Krentsel & Guzman, LLP v Napoli, Kaiser & Assoc., LLP
2015 NY Slip Op 32450(U)
December 22, 2015
Supreme Court, New York County
Docket Number: 151158/15
Judge: Kelly A. O'Neill Levy
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 19

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KRENTSEL & GUZMAN, LLP., STEVEN E. KRENTSEL and JEFFREY A. GUZMAN, Individually,

Plaintiffs,

-against-

NAPOLI, KAISER & ASSOCIATES, LLP., NAPOLI, KAISER & BERN, LLP, NAPOLI, BERN, RIPKA SHKOLNIK, LLP., NAPOLI, BERN & ASSOCIATES, LLP., LAW OFFICES OF NAPOLI, BERN, RIPKA, SHKOLNIK & ASSOCIATES, LLP., LAW OFFICE OF NAPOLI, BERN, RIPKA, SHKOLNIK, LLP., NAPOLI, BERN, LLP, LAW OFFICE OF NAPOLI, BERN, LLP., NAPOLI, BERN, RIPKA & ASSOCIATES LLP., NAPOLI, BERN, RIPKA, LLP., LAW OFFICES OF NAPOLI, BERN, RIPKA & ASSOCIATES, LLP., PASTERNACK, TIKER, NAPOLI, BERN, LLP., WORBY, GRONER, EDELMAN & NAPOLI BERN, LLP and WORBY, GRONER, LLP.,

Defendants.

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Index No.: 151158/15

DECISION AND ORDER

Mot. Seq. 001

KELLY O'NEILL LEVY, J.:

In this action alleging breach of contract, promissory estoppel, unjust enrichment and intentional misrepresentation, (1) defendants Napoli, Kaiser & Associates, LLP, Napoli, Bern, Ripka, Shkolnik, LLP., Napoli, Bern & Associates LLP., Law Offices of Napoli, Bern, Ripka, Shkolnik & Associates, LLP., Law Office of Napoli, Bern, Ripka, Shkolnik, LLP., Napoli, Bern, LLP., Law Offices of Napoli, Bern, LLP., Napoli, Bern, Ripka, Shkolnik & Associates, LLP., Napoli, Bern, Ripka & Associates, LLP, Law Offices of Napoli, Bern, Ripka & Associates, LLP., Pasternack, Tilker, Napoli, Bern, LLP, Worby Groner Edelman & Napoli Bern LLP and Worby

Groner Edelman LLP s/h/a Worby Groner, LLP (collectively the Napoli defendants) move, pursuant to CPLR 3212, to dismiss the complaint as against them; (2) defendants Napoli, Kaiser & Bern, LLP and Napoli, Bern, Ripka, LLP (collectively Napoli, Bern) move, pursuant to CPLR 3212, to dismiss the second, third and fourth causes of action alleging promissory estoppel, unjust enrichment and intentional misrepresentation,[1] and (3) for an order, pursuant to CPLR 7503 (a) compelling arbitration of the breach of contract claim.

BACKGROUND

This is an action to recover attorneys' fees by plaintiffs Steven E. Krentsel (Krentsel) and Jeffrey A. Guzman (Guzman) for cases involving personal injuries suffered by first responders in connection with the 2001 World Trade Center attack which plaintiffs allegedly referred to defendants.

According to his employment agreement dated April 1, 2003, Krentsel was formerly associated with the Napoli, Kaiser & Bern, LLP and Napoli, Kaiser, Bern & Associates, LLP law firms. On March 22, 2006 Guzman entered into an employment agreement with the Napoli Bern Ripka, LLP law firm.

The employment agreements outline the obligations of the parties and delineate the fees Krentsel and Guzman will receive for cases which they refer to their employers (Hitchcock affirmation, exhibits H & I). Section 5.1 of those employment agreements states, in pertinent

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[1] Plaintiffs concede that the unjust enrichment and promissory estoppel claims are duplicative of the breach of contract claims and should be dismissed (Plaintiffs affirmation in opposition at 4).

part, that "[a]ny and all disputes arising from or under this Agreement or breach thereof, . . . shall be settled by arbitration in accordance with the rules of the American Arbitration Association then in effect" (*id.*). Both employment agreements also provide, in Article 3.1(e), that upon termination, "this Agreement and all rights and obligations of the parties hereunder [except as set forth in Sections 3.2, 3.3, 3.4, 3.5, and 4.1,[2] which shall survive any termination of this Agreement] shall terminate immediately . . . " upon two weeks written notice by the attorney to the law firm (*id.*). None of the sections that survive termination pertain to referral fees for the World Trade Center cases and none of the sections compel the attorneys to arbitrate their disputes after termination.

Krentsel terminated his employment with Napoli Bern Ripka, LLP as of February 27, 2006. In a March 7, 2006 referral agreement, Krentsel agreed that the terms and conditions of his employment agreement were incorporated into the referral agreement and, as to the 35 World Trade Center - 9/11 cases, which were enumerated on the list attached to the agreement, it was agreed that he would receive 20% of the net attorneys' fees that Napoli Bern Ripka earned for each case (*id.*, exhibit J). Net attorneys' fees are defined in the agreement as all attorneys' fees received by Napoli Bern after deductions of all costs and disbursements chargeable to the file.

Both Krentsel and Guzman terminated their employment relationships with Napoli Bern Ripka, LLP and they formed plaintiff Krentsel & Guzman, LLP. Thereafter, Napoli Bern Ripka

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[2] Section 3.2 prevents the attorney from removing any existing case files from the law office; Section 3.3 permits the attorney to take cases with him if those cases were personal referrals to the attorney; Section 3.4 pertains to the division of legal fees for cases removed from the law firms; Section 3.5 sets forth a formula in the event the division of fees for removed cases is difficult to determine; Section 4.1 prevents an attorney from divulging confidential information and trade secrets.

LLP commenced a lawsuit against Krentsel & Guzman, LLP and Krentsel and Guzman individually, over an attorneys' fees dispute. On November 27, 2006, the parties settled that lawsuit. The settlement agreement provides, among other things, that "[t]he parties acknowledge that Guzman cannot provide Schedule B forms for many of the World Trade Center Cases for which he claims to be referring counsel. Accordingly, in the event that there is a dispute regarding any referral of a World Trade Center case by Guzman, the parties agree that it will be resolved by agreement or arbitration . . ." (*id.*, exhibit E).

CONTENTIONS

In support of the motion for summary judgment, defendants argue that the complaint must be dismissed against the Napoli defendants because: (1) there was no contractual relationship or privity between plaintiffs and the Napoli defendants and plaintiffs do not allege any facts that would support an independent duty owed by the Napoli defendants to plaintiffs.

The Napoli Bern defendants contend that the intentional misrepresentation claim must be dismissed because it is duplicative of the breach of contract claim; and that, as to Krentsel, arbitration is mandatory because the arbitration clause in his employment agreement was incorporated by reference into the March 7, 2006 referral agreement.

In opposition to the motion for summary judgment and to compel arbitration, plaintiffs contend that: (1) there is a relationship between the Napoli law firms and the Napoli Bern Law firms and that summary judgment is inappropriate where the existence of parameters of the relationship between all the defendants is exclusively within the knowledge of those defendants; (2) the intentional misrepresentation claim alleges conduct that rises to the level of wanton dishonesty; and (3) although plaintiffs concede that Guzman entered into an arbitration

agreement regarding the World Trade Center cases, they contend that Krentsel is not bound by an arbitration agreement with regard to those cases because the arbitration clause in his employment agreement did not survive his termination from Napoli Bern.

DISCUSSION

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law" (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 [1st Dept 2007], citing *Winegrad v New York Univ., Med. Ctr.*, 64 NY2d 851, 853 [1985]). Upon proffer of evidence establishing a prima facie case by the movant, "the party opposing a motion for summary judgment bears the burden of 'producing evidentiary proof in admissible form sufficient to require a trial of material questions of fact'" (*People v Grasso*, 50 AD3d 535, 545 [1st Dept 2008], quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient [to defeat a summary judgment motion]" (*Zuckerman*, 49 NY2d at 562).

A. The Napoli Defendants' Motion for Summary Judgment Dismissing the Complaint.

The Napoli defendants have established their prima facie case that they are entitled to judgment dismissing the claims against them as a matter of law by producing, (1) the employment agreements signed by Krentsel and Guzman which demonstrate that they entered into employment contracts with only the Napoli Bern defendants (Hitchcock affirmation, exhibits H & I), and (2) the affirmations Paul Napoli (Napoli), a partner in the Napoli law firms, and William Groner (Groner), a member of the firm of Worby, Groner LLP. In his affirmation, Napoli states that plaintiffs did not, and do not, have any contractual relationship or privity with

the Napoli law firms and that each of the Napoli law firms is a separate and distinct entity from the Napoli Bern firms (*id.*, exhibit F, ¶ 5). Similarly, in his affirmation, Groner avers that plaintiffs did not have a contractual relationship or privity with Worby, Groner, LLP (*id.*, exhibit G, ¶¶ 3,4).

It is well settled that liability for breach of contract does not lie absent proof of a contractual relationship or privity between the parties (*Simplex Grinnell v Ultimate Realty, LLC*, 38 AD3d 600, 600 [2d Dept 2007]; *M. Paladino, Inc. v Lucchese & Son Contr. Corp.*, 247 AD2d 515, 515 [2d Dept 1998]; *Natural Stone Warehouse Inc. v AKG Yahtim Ve Insaat Malzemeiri Sanayi Ve Ticaret A.S.*, 20 Misc 3d 1143 (A), 2008 NY Slip Op 51842 (U) *4 [Sup Ct. Kings County 2008]).

Moreover, an intentional misrepresentation claim will be dismissed absent a contract or other relationship between the defendants and the plaintiffs which could give rise to a duty to disclose facts (*Douglas Elliman LLC v Corcoran Group Mktg.*, 93 AD3d 539, 540 [1st Dept 2012]).

In opposition to summary judgment, plaintiffs have failed to present admissible evidence to overcome defendants' prima facie showing that they are entitled to judgment dismissing the breach of contract and intentional misrepresentation claims as against them. Here, plaintiffs have provided nothing more than an affirmation from counsel, who has no personal knowledge of the facts. These assertions are insufficient to raise a triable issue of fact. (*see Strongback Corp. v N.E.D. Cambridge Ave. Dev. Corp.*, 25 AD3d 392, 393 [1st Dept 2006] [affirmation of attorney without personal knowledge that is unsupported by documentary evidence is insufficient to raise a triable issue of fact]; *Lewis v Safety Disposal Sys. of Pa., Inc.*, 12 AD3d 324, 325 [1st Dept

2004] ["an opposing attorney's assertions, unsupported by any factual proof whatsoever, are of no probative value, and therefore, fail to raise a triable issue of fact"]). Plaintiffs have failed to submit their own affidavits or any documentary evidence to substantiate their vague claims that some of the Napoli defendants were incorporated specifically to handle the World Trade Center cases; that plaintiffs worked for the Napoli partnerships as well as the Napoli Bern defendants; and that unspecified Napoli defendants assumed control of the cases that plaintiffs referred. Accordingly, plaintiffs' hope that discovery might lead to evidence sufficient to raise a triable issue of fact regarding the alleged interrelationship between all of the defendants is unavailing (*Bailey v New York City Tr. Auth.*, 270 AD2d 156, 157 [1st Dept 2000] ["A grant of summary judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence"]; *see also DaSilva v Haks Engrs., Architects & Land Surveyors, P.C.*, 125 AD3d 480, 482 [1st Dept 2015]).

Accordingly, the branch of the motion by the Napoli defendants (including Worby, Groner, LLP) which seeks to dismiss the complaint as to them is granted.

B. The Napoli Bern Defendants' Motion for Summary Judgment Dismissing the Intentional Misrepresentation Claim

The branch of the motion that seeks to dismiss the intentional misrepresentation claim is granted because plaintiffs failed to plead or present evidence demonstrating that they relied on the alleged misrepresentations and have failed to allege damages that are different from the breach of contract damages (*see Chowaiki & Co. Fine Art Ltd. v Lacher*, 115 AD3d 600, 600-601 [1st Dept. 2014]). The elements of a claim for intentional or fraudulent misrepresentation are exactly the same as for fraud: (1) the misrepresentation of a material fact; (2) the intent to

defraud thereby; (3) reasonable reliance thereon; and (3) damages as a result of the reliance (*Langman v Apparel Production, Inc.*, 2009 WL 1437277, 2009 NY Slip Op 31107 (U) *citing MBF Clearing Corp v Shine*, 212 AD2d 478, 479 [1st Dept 1995]; *see also Swersky v Dryer & Traub*, 219 AD2d 321, 326 [1st Dept 1996]).

Here, plaintiffs have alleged a breach of duty that is different from the allegations in the breach of contract claim (*see OP Solutions, Inc. v Crowell & Moring, LLP,* 72 AD3d 622, 622 [1st Dept 2010] ["a simple breach of contract is not to be considered a tort unless a duty independent of the contract itself has been violated"] [internal quotation marks and citations omitted]). The breach of contract cause of action in this case alleges only that the defendants failed to pay the attorneys' fees required under the referral agreement (Hitchcock affirmation, exhibit A, ¶¶ 30-33). However, the misrepresentation cause of action alleges that defendants intentionally and fraudulently assessed the referred client costs and disbursements allegedly paid by Napoli Bern, including expert fees, messenger fees, photocopying fees and travel expenses, which decreased recovery of the fees properly payable (id., ¶¶ 20-22, 38-40). In the complaint, plaintiffs contend that these costs were either not incurred, not paid by Napoli Bern and/or were not properly chargeable to the referred clients.

These allegations of misrepresentation do not arise out of the breach of contract claim. Rather, they speak to the breach of a separate duty of trust and confidence or "duty of candor independent of their duty to perform under the contracts in that [defendants] had superior knowledge unavailable to plaintiffs and knew plaintiffs were relying on the information they supplied" (*Kosowsky v Willard Mtn., Inc.*, 90 AD3d 1127, 1129 [3d Dept 2011]).

However, plaintiffs have failed to specifically allege or present evidence to show that they

relied on Napoli Bern's alleged misrepresentations (see, Hitchcock affirmation, exhibit A, ¶¶ 38-39) and have not alleged or demonstrated that they suffered damages that are distinct from the alleged breach of contract damages (*Mosaic Caribe Ltd. v AllSettled Group, Inc.*, 117 AD3d 421, 422-423 [1st Dept 2014]; [id., ¶ 40]).

Moreover, the punitive damages demand is dismissed because plaintiffs have failed to sufficiently plead or demonstrate that "the wrong complained of rose to a level of such wanton dishonesty as to imply a criminal indifference to civil obligations (*Weiss v Lowenberg*, 95 AD3d 405, 407 [1st Dept 2012]; *see also Giblin v Murphy*, 73 NY2d 769, 772 [1988]).

C. Arbitration

The branch of the motion that seeks to compel Guzman to arbitrate his referral fee claims relating to the World Trade Center cases is granted without opposition. Plaintiffs concede that Guzman is subject to arbitration regarding those claims.

However, the branch of the motion that seeks to compel Krentsel to arbitrate his claims against the Napoli Bern defendants relating to the World Trade Center cases is denied. It is well settled that "'a party will not be compelled to arbitrate and, thereby, to surrender the right to resort to the courts, absent "evidence which affirmatively establishes that the parties expressly agreed to arbitrate their disputes'" (*Matter of Miller*, 40 AD3d 861, 862 [2d Dept 2007] quoting *Matter of Waldron (Goddess)*, 61 NY2d 181, 183 [1984]); *see also TNS Holdings v MKI Sec. Corp*, 92 NY2d 335, 339 [1998] [where there is no clear indication of an intent to arbitrate, an agreement to arbitrate should not be inferred]; *Rinaolo v Berke*, 188 AD2d 297, 297 [1st Dept 1992] ["an agreement to arbitrate must not depend upon implication or subtlety").

As to Krentsel, although section 5.1 of his employment agreement contained a broad

arbitration clause, that arbitration clause did not survive termination of the agreement.[3] Krentsel terminated his employment agreement with Napoli Bern as of February 27, 2006. On March 7, 2006, Krentsel and Napoli Bern entered into a referral agreement concerning, among other things, the referral fees Krentsel would earn for the World Trade Center cases. In that referral agreement, Krentsel agreed that his "resignation was pursuant to the terms and conditions of [his] Employment Agreement executed April 1, 2003" and that "the terms and conditions shall be incorporated herein as if fully set forth herein" (Hitchcock affirmation, exhibit J). Accordingly, because Krentsel's termination was effective as of February 27, 2006, on the date he signed the referral agreement, he was no longer obligated to arbitrate his referral fee claims against Napoli Bern. The arbitration clause in Krentsel's employment agreement did not survive termination and there is no other clause in the referral agreement, or any other agreement before the court, that compels Krentsel to arbitrate referral fee claims relating to the World Trade Center cases.

Therefore, it is ORDERED that the branch of defendants' motion for summary judgment that seeks to dismiss the complaint as against Napoli, Kaiser & Associates, LLP, Napoli, Bern, Ripka, Shkolnik, LLP., Napoli, Bern & Associates LLP., Law Offices of Napoli, Bern, Ripka, Shkolnik & Associates, LLP., Law Office of Napoli, Bern, Ripka, Shkolnik, LLP., Napoli, Bern, LLP., Law Offices of Napoli, Bern, LLP., Napoli, Bern, Ripka, Shkolnik & Associates, LLP., Napoli, Bern, Ripka & Associates, LLP, Law Offices of Napoli, Bern, Ripka & Associates, LLP., Pasternack, Tilker, Napoli, Bern, LLP, Worby Groner Edelman & Napoli Bern LLP and Worby

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[3] Pursuant to section 3.1 of the agreement, the only obligations that survived Krentsel's termination were set forth on sections 3.2, 3.3, 3.4, 3.5 and 4.1 of the employment agreement (Hitchcock affirmation, exhibit H).

Groner Edelman LLP s/h/a Worby Groner, LLP is granted; and it is further

ORDERED that the branch of the motion that seeks summary judgment dismissing the third cause of action alleging unjust enrichment and the fourth cause of action alleging promissory estoppel as against Napoli, Kaiser & Bern, LLP and Napoli, Bern, Ripka, LLP is granted on consent; and it is further

ORDERED that the branch of the motion that seeks summary judgment dismissing the second cause of action alleging intentional misrepresentation is granted; and it is further

ORDERED that the branch of the motion that seeks to dismiss plaintiffs' demand for punitive damages is granted; and it is further

ORDERED that the branch of the motion that seeks to compel plaintiff Jeffrey A. Guzman to arbitrate his fee disputes regarding the World Trade Center cases is granted on consent; and it is further

ORDERED that the branch of the motion that seeks to compel plaintiff Steven E. Krentsel to arbitrate his fee disputes regarding World Trade Center cases is denied; and it is further

ORDERED that the action shall continue as to the first cause of action; and it is further

ORDERED that counsel are directed to appear for a ~~status~~ Preliminary conference in Part 19 (111 Centre Street Room 1164B) on January 27, 2016 at 9:30 AM.

This constitutes the decision and order of the court.

Dated: December 22, 2015

ENTER:

Kelly O'Neill Levy

Kelly O'Neill Levy, A.J.S.C.

HON. KELLY O'NEILL LEVY