Menaker & Herrman, LLP v Foster
2017 NY Slip Op 31456(U)
July 7, 2017
Supreme Court, New York County
Docket Number: 651969/2016
Judge: Manuel J. Mendez
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ *Justice* PART 13

MENAKER & HERRMAN, LLP,
Plaintiff,
-against-
MARTHA G. FOSTER, MATTHEW FOSTER and LARRY J. GUFFEY,
Defendants.

INDEX NO. 651969/2016
MOTION DATE 05-24-2017
MOTION SEQ. NO. 002
MOTION CAL. NO.

The following papers, numbered 1 to 16 were read on this motion pursuant to CPLR §3211[a][1][5] and [7] to dismiss this action:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1 - 7
Answering Affidavits — Exhibits	8 - 10
Replying Affidavits	11 - 16

Cross-Motion: ☐ Yes X No

Upon a reading of the foregoing cited papers, it is Ordered that defendants' motion pursuant to CPLR §3211a[1],[5] and [7] to dismiss this action for failure to state a cause of action and under the Statute of Frauds defense and for other related relief, is denied. Plaintiff's motion filed under Motion Sequence 003 pursuant to CPLR §3212[a] for summary judgment on the third cause of action for account stated, is denied.

The complaint alleges that on May 3, 2013, defendant, Larry J. Guffey, an attorney, retained the plaintiff on behalf of his daughter and son-in-law, Martha G. Foster and Matthew Foster (the "Foster defendants") and his two minor grandchildren. Plaintiff commenced an action titled Foster v. Svenson, filed under Index Number 651826/2013, in Supreme Court New York County alleging violations of New York Civil Rights Law §50-§51 and for intentional infliction of emotional distress against Arne Svenson, an artist, after he used a telephoto lens to photograph the Foster defendants and their minor children for his artwork, titled "The Neighbors," without obtaining approval (Mot., Exh. 1 and 1A).

Justice Eileen A. Rackower's August 5, 2013 Decision/Order denied defendants' motion for an injunction and granted Arne Svenson's cross-motion to dismiss the action filed under 651826/13 (Opp. Exh. 16). On April 9, 2015 the Appellate Division 1st Department affirmed Justice Rackower's decision (Foster v. Svenson, 128 A.D. 3d 150, 7 N.Y.S. 3d 96 [1st Dept., 2015]).

This is an action to recover legal fees for services rendered. The defendants signed a retainer letter on May 15, 2013, that agreed to have plaintiff represent them in connection with the resolution of claims billable after May 9, 2013, but not representation in litigation (Mot. Exh. 1A). The defendants signed a second retainer letter dated May 28, 2013 for representation during litigation that refers to "seeking a temporary restraining order and preliminary injunction and bringing an action against Arne Svenson." The May 28, 2013 retainer letter required a deposit of $5,000.00 which was paid by defendant Larry J. Guffey. The retainer letters also refers to Larry J. Guffey guaranteeing payment of the bills (Mot. Exh. 1A and Mot. Seq. 003, Exh. 1). There was no written retainer agreement for the appeal work performed by the plaintiff. By letter dated October 22, 2013 plaintiff acknowledged receipt of a $10,000.00 payment from Mr. Guffey (Mot. Exh. 1C). On January 27, 2014

Larry J. Guffey sent plaintiff a $20,000.00 payment (Opp. Exh. 32). Defendant Larry J. Guffey made a total of $35,000.00 in payments to plaintiff. At the end of litigation and after the failed appeal, plaintiff sent a letter by e-mail dated June 25, 2015 to all of the defendants showing a balance due of $101, 241.85 and seeking to settle the amount due (Mot. Exh. 1C).

On April 13, 2016 plaintiff commenced this action by summons with notice. The complaint was filed on June 30, 2016 and asserts three causes of action against the defendants for breach of contract, quantum meruit, and account stated (Mot. Exh. 1). On September 16, 2016, Defendants served and filed an answer asserting counter-claims for overbilling, failure to have a proper retainer agreement, breach of fiduciary duty, fraudulent inducement, legal malpractice and pursuant to 22 N.Y.C.R.R. 103.1-1 seeking attorney fees from plaintiff for bringing a frivolous case (Mot. Exh. 2). On October 4, 2016 plaintiff filed a reply to the counterclaims (Mot. Exh. 3).

Defendants' motion (1) pursuant to CPLR §3211a [1],[5] and [7] seeks to dismiss this action for failure to state a cause of action and under the Statute of Frauds defense; (2) to seal the record in the case of Foster v. Svenson filed under Index No. 651826/13; (3) to re-file documents in this instant case using pseudonyms for defendants, and costs and attorneys fees; (4) upon proper notice to convert this motion pursuant to CPLR §3211[c] and CPLR §3212 to summary judgment, dismissing this case on the merits and (5) pursuant to 22 N.Y.C.R.R. 130-1.1 to obtain the return of legal fees previously paid to the plaintiff in the amount of $35,000.00 and for the legal costs associated with this motion.

CPLR §3211[c] permits a Court in its discretion to treat a motion to dismiss as a motion for summary judgment where the parties indicate that they are "deliberately charting a summary judgment course," or when a "purely legal question" is presented (Mihlovan v. Grozavu, 72 N.Y. 2d 506, 531 N.E. 2d 288, 534 N.Y.S. 2d 656 [1988] and Cooney v. City of New York Dept. of Sanitation, 127 A.D. 3d 629, 8 N.Y.S. 3d 166 [1st Dept. 2015]). CPLR §3211[c] applies if there are no issues of fact, "but only issues of law fully appreciated and argued by both sides"(Four Seasons Hotels Ltd. v. Vinnick, 127 A.D. 2d 310, 515 N.Y.S. 2d 1 [1st Dept., 1987]). A unilateral request for conversion, that is objected to, is a significant indication that the parties were not "charting a summary judgment course"(Wadiak v. Pond Management, LLC, 101 A.D. 3d 474, 955 N.Y.S. 2d 51[1st Dept., 2012]).

The CPLR §3211[c] relief seeking to covert this motion to summary judgment, is denied. Plaintiff has opposed the conversion relief and defendants failed to show the that there is a purely legal question, or that each side has laid bare their proof to the extent that conversion should be granted.

A motion to dismiss pursuant to CPLR §3211[a][1] requires that the party seeking dismissal produce documentary evidence that "utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (Fortis Fin. Servs. v. Fimat Futures, USA, 290 A.D. 2d 383, 737 N.Y.S. 2d 40 [1st Dept., 2002] and Leon v. Martinez, 84 N.Y. 2d 83, 638 N.E. 2d 511, 614 N.Y.S. 2d 972 [1994]).

The documentary evidence produced by the defendants does not conclusively establish a defense as a matter of law or utterly refute plaintiff's claims. Defendants arguments that the documentary evidence shows the billing statements are excessive and should be reduced, does not conclusively establish a defense. The bills are sufficiently detailed. The documentation showing rejection of some of plaintiffs' bills does not utterly refute the claims asserted in the complaint.

Dismissal pursuant to CPLR §3211[a][7] requires a reading of the pleadings to determine whether a legally recognizable cause of action can be identified and is properly pled. A cause of action has to present facts so that it can be identified and establish a potentially meritorious claim (Leon v. Martinez, 84 N.Y. 2d 83, 638 N.E. 2d 511, 614 N.Y.S. 2d 972 [1994]). Pleadings that consist of bare legal conclusions and factual assertions which

are clearly contradicted by evidence will not be presumed to be true and are susceptible to dismissal (Dragon Head LLC v. Elkman, 102 A.D. 3d 552, 958 N.Y.S. 2d 134 [1st Dept., 2013]).

Defendants have not shown that the complaint fails to state legally recognizable causes of action. Plaintiff sought arbitration of the full amount of the disputed legal fees, and provided proof of same as Exhibit D to the Complaint, in compliance with 22 N.Y.C.R.R. 137.6 [b]. Arbitration was rejected by the defendants (Opp. Exhs. 63 and 64). Defendants signed two retainer agreements without objection. They have not shown that the cause of action for breach of contract is not stated.

The failure to comply with the rules on retainer agreements (22 N.Y.C.R.R. 1215.1), does not preclude a law firm from suing to recover legal fees under such theories as services rendered, quantum meruit, and account stated (Kucker & Bruh, LLP v. Sendowski, 136 A.D. 3d 475, 24 N.Y.S. 3d 507 [1st Dept., 2016] citing to Roth Law Firm PLLC v. Sands, 82 A.D. 3d 675, 920 N.Y.S. 2d 72 [1st Dept., 2011]).

Plaintiff is not prohibited from asserting causes of action under quantum meruit and account stated for legal fees, without a retainer agreement. Plaintiff agreed to a fixed fee for the appeal which was billed and treated differently from the work performed in the lower court action. This could be deemed as creating a second representation and create a new period for objection, but does not eliminate the potential claim (See Boies, Schiller & Flexner LLP v. Modell, 129 A.D. 3d 533, 11 N.Y.S. 3d 60 [1st Dept. ,2015]). Defendants received bills and partial payment was made by Larry J. Guffey. There has been no showing by the defendants that the rules governing contingency fees for personal injury and wrongful death cases applies to intentional infliction of emotional distress and violation of privacy claims, or that plaintiff did not provide legal services. Potentially meritorious causes of action for account stated and quantum meruit have been stated in the complaint.

CPLR §3211[e] requires a motion to dismiss pursuant to CPLR §3211[a][5], which includes the statute of frauds, be made before an answer is served, or after service if there is an affirmative defense of statute of frauds asserted in the answer. When a defendant does neither, the defense is waived (Wan Li Situ v. MTA Bus Co., 130 A.D. 3d 807, 14 N.Y.S. 3d 89 [2nd Dept., 2015]).

Defendants did not make a pre-answer motion to dismiss or assert an affirmative defense of statute of frauds in their answer (Mot. Exh. 2). The CPLR §3211[a][5] relief sought in defendants' motion is denied.

To permit pseudonyms, the privacy right implicated must be "so substantial as to outweigh the customary and constitutionally embedded presumption of openness in a judicial proceeding," and requires "a legally cognizable cause of action." ("J. Doe No. 1" v. CBS Broadcasting Inc., 24 A.D. 3d 215, 806 N.Y.S. 2d 38 [1st Dept., 2005]).

Defendants have not stated a reason for this Court to issue an order permitting them to re-file documents in this instant case using pseudonyms for the defendants. Defendants have not shown that the privacy right implicated warrants the use of pseudonyms or that they were harmed by the use of their full names. Foster v. Svenson filed under index number 651826/13 was assigned to Justice Rackower in IAS Part 15. Defendants failed to state a reason for not making the application to seal the records before Justice Rackower, or for this Court to seal the record in the other case years later.

Frivolity as defined by 22 NYCRR 130-1.1, requires conduct which is continued when its lack of legal or factual basis should have been apparent to counsel or the party. The imposition of sanctions requires a pattern of frivolous behavior (Sarkar v. Pathak, 67 A.D. 3d 606, 889 N.Y.S. 2d 184 [1st Dept. 2009]).

Defendants have not shown entitlement to sanctions against plaintiff pursuant

to 22 NYCRR 130-1.1 for bringing this action. They have failed to show that this action is frivolous with no factual basis, or that there is a pattern of actions brought to recover fees for inappropriate purposes that would warrant sanctions.

Plaintiff under Motion Sequence 003 pursuant to CPLR §3212[a] seeks partial summary judgment on the third cause of action for account stated. Plaintiff refers to the two retainer agreements, copies of bills sent to defendants, proof of Larry J. Guffey's partial payments, together with proof of attempts to resolve the dispute through arbitration that were rejected by defendants (Mot. Seq. 003, Exhs. 1, 2-19, 20D). Plaintiff claims that although monthly billing throughout the litigation was sent to Larry J. Guffey as guarantor, as of December of 2013 the Foster defendants were included in the billing and did not object or question the amounts (Menaker Aff. in Opp. Exhs. 35-50).

In order to prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (Klein v. City of New York, 81 N.Y. 2d 833, 652 N.Y.S. 2d 723 [1996]). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence, in admissible form, sufficient to require a trial of material factual issues (Amatulli v. Delhi Constr. Corp., 77 N.Y. 2d 525, 569 N.Y.S. 2d 337 [1999]).

To establish prima facie claim of account stated, the movant is required to demonstrate that it, "generated detailed monthly invoices and mailed them to the defendant on a regular basis in the course of its business" (Stephanie R. Cooper, P.C. v. Robert, 78 A.D. 3d 572, 911 N.Y.S. 2d 63 [1st Dept., 2010]). Plaintiff is also required to establish that the defendant retained the invoices or made a partial payment without objection for a reasonable period of time (Morrison Cohen Singer and Weinstein LLP v. Waters, 13 A.D. 3d 51, 786 N.Y.S. 2d 155 [1st Dept., 2004]). Defendant can raise an issue of fact with proof of objections to the bills or statement of account. Defendant cannot rely on self serving, or bald allegations of oral protests, and must show when the objection was made or provide specific details (Darby & Darby v. VSI Intl., 95 N.Y. 2d 308, 739 N.E. 2d 744, 716 N.Y.S. 2d 378 [2000]). Invoices addressed inconsistently or sent irregularly fail to establish an account stated (Roth Law Firm, PLLC v. Sands, 82 A.D. 3d 675 at p. 676, 920 N.Y.S. 3d 72 [1st Dept., 2011]).

Defendants have raised issues of fact warranting denial of partial summary on account stated. Plaintiff concedes that the billing sent directly to the Foster defendants for the first time in December of 2013, after the final determination by the Supreme Court and the work on the Appeal had commenced. The billing sent to the Foster defendants was inconsistent and partial and does not make a prima facie case for summary judgment. The March 18, 2014 bill included a letter from plaintiff acknowledging Larry J. Guffey's e-mail complaining of being overcharged and provided forms for the New York County Lawyer Association fee conciliation program (Mot. Exh. 1C). Larry J. Guffey has raised an issue of fact whether the bills and statements were objected to warranting denial of the relief sought.

Accordingly, it is ORDERED that Defendants' motion to: (1) pursuant to CPLR §3211a [1],[5] and [7] to dismiss this action for failure to state a cause of action and under the Statute of Frauds defense; (2) seal the record in the case of Foster v. Svenson filed under Index No. 651826/13; (3) to re-file documents in this instant case using pseudonyms for defendants, and costs and attorneys fees; (4) upon proper notice to convert this motion pursuant to CPLR §3211[c] and CPLR §3212 to summary judgment, dismissing this case on the merits and (5) pursuant to 22 N.Y.C.R.R. 130-1.1 to obtain the return of legal fees previously paid to the plaintiff in the amount of $35,000.00 and for the legal costs associated with this motion, is denied, and it is further,

ORDERED that plaintiff's motion for partial summary judgment on account stated, is denied.

ENTER:

MANUEL J. MENDEZ,
J.S.C.

Dated: July 7, 2017

MANUEL J. MENDEZ
J.S.C.

Check one: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE