SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 6

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Maureen L. Schwarz,

Plaintiff,

- v -

Howard C. Edelman,

Defendant.

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Index No. 652349/2017

DECISION and ORDER

Mot. Seq. #1

Plaintiff, Maureen L. Schwarz ("Schwarz"), commenced this action on May 2, 2017 against defendant, Howard C. Edelman ("Edelman"), for unjust enrichment and violation of the Judiciary Law § 487. Edelman served an answer on June 6, 2017.

Presently before the Court is Edelman's motion for summary judgment. Schwarz opposes.

Background

Schwarz was a former employee of the Pearl River School District ("the District"). Schwarz filed three grievances against the District. Schwarz alleged that the District violated the Collective Negotiation Agreement ("CNA") by failing to pay her accrued sick and vacation leave and a percentage of her health insurance premium upon her resignation from her employment. Schwarz's grievances proceeded to a non-binding, advisory arbitration ("the Arbitration"). Edelman served as the arbitrator. Schwarz was represented by Karen Zdanis ("Zdanis"). The District was represented by Mark C. Rushfield ("Rushfield"). Schwarz and the District each paid half of Edelman's "anticipated" fees prior to the arbitration - with each side paying Edelman $6,995.00. The Arbitration was held on November 17, 2015 and April 18, 2016. Edelman issued his advisory opinion on August 29, 2016. Edelman concluded that the District had violated the CNA by failing to pay Schwarz for 40 vacation days. Edelman further concluded that the District did not

violate the CBA when it failed to pay Schwarz for accumulated sick leave and a portion of her health insurance premium.

In this action, Schwarz claims that Edelman overcharged her for the services he performed. Schwarz also claims that Edelman colluded with the District by charging the unreasonable fee and delaying the arbitration proceedings to her detriment and to the District's benefit. Specifically, Schwarz claims that the parties had scheduled the Arbitration to proceed on the entire day of November 17, 2015. She alleges that Edelman, "without cause or explanation canceled the afternoon session and cut-short the morning session of the arbitration held on November 17, 2015." She alleges that the cancellation was intended to cause her further expense because she had travelled from Florida to New York for the hearing, and to benefit the District by giving the District more time to prepare its case and "to 'turn' the Plaintiff's witness, an employee of the School District."

Pending Motion

In support of the motion for summary judgment, Edelman submits: the attorney affirmation of Karolina Wiaderna; affirmation of Rushfield; pleadings; CNA between The Pearl River Union Free School District and The Pearl River Union Free School District and The Pearl River Schools Educational Support, Operations, Administrators and Supervisors Association, effective July 1, 2013 through June 30, 2016; Labor Arbitration Rules; e-mail dated November 20, 2015 from Rushfield to Edelman regarding scheduling of the arbitration; e-mails dated March 14, 2016 and March 17, 2016 from Edelman to Zdanis and Rushfield regarding Edelman's anticipated fees; e-mails dated March 23, 2016, April 8, 2016, and April 11, 2016 from Edelman to Zdanis and Rushfield regarding payment; and Edelman's advisory decision.

Schwarz opposes. Schwarz submits an affidavit and the attorney affirmation of Christopher Esposito.

Legal Standard

CPLR § 3211(b) provides that motions for summary judgment must be supported by an affidavit by a person having knowledge of the facts.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. *Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980). That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. (*Id.*) "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 476 N.E.2d 642 (1985). The reply is not a proper vehicle to introduce new evidence to cure deficiencies in a party's moving papers. *See e.g.*, *Migdol v City of New York,* 291 A.D.2d 201, 201 (1st Dept 2002) (rejecting the affidavit submitted with reply since it sought to remedy deficiencies in motion for summary judgment rather than respond to arguments made by opponent).

To prevail on a claim for unjust enrichment, the "plaintiff must show that the other party was enriched, at plaintiff's expense, and that it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered." *Georgia Malone & Co., Inc. v. Rieder*, 86 A.D.3d 406 (1st Dep't 2011).

New York Judiciary Law, Section § 487(1), permits a party to recover damages against an attorney who "is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party."

CPLR § 3212(f) provides that, "[s]hould it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just."

Discussion

Edelman has failed to produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Absent from Edelman's motion is an affidavit from him as to the relevant facts relating to his charges and conduct during the Arbitration. The affirmation submitted by Edelman's attorney is without probative value because his attorney lacks personal knowledge of the facts. The answer, which is verified by Edelman's attorney, also does not constitute an affidavit of facts. While Rushfield claims in his affirmation that Edelman's

charges were proper and denies collusion between the District and Edelman during the Arbitration, Schwarz presents a conflicting account in her affidavit. Therefore, Rushfield's affidavit does not constitute evidence in admissible form to eliminate any material issue of fact from the case.

The Court notes that in reply, Edelman submits an affidavit. However, as stated above, the reply is not a proper vehicle to introduce new evidence to cure deficiencies in a party's moving papers. *See Migdol,* 291 A.D.2d at 201. Even if the court were to accept this affidavit which is first submitted in reply, Edelman's affidavit is insufficient to eliminate any material issue of fact from the case. For example, while Edelman states that all charges were proper and that he provided both parties a bill which itemized all charges, Edelman does not provide a copy of the bill. He refers to the bill as "Exhibit E" to his motion for summary judgment; however, there is no "Exhibit E" on the court's e-filing system.

Lastly, according to Schwarz, Edelman, to date, has failed to provide responses to her Notice for Discovery & Inspection served on August 2, 2017, faxed on August 31, 2017, and demanded by good faith letter dated August 31, 2017. Schwarz's Notice for Discovery and Inspection seeks among other things Edelman's calendar book entry for the November 17, 2015 arbitration day and billing records. The motion is premature. (CPLR § 3215).

Wherefore, it is hereby

ORDERED that the motion for summary judgment is denied; and it is further

ORDERED that the matter is not a medical malpractice case or special proceeding and is therefore referred to Trial Support for random reassignment to a non medical malpractice part.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

DATED: MARCH 28, 2018

EILEEN A. RAKOWER, J.S.C.