

<p>Smith, Gambrell & Russell, LLP v Telecommunication Sys., Inc.</p>
<p>2017 NY Slip Op 30951(U)</p>
<p>May 5, 2017</p>
<p>Supreme Court, New York County</p>
<p>Docket Number: 653476/2016</p>
<p>Judge: Anil C. Singh</p>
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 45

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SMITH, GAMBRELL & RUSSELL, LLP,

Plaintiff,

-against-

TELECOMMUNICATION SYSTEMS, INC.,

Defendant.

DECISION AND
ORDER

Index No.
653476/2016

HON. ANIL C. SINGH, J.:

Plaintiff law firm Smith, Gambrell & Russell, LLP (“plaintiff” or “SGR”) moves pursuant to CPLR 3211(a)(1) and (7) to dismiss defendant Telecommunications Systems, Inc.’s (“defendant” or “TCS”) counterclaim alleging legal malpractice, contending that it did not miss a statutory 14-day deadline under Rule 54(d)(2)(B) of the Federal Rules of Civil Procedure for filing a motion for attorneys’ fees as the deadline was tolled while post-judgment motions were pending in the underlying federal matter. Defendant opposes the motion.

Plaintiff commenced this action by filing a summons and complaint on June 30, 2016. The complaint alleges that TCS retained SGR to represent TCS in connection with five separate patent lawsuits from January 1, 2013, through early 2016. Plaintiff contends that TCS failed to compensate SGR for legal services rendered. The complaint asserts causes of action for: 1) breach of contract; 2) account stated; 3)

unjust enrichment; and 4) quantum meruit. Plaintiff seeks damages in the amount of approximately \$2.4 million.

The counterclaim alleges the following facts.

On September 26, 2012, Cassidian Communications, Inc. (“Cassidian”) commenced a patent infringement lawsuit against TCS in the United States District Court for the Eastern District of Texas, Marshall Division, in a case captioned Cassidian Communications, Inc. v. Microdata GIS, Inc., Microdata, LLC and Telecommunication Systems, Inc. (2:12-cv-162-JRG), United States District Court for the Eastern District of Texas, Marshall Division (the “Cassidian matter”). TCS interposed counterclaims in the Cassidian matter seeking a declaratory judgment of non-infringement and invalidity. SGR provided legal representation to TCS in the Cassidian matter.

Following a five-day jury trial, the jury returned a verdict in favor of TCS on December 20, 2013. The Court entered a judgment on January 3, 2014, finding specifically that TCS was a prevailing party (Answer, Affirmative Defenses and Counterclaim (“Counterclaim”), p.16, para. 78).

On January 10, 2014, Edward Pennington (“Pennington”), a partner at SGR, announced that SGR would be moving to recover attorneys’ fees because TCS prevailed in the litigation (Counterclaim, p. 17, para. 80). At that time, TCS’s

attorneys' fees were approximately \$3.4 million. A motion for attorneys' fees pursuant to section 54(d)(2)(B) of the Federal Rules of Civil Procedure is required to be "filed no later than 14 days after the entry of judgment." A judgment on the Cassidian matter was entered on January 3, 2014. Accordingly, TCS contends that any motion for attorneys' fees was required to be filed by January 17, 2014. TCS contends that it would have prevailed on such a motion, had the motion been brought by SGR in a timely manner. However, SGR made no motion for attorneys' fees by the January 17, 2014 deadline.

TCS inquired about the status of the fee application during conference calls with SGR on February 25, 2014, and March 20, 2014. Initially, SGR advised TCS that "local counsel has advised us that judges down in Texas don't like motions for fees" (Counterclaim, p. 18, para. 85). During the second conference call, SGR blamed local counsel for missing the deadline to make the motion.

Subsequently, TCS and SGR met at TCS's main offices in Maryland. There, Pennington apologized for missing the deadline and informed TCS that such a motion was no longer possible (Counterclaim, pp. 18-19, para. 88).

Sixteen months after the missed deadline in the wake of extensive post-trial proceedings, in May 2015, SGR sought fees in the form of a motion for sanctions. SGR advised TCS that a sanctions motion was a better way to proceed because of

difficulties in establishing that TCS was the “prevailing party” under the statute.

Specifically, in an e-mail dated May 4, 2015, SGR stated:

Attached is a draft of the motion which we are still reviewing and revising on our end. The motion is styled as a motion for sanctions because we think that arguing that we are a “prevailing party” under 285 would be a stretch. So, we are asking the Court to use its inherent power to award fees due to Cassidian’s misconduct.

(Counterclaim, p. 19, para. 90).

TCS contends that SGR sought fees based on a sanctions argument not because of difficulties in establishing TCS as the “prevailing party” – the judgment expressly held that TCS was the prevailing party – but because SGR had missed the deadline for an attorneys’ fee application set by Rule 54(d)(2)(B).

Neither TCS nor SGR states whether the Court ever decided the motion for sanctions. SGR points out that, after the motion for sanctions was filed, Cassidian and TCS settled their dispute, and all pending actions and appeals were withdrawn by the parties on December 18, 2015 (SGR’s Memorandum of Law dated Nov. 11, 2016, p. 7).

The counterclaim asserts a single cause of action for legal malpractice alleging that by failing to file a timely motion for attorneys’ fees, SGR breached its duty of care (Counterclaim, p. 20, para. 96). TCS seeks damages in the sum of \$3.4 million.

Discussion

On a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211(a)(7), the sole criteria is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law, such a motion will fail (Gawrych v. Astoria Federal Savings and Loan, 148 A.D.3d 681 [2nd Dept., 2017]). The complaint must be construed liberally, the factual allegations deemed to be true, and the nonmoving party granted the benefit of every possible favorable inference (*id.*)

A motion to dismiss based on documentary evidence under CPLR 3211(a)(1) is appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law (Goshen v. Mutual Life Ins. Co. of New York, 98 N.Y.2d 314, 326 [2002]).

The essential elements of a cause of action for legal malpractice are: 1) the attorney's failure to exercise that degree of care, skill and diligence commonly possessed by a member of the legal profession; 2) causation; and 3) actual damages (Prudential Ins. Co. of Am. v. Dewey, Ballantine, Bushby, Palmer & Wood, 170 A.D.2d 108 [1st Dept., 1991]). "An attorney's conduct or inaction is the proximate cause of a plaintiff's damages if but for the attorney's negligence the plaintiff would have succeeded on the merits of the underlying action, or would not have sustained actual and ascertainable damages" (Gallet, Dreyer & Berkey, LLP v. Basile, 141

A.D.3d 405, 405 [1st Dept., 2016] (internal citation omitted)).

Here, the Court entered a judgment in favor of TCS on January 3, 2014. It is undisputed that a motion for attorneys' fees was not made by January 17, 2014. However, on January 31, 2014, Cassidian made a motion for a judgment as a matter of law, or alternatively for a new trial. The Court granted the motion in part and denied the motion in part in a memorandum and opinion entered on August 8, 2014. (Rosenthal Aff., exhibit E). On August 26, 2014, Cassidian then filed a motion to vacate the judgment. The Court granted the motion in a memorandum opinion and order entered on April 20, 2015 (Rosenthal Aff., exhibit F).

TCS argues that SGR breached its duty of care by not filing a timely motion for attorneys' fees by January 17, 2014, within the 14-day deadline set forth in Rule 54(d)(2)(B). The time period was not tolled because Cassidian's post-judgment motion was not made until January 31, 2014, after the expiration of the 14-day deadline.

There are numerous federal cases holding that a motion for attorneys' fees is timely under Rule 54(d)(2)(B) when filed within 14 days after the entry of judgment, or within 14 days of the resolution of post-judgment motions. For example, in Sorenson v. Wolfson, 170 F.Supp.3d 622 (S.D.N.Y. 2016), the Court held that a post-judgment motion revives the time to seek legal fees regardless of whether or not an

initial application was made during the 14-day period following entry of the original judgment (id. at 628).

Other federal district and circuit courts have reached the same conclusion (see, for example, SAS Inst., Inc. v. World Programming Ltd., 2016 WL 3920203, at *3 (E.D.N.C. July 15, 2016) (“After disposition of defendant’s [post-judgment motions], the filing period for attorney’s fees began anew.”); Waltrous v. Borner, 995 F.Supp.2d 84, 88 (D. Conn. 2014) (“[A] party’s motion for attorney’s fees is timely, unless filed outside the fourteen-day window following the court’s last ruling on any pending [post-judgment] motions.”); Drumgold v. Callahan, 806 F.Supp.2d 428, 435 (D. Mass. 2011) (“The overarching rule is that a motion for attorneys’ fees ‘is timely filed if filed no later than 14 days after the resolution of [post-trial motions].’”) (citing Weyant v. Okst, 198 F.3d 311, 315 (2d Cir. 1999); Chirco v. Charter Oak Homes, Inc., 2008 WL 1743343, at *8 (E.D. Mich. Apr. 11, 2008) (“Where a post-judgment motion has been filed, the time limit shall begin to run upon the denial of the motion.”); Bio-Med Applications of Tex., Inc. v. BAP-FMC San Antonio, Ltd., 2006 WL 2728915, at *1 (W.D. Tex. July 7, 2006) (“Plaintiff’s motion for attorney’s fees was filed within fourteen days of the order disposing of plaintiff’s [post-judgment motion]. The motion is therefore timely.”)

It is noteworthy that in four of the above cases, the prevailing party filed a

motion for attorneys' fees after the initial 14-day deadline expired. Likewise, we note that TCS has not cited a case setting forth an inflexible – and arguably irrational – holding that a motion for attorneys' fees should have been filed within 14 days of the initial entry of judgment even where post-judgment motions were filed.

TCS asserts that there are two cases – Bailey v. County of Riverside, 414 F.3d 1023 (9th Cir. 2005), and Members First Fed. Credit Union v. Members First Credit Union of Florida, 244 F.3d 806 (11th Cir. 2001) – whose facts “reflect” that a post-judgment motion may toll the filing deadline for a fee application but only where the non-prevailing party files its post-judgment motion prior to the expiration of the fee application deadline (Memorandum in Opp., p. 10).

TCS's reliance on the cases is misplaced. In Bailey, the Court specifically held that “the Rule 54(d)(2)(B) motion for fees is timely if filed no later than 14 days after the resolution of a [post-judgment motion]” (Bailey, 414 F.3d at 1025). The Ninth Circuit explained that a post-trial motion suspends the finality of the judgment. Accordingly, the 14-day period is tolled (*id.*) On its face, Members First neither states nor implies that post-judgment motions toll the filing deadline for a fee application only where the non-prevailing party files its post-judgment motion prior to the expiration of the fee application deadline.

The documentary evidence shows unambiguously that post-judgment motions

were filed in the Cassidian matter; the Court issued its final ruling on the post-judgment motions on April 20, 2015; and on May 4, 2015, SGR made a timely motion to recover legal fees as a sanction (Rosenthal Aff., exhibits C, D, E, F). The Court finds that the documentary evidence utterly refutes the allegation that SGR failed to make a timely motion for attorneys' fees. The counterclaim fails to state a cause of action for malpractice predicated on the missed deadline.

Accordingly, it is

ORDERED that the motion is granted, and the counterclaim is dismissed pursuant to CPLR 3211(a)(1) and (7) without leave to replead.

The foregoing constitutes the decision and order of the court.

Date: May 5, 2017
New York, New York



Anil C. Singh