Cerrato v Silberstein, Awad & Miklos, P.C.
2025 NY Slip Op 35509(U)
February 26, 2025
Supreme Court, Nassau County
Docket Number: Index No. 615386/24
Judge: Erica L. Prager
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT: ERICA L. PRAGER, J.S.C.

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LOUIS J CERRATO, individually and on behalf of ROVEGNO & CERRATO, LLP,

Plaintiffs,

-against-

SILBERSTEIN, AWAD & MIKLOS, P.C., JOSEPH AWAD, and JOSEPH MIKLOS,

Defendants.

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IAS/TRIAL PART 15

Motion Seq.: 001
Submission Date: 12/17/24

Index No.: 615386/24

DECISION AND ORDER
X X X

Papers Considered:	**NYSCEF Doc. No.**
Supporting Papers	5-13
Opposition Papers	15-17
Reply Papers	18-19

Relief Sought

Defendants move for an order dismissing the action: (1) pursuant to CPLR3211(a)(7) for failure to state a cause of action; and (2) pursuant to CPLR3211(a)(1) on the ground that the action is barred by documentary evidence.

Background

This is an action brought by a partner and a dissolved law partnership against the law firm and attorneys to whom numerous partnership matters were transferred. The action alleges tortious interference with contract, based upon allegations that the defendant law firm encouraged, and/or allowed the other partner in the partnership to breach the terms of the partnership agreement and the partnership's dissolution agreement.

The facts recited below are taken from the complaint are presumed to be true for purposes of this motion to dismiss. *Joseph v Fensterman*, 204 AD3d 766 (2d Dept 2022). As recited, the facts are consistent with documentary proof submitted on this motion, but do not constitute findings of fact by the Court.

CERRATO v. SILBERSTEIN, AWAD & MIKLOS
Index No.: 615386/24

On or about August 5, 2015, plaintiff LOUIS J. CERRATO ("CERRATO") and non-party Robert P. Rovegno ("Rovegno") formed a limited liability partnership known as ROVEGNO & CERRATO, LLP ("R&C" or the "Partnership") to conduct the practice of law. The Partnership was governed by a Partnership Agreement entered into on August 4, 2015 (the "Partnership Agreement"). Pursuant to the Partnership Agreement, the interests in the Partnership were divided equally, with Rovegno and CERRATO each having a fifty (50%) percent share. The Partnership Agreement provided that each of the partners' pre-existing entities (Rovegno & Taylor, P.C. and Frommer and Cerrato, LLP, respectively) would survive the formation of the Partnership, and that each would maintain a lien against the legal fees and disbursements relating to matters that originated in the respective pre-existing practices.

The Partnership was dissolved on April 30, 2018. Prior to the dissolution of the Partnership, Rovegno entered into an agreement with defendants SILBERSTEIN, AWAD & MIKLOS, P.C. ("SAM"), JOSEPH AWAD ("AWAD"), and JOSEPH MIKLOS ("MIKLOS") dated April 13, 2018 and effective May 1, 2018 (the "SAM Agreement"), pursuant to which Rovegno agreed to transfer approximately 115 cases (the "Transferred Matters") to SAM, AWAD and MIKLOS, upon the terms and conditions set forth in the SAM Agreement. Pursuant to the SAM Agreement, Rovegno would be paid a referral fee in the amount of 40% (50% on post-Note of Issue matters) of the net attorneys fees collected on the Transferred Matters. The referral fees were intended to include any and all liens that may be imposed by Rovegno, Rovegno & Taylor, P.C. R&C, and CERRATO. Rovegno warranted that he would be solely responsible for any claims or lawsuits by any other party regarding division of advances or referral fees paid to him from SAM, AWAD, or MIKLOS.

On or about September 27, 2018, R&C, Rovegno and CERRATO entered into a dissolution agreement (the "Dissolution Agreement"), outlining the terms and conditions of their April 30, 2018 dissolution and the winding down of the Partnership's business. Each of the partners was required to provide a complete list of matters that had originated at R&C which they were presently handling through their current practices – specifically, Rovegno through SAM, and CERRATO through Louis J. Cerrato, P.C. (the "Cerrato PC"). The parties agreed that with respect to the active matters handled by the Partnership, R&C would retain a lien on any legal fees earned and disbursements advanced by R&C as of the "measuring date" of April 30, 2018 (the "R&C Lien"). The amount of the lien on each case would be computed based upon the status of the case and the work completed as of the measuring date, in accordance with a formula set forth in Paragraph 8 of the agreement.

The Dissolution Agreement provided further that each of the partners would be entitled to receive distributions of their respective shares of the net R&C Lien in proportion to the individual partner's profit and loss sharing percentage (50%), and that each partner would retain a lien for such amount.[1] The parties agreed that payment of the R&C Lien, or payment to each individual partner of their individual share of the R&C Lien, would be made directly from the escrow account of the firm collecting the legal fee when the case resolved. Rovegno warranted in the Dissolution Agreement that SAM would pay directly to CERRATO the portion of any R&C Lien to which CERRATO was entitled.[2]

CERRATO claims that since 2018, SAM, AWAD and MIKLOS have not paid CERRATO directly for any fees owed to R&C or CERRATO. Instead, SAM, AWAD and MIKLOS have paid the R&C share and the CERRATO share of fees collected on the Transferred Matters directly to Rovegno and/or Rovegno's entity (Rovegno Law, P.C.). CERRATO alleges further that neither Rovegno nor Rovegno Law, P.C. has remitted any fees or disbursements from the Transferred Matters to R&C or CERRATO since 2022.

Based upon the foregoing, CERRATO commenced the instant action on August 29, 2024.[3] The Complaint (*NYSCEF Doc. 1*) states two causes of action: the FIRST entitled Tortious Interference with Contract, and the SECOND entitled Unjust Enrichment. CERRATO alleges that SAM, AWAD and MIKLOS were aware of the R&C Lien and CERRATO's 50% interest in the R&C Lien, and improperly entered into the SAM Agreement, prior to the dissolution of the Partnership, with the intent to induce Rovegno to defeat and dishonor his obligation to pay CERRATO and R&C in accordance with their liens on the Transferred Matters. As alleged in the Complaint, defendants "allowed and encouraged" Rovegno to breach his obligations to CERRATO under the Partnership Agreement and the Dissolution Agreement (¶27) by: (i) entering into the SAM

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[1] The agreement also provided for the preservation of the liens created in the Partnership Agreement relating to matters that Rovegno and CERRATO had worked on prior to the formation of R&C. These liens were to be paid from the fees allocable to R&C, and calculated in the manner provided in the Partnership Agreement.

[2] CERRATO gave a corresponding warranty that the Cerrato PC would pay directly to Rovegno the portion of any R&C Lien collected by the Cerrato PC to which Rovegno was entitled.

[3] CERRATO had commenced an earlier action against Rovegno and Rovegno & Taylor, P.C. on May 3, 2021, based upon allegations that, among other things, Rovegno and Rovegno & Taylor, P.C. failed to deliver to R&C its share of attorneys fees collected in a matter that was settled after the formation of the Partnership. See *Cerrato et al. v Rovegno et al.*, Nassau County Index No. 605453/21.

Agreement (¶19) providing that all fees due to R&C from the Transferred Matters would be paid directly to Rovello (¶28); (ii) keeping the terms of the SAM Agreement secret from CERRATO (¶¶ 20-22); (iii) paying the R&C share and CERRATO share of the fees collected on the Transferred Matters directly to Rovegno and/or Rovegno Law, P.C. (¶26); (iv) agreeing to pay Rovegno a monthly advance against the fees payable to R&C on the Transferred Matters (¶29); and (v) ignoring Rovegno's obligation to honor R&C's and CERRATO's legal interests in the fees and disbursements payable on the Transferred Matters (¶31).

The Complaint alleges further that by engaging in the conduct described above, defendants have unjustly enriched themselves at the expense of R&C and CERRATO. According to plaintiffs, defendants have withheld money that rightfully belongs to plaintiffs, and which they have no right to retain.

In lieu of an answer, defendants have filed this pre-answer motion to dismiss. The motion has been fully briefed, with opposition and reply.

Discussion

The standards on a motion to dismiss are well known to practitioners and the courts. When considering a motion to dismiss pursuant to CPLR §3211(a)(1), the proffered documentary evidence must "utterly refute" the allegations in the plaintiff's complaint, "conclusively establishing a defense as a matter of law." *Hart 230, Inc. v PennyMac Corp.*, 194 AD3d 789, 790 (2nd Dept 2021). In evaluating a motion to dismiss pursuant to CPLR §3211(a)(7), the Court is to afford the pleading a liberal construction, accept the facts in the allegations as true, accord the plaintiff the benefit of every possible favorable inference and determine only whether the facts as alleged fit into any cognizable legal theory. *Connaughton v. Chipotle Mexican Grill, Inc.*, 29 N.Y.3d 137, 141–42 (2017). At the same time, however, allegations consisting of bare legal conclusions are not entitled to any such consideration. Dismissal of the complaint is warranted if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery. *Id.*

To state a claim for tortious interference with a contract, the plaintiff must allege: "(1) the existence of a contract between plaintiff and a third party; (2) defendant's knowledge of the contract; (3) defendant's intentional inducement of the third party to breach or otherwise render performance impossible; and (4) damages to plaintiff. " *Oxford Health Plans (NY), Inc. v Biomed Pharms., Inc.*, 181 A.D.3d 808, 814 (2d Dept. 2020), citing *Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 94 (1993). The plaintiff must also establish that the defendant intentionally procured the breach of contract without justification. *Id.*, citing *Lama Holding Co. v Smith Barney*, 88 NY2d 413, 424 (1996); *Ferrandino & Son, Inc. v Wheaton Bldrs., Inc., LLC*, 82 AD3d 1035, 1036 (2d Dept. 2011).

To state a claim for unjust enrichment, a plaintiff must allege that (1) the defendant was enriched, (2) at the plaintiff's expense, and (3) that it is against equity and good conscience to permit the defendant to retain what is sought to be recovered. *Pierce Coach Line, Inc. v Port Wash. Union Free Sch. Dist.*, 213 A.D.3d 959, 961 (2d Dept 2023) See also *Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y.3d 173, 182 (2011). "The basis of a claim for unjust enrichment is that the defendant has obtained a benefit which in 'equity and good conscience' should be paid to the plaintiff. In a broad sense, this may be true in many cases, but unjust enrichment is not a catchall cause of action to be used when others fail. It is available only in unusual situations when, though the defendant has not breached a contract nor committed a recognized tort, circumstances create an equitable obligation running from the defendant to the plaintiff. Typical cases are those in which the defendant, though guilty of no wrongdoing, has received money to which he or she is not entitled." *Corsello v. Verizon New York, Inc.*, 18 N.Y.3d 777, 790 (2012).

Defendants argue that dismissal pursuant to CPLR §3211(a)(7) is warranted on the ground that plaintiffs have failed to allege a viable cause of action for tortious interference or unjust enrichment. According to defendants, plaintiffs' claims are conclusory. There is no factual basis for plaintiffs' claims that defendants "allowed," "encouraged," or "ignored" Rovegno's breach of his contractual duties to CERRATO by paying R&C's fees directly to Rovegno, or that SAM was unjustly enriched by withholding money owed to CERRATO.

In addition, defendants assert that dismissal pursuant to CPLR §3211(a)(1) is warranted on the ground that the documentary evidence utterly refutes plaintiffs' claims. They refer to the provision in the SAM Agreement in which the parties agreed that the fees paid to Rovegno would include any and all liens that could be imposed by Rovegno, Rovegno & Taylor, P.C., R&C, and CERRATO. Defendants also submit a copy of an Affidavit submitted by Rovegno in a separate action,[4] in which Rovegno affirms that he agreed to be responsible for payment to CERRATO of CERRATO's proportionate share of all fees due to R&C under the Partnership and Dissolution Agreements. See Exhibit D (*NYSCEF Doc. 10*). Based upon these documents, defendants assert that it was Rovegno's duty to pay CERRATO his share of the fees from the monies paid by SAM to Rovegno, and that SAM was under no obligation to pay CERRATO directly.

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[4] See *Cerrato et al. v Rovegno et al.*, Nassau County Index No. 605453/21 (*NYSCEF Doc. 150*).

In opposition, Plaintiffs, by way of their attorney's affirmation (*NYSCEF Doc. 15*), argue that the Complaint is sufficient, insofar as it alleges that "Defendants were fully aware of CERRATO's and R&C's contractual interests, and acted to induce Rovegno to breach his Agreements and empowered Rovegno to do so by ignoring the claims of the firm for which they were substituting as counsel and paying Rovegno the entire sum owed, subject to their own fee sharing arrangement, in utter disregard of the contractual obligations Rovegno already had made." Affirmation, ¶34 (citations omitted).

In plaintiff's view, defendants' intent to induce breach is evidenced by the fact that: (i) defendants knowingly entered into an agreement with Rovegno with respect to the Transferred Matters "without regard" for CERRATO's interest in R&C, or R&C's interest in those cases (Affirmation ¶25); (ii) defendants "created the means" by which Rovegno usurped control over the transfer of those cases, and recreated his proportionate share of the fees that he would keep (Affirmation ¶26); (iii) "allowed Rovegno to position himself" to collect a windfall in violation of the R&C Partnership Agreement... (Affirmation ¶27).

Apparently, plaintiff refers to SAM's agreement to pay a referral fee to Rovegno of 40% of the net attorneys fees collected on the Transferred Matters for all pre-Note of Issue cases, out of which Rovegno was to pay the R&C Lien. The Dissolution Agreement provides for calculation of the R&C Lien pursuant to a sliding scale of *up to* 40% for pre-Note of Issue cases. The SAM Agreement could thus result in a recovery to Rovegno, individually, in excess of the amount allocable to R&C for pre-Note of Issue matters – a "windfall," in plaintiffs' view. Moreover, insofar as payments would be made directly to Rovegno, this would, according to plaintiffs, encourage Rovegno to deprive plaintiffs of the benefit they negotiated, in violation of Rovegno's fiduciary and contractual duties. Plaintiffs contend that defendants made this arrangement for their own benefit, in order to share in the fees generated by the Transferred Matters.

The Court, as it must, accepts all of plaintiffs' allegations as true for purposes of this motion, except those that constitute bare legal conclusions. Considering the arguments of the parties, the Court notes, at the outset, that the existence of contracts between CERRATO, R&C and Rovegno are not in dispute. Nor is it disputed that defendants knew, at least generally, of Rovegno's obligations to CERRATO and R&C with respect to the Transferred Matters. The sufficiency of plaintiffs allegations with respect to damages is not challenged.

The heart of the dispute in this case is whether or not plaintiffs have adequately alleged the element of intent to induce breach. This Court is of the opinion that they have not.

There are no factual allegations which support the conclusion that defendants expressly urged or encouraged Rovegno to breach his obligations to plaintiffs. The essence of plaintiffs' complaint is that by virtue of the arrangements made for the transfer of cases to defendants, the secrecy of these arrangements, and the absence of any contractual provisions safeguarding plaintiffs' interests, defendants allowed, and created the conditions for, Rovegno to breach his obligations to plaintiffs with respect to their share of the fees collected on the Transferred Matters. Conceptually, this Court is of the opinion that there is a distinction between intending to induce a breach, and allowing, or creating the conditions for, a breach. The latter does not necessarily rise to the level of intent.

Looking closely at the facts alleged, the Court does not find that they evidence an intent to induce a breach. Plaintiffs' assertion that defendants entered into an agreement with Rovegno "without regard" for CERRATO's interest in R&C, or R&C's interest in those cases, is belied by the terms of the SAM Agreement itself which specifically acknowledges the existence of potential claims and liens, and provides a means for them to be paid, albeit not the means preferred by plaintiffs. Notably, the SAM Agreement did not render Rovegno's performance of his obligations to R&C and Cerrato impossible. See *Oxford Health Plans* 181 A.D.3d at 814.

Plaintiff's assertion that Rovegno "usurped control" over the transfer of his cases to defendants, and that defendants created the means for him to do so for their own benefit, loses its nefarious undertones when viewed in context. There was a five month gap between the effective dissolution of R&C and the execution of the Dissolution Agreement. The Dissolution Agreement reflects that in the interim period, subsequent to the effective dissolution of R&C, R&C matters were transferred by Rovegno to SAM, MIKLOS and AWAD, and by CERRATO to the Cerrato PC. There are no factual allegations supporting the proposition that Rovegno "usurped control" over the transfer of his cases, any more than CERRATO did, with respect to the cases he transferred to the Cerrato PC. There are no factual allegations supporting the proposition that SAM, MIKLOS and AWAD benefitted any differently from the cases it received from Rovegno, than the Cerrato PC benefitted from the cases that it received from CERRATO.

To the extent that plaintiff complains of a lack of information as to the terms of the SAM Agreement, and as to the status and disposition of the Transferred Matters, the Court is aware of no contractual or legal duty on the part of defendants to communicate with plaintiffs. Although Rovegno and CERRATO had a mutual contractual obligation to communicate with each other regarding R&C matters subsequently transferred to other attorneys or firms, the Court is aware of no such duty owed by the transferees. Nor could the transferees be bound by any agreement to which they were not parties.

The central grievance alleged by plaintiffs, and the one presumably responsible for the alleged harm to plaintiffs, is that the SAM Agreement provided for the direct payment to Rovegno of all amounts allocable to the R&C Lien, and made him responsible for the distribution of any amounts owed to others.[5] This effectively gave Rovegno the means, if not the power, to keep the money for himself, in violation of his agreements with plaintiffs. Does this evidence an intent on the part of defendants to induce such a violation?

In the view of this Court, although the SAM Agreement did provide the means for Rovegno to breach its obligations to plaintiffs, it also provided the means for Rovegno to fulfill them. Contrary to the arguments advanced by plaintiffs, by paying Rovegno more than the portion of fees allocable to the R&C Lien, it rendered Rovegno's performance possible; that is, it created the means by which Rovegno could pay R&C and CERRATO their fair share. (Consider that if the SAM Agreement had provided for payment to Rovegno of a lower percentage of fees than the percentage allocable to the R&C Lien, then performance of Rovegno's obligations would have been rendered impossible.)

Even if the payment arrangement set forth in the SAM Agreement did create an opportunity for abuse on the part of Rovegno, the Court is aware of no legal or contractual duty owed by defendants to pay plaintiffs directly or to ensure the payment of plaintiffs' share. There is no allegation supporting the proposition that any of the defendants could be charged with knowledge that Rovegno intended to breach his obligations to his former partner and partnership. In the view of this Court, tortious intent requires something more than mere indifference or the abdication of responsibility. With respect to a claim of tortious interference, the requisite intent is the intent to defeat a third parties rights, not the absence of a will to preserve them.

[5] By contrast, the Dissolution Agreement provided for the direct distribution of the R&C Lien to its former partners by the transferee entities who received the fees. The SAM Agreement, however, did not breach or induce a breach of this term of the Dissolution Agreement. The SAM Agreement was executed five months before the R&C partners entered into the Dissolution Agreement. At the time of signing, defendants presumably could not have known about, or intended to induce a breach of, a term that was not yet in existence. Moreover, any continued adherence to the SAM Agreement after the execution of the Dissolution Agreement is not actionable, particularly insofar as SAM is not bound by a subsequent agreement to which it was not a party.

As to the claim of unjust enrichment, on the facts alleged, the Court finds no support for the inference that defendants derived any particular benefit from the payment arrangements made with Rovegno, other than to remove themselves from any disputes between the former partners. There are no factual allegations supporting the proposition that defendants received money to which they were not entitled. The SAM Agreement required defendants to pay Rovegno a percentage of fees greater than or equal to the percentage allocable to R&C under the Dissolution Agreement. To the extent that SAM overpaid Rovegno, it earned less than it would have if it had followed the formula set forth in the Dissolution Agreement. There are no specific factual allegations that SAM breached the SAM Agreement, or failed to pay Rovegno the amounts due. Plaintiffs' claim that defendants withheld money owed to plaintiffs is unsupported by evidentiary fact. That defendants may have benefitted from the transfer of cases to them from R&C, there are no allegations suggesting that such benefit was any different in kind from the benefit enjoyed by the Cerrato PC, or that such benefit was in any way unjust or unearned.

Conclusion

The Court has considered the remaining contentions of the parties and finds that they do not require discussion or alter the determination herein. Based upon the foregoing, it is

ORDERED, that defendants' motion to dismiss the complaint is ***granted.***

Any requests for relief not specifically addressed herein are ***denied.***

This constitutes the Decision and Order of this Court.

Dated: February 28, 2025 **E N T E R:**
Mineola, NY, 11501

HON. ERICA L. PRAGER, J.S.C.

ENTERED
Feb 28 2025
NASSAU COUNTY
COUNTY CLERK'S OFFICE

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