

Morelli Law Firm, PLLC v Perez
2023 NY Slip Op 30228(U)
January 24, 2023
Supreme Court, New York County
Docket Number: Index No. 150661/2022
Judge: Louis L. Nock
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LOUIS L. NOCK PART 38M

Justice

-----X

MORELLI LAW FIRM, PLLC,

Plaintiff,

- v -

MARK PEREZ,

Defendant.

-----X

MARK PEREZ,

Third-Party Plaintiff,

-against-

BENEDICT MORELLI,

Third-Party Defendant.

-----X

INDEX NO. 150661/2022

MOTION DATE 02/24/2022

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 595063/2022

The following e-filed documents, listed by NYSCEF document numbers (Motion 001) 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, and 22

were read on this motion to DISMISS.

LOUIS L. NOCK, J.

Upon the foregoing documents, the motion to dismiss is granted in part in accordance with the following memorandum decision, and otherwise denied.

Background

In this declaratory judgment action, plaintiff Morelli Law Firm, PLLC (“plaintiff”) asserts that it is entitled to \$5,500,000 in additional attorneys’ fees from the settlement in an underlying personal injury action, in which plaintiff represented defendant Mark Perez

(“defendant”).¹ The funds are presently being held in plaintiff’s escrow account. Defendant counterclaims, and asserts third-party claims against plaintiff’s named partner, third-party defendant Benedict Morelli (“Morelli”). The court has before it plaintiff’s and Morelli’s motion to dismiss defendant’s counterclaims and third-party complaint.

Pursuant to the retainer agreement between plaintiff and defendant, plaintiff was entitled to “thirty-three and one-third (33 1/3) percent of the sum recovered” (retainer agreement, NYSCEF Doc. No. 1, Exhibit A at 1). In addition, defendant agreed to pay for “services which [plaintiff] deems extraordinary or ancillary to the matter of [plaintiff’s] representation, such as “appellate litigation” (*id.* at 3). However, any additional fee for such services is “to be agreed upon in advance of the performance of any such extraordinary or ancillary services” (*id.*).

Following the verdict in the underlying action, plaintiff sent a letter to defendant regarding its fee for post-trial motions and appellate work, asserting that it would charge an additional ten percent for post-trial and appellate work on the case, and requested that defendant sign the letter acknowledging the additional fee (appellate fee letter, NYSCEF Doc. No.1, Exhibit B). It is undisputed that defendant never signed the letter, and the parties do not dispute that shortly after receiving the letter, defendant stated that he would not pay the two percent additional fee. The parties were unable to come to agreement on an alternative fee structure. Plaintiff asserts that it nonetheless represented defendant throughout the post-trial and appellate phases of the underlying action and now seeks to collect its attorneys’ fees according to the appellate fee letter, the amount of which is being held in plaintiff’s escrow account.

¹ Per the complaint in this action, plaintiff law firm succeeded in securing a \$102 million jury verdict for the defendant in his underlying personal injury action “and secured a landmark result for Mr. Perez by sustaining what was one of the largest pain and suffering awards in the history of the State of New York” (complaint, NYSCEF Doc. No. 1, at 1; *id.*, ¶ 16). On post-trial motion practice, the court in the underlying action reduced the verdict to \$53,705,730 (*id.*, ¶ 28).

Standard of Review

“On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction” (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). “[The court] accept[s] the facts as alleged in the complaint as true, accord[ing] plaintiffs the benefit of every possible favorable inference, and determin[ing] only whether the facts as alleged fit within any cognizable legal theory” (*id.* at 87-88). Ambiguous allegations must be resolved in plaintiff’s favor (*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]). “[W]here ... the allegations consist of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, they are not entitled to such consideration” (*Ullmann v Norma Kamali, Inc.*, 207 AD2d 691, 692 [1st Dept 1994]).

Discussion

In his answer, defendant alleges that plaintiff breached the retainer agreement by withholding funds over and above the amount set forth in the retainer agreement after the parties did not come to an agreement about the fees for plaintiff’s post-trial and appellate work. Defendant also alleges claims against both plaintiff and Morelli for breach of fiduciary duty, conversion, and unjust enrichment. As an initial matter, and contrary to defendant’s framing in the answer, the claims for conversion and unjust enrichment arise out of the same facts as the breach of contract claim and seek the same damages, and therefore must be dismissed (*Corsello v Verizon N.Y., Inc.*, 18 NY3d 777, 790 [“An unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim”], *rearg denied* 19 NY3d

937 [2012]; *Johnson v Cestone*, 162 AD3d 526, 527 [1st Dept 2018] [“The conversion and aiding and abetting conversion claims are duplicative of the breach of contract claims, i.e., they are predicated on breaches of contract and allege no facts that would give rise to tort liability”]).

A claim for breach of contract requires allegations of “the existence of a contract, the plaintiff’s performance thereunder, the defendant’s breach thereof, and resulting damages” (*Harris v Seward Park Housing Corp.*, 79 AD3d 425 [1st Dept 2010]). In his counterclaims and third-party claims, defendant adequately alleges the existence of the retainer agreement, the receipt by plaintiff of thirty-three and one-third percent of the ultimate settlement of the underlying action, and the allegedly unlawful withholding by plaintiff of additional settlement proceeds.

Plaintiff argues, in support of its motion, that defendant does not plead a material breach because: (i) Rule 1.15(b)(4) of the Rules of Professional Conduct required plaintiff to escrow the disputed funds, and it did so; (ii) the appellate fee letter is binding on defendant even in the absence of his signature; and (iii) defendant in any case ratified the appellate fee letter by excepting the benefits of plaintiff’s work. None of these arguments suffices to dismiss the breach of contract claim.

Rule 1.15(b)(4) provides that an attorney should hold in its escrow account any funds to which the attorney’s entitlement is disputed by the client (Rules of Professional Conduct [22 NYCRR 1200.00] rule 1.15[b][4]). Plaintiff appears to argue that because Rule 1.15(b)(4) requires that it keep disputed funds in its escrow account, it cannot be liable in breach of contract for failing to turn those funds over to defendant. This defense, however, conflates two issues. At bottom, every dispute between an attorney and a client over fees is a breach of contract dispute; either the client has failed to pay the fees set forth in the retainer agreement or

engagement letter, or the attorney has charged more for its services than is allowed under the applicable document. While plaintiff has commendably complied with its ethical obligation to sequester the disputed funds in its escrow account rather than maintain them in its general account, the fact remains that it is still withholding the funds from defendant. Based upon the well-pleaded allegations of the counterclaims, which must be taken as true at this stage (*511 West 232nd Owners Corp., supra*), the manner in which plaintiff is keeping the funds does not resolve the issue of whether it is a breach of the parties' agreement to withhold the funds from defendant in the first instance.

Moreover, the appellate fee letter cannot be said to be binding on defendant at this stage of the case. 22 NYCRR 1215.1, which sets forth the information required to be contained in an engagement letter, "was not to address abuses in the practice of law, but rather, to prevent misunderstandings about fees" (*Seth Rubenstein, P.C. v Ganea*, 41 AD3d 54, 60 [2d Dept 2007]). The regulation does not provide that upon receipt of the letter, the fee set forth therein is binding on the client in all circumstances. In *Seth Rubenstein, P.C.*, relied on by plaintiff, the parties agreed on the amount of the attorney's fees; but because the attorney failed to reduce the terms to a writing, it was restricted to recovery in quantum meruit (*id.* at 56). The determining factor in *Seth Rubenstein, P.C.* was the lack of a writing, not the lack of an agreement. By contrast, as alleged by defendant herein, there was no agreement between the parties on the post-trial and appellate fees. Defendant states that he contested the additional ten percent fee upon receiving the appellate fee letter and continued to do so over the remainder of the litigation (answer with counterclaims, NYSCEF Doc. No. 3, ¶¶ 115-140).

Further, defendant claims that Morelli acknowledged that there was no agreement during a call between the parties, stating "whether we agree or don't, I'm going to be working on

Mark's behalf" (*id.*, ¶ 139). Following conclusion of the appeal in the underlying matter, the parties began discussing the additional fee again and defendant alleges that Morelli continued to acknowledge the parties' disagreement on the amount owed (*id.*, ¶¶ 145-158). Given the allegations that Morelli acknowledged the dispute multiple times, plaintiff's arguments regarding the possible binding effect of the fee letter, and defendant's possible ratification thereof, raise issues of fact that cannot be resolved on a motion to dismiss (*Williams v Citigroup, Inc.*, 104 AD3d 521, 522 [1st Dept 2013]).

Finally, "[t]o establish a prima facie case for breach of fiduciary duty, a plaintiff must allege (1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant's misconduct" (*Village of Kiryas Joel v County of Orange*, 144 AD3d 895, 898 [2d Dept 2016] [internal quotation marks and citations omitted]). To the extent that a breach of fiduciary claim is duplicative of a breach of contract claim, it should be dismissed (*id.*). Here, defendant alleges multiple purported breaches of plaintiff's and Morelli's fiduciary duty, most of which relate to plaintiff's claim on the \$5,500,000 currently being held in escrow (answer, ¶¶ 196[a-c]). As that is also the basis for the breach of contract claim, a claim for breach of fiduciary duty on those grounds is duplicative. However, defendant also alleges that plaintiff, and Morelli personally in his capacity as plaintiff's name partner, "[i]ntentionally fail[ed] to communicate multiple settlement offers to [defendant] in violation of their fiduciary duties as well as their ethical obligations under RPC 1.2 and 1.4[a]" (*id.*, ¶ 196[d]). While plaintiff and Morelli assert that defendant has not been damaged by their alleged failure to communicate offers, given that the settlement defendant ultimately obtained was higher than the offers that were not brought to him, defendant claims that Morelli received an offer of settlement during trial, which he rejected without passing on to defendant. If that is the case,

defendant was deprived of an opportunity to settle the underlying action before any post-trial or appellate work was necessary, which would have obviated this entire dispute. At minimum, issues of fact remain as to what offers were conveyed and when, and what offers were rejected by Morelli without being conveyed to defendant, which cannot be resolved on the present motion. The court rejects Morelli's argument that this claim should be dismissed against him personally, as defendant's allegations clearly identify specific actions taken by him in his capacity as plaintiff's name partner while rendering professional services, even if they do not use the specific words "on behalf of plaintiff" (Limited Liability Company Law § 1205[a] ["Each member . . . of a professional service limited liability company shall be personally and fully liable . . . for any negligent or wrongful act or misconduct committed by him . . . while rendering professional services on behalf of such limited liability company"]).

Accordingly, it is hereby

ORDERED that the motion of plaintiff Morelli Law Firm, PLLC, and third-party plaintiff Benedict Morelli to dismiss the counterclaims and third-party complaint is granted in part as set forth above, and the third and fourth counterclaims and causes of action of the third-party complaint are dismissed; and it is further

ORDERED that plaintiff and Morelli are directed to serve a reply to the counterclaims and an answer to the third-party complaint within 20 days after the date of filing hereof; and it is further

ORDERED that counsel are directed to appear for a preliminary conference at the Courthouse, 111 Centre Street, Room 1166, New York, New York, on March 1, 2023, at 2:00 PM.

This constitutes the decision and order of the court.

ENTER:



<u>1/24/2023</u>			<u>LOUIS L. NOCK, J.S.C.</u>	
DATE				
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input checked="" type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	OTHER
			<input type="checkbox"/>	REFERENCE