SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 63

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ALAN DUBROW,

Plaintiff,

- against -

HERMAN & BEININ, Attorneys at Law and
MARK D. HERMAN,

Defendants.

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Index No. 651605/2016
DECISION & ORDER

(Motion Seq. 001)

ELLEN M. COIN, J.:

In this legal fee dispute, defendants Herman & Beinin, Attorneys at Law and Mark D. Herman (Herman) move, pursuant to CPLR 3211 (a) (1), (5) and (7) and the "voluntary payment doctrine," to dismiss the complaint. Plaintiff Alan Dubrow (Dr. Dubrow) cross-moves for summary judgment in his favor.

This lawsuit arises out of defendants' legal representation of Dr. Dubrow, from August 2012 through October 2015, with respect to employment issues involving Beth Israel Medical Center (BIMC). On December 31, 2012, Dr. Dubrow's employment at BIMC ended. Dr. Dubrow claims that he was terminated days before his 64th birthday, but BIMC contended that he voluntarily resigned his position.

On March 1, 2013, defendants filed a lawsuit against BIMC and others in this court, entitled *Alan Dubrow v Beth Israel Medical Center, et al.*, Index No. 151877/2013 (the BIMC Action). The complaint in the BIMC Action alleged, among other claims, a cause of action for age discrimination under the New York City Human Rights Law. In

July 2014, BIMC filed a motion for summary judgment. Oral argument was held on November 6, 2014. In October 2015, Dr. Dubrow retained new counsel. On December 14, 2015, the BIMC Action was dismissed in its entirety by the Hon. Debra A. James. Justice James held that Dr. Dubrow had not established a prima facie case of employment discrimination based on age, even under the law's extremely low threshold, and that she concurred with the defendants "that there is no evidence that age played any role whatsoever in defendants' decision to terminate plaintiff" (Herman moving affirmation, Ex. E, Decision at 7). By letter dated December 23, 2015, plaintiff's new counsel requested an itemization of the legal fees that Dr. Dubrow paid to defendants.

This action was commenced on March 14, 2016. The complaint alleges that Dr. Dubrow paid defendants "a monetary retainer over $3000" in September 2012 (Cmplt., ¶ 7), and a total of $176,500 in legal fees. Dr. Dubrow paid this amount, despite the fact that defendants never provided him with a written retainer agreement, in violation of 22 NYCRR 1215; never provided the plaintiff with any billing statements for the hours that they worked; and never provided any explanation of how the amount collected was fair and reasonable for the legal services that were rendered. Dr. Dubrow sues to recover the $176,500 paid to defendants based on breach of contract, conversion and legal malpractice, and also seeks $500,000 in punitive damages.

In support of defendants' motion to dismiss the complaint, defendant Herman submits an affirmation,[1] by which he contends that "Plaintiff and I never discussed a

[1] Herman is a party to this lawsuit. Thus, he is not entitled to submit an affirmation in lieu of a sworn affidavit (CPLR 2106 [a]). However, since plaintiff's counsel has not objected to his

retainer agreement as such. He chose to reserve his rights in that regard, preferring to see how our legal representation and legal process unfolded. Dr. Dubrow believed the case would be settled" (Herman moving affirmation, ¶ 15). Defendant Herman further contends that:

> "fees were always paid in amount and at times convenient to [Dr. Dubrow]. Each fee was set, determined and on seventeen (17) separate occasions between September 2012 and June 2015, voluntarily paid to Defendants by Dr. Dubrow. He never objected to paying; never asked for a bill or an itemized statement"

(*id.*, ¶ 16).

The first cause of action alleges that the $176,500 Dr. Dubrow paid to defendants was a retainer for work performed in the BIMC Action, and that said retainer was to be used in the prosecution of the case and debited on an hourly basis of $300 per hour, as counsel's time was expended. It was further allegedly understood that all retainer funds not exhausted would be returned to Dr. Dubrow after the BIMC Action was resolved. Defendants move to dismiss this cause of action, contending that the first cause of action is factually insufficient to state a cause of action for breach of contract.

To maintain a cause of action for breach of an oral contract, plaintiff must show "the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages" (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). The complaint alleges that the parties had an oral agreement to provide

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moving or reply affirmations on this ground, they will be considered for this motion only. However, the court has not considered the numerous factual allegations found in the moving memorandum of law, but will consider the documentary exhibits attached thereto.

legal representation in connection with Dr. Dubrow's employment at BIMC, that defendants would bill for their time at the hourly rate of $300, that Dr. Dubrow paid defendants a total of $176,5000, and that, despite due demand, defendants have failed to account for the time billed on the BIMC Action and to refund any portion of the unexhausted retainer. The allegations are sufficient to plead the existence of an oral agreement.

The fact that defendants failed to provide Dr. Dubrow with a written retainer agreement in accordance with Section 1215.1 of the Professional Disciplinary Rules (22 NYCRR § 1215.1), is not, in and of itself, a ground for disgorgement or refund of already paid attorneys' fees (*Richard A. Kraslow, P.C. v LoGiudice*, 31 Misc 3d 141(A), 2011 NY Slip Op 50823[U] [App Term, 2d Dept, 9th & 10th Jud Dists 2011]; *Constantine Cannon LLP v Parnes*, 2010 NY Slip Op 31956[U], *16 [Sup Ct, NY County 2010]; *Lewin v Law Offs. of Godfrey G. Brown*, 8 Misc 3d 622, 625 [Civ Ct, Kings County 2005]; *cf. Roth Law Firm, PLLC v Sands,* 82 AD3d 675, 676 [1st Dept 2011] [attorney's noncompliance with letter of engagement rule did not preclude a recovery of fees based on services rendered, quantum meruit or account stated]). However, since defendants failed to properly document the fee agreement in writing, as required by 22 NYCRR 1215.1, they bear "the burden of establishing that the terms of the alleged fee arrangement were fair, fully understood, and agreed to" by Dr. Dubrow (*Seth Rubenstein, P.C. v Ganea*, 41 AD3d 54, 64 [2d Dept 2007]).

By this motion, defendants neither dispute the existence of an oral contract to perform legal services on Dr. Dubrow's behalf, nor explain the circumstances

surrounding the seventeen alleged voluntary payments by Dr. Dubrow or how these amounts were calculated. Dr. Dubrow may not have asked for an itemized bill from defendants at the time he was being asked to pay legal fees, but he certainly did so in December 2015. By court rule effective April 15, 2013, a client is "entitled to request and receive a written itemized bill from [the] attorney at reasonable intervals" (22 NYCRR § 1210.1). The court interprets this rule as requiring an attorney to provide a client with an itemized bill, even after the representation has been concluded and after payment from the client has been forthcoming. "[A]s a matter of public policy, courts pay particular attention to fee arrangements between attorneys and their clients" (*Jacobson v Sassower*, 66 NY2d 991, 993 [1985]). Even where it is the client who commences an action to recover a portion of attorney's fees that have already been paid, it is the attorney who must shoulder the burden of demonstrating the fair and reasonable value of the services rendered (*id.*).

Defendants maintain that the "voluntary payment doctrine" bars Dr. Dubrow's complaint. "That common-law doctrine bars recovery of payments voluntarily made with full knowledge of the facts, and in the absence of fraud or mistake of material fact or law" (*Dillon v U-A Columbia Cablevision of Westchester*, 100 NY2d 525, 526 [2003]). "The onus is on a party that receives what it perceives as an improper demand for money to 'take its position at the time of the demand, and litigate the issue before, rather than after, payment is made'" (*DRMAK Realty LLC v Progressive Credit Union*, 133 AD3d 401, 403 [1st Dept 2015], quoting *Gimbel Bros. v Brook Shopping Ctrs.*, 118 AD2d 532, 535 [2d Dept 1986]). In view of the fact that defendants admittedly failed to furnish Dr.

Dubrow with a written retainer agreement and never once sent him an itemized bill documenting the hours spent on the BMIC Action, Dr. Dubrow may very well establish that the seventeen payments he made, totaling $176,500, were not made "with full knowledge of the facts." However, such a factual ruling is completely inappropriate on a motion to dismiss pursuant to CPLR 3211(a).

The second cause of action alleges that, by their actions, defendants have converted $176,500 of Dr. Dubrow's money. This cause of action is dismissed as legally insufficient and wholly duplicative of the first cause of action alleging a breach of contract. "A conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession" (*Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 49–50 [2006]). A claim seeking repayment of money or a right to recover money damages cannot form the basis for a cause of action alleging conversion, since the essence of a conversion claim is the defendant's unauthorized dominion over the funds in question (*see Daub v Future Tech Enter., Inc.*, 65 AD3d 1004, 1006 [2d Dept 2009]).

The third cause of action is based on legal malpractice. The complaint alleges that Dr. Dubrow engaged the defendants based on their professional legal advice that he had a viable cause of action for age discrimination, and that defendants accepted a large retainer in the amount of $176,500 that was paid between September 2012 and June 2015. The complaint further alleges that Dr. Dubrow would never have retained defendants to commence the BIMC Action if he had been properly advised that such

action was "without merit and frivolous as decided by the Hon. Debra A. James" (Cmplt., ¶ 35); that defendants failed to exercise the commonly used standard of care by an ordinary member of the legal profession when explaining the course of action that the defendants chose to pursue; and that defendants failed to explain to Dr. Dubrow the nature of the risks involved in prosecuting such a cause of action.

Defendants move to dismiss this claim based on the expiration of the three-year statute of limitations for legal malpractice (CPLR 214 [6]) and for failure to state a cause of action.

An action to recover damages arising from an attorney's malpractice must be commenced within three years from accrual (*see* CPLR 214 [6]). A legal malpractice claim accrues "when all the facts necessary to the cause of action have occurred and an injured party can obtain relief in court" (*Ackerman v Price Waterhouse*, 84 NY2d 535, 541 [1994]). In most cases, this accrual time is measured from the day an actionable injury occurs, "even if the aggrieved party is then ignorant of the wrong or injury" (*id.*). However, a legal malpractice claim, which would otherwise be barred by the statute of limitations, is timely if the doctrine of continuous representation applies (*Glamm v Allen*, 57 NY2d 87, 94 [1982]; *Macaluso v Del Col*, 95 AD3d 959, 960 [2d Dept 2012]). The three-year statute of limitations is tolled for the period following the alleged malpractice until the attorney's continuing representation of the client on a particular matter is completed (*see Zorn v Gilbert*, 8 NY3d 933, 934 [2007]; *Shumsky v Eisenstein*, 96 NY2d 164, 167–168 [2001]; *Glamm v Allen*, 57 NY2d at 94).

Defendants maintain that any malpractice in recommending that Dr. Dubrow commence and prosecute an age discrimination lawsuit against BIMC accrued on the filing of the complaint in the BIMC Action, which occurred on March 1, 2013, more than three years before the filing of this lawsuit on March 21, 2016. However, the attorney-client relationship did not end until October 2015, and, thus, the third cause of action is timely.

"Recovery for professional malpractice against an attorney requires proof of three elements: '(1) the negligence of the attorney; (2) that the negligence was the proximate cause of the loss sustained; and (3) proof of actual damages'" (*Ulico Cas. Co. v Wilson, Elser, Moskowitz, Edelman & Dicker*, 56 AD3d 1, 10 [1st Dept 2008], quoting *Mendoza v Schlossman*, 87 AD2d 606, 607 [1st Dept 1982]). It requires that Dr. Dubrow establish that defendants "failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession" and that "'but for' the attorney's negligence" Dr. Dubrow would have prevailed in the matter or would have avoided damages (*AmBase Corp. v Davis Polk & Wardwell*, 8 NY3d 428, 434 [2007]; *see Barbara King Family Trust v Voluto Ventures LLC*, 46 AD3d 423, 424 [1st Dept 2007]).

Dr. Dubrow's legal malpractice claim is rooted in the assertion that defendants improperly advised him that he had a viable lawsuit against his former employer, BIMC, based on age discrimination. Defendants argue that the complaint fails to state a cause of action for legal malpractice, because it contains no factual allegations demonstrating that Herman's legal advice was below the standard of care, that he was careless in prosecuting

the BIMC Action, that he made any guarantees of success to Dr. Dubrow, or that the latter was not kept fully informed on all aspects of the litigation.

Contrary to the allegations of the complaint, Justice James did not rule that the complaint in the BIMC Action was "frivolous." Indeed, she complimented Herman at oral argument of the motion, stating on the record: "Mr. Herman, you've done a good job. I do believe I need to deliberate. The fact pattern is clearly complicated" (Herman moving affirmation, Ex. I at 13). Although Justice James found no evidence of age discrimination, it appears that Dr. Dubrow was replaced by a much younger physician. The complaint fails to allege facts demonstrating that the BIMC Action totally lacked merit and it is well settled that attorneys are not liable for errors of judgment that lead to an unsuccessful result (*Rosner v Paley*, 65 NY2d 736, 738 [1985]; *Rubinberg v Walker*, 252 AD2d 466, 467 [1st Dept 1998]; *see also Bernstein v Oppenheim & Co.*, 160 AD2d 428, 431 [1st Dept 1990] [post hoc dissatisfaction with strategic choices does not support a malpractice claim]).

Dr. Dubrow's present counsel argues that the only viable cause of action that Dr. Dubrow had against his former employer was retaliation, not age discrimination, for his intense criticisms of the way that the hospital conducted its business. "Under both the State and City Human Rights Laws, it is unlawful to retaliate against an employee for opposing discriminatory practices" (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 312 [2004], citing Executive Law § 296 [7]; Administrative Code of City of NY § 8–107 [7]). If this is Dr. Dubrow's theory of malpractice, then it is incumbent on him to plead

facts to establish a basis for this theory. Dismissal of the third cause of action is granted, but with leave to replead.

Dr. Dubrow's cross motion for summary judgment in his favor is denied.

CONCLUSION and ORDER

For the foregoing reasons, it is hereby

ORDERED that defendants' motion (seq. no. 001) to dismiss the complaint is granted only with respect to the second and third causes of action, which are dismissed; and it is further

ORDERED that plaintiff is granted leave to serve an amended complaint so as to replead the third cause of action within 20 days after the filing/service of this order with notice of entry; and it is further

ORDERED that plaintiff's cross motion for summary judgment is denied.

Dated: July 21, 2017

ENTER:

J.S.C.
HON. ELLEN M. COIN