

Vioni v Carey & Assoc., LLC
2018 NY Slip Op 31963(U)
August 11, 2018
Supreme Court, New York County
Docket Number: 154928/2017
Judge: Anthony Cannataro
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

LISA VIONI,

Plaintiff,

Index No. 154928/2017

against

DECISION & ORDER

CAREY & ASSOCIATES, LLC and MICHAEL
Q. CAREY,

Defendants.

Anthony Cannataro, J.:

Plaintiff Lisa Vioni commenced this action against her former attorney, Michael Carey, and his law firm, Carey & Associates LLC, seeking damages arising from their alleged malpractice in representing her in an underlying federal lawsuit. In their answer, defendants set forth counterclaims for breach of contract, account stated, and *quantum meruit*. Plaintiff now moves pursuant to CPLR 3211 (a) (1), CPLR 3211 (a) (7), and/or CPLR 3211 (c) to dismiss defendants' counterclaims. Plaintiff argues that defendants' breach of contract counterclaim must be dismissed because plaintiff terminated defendants for cause in the underlying litigation. Plaintiff further argues that the defendants' counterclaims for *quantum meruit* and account stated must be dismissed as being duplicative of the breach of contract counterclaim.

Dismissal of a complaint pursuant to CPLR 3211 (a) (1) is only appropriate where the documentary evidence presented conclusively establishes a defense to the plaintiff's claims as a matter of law (*Leon v Martinez*, 84 NY2d 83 [1994]; see also *Dixon v 105 W. 75th St. LLC*, 148 AD3d 623 [1st Dept 2017]). The documents submitted must be explicit and unambiguous (see *Bronxville Knolls v Webster Town Ctr. Partnership*, 221 AD2d 248 [1st Dept 1995]). When a court considers the documents offered by the movant to negate the

claims in the complaint, the allegations in the complaint must be presumed to be true, and the pleading is entitled to all reasonable inferences (*see Leon*, 84 NY2d at 87–88).

In considering a motion to dismiss a complaint pursuant to CPLR 3211 (a) (7), “the court must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Sokol v Leader*, 74 AD3d 1180, 1181 [2d Dept 2010] [internal quotation marks omitted]; *see Nonnon v City of New York*, 9 NY3d 825, 827 [2007]; *Leon*, 84 NY2d at 87–88 [1994]). However, when evidentiary material is adduced in support of a motion to dismiss a complaint pursuant to CPLR 3211 (a) (7), and the motion has not been converted to one for summary judgment, the court must determine whether the proponent of the pleading has a cause of action, and unless it has been shown that no significant dispute exists regarding a material fact, dismissal should not eventuate” (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *see Jannetti v Whelan*, 97 AD3d 797, 797–798 [2012]).

In the instant case, plaintiff submitted several documents in an attempt to establish, as a matter of law, that she terminated defendants for cause. However, plaintiff’s motion relies upon, among other documents, several email exchanges, letters, and affidavits, a substantial portion of which do not constitute documentary evidence which may be considered on a CPLR 3211(a)(1) motion to dismiss (*see Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267 [1st Dept 2004] [e-mails and deposition and trial testimony did not constitute documentary evidence under CPLR 3211(a)(1)]; *United States Fire Ins. Co. v North Shore Risk Mgt.*, 114 AD3d 408 [1st Dept 2014] [affidavits and e-mails did not qualify as “documentary evidence” for purposes of a motion to dismiss based on documentary evidence]; *see also Art & Fashion Group Corp. v Cyclops Prod., Inc.*, 120 AD3d 436, 438 [1st Dept 2014]).

Furthermore, in *Matter of Weitling* (266 NY 184 [1935]), the Court of Appeals held that a hearing is generally required to determine if an attorney was discharged for or

without cause before completion of his services because of the severity of the consequences which follow from such a finding (*see also Doviak v Finkelstein & Partners, LLP*, 90 AD3d 696 [2d Dept 2011]; *Schultz v Hughes*, 109 AD3d 895 [2d Dept 2013]). The Court of Appeals explained:

It is a serious matter to charge an attorney with such unprofessional conduct as will entitle a client to a surrender of papers in his possession without the payment of his fair and just compensation. Ordinarily, where the charge of misconduct is denied in detail, the issue should not be determined upon conflicting affidavits alone. Testimony should be taken and the issue should be heard by the court or the matter sent to a referee. In a matter of such importance, the witnesses should be produced in court subject to cross-examination (*Matter of Weitling*, 266 NY at 187).

In the instant case, the substance of the documents submitted, and the allegations made by plaintiff are disputed by defendants. Faced with such conflicting proofs, this Court is required to hold a hearing, or at least permit discovery, before it can determine whether defendants were terminated for cause (*see also Frechtman v Gutterman*, 140 AD3d 538 [1st Dept 2016] *citing Dreyer & Traub v Rubinstein*, 191 AD2d 236 [1st Dept 1993]). Accordingly, the branch of plaintiff's motion seeking to dismiss defendants' first counterclaim for breach of contract is denied.

The Court next turns to that branch of plaintiff's motion which seeks to dismiss defendants' second and third counterclaims. If, after a hearing, the factfinder determines that defendants were terminated without cause, defendants may seek to recover legal fees for services they provided on a *quantum meruit* and account stated basis (*see Miller v Nadler*, 60 AD3d 499 [1st Dept 2009]; *Seth Rubenstein, P.C. v Ganea*, 41 AD3d 54 [2d Dept 2007]; *see also Crowley v Wolf*, 281 NY 59 [1939]; *Marschke v Cross*, 82 AD2d 944 [3d Dept 1981]; *Vertical Progression, Inc. v Canyon-Johnson Urban Funds*, 126 AD3d 784 [2d Dept 2015]). Accordingly, defendants' second and third counterclaims cannot be dismissed at

this juncture as they are properly pled and not necessarily duplicative of the breach of contract counterclaim.

Accordingly, it is

ORDERED that plaintiff's motion to dismiss defendants' counterclaims is denied in its entirety; and it is further

ORDERED that plaintiff is directed to serve a reply to the counterclaims within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that the parties are directed to appear for a preliminary conference in Part 41 at 111 Centre Street, Rm 490 on August 12, 2018 at 2:15 P.M.

This constitutes the decision and order of the Court.

Dated: 8/11/18

ENTER:



Anthony Cannataro, JSC