

Levy v Brancato

2025 NY Slip Op 34103(U)

October 24, 2025

Supreme Court, New York County

Docket Number: Index No. 159951/2024

Judge: Mary V. Rosado

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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. MARY V. ROSADO PART 33M

Justice

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INDEX NO. 159951/2024

SUSAN LEVY, ESQ.,

MOTION DATE 01/28/2025

Plaintiff,

MOTION SEQ. NO. 001

- v -

LAURA BRANCATO, ESQ., LISA FENECH, ESQ., and
MELTZER, LIPPE, GOLDSTEIN AND BREITSTONE, L.L.P.

DECISION + ORDER ON MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 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

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, and after a final submission date of August 5, 2025, Susan Levy, Esq.'s ("Plaintiff") motion to dismiss Defendants' affirmative defenses and counterclaims, to strike Defendants' Amended Answers, and for sanctions is granted in part and denied in part.¹

I. Background

On January 6, 2023, Plaintiff retained Defendants to represent her in a guardianship proceeding. Plaintiff alleges she retained Defendants to facilitate settlement. Allegedly, on March 8, 2023, days before a settlement was to be so-ordered, Defendants Laura Brancato, Esq. ("Brancato") and Lisa Fenech, Esq. ("Fenech") "walked off [Plaintiff's] case". Plaintiff provides a litany of alleged misconduct claims and claims she tried several times to terminate the retainer through e-mail and text messages to Brancato. Plaintiff disputed Defendants' legal fees, and the parties participated in a fee dispute arbitration on September 19, 2024. A decision was issued on

¹ Plaintiff, Defendant Lisa Fenech, Esq. and Meltzer, Lippe, Goldstein & Breitstone, LLP are all proceeding self-represented. Defendant Laura Brancato, Esq. has retained counsel.

September 25, 2024, which Plaintiff disagreed with, so she filed this action seeking a trial de novo. She also alleges breach of contract, seeks declaratory judgment declaring the retainer null and void, and damages for alleged negligent supervision, legal malpractice, and violations of “CPLR 487” which this Court construes to be an alleged violation of Judiciary Law § 487.

Defendants responded with several affirmative defenses and counterclaims. According to Defendants, on January 20, 2023, they sent Plaintiff their standard engagement agreement, and in response Plaintiff asked that the hourly rate be lowered, that Defendants serve as co-counsel to her, and to remove other language. On January 24, 2023, Defendants sent a revised agreement. On February 3, 2023, Plaintiff signed and returned the retainer with an “addendum.” The Amended Answer goes on to detail an allegedly difficult attorney/client relationship. As a result, Defendants claim they sent Plaintiff a consent to change attorney on March 7, 2023 changing Plaintiff’s status to *pro se*, which Plaintiff signed. Defendants allege Plaintiff owes \$44,308.50 in legal fees, \$7,500 of which was covered by the original retainer fee. After fee arbitration, Defendants were awarded \$39,877.65 in costs and disbursements, not including the \$7,500 retainer fee. Defendants counterclaim for breach of contract, unjust enrichment, quantum meruit, and account stated. Plaintiff moves to dismiss the affirmative defenses and counterclaims and seeks to strike Defendants’ Amended Answers and asks for sanctions. Defendants oppose.

II. Discussion

A. CPLR 3211(c)

As a preliminary matter, Plaintiff’s request that this Court disregard any purportedly untimely opposition is denied. Plaintiff has had adequate time to file extensive reply papers and has failed to show the requisite prejudice for this Court to disregard any late papers, which even if late were only one week late, and were submitted far in advance of the return date. Keeping in

mind New York's public policy in resolving cases on the merits (*see Genao v Salcedo Maintenance Corp.*, 168 AD3d 528, 529 [1st Dept 2019] citing *Yea Soon Chung v Mid Queens LP*, 139 AD3d 490 [1st Dept 2016]), the Court considers the Defendants' opposition papers.

Turning to the merits, Plaintiff's request that her motion to dismiss be converted to a motion for summary judgment pursuant to CPLR 3211(c) is denied. This case does not involve purely legal questions, and instead the pleadings raise numerous issues of fact. Thus, converting the motion into one for summary judgment pursuant to CPLR 3211(c) is inappropriate, and this prong of the motion is denied (*see Brathwaite v Frankel*, 98 AD3d 444, 444-45 [1st Dept 2012]).

B. Motion to Strike Defendants' Amended Answers

The portion of the motion which seeks to strike Defendants' Amended Answers pursuant to CPLR 3025(d) for failure to timely file the Amended Answers within 20 days of Plaintiff's Amended Complaint is denied. When the Amended Answers were filed, Plaintiff never filed a timely notice of rejection pursuant to CPLR 2101(f). Moreover, the Amended Answers were late by less than ten days, and as described in the proceeding section, cases are to be decided on the merits rather than technicalities. Therefore, this prong of Plaintiff's motion is denied.

C. Motion to Dismiss

Plaintiff's motion to dismiss is granted in part and denied in part. Plaintiff's argument that the counterclaims should be dismissed because they were not raised in the fee dispute arbitration is without merit. Plaintiff's argument that the issue of attorneys' fees for enforcing the retainer and litigating a fee dispute was not raised in the underlying fee dispute arbitration is belied by the terms of the retainer, the notice of client's right to arbitrate a fee dispute, and Defendants' filings in the arbitration (*see* NYSCEF Docs. 60, 67 and 87). These documents state that reasonable attorneys' fees may be awarded in any dispute over the retainer, and that Defendants would be seeking

attorneys' fees in the arbitration. Plaintiff filed this *de novo* proceeding which nullified the arbitrator's award and allows Defendants to again seek attorneys' fees, just as Plaintiff is entitled to again dispute the amount in legal fees owed to Defendants.

Plaintiff's argument that Defendants are not entitled to assert counterclaims because they did not file for a *de novo* review of the arbitration award is similarly without merit. Plaintiff timely filed for *de novo* review which nullified the fee dispute arbitration award and raised numerous other causes of action including negligent supervision and legal malpractice. Defendants are entitled to raise counterclaims in defense of Plaintiff's Complaint. Plaintiff's request that Defendants' Amended Answers be stricken because Defendants reference the arbitrator's award in the underlying fee dispute is denied. While Plaintiff is correct that 22 NYCRR § 137.8(c) states that at a trial *de novo*, arbitrators shall not be called as witnesses nor should the arbitration award be admitted in evidence, this matter is not at trial and there is no testimony from any arbitrator, nor has the arbitrator's award been admitted into evidence.

Plaintiff's arguments that the counterclaims for breach of contract, unjust enrichment, quantum meruit and account stated should be dismissed as duplicative of Plaintiff's claim for a *de novo* review is denied. Defendant's counterclaims are separate and distinct from Plaintiff's claim for a *de novo* review – conceptually, a counterclaim cannot be duplicative of a claim asserted by a plaintiff because the claims are asserted by two parties adverse to one another. Plaintiff's argument that the retainer is unenforceable is unavailing at this juncture. Plaintiff's argument that the quantum meruit counterclaim should be dismissed due to Defendants' professional misconduct is not ripe for review on a CPLR 3211 motion to dismiss, for it requires discovery and factual determinations. Moreover, Plaintiff has failed to meet her heavy burden of establishing the

affirmative defenses raised should be dismissed as a matter of law (*see, e.g. Granite State Ins. Co. v Transatlantic Reinsurance Co.*, 132 AD3d 479, 481 [1st Dept 2015]).

However, the motion is granted to the extent the counterclaim asserted by Fenech and Meltzer Lippe alleging account stated is dismissed. Based on the allegations related to the counterclaim and the parties' submissions, Plaintiff frequently expressed concerns at what she was being billed for and objected (NYSCEF Doc. 42; *see also Brennan Beer Gorman/Architects, LLP v Cappelli Enterprises, Inc.*, 85 AD3d 482, 483 [1st Dept 2011] [no account stated claim where client repeatedly objected]). The Court has considered the remainder of Plaintiff's arguments and finds them unavailing.

D. Sanctions

Finally, Plaintiff's motion for sanctions against Defendants is denied. The decision whether to impose sanctions for frivolous conduct is generally left to the sound discretion of the Court (*Flowers v 73rd Townhouse, LLC*, 227 AD3d 568 [1st Dept 2024]). At this time, the Court does not find Defendants' conduct frivolous or in bad faith such that sanctions are appropriate.

Accordingly, it is hereby,

ORDERED that Plaintiff's motion is granted solely to the extent that Fenech and Meltzer Lippe's counterclaim for account stated asserted against Plaintiff is dismissed, and the remainder of Plaintiff's motion is denied; and it is further

ORDERED that within twenty days, Plaintiff shall serve a reply to Defendants' counterclaims for breach of contract, unjust enrichment, and quantum meruit; and it is further

ORDERED that the parties shall meet and confer and submit a proposed preliminary conference order to the Court via e-mail to SFC-Part33-Clerk@nycourts.gov on or before December 10, 2025. If the parties have a serious discovery dispute precluding them from entering

into a preliminary conference order they shall notify the Court via e-mail to be scheduled for a conference; and it is further

ORDERED that if the parties are amenable to resolving this dispute in this Court's alternative dispute resolution program, they shall notify the Court; and it is further

ORDERED that within ten days of entry, counsel for Defendants shall serve a copy of this Decision and Order, with notice of entry, on all parties via NYSCEF.

This constitutes the Decision and Order of the Court.

10/24/2025
DATE

Mary V Rosado JSC
HON. MARY V. ROSADO, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

APPLICATION:

SETTLE ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE