Moche v Srour
2013 NY Slip Op 32740(U)
October 26, 2013
Sup Ct, New York County
Docket Number: 157764/2012
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. **EILEEN A. RAKOWER**   PART 15
                           Justice

CHARLES M. MOCHE and EZRA S. MOCHE,

                    Plaintiffs,

- v -

DEBORAH R. SROUR, ESQ., COZ, PADMORE,
SKOLNICK & SHAKARCHY, LLP, PATROL
H.Y. SECURITY (2007) LTD and CHAIM
SHARVIT,

                    Defendants.

INDEX NO.	157764/2012
MOTION DATE	_____
MOTION SEQ. NO.	_____
MOTION CAL. NO.	<u>2</u>

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1, 2</u>
Answer — Affidavits — Exhibits _____	<u>3</u>
Replying Affidavits _____	4

This action arises from the retention of a private investigator on Plaintiffs' behalf by their attorney. In this action, plaintiffs Charles M. Moche and Ezra S. Moche (collectively, "Plaintiffs"), residents of New Jersey, contend they "were individuals who were victims of a real estate fraud scheme which caused them to lose millions of dollars." Plaintiffs allege that they thereafter "retained Deborah R. Srour, Esq. Srour and the law firm of Cox, Padmore Skolnick & Skarachy LLC to help regain the money they had lost." Plaintiffs further allege that Srour thereafter "took undue advantage of plaintiffs' desperate situation because of their significant losses and entered into an agreement with defendant Patrol H.Y. Security (2007) Ltd. (Patrol) and Chaim Sharvit (Sharvit) purportedly obligating plaintiff's [sic] to pay Patrol $350,00 caused plaintiff's [sic] to give $225,000 to Patrol."

Plaintiffs allege, "Sharvit provided almost no services or work product to plaintiffs yet retained plaintiffs' $225,000.00 and demanded the additional $125,000 purportedly due under Srour's agreement." Plaintiffs further allege that "[u]pon information and belief, Sharvit shared those funds with Srour and/or Cox Padmore

while Srour in fact during said period in question was purportedly representing plaintiff and had a fiduciary obligation to plaintiff."

Annexed as Exhibit A to the Amended Complaint is an unsigned copy of the Engagement Letter, dated August 2, 2010, addressed to Srour from Chaim Sharvit, "Partner" of Patrol, which provides, in relevant part:

> This letter confirms the engagement of Patrol H.Y. Security (2007) Ltd. ("Patrol") on behalf of your Client ("Client") to provide investigative services to you in a Debt Recovery matter under the terms set forth in this letter. Specifically, Patrol will conduct the investigation, identify assets and funds enough to recover the principal plus interest of the underlying loan made by the Client together with the expenses and fees incurred with matter. Hereinafter when referring to "you" it shall be you and your client.

> Our investigation will be limited to the above-referenced matter. In order to commence our work, we require payment in th sum of $350,000 to be applied against our work and expenses (the "Payment"). Half of the Payment, or $175,000 shall be paid before work is commenced on behalf of the Client. Within 45 days from the date of our first invoice you will receive a second invoice for the remaining balance of the Payment of $175,000. Under no circumstances, we will (sic) charge over $350,000 for this matter, including expenses. In the event we are successful in identifying and recovering for the amounts due to your Client, then it is agreed that we will be paid 25% of any amounts recovered from the principal of the debt only.

> * * *

> The agreement shall be deemed made in and governed and construed solely and exclusively in accordance with the laws of the State of Israel, without regard to any conflicts of law. Each party hereby submits to the sole and exclusive jurisdiction of the state courts of Israel.

Defendants Srour and Cox Padmore (collectively, "Defendants") move for an Order, pursuant to CPLR §3211(a)(7), dismissing the Amended Complaint.

The Amended Complaint alleges fraud, unjust enrichment, breach of fiduciary

duty, legal malpractice, fraud in the inducement, consumer fraud act of NJ, and rescission.

CPLR §3211 provides, in relevant part:

> (a) a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
>
> (7) the pleading fails to state a cause of action.

In determining whether dismissal is warranted for failure to state a cause of action, the court must "accept the facts alleged as true ... and determine simply whether the facts alleged fit within any cognizable legal theory." (*People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 AD2d 91[1st Dept. 2003]) (internal citations omitted) (*see* CPLR §3211[a][7]).

The first cause of action of the Amended Complaint is for fraud. "The elements of a cause of action for fraud are (1) the false representation or concealment of a material existing fact, (2) scienter, (3) deception, (4) reliance, and (5) injury." *House of Spices (India), Inc. v SMJ Servs., Inc.*, 2011 N.Y. Misc. LEXIS 1922 (N.Y. Misc. 2011). "[E]ach of these essential elements must be supported by factual allegations sufficient to satisfy CPLR 3016(b), which requires, in the case of a cause of action based on fraud, that 'the circumstances constituting the wrong shall be stated in detail.'" (*Id.*)(citations omitted).

The fifth cause of action of the Amended Complaint is for fraud in the inducement. The elements of fraudulent inducement are: (1) a false representation of material fact; (2) known by the utterer to be untrue; (3) made with the intention of inducing reliance and forbearance from further inquiry; (4) that is justifiably relied upon; and (5) results in damages. (*See, MBIA Ins. Corp. v. Credit Suisse Securities USA LLC*, 32 Misc. 3d 758 [Sup Ct NY Cty 2011]).

Here, accepting the allegations as true that Srour "at the time of entering into the agreement either acted as Patrol's attorney and/or partner, and failed to disclose same to plaintiffs," "Sour also concealed that under the agreement . . ., Sharvit was not obligated to do anything," and "Upon information and belief, Sharvit shared those funds with Srour and/or Cox Padmore ...," Plaintiffs have stated claims for fraud and fraud in the inducement as against Srour and Cox Padmore.

The second cause of action of the Amended Complaint is for unjust enrichment. "[T]o prevail on a claim of unjust enrichment, "a party must show that (1) the other party was enriched, (2) at that party's expense, and (3) that 'it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered.'" (*Cruz v. McAneney*, 31 A.D.3d 54, 59 [2006]). "The existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter." *Clark- Fitzpatrick, Inc. v. Long Island R.R. Co.*, 70 N.Y. 2d 382, 399 [1987]. "[A] party is not precluded from proceeding on both breach of contract and quasi contract theories where there is a bona fide dispute as to the existence of a contract or where the contract does not cover the dispute in issue." *Curtis Props. Corp. v. Greif Cos.*, 236 A.D.2d 237, 239 (1st Dep't 1997). A *bona fide* dispute exists where a defendant alleges unconscionability or fraud. (*Id.*). Here, accepting the allegations that Plaintiffs paid Sharvit and Patrol $225,000 for services that were not adequately invoiced or rendered, that Srour and Cox Padmore shared those funds, and the contract entered by Srour with Patrol and Sharvit on Plaintiffs' behalf was unconscionable, Plaintiffs have stated a claim for unjust enrichment.

The third cause of action of the Amended Complaint is for breach of fiduciary duty. The elements of a cause of action for breach of fiduciary duty include (1) the existence of a fiduciary relationship; (2) misconduct; and (3) damages caused by the misconduct. (*Armentano v. Paraco Gas Corp.*, 90 AD3d 683, 935 NYS2d 304 [2nd Dept 2011]). Based on the allegations that Srour, as Plaintiffs' attorney, "prepared the agreement with Sharvit to the benefit of Sharvit and the detriment of plaintiffs" and thereafter shared in those funds that Plaintiffs paid to Sharvit without Plaintiffs' knowledge," Plaintiffs have stated a claim for breach of fiduciary as against Srour and Cox Padmore.

The fourth cause of action of the Amended Complaint is for legal malpractice stemming from Plaintiffs' recommendation of Patrol and Sharvit. In order to prevail against an attorney on a legal malpractice claim, a plaintiff must first prove that the attorney was negligent, that such negligence was the proximate cause of the loss sustained, and that actual damages resulted therefrom (*see Tydings v. Greenfield, Stein & Senior*, 2007 NY Slip Op 6734, *2 [1st Dept. 2007]). An attorney does not, except by express agreement, guarantee results. *Weinberg v. Needelman*, 226 A.D. 3,4-5 [1st Dept 1929], *aff'd*, 252 N.Y. 622 [1930]. "[A]n attorney is not held to the rule of infallibility and is not liable for an honest mistake of judgment, where the proper course is open to reasonable doubt. Thus, 'selection of one among several reasonable courses of action does not constitute malpractice.'" *Bernstein v. Oppenheim & Co.*,

P.C., 160 A.D.2d 428, 430 [1ˢᵗ Dept 1990]. Here, Plaintiffs' legal malpractice claim is based on Srour's recommendation which they followed in the retention of the private investigator. This allegation alone is insufficient to make out a legal malpractice claim.

The sixth cause of action of the Amended Complaint is for violation of the Consumer Fraud Act of New Jersey. The Amended Complaint alleges:

> Plaintiffs, during the course of the events were residents of New Jersey. Many of the actions by Srour and Shavit took place in New Jersey. As such, the New Jersey Consumer Fraud Statute applies. Defendant Srour, in promoting defendant Patrol and Sharvit acted outside her capacity as plaintiff's [sic] attorney. In doing so, Srour deceptively promoted the service of Patrol and Sharvit in violation of the New Jersey Consumer Fraud Act. By their actions, the defendants violate [sic] the New Jersey Consumer Fraud Action.

As against Srour and Cox Padmore, however, the Amended Complaint fails to state a claim under the Consumer Fraud Act of New Jersey as attorney services do not fall within the scope of the New Jersey Consumer Fraud Act. *Vort v. Hollander*, 257 N.J. Super. 56, 61-62 [N.J. Super. App. Div. 1992]("Although the sale of certain services fall within the purview of the Act, it is clear that attorney's services do not fall within the inducement of the Consumer Fraud Act."). Furthermore, although Plaintiffs allege in a conclusory fashion that Srour "in promoting defendant Patrol and Sharvit acted outside her capacity as plaintiff's [sic] attorney," there are no factual allegations contained in the Amended Complaint to support that contention.

The seventh cause of action of the Amended Complaint is for rescission of the contract with Patrol on the basis that "[t]he terms of the Contract were unconscionable, incomprehensible, unlawful, incoherent and unenforceable." Accepting all allegations as true, the Amended Complaint states a claim for rescission.

Wherefore it is hereby

ORDERED that defendants Deborah R. Srour, Esq. and Cox, Padmore, Skolnik & Shakarchy, LLP's motion is granted only to the extent that the fourth cause of action for legal malpractice and the sixth cause of action for violation of the Consumer Fraud Act of New Jersey are dismissed as against Deborah R. Srour, Esq. and Cox, Padmore, Skolnik & Shakarchy, LLP.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: October 26, 2013

HON. EILEEN A. RAKOWER

Check one: **FINAL DISPOSITION** **X NON-FINAL DISPOSITION**

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