

Swetnick v Roth

2023 NY Slip Op 33021(U)

August 21, 2023

Supreme Court, New York County

Docket Number: Index No. 154917/2022

Judge: Lucy Billings

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: PART 41

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 ROBERT N. SWETNICK, individually and
 on behalf of DUNNINGTON BARTHOLOW &
 MILLER LLP and EATON & VANWINKLE LLP, Index No. 154917/2022

Plaintiff

- against -

DECISION AND ORDER

JOREL ROTH, JENNIFER ROTH a/k/a
 JENNIFER ROTH FISHMAN, and DJR
 COMMUNICATIONS CORP.,

Defendants

-----x
 LUCY BILLINGS, J.S.C.:

Defendants, two individual shareholders in a corporation and the corporation, move to dismiss the claims against them based on documentary evidence and the complaint's failure to allege a viable claim. C.P.L.R. § 3211(a)(1) and (7). They also move for sanctions against plaintiff for maintaining claims completely contradicted by the parties' contract and without any basis for the individual defendants' liability. 22 N.Y.C.R.R. § 130-1.1.

I. DISMISSAL

Plaintiff, an attorney on behalf of himself and his current and former law firms, bases his claim on a retainer agreement in which he agreed to represent defendant corporation in a New York City Civil Court summary nonpayment proceeding by the corporation's landlord and in a New York State Supreme Court

action against the landlord, in exchange for attorneys' fees as specified in the agreement. The retainer agreement is not attached to the complaint, but plaintiff stipulates that the retainer agreement defendants present as their documentary evidence is authenticated and admissible.

In the Supreme Court action, defendant corporation, the plaintiff there, prevailed on its claim for a declaratory judgment that the corporation was entitled under its lease to remain in possession of the leased apartment with an option to purchase the apartment. Plaintiff claims that defendants here, once successful in the declaratory judgment action, agreed to use the apartment to produce income, by surrendering the apartment to the landlord for a monetary settlement, by purchasing the apartment at an insider's price and selling the apartment for a profit, or by subletting the apartment. According to plaintiff, defendants further agreed to use that income to pay enhanced compensation to him for successfully representing the corporation in the declaratory judgment action.

Plaintiff drafted the retainer agreement to include what he considered fair and reasonable terms. It provides that defendants would pay to plaintiff \$250 per hour on a monthly basis, a discounted rate, and \$400 per hour from any settlement proceeds or any rental income if defendant corporation sublet the apartment. Nowhere does the agreement impose any obligation on

defendants to use the apartment to produce income to pay the enhanced compensation to plaintiff within any time frame. The agreement merely provides that, if defendants use the apartment to produce income, then they will use that income to pay the \$400 per hour rate to plaintiff.

Plaintiff does not allege that defendants have used the apartment to produce income. In fact he complains that they have breached the covenant of good faith and fair dealing by not using the apartment to produce income. Since plaintiff drafted the retainer agreement, he may not successfully claim that defendants have dealt with him unfairly or in bad faith when they simply have adhered to the agreement's terms. Cherry Operating LLC v. CPS Fee Co. LLC, 216 AD.3d 544, 545 (1st Dep't 2023); Baker v. 16 Sutton Place Apt. Corp., 110 A.D.3d 479, 480 (1st Dep't 2013).

Until defendants have used the apartment to produce income and then failed to pay the enhanced compensation to plaintiff, his claim for breach of the retainer agreement is premature. Madison Equities, LLC v. Serbian Orthodox Cathedral of St. Sava, 144 A.D.3d 431, 431 (1st Dep't 2016). Since the parties do not dispute that the written retainer agreement governs their relationship and only dispute the interpretation and application of the agreement, plaintiff's quantum meruit and unjust enrichment claims duplicate his breach of contract claim. Parker Realty Group, Inc. v. Petigny, 14 N.Y.3d 864, 865-66 (2010);

Panwest NCA2 Holdings LLC v. Rockland NCA2 Holdings, LLC, 205 A.D.3d 551, 552 (1st Dep't 2022); Mintz Fraade Law Firm, P.C. v. Federal Ins. Co., 193 A.D.3d 654, 655 (1st Dep't 2021); Polaris Venture Partners VI L.P. v. AD-Venture Cap. Partners L.P., 179 A.D.3d 548, 548 (1st Dep't 2020). While plaintiff complains that the individual shareholder defendants are unjustly enriched by living in the corporation's apartment at a nominal rent, the corporation is entitled to determine who occupies the apartment.

II. SANCTIONS

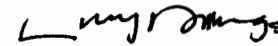
Although the court dismisses each of plaintiff's claims, his conduct does not warrant sanctions. 22 N.Y.C.R.R. § 130-1.1(c); Bradley v. Bradley, 167 A.D.3d 489, 489-90 (1st Dep't 2019); Korangy v. Malone, 161 A.D.3d 645, 646 (1st Dep't 2018); Curtis v. Tabak Is Tribeca, LLC, 144 A.D.3d 509, 509-10 (1st Dep't 2016); Gordon Group Invs., LLC v. Kugler, 127 A.D.3d 592, 594 (1st Dep't 2015). Plaintiff demonstrated a sincere belief that his undeniably successful representation of defendant corporation in the declaratory judgment action and the undeniable benefits all defendants received as a result entitled him to his full fee rather than the discounted rate he allowed defendant corporation to pay while the representation was ongoing.

III. CONCLUSION

For each of the reasons explained above, the court grants defendants' motion to dismiss the complaint's claims for breach

of the parties' retainer agreement, breach of the covenant of good faith and fair dealing, quántum meruit, and unjust enrichment, based on the agreement's terms and the complaint's failure to allege a viable claim in view of those terms. C.P.L.R. § 3211(a)(1) and (7). This dismissal is without prejudice to a future action if defendants do surrender or sublet their apartment for compensation and breach the retainer agreement by failing to pay plaintiff. As also explained above, the court denies defendants' motion for sanctions. 22 N.Y.C.R.R. § 130-1.1(c).

DATED: August 21, 2023



LUCY BILLINGS, J.S.C.

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J.S.C