

Davidoff Law Firm PLLC v Bertoni

2025 NY Slip Op 31370(U)

February 19, 2025

Supreme Court, New York County

Docket Number: Index No. 655737/2023

Judge: Lyle E. Frank

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. LYLE E. FRANK **PART** **11M**

Justice

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DAVIDOFF LAW FIRM PLLC,

Plaintiff,

INDEX NO. 655737/2023

MOTION DATE 01/28/2025

MOTION SEQ. NO. 007

- v -

ROBERTO BERTONI,

Defendant.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 007) 156, 157, 158, 159, 160, 161, 162, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 196

were read on this motion to/for LEAVE TO FILE.

Upon the foregoing documents, defendant’s motion is granted in part and denied in part.

Background

This action arises out of Davidoff Law Firm PLLC (“Plaintff”)’s attempt to recover unpaid attorney’s fees from Roberto Bertoni (“Defendant”). Plaintiff had been retained in 2022 by Defendant to represent him in an attempt to cash in a Certificate of Deposit that had been issued in 1983. Defendant, a resident of Uruguay, had given non-party and New York resident Arturo Porzecanski (“Porzecanski”) a power of attorney for “banking transactions, claims and litigation.” It was in this capacity that Porzecanski retained Plaintiff, after being referred to them by another attorney. While Porzecanski originally requested that Plaintiff take the case *pro bono*, ultimately the case was taken on a hybrid-contingency basis according to the terms laid out in the retainer agreement. Midway through the litigation on that case, Plaintiff withdrew as counsel due to differences with Defendant and Porzecanski. Defendant retained another firm, who settled the matter. Plaintiff brought this underlying suit seeking a portion of that settlement amount pursuant

to the terms of the retainer agreement. Defendant, acting pro se, filed an answer with a counterclaim on December 23rd, 2023. He now brings the present motion seeking leave to amend the answer to add additional counterclaims.

Standard of Review

A party may amend their pleading “at any time by leave of court” and “[l]eave shall be freely given upon such terms as may be just.” CPLR § 3025(b). The decision whether to grant the amendment lies within the court’s discretion, but such leave should generally be granted absent a showing of prejudice to the other side. *Heller v. Louis Provenzano, Inc.*, 303 A.D.2d 20, 22 (1st Dept. 2003). The plaintiff must also show that the amendment “is not palpably insufficient or clearly devoid of merit.” *MBIA Ins. Corp. v. Greystone & Co., Inc.*, 74 A.D.3d 499, 500 (1st Dept. 2010).

Discussion

The proposed amendments to the answer here consist mainly the addition of three counterclaims for violation of General Business Law § 349, breach of fiduciary duty, and negligence. Plaintiff argues that these counterclaims are devoid of merit and palpably insufficient as a matter of law. There are other, more minor alterations to the answer that Plaintiff does not contest.

An important issue to be addressed at the outset is the purported affirmation in reply to Plaintiff’s opposition papers that was submitted by Porzecanski. Relying on the power of attorney granting him agency for Defendant in litigation matters, Porzecanski attempts to reply to the opposition papers and support this motion. A power of attorney does not, and cannot, supersede the state licensure requirements or enable the unauthorized practice of law. *See 91 E. Main St. Realty Corp. v. Angelic Creations by Lucia*, 24 Misc.3d 25, 28 (2nd Dept. App. Term

2009); *Matter of Welsh v. Commissioner of Labor*, 51 A.D.3d 1351, 1352 (3rd Dept. 2008).

Defendant here is operating pro se, and Porzecanski cannot provide legal representation to Defendant in this matter or make an appearance. Therefore, the purported reply affirmation will not be considered by this Court.

The Proposed Counterclaims Are Palpably Insufficient

Plaintiff argues that the counterclaim for violation of GBL § 349 is palpably insufficient as a matter of law because it fails to allege a valid claim. A GBL § 349 unlawful deceptive acts claim must as a threshold matter “charge conduct that is consumer orientated. The conduct need not be repetitive or recurring, but defendant’s acts or practices must have a broad impact on consumers at large; private contract disputes unique to the parties would not fall within the ambit of the statute.” *New York Univ. v. Cont’l Ins. Co.*, 87 N.Y.2d 308, 320 (1995).

Here, Defendant alleges that the deceptive acts were that Plaintiff “induced the Defendant to enter into a Fee Agreement with low representation charges which Plaintiff had no intent to honor.” The facts as alleged by Defendant clearly fall under a private contractual dispute between the parties, and there are no allegations of conduct that has a broad impact on consumers at large. When a proposed amendment “is not supported by the factual allegations contained therein” or fails to allege a viable cause of action, plaintiff has not made a showing that the claim is not palpably insufficient. *Perrotti v. Becker, Glynn, Melamed & Muffly LLP*, 82 A.D.3d 495, 498 (1st Dept. 2011). Therefore, leave to amend to add the GBL § 349 counterclaim should not be granted.


Turning next to the proposed amendment to add a cause of action for breach of fiduciary duty, Defendant alleges that Plaintiff breached his fiduciary duty by 1) presenting Defendant with a non-negotiable retainer agreement and 2) by withdrawing partway through the initial

litigation. Plaintiff argues that this cause of action is also palpably insufficient. Regarding the first allegation of breach of fiduciary duty, the mere presentation of a non-negotiable retainer agreement is not a breach of any fiduciary duty owed to a prospective client. The second allegation, that Plaintiff breached their fiduciary duty by withdrawing mid-litigation, could be a viable claim for breach of fiduciary duty. But this cause of action is entirely duplicative of the malpractice counterclaim, as they both “arose from identical facts and allege the same damages.” *Barrett v. Goldstein*, 161 A.D.3d 472, 473 (1st Dept. 2018). Both the breach of fiduciary duty and the malpractice claim allege that Defendant was harmed through an inability to reach the original recovery goal due to Plaintiff’s withdrawal. Because this proposed amendment fails to state a counterclaim that is not duplicative of the malpractice counterclaim, it is palpably insufficient and therefore leave to amend to add this counterclaim should not be granted.

Finally, Defendant seeks leave to amend to add a negligence counterclaim. This counterclaim is predicated on allegations that Plaintiff violated the New York Rules of Professional Conduct and therefore did not exercise reasonable care in fulfilling their duties. A violation of the rules of Professional Conduct “in itself, would not create a private right of action.” *Arkin Kaplan LLP v. Jones*, 42 A.D.3d 362, 366 (1st Dept. 2007). Furthermore, any alleged negligence on the part of Plaintiff in the course of their representation of Defendant would be duplicative of the counterclaim for malpractice, as that is a claim based on negligence by a professional. *See, e.g., Fleischer v. Zhang*, 228 A.D.3d 484, 485 (1st Dept. 2024) (holding that a claim for professional malpractice “does not provide the basis for a distinct claim of ordinary negligence”). Here, Defendant’s allegations that they were injured as a result of Plaintiff’s negligence in representing them are covered by the malpractice claim, and the negligence claim is duplicative. Accordingly, it is hereby

ADJUDGED that defendant/counter-plaintiff Roberto Bertoni’s motion for leave to amend the answer is denied as to the additional counterclaims; and it is further

ADJUDGED that defendant/counter-plaintiff Roberto Bertoni’s motion for leave to amend the answer is granted as to the remaining amendments.

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2/19/2025
DATE

LYLE E. FRANK, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
			DENIED		OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/>
					REFERENCE