

Davidoff Hutcher & Citron LLP v Parada
2019 NY Slip Op 31121(U)
April 22, 2019
Supreme Court, New York County
Docket Number: 152533/2016
Judge: Paul A. Goetz
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. PAUL A. GOETZ PART IAS MOTION 47EFM

Justice

INDEX NO. 152533/2016
MOTION DATE 04/15/2019, 04/15/2019
MOTION SEQ. NO. 003 004

DAVIDOFF HUTCHER & CITRON LLP
Plaintiff,

- v -

MARIA DEL PILAR NAVA PARADA,
Defendant.

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 003) 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 107, 108

were read on this motion to/for JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 004) 63, 64, 65, 66, 67, 93, 94, 95, 96, 97, 98, 99, 109

were read on this motion to/for AMEND CAPTION/PLEADINGS

Plaintiff Davidoff Hutcher & Citron LLP commenced this action against its former client, defendant Maria Del Pilar Nava Parada, for unpaid legal fees arising from plaintiff's representation of Ms. Parada in a divorce proceeding. In her answer, Ms. Parada asserted a counterclaim for unjust enrichment based on plaintiff's alleged excessive billing practices. By order dated November 26, 2018, this court granted plaintiff's motion for summary judgment on its complaint for unpaid legal fees. Plaintiff now moves pursuant to CPLR 3212 for summary judgment dismissing Ms. Parada's counterclaim for unjust enrichment. In a separate motion, defendant Ms. Parada moves pursuant to CPLR 3025 to amend her answer to assert additional counterclaims arising from plaintiff's alleged malpractice in representing defendant in a divorce proceeding. The motions are consolidated for purposes of this decision.

Pursuant to CPLR 3025(b), motions for leave to amend pleadings should be freely granted absent prejudice or surprise resulting therefrom. MBI Ins. Co. v. Greystone & Co., 74

A.D.3d 499, 499 (1st Dep't 2010). However, where a proposed amendment would be futile, the motion to amend should be denied. *Desarroladora Farallon S. de R.L. de C.V. v Mexvalo, S. De R.L. De C.V.*, 146 A.D.3d 442, 442 (1st Dep't 2017).

Defendant Ms. Parada's counterclaim for unjust enrichment based on plaintiff's alleged billing practices lacks merit. It is well-established that the existence of a valid and enforceable contract governing a particular subject matter precludes recovery on a quasi-contractual claim, such as unjust enrichment. *Polo Elec. Corp v. New York Law School*, 114 A.D.3d 419, 419 (1st Dep't 2014). Here, as discussed in this court's order dated November 26, 2018, defendant Ms. Parada signed a retainer agreement with plaintiff which governs the billing practices that Ms. Parada complains of in her counterclaim for unjust enrichment. Accordingly, plaintiff's motion for summary judgment to dismiss the counterclaim for unjust enrichment must be granted.

The proposed counterclaim for breach of contract also lacks merit. "Unless a plaintiff alleges that an attorney defendant breached a promise to achieve a specific result, a claim for breach of contract is insufficient and duplicative of the malpractice claim." *Alphas v. Smith*, 147 A.D.3d 557, 558 (1st Dep't 2017) (internal citation and quotation omitted). Here, Ms. Parada's breach of contract claim is based on plaintiff's failure to zealously represent her in the divorce proceeding, as required by the retainer agreement. Clearly, the claim is not based on plaintiff's promise to achieve a specific result and is thus duplicative of the malpractice claim. Likewise, defendant Ms. Parada's proposed counterclaim for breach of good faith and fair dealing is duplicative of her malpractice claim and therefore lacks merit. *Weight v. Day*, 134 A.D.3d 806, 808-09 (2d Dep't 2015).

With respect to the proposed counterclaim for breach of fiduciary duty, this claim also lacks merit. A fiduciary claim is "redundant of the legal malpractice cause of action" where it is

predicated on the same allegations as the malpractice claim and alleges similar damages. *Alphas*, 147 A.D.3d at 558-59. Here, defendant Ms. Parada's proposed breach of fiduciary duty counterclaim is identical to her legal malpractice claim and seeks identical damages. Accordingly, this proposed counterclaim lacks merit.

With respect to the proposed counterclaim for legal malpractice, defendant Ms. Parada alleges that as a result of plaintiff's failure to complete certain tasks in the underlying divorce proceeding, Ms. Parada was forced to enter into an unfavorable settlement agreement with her ex-husband. Affirmation of Peter Hanschke dated February 26, 2019, Exh. C, ¶ 22. Although plaintiff argues that Ms. Parada's allegations are speculative and that she will not be able to show that plaintiff's actions caused Ms. Parada to enter into this agreement, it cannot be said at this stage that the proposed counterclaim is palpably insufficient or completely devoid of merit so as to warrant denial of her motion to amend. *Cruz v. Brown*, 129 A.D.3d 455, 456 (1st Dep't 2015). Further, Ms. Parada provided a reasonable excuse for her delay in asserting this claim as the underlying divorce proceeding finally settled in December 2018 and defendant moved promptly thereafter to amend her counterclaims. Accordingly, it is

ORDERED that the motion for summary judgment is granted and the counterclaim for unjust enrichment is dismissed; and it is further

ORDERED that the motion to amend to assert additional counterclaims is granted only to the extent that defendant Ms. Parada may assert a counterclaim for legal malpractice as alleged in the proposed amended answer and counterclaims attached to the motion papers, and is otherwise denied; and it is further

ORDERED that defendant Ms. Parada shall file and serve her answer with amended counterclaims in accordance with the terms of this order within ten days of entry of this order; and it is further

ORDERED that plaintiff shall respond to the amended counterclaims within thirty days of service; and it is further

ORDERED that the parties shall appear for a compliance conference on July 11, 2019.

4/22/19

DATE



PAUL A. GOETZ, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED
<input type="checkbox"/>	GRANTED		
<input type="checkbox"/>	SETTLE ORDER		
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input checked="" type="checkbox"/>	GRANTED IN PART		
<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: