

Filemyr v Hall

2019 NY Slip Op 31526(U)

May 28, 2019

Supreme Court, New York County

Docket Number: 654563/2018

Judge: Andrew Borrok

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK PART IAS MOTION 53EFM

Justice

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EDWARD FILEMYR,

Plaintiff,

- v -

MELISSA HALL, VERONICA MAIR, ROBIN MCNEILL, ELIJAH MUSTAFA, ZAKIA RICHARDSON

Defendant.

INDEX NO. 654563/2018

MOTION DATE 10/30/2018, 12/11/2018, 12/11/2018

MOTION SEQ. NO. 001 002 002

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 19, 33, 34, 35, 36, 37, 38, 39, 40, 42, 43, 44, 46, 49, 50, 51, 52, 53, 54, 57

were read on this motion to/for DISMISS DEFENSE.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 41, 45, 48, 55, 56

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 41, 45, 48, 55, 56

were read on this motion to/for DISMISSAL.

Upon the foregoing documents and for the reasons set forth on the record (5/28/2019), (i) Edward Filemyr's motion to dismiss the affirmative defenses is denied (mtn. seq. 001), (ii) the defendants' cross-motion to dismiss the complaint is granted (mtn. seq. 001), and Mr. Filemyr's motion to dismiss the counterclaim is granted (mtn. seq. 002).

This action arises from Mr. Filemyr's representation of the defendants as shareholders of 1885 - 93 7th Avenue HDFC in a separate action pursuant to a retainer agreement (the Retainer), dated December 8, 2010 (NYSCEF Doc. No. 11). In that action, Mr. Filemyr was granted his motion to withdraw as counsel on July 21, 2015 (NYSCEF Doc. No. 51). In his complaint, Mr. Filemyr alleges breach of contract, and alternatively quantum meruit, for recovery of \$34,152.97 in

unpaid legal fees. In their amended answer, the defendants assert three affirmative defenses and a counterclaim for legal malpractice.

Dismissal under CPLR § 3211 requires that a court take “the allegations asserted within a plaintiff’s complaint as true and accord plaintiff the benefit of every possible inference, determining only whether the facts as alleged fit within any cognizable legal theory” (*Samiento v World Yacht Inc.*, 10 NY3d 70, 79 [2008]). Allegations that consist of bare legal conclusions, or factual claims inherently incredible or flatly contradicted by documentary evidence are not entitled to the same consideration (*Caniglia v Chicago Tribune-New York News Syndicate*, 204 AD2d 233, 233-234 [1st Dept 1994]).

I. Motion Sequence 001 (Plaintiff’s Motion to Dismiss the Defendants’ Affirmative Defenses and Defendants’ Cross-Motion to Dismiss the Complaint)

22 NYCRR 137 provides that if an attorney and client cannot agree on fees, the attorney is to forward written notice to the client by certified mail or personal service. The Fee Dispute Resolution Program, however, does not apply to “disputes where no attorney’s services have been rendered for more than two years” (22 NYCRR § 137.1(6)). Failure to serve clients with notice of their right to arbitrate, and failure to allege in a complaint that clients received such notice and did not file a timely request for arbitration requires dismissal of the complaint (*Paikin v Tsirelman*, 266 AD2d 136, 136-137 [1st Dept 1999]). It is undisputed that Mr. Filemyr did not provide notice of the defendants’ right to arbitrate because he served the required notices on June 25, 2018 (NYSCEF Doc. No. 52, collectively the **Notices**), i.e., more than two years after he last rendered attorney’s services. To wit, even though the defendants received notice from Mr.

Filemyr, the notice was provided when the defendants' right to arbitrate was already time barred by 22 NYCRR § 137.1(6) (*see* NYSCEF Doc. No. 53). Therefore, Mr. Filemyr motion to dismiss the defendants' affirmative defenses based on laches/waiver/unclean hands is denied and the defendant's cross motion to dismiss the complaint is granted.

II. Motion Sequence 002 (Plaintiff's Motion to Dismiss the Defendants' Counterclaim)

Mr. Filemyr argues that the defendants' counterclaim for legal malpractice should be dismissed because it is time-barred, they do not have standing to bring the counterclaim and there is no proximate cause. A claim for legal malpractice requires three elements: (1) negligence of the attorney, (2) that the negligence was the proximate cause of the loss sustained and (3) actual damages (*Leder v Spiegel*, 31 AD3d 266, 267 [1st Dept 2006]). A legal malpractice action must be dismissed if there is failure to demonstrate proximate cause, regardless of whether the attorney was negligent (*id.*, 268).

In this case, the defendants' assert conclusory allegations they would have recovered lost proceeds of an apartment sale and saved legal fees but for Mr. Filemyr's departure from the ordinary standards of professional conduct and breach of fiduciary duty (NYSCEF Doc. No. 47, ¶ 19). While the amended answer refers to instances when the defendants were unhappy with Mr. Filemyr's representation, the defendants fail to plead specific factual allegations that establish but for Mr. Filemyr's representation, there would have been a more favorable outcome in the underlying action (*see Dweck Law Firm, LLP v Mann*, 283 AD2d 292, 293 [1st Dept 2001]). In their opposing papers, the defendants do not provide an affirmation in further support

of their allegations. Accordingly, the defendants' counterclaim for legal malpractice is dismissed.

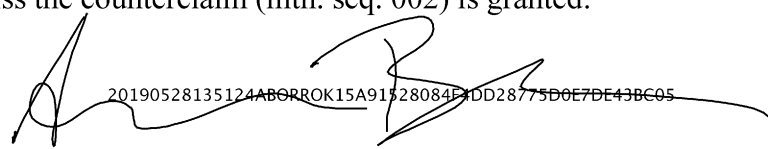
Accordingly, it is

ORDERED that the plaintiff's motion to dismiss the defendants' affirmative defenses at paragraphs 5, 6 and 10 of their amended answer (mnt. seq. 001) is denied; and it is further

ORDERED that defendants' cross-motion to dismiss the complaint (mnt. seq. 001) is granted; and it is further

ORDERED that the plaintiff's motion to dismiss the counterclaim (mnt. seq. 002) is granted.

5/28/2019
DATE



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ANDREW BORROK, J.S.C.

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: