Tiago v Trachtman
2022 NY Slip Op 30869(U)
March 15, 2022
Supreme Court, New York County
Docket Number: Index No. 651404/2019
Judge: Arlene P. Bluth

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE BLUTH** **PART** **14**

Justice

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JANINE A. TIAGO, PH.D., ABPP-CN and M. MARGARET WHELLEY, PH.D.

Plaintiffs,

- v -

ALAN C. TRACHTMAN, ESQ. D/B/A LAW OFFICE OF ALAN C. TRACHTMAN,

Defendant.

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INDEX NO. 651404/2019

MOTION DATE 03/11/2022

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169

were read on this motion to/for SUMMARY JUDGMENT.

The motion by plaintiffs for summary judgment is granted in part and the cross-motion by defendant for summary judgment is denied.

Background

Plaintiffs are psychologists who claim they were retained by defendant to be expert witnesses in connection with a class action litigation in the Southern District of Florida. That case involved a cruise line which faced claims from certain passengers (special needs children and their family members) arising out of alleged injuries suffered during a severe winter storm while the ship was at sea. During the severe weather, passengers were confined to their cabins for 12-13 hours. Defendant, an attorney, represented the plaintiffs (the passengers) in the Florida litigation.

Plaintiffs claim they delivered their expert reports at defendant's request but defendant refused to pay. They allege that when defendant demanded that they appear for depositions, they decided to stop providing any further services until their bills were paid. According to plaintiffs, they had collectively prepared reports for 14 plaintiffs and did not want to sit for 14 depositions within a two-week period when they were both owed thousands of dollars.

Plaintiffs maintain that they were subpoenaed by the defendant in the Florida litigation (Royal Caribbean) because plaintiffs had examined the Florida litigation plaintiffs. They insist they had to spend money retaining counsel in order to respond to these subpoenas. Plaintiffs argue that the defendant here does not deny that he did not pay plaintiffs and instead focuses on irrelevant actions taken afterward (such as hiring a new expert witness).

In opposition and in support of his motion for summary judgment, defendant argues that plaintiffs committed an anticipatory breach of contract pursuant to the retainer agreements in which plaintiffs agreed to be experts. He insists that after they were retained, plaintiffs suddenly imposed time and schedule limitations regarding when they could perform the tasks requested by defendant. He emphasizes that this conflicted with the condensed discovery schedule in the Florida litigation. Defendant argues that plaintiffs essentially imposed additional terms separate and apart from their retainer agreements and this constitutes an anticipatory breach of contract. Defendant denies that plaintiffs ever told him about potential scheduling limitations before he retained them.

Defendant complains that plaintiff Tiago claimed she could only work on the case on Friday mornings and early afternoons while plaintiff Whelley could only focus on the case on Saturdays despite the fact that the retainer agreement mentioned nothing about their limited

availabilities. Defendant insists that because plaintiff did not provide full time services, as indicated in the retainer agreement, he is entitled to summary judgment.

Defendant also insists that plaintiffs waived the terms of the contract, including the requirement that defendant pay a $5,000 retainer within 10 days. He admits he did not initially pay the entire amount but plaintiffs provided services nonetheless (defendant apparently eventually paid the retainers). Defendant also points out that despite not promptly paying the invoices, plaintiffs provided services and so plaintiffs waived the portion of the contract that required defendant to pay any amount owed prior to providing future services, such as showing up for a deposition. He also insists that any charges by plaintiffs after January 18 and 19, 2018 (the date they terminated the contracts) are invalid.

Defendant also argues that plaintiffs negligently destroyed certain documents and that plaintiff Tiago's claim that her computer malfunctioned is not sufficient. He also claims plaintiff Whelley could not account for certain documents either. Defendant wants the Court to grant summary judgment on this basis alone. With respect to the account stated cause of action, defendant points out that he made partial payments but insists that plaintiff sent several revised invoices to which defendant objected as excessive.

In reply and in opposition to the cross-motion, plaintiffs emphasize that they performed all the services required within the stated deadlines prior to terminating the contracts. Plaintiffs admit that they kept working without prompt payment in the hope that they would eventually get paid but argue that this does not operate as a waiver.

In reply to his cross-motion, defendant insists that plaintiffs never fully performed under the contract and therefore are not entitled to summary judgment. He emphasizes that the Florida

case was entirely dependent on experts as the cruise passengers were asserting emotional distress claims.

Discussion

To be entitled to the remedy of summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id*.). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

The Court grants the motion by plaintiffs with respect to liability only for the breach of contract claims and denies and the cross-motion by defendant. Clearly, the papers submitted on

this motion suggest two wildly divergent versions of what happened. Plaintiffs contend that defendant did not pay up and that they simply had enough. They did not want to keep working for an attorney who refused to pay them. Defendant insists that plaintiffs tried to impose all manner of limitations despite entering into a contract to be expert witnesses. He maintains that plaintiffs were not permitted to agree to be expert witnesses and then demand that they only work one day a week.

But it is undisputed that right from the beginning, defendant did not pay plaintiffs what he was supposed to pay them. He admits he did not initially pay the full retainer and only made partial payments. Defendant's entire opposition (and the basis of his summary judgment motion) is based on the fact that plaintiffs waived their right to enforce the contract. Certainly, the retainer agreement provides that "Testimony, reports and opinions will not be written or released unless account balances are current and retainers have been paid" (NYSCEF Doc. No. 99 at 1). However, the Court is unable to find that simply because plaintiffs refused to stop working the moment defendant reneged on his obligations, plaintiffs are forbidden from seeking payment for the work they performed.

"As the intentional relinquishment of a known right, a waiver should not be lightly presumed. Ordinarily, mere negligence, oversight or thoughtlessness does not create a waiver Similarly, a party's reluctance to terminate a contract upon a breach and its attempts to encourage the breaching party to adhere to its obligations under the contract do not necessarily constitute a waiver of the innocent party's rights in the future" (*Kamco Supply Corp. v On the Right Track, LLC*, 149 AD3d 275, 280, 49 NYS3d 721 [2d Dept 2017] [internal quotations and citations omitted]).

This is exactly what happened here—plaintiffs kept working in the hope that they would eventually get paid. Defendant's assertion that plaintiffs waived the right to enforce the contract because they kept working is tantamount to demanding that plaintiffs relinquished their right to get paid for that work. That makes no sense in this context nor is it supported even under defendant's version of events. In fact, defendant appears to insist that plaintiffs should not have given him the benefit of any doubt when defendant did not pay the full retainer. In other words, defendant seems to be arguing that because plaintiffs did not instantly stop when defendant breached the contract (by not paying the retainer or a subsequent bill), plaintiffs waived the right to sue for the work they performed. That is simply not a coherent interpretation of the waiver doctrine, a theory applicable only under very limited and specific circumstances.

Similarly, the Court is unable to find that defendant is entitled to relief under the doctrine of anticipatory breach of contract. "The principle of anticipatory breach of contract is supported by sound policy considerations. Once a party has indicated an unequivocal intent to forego performance of his obligations under a contract, there is little to be gained by requiring a party who will be injured to await the actual breach before commencing suit, with the attendant risk of faded memories and unavailable witnesses. However, it is clear that there must be a definite and final communication of the intention to forego performance before the anticipated breach may be the subject of legal action" (*Rachmani Corp. v 9 E. 96th St. Apt. Corp.*, 211 AD2d 262, 266-67, 629 NYS2d 382 [1st Dept 1995][citation omitted]).

By the time plaintiffs sought to terminate the contract in January 2018, defendant had already breached the contract himself by not paying plaintiffs what they were owed. And, as stated above, the contract was very clear that plaintiffs had the right to stop working if their bills

were not fully paid. Defendant cannot evade his obligation to pay plaintiffs because they decided they did not want to work indefinitely for free any longer.

The Court also observes that defendant's reliance on actions taken by the Magistrate judge in federal court does not compel a different outcome. That the Magistrate may have imposed sanctions on defendant or that defendant had to retain a new expert is a direct result of defendant not paying plaintiffs.

The Court emphasizes that it is granting plaintiffs summary judgment on liability only with respect to liability on the breach of contract causes of action by each plaintiff. The Court is unable to grant summary judgment on the account stated causes of action because defendant disputed certain bills. Moreover, plaintiffs do not dispute that they sent revised invoices and defendant insists he objected to the final invoice sent by each plaintiff (*see* NYSCEF Doc. No. 147 [objection to plaintiff Whelley], NYSCEF Doc. No. 148 [objection to plaintiff Tiago]). And plaintiffs requested, in the alternative, that the Court order a trial on damages. Accordingly, there shall be a trial to determine how much each plaintiff is owed.

Based on the foregoing, the Court also grants plaintiffs' request to dismiss defendant's counterclaims for breach of contract against plaintiffs. The Court finds that defendant breached the contract by not paying plaintiffs and therefore he is not entitled to recover purported damages against plaintiffs stemming from his own breach.

With respect to defendant's claim of spoliation, the Court previously explored these issues (although not all of them) in connection with a prior motion by defendant to strike plaintiffs' complaint (NYSCEF Doc. No. 73). There is no basis, on these papers, to grant defendant summary judgment based on a claim of spoliation; that is simply too harsh a remedy where it appears plaintiffs attempted (although sloppily) to comply with various discovery

orders. They should not have their case dismissed because they cannot account for every single communication. Under defendant's view of the doctrine of spoliation, any plaintiff who cannot account for a single email would not be permitted to purse his or her case. That is not a workable or fair standard.

Summary

The Court recognizes that defendant was likely unhappy with plaintiffs, possibly due to their insistence that they only work on the Florida litigation on certain days and certainly once they refused to show up for depositions. But defendant admits he did not initially pay the full retainer and did not pay the bills as they came in. According to plaintiff Tiago, she examined and wrote expert reports for eight plaintiffs while plaintiff Whelley did the same for another six plaintiffs. That meant that there would be a total of fourteen depositions for plaintiffs and they decided they did not want to sit for hours and hours within two weeks (under the deadline set by the Court) without getting paid.

It may be that the defendant had problems with the Florida litigation, let the deadlines get away from him or simply did not communicate effectively with plaintiffs. But defendant's claim that plaintiffs should get nothing is not supported by the facts or law. Defendant cannot manufacture an issue of fact by complaining about scheduling limitations. Defendant could have sought to cancel the contract with plaintiffs once he found out about their limitations; instead, he permitted plaintiffs to keep working on the case. Also, it is not clear that plaintiffs failed to do anything under the contract due to these limitations. Rather, the issue seems to be that plaintiffs eventually got tired of not getting paid. Defendant cannot be surprised that experts who collectively interviewed more than a dozen injured plaintiffs would not continue to work on a case where defendant refused to pay them.

Accordingly, it is hereby

ORDERED that the motion by plaintiffs for summary judgment is granted as to liability only with respect to its breach of contract claims and to the extent it sought to sever and dismiss defendant's counterclaims; and it is further

ORDERED that the motion for summary judgment by defendant is denied.

3/15/2022
DATE

ARLENE BLUTH, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	DENIED		GRANTED IN PART	X	OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE