

Pryor Cashman Sherman & Flynn LLP v Brody

2005 NY Slip Op 30487(U)

April 13, 2005

Sup Ct, NY County

Docket Number: 603414/04

Judge: Louis B. York

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: LOUIS B. YORK

Justice

PART 2

Pryor Cashman Sherman

- v -

Cary G Brody

INDEX NO. 603414-04

MOTION DATE 2/9/05

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED
MAY 02 2005
NEW YORK
COUNTY CLERK'S OFFICE

Motion is decided in accordance with accompanying memorandum decision.

Dated: 4/13/05

Fly

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2

-----X
PRYOR CASHMAN SHERMAN & FLYNN LLP,

Plaintiff,

-against-

Index No.: 603414/04

CARY G. BRODY,

Defendant.

FILED
MAY 02 2005
NEW YORK
COUNTY CLERK'S OFFICE

LOUIS B. YORK, J.:

The defendant Cary G. Brody (Brody), moves, pursuant to CPLR 3211 (a) (1), for an order dismissing so much of the complaint as is based upon an alleged bonus provision of a written retainer agreement for the provision of legal services, upon the ground that a complete defense to the action appears in that written contract between the parties.

The plaintiff Pryor Cashman Sherman & Flynn LP (Pryor Cashman) is a law firm. The defendant Brody is a domiciliary of the State of Connecticut, and operates a hedge fund in the State of New York. In 2003, Brody engaged Pryor Cashman to litigate a claim made by the New York State Department of Taxation and Finance that Brody had been deficient in the payment of personal New York State and New York City taxes for the years 1997 through 2000. Subsequently, Brody's tax liability was reduced by settlement to \$1 million dollars. Brody paid to Pryor Cashman legal fees in the total sum of \$783,501.25 This is an action by Pryor Cashman to recover a bonus in the sum of \$260,499.69 allegedly due pursuant to the terms of a letter retainer agreement between Pryor Cashman and Brody.

The relevant portions of the agreement provide: "By reason of the scope of the work for

6034117-04 (0101) Pryor

which we have been retained our regular hourly rates ... will be reduced by 20%," and

We hope to achieve outstanding results on your behalf. Assuming that proves to be the case, we would expect to receive a bonus, subject to mutual agreement, in the neighborhood of the aggregate 20% reductions in our fees to such date.

In support of his motion to dismiss, Brody makes the following arguments. The agreement expressly conditions the payment of any bonus on Brody's subjective personal satisfaction with Pryor Cashman's performance. The agreement is subject to the occurrence of a condition precedent (i.e., that the parties had to reach a future mutual agreement) which failed to occur, and cannot occur. The bonus provision is a mere agreement to agree, which fails for indefiniteness.

In opposition to the motion, the plaintiff Pryor Cashman makes the following arguments. If the court were to conclude that there is merit to Brody's motion, Pryor Cashman requests leave to replead. The Body affidavit is not conclusive, irrefutable evidence concerning the meaning of the bonus provision and whether it has been satisfied. Significant factual issues remain concerning the interpretation of the bonus provision and whether that provision was satisfied. The bonus provision contains an objective standard. The court should decline to apply the rule that any ambiguity should be construed against the drafter. The agreement is enforceable as written. The agreement is not indefinite. Summary judgment is unwarranted as premature.

On a motion to dismiss a complaint for legal insufficiency, the court accepts the facts alleged as true, and determines simply whether the facts alleged fit within any cognizable legal theory (Morone v Morone, 50 NY2d 481 [1980]). The pleading is to be liberally construed, accepting all the facts alleged therein to be true, and according the allegations the benefit of every possible favorable inference (Leon v Martinez, 84 NY2d 83 [1994]). The credibility of the parties is not under consideration (S.J. Capelin Assocs. v Globe Mfg. Corp., 34 NY2d 338

603414-4 (no) Pryor

[1974]). In addition, a CPLR 3211 dismissal may be granted where documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law (Held v Kaufman, 91 NY2d 425 [1998]).

A contract, to be enforced, must be sufficiently certain, and specific, so that what was promised can be ascertained, and a mere agreement to agree, in which a material term is left for future negotiations, is unenforceable (Joseph Martin, Jr. Delicatessen, Inc. v Schumacher, 52 NY2d 105 [1981]). Although the case involves services and not goods, Uniform Commercial Code § 2-305, applicable to the sale of goods, will supply missing price terms to save and enforce an agreement. In addition, a price term may be sufficiently definite, if the amount can be determined objectively, without the need for new expressions by the parties (Cobble Hill Nursing Home v Henry & Warren Corp., 74 NY2d 475 [1989]), or if there is evidence that both parties intended to give one party power to select reasonable terms. Still, there must be objective evidence of a shared intent to permit one party to set terms in the future (Matter of Express Industries & Terminal Corp. v New York State Dept. of Transportation, 93 NY2d 584 [1999]).

Preliminarily, before applying the above legal principles, the court notes the following. First, given the contract language quoted above, the drafter should have anticipated that, ultimately, Pryor Cashman would view the settlement as outstanding, and that the client Brody, on the other hand, would not view the settlement as outstanding. Second, if Pryor Cashman wanted the agreement to provide for the payment of a bonus, contingent on the tax matter settling for a certain dollar amount, the agreement should have clearly so provided. Third, putting aside the question of whether the result obtained was outstanding, the price terms seem to be sufficiently certain, and specific, so that what price was promised can be ascertained.

Nevertheless, the documentary evidence submitted by the defendant Brody does not

603414-04(0201) Pr-Por

resolve all factual issues as a matter of law.

The plaintiff Pryor Cashman alleges that the result it achieved in the underlying tax matter was clearly outstanding. Accepting that, and the other allegations as true, and affording them every possible favorable inference (Leon v Martinez, 84 NY2d at 87), the complaint sufficiently states a claim. Whether, in fact, the settlement was an outstanding result, and whether there is a reasonably certain basis for determining if the result obtained was outstanding, are both matters which cannot be safely decided simply on a pleading motion, but require a further exploration of the facts, whether by way of summary judgment or trial.

Accordingly, it is

ORDERED that the motion is denied; and it is further

ORDERED that the defendant serve his answer within 20 days of service of a copy of this order with notice of entry.

Dated: 4/13/05

ENTER:

[Signature]

J.S.C.

LOUIS B. YORK
FILED
MAY 02 2005
NEW YORK
COUNTY CLERK'S OFFICE