Blodnick Fazio & Clark v Bermeo
2024 NY Slip Op 35296(U)
September 3, 2024
Supreme Court, Nassau County
Docket Number: Index No. 607141/2022
Judge: Catherine Rizzo
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SUPREME COURT - STATE OF NEW YORK

Present:

Hon. Catherine Rizzo
Acting Justice of the Supreme Court

X

BLODNICK FAZIO & CLARK,	**TRIAL/IAS, PART 44 NASSAU COUNTY**
Plaintiff,	**INDEX NO.: 607141/2022**
-against-	**MOTION SUBMISSION DATE: 7/25/2024**
NELSON BERMEO,	
Defendant.	**MOTION SEQUENCE NOS.: 003, 004**

X

The following e-filed documents for Motion Sequence 003 and 004 listed by NYSCEF and attachments and exhibits thereto have been read on this motion:

Motion Sequence 003

Notice of Motion and Affidavits/Affirmations......... X
Memorandum of Law in Support of Motion............ X
Affidavits/Affirmations in Opposition...................... X
Reply Affidavit/Affirmation.................................... X

Motion Sequence 004

Notice of Motion and Affidavits/Affirmations......... X
Affidavits/Affirmations in Opposition...................... X
Reply Affidavit/Affirmation.................................... X

The Plaintiff moves this Court (Motion Sequence 003) for an order dismissing the affirmative defenses asserted by the Defendant pursuant to CPLR §§3211(a)(1) and (7), dismissing the Defendant's counterclaims as barred by the doctrine of *res judicata* pursuant to CPLR §3211(a)(5), and awarding sanctions pursuant to 22 NYCRR § 130-1.1. The Defendant opposes the motion. The Plaintiff submits a reply.

The Defendant moves this Court (Motion Sequence 004) for an order pursuant to CPLR §3211(a)(7) dismissing the Plaintiff's complaint. The plaintiff opposes the motion. The defendant submits a reply.

Background

On September 16, 2021, the Defendant executed a retainer agreement ("Retainer") formally engaging the Plaintiff to legally represent him with respect to various liens levied against his property by the City of New York. In connection therewith, the Plaintiff, with the knowledge and consent of the Defendant, retained the services of nonparty, Best Express Expediting Services ("Best"), a company experienced in reducing such liens through an amnesty program.

The Plaintiff alleges that while the Defendant remitted the initial payment of $2000, all "subsequent bills" remain unpaid with an outstanding balance of $38,525.14, inclusive of $28,224.26 incurred in connection with the retention of Best. On February 1, 2022, the Plaintiff terminated its representation of the Defendant and, on March 3, 2022, provided him with written notice of the right to arbitrate the fee dispute pursuant to 22 NYCRR 137 ("March 2022 Letter"). On June 1, 2022, the Plaintiff commenced the underlying action asserting claims premised upon breach of contract, account stated, quantum meruit and unjust enrichment. The Defendant thereafter served an answer containing ten affirmative defenses and three counterclaims.

In the *interim*, on or about November 20, 2022, the Defendant herein commenced an action in Queens County against the Plaintiff asserting claims based upon legal malpractice, negligent hiring and supervision, and "breach of contract, breach of the implied covenant of good faith and fair dealings, and breach of implied covenant of workmanlike performance and negligence" (the "Queens Action"). By Judgment entered on September 7, 2023, the Queens Action was dismissed based upon documentary evidence and a failure to state a cause of action. Subsequently, on or about October 5, 2023, the Defendant commenced an action in Supreme Court, Nassau County against the Plaintiff asserting three claims respectively predicated upon misrepresentation, breach of contract and breach of fiduciary duty (the "2023 Nassau Action"). By Decision and Order entered on February 21, 2024, this Court held that as the "complaint . . . stem[med] from the same facts and circumstances as the . . . [Queens Action]" it was barred by *res judicata*.

Motion Sequence 003

The Court initially addresses that branch of the Plaintiff's application seeking dismissal of the Defendant's ten affirmative defenses. As relevant here, CPLR §3211(b) "provides that '[a] party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit.'" (*Shah v. Mitra,* 171 AD3d 971, 974, quoting CPLR § 3211 [b]). "When moving to dismiss, the plaintiff bears the burden of demonstrating that the affirmative defenses 'are without merit as a matter of law because they either do not apply under the factual circumstances of [the] case, or fail to state a defense.'" (*Id.* quoting *Bank of Am., N.A. v. 414 Midland Ave. Assoc., LLC*, 78 AD3d 746, 748 [internal quotation marks omitted]).

The Defendant's First and Fourth affirmative defenses allege that the complaint is "ambiguous" as the Plaintiff fails to "clarify" the circumstances surrounding the fees incurred in connection to the services performed by Best. However, contrary to the Defendant's assertions, the Plaintiff adequately sets forth the facts attendant to its retention of Best in the underlying complaint and annexes thereto the relevant billing invoices, together with a check from the Defendant paid directly thereby to Best referable to the services it rendered. Accordingly, dismissal of the Defendant's the First and Fourth affirmative is warranted under these circumstances. (*Shah, supra* at 974).

In the Second affirmative defense, the Defendant alleges the Plaintiff failed to satisfy a condition precedent as contemplated by the arbitration provisions set forth in 22 NYCRR 137 by "only recently" notifying the Defendant of such an option. Here, appended to the complaint is the afore-noted March 2022 Letter plainly advising the Defendant of his right to pursue arbitration and, as such, dismissal of the Second affirmative defense is warranted. (*Id.*).

The Defendant's Third affirmative defense asserts that "[s]ince Plaintiff is trying to collect" a debt "from a creditor . . . [Best]", it failed to send a demand letter and has thus violated the Fair Debt Collection Practices Act [hereinafter FDCPA] as codified in 15 USC § 1692. As defined in the statute, "[t]he term 'debt collector' means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." (15 USC § 1692a [6]). Here, Plaintiff's "principal purpose" is not to "regularly collect" debts owing to others but rather is that of a law firm and, as such, is not a "debt collector" within the purview of the statute. (*Id.*). Accordingly, the Third affirmative defense should be dismissed. (*Shah* at 974).

The Fifth affirmative defense asserts that the Plaintiff failed to mitigate its damages and "neglects to acknowledge the $10,000 held in escrow under Defendant's name, which could have been utilized to offset the legal fees." However, in the absence of the Defendant's consent, which has yet to be forthcoming, the Plaintiff is prohibited from utilizing the sums on deposit in the IOLA account and, as so, dismissal of the Fifth affirmative defense is warranted. (*see* Rules of Prof Conduct [22 NYCRR 1200.0] rule 1.15 [a]).

The Sixth affirmative defense asserts violations of GBL §349 based upon the Plaintiff having "engaged in deceptive practices by knowingly concealing information regarding . . . [Best's] fees." In asserting such a claim "[a] plaintiff must allege that: (1) the defendant's conduct was consumer-oriented; (2) the defendant's act or practice was deceptive or misleading in a material way; and (3) the plaintiff suffered an injury as a result of the deception" (*Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP v. Matthew Bender & Co., Inc.*, 37 NY3d 169, 176). "[A]n act or practice is consumer-oriented when it has a broader impact on consumers at large." (*Id.* at 177 [internal quotation marks omitted];*Oswego Laborers' Local 214 Pension Fund v. Mar. Midland Bank, N.A.*, 85 NY2d 20, 25-27). Here, the underlying action involves a private fee dispute between the Plaintiff and Defendant and not a transaction which encompasses "consumers at large." (*Id.*). Accordingly, the Sixth affirmative defense should be dismissed. (*Id.*; *Shah* at 974).

The Seventh, Eighth and Ninth affirmative defenses are respectively premised upon breach of fiduciary duty, misrepresentation and fraud arising from the Plaintiff's legal representation of the Defendant.

"Under the doctrine of *res judicata*, a party may not litigate a claim where a judgment on the merits exists from a prior action between the same parties involving the same subject matter." (*In re Hunter*, 4 NY3d 260, 269). "The rule applies not only to claims actually litigated but also to claims that could have been raised in the prior litigation." (*Id.*). "The rationale underlying this principle is that a party who has been given a full and fair opportunity to litigate a claim should not be allowed to do so again." (*Id.*). "Additionally, under New York's transactional analysis approach to *res judicata*, 'once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy.'" (*Id.*, quoting *O'Brien v. City of Syracuse*, 54 NY2d 353, 357). Here, the Seventh, Eighth and Ninth affirmative defenses are premised upon claims arising out of the identical transactions and occurrences as those attendant to both the Queens Action and the 2023 Nassau Action and therefore are barred by *res judicata*. (*Id.*).

As to the Tenth affirmative defense based upon a failure to join a necessary party, inasmuch as the underlying action is premised upon the Plaintiff's direct claims against the Defendant to recover unpaid legal fees therefrom, Best is not a necessary party and the defense should be dismissed. (*Shah* at 974).

The Court now addresses that branch of the Plaintiff's application seeking dismissal of the Defendant's three counterclaims respectively based upon GBL §349, the FDCPA and fraud/misrepresentation. Consistent with the foregoing rationale referable to the Defendant's Third and Sixth affirmative defenses, the First and Second counterclaims are dismissed. (CPLR §3211(a)(7)). As to the Third counterclaim, as it clearly arises out of the same transactions and occurrences underlying the Queens Action, as well as the 2023 Nassau Action it is barred by *res judicata*. (*In re Hunter*, *supra* at 269).

As to that branch of the Plaintiff's application seeking an award of costs and sanctions, "[a] court may award a party 'costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct.'" (*Bd. of Managers of Foundry at Washington Park Condominium v Foundry Dev. Co., Inc.*, 142 AD3d 1124, 1125, quoting 22 NYCRR 130–1.1[a]). Within the ambit of the regulation, conduct "is frivolous if ... (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; [or] (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another.'" (*Tamburello v. Tamburello*, 165 AD3d 1006, 1007-1008, quoting 22 NYCRR 130–1.1[c]). "The decision whether to impose costs or sanctions for frivolous conduct is generally entrusted to the court's sound discretion." (*Id.* at 1008).

While the Defendant is requesting similar relief arising out of the identical transactions and occurrences underlying the Queens Action and the 2023 Nassau Action by way of the afore-noted affirmative defenses and counterclaims, the Court is not persuaded that it was undertaken to delay the resolution of the instant matter. (*Id.*). Accordingly, the Court finds an award of counsel fees incurred by the Plaintiff in connection to interposing its dismissal application *sub judice* is not warranted under these circumstances. (22 NYCRR 130–1.1[c]).

Motion Sequence 004

As to the Defendant's motion seeking dismissal of the Plaintiff's complaint pursuant to CPLR §3211(a)(7), when entertaining such an application the Court must "'accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.'" (*Nonnon v. City of New York*, 9 NY3d 825, 827, quoting *Leon v. Martinez*, 84 NY2d 83, 87-88).

As noted, the Plaintiff's complaint asserts four causes of action, the first and second of which are based upon breach of contract and an account stated. "'The essential elements of a cause of action to recover damages for breach of contract are (1) the existence of an enforceable contract, (2) the plaintiff's performance pursuant to that contract, (3) the defendant's breach of the contract, and (4) damages resulting from that breach.'" (*Angeli v. Barket*, 211 AD3d 896, 898, quoting *Nassau Operating Co., LLC v. DeSimone*, 206 AD3d 920, 926). Additionally, "'[a]n account stated is an agreement between parties, based upon their prior transactions, with respect to the correctness of the account items and the specific balance due.'" (*All. Natl. Ins. Co. v. Hagler*, 219 AD3d 1393, 1394, quoting *Bank of Am., N.A. v. Ball*, 188 AD.3d 974, 974 [internal quotation marks omitted]). Accepting the factual allegations in the complaint as true, the Court finds the first cause of action sounding in breach of contract, which is based upon the Retainer signed by the Defendant, to be adequately stated. (*Nonnon*, *supra* at 827; *Angeli*, *supra* at 898). Further, the Plaintiff's second cause of action for an account stated, which is specifically premised upon the annexed billing statements mailed to the Defendant, is sufficiently alleged. (*Nonnon* at 827;*All. Natl. Ins. Co*, *supra* at 1394).

As to the third and fourth causes of action respectively based upon *quantum meruit* and unjust enrichment, the Court finds that same are adequately stated. (*Leon v. Martinez*, *supra* at 87-88). Further, "[a]lthough the existence of a valid and enforceable contract governing a particular subject matter generally precludes recovery in quasi contract, where there is a bona fide dispute as to the existence of a contract or the application of a contract to the dispute in issue, a plaintiff may proceed upon a theory of quasi contract as well as breach of contract." (*Old Salem Dev. Group, Ltd. V. Town of Fishkill,* 301 AD2d 639, 639 [internal citations omitted]). Thus, while the within matter is governed principally by the Retainer, as there appears to be a bona fide dispute as to the scope thereof the Plaintiff can proceed upon theories of breach of contract, as well as unjust enrichment and *quantum meruit.* (*Id.; see Breslin Realty Dev. Corp. v. 112 Leaseholds*, 270 AD2d 299, 299). Accordingly, dismissal of the Plaintiff's complaint is not warranted under these circumstances.

In light of the foregoing, it is hereby

ORDERED, that the branch of Plaintiff's motion (Motion Sequence 003) for an order dismissing the Defendant's ten affirmative defenses is granted, and it is further

ORDERED, that the Defendant's ten affirmative defenses are hereby dismissed, and it is further

ORDERED, that the branch of Plaintiff's motion (Motion Sequence 003) for an order dismissing the Defendant's counterclaims is granted, and it is further

ORDERED, that the Defendant's counterclaims are hereby dismissed, and it is further

ORDERED, that the branch of Plaintiff's motion (Motin Sequence 003) seeking an award of sanctions is denied, and it is further

ORDERED, the Defendant's motion (Motion Sequence 004) for an order dismissing the Plaintiff's complaint is denied, and it is further

ORDERED, that counsel for all parties shall appear before the undersigned for the previously scheduled compliance conference on October 17, 2024 at 9:30 AM.

This hereby constitutes the decision and order of this Court.

ENTER:

HON. CATHERINE RIZZO, A.J.S.C.

Dated: September 3, 2024