Borah, Goldstein, Altschuler, Nahins & Goidel, P.C. v 49 Bleecker, Inc.
2018 NY Slip Op 32924(U)
November 1, 2018
Supreme Court, New York County
Docket Number: 656317/2017
Judge: Anthony Cannataro
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART IAS MOTION 41EFM

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BORAH, GOLDSTEIN, ALTSCHULER, NAHINS & GOIDEL, P.C.,

Plaintiff,

- v -

49 BLEECKER, INC.,

Defendant.

INDEX NO. 656317/2017

MOTION DATE N/A

MOTION SEQ. NO. 001

DECISION AND ORDER

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HON. ANTHONY CANNATARO:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37

were read on this motion to/for DISMISSAL.

Plaintiff Borah, Goldstein, Altschuler, Nahins & Goidel, P.C. (Borah Goldstein) commenced this action against its former client, defendant 49 Bleecker, Inc. (49 Bleecker), to recover unpaid legal fees upon the theories of breach of contract, account stated, and *quantum meruit*. Plaintiff represented defendant in various proceedings against undertenants residing in defendant's leased commercial space. In its answer, defendant set forth several defenses and counterclaims. Plaintiff now moves, pursuant to CPLR 3211 (b), to dismiss defendant's affirmative defenses, and, pursuant to CPLR 3211 (a) defendant's counterclaims. Defendant opposes and cross-moves for leave to amend its answer.

The Court first addresses defendant's cross motion. Pursuant to CPLR 3025 (b), motions to amend are freely granted in the absence of prejudice or unfair surprise resulting from delay, unless the proposed amendment is plainly lacking in merit (*Thomas Crimmins Contr. Co., Inc. v City of New York*, 74 NY2d 166 [1989]). CPLR 3025 allows liberal amendment of pleadings absent demonstrable prejudice (*Atlantic Mut. Ins. Co. v Greater N.Y. Mut. Ins. Co.*, 271 AD2d 278 [1st Dept 2000]).

In its proposed amended answer, defendant includes additional factual allegations to support its claims and defenses. Allowing defendant to amend its answer to include these factual allegations would not prejudice plaintiff as the allegations do not change, but instead more fully explain, defendant's affirmative defenses. Accordingly, defendant's cross motion for leave to amend its answer is granted, and the proposed amended answer attached to its motion papers is deemed the answer in this action.

The Court next turns to plaintiff's motion to strike the affirmative defenses and counterclaims asserted in defendant's answer. The standard used on a CPLR 3211 (b) motion to strike affirmative defenses is akin to the one used on a CPLR 3211 (a) (7) motion to dismiss for failure to state a cause of action (*Pamela Equities Corp. v The Law Suite, L.P.*, 14 Misc 3d 1217(A), 2005 NY Slip Op 52325 (U) [Sup Ct, NY County 2005]; *see also Wells Fargo Bank, N.A. v Rios*, 160 AD3d 912, 913 [2d Dept 2018] [on a CPLR 3211 (b) motion to dismiss one or more defenses, the court should apply the same standard of proof as it would to a CPLR 3211 (a) (7) motion to dismiss for failure to state a cause of action]). In considering a motion to dismiss pursuant to CPLR 3211 (a), "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" (*Faison v Lewis*, 25 NY3d 220, 224 [2015], quoting *Leon v Martinez*, 84 NY2d 83, 87–88 [1994] [citations omitted]; *see also Nonnon v City of New York*, 9 NY3d

825, 827 [2007]; *Sokol v Leader,* 74 AD3d 1180, 1181 [2d Dept 2010]). Under CPLR 3019 (d), a cause of action contained in a counterclaim must be treated as if it were contained in a complaint. Thus, a counterclaim should be as complete as a complaint, as to both form and content, and should sufficiently set forth a cause of action (*Tompkins v Leitz*, 11 AD2d 800 [2d Dept 1960]; *Smith v D.A. Schulte, Inc*., 280 App Div 913 [1st Dept 1952]).

Defendant's first affirmative defense states that plaintiff's complaint fails to state a cause of action. However, the complaint states a clear cause of action for legal fees, with a copy of a retainer agreement annexed, and states an amount owed by defendant. This first defense is merely a boilerplate conclusory allegation, devoid of factual support and is therefore insufficient (*see Robbins v Growney*, 229 AD2d 356 [1st Dept 1996]). Accordingly, the first affirmative defense is dismissed.

Defendant's second affirmative defense states that plaintiff's causes of action are barred by the statute of limitations. Pursuant to CPLR 213, the statute of limitations for breach of contract claims is six years. Annexed to plaintiff's complaint is its retainer agreement with defendant. The agreement was executed in March 2013, less than six years before the action was commenced, and all of the complained of outstanding fees postdate the execution of that agreement. Accordingly, the second affirmative defense is also meritless and therefore dismissed.

Defendant's third, fourth, fifth, and sixth affirmative defenses contain various legal theories all pertaining to the defense that plaintiff failed to perform on the agreement and committed malpractice. Further, the fourth defense, that plaintiff has unclean hands, although a claim in equity, is potentially applicable in this case as plaintiff has made an equitable claim for *quantum meruit*. As to these defenses, taking the allegations set forth in defendant's answer as true, and affording them every reasonable inference, defendant has raised colorable defenses that plaintiff failed to perform its

duties to defendant and/or committed malpractice. Accordingly, so much of plaintiff's motion as seeks to strike defendant's third, fourth, fifth, and sixth defenses is denied.

Defendant's seventh affirmative defense is, in effect, that plaintiff's cause of action for breach of contract is barred by a lack of consideration. However, the retainer agreement clearly provides for a *quid pro quo* of work for payment (*see Rooney v Tyson*, 91 NY2d 685 [1998)]; *Roffe v Weil*, 161 AD2d 509 [1st Dept 1990]; *see also Meo Universe v Takanobu*, 147 AD3d 682 [1st Dept 2017]). Accordingly, the seventh affirmative defense is meritless and therefore dismissed.

Defendant's counterclaims alleging malpractice and breach of contract are each supported by factual allegations. The facts as alleged could fit within both legal theories (*see Ullmann-Schneider v Lacher & Lovell-Taylor, P.C.*, 121 AD3d 415 [1st Dept 2014]). Accordingly, the branch of the motion which seeks to strike defendant's counterclaims is denied.

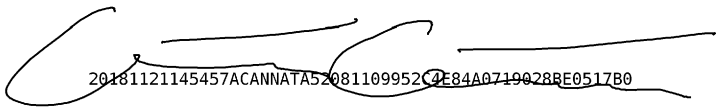
Accordingly, it is

ORDERED that defendant's cross-motion for leave to amend its answer is granted and the proposed amended answer attached to its motion papers is deemed the answer in this action; and it is further

ORDERED that plaintiffs's motion to dismiss defendant's affirmative defenses and counterclaims is granted to the extent of dismissing defendant's first and seventh affirmative defenses and otherwise denied; 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 December 12, 2018 at 2:15 P.M.

This constitutes the decision and order of the Court.



11/1/2018
DATE

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