Ginarte, O'Dwyer, Gonzalez, Gallardo, & Winograd, LLP v Law Offs. of Rex E. Zachofsky, PLLC
2017 NY Slip Op 31450(U)
July 5, 2017
Supreme Court, New York County
Docket Number: 158422/12
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 42

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GINARTE, O'DWYER, GONZALEZ, GALLARDO, and WINOGRAD, LLP

Plaintiff

v

THE LAW OFFICES OF REX E. ZACHOFSKY, PLLC, and REX E. ZACHOFSKY, individually

Defendant.

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Index No. 158422/12

DECISION AND ORDER

MOT. SEQ. 004
005
006

NANCY M. BANNON, J.:

I. INTRODUCTION

In this action, inter alia, to recover for breach of numerous attorney's fee-sharing agreements, for unjust enrichment, and based on the theory of quantum meruit, the defendants move pursuant to 22 NYCRR 202.21(e) to vacate the note of issue (SEQ. 004) and pursuant to CPLR 3212 for summary judgment dismissing the unjust enrichment and quantum meruit causes of action, and dismissing so much of the breach of contract cause of action pursuant to which the plaintiff law firm seeks a share of the attorney's fees that the defendants recovered on Workers' Compensation proceedings that were referred to them by, or originated with, the plaintiff after March 2012 (SEQ. 005) The plaintiff moves pursuant to CPLR 3124 and 3126 to compel discovery or, in the alternative, to strike the

defendants' answer for failure to comply with discovery orders (SEQ. 006). The defendants' motion to vacate the note of issue is denied, their motion for partial summary judgment is granted, and the plaintiff's motion to compel discovery or strike the defendants' answer is denied.

II. BACKGROUND

Between 2007 and March 2012, the defendant attorney Rex E. Zachofsky was engaged in a business relationship with the plaintiff law firm, Ginarte, O'Dwyer, Gonzalez, Gallardo, and Winograd, LLP, which the defendants characterize as a "referral" arrangement and the plaintiff characterizes as an "of counsel" relationship, inasmuch as Zachofsky was listed on the plaintiff's letterhead as "of counsel" to the plaintiff firm. The plaintiff's principal also characterizes the arrangement as a "counsel agreement."

Pursuant to the parties' arrangement, Zachofsky agreed to pay the plaintiff 33 1/3% of the attorneys' fees that he or his law firm, the defendant The Law Office of Rex E. Zachofsky, PLLC (together the defendants), was awarded in connection Workers' Compensation matters that the plaintiff law firm referred to them. A separate fee-sharing agreement was executed by the plaintiff and Zachofsky in connection with each and every Workers' Compensation case that the firm referred to Zachofsky.

After March 2012, the ongoing referral arrangement or counsel agreement, by whatever term it may be characterized, was terminated, and Zachofsky's name was removed from the plaintiff's letterhead. Nonetheless, the defendants continued to litigate numerous matters before the Workers' Compensation Board (WCB) that had been referred to them by the plaintiff after March 2012, pursuant to separate, written fee-sharing agreements applicable to each case that were executed after that date. The post-March 2012 agreements each recited that the plaintiff was entitled to recover 33 1/3% of the fees recovered by the defendants in connection with the particular Workers' Compensation case to which the agreement referred.

The plaintiff seeks to recover 33 1/3% of the fee awarded in all of the Workers' Compensation matters that it referred to the defendants, including matters that were referred both prior to and after March 2012.

III. DISCUSSION

A. PARTIAL SUMMARY JUDGMENT DISMISSING THE BREACH OF CONTRACT CAUSE OF ACTION AS TO POST-MARCH 2012 FEE-SHARING AGREEMENTS (SEQ 005).

The defendants are entitled to summary judgment dismissing so much of the complaint as seeks a 33 1/3% share of the fees awarded to the defendants for Workers' Compensation matter referred by the plaintiff to them after March 2012 since,

notwithstanding the existence of discrete fee-sharing agreements applicable to each referral, the defendants established that the plaintiff performed no work on those cases, and the plaintiff failed to raise a triable issue of fact in opposition.

Rule 1.5(g)(1) of the Rules of Professional Conduct (22 NYCRR 1200.0) provides that:

> "a lawyer shall not divide a fee for legal services with another lawyer who is not associated in the same law firm unless:. . . the division is in proportion to the services performed by each lawyer or, by a writing given to the client, each lawyer assumes joint responsibility for the representation" (emphasis added).

See former Code of Professional Responsibility DR 2-17(A). Between 2007 and March 2012, Zachofsky's "of counsel" status constituted an associational relationship with the plaintiff firm to the extent that he performed work for the plaintiff. See Senate Ins. Co. v Tamarack Am., 14 AD3d 922 (3rd Dept. 2005). Here, the headings on the numerous fee-sharing agreements submitted by the parties suggest that Zachofsky was "associated in the same law firm" as the plaintiff from 2007 until the end of March 2012. Thus, Rule 1.5(g)(1) and former Rule DR 2-17(A) do and did not prohibit any fee-sharing arrangement between Zachofsky and the plaintiff during that period of time.

After both the so-called counsel agreement and Zachofsky's of-counsel status with the plaintiff were terminated in March 2012, Rule 1.5(g)(1) would appear, on its face, to render any

fee-sharing arrangement violative of the Rules of Professional Conduct. Nonetheless, the plaintiff correctly notes that application of the Rules of Professional Conduct cannot be relied upon to void contractual fee-sharing agreements to which the parties willingly consented. See Samuel v Druckman & Sinel, LLP, 12 NY3d 205 (2009); Benjamin v Koeppel, 85 NY2d 549 (1995); Weinstein, Chayt & Chase, P.C. v Breitbart, 65 AD3d 587 (2nd Dept. 2009); Law Offs. of K.C. Okoli, P.C. v Maduegbuna, 62 AD3d 477 (1st Dept. 2009). Notwithstanding that rule, however, "[c]ourts will not inquire into the precise worth of the services performed by the parties as long as each party actually contributed to the legal work and there is no claim that either refused to contribute more substantially." Benjamin v Koeppel, supra, at 556 (emphasis added) (internal quotation marks and citation omitted); see Reich v Wolf & Fuhrman, P.C., 36 AD3d 885 (2nd Dept. 2007); Witt v Cohen, 192 AD2d 528 (2nd Dept. 1993); Oberman v Reilly, 66 AD2d 686 (1st Dept. 1978). To be entitled to share in a fee pursuant to an agreement, the attorney seeking the fee must have performed "some work, labor or service." Reich v Wolf & Fuhrman, P.C., supra, at 886; see Graham v Corona Group Home, 302 AD2d 358 (2nd Dept. 2003); Witt v Cohen, supra. To constitute legal work that is compensable pursuant to a fee-sharing agreement, "[m]ore involvement is required of a referring attorney than merely having recommended the subsequent

lawyer." Alderman v Pan Am World Airways, 169 F3d 99, 103 (2nd Cir. 1999); see Nicholson v Nason & Cohen, 192 AD2d 473 (1st Dept. 1993); Calcagno v Aidman 20 Misc 3d 1132(A) (Sup Ct, Richmond County 2008) (Maltese, J.). Where there is no proof that a law firm actually contributed any substantive legal work in connection with a particular matter, courts have routinely declined to enforce contractual obligations to compensate such a firm notwithstanding the existence of a fee-sharing agreement. See Nicholson v Nason & Cohen, supra; see also Alderman v Pan Am World Airways; Nigro, D'Anna & Utrecht v Collard, 208 AD2d 911 (2nd Dept. 1994); Calcagno v Aidman, supra.

Here, all of the fee-sharing agreements submitted by the parties refer to the "[plaintiff's] attorneys and legal assistants' extensive legal work and ongoing communications with the client." This ubiquitous language suggests that, in accordance with the standards applicable to a referring attorney's share in fees generated by a referred case, the plaintiff was to provide at least some nominal amount of substantive legal work in order to receive 33 1/3% of the legal fees awarded to the defendants. The defendants, through Zachofsky's affidavit, established, prima facie, that the plaintiff performed absolutely no substantive work in connection with matters that were referred to the defendants subsequent to March 2012, and that the defendants performed all of the work.

They have thus shown that, notwithstanding the execution of fee-sharing agreements with respect to those matters, the plaintiff is not entitled to share in those fees. In opposition, the plaintiff has not provided any evidence of legal services performed in connection with matters that it referred to the defendants after March 2012, nor has it provided any evidence of any joint responsibility agreements. Hence, it failed to raise a triable issue of fact.

B. SUMMARY JUDGMENT DISMISSING UNJUST ENRICHMENT AND QUANTUM MERUIT CAUSES OF ACTION (SEQ 005)

> "The existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter. A 'quasi contract' only applies in the absence of an express agreement, and is not really a contract at all, but rather a legal obligation imposed in order to prevent a party's unjust enrichment."

Clark-Fitzpatrick, Inc. v Long Is. R.R. Co., 70 NY2d 382, 388 (1987) (citations omitted). Thus, where a plaintiff seeks to recover under an express agreement, no cause of action lies to recover for unjust enrichment. See JDF Realty, Inc. v Sartiano, 93 AD3d 410 (1st Dept. 2012). Similarly, where a party seeks to recover in quantum meruit for the same damages as sought for breach of an express contract, a quantum meruit claim is duplicative of the breach of contract claim (see Sebastian Holdings, Inc. v Deutsche Bank, AG, 108 AD3d 433 [1st Dept.

2013]), and does not provide a basis upon which to award judgment. Here, the defendants established their prima facie entitlement to judgment as a matter of law dismissing the unjust enrichment and quantum meruit causes of action, since there were express agreements governing the parties' business relationship and all of the matters referred to the defendants. In opposition to this showing, the plaintiff failed to raise a triable issue of fact, since its submissions did not negate the existence of written fee-sharing agreements covering all of the matters that they referred to the defendants.

C. MOTION TO STRIKE THE NOTE OF ISSUE (SEQ 004)

There is no basis for striking the note of issue here. The note of issue was filed on April 29, 2016. The parties appeared for a preliminary conference on June 2, 2014, more than 18 months after this action was commenced. By order dated January 14, 2015, the defendants, after having failed to comply with that preliminary conference order, and initially defaulting on the plaintiff's motion to compel them to make disclosure, were compelled to provide a bill of particulars as to their counterclaims and pay the costs of the motion.

A scheduled compliance conference was adjourned seven times over a seven-month period until May 7, 2015, and the compliance conference order issued thereafter was marked "final." Status

conferences were then conducted on September 3, 2015, and December 10, 2015. By order dated April 6, 2016, the parties stipulated to resolve the plaintiff's motion to compel the defendants to provide it with password-protected access to their on-line WCB account. The only discovery addressed by the stipulation related to information contained in the WCB's on-line computer database referable to WCB case files. The court ordered that "there shall be no further discovery other than that specified in the attached stipulation (see prior orders marked 'FINAL-NO EXTENSIONS 3x')."

The defendants' motion to strike the note of issue is premised on the plaintiff's alleged failure to respond to discovery demands dated May 21, 2015, that were served 11 months prior to the order restricting further discovery. Since the court had already precluded the defendants from seeking the discovery on which their motion to strike the note of issue is premised, the motion must be denied.

D. MOTION TO COMPEL DISCOVERY OR STRIKE THE DEFENDANTS' ANSWER (SEQ 006)

The plaintiff's failure, prior to the filing of the note of issue, to move pursuant to CPLR 3124 to compel discovery or pursuant to CPLR 3126 to strike the answer, is deemed a waiver of its contention that the defendants have failed to meet their disclosure obligations. See Flanagan v Wolff, 136 AD3d 739 (2nd

Dept. 2016); Marte v City of New York, 102 AD3d 557 (1st Dept. 2013); Rivera-Irby v City of New York, 71 AD3d 482 (1st Dept. 2010). Hence, the plaintiff's motion to compel additional discovery responses or strike the defendants' answer must be denied.

IV. CONCLUSION

In light of the foregoing, it is

ORDERED that the defendants' motion to vacate the note of issue (MOT. SEQ. 004) is denied; and it is further,

ORDERED that the defendants' motion for summary judgment dismissing the second cause of action, which was to recover for unjust enrichment, the third cause of action, which was to recover in quantum meruit, and so much of the first cause of action, which was to recover for breach of contract, as sought to recover fees referable to Workers' Compensation matters that were referred by the plaintiff to them after March 2012 (MOT. SEQ. 005) is granted; and it is further,

ORDERED that the plaintiff's motion to compel discovery or strike the defendants' answer (MOT. SEQ. 006) is denied.

This constitutes the Decision and Order of the court.

Dated: July 5,2017

J.S.C.
HON. NANCY M. BANNON