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

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THE EXETER LAW GROUP LLP,

Plaintiff-Counterclaim Defendant,

- and -

MITCHELL WONG, ZHEJUN "SUSAN" TAN, and LAW OFFICE OF Z. TAN PLLC,

Counterclaim Defendants.

-against-

IMMORTALANA INC. and ROBIN FARIAS-EISNER, SALVAREGEN, INC., and KELLY DAY,

Defendants-Counterclaim Plaintiffs.

Index No. 161667/2014

DECISION and ORDER

Mot. Seq. 003

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

Plaintiff-counterclaim defendant The Exeter Law Group LLP ("Exeter") brings suit to collect legal fees allegedly owed to it by Defendants. Exeter commenced this action against defendants Immortalana Inc. ("Immortalana") and Robin Farias-Eisner ("Eisner") by filing a Complaint on November 24, 2014 asserting six causes of action, including breach of contract (first cause of action), an account stated (second cause of action), unjust enrichment (third cause of action), quantum meruit (fourth cause of action), fraud (fifth cause of action), and tortious interference with contractual relations (sixth cause of action).

On January 15, 2015, Immortalana and Eisner moved to dismiss portions of the complaint (Mot. Seq. #1) and, on June 30, 2015, the Court dismissed several of Exeter's causes of action, including its second cause of action for an account stated, and directed Exeter to file an Amended Complaint.

Exeter filed its Verified Amended Complaint on July 20, 2015. The Amended Complaint named Eisner and Immortalana as defendants, as well as Kelly Day ("Day") and Salvaregen, Inc. ("Salvaregen"). Eisner and Day are individual defendants. Immortalana and Salvaregen are corporations in which Day and Eisner allegedly held shares and Exeter allegedly performed work on behalf of both companies. The Amended Complaint asserts the following claims: breach of contract as against Eisner and Day (first cause of action); account stated for the months of February 2013 through April 2013 as against Eisner and Day (second cause of action); unjust enrichment as against Immortalana and Salvaregen (third cause of action); quantum meruit as against Immortalana and Salvaregen (fourth cause of action); and account stated for the months of May 2012 through July 2013 as against Eisner and Day (fifth cause of action).

Exeter claims that for approximately three years between 2011 and 2014, Day and Eisner, as the "clients," engaged Exeter to represent them on two matters. On June 12, 2011, Day and Eisner executed an engagement letter engaging Exeter to provide advice "on patenting and regulatory strategy for the development of certain products that may be governed under [federal law]." On February 1, 2012, Day and Eisner executed a second engagement letter reengaging Exeter to "assist [Day and Eisner] in procuring counsel to enable Ms. Kelly Day to provide Five Hundred Thousand Dollars ($500,000.00) per year in financing from her personal funds toward the efforts of Dr. Robin Farias Eisner to continue his research." Exeter was to "identify and engage outside counsel" to complete the work if necessary.

Exeter claims, "After uncovering irregularities and conflicts with the transactions, the Exeter Firm withdrew from the engagements." Day and Eisner refused to pay the outstanding balance of Exeter's invoices. Exeter commenced this action to recover those monies.

Defendants Day, Eisner, Immortalana and Salvaregen asserted six counterclaims against Exeter for: (1) legal malpractice; (2) breach of fiduciary duty; (3) fraud; (4) violation of GBL 349; (5) fraudulent inducement; and (6) breach of contract. Day, Eisner, Immortalana and Salvaregen asserted

"counterclaims" against Mitchell Wong ("Wong") and Zhejun "Susan" Tan ("Ms. Tan"), and the Law Offices of Z. Tan PLLC (the "Tan Firm").[1]

Mot. Seq. 3

Defendants Day, Eisner, Immortalana and Salvaregen (collectively. "Defendants") move for an order pursuant to a) CPLR §3211(7) dismissing the second and fifth causes of action of the Amended Complaint against Eisner and Day; and b) CPLR §3024(b) striking scandalous and prejudicial language from the Complaint. Exeter cross moves for summary judgment on their second cause of action for account stated. Exeter does not oppose Defendants' motion to dismiss the fifth cause of action.

CPLR § 3211 provides, in relevant part: "(a) Motion to dismiss a cause of action. 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 A.D. 2d 91 [1st Dep't 2003] [internal citations omitted]; CPLR § 3211[a][7]). The challenged pleading is "afforded a liberal construction" and the plaintiff is accorded "the benefit of every possible favorable inference." (*Leon v. Martinez*, 84 N.Y.2d 83, 87, 638 N.E.2d 511, 513 [1994]).

As for Plaintiff's second and fifth causes of action, an account stated is "an account balanced and rendered, with an assent to the balance express or implied". (*Morrison Cohen Singer & Weinstein v. Janet L. N. Ackerman*, 280 A.D.2d 355, 355-56 [1st Dep't 2001]).

The second cause of action of Exeter's Amended Complaint is for account stated for the months of February 2013 through April 2013 as against Eisner and Day. It alleges, "The parties formed an agreement to an account based upon the transactions between them with respect to the correctness of the separate items composing the account and the balance due to the Exeter firm." It alleges that on July 5, 2011 (covering the month of June 2011), October 10, 2011 (covering the months of July 2011 through September 2011), November 17, 2011 (covering the

[1] Day, Eisner, Immortalana and Salvaregen improperly label their third party claims against Wong, Ms. Tan, and the Tan Firm as "counterclaims."

month of October 2011), June 16, 2012 (covering the months of November 2011 through January 2012), November 26, 2012 (covering the months of February 2012 through April 2012), and April 30, 2013 (covering the months of May 2012 through July 2012), Plaintiff issued invoices to Defendants for legal services rendered in those months, "Defendants paid the invoice without dispute and in full, and further continued to request and receive legal services from the Plaintiff." After receiving the invoices, Defendants "continued to receive and receive legal services from the Plaintiff." It alleges:

> On December 19, 2013, the Plaintiff issued to the Defendants an invoice in the amount of $86,715.90 (representing the sum of $61,065.90 in expenses and undeferred professional fees, plus $25,650.00 in deferred professional fees) covering the months of February 2013 through April 2013. After receiving the invoice, the Defendants continued to request and receive legal services from the Plaintiff. The Defendants never disputed the amount of the invoice until after the Exeter Firm withdrew from further representation six months later.

Defendants argue Exeter fails to sufficiently plead that Eisner or Day retained the disputed invoice for a reasonable period of time without objecting, or, in the alternative, that either or both of them made a partial payment of the disputed invoices.

Defendants also argue that the second cause of action "is nothing more than a recitation of the seven invoices Exeter claims to have sent to Defendants, some of which were sent out of order, incomplete, and more than a year after the alleged services were completed." Defendants argue, "Exeter's own pleadings fail to provide a clear explanation of the invoices it sent to Defendants. For example, Exeter claims that Exhibit L is an invoice for $86,715.90, yet the cover page of the invoice only claims a balance of $61,065.90.2 Ex. 1(Verified Amended Complaint para. 99)."

Defendants also argue that Exeter's second cause of action is duplicative of its fifth cause of action which asserts a claim for an account stated for invoices covering the period of May 2012 through July 2013, which necessarily includes the February 2013 through April 2013 period. Exeter does not present any opposition to the portion of Defendants' motion to dismiss the fifth cause of action, as duplicative of the second cause of action, and therefore that claim is dismissed.

Here, accepting Exeter's allegations as true and drawing all inferences in favor of the non-moving party, the four corners of Exeter's Amended Complaint adequately plead an account stated in the second cause of action.

Turning to Exeter's cross motion for summary judgment on the second cause of action for account stated, summary judgment, the proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law.

Here, Exeter submits the affirmation of Mitchell Wong; an engagement letter dated June 3, 2011; and a copy of the invoice dated December 19, 2013 sent to Eisner and Day for services covering February 1, 2013 through April 30, 2013. Exeter contends that it has established Defendants' receipt and retention of the invoice with no contemporaneous objection, and is entitled to summary judgment.

In opposition, Defendants argue that Exeter's motion is premature "due to the Court's decision that all discovery be stayed until the amended pleadings were finalized." However, there was no stay of discovery. Alternatively, Defendants argue that Wong's conclusory affidavit is insufficient to make out a prima facie case of entitlement to summary judgment, and there are issues of fact as demonstrated in the affidavits submitted by Eisner and Day in which they attest to having objected to the December 2013 invoice.

Eisner submits an affidavit in which she attests that Exeter's claims that Eisner and Day retained the December 2013 invoice without objection until June 2014 is not true. Eisner states, "From our initial engagement of Exeter, and throughout its representation, Day and I reminded Wong of the expectation of budgets and pre-authorizations for work" which would "usually happen at in-person meetings." Eisner attests:

> However, after receiving the December Invoice, Day and I were taken aback. An invoice of that amount was completely unexpected as we had never discussed a budget or authorized this work. Further, although this invoice covered work performed between February 2013 and April 2013, it is dated December 19, 2013, almost eight (8) months after the work was completed. At that time, we had not even received invoices for work performed during the months of August 2012 to January 2013, and would not receive those invoices until around September 2014. For some unknown reason the invoices were sent out of order, providing no context to what work was claimed to

be done for the six months prior to the time billed in the December Invoice.

Eisner further attests:

After receiving the December Invoice, I personally spoke with Wong on numerous occasions between January 2014 and June 2014 before meeting in person in June 2014. Specifically, I spoke to Wong on February 27, 2014, March 17, 2014, March 18, 2014, April 18, 2014, May 20, 2014, June 9, 2014, June 11, 2014, and June 12, 2014. While I cannot recall the exact dates of all of the conversations and telephone calls I had with Wong between January 2014 to June 2014, to the best of my recollection I had at least two to four telephone calls between December 2013 and February 2014, in addition to the calls listed in the paragraph above. In these phone calls I explained to Wong that Day and I were very surprised with the December Invoice. I do not recall the exact words spoken by myself or Wong, but I recall that in each of these phone calls I expressed concerns to Wong that we never received a budget or gave authorization for the work shown in the December Invoice. I also specifically expressed to Wong that Day and I were dissatisfied with Exeter's work and thought the invoices were very high in light of the amount of work we believed was done, and specifically requested to be done. I further expressed that Day and I were distressed by the invoices and that we did not feel that the charges were commensurate with the quality of work that was provided and that the number of hours worked seemed excessive.

Following these phone calls, Day and I arranged to meet with Wong in June 2014 when I was visiting New York. On the day of the meeting, Day was feeling under the weather, so I met with Wong alone at a restaurant. During this conversation I reiterated our concerns that the December Invoice was based on unauthorized work, included work performed without a budget, involved excessive amounts of time in light of the quality and amount of work provided, and that Day and I disagreed with the charges. Wong, in his affirmation, acknowledges there was a dispute over the December Invoice. It is clear that there was never any time that Day and I accepted the December Invoice without objection. Wong attempts to claim that Day and I continued to request that Exeter provide services after this invoice, but as the invoices show from January 2014 to June

> 2014 most of the work done was extremely limited and only necessary to avoid any issues while we obtained new counsel. *See* Ex. M to the Amended Complaint (Exe 000091 to Exe 000097).

Day's affidavit attests to similar statements as set forth in Eisner's affidavit. Attached to both are emails commencing August 25, 2014 between Wong, Eisner, and Day regarding billing issues.

Exeter's cross motion for summary judgment is denied in light of the conflicting affidavits.

Defendants also move to strike certain allegations of the Amended Complaint as scandalous and prejudicial. Defendants argue that Paragraphs 18, 30, and 31 "include irrelevant allegations that provide background and personal information to be read in conjunction with other highly prejudicial allegations." Defendants argue, "When read in context, these irrelevant and scandalous allegations are meant to imply that Eisner and his associates and colleagues were unethical and fraudulent, and that they violated rules or laws." These paragraphs read:

> 18. Moreover, the three principals [Eisner, Day, and Professor Reddy] also had limited time to develop the medicines and cosmetic products they intended to create:
>
> a. Both Dr. Farias-Eisner and Professor Reddy were full-time employees of the University of California.
>
> b. As full-time employees of the University of California, Dr. Farias-Eisner and Professor Reddy were prohibited by the University's uniform "Conflict of Commitment" policy from holding executive responsibilities outside their full-time employment under the University.
>
> c. Ms. Day is a retiree.
>
> ***
>
> 30. At around mid-2013, Dr. Farias-Eisner requested additional time to pay the bills [of Plaintiff], explaining that Ms. Day was undergoing a difficult divorce and needed some flexibility.
>
> 31. In view of their payment history, and out of solicitude for Ms. Day's circumstances, the Firm agreed to delay the bills and continued rendering legal services.

Defendants argue that the section entitled "Conflicts of Interest" and other paragraphs (paragraphs 32 through 62), "allege that Defendants and their associates may have disregarded legal advice, acted fraudulently towards third parties, and faced conflicts of interest in various manners but disregarded them."

Exeter argues that these paragraphs are relevant and should not be stricken based upon Defendants' accusations that Exeter endangered their patent rights, was negligent in their communications with third parties, and compromised various third parties. Exeter further argues that "Defendants have themselves put at issue the legality and purpose of the underlying transactions by alleging that the Plaintiffs committed malpractice in structuring the corporate Defendants 'in a manner that was inappropriate and improper for their corporate purpose and for the purposes of Day's and Farias-Eisner's ownership interests.'"

Paragraphs 32 and 62 of the Amended Complaint:

The Conflicts of Interest

A. Conflicts of Interest Arising out of Co-Investor Relationship

32. From the outset and throughout the course of the engagement, the Firm advised both Dr. Farias-Eisner and Ms. Day to seek independent counsel to establish their respective rights and obligations in their Businesses.

33. Each time, both Dr. Farias-Eisner and Ms. Day refused the Firm's advice.

B. Conflicts of Interest Arising out of Doctor-Patient Relationship

34. Additionally, at the outset of the engagement, the Firm asked Dr. Farias-Eisner whether there were any impediments with UCLA physicians soliciting investments from their patients.

35. Dr. Farias-Eisner assured the Firm that he had cleared the matter with UCLA, and that UCLA not only "permitted" physicians to raise funds from patients, but "encouraged" the practice.

36. At the time, the Firm had no reason to doubt Dr. Farias-Eisner's statements.

37. After the events that gave rise to this Complaint, it has become less clear whether the joint ventures between Dr. Farias-Eisner and

Ms. Day had, in fact, been approved by UCLA, or even legally or professionally permissible.

38. The UCLA Health System Code of Conduct (Standard 10(1)) specifically prohibits its medical personnel from engaging in financial transactions with patients outside the therapeutic relationship: "University personnel must not . . . accept gifts, gratuities, loans, or other special treatment from third parties doing business with or wishing to do business with the University, in accordance with University policy. Such third parties or entities may include, but are not limited to, . . . patients . . . ."

39. The American Medical Association's Code of Medical Ethics, Opinion 10.018, also forbids physicians from soliciting funds from their patients: "Physicians should avoid directly soliciting their own patients."

40. Finally, California Medical Practice Act § 2234 prohibits financial transactions outside the therapeutic relationship as a boundary violation, and any such violation is an actionable offence

41. These potential conflicts of interest between Dr. Farias-Eisner and Ms. Day limited the types of transactions that the Firm would be able to act on their behalf.

C. Conflict of Interest Arising out of Corporate Malfeasance

42. A potential conflict of interest also arose between Dr. Farias-Eisner's and Professor Reddy's interests, on the one hand, and the interests of Ms. Day and one of their Businesses, on the other hand, in relation to an irregular transaction attempted by Dr. Farias-Eisner and Professor Reddy in 2013.

43. In December 2013, Dr. Farias-Eisner requested that the Firm help them prepare a $62,000.00 invoice from one of their Businesses to UCLA.

44. According to Dr. Farias-Eisner, the invoice would be used to request reimbursement from UCLA for $62,000.00 in chemical reagents purchased through the Business for UCLA research.

45. The Firm prepared the draft invoice and expressly instructed Dr. Farias-Eisner to attach a copy of the receipt from the supplier that sold the $62,000.00 in reagents to the Business. A true and correct copy of

the Firm's correspondence regarding the draft invoice is attached as Exhibit B.

46. Unbeknownst to the Firm, Dr. Farias-Eisner and Professor Reddy had never purchased $62,000.00 in reagents from the supplier at all.

47. Nonetheless, Dr. Farias-Eisner and Professor Reddy submitted the draft invoice to UCLA for "reimbursement" of $62,000.00.

48. The false invoice triggered an investigative audit by UCLA into both Dr. Farias-Eisner and Professor Reddy.

49. In response to the investigation, Dr. Farias-Eisner initially requested that the Firm provide UCLA with an untruthful statement that the Firm had directed him to submit the fraudulent $62,000.00 invoice to UCLA.

50. The Firm refused to provide the false account of the false invoice, and instead offered to help Dr. Farias-Eisner and Professor Reddy present a truthful but more sympathetic defense of his actions.

51. Upon information and belief, at the conclusion of UCLA's investigative audit, UCLA required Dr. Farias-Eisner and Professor Reddy immediately to resign their executive and Board-officer positions at their Businesses.

52. Upon information and belief, UCLA permitted Dr. Farias-Eisner and Professor Reddy to remain only as passive non-executive Board members at their Businesses.

53. Dr. Farias-Eisner telephoned the Firm to request that the Firm prepare corporate resolutions removing himself and Professor Reddy from their executive and Board-officer positions.

54. Despite his removal from the Businesses, Dr. Farias-Eisner has continued to act as the de facto CEO for all of their Businesses.

D. Conflict of Interest Arising out of Investor-Invested Relationship

55. A final set of conflicts arose between Dr. Farias-Eisner's and Professor Reddy's interests, on the one hand, and the interests of Ms. Day, on the other hand, in connection with the use of Business funds to purchase shares in a biotech startup (the "Start-up").

56. In September 2013, Dr. Farias-Eisner, Professor Reddy and Ms. Day telephoned the Firm to request that the Firm conduct diligence concerning the purchase of shares in the Start-up.

57. Upon information and belief, both Dr. Farias-Eisner and Professor Reddy were already advisors and shareholders in the Start-up.

58. The Firm immediately identified a number of legal problems with the Start-up, including the fact that the transaction would cause the Start-up to issue more shares than the Start-up had accounted for on its books and that the Start-up lacked the necessary intellectual property.

59. When the Firm requested additional information from the Start-up the Start-up bluntly refused to respond, stating in an October 13, 2013, e-mail: "Don't bother sending over a list [of your requests]. We won't look at it."

60. Based on the incomplete information provided and the Start-up's response, the Firm was unable to complete the diligence.

61. The Firm immediately reported the stalled outcome of the diligence to the Clients, and advised the Clients that it would be unwise to proceed with the share purchase.

62. The Firm received no further instructions or communications from the Clients regarding the Start-up for nine months.

Defendants also seek to strike Paragraphs 63-72 which fall under the heading "Termination of the Attorney-Client Relationship" of the Amended Complaint. Defendants argue that these allegations are not relevant and an attempt to disparage them. These paragraphs state:

Termination of the Attorney-Client Relationship

63. In June 2014, Dr. Farias-Eisner telephoned the Firm with instructions to prepare two sets of documents.

64. The first set of documents would formalize his ownership of one-third of the Businesses, and Professor Reddy's ownership of another one-third of the Businesses.

65. The second set of documents would take approximately $1.8 million of one of the Businesses' funds (representing almost all of the Businesses' collective funds) to purchase shares in the Start-up.

66. These two sets of documents materially changed the purpose of the Businesses.

67. Whereas the Businesses initially had been created to develop products based on Dr. Farias-Eisner and Professor Reddy's research, the proposed transaction would transform the Business into an investment fund that merely owned stock in the Start-up and would not develop any products at all based on Dr. Farias-Eisner's and Professor Reddy's research.

68. Additionally, whereas the Business's funds were initially intended to be spent on research and development, the proposed transaction would effectively transfer one-third of those funds to Dr. Farias-Eisner, and a second third of those funds to Professor Reddy.

69. Finally, there was a further potential conflict of interest arising out of the fact that both Dr. Farias-Eisner and Professor Reddy stood on both sides of the transaction: both Dr. Farias-Eisner and Professor Reddy were shareholders and advisors of the Start-up, at the same time they were also directors and officers of the Business buying the Start-up's shares.

70. In other words, both Dr. Farias-Eisner and Professor Reddy stood on both the buyer's side and the seller's side of the transaction. In contrast, Ms. Day—the only person putting any money into the transaction—stood on only the buyer's side of the transaction.

71. In view of the apparent conflicts of interest listed above, the Firm declined to act on Dr. Farias-Eisner's instructions, and referred Dr. Farias-Eisner to an attorney who specialized in biotechnology transactions at another law firm.

72. After conferring with another lawyer regarding the Firm's professional obligations in connection with the Firm's withdrawal, the Firm concluded that it was also required to directly advise Ms. Day of its withdrawal and the existence of a conflict of interest.

CPLR § 3024(b) permits a party to "move to strike any scandalous or prejudicial matter unnecessarily inserted into a pleading." In order to prevail on a motion to strike under CPLR § 3024(b), a party must demonstrate that the matter at

issue is not merely "scandalous" or "prejudicial", but also that the matter is "unnecessarily" inserted in the pleadings. In determining a motion to strike pursuant to CPLR §3024(b), the Court looks to "whether the purportedly scandalous or prejudicial allegations are relevant to a cause of action." (*New York City Health and Hosps. Corp. v. St. Barnabas Comly. Health Plan*, 22 A.D.3d 391, 391 [1st Dep't 2005]).

Defendants have failed to demonstrate that the referenced paragraphs of the Amended Complaint are scandalous, prejudicial, and unnecessarily inserted in the pleadings. Rather, these paragraphs add context to the parties' relationship and the underlying transactions while Exeter provided representation.

Wherefore, it is hereby

ORDERED that defendants Day, Eisner, Immortalana and Salvaregen's motion to dismiss the second cause of action for account stated of the Amended Complaint is denied; and it is further

ORDERED that defendants Day, Eisner, Immortalana and Salvaregen's motion to dismiss the fifth cause of action for account stated of the Amended Complaint is granted without opposition, and the fifth cause of action of the Amended Complaint is dismissed; and it is further

ORDERED that defendants Day, Eisner, Immortalana and Salvaregen's motion to strike certain paragraphs of the Amended Complaint pursuant to CPLR § 3024(b) is denied; and it is further

ORDERED that Plaintiff's cross motion for summary judgment on the second cause of action of the Amended Complaint is denied.

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

DATED: OCTOBER 11 2016

EILEEN A. RAKOWER, J.S.C.

OCT 11 2016