

<b>Alter &amp; Barbaro, Esqs. v Nestor</b>
2021 NY Slip Op 31369(U)
April 23, 2021
Supreme Court, Kings County
Docket Number: 507130/20
Judge: Peter P. Sweeney
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS: PART 73

Index No.: 507130/20  
Motion Date: 2-22-21  
Mot. Seq. No.: 2

-----X  
ALTER & BARBARO, ESQS. and  
LESLIE SHOY BARON,

Plaintiff,  
-against-

DECISION/ORDER

FELICIA NESTOR,

Defendant.  
-----X

The following papers were read on this motion:

<b>Papers:</b>	<b>NYSCEF Nos:</b>
Notice of Motion/Order to Show Cause	
Affirmations/Affidavits/Exhibits/Memo of Law.....	21-41
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Upon the foregoing papers, the motion is decided as follows:

In this interpleader action brought by plaintiffs ALTER & BARBARO [“AB”] and  
LESLIE SHOY-BARON pursuant to CPLR 1006[a] for this court to determine which attorney,  
between plaintiff-attorney Shoy-Baron and defendant-attorney FELICIA NESTOR, shall be  
entitled to funds held in escrow by AB, defendant Nestor seeks an Order pursuant to CPLR §  
3211[a][1] and [a][7], dismissing the complaint. Plaintiffs oppose dismissal. This dispute is  
outside the jurisdictional limit of the Joint Committee on Fee Disputes and Conciliation through  
the NY County Lawyers Association.<sup>1</sup> Both sides agree that defendant Nestor’s charging lien is

<sup>1</sup> Alter & Barbaro and Shoy-Baron allege that Nestor is owed legal fees totaling \$29,518.57. Nestor claims that the total amount of Shoy Baron's legal fees was \$95,116.77; however, as Shoy-Baron was already paid \$20,481.43, the actual amount in dispute is \$74,635.34.

not relevant to this motion. The complaint alleges causes of action for breach of contract, breach of fiduciary duty and negligent misrepresentation, and seeks punitive damages.

The crux of the dispute between Shoy-Baron and Nestor is whether Nestor authorized Shoy-Baron to perform certain legal work on her behalf and to what extent, if any, Shoy-Baron is entitled to be paid from the funds in escrow. Nestor previously represented Shoy-Baron in an EEOC discrimination case that was settled with Shoy-Baron's former employer FEMA for the sum of \$140,000 in exchange for her resignation. Co-plaintiff AB was retained by Shoy-Baron when she and Nestor parted ways. AB is holding the funds in escrow since both Shoy-Baron and Nestor claim ownership.

On a motion to dismiss a complaint pursuant to CPLR § 3211[a][7], the court must afford the complaint a liberal construction, accept the facts as alleged in the complaint as true, accord the plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*see Leon v. Martinez*, 84 NY2d 83, 87-88; *see Goshen v Mutual Life Ins. Co. of NY*, 98 NY2d 314, 326; *Qureshi v Vital Transp., Inc.*, 173 AD3d 1076, 1077).

The essential elements of a breach of contract claim are the existence of a contract, the plaintiff's performance under the contract, the defendant's breach of obligations under the contract and damages from the breach (*see Berkovits v. Berkovits*, 190 AD3d 911; *Hausen v North Fork Radiology, PC*, 171 AD3d 888). Shoy-Baron's allegations that she retained the defendant to perform legal work, paid the defendant, and that the defendant unreasonably and prematurely withdrew from representing plaintiff, causing plaintiff to get a lesser settlement than she otherwise would have received, are sufficient to sustain a breach of contract cause of action.

To allege a cause of action sounding in breach of fiduciary duty, a plaintiff must assert the existence of a fiduciary relationship, misconduct by the defendant, and damages that were directly caused by the defendant's misconduct (*see Berkovits v Berkovits*, 190 AD3d at 916; *Rut v Young Adult Inst., Inc.*, 74 AD3d 776, 777; *see Deblinger v Sani-Pine Prods. Co., Inc.*, 107 AD3d 659, 660). Plaintiff's allegation that Ms. Nestor elected to work on and filed an expensive summary judgment motion on plaintiff's behalf without the consent of the plaintiff (who is an attorney), and that defendant Nestor prematurely withdrew from representing the plaintiff, which conduct resulted in a lesser settlement, are sufficiently stated to sustain a claim for breach of fiduciary duty.

On a cause of action alleging negligent misrepresentation, the plaintiff is required to demonstrate "(1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information" (*J.A.O. Acquisition Corp. v Stavitsky*, 8 NY3d 144, 148 [2007]; *see Ginsburg Dev. Cos., LLC v Carbone*, 134 AD3d 890). To show reliance, a party "must demonstrate that [it] was induced to act or refrain from acting to [its] detriment by virtue of the alleged misrepresentation or omission" (*Shea v Hambros PLC*, 244 AD2d 39 [1998] [internal quotation marks and brackets omitted]). The plaintiff's allegations that she retained defendant Nestor to handle the EEOC matter, that the defendant knew or should have known that her representations to the plaintiff about the anticipated award were mostly for her own financial gain and not the plaintiff's (as demonstrated by the "exorbitant" legal fees allegedly due as compared with the actual settlement achieved), that the plaintiff relied upon the defendant's statements and had continued to pay the defendant's legal fees to her detriment, are inadequate to state a cause of action for negligent misrepresentation. While plaintiff claims that the defendant

misrepresented the anticipated award for her own financial gain, such a “misrepresentation” does not constitute actionable fraud because it is a mere expression of future expectations (*see Deutsche Bank Natl. Trust Co. v Sinclair*, 68 AD3d 914, 916, 891 NYS2d 445 [2009]; *Adrien v Estate of Zurita*, 29 AD3d 498, 814 NYS2d 709 [2006]; *Goldman v Strough*, 2 AD3d 677, 678, 770 NYS2d 94 [2003]).

Defendant’s argument that this action was improperly brought by AB under CPLR § 1006 is unpersuasive. CPLR § 1006[a] provides: “A stakeholder is a person who is or may be exposed to multiple liability as the result of adverse claims. A claimant is a person who has made or may be expected to make such a claim. A stakeholder may commence an action of interpleader against two or more claimants.” It is settled law that an escrow agent may maintain an interpleader action to determine who should receive the money held in escrow (*see Manufacturer's & Traders Trust Co. v. Reliance Ins. Co.*, 8 NY3d 583 [2007]).

Defendant alleges that many of the facts asserted by plaintiff are directly contradicted by documentary evidence. On a motion to dismiss on the ground that the action is barred by documentary evidence pursuant to CPLR 3211[a][1] may be granted only where the documentary evidence utterly refutes the plaintiff’s factual allegations, conclusively establishing a defense as a matter of law (*see Goshen v Mutual Life Ins. Co. of NY*, 98 NY2d at 326; *Leon v Martinez*, 84 NY2d at 88; *Louzoun v. Kroll Moss and Kroll, LLP*, 113 AD3d 600). Here, the documents submitted by the defendant, including two retainer agreements and a selection of emails, do not conclusively establish a defense to the complaint.

The standard for an award of punitive damages is that a defendant manifest evil or malicious conduct beyond any breach of professional duty. There must be " 'aggravation or

outrage, such as spite or "malice," or a fraudulent or evil motive on the part of the defendant, or such a conscious and deliberate disregard of the interests of others that the conduct may be called willful or wanton' " (*Dupree v Giugliano*, 20 NY3d 921 [2012]; see *Prozeralik v Capital Cities Communications*, 82 NY2d 466, 479 [1993] quoting Prosser and Keeton, Torts § 2 at 9-10 [5th ed 1984]). The circumstances here do not measure up to this standard: there is neither an allegation nor evidence that the defendant willfully caused plaintiff to get a reduced settlement based upon a conscious and deliberate disregard of the plaintiff's interests sufficient to be called willful or wanton conduct.

Accordingly, it is hereby

**ORDERED**, the defendant's motion to dismiss is **GRANTED** as to the cause of action for punitive damages; the defendant's motion is in all other respects **DENIED**.

This constitutes the decision and order of the Court.

Dated: April 23, 2021



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**PETER P. SWEENEY, J.S.C.**

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020