[*1] SCANNED ON 3/22/2013

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. EILEEN A. RAKOWER PART 15

Justice

Index Number : 603665/2009
STROUGO & BLUM, ESQS.
vs.
ZALMAN & SCHNURMAN, ESQS.
SEQUENCE NUMBER : 007
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1, 2

Answering Affidavits — Exhibits _____ | No(s). 3

Replying Affidavits _____ | No(s). 4, 5

Upon the foregoing papers, it is ordered that this motion is

FILED
MAR 22 2013
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 3/15/13

HON. EILEEN A. RAKOWER, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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STROUGO & BLUM, ESQS.,

Plaintiff,

Index No.603665/09

Mot. Seq.: 007

- against -

DECISION/ORDER

ZALMAN & SCHNURMAN, ESQS., 12-14 EAST 64TH OWNERS CORP.,GOODMAN MANAGEMENT CO., INC. and MONTROSE ADJUSTMENT CO.,

Defendants.

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HON. EILEEN A. RAKOWER, J.S.C.

Plaintiff Strougo & Blum, Esqs. ("Plaintiff"), bring this action for tortious interference with contract and civil conspiracy for the alleged acts of defendants arising out of the signing of a General Release by non-party, Verina Hixon, on December 7, 2006. Defendant Zalman & Schnurman, Esqs. ("Defendant") now moves for an Order, pursuant to CPLR 3212, for summary judgment in their favor. Plaintiff's claims against defendants 12-14 East 64th Street Owners Corp., Goodman Management Co., Inc., and Montrose Adjustment Co. were previously dismissed in this matter. By Order dated August 3, 2010, this action was consolidated with the action entitled *Verina Hixon v. Schnurman and Benjamin Zalman*, Index No. 117061/09, an action in which Ms. Hixon alleges that legal malpractice as against Defendant. .

On August 23, 2002, Ms. Hixon retained plaintiff, a law firm, to prosecute her

claim against the 12-14, the building owner, and Goodman, Inc., the manager,[1] for damages to her property that allegedly occurred when her co-op apartment, located at 12-14 East 64th Street in the County and State of New York, was flooded with raw sewage. The retainer agreement provided that the legal fees would be payable on a contingency basis, and would consist of 1/3 of any recovery in the action. Plaintiff commenced an action and served a summons and complaint demanding $400,000, plus punitive damages ("2002 Action"). Plaintiff served the summons and complaint on or about October 3, 2002. The 2002 Hixon Action was transferred to Civil Court pursuant to CPLR 325.

On or about January 11, 2004, while the 2002 Hixon Action was pending, Ms. Hixon retained Defendant to commence a separate negligence action for damages that she sustained as a result of pipe burst in the apartment immediately above Ms. Hixon's that was being occupied by Charles and Ruth Adams, causing Ms. Hixon's premises to sustain water damage ("2004 Hixon Action"). The 2004 Action was commenced as against 12-14, Goodman, and Charles and Ruth Adams.

Defendant states that, in or about December 2006, a mediation was held in the 2004 Hixon Action before JAMS, the purpose of which was to resolve the claims Ms. Hixon asserted in the 2004 Hixon Action.

As a result of the mediation, a settlement agreement was reached, whereby Ms. Hixon agreed to settle her action for payment in the amount of $1,450,000. On December 7, 2006, Ms. Hixon executed a General Release in the 2004 Hixon Action, which released 12-14, Goodman, Inc., and the Adams' from:

> all actions, causes of action, suits . . . specifically with respect to damages that RELEASOR sustained which were the subject of a lawsuit pending in the Supreme Court . . .

The defendants in the 2002 Hixon Action thereafter moved to amend their answer to add the release as an affirmative defense, and to dismiss the 2002 Hixon Action on *collateral estoppel* and *res judicata* grounds. By Order entered August 12, 2009, Judge Jose A. Padilla, Jr. granted all aspects of the motion and dismissed as to

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[1]The suit also named the plumber and the architect, who were employed by the building owner.

all defendants.[2] Thereafter, plaintiff brought the instant action against Defendant alleging that Defendant fraudulently induced Ms. Hixon to sign the General Release by reassuring her that it would not effect the 2002 Hixon Action. As such, plaintiff alleges, Defendant tortiously interfered with the retainer agreement between plaintiff and Ms. Hixon, and alleges civil conspiracy with the former co-defendants by way of interference with plaintiff's retainer agreement.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. *(Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*,145 A.D.2d 249, 251-52 [1st Dept. 1989]).

"Tortious interference with contract requires the existence of a valid contract between the plaintiff and a third party, defendant's knowledge of that contract, defendant's intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom" (*Havana Cent. NY2 LLC v. Lunney's Pub, Inc.*, 2007 NY Slip Op 10509, *5 [1st Dept. 2007], *citing Lama Holding Co. v Smith Barney*, 88 N.Y.2d 413, 424 [1996]).

A retainer agreement between an attorney and a client is terminable at will because the client has an "absolute right . . . to terminate the attorney client relationship at any time without cause . . ." *(Demov, Morris, Levin & Shein v. Glantz*, 53 NY2d 553,556-557[1981]). When alleging tortious interference with a contract that is terminable at will, plaintiff must also show that the alleged interference was achieved through "wrongful means," such as fraudulent misrepresentations (see *Guard-Life Corporation v. S. Parker Hardware Manufacturing Corp., 50 NY2d 183).*

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[2]The 2002 Hixon action was dismissed as to the plumber and architect on statute of limitation grounds.

Civil conspiracy is not recognized in New York as an independent tort, but may be viable if connected with other actionable torts. (see *Alexander & Alexander of New York, Inc. v. Fritzen*, 68 NY2d 968[1986]).

Defendant has made a prima facie showing of entitlement of summary judgment. Defendant submits the affidavit of Benjamin Zalman. Mr. Zalman states that the 2006 General Release which Ms. Hixon executed expressly states that the claims being released are those with respect to the 2004 Hixon Action, not the 2002 Hixon Action. Mr. Zalman states that at all times Defendant represented to Ms. Hixon that her execution of the Release would only serve to release the defendants from the 2004 Hixon Action and that at no time did Defendant intend to defraud Defendant or interfere with the retainer agreement.

In opposition, Plaintiff fails to raise a triable issue of fact. Plaintiff submits only the affirmation of Robert I. Strougo, which annexes previous orders of the Court on former defendants' motions to dismiss, a copy of the 2006 General Release, Judge Padilla's 2009 decision dismissing the 2002 Hixon Action, and contends without any merit that these orders preclude summary judgment. Nor does Plaintiff contend that Defendant's motion is premature or that Plaintiff needs to conduct discovery in order to allow it to obtain facts to oppose Defendant's motion. Rather, Plaintiff requests that the Court "instead grant Plaintiff summary judgment on liability and leave the question of the amount of damages for immediate trial." Plaintiff does not, however, submit a cross motion for the same.

In the instant action, Plaintiff alleges that Defendant tortuously interfered with Plaintiff' retainer agreement with Ms. Hixon by inducing Ms. Hixon to sign the 2006 General Release in the 2004 Hixon Action and assuring her that it would have no effect on the 2002 Hixon Action. However, the execution of the 2006 General Release did not result in a termination of Plaintiff's representation of Ms. Hixon. Indeed, the 2002 Hixon Action continued until Judge Padilla issued his August 12, 2009 Order and Decision. In that Decision, the Court awarded summary judgment to defendant/plumbing company Alan E. Rosenberg, holding that certain claims were time barred and that Rosenberg "had established a prima facie case that it did not create the flooding condition in the plaintiff's unit." Similarly, the Court found that defendant/architect Francois Bollack Architect had "established prima facie entitlement to dismissal of all claims and cross claims against it on the basis that it did not cause nor contribute to any flooding condition leading to the alleged property

damage in plaintiff's unit." The Court found that Plaintiff had failed to come forward with proof, in admissible form, to raise any triable issues of fact. As for defendants 12-14 64th Street Owners Corp. and Goodman Management Co., Inc., the Court held that 2006 General Release, executed by Ms. Hixon, released these defendants from any and all claims, and dismissed the action as against them. Notably, there was no appeal of Judge Padilla's decision.

Thus, the record demonstrates that the 2002 Hixon Action proceeded until completion and although that outcome was not favorable to Plaintiff because Plaintiff did not recover under the contingency agreement, there is no evidence or even claim by Plaintiff that Ms. Hixon breached that agreement. Accordingly, absent a breach of any underlying contract, Plaintiff's claim of tortious interference as against Defendant fails as a matter of law. Furthermore, assuming that Plaintiff could establish a breach of contract, Plaintiff has come forward with no evidence in admissible form of any wrongful conduct on Defendant's part.

Plaintiff's civil conspiracy claim, which is predicated on the alleged tortious interference with contract claim, therefore also fails as a matter of law.

Wherefore, it is hereby

ORDERED that defendant Zalman & Schnurman, Esqs.'s motion for summary judgment is granted and Plaintiff's complaint as against Defendant Zalman & Schnurman, Esqs. shall be dismissed in its entirety; and it is further

ORDERED that the Clerk enter judgment accordingly; and it is further

ORDERED that the remainder of the consolidated action shall continue.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

DATED: March 15, 2013

EILEEN A. RAKOWER, J.S.C.