

Pick & Zabicki LLP v Wu
2017 NY Slip Op 30687(U)
April 4, 2017
Supreme Court, New York County
Docket Number: 155702/2016
Judge: Gerald Lebovits
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: PART 7**

PICK & ZABICKI LLP,

Plaintiff,

-against-

MARGARET WU,

Defendant.

Index No.: 155702/2016

DECISION/ORDER

Motion Sequence No. 001

Recitation, as required by CPLR 2219 (a), of the papers considered in reviewing plaintiff's motion to dismiss and defendant's cross-motion for leave to interpose counterclaims.

Papers	Numbered
Plaintiff's Notice of Motion to Dismiss Defenses	1
Plaintiff's Memorandum of Law in Support.....	2
Defendant's Notice of Cross-Motion.....	3
Plaintiff's Affirmation in Reply and in Opposition to Cross-Motion.....	4

Pick & Zabicki LLP, New York City (Douglas J. Pick of counsel), for plaintiff.
The Luthmann Law Firm PLLC, Staten Island (Richard A. Luthmann of counsel), for defendant.

Gerald Lebovits, J.

Plaintiff moves under CPLR 3211 (b) to dismiss the second through the twentieth defenses and/or affirmative defenses. Defendant cross-moves under CPLR 3025 (b) for leave to interpose counterclaims.

This case is about a dispute over legal fees allegedly owed by defendant. Plaintiff claims that defendant engaged it in May 2015 as co-counsel with Morrison Tenenbaum PLLC in a bankruptcy case. Plaintiff acknowledges that defendant has paid \$2,500 but alleges that defendant still owes \$63,047.24. (Plaintiff's Notice of Motion to Dismiss Defenses, Affirmation in Support, at ¶¶ 5, 7-8.)

I. Plaintiff's Motion to Dismiss

Plaintiff moves to dismiss the second through the twentieth defenses and/or affirmative defenses on the ground that defendant has not adequately stated these defenses in her answer and/or these defenses are without merit as a matter of law.

Defendant's answer raises the following defenses and/or affirmative defenses, numbered 1 through 20: (1) failure to state a cause of action, but plaintiff does not move to dismiss this defense; (2) unclean hands and/or in *pari delicto*; (3) lack of capacity to sue; (4) lack of standing

to sue; (5) claim is barred or, in the alternative, plaintiff's damages are the result of its own breach of fiduciary duty, breach of certain agreements, and failure to complete the performance required; (6) lack of damages, or that the damages are inconsequential and de minimis; (7) failure to mitigate; (8) claims were not filed within the applicable statutes of limitations and/or administrative filing periods; (9) plaintiff failed timely and properly to exhaust all necessary administrative, statutory, and/or jurisdictional prerequisites to commence this action; (10) waiver and estoppel; (11) laches; (12) plaintiff failed to comply with its obligations under the agreement; (13) claims are barred in whole or in part by the existence of the agreement which sets forth the only representation on which the parties were entitled to rely, as well as the parties' rights and obligations with respect to each other; (14) defendant's performance was excused, and defendant would have performed its obligations under the contract but for plaintiff's interference with defendant's ability to perform, to the extent that defendant is found in breach of the contract; (15) insufficiency of service of process; (16) invalid service of process; (17) defendant does not owe the alleged debt and demands proof of the debt and damages plaintiff claims under the alleged contract; (18) lack of capacity to maintain or defend an action in the courts of the State of New York because plaintiff is unlicensed to do business in the State of New York; (19) "[p]laintiff presented the [d]efendant a forged contract with his name"; and (20) the purported contract is a fraud because the defendant was absent when it was executed.

Plaintiff argues that it represented defendant for three months and that defendant disputed neither the quality or extent of plaintiff's legal services nor the amounts billed to defendant each month. Plaintiff claims that defendant never raised any issues or any allegations over any purported acts of wrongdoing, misconduct, malfeasance, and the like concerning plaintiff's representation of defendant. (Plaintiff's Memorandum of Law in Support, at ¶ 2.) Plaintiff asserts that no affirmative defense is supported by any factual allegation or evidence from defendant, including "boilerplate" defenses like unclean hands, lack of standing, lack of capacity to sue, waiver, estoppel, laches, statute of limitations, and the like. (Plaintiff's Memorandum of Law in Support, at ¶ 3.) In support of its motion, plaintiff provides copies of the Certificate of Status of Pick & Zabicki LLP obtained from the New York State Department of State, Division of Corporation, and Certificate of Good Standing of Douglas J. Pick and Eric Christopher Zabicki to demonstrate that plaintiff has the capacity to bring this action and that plaintiff is licensed to do business in the State of New York. (Plaintiff's Notice of Motion to Dismiss Defenses, Affirmation in Support, at Exhibits C, D & E.) Plaintiff also provides a copy of the Stipulation Extending Time to File and Answer, signed by defendant on August 8, 2016, in which defendant stipulates that she "waives any and all jurisdictional defenses as well as those based upon the service of process of the SUMMONS and COMPLAINT herein." (Plaintiff's Notice of Motion to Dismiss Defenses, Affirmation in Support, at Exhibit F.)

Defendant raises several arguments about why she does not owe any money to plaintiff, including that plaintiff fraudulently induced her and inadequately represented her as well as that this case has been settled. Defendant alleges that she "speaks very little English and requires an interpreter." (Defendant's Notice of Cross-Motion, Affidavit of Margaret Wu, at ¶ 3.) Defendant states that she agreed to give Lawrence Morrison, Esq. the authority to retain Douglas Pick, Esq., as co-counsel in a bankruptcy case and authorize Morrison to sign a retainer agreement with Pick on defendant's behalf. (Defendant's Notice of Cross-Motion, Affirmation in Opposition, at Exhibit A.) Defendant states that plaintiff provided an interpreter, Virgo Lee, to her and that Lee

was paid by defendant and Morrison Tenenbaum. Defendant claims that Lee improperly interpreted comments to her and that Lee was “in cahoots” with plaintiff. (Defendant’s Notice of Cross-Motion, Affirmation in Opposition, at ¶¶ 6-8.) Defendant further claims that plaintiff breached the contract with defendant by failing to inform defendant in her native language about the status of her case. Defendant asserts that “[p]laintiff made [d]efendant agree to a settlement of \$500,000.00 and then settled for \$500,000.00” and that defendant suffered damages for \$500,000.00 plus interest as a direct and proximate result of plaintiff’s breach. (Defendant’s Notice of Cross-Motion, Affirmation in Opposition, at ¶¶ 11-12.) Also, defendant claims that it is highly questionable why defendant would hire plaintiff to represent her together with Morrison Tenenbaum and that plaintiff was “double-crossed into signing an agreement to have co-counsel on her bankruptcy matter.” (Defendant’s Notice of Cross-Motion, Affirmation in Opposition, at ¶¶ 14, 17.) Defendant further argues that plaintiff submitted multiple blanket invoices to defendant that are not detailed.

In reply, plaintiff reiterates that defendant does not set forth any legal or factual argument in opposition. (Plaintiff’s Affirmation in Reply and in Opposition to Cross-Motion, Section A.)

CPLR 3211 (b) provides that “[a] party may move for judgment dismissing one or more defense, on the ground that a defense is not stated or has not merit.” On a motion to dismiss an affirmative defense, “the plaintiff bears the burden of demonstrating that the affirmative defense is ‘without merit as a matter of law.’” (*Greco v Christoffersen*, 70 AD3d 769, 711 [2d Dept 2010], quoting *Vita v New York Waste Servs., LLC*, 34 AD3d 559, 559 [2d Dept 2006].) And the court “[i]n reviewing a motion to dismiss an affirmative defense . . . must liberally construe the pleadings in favor of the party asserting the defense and give that party the benefit of every reasonable inference.” (*Fireman’s Fund Ins. Co. v Farrell*, 57 AD3d 721, 723 [2d Dept 2008].) But “[d]efenses which merely plead conclusions of law without supporting facts are insufficient.” (*Glenesk v Guidance Realty Corp.*, 36 AD2d 852, 853 [2d Dept 1971]; accord *Bank Leumi Trust Co. of New York v Samalot/Edge Assoc.*, 202 AD2d 282, 283 [1st Dept 1994].) A court should not strike a defense when questions of fact require a trial. (*Ailas Feather Corp. v Pine Top Ins. Co.*, 128 AD2d 578, 578–579 [2d Dept 1987].)

Plaintiff’s motion to dismiss the second, fifth, twelfth, thirteenth, and fourteenth affirmative defenses is granted. Defendant claims that plaintiff provided an interpreter to her and that the interpreter was paid by defendant and Morrison Tenenbaum. Defendant claims that the interpreter improperly interpreted comments to her and was “in cahoots” with plaintiff. (Defendant’s Notice of Cross-Motion, Affirmation in Opposition, at ¶¶ 6-8.) But defendant does not specify how Lee, the interpreter, improperly interpreted comments to her and how Lee was in cahoots with plaintiff. Furthermore, defendant does not address any factual allegation in her papers in relation to plaintiff’s breach of contract and plaintiff’s failure to comply with its fiduciary duties and obligations. Therefore, the defense related to unclean hand and/or in *pari delicto* and related to contract and fiduciary duties are without merit.

Plaintiff’s motion to dismiss the sixth and seventeenth affirmative defenses is granted. Defendant’s counsel affirms in his opposition papers that this case has settled: “Plaintiff made Defendant agree to a settlement of \$500,000.00 and then settled for \$500,000.00.” (Defendant’s Notice of Cross-Motion, Affirmation in Opposition, at ¶ 11.) Defendant’s counsel also states that

defendant suffered damages for \$500,000.00 plus interest as a direct and proximate result of plaintiff's breach. (Defendant's Notice of Cross-Motion, Affirmation in Opposition, at ¶12.) But plaintiff argues that the settlement is pure fiction. (Plaintiff's Affirmation in Reply and in Opposition to Cross-Motion, fn 5.) The court notes that defendant's counsel offers no proof of any alleged settlement. Nor does defendant's counsel state that he has personal knowledge about the settlement. And defendant does not mention in her signed affidavit any information about a settlement. This court finds that defendant's defenses based on lack of damages and nonexistent debts are without merit.

Plaintiff's motion to dismiss the third and eighteenth affirmative defenses is granted. Given that plaintiff provides its Certificate of Status and the Certificate of Good Standing of its attorneys Pick and Zabicki, plaintiff does not lack the capacity to sue and plaintiff is not unlicensed to do business in the State of New York. Therefore, these defenses are without merit.

Plaintiff's motion to dismiss the fourth affirmative defense is granted. Defendant does not dispute in her papers that plaintiff was a party to the transactions with defendant; thus, plaintiff has standing to sue. Therefore, the defense of lack of standing is without merit.

Plaintiff's motion to dismiss the seventh affirmative defense is granted. Defendant fails to set forth in her papers any factual allegation in support of her defense that plaintiff failed to mitigate.

Plaintiff's motion to dismiss the eighth and eleventh affirmative defenses is granted. As plaintiff's claims against defendant accrued in 2015 and plaintiff filed the complaint on July 11, 2016, within the six-year statute of limitations, the statute of limitations defense is without merit as a matter of law. Given that plaintiff filed the complaint within a year after its claims against defendant accrued, defendant is not substantially prejudiced by an inexcusable delay in the enforcement of a right. Therefore, the defense of doctrine of laches is without merit.

Plaintiff's motion to dismiss the ninth affirmative defense is granted. Defendant fails to identify which administrative, statutory, and/or specific jurisdictional prerequisites are necessary to commence this action. Therefore, this defense is without merit.

Plaintiff's motion to dismiss the tenth affirmative defense is granted. Defendant does not raise any factual allegation that plaintiff should be barred by the doctrines of waiver and estoppel. For the reasons stated in plaintiff's papers, the defense of the doctrines of waiver and estoppel is without merit.

Plaintiff's motion to dismiss the fifteenth and sixteenth affirmative defenses is granted. As defendant expressly waived any defenses premised on jurisdiction or service of process in the Stipulation Extending Time to File and Answer, signed by the defendant on August 8, 2016, her defenses based on insufficient service of process and invalid service of process are waived.

Plaintiff's motion to dismiss the nineteenth and twentieth affirmative defense is granted. Defendant fails to raise any factual allegation in support of her defenses about a forged contract.

II. Defendant's Cross-Motion

Defendant cross-moves under CPLR 3025 (b) for leave to interpose counterclaims.

Defendant raises the same arguments as stated above in Defendant's Notice of Cross-Motion and Affirmation in Opposition.

Defendant submits a proposed Verified Counterclaim, which includes the following counterclaims: (1) breach of fiduciary duty; (2) legal malpractice; (3) unjust enrichment; and (4) fraud.

For her first proposed counterclaim — breach of fiduciary duty — defendant argues that plaintiff hired a dishonest interpreter, Lee, who improperly interpreted comments to defendant. Defendant also claims that plaintiff failed to provide reasonably competent legal representation by negligently engaging and proceeding in a case in which defendant had no standing. Defendant asserts that plaintiff and Morrison Tenebanum double-billed defendant for the bankruptcy proceeding. Defendant also argues that plaintiff failed to disclose its pre-existing “side deal” with Lee; that plaintiff failed to disclose to defendant that defendant had no standing in the bankruptcy case and no basis for a positive economic result; that plaintiff failed to make any valid argument in Bankruptcy Court that defendant had standing in the bankruptcy case and a basis for a positive economic result. Defendant also asserts in her first counterclaim that plaintiff “encourage[ed] and orchestrat[ed] [plaintiff's] engagement by [defendant] Wu in order to secure appointment counsel and the ability to receive larger fees.”

For her second proposed counterclaim — legal malpractice — defendant argues that had plaintiff exercised the degree of care, skill, and diligence commonly possessed by a member in the legal professions, plaintiff would not have maintained that defendant had standing in the bankruptcy case. Defendant also argues that her engagement with plaintiff was based on Lee's false and misleading representation.

For her third proposed counterclaim — unjust enrichment — defendant argues that plaintiff was enriched by the sums it received — attorney fees — in the bankruptcy representation as a result of plaintiff's legal malpractice and plaintiff failed to put the defendant's interest ahead of plaintiff's interests.

For her fourth proposed counterclaim — fraudulent inducement — defendant argues that plaintiff fraudulently induced her to hire plaintiff to represent her in the bankruptcy case by failing to disclose its pre-existing “side deal” with Lee; failing to disclose to her that she had no standing in the bankruptcy case and no basis for a positive economic result; and failing to make any valid argument in Bankruptcy Court that defendant had standing in the bankruptcy case and a basis for a positive economic result. Defendant also asserts that plaintiff “encourage[ed] and orchestrat[ed] [plaintiff's] engagement by [defendant] Wu in order to secure appointment counsel and the ability to receive larger fees.” Defendant also argues that she relied on plaintiff's statements in participating in the bankruptcy action and was damaged by plaintiff's fraud.

Defendant requests this court to award defendant actual damages, order plaintiff to disgorge fees and compensation received by plaintiff while acting as faithless fiduciaries, order

plaintiff to turn over all plaintiff's documents related to the bankruptcy action, award defendant punitive damages, and award defendant costs and disbursements of this action.

In opposition to the cross-motion, plaintiff argues that the cross-motion should be denied because defendant's proposed counterclaims are not adequately pleaded and cannot otherwise be sustained. Plaintiff claims that "the Bankruptcy Court stated that [d]efendant could be heard as a 'party-in-interest' (as opposed to having standing as an equity security holder of an equity security holder or creditor of Realty Corp.)."¹ (Plaintiff's Affirmation in Reply and in Opposition to Cross-Motion, at ¶ 11.) Plaintiff also claims that "the issue concerning Defendant's standing as an equity security holder or creditor of Realty Corp. had already been briefed and were *sub judice* before the Bankruptcy Court when Plaintiff was retained as co-counsel." (Plaintiff's Affirmation in Reply and in Opposition to Cross-Motion, at ¶ 12.) Plaintiff further claims that defendant fails to state with specificity plaintiff's purported misconduct, such as specifying the matters Lee is alleged to have incorrectly interpreted to defendant and how Lee was "in cahoots" with plaintiff. Plaintiff points out that defendant fails to plead any damages directly caused by any breach of fiduciary duty. Plaintiff also argues that defendant fails to sustain a claim for legal malpractice as "the Bankruptcy Court never made such 'blanket' ruling concerning [d]efendant's standing" and plaintiff made potential meritorious argument for defendant's standing. (Plaintiff's Affirmation in Reply and in Opposition to Cross-Motion, at ¶ 15.) Moreover, plaintiff asserts that it received only \$2,500 from or on behalf of defendant against legal fees and out-of-pocket expenses and defendant fails to demonstrate the unjust enrichment. Plaintiff further claims that defendant fails to plead with particularity the circumstances constituting the wrong underlying an assertion of fraudulent inducement. Plaintiff argues that each proposed counterclaim is palpably insufficient and/or patently devoid of merit. Also, plaintiff argues that it will be prejudiced if defendant's cross-motion is granted because it believes that defendant has brought the cross-motion as a means to delay the case.

Under CPLR 3025 (b), leave to amend a pleading will ordinarily be granted absent prejudice or surprise to the opposing party unless the proposed amendment is palpably insufficient or patently devoid of merit. (*Malanga v Chamberlain*, 71 AD3d 425, 427 [2d Dept 2010].) Notwithstanding the CPLR's liberal pleading requirements, a cause of action cannot be predicated solely on mere conclusory statements unsupported by factual allegations. (*Taylor v State of New York*, 36 AD2d 878, 879 [3d Dept 1971].) The Court of Appeals has noted that

"[g]eneral allegations of misconduct will not do in the absence of statements of those facts upon which are based the pleader's conclusions that the acts of which the complaint is made are wrongful, lacking in good faith, or unlawful, as the case may be. . . . A pleading which, fairly construed, fails to allege any facts which constitute a wrong but only general conclusions, is entirely insufficient and may be dismissed on that ground." (*Kalmanash v Smith*, 291 NY 142, 154 [1943].)

¹"Realty Corp." refers to Queen Elizabeth Realty Corp., the debtor in the bankruptcy case.

Defendant's cross-motion to interpose the first counterclaim is denied. To establish a breach of a fiduciary duty, defendant must establish: (1) a fiduciary relationship between her and plaintiff; (2) plaintiff's misconduct that is in derogation of its fiduciary duty; and (3) damages directly caused by plaintiff's misconduct. (*Palmetto Partners, L.P. v AJW Qualified Partners, LLC*, 83 AD3d 804, 807-808 [2d Dept 2011].) And "[a] cause of action sounding in breach of fiduciary duty must be pleaded with the particularity required by CPLR 3016 (b)." (*Id.* at 808.) Defendant fails to state with particularity how plaintiff's misconduct was in derogation of its fiduciary duty; defendant does not allege any facts to support her assertions that Lee improperly interpreted comments to her and that Lee was "in cahoots" with plaintiff.

Also, the Bankruptcy Court did not rule that defendant lacked standing in the bankruptcy matter. (Plaintiff's Affirmation in Reply and in Opposition to Cross-Motion, at ¶¶ 11, 15.) Defendant had withdrawn her motion in appointing a Chapter 11 trustee — addressing the standing issue — before she retained plaintiff to represent her. (Defendant's Notice of Cross-Motion, Exhibit D, at 26, minutes from Bankruptcy Court, *In Re Queen Elizabeth Realty Corp.*, July 30, 2015; Plaintiff's Affirmation in Reply and in Opposition to Cross-Motion, at ¶ 12.) Defendant retained plaintiff to move for leave to file a late proof of claim in the bankruptcy matter. The Bankruptcy Court denied defendant's motion for leave to file a late proof of claim not because she lacked standing but because defendant failed to explain the reason for her 19-month delay. (Defendant's Notice of Cross-Motion, Exhibit D, at 31, minutes from Bankruptcy Court, *In Re Queen Elizabeth Realty Corp.*, July 30, 2015.) Defendant's allegations — that plaintiff failed to disclose to her that she had no standing in the bankruptcy case and no basis for a positive economic result, and that plaintiff failed to make any valid argument in Bankruptcy Court that defendant had standing in the bankruptcy case and a basis for a positive economic result — are patently devoid of merit.

Furthermore, defendant fails to specify her damages. The first counterclaim is palpably insufficient and patently devoid of merit.

Defendant's cross-motion to interpose the second counterclaim is denied. To sustain a claim for legal malpractice, defendant must establish: (1) that an attorney-client relationship exists; (2) the attorney's negligence; (3) the negligence was a proximate cause of the loss sustained; and (4) plaintiff suffered actual and ascertainable damages. (*Tabner v Drake*, 9 AD3d 608, 608 [3d Dept 2004].) Plaintiff states in conclusory fashion that plaintiff was "in cahoots" with Lee and that plaintiff did not make appropriate arguments about standing in Bankruptcy Court. But defendant's allegations are insufficient to assert a claim for legal malpractice. Other than conclusory statements, defendant does not state how plaintiff was negligent. Nor does defendant state how plaintiff's negligence was a proximate cause of her loss. And defendant fails to specify what damages, if any, she has suffered. The second counterclaim is palpably insufficient and patently devoid of merit.

Defendant's cross-motion to interpose the third counterclaim is denied. To assert a cause of action for unjust enrichment, defendant must show that plaintiff was enriched at her expense and that equity and good conscience do not permit plaintiff to retain what defendant is seeking to recover. (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173,173 [2001].) Defendant's unjust-enrichment counterclaim is based on the same facts as her second counterclaim — legal

malpractice. Likewise, defendant's third counterclaim is palpably insufficient and patently devoid of merit. Defendant fails to plead that plaintiff was unjustly enriched at her expense.

Defendant's cross-motion to interpose the fourth counterclaim is denied. To prevail on a fraudulent-inducement claim, defendant must demonstrate that plaintiff misrepresented or materially omitted a fact, which was false and known to be false when made, and which was made for the purpose of inducing defendant to justifiably rely on it, and defendant suffered injury as a result of relying on the plaintiff's misrepresentation or material omission. (*See Lama Holding Co. v Smith Barney, Inc.*, 88 NY2d 413, 421 [1996].) Under CPLR 3016 (b), where a cause of action is based on undue influence, the circumstances constituting the wrong must be stated in detail. Defendant's fraudulent-inducement counterclaim is based on the same facts as her first counterclaim — breach of fiduciary duty. Likewise, defendant's fourth counterclaim is palpably insufficient and patently devoid of merit. Defendant fails to plead that plaintiff misrepresented or materially omitted a fact that was false and known to be false when made.

Accordingly, it is

ORDERED that plaintiff's motion to dismiss the second through the twentieth defenses and/or affirmative defenses is granted; and it is further

ORDERED that defendant's cross-motion to interpose counterclaims is denied; and it is further

ORDERED that plaintiff serve a copy of this decision and order with notice of entry on defendant; and it is further

ORDERED that plaintiff serve a copy of this decision and order on the County Clerk's Office, which is directed to enter judgment accordingly; and it is further

ORDERED that the parties appear for a preliminary conference in Part 7, at 111 Centre Street, room 1127A, on May 3, 2017, at 11:00 a.m.

Dated: April 4, 2017



J.S.C.

HON. GERALD LEBOVITS
J.S.C.