Linda Garcia-RoseLCSW & Assoc. PLLC v Turetsky
2021 NY Slip Op 31429(U)
April 27, 2021
Supreme Court, New York County
Docket Number: 657498/2019
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

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LINDA GARCIA-ROSE LCSW AND ASSOCIATES PLLC,

Plaintiff,

- v -

ANDREW TURETSKY,

Defendant.

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INDEX NO. 657498/2019

MOTION DATE 02/06/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

LOUIS L. NOCK, J.

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

were read on this motion to/for AMEND CAPTION/PLEADINGS.

Upon the foregoing documents, the motion of defendant Andrew Turetsky ("Defendant") for leave to file an amended answer is granted, in accord with the following memorandum decision.

Background

Plaintiff Linda Garcia-Rose LCSW and Associates PLLC ("Plaintiff") is a New York limited liability company that provides psychotherapy, cognitive behavioral therapy, and other related therapies and services to private clients in New York City (Complaint ¶ 1, NYSCEF Doc 1). Defendant is a licensed clinical social worker who was employed as a therapist with Plaintiff through May 2019 (*id.* ¶¶ 4-5). The complaint alleges that the parties executed an agreement governing Defendant's employment with Plaintiff, and that Defendant, while an employee of Plaintiff and in violation of the agreement, solicited Plaintiff's clients to use his therapy services for a lower fee outside of Plaintiff's business and did provide such services in violation of his fiduciary duties to Plaintiff (Complaint ¶¶ 8-14). The complaint interposes causes of action for

breach of contract, breach of fiduciary duty, and unfair competition. Defendant appeared in the case by filing an answer that denies Plaintiff's allegations and asserts the following six affirmative defenses: (1) failure to state a cause of action, (2) employment agreement exists and/or Defendant was misclassified as an independent contractor, (3) "defendant did not solicit Plaintiff's patients," (4) unclean hands/breach of employment relationship, (5) Defendant's claims are barred by "public policy and/or the parties' code of ethics," and (6) Plaintiff's claims are "barred due to Plaintiff's termination of Defendant's employment" (Answer ¶¶ 38-43, NYSCEF Doc 3).

Defendant now moves pursuant to CPLR 3025 (b) for leave to serve and file an amended answer. The proposed amended answer asserts the following additional seventh through eleventh affirmative defenses: (7) statute of frauds, (8) the "Sub-Contracting Agreement" terminated upon the commencement of Defendant's employment by Plaintiff, (9) the restrictive covenant(s) are violative of public policy, overbroad, and/or unreasonable in their scope and effect, (10) Plaintiff breached or attempted to breach ethical standards governing Plaintiff's practice and the relationship between Defendant and his patients, and (11) "[t]o the extent that Defendant's conduct allegedly breached any obligation owed to Plaintiff, whether arising from contract or common law, such conduct was justified and required by Defendant's adherence to the ethical standards governing licensed certified social workers" (Proposed Amended Answer ¶¶ 38-48, NYSCEF Doc 17). The proposed amended answer also contains a counterclaim that alleges Plaintiff failed to give Defendant a 60-day notice of termination of his employment, in breach of a provision of the Sub-Contracting Agreement that provides, "Both parties agree that 2 months (60 days) notice is required to terminate this contract, as long as neither party has cause

as defined by NY State Laws and Regulations for Social Workers, Psychotherapists and Mental Health Professionals, or by violation of above terms and conditions" (*id.* ¶ 51).

Plaintiff opposes the motion to amend on the grounds that the proposed additional affirmative defenses and counterclaim are "devoid of merit" as a matter of law. Plaintiff argues that the counterclaim is devoid of merit because documentary evidence demonstrates that Defendant was terminated "for cause," and the 60-day notice provision is, therefore, inapplicable. Plaintiff also argues that the proposed seventh affirmative defense of statute of frauds is insufficient as a matter of law because Defendant's employment was "at will," and an employment agreement at will is capable of performance within one year. Plaintiff does not assert any arguments in opposition to the remainder of the proposed amendments. On reply, Defendant argues that it is unclear whether Plaintiff's claims rely on the "Sub-Contracting Agreement," and unsigned "Employment Agreement," or a unidentified oral agreement; that the documentary evidence submitted by Plaintiff does not conclusively demonstrate that Defendant was terminated for cause; that Plaintiff's allegation that Defendant was an at-will employee contradicts the contention that the relationship was governed by the Sub-Contracting Agreement, and, in any event, the complaint does not allege that Defendant's employment was at-will. Defendant also asserts that the court should impose sanctions against Plaintiff for advancing frivolous contentions within the meaning of 22 NYCRR 130-1.1 (c).

Discussion

CPLR §3025(b) provides that "[a] party may amend his pleading . . . at any time by leave of court . . . [which] shall be freely given upon such terms as may be just[.]" "CPLR §3025 allows liberal amendment of pleadings absent demonstrable prejudice" (*Atlantic Mut. Ins. Co. v Greater New York Mut. Ins. Co.*, 271 AD2d 278, 280 [1st Dept 2000]). In the absence of

prejudice, leave to amend a pleading should be denied only when the proposed amendment is plainly lacking in merit (*Bd. of Managers of Gramercy Park Habitat Condo. v. Zucker*, 190 AD2d 636 [1st Dept. 1993]). "An amendment is devoid of merit where the allegations are legally insufficient" (*Reyes v BSP Realty Corp.*, 171 AD3d 504, 504 [1st Dept 2019]). As such, the court must examine the sufficiency of the merits of the proposed amendment and is not required to accept the movant's allegations as true (*Boaz Bag Bag v Alcobi*, 129 AD3d 649, 649 [1st Dept 2015]). The party moving to amend the pleadings need not prove the facts (*Fairpoint Cos., LLC v Vella*, 134 AD3d 645, 645 [1st Dept 2015]), but must tender an affidavit of merit or offer of evidence similar to that used to support a motion for summary judgment (*Velarde v City of New York*, 149 AD3d 457, 457 [1st Dept 2017]; *Boaz*, 129 AD3d at 649). The party opposing the motion bears a heavy burden of showing prejudice (*McGhee v Odell*, 96 AD3d 449, 450 [1st Dept 2012]), or demonstrating that the facts as alleged are unreliable or insufficient to support the motion (*Peach Parking Corp. v 346 W. 40th St., LLC*, 42 AD3d 82, 86 [1st Dept 2007]).

Turning first to the proposed counterclaim, Plaintiff alleges that the 60-day notice provision in the Sub-Contracting Agreement does not apply because Defendant was terminated for cause due to the fact that he wrongfully solicited Plaintiff's clients and failed to properly document patient sessions for billing purposes. To support these contentions, Plaintiff presents an affidavit of its principal and owner, Linda Garcia-Rose, which attaches two exhibits of email correspondence with Defendant (NYSCEF Doc 21). In the first email purported from Garcia-Rose to Defendant, dated November 7, 2019, Garcia-Rose states, "I am so disturbed that you thought it was ok, to see LGR&A patients outside of the practice at rates lower than what we were offering. . . . Based upon your actions, . . . you are terminated with cause effective immediately" (NYSCEF Doc. No. 21 [Exhibit 1]). In other email correspondence, Defendant

states, in a billing-related email dated October 25, 2019, that "some may not have been processed for the insurance" (*id.*, Exhibit 2).

Upon examination of those materials, it is the opinion of this court that Plaintiff has not demonstrated that the proposed amendment is devoid of merit as a matter of law. At the outset, the Sub-Contracting Agreement upon which Plaintiff relies indicates that the "for cause" standard is "as defined by NY State Laws and Regulations for Social Workers, Psychotherapists and Mental Health Professionals" (NYSCEF Doc 14 at 3), but neither party has addressed these laws and regulations on this motion and the applicable standards are not before the court. Additionally, the self-serving Garcia-Rose affidavit is not incontrovertible evidence sufficient to establish that the termination was for cause, and the emails attached to the affidavit appear incomplete. In short, whether Defendant was terminated for cause is a mixed question of fact and law that cannot be resolved on the basis of the limited evidence currently before the court and at this stage of the litigation prior to the conclusion of discovery. As such, the proposed counterclaim cannot be found to be devoid of merit. Thus, the amendment is permitted.

Next, Plaintiff asserts that the proposed seventh affirmative defense of statute of frauds is devoid of merit because the agreement between the parties is "at will," and the statute of frauds does not apply to such an agreement. Nonetheless, it is unclear on which agreement Plaintiff's claims rely. The complaint pleads that "Turetsky executed an agreement governing his services" (Complaint ¶ 8), but does not indicate the date of the alleged agreement; nor is the purported agreement attached to the complaint. In support of its motion, Defendant submits two agreements that he represents were produced by Plaintiff in discovery, a "Sub-Contracting Agreement" executed in December 2015 and an unsigned "Employment Agreement" purportedly "provided to Defendant by Plaintiff in or about October 2018 when Defendant was converted

from an independent contractor to an employee" (Goidell Aff. [NYSCEF Doc 11] ¶ 8, Exhibits C-D). Plaintiff does not address these documents in its opposition to the motion. Therefore, a question of fact exists regarding what agreement, if any, governed the terms of Defendant's employment. Thus, the court cannot, at this time, determine whether the statute of frauds is applicable. The proposed seventh affirmative defense is, therefore, not found to be devoid of merit. Thus, the proposed amendment shall be permitted.

Whereas Plaintiff does not object to the remaining proposed affirmative defenses and has not demonstrated the existence of any undue prejudice that it will suffer from the proposed amendments, these amendments are permitted. The court also declines to impose any sanction on Plaintiff for its opposition to the motion, finding that Plaintiff's arguments in opposition to the motion are interposed in good faith, irrespective of the within outcome of Defendant's motion to amend.

Accordingly, it is

ORDERED that the Defendant's motion for leave to amend the answer herein is granted, and the amended answer with counterclaim in the proposed form annexed to the moving papers (NYSCEF Doc 17) shall be deemed served upon the filing hereof; and it is further

ORDERED that the Plaintiff shall serve a reply to the counterclaim, or otherwise respond to the amended answer and counterclaim, within 20 days from the date of filing hereof; and it is further

ORDERED that counsel are directed to appear for a status conference on June 23, 2021 at 2:00 p.m., to be conducted by a Microsoft Teams appearance arranged by the court.

ENTER:

4/27/2021
DATE

LOUIS L. NOCK, J.S.C.

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