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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 55

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BUCHANAN INGERSOLL & ROONEY, P.C.,
Plaintiff,

Index No. 106189/2010

-against-

DECISION & ORDER

PHILIP E. STIEG,
Defendant.

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JANE S. SOLOMON, J.:

Plaintiff Buchanan Ingersoll & Rooney, P.C. (Buchanan), a law firm, sues defendant Philip E. Stieg (Stieg) to recover legal fees owed for work performed on Stieg's behalf. Buchanan moves to dismiss four of the five counterclaims asserted in Stieg's answer, on the grounds of documentary evidence (CPLR 3211[a][1]) and failure to state a cause of action (CPLR 3211[a][7]).

FACTS

On April 5, 2007 Stieg retained Buchanan to represent him in a highly contested high cost divorce. Buchanan also arranged a life insurance trust for Stieg's two children. By October 2009, Buchanan billed $790,000 for work performed for Steig. Stieg paid approximately $665,000, but refuses to pay the remaining $123,522.78. This action followed asserting three causes of action for breach of the retainer agreement, account stated, and quantum meruit.

Stieg answered and asserted five counterclaims for

excessive fees, breach of contract, unjust enrichment, negligence, and a breach of Judiciary Law § 487. Stieg alleges that Buchanan failed to pursue settlement negotiations in favor of taking the case to trial, which forced him to hire a second attorney, Jacalyn F. Barnett (Barnett), to settle the case. He claims that Buchanan refused to cooperate with Barnett by refusing her access to certain documents and litigation support software, for which Steig was paying. Despite this, Barnett settled the matter. She charged Stieg $132,000. Stieg seeks a declaration that he does not owe Buchanan any further fees, and an order disgorging from Buchanan to him all fees paid above $265,000 (the amount his wife's divorce attorney charged her).

Buchanan moves to dismiss each counterclaim, except the breach of contract. It makes the following arguments. The counterclaims for excessive fees, unjust enrichment and negligence are duplicative of the breach of contract claim; the negligence claim also fails to assert duty or proximate cause; and the Juduciary Law claim fails to a allege a chronic and extreme pattern of delinquency and does not allege actionable misrepresentation. Stieg opposes the motion by arguing that the court possesses the power to review and supervise the charging of attorney fees; the unjust enrichment claim may be argued in the alternative; the negligence claim alleges different damages from the contract claim; and, he has sufficiently alleged a pattern of

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deceit.

DISCUSSION

On a motion to dismiss under CPLR 3211(a)(7)), the court "accept[s] the facts alleged as true and determine[s] simply whether the facts alleged fit within any cognizable legal theory" (*Morone v Morone*, 50 NY2d 481, 484 [1980] [citation omitted]). 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 (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314 [2002]).

Generally, a tort cause of action that is based the same underlying facts as a breach of contract cause of action will be dismissed as duplicative (*Duane Reade v. SL Green Operating Partnership, L.P.*, 30 AD3d 189, 190 [1st Dept., 2006]).

1. Excessive Fees

Stieg's counterclaim for excessive fees seeks identical damages to that from his breach of contract claim, and arises from identical facts. Nevertheless, he argues that the claim must stand in the alternative because the court might find the retainer agreement unenforceable and order recision of the contract, leaving him without recompense. This argument is unavailing first and foremost because he has not specifically sought recision in any of his counterclaims, and even had he done so, such a remedy, itself, necessarily includes restitution or

recoupment of the fees paid under the contract.

2. Unjust Enrichment

The existence of a valid and enforceable written contract precludes recovery for quasi contract for events arising from the same subject matter (*Aviv Construction, Inc. v. Antiquarium, Ltd.*, 259 AD2d 445, 446 [1st Dept., 1999]). Only where an express contract has been rescinded, is unenforceable or abrogated, may recovery be had under quasi contract (*Waldman v. Englishtown Sportswear, Ltd.*, 92 AD2d 833, 836 [1st Dept., 1986]).

It is undisputed that the retainer agreement exists. Buchanan's direct claims rest solely on the existence and validity of that contract. Moreover, it acknowledges the contract's validity (see, Reply Memorandum, p. 5). Similarly, despite Stieg's assertion, there has been no articulated dispute over the applicability to the retainer agreement of Rule 1.5 of the Professional Conduct Rules (attorneys shall not charge excessive fees) that would rise to the level of a "sharp dispute" between the parties over the scope and definition of the agreement (see, *ME Corp. v. Cohen Bros., L.L.C.*, 292 AD2d 183, 185 [1st Dept., 2002]) Accordingly, this counterclaim must be dismissed.

3. Negligence

A "simple breach of contract is not to be considered a

tort unless a legal duty independent of the contract itself has been violated" (*OP Solutions, Inc., v. Cromwell & Morning, L.L.P.*, 72 AD3d 622 [1st Dept., 2010]). Similarly, causes of action are duplicative where the same monetary relief is sought (*McMahan & Co., v. Bass*, 250 AD2d 460, 462 [1st Dept., 1998]).

The negligence counterclaim is predicated on the same set of facts as the breach of contract counterclaim. Both claims seek the same relief, to wit:

> [D]eclaring that [Stieg] does not owe [Buchanan] any additional fees or expenses, and disgorging from [Buchanan] to [Stieg] all fees paid above $265,000, and/or awarding [Stieg] damages in an amount to be proven at trial

(Answer, ¶ C and E)

Even assuming that the relief sought is somehow different, the counterclaim must still be dismissed. Stieg contends that he sufficiently sets forth that Buchanan was negligent when it drafted a life insurance trust for his children that was ultimately made invalid by a decision of the matrimonial court, who ordered that Stieg maintain a life insurance policy in his wife and children's names (Motion, Ex. 3 & 4). He argues that Buchanan "should have known that a divorce court would insist that Mr. Stieg have a life insurance policy with his wife and children as the beneficiaries rather than a life insurance trust with his children as the beneficiaries", and was negligent for not knowing so (Memorandum in opposition, p. 6). Buchanan responds that it cannot be negligent in its failure to anticipate

a discretionary court order (citing *Leder v. Spiegel*, 9 NY3d 836 [2007]).

Stieg's opposition to the dismissal of his negligence claim rests on the belief that there is a requirement in New York's divorce law that requires an ex-spouse to continue to be a beneficiary under a life insurance policy. He cites to no such authority. Accordingly, the fourth counterclaim should be dismissed.

4. Judiciary Law § 487

Judiciary Law § 487 provides:

> An attorney or counselor who:
> 1. Is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party; or,
> 2. Wilfully delays his client's suit with a view to his own gain; or, wilfully receives any money or allowance for or on account of any money which he has not laid out, or becomes answerable for,
>
> Is guilty of a misdemeanor, and in addition to the punishment prescribed therefor by the penal law, he forfeits to the party injured treble damages, to be recovered in a civil action.

Several of Stieg's allegations address events that occurred prior to the pendency of a judicial proceeding. These are irrelevant to a section 487 claim (*Jacobs v. Kay*, 50 AD3d 526, 527 [1st Dept, 2008]). However, his allegation that Buchanan willfully delayed the divorce action by failing to pursue settlement negotiations in favor of preparing for trial (and needlessly increasing billed hours), necessitating the

hiring of a second attorney to settle the matter, if true, establishes grounds for a claim. Buchanan's argument that Stieg has not established "a chronic and extreme pattern of legal delinquency" (*Solow Management Corp. v. Seltzer*, 18 AD3d 399 [1st Dept. 2005]), is a fact based issue unsuited to a motion to dismiss. Accordingly, this counterclaim survives dismissal.

CONCLUSION

In accordance with the foregoing, it hereby is

ORDERED that the motion to dismiss the counterclaims is granted to the extent that the first, third and fourth counterclaims are dismissed, and is otherwise denied; and it further is

ORDERED that Plaintiff is directed to serve a reply to the remaining counterclaims within twenty (20) days after service of a copy of this order with notice of entry; and it further is

ORDERED that counsel shall appear for a preliminary conference in Part 55, 60 Centre Street, Room 432, New York, NY, on December 13, 2010 at 2 PM.

Dated: 11-4-10

ENTER

J.S.C.
JANE S. SOLOMON