

ORDERED that the motion by plaintiff to dismiss defendant’s counterclaims is granted and these counterclaims are severed and dismissed.

Remote Conference: June 3, 2021.

3/22/2021

DATE



ARLENE P. BLUTH, J.S.C.

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