Arent Fox LLP v JDN AA, LLC
2018 NY Slip Op 32877(U)
November 8, 2018
Supreme Court, New York County
Docket Number: 151654/2018
Judge: Joel M. Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART IAS MOTION 45

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ARENT FOX LLP,

Plaintiff,

- v -

JDN AA, LLC D/B/A AUDI/NEWTON, SUBARU 46 LLC, DCN AUTOMOTIVE LLC

Defendant.

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INDEX NO. 151654/2018

MOTION DATE 10/10/2018

MOTION SEQ. NO. 001

DECISION AND ORDER

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 24, 25, 26, 27, 28, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 98

were read on this motion to/for DISMISS.

Upon the foregoing documents:

In this case, Arent Fox LLP is suing three clients (collectively, "Defendants") for nonpayment of legal fees. The firm asserts claims for breach of contract, account stated, quantum meruit, unjust enrichment, and promissory estoppel. Defendants seek dismissal of Arent Fox's breach of contract claim on the ground that the firm did not obtain an executed retention agreement with respect to the legal services provided.[1]

[1] Initially, Defendants sought dismissal of *all* claims on the ground that Arent Fox failed to comply with the requirement of 22 N.Y.C.R.R. § 137 to advise Defendants of their right to pursue arbitration and mediation. Arent Fox responded, in part, by noting that the amount in dispute in this action exceeds $50,000 and thus Part 137 is inapplicable. In the end, however, Arent Fox did send Defendant a Notice of Client's Right to Arbitrate. At oral argument, Defendants agreed that such action mooted this portion of their motion to dismiss. Accordingly, the Court will not address the issue further.

The motion is granted with respect to the claim against Defendants Subaru 46 LLC and DCN Automotive LLC and denied with respect to the claim against Defendant JDN AA, LLC.[2]

Background

According to the factual allegations of the Amended Complaint, Arent Fox began performing legal services for Defendants on or about August 1, 2014 and continued to do so off and on "at the specific instance and request of Defendants until on or about December 9, 2016."[3] During that time, the firm sent detailed invoices to Defendants setting forth the date of service, the attorney who performed each service, the service performed by the attorney, the amount of time spent by the attorney, the fee assessed for each block of service performed, and the expenses incurred. Defendants made partial payment in the amount of $253,338.70 but failed to pay the remaining $278,128.91 that was due. (Am. Compl. ¶¶ 8-17.) Defendants never objected to the tendered invoices. (*Id.* ¶ 33.) Arent Fox alleges that it had "a valid, existing, and enforceable contractual relationship with Defendants;" that it fully performed its duties under the contract; and that Defendants failed to make payments that were required under the contract. (*Id.* ¶ 20.)

As noted above, Defendants seek to dismiss Arent Fox's claim for breach of contract because the firm did not allege in the Amended Complaint that there was an executed retainer

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[2] Arent Fox made a cross-motion for summary judgment on its claims for breach of contract, account stated, and quantum meruit, based in part on the suggestion that Defendants had opened the door to such a motion by submitting extrinsic evidence in support of their motion to dismiss. At oral argument, with some prompting that there was no guarantee of a second bite at the summary judgment apple, Arent Fox withdrew the cross-motion, without prejudice. (NYSCEF 98, Tr. at 21.)

[3] The engagement began when current Arent Fox partner Russell P. McCrory was a partner with Robinson Brog Leinwand Greene Genovese & Gluck P.C. The relationship was transitioned to Arent Fox when McCrory joined that firm. For simplicity, we will refer to Arent Fox as counsel for purposes of describing the facts. Defendants have not asserted that the change in firms has any bearing on the merits of the instant motion. Any disputes as to whether the engagement letter executed by McCrory at his former firm covers work for which Arent Fox now seeks fees can be litigated as the case proceeds.

agreement between the parties. In response, Arent Fox submitted an affidavit of Russell McCrory, the Arent Fox partner who principally handled the representation of Defendants. According to the affidavit, McCrory (while at his former law firm) signed an "engagement agreement," in the form of a letter to "Audi of Newton" (*i.e.*, Defendant JDN AA, LLC) on or about March 5, 2014. McCrory "believe[s]" the letter was countersigned by Joseph Natale, the managing member of JDN, but the copy attached to the affidavit does not contain his signature and at oral argument Defendants' counsel indicated they will challenge that assertion.[4]

The March 2014 engagement letter relates to JDN AA's selection of McCrory's former firm to represent JDN AA in a lawsuit against Volkswagen Group of America, Inc. challenging the attempted termination of JDN AA's Audi dealership. The letter set forth, among other things, the scope of the legal services to be provided, an explanation of the fees to be charged (including McCrory's billing rate), and a description of expenses and billing practices. McCrory avers that on or about August 4, 2014, Mr. Natale signed "consent to change attorney" forms to change JDN AA's counsel in the Volkswagen litigation from McCrory's former firm to his new firm (Arent Fox).

McCrory avers that he (on behalf of Arent Fox) and Mr. Natale (on behalf of JDN AA and JDN VW, LLC) signed an "engagement agreement and conflict waiver," which he describes as a "Second Engagement Letter" on or about June 12, 2015 with respect to the sale of Newton Audi and JDN Volkswagen to a third party. The document, which is attached to the affidavit and titled "Sale of Dealership – Conflict Waiver," focuses on JDN's waiver of conflicts with respect to Arent Fox's representation of the proposed buyer (in unrelated matters). The letter describes

[4] Defendants do not object to Arent Fox's submission of the McCrory affidavit and attachments *per se*, but state that the information should be considered solely "for the limited purpose of remedying the defects of Plaintiff's pleading." (NYSCEF 90 at 2) (citing cases).

the scope of the engagement but does not contain an explanation of fees, expenses, or billing practices with respect to the engagement.

Defendants Subaru 46 LLC and DCN Automotive LLC are not referenced by name in any of the "engagement" documents submitted by Arent Fox. Nor has Arent Fox submitted any evidence that describes the terms of any alleged contract between Arent Fox and either of those entities.

The McCrory affidavit details a series of written communications between himself and Mr. Natale, ranging from March 4, 2015 through April 29, 2016, in which Mr. Natale purportedly requests that Arent Fox perform certain tasks with respect to various legal matters for Defendants. The affidavit also describes and attaches a series of invoices sent to Defendants, and states that Defendants made payment of $253,338.70 of the $531,467.61 billed, leaving a total amount due and owning of $278,128.91.

In reply, Defendants note that the March 2014 "engagement agreement" was with only one of the Defendants (JDN AA) and was not signed, and that the June 2015 "conflict waiver" letter also did not involve all Defendants; related to one specific engagement; and did not contain necessary information with respect to, among other things, an explanation of the fees to be charged.

Discussion

A. **Legal Standard**

The standard for assessing a motion to dismiss under CPLR 3211(a)(7) is a familiar one. The role of the Court is to "determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v. Martinez*, 84 N.Y.2d 83, 87 (1994). In doing so, the Court must give the complaint a liberal construction, accept its factual allegations as true, and provide the plaintiff

with the benefit of every favorable inference. *See, e.g.*, *Nomura Home Equity Loan, Inc. v. Nomura Credit & Capital, Inc.*, 30 N.Y.3d 572, 582 (2017); *Myers v. Schneiderman*, 30 N.Y.2d 1, 11 (2017). Allegations consisting of "bare legal conclusions" are not entitled to such consideration. *See, e.g.*, *Connaughton v. Chipotle Mexican Grill, Inc.*, 29 N.Y.3d 137, 141-42 (2017).

Moreover, the Court "may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint." *Id.*; *see also AG Capital Funding Partners, L.P. v. State Street Bank and Trust Co.*, 5 N.Y.3d 582, 591 (2005) ("any deficiencies in the complaint may be amplified by supplemental pleadings and other evidence."); *Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 634-45 (1976) ("affidavits may be used freely to preserve inartfully pleaded, but potentially meritorious, claims.").

B. **Arent Fox Has Adequately Pleaded a Claim for Breach of Contract Only Against Defendant JDN AA, LLC**

The compensation of an attorney for legal services "is governed by agreement, express or implied. . . ." Judiciary Law § 474. To state a viable cause of action for breach of contract, a plaintiff must allege facts sufficient to show "the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages." *Harris v. Seward Park Housing Corp.*, 79 A.D.3d 425, 426 (1st Dep't 2010).

Arent Fox's allegations against Defendants Subaru 46 LLC and DCN LLC are conclusory. The Amended Complaint simply asserts, as to all three defendants, that "Arent Fox had a valid, existing, and enforceable contractual relationship with Defendants." While it subsequently provided documentary evidence supporting that general allegation with respect to Defendant JDN AA, LLC, it did not do so with respect to the other two defendants. Accordingly, the breach of contract claims against those defendants, as pleaded, cannot

withstand a motion to dismiss. *See, e.g., Mandarin Trading Ltd v. Wildenstein*, 16 N.Y.3d 173, 181-82 (2011) (affirming dismissal of contract claim where "[t]he complaint only offers conclusory allegations without pleading the pertinent terms of the purported agreement"); *see also Detringo v. South Island Family Medical,* LLC, 158 A.D.3d 609, 610 (2nd Dep't 2018) (dismissing breach of contract claim where "allegations as to the formation and terms of any alleged contract are vague and entirely conclusory"); *Marino v. Vunk*, 39 A.D.3d 339, 340 (1st Dep't 2007) (stating "[v]ague and conclusory allegations are insufficient to sustain a breach of contract cause of action.").[5]

By contrast, Arent Fox *has* adequately pleaded a claim for breach of contract against Defendant JDN AA, LLC. The Amended Complaint includes factual allegations (bolstered by the McCrory affidavit and exhibits, including a written letter of engagement and an agreement to substitute Arent Fox as counsel in the Volkswagen litigation) that would, if proven, show there were one or more agreements between the parties regarding Arent Fox's provision of legal services, that Arent Fox performed legal services pursuant to the parties' agreements, that Defendants breached the agreements by failing to fully compensate Arent Fox for its services under the terms of the agreement, and that Arent Fox has suffered damages as a result of the breach.

Defendants do not seriously dispute the facial sufficiency of the allegations against JDN AA, LLC. Instead, they contend that Arent Fox's claim nevertheless should be dismissed, as a matter of law, because Arent Fox did not obtain executed retention agreements, which they

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[5] Arent Fox includes in its brief a general request for leave to replead in the event the Court grants any relief to Defendants. That does not suffice. Arent Fox is free to submit a motion for leave to amend, attaching a copy of a proposed amended complaint.

contend were required under 22 N.Y.C.R.R. § 1215.1 (the "engagement letter rule"). The Court now turns to that issue.

C. **The Record Does Not Establish a Violation of the Engagement Letter Rule**

Defendants' argument that the engagement letter rule bars Arent Fox from pursuing a claim for breach of contract raises two distinct issues. First, does the record at this early stage of the case demonstrate conclusively that Arent Fox failed to comply with the engagement letter rule? Second, *if so*, does a failure to comply with the engagement letter rule preclude a claim for breach of contract as a matter of law? Because the answer to the first question is No, the Court need not resolve the second question.

i. **The Engagement Letter Rule**

The engagement letter rule, promulgated by the Appellate Divisions in 2002, requires that an attorney who undertakes to represent a client for a fee must provide to the client a "written letter of engagement" before commencing the engagement or within a reasonable time thereafter. 22 N.Y.C.R.R. § 1215.1(a). The engagement letter must include an "explanation of the scope of the legal services to be provided," an "explanation of attorney's fees to be charged, expenses and billing practices," and, where applicable, a notification that the client may have a right to arbitrate fee disputes. *Id.* § 1215.1(b). As an alternative to a written letter of engagement, an attorney may instead enter into a "signed written retainer agreement" with the client that addresses the above topics. *Id.* § 1215.1(c). The rule does not apply to, *inter alia*, a "representation where the attorney's services are of the same general kind as previously rendered to and paid for by the client." *Id.* § 1215.2.[6]

[6] In 2009, a variant of the engagement letter rule was incorporated in the New York Rules of Professional Conduct. Specifically, Rule 1.5(b) provides that: "A lawyer shall communicate to a client the scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible. This information shall be

The engagement letter rule serves to "aid the administration of justice by prodding attorneys to memorialize the terms of their retainer agreements containing basic information regarding fees, billing, and dispute resolution which, in turn, minimizes potential conflicts and misunderstandings between the bar and clientele." *Seth Rubenstein, P.C. v. Ganea*, 41 A.D.3d 54, 61 (2nd Dep't 2007). Although compliance with the engagement letter rule is mandatory, the rule does not set forth a penalty for noncompliance. *See Rubenstein,* 41 A.D.3d at 60; *Barry Mallin & Assocs. v. Nash Metalware Co.*, 18 Misc.3d 890 (Civ. Ct., NY Cty. 2008). As the court in *Rubenstein* observed, "the intent of Rule 1215.1 was not to address abuses in the practice of law, but rather, to prevent misunderstandings about fees that were a frequent source of contention between attorneys and clients." 41 A.D.3d at 60.

Numerous cases have stated the general proposition that a failure to comply with the engagement letter rule does not preclude an attorney from recovering for unpaid fees. *See*, *e.g.*, *Egnotovich v. Katten Muchin Zavis & Rosenman LLP*, 55 A.D.3d 462, 464 (1st Dep't 2008) ("that firm's failure to provide a retainer agreement does not preclude it from recovering legal fees for its services"); *Rubenstein*, 41 A.D.3d at 63 ("We find that a strict rule prohibiting the recovery of counsel fees for an attorney's noncompliance with 22 N.Y.C.R.R. §1215.1 is not appropriate and could create unfair windfalls for clients, particularly where clients know that the legal services they receive are not pro bono and where the failure to comply with the rule is not willful.").

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communicated to the client before or within a reasonable time after commencement of the representation and shall be in writing where required by statute or court rule. This provision shall not apply when the lawyer will charge a regularly represented client on the same basis or rate and perform services that are of the same general kind as previously rendered to and paid for by the client. Any changes in the scope of the representation or the basis or rate of the fee or expenses shall also be communicated to the client." 22 N.Y.C.R.R. §1200.0, Rule 1.5(b).

The cases that have considered the implications of a failure to comply with the requirements of Section 1215.1 have focused mainly on an attorney's ability to pursue payment of fees by asserting claims for *account stated* or *quantum meruit* (which Defendants do not challenge in this case), rather than breach of contract. *See, e.g., Jaffe Ross & Light v. Mann*, 121 A.D.3d 480, 481 (1st Dep't 2014) (law firm's "failure to comply with the letter of the engagement rule (22 N.Y.C.R.R. §1215.1) does not preclude it from recovery of legal fees under a theory of account stated"); *Roth Law Firm, PLLC v. Sands*, 82 A.D.3d 675, 676 (1st Dep't 2011) (law firm's "failure to comply with the letter of the engagement rule (22 N.Y.C.R.R. §1215.1) does not preclude it from seeking recovery of legal fees under such theories as services rendered, quantum meruit, and account stated."); *Rubenstein,* 41 A.D.3d at 63-64 (failure to comply with engagement letter rule does not preclude a claim for quantum meruit).

The law is murkier with respect to claims asserted by attorneys for breach of contract. The First and Second Departments have affirmed summary judgment dismissals of such claims where the record indicated that the attorney failed to comply with the engagement letter rule. *See Frechtman v. Gutterman*, 140 A.D.3d 538, 538 (1st Dep't 2016) ("Moreover, plaintiff has conceded that there was no retainer agreement, and thus, his breach of contract claim fails as a matter of law."); *Sidoti v. Hall*, 124 A.D.3d 760, 761 (1st Dep't 2015) ("The defendants established, *prima facie*, that there was no written retainer agreement, and thus, the plaintiff cannot recover legal fees on a theory of breach of contract."); *Rubenstein*, 41 A.D.3d at 59. The courts in those cases did not indicate whether there is a *per se* rule that such claims are precluded as a matter of law *in every case*, or instead that it is an issue to be decided on a case by case basis. As noted above, however, given the Court's finding below that the record at this stage does not demonstrate that Arent Fox failed to comply with the engagement letter rule with

respect to Defendant JDN AA, LLC, there is no need to resolve that question in deciding the instant motion.[7]

ii. Did Arent Fox comply with the engagement letter rule?

The short answer to the above question is that it is too early to tell.

a. <u>The March 2014 Engagement Letter</u>

Defendants assert that the March 2014 engagement letter executed by McCrory does not comply with the engagement letter rule because it was not countersigned by the client. That is incorrect. Section 1215.1(a) requires that the lawyer provide to the client "a written letter of engagement before commencing the representation, or within a reasonable time thereafter." Section 1215.1(c), upon which Defendants appear to rely, provides that a lawyer "may," *instead of an engagement letter*, use a "signed written retainer agreement" to satisfy the requirements of section 1215.1(a). Given that section 1215.1 provides one option described as a "written letter of engagement" and another described as a "*signed* written retainer agreement" (emphasis added), the most natural reading of the rule is that the "written letter of engagement" does not have to be countersigned by the client. *See Pechenik and Curio, P.C. v. Weaver*, 24 Misc. 3d 1246(A), 2009 WL 2877598 (N.Y. Sup. Ct, Rensselaer Cty. 2009) (holding that section 1215.1 does not require that the attorney obtain the client's signature on a written letter of engagement). To be

[7] In *Rubenstein*, on which both *Frechtman* and *Sidoti* principally rely, the court affirmed the grant of summary judgment dismissing a breach of contract claim (*id.* at 59) but spent the bulk of the opinion focused on why it would be reasonable to permit the lawyer to obtain fees for services rendered via a claim for quantum meruit. One could read the court's opinion as concluding that the attorney in that particular case did not adequately state a case for breach of contract, rather than finding that attorneys *categorically* cannot assert claims for breach of contract in the face of a failure to comply with 22 N.Y.C.R.R. §1215.1. The only reference to the court's rationale for affirming dismissal of the plaintiff's claim for breach of contract is the court's statement that: "If the terms of a retainer are not established, or if a client discharges an attorney without cause, the attorney may recover only in quantum meruit to the extent that the fair and reasonable value of legal services can be established." *Id.* at 60. Whether the court's statement referred to the fact that the lawyer in that case had in fact been discharged, or that the terms of the agreement were ambiguous or unfair, or something else, is unclear.

sure, obtaining the client's signature might be useful for litigation purposes, to eliminate any uncertainty as to whether there is in fact a meeting of the minds as to the terms of the engagement, but the letter by the lawyer serves the purpose of clearly laying out for the client the terms on which the lawyer is offering her or his services, which is the principal purpose of the engagement letter rule.

Arent Fox's March 2014 letter of engagement was sufficient to satisfy the requirements of 22 N.Y.C.R.R. §1215.1(a) with respect to its alleged engagement by JDN AA, LLC in connection with the Volkswagen litigation. It set forth set forth the scope of the legal services to be provided, an explanation of the fees to be charged (including McCrory's billing rate), and a description of expenses and billing practices. That is all that was required by the engagement letter rule. Moreover, the fact that JDN AA signed a "consent to change attorney" form in August 2014 supports the allegation that the client assented to continuation of the contractual relationship with McCrory's new firm Arent Fox. The Court finds that, on the face of the pleadings and supporting documents, Arent Fox complied with the engagement letter rule in connection with its work for JDN AA, LLC on the Volkswagen litigation. Whether the agreed terms of that engagement covered work for JDN AA on other matters, such as the proposed sale of a business, is a matter to be determined in the litigation rather than on a motion to dismiss.[8]

[8] The June 2015 letter signed by McCrory and Mr. Natale relating to Arent Fox's engagement to represent JDN AA and JDN VW, LLC in connection with the sale of a business did not include an explanation of fees to be charged for the engagement. As such, it was not by itself a "written letter of engagement" within the meaning of 22 NYCRR §1215.1(a). The same is true with respect to the email communications to the extent they relate to engagements for JDN AA other than the Volkswagen engagement. However, that fact standing alone does not necessarily mean there was a failure to comply with the engagement letter rule. There is no indication in the record, one way or another, whether this was a "representation where the attorney's services are of the same general kind as previously rendered to and paid for by the client," *id.* § 1215.2, or as to whether the terms of the March 2014 engagement letter were extended by agreement to include other representations of JDN AA, LLC.

Therefore, it is:

ORDERED that the motion by Defendants to dismiss the First Cause of Action is granted with respect to the claim against Defendants Subaru 46 LLC and DCN Automotive LL and denied with respect to the claim against Defendant JDN AA, LLC; it is further

ORDERED that Plaintiff's Cross-Motion for Summary Judgment has been withdrawn, without prejudice.

This constitutes the Decision and Order of the Court.

HON. JOEL M. COHEN
J.S.C.

11/8/2018
DATE

JOEL M. COHEN, J.S.C.

CHECK ONE:	[ ]	CASE DISPOSED		[X]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[ ] DENIED	[X]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE