

Ganieva v Ivywise, LLC
2021 NY Slip Op 31218(U)
April 13, 2021
Supreme Court, New York County
Docket Number: 651071/2019
Judge: Louis L. Nock
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LOUIS L. NOCK PART IAS MOTION 38EFM

Justice

-----X

GUZEL GANIEVA,

Plaintiff,

- v -

IVYWISE, LLC,

Defendant.

-----X

INDEX NO. 651071/2019

MOTION DATE _____

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

LOUIS L. NOCK, J.

The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 4, 5, 6, 7, 9, 10, 11, and 12

were read on this motion to

DISMISS

Upon the foregoing documents, the motion of defendant IvyWise, LLC (“Defendant”) to dismiss the complaint is granted, in accord with the following memorandum decision.

Background

Plaintiff Guzel Ganieva (“Plaintiff”) commenced this action to recover sums in connection with Defendant’s alleged breach of two contracts for college counseling and tutoring services. As pled in the complaint, on or about June 7, 2018, Plaintiff entered into an agreement with Defendant for college admissions counseling for her son (the “College Prep Agreement”), pursuant to which Defendant agreed to provide Plaintiff a “30-Hour IvyWise Freshman Program” for the total cost of \$76,500, with the option to purchase additional hours beyond the 30 hours charged at \$2,550 per hour (Complaint [NYSCEF Doc 1] ¶ 6). Plaintiff paid Defendant a deposit of \$38,750 toward the cost of the College Prep Agreement (*id.* ¶ 7). On or about September 27, 2018, Plaintiff entered into an additional agreement with Defendant for tutoring

services for her son (the “Tutoring Agreement”) (*id.* ¶ 8). Pursuant to the Tutoring Agreement, Plaintiff prepaid \$39,000 to Defendant for 100 hours of tutoring services at the hourly rate of \$395 (*id.*).

Plaintiff alleges that “[a]ccording to the College Prep Agreement, Defendant was to provide very specific services outlined in a so called ‘General Program Outline’ during Plaintiff’s son’s freshman year and continuing all through senior year of high school,” which Defendant failed to provide (*id.* ¶¶ 9-10). “At the time of the execution of the College Prep Agreement, Defendant’s son was already in his sophomore year” (*id.* ¶ 9). Instead, Plaintiff continues, “[b]y November 2018, all that Defendant had delivered under the College Prep Agreement were two brief meetings with Defendant’s employee ‘Meg’, a far cry from the promised services in the agreement” (*id.* ¶ 10). With respect to the Tutoring Agreement, Plaintiff alleges that her son utilized 17.5 of the prepaid tutoring hours, and “the provided tutors were not qualified and/or motivated to provide her son with appropriate tutoring. Rather than improving her son’s grades, her son’s grades decreased considerably. Due to Defendant’s lack of performance under the College Prep Agreement and the Tutoring Agreement, Plaintiff’s son performed poorly on his final exam Rather than adding something to her son’s educational experience, the tutors were more like homework helpers and went over material that was already addressed in [the student’s] regular school curriculum” (*id.* ¶ 12). Plaintiff alleges that she “repeatedly tried to discuss these shortcomings with Defendant, but Defendant failed to address these concerns; instead Defendant repeatedly placated Plaintiff with superficial promises which never materialized and substituted other inadequate tutors for prior ones” (*id.* ¶ 13). On or about November 28, 2018, Plaintiff terminated the relationship with Defendant and requested that they

refund \$69,562.50 of the amount paid under both agreements (*id.* ¶ 14). Defendant refused and plaintiff commenced this action.

The complaint interposes causes of action for breach of contract, unjust enrichment, and breach of fiduciary duty. By this pre-answer motion, Defendant moves to dismiss the complaint pursuant to CPLR 3211 (a)(1) and (a)(7). Defendant argues that the breach of contract claim should be dismissed because, pursuant to the terms of both agreements, Plaintiff “is not entitled to any refunds of amounts already paid in the event of cancellation or subsequent non-payment by [Plaintiff], including for any unused tutoring sessions or hours,” that “all services were performed in accordance with the agreements,” that the breach of fiduciary duty cause of action must be dismissed as duplicative of her breach of contract cause of action, and that the unjust enrichment cause of action must be dismissed because a valid contract governs the relationship between the parties (Mem in Support [NYSCEF Doc 4] at 3).

Standard of Review

On a motion to dismiss brought under CPLR 3211 (a) (7), the court must “accept the facts as alleged in the complaint as true, accord the plaintiff 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] [citations omitted]). Ambiguous allegations must be resolved in the plaintiff’s favor (*see JF Capital Advisors, LLC v Lightstone Group, LLC*, 25 NY3d 759, 764 [2015]). “The motion must be denied if from the pleadings’ four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law” (*511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002] [internal citations omitted]). “Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss” (*Cortlandt Street Recovery Corp. v*

Bonderman, 31 NY3d 30, 38 [2018]), but a pleading consisting of “bare legal conclusions” is insufficient (*Leder v Spiegel*, 31 AD3d 266, 267 [1st Dept 2006], *affd* 9 NY3d 836 [2007], *cert denied sub nom Spiegel v Rowland*, 552 US 1257 [2008]) and “the court is not required to accept factual allegations that are plainly contradicted by the documentary evidence or legal conclusions that are unsupportable based upon the undisputed facts” (*Robinson v Robinson*, 303 AD2d 234, 235 [1st Dept 2003]).

Dismissal under CPLR 3211 (a) (1) is warranted “only where the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law” (*Goshen v Mutual Life Ins. Co.*, 98 NY2d 314, 326 [2002]). “To be considered ‘documentary’ under CPLR 3211 (a) (1), evidence must be unambiguous and of undisputed authenticity” (*Fontanetta v John Doe I*, 73 AD3d 78, 86 [2d Dept 2010] [internal citation omitted]). In effect, “the paper’s content must be ‘essentially undeniable and . . . assuming the verity of [the paper] and the validity of its execution, will itself support the ground on which the motion is based” (*Amsterdam Hospitality Group, LLC v Marshall-Alan Assocs., Inc.*, 120 AD3d 431, 432 [1st Dept 2014] [internal citation omitted]). Affidavits and deposition testimony do not qualify as documentary evidence for the purposes of CPLR 3211 (a) (1) (*Lowenstern v Sherman Sq. Realty Corp.*, 143 AD3d 562, 562 [1st Dept 2016]; *Correa v Orient-Express Hotels, Inc.*, 84 AD3d 651, 651 [1st Dept 2011]), but judicial records, mortgages, deeds and contracts (*Fontanetta*, 73 AD3d at 84), and email and letter correspondence (*Kolchins v Evolution Mkts, Inc.*, 31 NY3d 100, 106 [2008]) may be considered. “[W]here a written agreement . . . unambiguously contradicts the allegations supporting a litigant’s cause of action for breach of contract, the contract itself constitutes documentary evidence warranting the dismissal of the complaint pursuant to CPLR 3211(a)(1)” (*Madison Equities, LLC v Serbian Orthodox Cathedral*

of *St. Sava*, 144 AD3d 431, 431 [1st Dept 2016]; *150 Broadway N.Y. Assoc., L.P. v Bodner*, 14 AD3d 1, 5 [1st Dept 2004]).

Discussion

A. Breach of Contract

Defendant moves to dismiss the complaint on the basis of documentary evidence and for failure to state a claim, and submits copies of the College Prep Agreement, a related Payment Plan Agreement, and the Tutoring Agreement in support of its motion (Bodell Affidavit [NYSCEF Doc 5] Exhibits B-C). Defendant also submits a copy of “redacted session notes and time records for Meg Caddeau’s counseling sessions with [Plaintiff’s son],” and a redacted email from Defendant to Plaintiff, dated December 10, 2018, wherein she terminated the relationship between the parties (*id.*, Exhibits D-E). To state a cause of action for breach of contract, a plaintiff must plead the existence of a contract between the parties, plaintiff’s performance, the defendant’s breach, and damages (*Belle Lighting LLC v Artisan Construction Partners LLC*, 178 AD3d 605, 606 [1st Dept 2019]). Plaintiff has pled the existence of two contracts between the parties, which Defendant concedes, and she alleges that she performed “by advancing the deposit required under [the agreements] and making her son available for services” (Complaint ¶ 18).

Plaintiff alleges that Defendant breached the College Prep Agreement by “fail[ing] to perform,” specifically alleging that “[b]y November 2018, all that Defendant had delivered . . . were two brief meetings with Defendant’s employee ‘Meg,’” and by failing to give Plaintiff a refund after she terminated the relationship with Defendant (*id.* ¶¶ 10,18-19). The College Prep Agreement provides an overview and outline of the services to be provided pursuant to the agreement. The agreement advises that the 30-hour program “will begin upon enrollment and see [the student] through application season in his senior year” (Bodell Aff [NYSCEF Doc 5] Exhibit B at 1), and outlines a program through which the student will meet with a counselor,

Meg, who will assist him to identify his academic interests, select school curriculum, and complete various college applications and planning activities throughout his time in high school (*id.* at 1-4). Plaintiff alleges that her son was a high school sophomore during the relevant time period (Complaint ¶ 9). The College Prep Agreement provides a “General Program Outline,” which sets forth the following for the student’s sophomore year:

Sophomore Year: Approximate Hours Used: 2-3 Hours

Counselor & Student Action Items:

- Continue developing appropriate study habits and address any academic problems that may arise
- Discuss strategies to deepen academic interests and explore ways to gain further credentials in these areas
- Begin planning preliminary/exploratory college visits
- Complete applications for appropriate summer programs/internships/etc.
- Start to narrow down extracurricular activities based on academic interests and passions
- Continue planning a standardized testing schedule

Student Goals:

- Select challenging schedule of classes for junior year and set appropriate grade goals
- Complete diagnostic testing to determine if ACT or SAT is the better-fit standardized test
- Identify rigorous, best-fit summer programs/internships in which to participate
- Identify 2-3 subjects to become an “expert” in and narrow down extra and co-curricular activities based on those interests

During sophomore year, [the student] will continue to work with Meg to develop an appropriately rigorous academic plan, solve any academic problems, and explore his interests. [The student] will learn to dive even deeper into his core interests and Meg will help to find related extracurricular initiatives, as well as robust summer programs. They will also begin to create a preliminary college list, conducting more in-depth research of specific schools of interest.

(Bodell Aff [NYSCEF Doc 5] Exhibit B at 2-3.)

Absent any further allegations, Plaintiff’s allegation that Defendant provided “two brief meetings” with Meg between the date of the agreement, September 27, 2018, and November 2018, the date of the purported termination, does not allege a breach of the College Prep

Agreement. Nor is the conclusory allegation that Defendant “failed to perform” under the agreement sufficient to state a cause of action (*Bodum USA, Inc. v Perez*, 148 AD3d 644, 654 [1st Dept 2017] [conclusory allegations insufficient to defeat motion to dismiss]). Where the agreement provides for two to three hours of counseling meetings throughout the student’s sophomore year and Plaintiff makes no factual allegations regarding any deficiency in the content of the meetings, the allegation that the student only had two meetings with Meg, the counselor identified in the College Prep Agreement, is not sufficient to state a cause of action for breach of contract.¹

Plaintiff also alleges that Defendant breached the College Prep Agreement and the Tutoring Agreement by “failing to return Plaintiff’s deposits under those agreements for services unearned” (Complaint ¶ 19). Each of the agreements signed by Plaintiff contains a provision regarding non-refundability. Defendant contends that the failure to provide a refund is not a breach of either agreement pursuant to the terms thereof. The College Prep Agreement states that “[t]here are no refunds for counseling or tutoring services, including any unused counseling or tutoring hours” (Bodell Aff [NYSCEF Doc 5] Exhibit B at 7 ¶ 3). The Tutoring Agreement similarly contains a provision that states that “there are no refunds for tutoring services, including any unused tutoring sessions or hours” (*id.*, Exhibit C at 2 ¶ 1).

It is well settled that the court’s role in interpreting a contract “is to ascertain the intention of the parties at the time they entered into the contract” (*Evans v Famous Music Corp.*, 1 NY3d 452, 458 [2004]). “If that intent is discernible from the plain meaning of the language of the contract, there is no need to look further” (*id.*). Hence, the plain language of a contractual

¹ In support of its motion to dismiss, Defendant submits documents that purport to be as copies of Meg’s notes from the two meetings with Plaintiff’s son, but these are not considered on the motion because Defendant fails to lay the proper foundation for admission of these items under the business records or any other exception to the hearsay rule.

provision providing that payments or deposits are nonrefundable are valid and enforceable where they are part of an otherwise valid agreement where the parties express an intent to be bound (*see Philip v G.O.L.A., Inc.*, 187 AD3d 652, 652 [1st Dept 2020]; *Kushner v King*, 126 AD2d 466, 468 [1st Dept 1987]). Here, the plain language of both agreements indicates that no refunds will be given for services provided or unused services, and both agreements express the parties' intent to be bound, which Plaintiff does not contest. The cases cited by Plaintiff on this point are inapposite because they address causes of action for unjust enrichment, not circumstances with a controlling contract between the parties. Therefore, the non-refundability provisions are valid and enforceable and Defendant's refusal to provide a refund was not a breach of contract.

Turning to the Tutoring Agreement, Plaintiff alleges that Defendant breached the agreement by providing tutors who were "not qualified and/or motivated to provide her son with appropriate tutoring," causing her son's grades to decrease and his poor performance on a final exam (Complaint ¶ 12). When Plaintiff raised her concerns with Defendant, she contends that it failed to address them and "substituted other inadequate tutors for prior ones" (*id.* ¶ 13). In a section titled "About the Premium Tutoring Program," the Tutoring Agreement states the following:

Premium tutoring programs provide students with a personalized learning experience. Students receive one-on-one instruction and benefit from a curriculum customized to the student's style of learning taught at the student's pace. Our tutors emphasize and focus on long-term learning skills, such as problem analysis, problem solving, critical reading, and successful essay writing. Tutors relate these skills to the subjects they teach students, which makes the content more tangible and easier to grasp. Their expert tutoring is supplemented with access to the best learning materials and resources in helping students achieve their academic and personal goals. As a result, our tutors build students' confidence while helping them develop effective learning skills, strategies, and techniques.

All Premium tutoring programs include:

- Emailed progress reports after every tutoring session
- A customized study plan built around [the student's] needs and schedule

- Access to archived tutoring sessions, so [the student] can review material or previous sessions at any time (not applicable for in-person tutoring)
- Integrated counseling and tutoring. Meg will have access to all of [the student's] tutoring notes and practice test scores enabling her to advise [the student] holistically throughout the college admissions process.

(Bodell Aff [NYSCEF Doc 5] Exhibit C at 1.) The remainder of the agreement sets forth various terms for payment, scheduling, cost of materials, etc. (*id.* at 1-4). Finally, the agreement contains the following disclaimer:

DISCLAIMER. I understand that IvyWise and their tutoring partners, and the tutors/coaches shall not be held responsible for score or examination results. Tutoring, no matter how well executed, requires the full participation of Student and cannot be held to guarantee any particular result.

(*Id.* at 4.)

In opposition to the motion, Plaintiff submits an affidavit in which she reiterates the allegations set forth in the complaint (NYSCEF Doc 11).² With respect to tutoring, she describes the services provided as “very unsatisfactory,” “completely inadequate,” and asserts that she “began to suspect that some or all of the tutors might be low-paid individuals outside the United States, whom Defendant was billing me at a mark up of fifteen or twenty times what they were being paid” (Ganieva Aff [NYSCEF Doc 10] ¶ 9). She also represents that “[w]hen I signed the contract for tutors, I was not informed the services would be provided on line, not in person” (*id.* ¶ 11).

Considering the terms of the agreement, Plaintiff’s factual allegations are not sufficient to state a cause of action for breach of the Tutoring Agreement. At the outset, Plaintiff represents that her son utilized 17.5 hours of the tutoring service between the time the agreement was signed on September 27, 2018 and the time of the alleged November 2018 termination of

² Plaintiff’s affidavit is considered here only to the extent that it may remedy pleading defects and not for any evidentiary support (*Nonnon v City of N.Y.*, 9 NY3d 825, 827 [2007]).

services, which indicates that Defendant did provide tutoring services as agreed. Significantly, Plaintiff does not allege that Defendant failed to provide any of the services specifically enumerated in the agreement, *i.e.*, one-on-one tutoring, progress reports, and the like. With respect to the “quality” of tutors, the agreement makes no specific representations regarding specific tutor qualifications, education, or experience of the tutors, nor are there any representations regarding where tutors would be located. On the contrary, the Tutoring agreement includes a “Travel Policy” that states, in plain terms, that “[t]his agreement is based on the understanding that all of IvyWise’s counseling and/or tutoring services will be provided by Internet voice/video, telephone, fax or email, or in-person at the IvyWise offices in Manhattan” (Bodell Aff [NYSCEF Doc 5] Exhibit B at 2 ¶ 6). Finally, the disclaimer specifically and clearly states that tutors “shall not be held responsible for score or examination results.” In sum, the factual allegations set forth in the complaint and the affidavit do not allege that Defendant did not provide the services that Plaintiff bargained for, as outlined in the agreement. As such, Plaintiff has not alleged a breach of the College Prep Agreement or the Tutoring Agreement and the cause of action for breach of contract is dismissed.

B. Unjust Enrichment

It is well established that a Plaintiff may not recover in unjust enrichment where a contract governs the subject matter (*Centennial Elevator Indus., Inc. v New York City Hous. Auth.*, 129 AD3d 449, 450 [1st Dept 2015] [“Plaintiff may not recover in *quantum merit* or unjust enrichment given that the contract governs the subject matter.”]). Nevertheless, a cause of action for unjust enrichment may be maintained where a bona fide question exists regarding whether there was an agreement between the parties (*see Henry Loheac, P.C. v Children’s Corner Learning Center*, 51 AD3d 476, 476 [1st Dept 2008]). In this case, there is no *bona fide* dispute

regarding whether the College Prep Agreement and the Tutoring Agreement governs the relationship between the parties. Therefore, the cause of action for unjust enrichment is dismissed.

C. Breach of Fiduciary Duty

“The elements of a cause of action to recover damages for breach of fiduciary duty are (1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant’s misconduct” (*Palmetto Partners, L.P. v AJW Qualified Partners, LLC*, 83 AD3d 804 [2d Dept 2011]). A cause of action for breach of fiduciary duty must be pled with particularity pursuant to CPLR 3016 (*Swartz v Swartz*, 145 AD3d 818, 823 [2d Dept 2016]). A fiduciary relationship exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation (*EBC I, Inc. v Goldman, Sachs & Co*, 5 NY3d 11, 19 [2005] [internal quote omitted]). “Such a relationship, necessarily fact-specific, is grounded in a higher level of trust than normally present in the marketplace between those involved in arm’s length business transactions” (*id.*). “Generally, where parties have entered into a contract, courts look to that agreement to discover . . . the nexus of [the parties’] relationship and the particular contractual expression establishing the parties’ interdependency” (*id.* [internal quote omitted]). “If the parties . . . do not create their own relationship of higher trust, courts should not ordinarily transport them to the higher realm of relationship and fashion the stricter duty for them” (*id.*). “However, it is fundamental that fiduciary liability is not dependent solely upon an agreement or contractual relation between the fiduciary and the beneficiary but results from the relation” (*id.*).

The complaint alleges that “Defendant undertook a fiduciary duty to Plaintiff when it offered a relationship of confidence, trust, and superior knowledge in advising Plaintiff and her

son as to college admissions” (Complaint ¶ 26). Nevertheless, this conclusory allegation is unsupported by any factual allegations, pled with particularity or otherwise, that the relationship between the parties extended beyond the contractual obligations set forth in the College Prep Agreement and the Tutoring Agreement. Nothing in the terms of the two agreements supports the existence of a fiduciary relationship. Consequently, Defendant’s only obligation to the Plaintiff was to provide the services that Plaintiff bargained for: tutoring and college counseling services. Contrary to Plaintiff’s assertions (*see* Mem in Opposition at 5, NYSCEF Doc 11), the hourly cost of the tutoring is irrelevant to the existence of a fiduciary duty. The cost is clear from the plain language of the agreement and there are no allegations that Plaintiff did not freely enter into the agreement, and Plaintiff does not plead any misconduct on the part of Defendant. Plaintiff has not pled a cause of action for breach of fiduciary duty.

Moreover, the cause of action for breach of fiduciary duty is duplicative of the cause of action for breach of contract. Courts permit a pleading to contain both a claim for breach of contract and a claim for breach of fiduciary duties where the fiduciary duties might be owed independent of contractual obligations (*see Andersen v Weinroth*, 48 AD3d 121 [1st Dept 2007]). However, “a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated” (*Clark-Fitzpatrick, Inc. v L.I.R.R. Co.*, 70 NY2d 382, 389 [1987]). “This legal duty must spring from circumstances extraneous to, and not constituting elements of, the contract, although it may be connected with and dependent upon the contract” (*id.*). Thus, a breach of fiduciary duty claim is subject to dismissal where a plaintiff fails to allege a duty separate and apart from the defendant’s duties under the terms of the governing agreements (*Nineteen Eighty-Nine, LLC v Icahn*, 96 AD3d 603 [1st Dept 2012]). Plaintiff alleges no such duty, and the cause of action for breach of fiduciary duty is based on the

same facts as the cause of action for breach of contract and seeks the same relief. Therefore, because Plaintiff has not pled the existence of a fiduciary relationship between the parties and the cause of action for fiduciary duty is duplicative of the cause of action for breach of contract, the third cause of action for breach of fiduciary duty is dismissed.

Accordingly, it is

ORDERED that the motion to dismiss is granted; and it is further

ORDERED that the defendant's motion to dismiss this action is granted and the Clerk is directed to enter judgment in favor of defendant dismissing this action, together with costs and disbursements to defendant, as taxed by the Clerk upon presentation of a bill of costs.

This will constitute the decision and order of the court.

ENTER:



<u>4/13/2021</u> DATE					<u>LOUIS L. NOCK, J.S.C.</u>		
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED		<input type="checkbox"/>	NON-FINAL DISPOSITION		
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APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/>	SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE