SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 61

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KASOWITZ, BENSON, TORRES & FRIEDMAN LLP,

Plaintiff,

-against-

ASSA PROPERTIES LLC, SOLLY ASSA d/b/a ASSA PROPERTIES and ASSA REALTY LLC doing business under the assumed name of ASSA PROPERTIES,

Defendants.

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DECISION AND ORDER

Index No. 102777/2009

O. PETER SHERWOOD, J.:

Plaintiff Kasowitz, Benson, Torres & Friedman LLP ("plaintiff" or KBTF) moves for an order pursuant to CPLR § 3211 (a) (1), (6) and (7) dismissing for legal insufficiency defendants' two counterclaims asserted in its verified answer.[1] Defendants oppose the motion.

Factual Background

The facts as alleged in the complaint are as follows: Commencing on or about April 3, 2008, KBTF began performing legal services for defendants pursuant to a written retainer agreement between the parties. The amount alleged to be due and owing for the performance of such legal services is $271,234.02, which remains unpaid despite due demand for payment. Since the amount exceeds $50,000.00 there is no jurisdiction for arbitration pursuant to Part 137 of the Rules of the Chief Administrator of the Courts of the State of New York. On or about February 26, 2009, plaintiff commenced the instant action by filing the summons and complaint seeking to recover the sum of $271,234.02 upon theories of breach of contract, *quantum meruit* and an account stated.

In their amended answer, dated April 28, 2009, defendants assert a counterclaim sounding in legal malpractice, and seek to recover the sum of $124,700,000.00, plus attorney's fees, costs and

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[1]By Notice of Discontinuance dated April 20, 2009, defendants discontinued their second counterclaim for malicious prosecution/abuse of process. In addition, defendant's amended answer, which asserts only the counterclaim for legal malpractice, supersedes the original answer. Accordingly, this Court will address only the arguments concerning the dismissal of the first counterclaim alleging legal malpractice as stated in the amended answer.

disbursements incurred in this action.

Motion to Dismiss/Parties' Arguments

Plaintiff moves to dismiss the counterclaim on the ground that it is predicated upon allegations that are speculative, conclusory and/or flatly contradicted by documentary evidence. In support of the motion, plaintiff submits the affirmation of its attorney, Joshua A. Siegel, Esq., an associate of KBTF. Mr. Siegel contends that plaintiff's claim for legal fees stems from its representation of defendants in an action commenced in this Court titled *511 9th LLC v Credit Suisse USA, Inc. and Column Financial, Inc.* (N.Y. Co. Index No. 650225/2008) ("the underlying action") which involved a dispute over the contents of a term sheet with respect to financing for construction of a residential, hotel and retail project being developed by 511 9th LLC, a single-purpose entity formed by defendants for this specific transaction. Credit Suisse, USA, Inc., and its affiliate Column Financial, were the Lender on the transaction. The Lender purportedly agreed to provide a loan of up to $124.7 million. After defendants commenced construction, the Lender refused to provide financing because of the collapse of the syndicated debt market in the summer of 2007, and the loan never closed. Defendants declared the Lender in material breach of the agreement and retained KBTF to initiate an action against the Lender, which KBTF did after a retainer agreement was executed. The Lender moved to dismiss that action on the ground that the term sheet was a preliminary agreement and explicitly demonstrated the parties' intention not to be bound until certain conditions precedent were satisfied and such conditions never occurred. After the motion was fully submitted and argued orally before the Court, the Honorable Charles E. Ramos of this court by decision and order dated January 30, 2009, granted defendants' motion to dismiss on the grounds that: (1) the breach of contract cause of action could not survive as the term sheet by its own terms did not constitute a binding and enforceable agreement to fund the loan as conditions precedent to the agreement had not been satisfied; (2) the cause of action alleging breach of covenant of good faith and fair dealing was dismissed as applying the covenant of good faith and fair dealing would nullify the express terms of the term sheet and create independent contractual rights that were not bargained for by the parties; and (3) dismissal of the causes of action for breach of contract also required dismissal of the promissory and equitable estoppel, negligent and fraudulent misrepresentation and fraud causes of action (Siegel Aff. ¶ 16, Ex. "J"). At the time Justice Ramos

issued his decision dismissing the complaint, defendants owed KBTF a substantial balance for legal fees and had not paid any of KBTF's invoices. Although it asserted a retaining lien, KBTF consented to defendants' General Counsel, Richard J. Migliaccio, Esq., being substituted as counsel of record in that action for purposes of perfecting an appeal from the January 30, 2009 order (*id.* ¶ 17). The appeal is pending.

Plaintiff contends that defendants' legal malpractice counterclaim is based upon the simple fact that defendants were unsuccessful in the underlying action and is "nothing more than a transparent attempt to frustrate KBTF's effort to collect its unpaid legal fees" (Siegel Aff. ¶¶ 19, 21). Plaintiff contends that defendants have failed to allege facts as to how any negligence on the part of KBTF in its representation of them in the underlying action proximately caused them to suffer any damages. Defendants' claim of "bad advice" given by KBTF is based upon the mere fact of commencement of the underlying action in which KBTF sought to affirmatively obtain relief on defendants' behalf to overcome a perceived wrong in the Lender withdrawing financing. Although such action was unsuccessful, KBTF properly opposed the Lender's motion to dismiss the complaint. Defendants' allegations fail to state what evidence plaintiff should have offered in opposition to that motion that would have altered the ultimate result of dismissal.

Defendants submit an affirmation of their attorney, Richard Migliaccio, Esq., in opposition to plaintiff's motion to dismiss. Mr. Miggliaccio asserts that defendants' counterclaim is based upon: (1) egregious and actionable conduct in KBTF's billing practices by which it sent an "ambush" bill more than eight months after the retainer agreement was executed; (2) excessive billing practices by which KBTF sent inaccurate invoices which contained double billing and padding and were inaccurate, misleading and incomplete; (3) KBTF's "bad advice" in advising defendants to undertake an improbable/impossible action; and (4) KBTF's deception, failure to advise, or bad advice concerning the corporate officer's individual and personal liability. Defendants also contend that KBTF were negligent in the underlying action by: (1) failing to plead and prove defendants' entitlement to recover their $150,000.00 deposit; (2) failing to plead and prove the terms of the escrow; (3) misleading defendants into entering an illegal retainer agreement providing for KBTF to obtain a 150% contingency fee; (4) failing to challenge the statements of defendants in the underlying action regarding the terms of the loan and the effectiveness of the term sheet as a binding

agreement and making a harmful concession that there were "open issues/items" with regard to the term sheet and conditions of the loan in contravention of defendants' position on the motion that the material conditions precedent to the loan were satisfied; (5) failing to offer parole evidence which would have negated the Lender's position that there was no binding contract; (6) failing to research other Credit Suisse borrowers and contact them or their counsel in order to pursue joint or complimentary actions or class action and to share costs and expenses; and (7) failing to initiate meaningful settlement discussions prior to commencing suit or engaging in any settlement discussions once the action was commenced.

Defendants further argue that plaintiff failed to properly file its motion to dismiss because it is supported by plaintiff's own affirmation rather that by an affidavit. Defendants note that CPLR § 2106 provides that an attorney, who is not a party, may submit an affirmation which shall have the same force and effect as an affidavit. Defendants argue that since KBTF is a party it must be represented by independent counsel. They further argue that the fact the affirmation was submitted by an associate does not ameliorate this procedural error. Defendants ask the Court to refer its claims of plaintiff's violations of the Code of Professional Responsibility Disciplinary Rules regarding charging illegal and excessive fees and against an attorney appearing in an action in which such lawyer may be called as a witness as to matters that do not relate solely to the nature and extent of legal services rendered to the First Department Disciplinary Committee and to stay further proceedings until a disposition is reached.

In reply, plaintiff contends that defendants have failed to address its specific arguments as to the failure of their counterclaim for legal malpractice. Specifically, plaintiff again asserts that any arguments concerning the retainer agreement or improper billing practices do not support the legal malpractice counterclaim, but rather are simply affirmative defenses to the action to recover outstanding legal fees. Plaintiff maintains that many of defendants' assertions concerning plaintiff's alleged failures are belied by the verified complaint in the underlying action which asserted a breach of contract cause of action and included in such allegations the terms of the escrow documents and claimed as an element of damages the $150,000 deposit held in escrow. In addressing defendants' claim that the instant motion was improperly filed, plaintiff submits an affidavit of KBTF associate Joshua Siegel in place of the affirmation submitted in support of the motion. Plaintiff submits that

there is no violation of CPLR § 2106 as Mr. Siegel is not a party to this action, but , in any event, his affidavit is sufficient to cure any alleged violation of CPLR § 2106. Plaintiff's challenge defendants' assertion that it cannot proceed without retaining independent counsel as without any supporting legal authority and submit that the same holds true with respect to defendants' charges of disciplinary violations on plaintiff's part.

Discussion

1. Plaintiff's affirmation in Support

Although CPLR § 2106 authorizes an attorney to submit an affirmation in lieu of an affidavit, an attorney who is also a party to an action may not do so (*see, Slavenburg Corp. v Opus Apparel,* 53 NY2d 799, 801 [1981]; *LaRusso v Katz,* 30 AD3d 240, 243 [1st Dept 2006]; *Matter of Nazario v Ciafone,* 65 AD3d 1240 [2d Dept 2009]). Thus, defendants correctly note that the submission of the affirmation of Mr. Siegel, an associate of the plaintiff law firm which is a party to the action, is improper and should be disregarded as having no probative value (*see, LaRusso v Katz,* supra; *Samuel & Weininger v Belovin & Franzblau,* 5 AD3d 466 [2d Dept 2004]; *Pisacreta v Minniti,* 265 AD2d 540 [2d Dept 1999]). However, plaintiff has submitted in reply an affidavit of Mr. Siegel to which he annexes an affidavit in support of the motion in place and stead of his original affirmation. Under these circumstances, the court deems the plaintiff's motion to be properly supported.

2. Self-Representation by Kasowitz, Benson, Torres & Friedman, LLP

Defendants' contention that plaintiff must appear by independent counsel is devoid of merit. Under CPLR § 321 (a), corporations and voluntary associations are required to appear by licensed attorneys who the court and other parties can hold accountable (*see, In re Sharon B.,* 72 NY2d 394, 398 [1988]). However, a professional corporation or partnership of attorneys are not subject to this rule against appearing *pro se* in civil actions (*see, Gilberg v Lennon,* 212 AD2d 662, 664 [2d Dept 1995]; *Toren v Anderson, Kill & Olick, P.C.,* 185 Misc2d 23, 27 [Sup. Ct., N.Y. Co. 2000]). Accordingly, there is no prohibition against KBTF appearing *pro se* in this action.

3. Standard on a CPLR § 3211 (a) Motion to Dismiss

On a motion to dismiss a pleading pursuant to CPLR § 3211 (a) (7) for failure to state a cause of action, the Court's role is limited to determining whether the complaint states a cause of action (*see, Frank v Daimler-Chrysler Corp.,* 292 AD2d 118 [1st Dept 2002]). The standard on such

motion is not whether a party has artfully drafted the pleading, but whether deeming the pleading to allege whatever can be reasonably implied from its statements a cause of action can be sustained (*see, Stendig, Inc. v Thorn Rock Realty Co.*, 163 AD2d 46 [1st Dept 1990]). The court is not called upon to determine the truth of the allegations (*see, Campaign for Fiscal Equity v State*, 86 NY2d 307, 317 [1995]; *219 Broadway Corp. v Alexander's, Inc.*, 46 NY2d 506, 509 [1979]). Rather, the court is required to "afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference [citation omitted]. Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). Thus, generally, if the Court determines that the non-moving parties are entitled to relief on any reasonable view of the facts stated, the inquiry is complete and the counterclaim must be declared legally sufficient (*see, Campaign for Fiscal Equity, supra*; *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). However, bare legal conclusions, as well as factual claims, that are inherently incredible or flatly contradicted by documentary evidence are not presumed to be true (*see, McKenzie v Meridian Capital Group, LLC*, 35 AD3d 676 [1st Dept 2006]; *Gershon v Goldberg*, 30 AD3d 373 [1st Dept 2006]). Where the moving party offers evidentiary material, the court must determine whether the proponent of the pleading has a cause of action, not simply whether he, she or it has stated one (*see, Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *Kantrowitz & Goldhamer, P.C. v Geller*, 265 AD2d 529 [2d Dept 1999]).

4. <u>Legal Malpractice Counterclaim</u>

The basic rules for pleading a prima facie case in legal malpractice are well settled. An action for legal malpractice requires proof: (1) that plaintiff breached its duty to use the degree of care, skill and diligence commonly possessed by a member of the legal community, (2) such negligence was the proximate cause of the loss sustained, and (3) actual damages (*see, LaRusso v Katz*, 30 AD3d *supra* at 243). To establish proximate cause, the pleading must show that "but for" the attorney's negligence, the proponent of the legal malpractice claim would have prevailed in the matter at issue or would not have sustained any "ascertainable damages" (*see, Ulico Cas. Co. v Wilson, Elser, Moskowitz, Edelman & Dicker*, 56 AD3d 1 [1st Dept. 2008]); *Brooks v Lewin*, 21 AD3d 731 [1st Dept 2005], *lv denied* 6 NY3d 713 [2006]; *Tortura v Sullivan Papain Block McGrath*

& Cannavo, PC, 21 AD3d 1082 [2d Dept. 2005], *lv denied* 6 NY3d 701 [2005]). The failure to demonstrate proximate cause requires dismissal of a legal malpractice claim regardless of whether the attorney was negligent (*see, Leder v Spiegel*, 31 AD3d 266, 267-268 [1st Dept 2006], *affd* 9 NY3d 836 [2007]).

Here, accepting all of defendants' factual allegations as true and viewing such allegations in a light most favorable to the defendants, the defendants' counterclaim fails to allege sufficient material facts to give rise to a legal malpractice claim. There is no dispute that plaintiff represented defendants in the underlying action from on or about April 2008 until on or about March 2009. In undertaking such representation, KBTF had a duty on behalf of defendants to exercise the degree of care, skill and diligence commonly possessed by a member of the legal profession. Although defendants assert a veritable laundry list of plaintiff's failures in its representation in the underlying action, many of the claimed deficiencies are directed at the retainer agreement and plaintiff's billing practices. While such conduct may diminish or defeat plaintiff's claim for outstanding legal fees, it is not the proximate cause of any alleged damages or harm to defendants. Plaintiff offers evidentiary material to address the various acts of alleged negligence asserted by the defendants. Such material includes the complaint in the underlying action, counsel's affirmation and the memorandum of law in opposition to the defendants' motion to dismiss that action, a transcript of the oral argument of the motion before Justice Ramos and Justice Ramos' decision and order. Contrary to defendants' allegations, such evidentiary material shows that in the underlying action, plaintiff raised issues concerning the term sheet as a binding agreement, the elements of the escrow agreement, and the $150,000 deposit and vigorously argued that the parties had a binding agreement that defendants breached by withdrawing the loan and, alternatively, that defendants were estopped from withdrawing the loan offer. Since there was no evidence that the loan agreement or the term sheet contained ambiguities, parol evidence would not have been permissible to challenge such documents. Thus, defendants' allegation in this regard, as well as the remaining allegations of negligence, amount to nothing more than defendants' criticism of plaintiff's strategy which is not sufficient to support a claim of legal malpractice (*see, Darby & Darby v VSI Intl.*, 95 NY2d 308 [2000]; *Palazzolo v Herrick, Feinstein, LLP*, 298 AD2d 372 [2002]). Although the position espoused by plaintiff was ultimately unsuccessful, defendants' allegations do not, on their face,

establish that "but for" plaintiff's conduct they would have not have sustained some ascertainable damages. The damages which defendants seek to recover on the counterclaim are the amount of the aborted loan at issue in the underlying action. However, it cannot be said that any mishandling of the underlying action by plaintiff caused such loan to be withdrawn. Moreover, defendants cannot show that Justice Ramos' decision was compelled by plaintiff's alleged mistakes. Rather, the record shows that plaintiff selected a reasonable course of action in presenting both a cause of action for breach of contract and, alternatively, a claim for promissory estoppel based upon the course of conduct between the parties.

Accordingly, it is

ORDERED, that plaintiff's motion to dismiss defendants' counterclaim for legal malpractice is granted and the counterclaim asserted in the amended answer is hereby dismissed; and it is further

ORDERED, that the parties' attorneys are directed to appear for a preliminary conference in Part 61, 60 Centre Street, Room 341, on December 16, 2009, at 9:30 a.m.

This constitutes the decision and order of the court.

DATED: 11/9/09

ENTER,

O. PETER SHERWOOD
J.S.C.