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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: LOUIS B. YORK J.S.C. Justice PART 2

Pavia & Harcourt

- v -

Aguirre, Sanders & Dempsey

INDEX NO. 103931/11

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

FILED

JAN 03 2012

NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 12/28/11

LOUIS B. YORK J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2

----------X

PAVIA & HARCOURT LLP,

Plaintiff,

Index No. 103931/11

-against-

DECISION/ORDER

SQUIRE SANDERS & DEMPSEY LLP,

Defendant.

----------X

LOUIS B. YORK, J.S.C.:

Plaintiff Pavia & Harcourt LLP ("Pavia") instituted this action for legal fees allegedly owed to it by defendant Squire Sanders & Dempsey LLP ("Squire Sanders"). Pavia's claim stems from an underlying action which Fendi Adele S.R.L., Fendi S.R.L., and Fendi North America, Inc. (collectively "Fendi") brought against Burlington Coat Factory Warehouse Corp. ("Burlington") for violation of a 1987 consent injunction which prohibited Burlington from selling any Fendi-branded products without Fendi's written consent ("the injunction"). Pavia represented Fendi from early 2005 through the end of June 2007.

During its representation of Fendi, Pavia performed legal services in connection with Pavia's dispute against Burlington. In October 2005, Pavia wrote a cease and desist letter on behalf of Fendi to notify Burlington that it was in violation of the injunction. Subsequently, on January 5, 2006, Pavia filed a complaint against Burlington, seeking damages for civil contempt of the injunction.

Pavia initially performed this work pursuant to a retainer agreement; in the agreement, Fendi stated it would pay Pavia for its time according to its hourly rates. Pavia and Fendi subsequently entered into a new billing arrangement under which Fendi agreed to pay Pavia for its standard billable rates for only 50% of the time it billed up to $300,000; but in addition, Fendi would pay Pavia 35% of any recovery obtained by Fendi, minus any amounts Fendi already had paid to Pavia. The agreement also stated that if Pavia was replaced as counsel, Fendi would pay Pavia a full 35% of any recovery in the Burlington lawsuit, and that Fendi would not reduce this amount by any previous payments to Pavia.

On July 1, 2007, Fendi replaced Pavia with Squire Sanders. Pavia contends that Fendi replaced it because four of the attorneys who worked on the Fendi-Burlington litigation left Pavia and joined Squire Sanders. It also states that during the course of the litigation Squire Sanders performed extensive work on the Burlington matter. Among other things, it obtained broad discovery, opposed several motions, and prepared and filed a motion for partial summary judgment to find Burlington in willful contempt of the 1987 injunction. It claims that this work constituted at least over 50% of the work done in connection with the case.

Moreover, Squire Sanders claims that the most intensive part of the litigation process began when it substituted for Pavia. Squire Sanders states that it had to file supplementary papers regarding the partial summary judgment Pavia had filed. It also prepared a summary of Fendi's costs associated with the proceeding and opposed Burlington's motion for reconsideration. In December of 2007, when Squire Sanders

determined that Burlington again was selling Fendi products, the firm brought further proceedings against Burlington on Fendi's behalf. According to Squire Sanders this took many hours of both attorney and expert time. The time records on the Burlington litigation show that Pavia billed 1,924 hours between April 1, 2006 and June 30, 2007, and Squire Sanders recorded 7,149 hours between July 1, 2007 and June 30, 2010.

In December 2010, the Fendi-Burlington litigation ended, and Fendi received $10 million in full settlement of all claims. Pavia demanded that Squire Sanders pay to Pavia its proportionate share of the contingency fee, but allegedly Squire Sanders refused. Pavia alleges that it is entitled to over 50% of the fee, or an amount no less than $1.6 million. When the parties could not resolve their fee dispute, Pavia filed this action for legal fees.

Currently before the court is Squire Sanders' motion to strike paragraphs 1, 2, 10, 11, 17, 36, 38, 45-47, 50, 52, and 55-60 of the complaint pursuant to CPLR §3024(b), which governs scandalous or prejudicial matters unnecessarily inserted into a pleading. In addtion, the Court has before it Pavia's cross motion for sanctions pursuant to NYCRR § 130-1.1. For the reasons below, the Court denies both the motion and the cross motion.

First, the Court considers the motion to strike portions of the complaint. To prevail, Squire Sanders must show that the challenged material is scandalous or prejudicial. Sandcham Realty Corp., et al. v. Taub, et. al., 266 A.D.2d 117, 117, 698 N.Y.S.2d 146, 146 (1st Dept. 1999). The allegation must do more than raise a negative inference about the moving party but must rise to a level deemed scandalous and

prejudicial in the context of contemporary society. See Rice v. St. Luke's Roosevelt Hosp. Center, 293 A.D.2d 258, 259 739 N.Y.S.2d 384, 385-86 (1st Dept. 2002)(allegation that defendant's actions may constitute a public harm insufficient); compare to Baychester Shopping Center, Inc. v. Llorente, 175 Misc. 2d 739, 669 N.Y.S.2d 460 (Sup. Ct. N.Y. County 1997)(in action seeking declaration that defendant had right to single room occupancy unit in which plaintiff resided, defendant's reference to article listing plaintiff as one of 10 worst landlords in New York City would be stricken, as article did not mention defendant and most or all of the actions described predated plaintiff's tenancy in the building). In addition to showing the material is scandalous or prejudicial, to prevail Squire Sanders also must show that the material was inserted into the complaint unnecessarily. Even if a statement is prejudicial or scandalous, a court will not strike it if it has any relevance to the claim. New York City Health and Hosp. Corp. v. St. Barnabus Community Health Plan, 22 A.D.3d 391, 391, 802 N.Y.S.2d 363, 363 (1st Dept. 2007). This applies even if the statement is unfounded. Kaufman & Kaufman v. Hoff, 213 A.D.2d 197, 199, 624 N.Y.S.2d 107, 108 (1st Dept. 1995). Furthermore, while a statement might be irrelevant to the cause of action, the court will not strike it from a pleading unless it is of a scandalous or prejudicial nature. See Card v. Budini, 29 A.D.2d 35, 38, 285 N.Y.S.2d 734, 737 (3rd Dept. 1967).

In its affirmation, Squire Sanders sets forth several arguments as to why particular paragraphs should be stricken. First, it states that for a proper complaint Pavia simply had to set forth the "transactions" or occurrences" it intends to prove as well as the "material elements" of the cause of action. By going beyond that, Pavia

allegedly violated the CPLR. Second, it states that Pavia unnecessarily inserted "highly charged and counterfactual rhetoric" regarding the process for determining the percentage of the contingency fee to which it is entitled. (Squire Sanders' Aff. In Support, ¶ 3). According to Squire Sanders, the billing records provide the sole basis for determining the matter at hand, and based on the records Pavia is entitled to $526,854.89 for its work rather than the amount it claims. It states that it offered to pay Pavia this sum, but that Pavia rejected this share of the fee. Third, Squire Sanders contends that the insertion of background information concerning Fendi's decision to change counsel is unnecessary to the determination of the claim for legal fees. Squire Sanders argues that it should not be forced to respond to these collateral issues in its answer, as it would unnecessarily complicate this straightforward litigation.

After careful consideration, the Court rejects these arguments. As Pavia states, Squire Sanders has not satisfied its burden of showing that the nineteen paragraphs should be stricken. First, Paragraphs 1 and 2 of the complaint set forth background information with respect to Pavia's action for legal fees. In paragraph 1, Pavia states that "Squire Sanders has kept the entire contingency fee for itself, and has refused to pay Pavia & Harcourt its fair share of the fee" (Complaint, ¶ 1). Squire Sanders contends that this paragraph should be stricken because Squire Sanders repeatedly offered Pavia sums equal to or greater than its proportionate share of the work. However, Pavia claims that Squire Sanders did not allot the *appropriate* amount of the contingency fee, and disputes Squire Sanders' method of calculation. Accordingly, the statement is relevant to the dispute. Moreover, Squire Sanders does not state why

these paragraphs are scandalous or prejudicial.

Second, Squire Sanders has pointed to nothing scandalous, prejudicial, or irrelevant in paragraph 10. This paragraph states that Fendi switched counsel because the three attorneys who had previously worked on the contempt litigation left Pavia and joined Squire Sanders. This paragraph contends that Fendi did not find Pavia's performance unsatisfactory although it discharged it. Squire Sanders is not harmed by the allegation, which potentially is relevant to the dispute over the respective fees of the parties. Moreover, the paragraph nothing to scandalize or prejudice Squire Sanders.

Squire Sanders also seeks to strike paragraphs 11 and 36, which elaborate upon the contingency fee agreement between Pavia and Fendi. While Squire Sanders alleges that these paragraphs are untrue and irrelevant, the terms of the agreement do not constitute prejudicial or scandalous material. Instead, and significantly, the terms of the contingency fee agreement is a critical issue in dispute in this action. Pavia has every right to frame the arguments in its complaint in a manner which supports its position with respect to this dispute, and which generally support its theory of the case. Squire Sanders cannot use CPLR § 3042 to abridge this right. Similarly, paragraphs 17 and 52, in which Pavia contends that it is entitled to over 50% of the contingency fee, are relevant to the dispute even if, as Squire Sanders contends, the statements turn out to be untrue or incorrect.

Paragraph 47, which Squire Sanders also challenges, alleges that Squire Sanders reduced its fee to $3 million, rather than accept the $3.2 million to which it was entitled. Squire Sanders states this is prejudicial because it is based on "rank

speculation" and risks breaching the attorney-client privilege between Squire Sanders and Fendi. However, Pavia counters that this statement is relevant because it is entitled to a percentage of the fee Squire Sanders was *entitled* to receive, rather than the reduced amount it accepted. Paragraph 47 therefore is relevant to the dispute at hand.

Next, Squire Sanders seeks to strike paragraphs 55-60. Squire Sanders states that these paragraphs seek recovery on a theory of unjust enrichment and are therefore unnecessary. However, as Squire Sanders does not indicate why these paragraphs are scandalous or prejudicial, it has not satisfied its burden. See Gibson v. Campbell, Index No. 11057/06 (Sup. Ct. N.Y. County Aug. 13, 2007)(avail at 2007 WL 2316477, at *4; 15 Misc. 3d 1123(A); 847 N.Y.S.2d 901 (table)).

Finally, the court denies the portion of Squire Sanders' motion that seeks to strike paragraphs 38, 45, 46, 50, 41, and 20-28. With respect to paragraphs 38, 45, 46, and 50 Squire Sanders does not indicate in either its affirmation or in its reply affirmation why these paragraphs should be stricken. Therefore, it has not satisfied its burden of proof. See id. In addition, the Court notes that though Squire Sanders argues in its affirmation in support that paragraphs 41 and 20-28 should be stricken, it did not seek to strike these paragraphs in its notice of motion.

The court now considers Pavia's cross motion for sanctions pursuant to 22 NYCRR §130-1.1. Under 22 NYCRR § 130-1.1, conduct is sanctionable if it is "completely without merit in law and cannot be supported by a reasonable argument for an extension, modification, or reversal of existing law." 22 NYCRR §130-1.1. Sanctions should not be imposed where a party "asserts colorable, albeit unpersuasive,

arguments in good faith and without an intent to harass or injure." Yenom Corp. v. 155 Wooster Street, Inc., 33 A.D.3d 67, 70, 818 N.Y.S.2d 210, 213 (1st Dept. 2006). Moreover, the court has "wide latitude" in determining appropriate sanctions. Pickens v. Castro, 55 A.D.3d 443, 444, 867 N.Y.S.2d 47, 48 (1st Dept. 2008). In this case, Pavia has failed to show convincingly that Squire Sanders made its motion in bad faith. Therefore, although this court has found Squire Sanders' arguments unconvincing, in its discretion it does not impose sanctions. Accordingly, Pavia's cross motion for sanctions is denied.

Based on the above, it is

ORDERED that Squire Sanders' motion to strike certain paragraph's of Pavia's complaint is denied and it is further

ORDERED that Pavia's cross motion for sanctions is denied.

ENTER:

FILED

JAN 03 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 12/23/11

Louis B. York, J.S.C.

LOUIS B. YORK
J.S.C.