SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARTHUR F. ENGORON** **PART** **IAS MOTION 37EFM**

Justice

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JEWELL LAW, PLLC

Plaintiff,

- v -

GERD RUCI,

Defendant.

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INDEX NO. 655702/2019

MOTION DATE N/A, N/A

MOTION SEQ. NO. 001 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 10, 11, 12, 16
were read on this motion to/for CHANGE VENUE.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 13, 14, 15, 17, 18, 19, 20, 21
were read on this motion to/for DISMISS.

Upon the forgoing documents, defendant's motion to change venue is denied, and plaintiff's motion to dismiss is granted in part and denied in part, for the reasons set forth herein.

Background

In this action, plaintiff, Jewell Law, PLLC ("Jewell"), sues to recover alleged unpaid legal fees resulting from the alleged breach of a retainer agreement between Jewell and defendant Gerd Ruci ("Ruci"). Jewell's complaint alleges, essentially, as follows. On September 26, 2018, the parties entered into a contract for legal services whereby Jewell agreed to represent Ruci in connection with a domestic relations action filed in Queens County Family Court ("the Underlying Action"). Jewell performed approximately 171.40 hours of legal services for Ruci. On March 10, 2019, Jewell sent Ruci a final bill for $42,108.16 and Ruci failed to pay it.

The instant complaint, filed on November 8, 2019, asserts five causes of action, to wit, breach of contract (first cause of action); promissory estoppel (second cause of action); quantum meruit (third cause of action); unjust enrichment (fourth cause of action); and account stated (fifth cause of action), and seeks a judgment against Ruci in the amount of $42,108.16, together with costs, disbursements, and interest.

On December 1, 2019, Ruci filed a demand to change venue to change the place of trial from New York County to Queens County. Jewell refused.

On December 10, 2019, Ruci filed his answer, denying the material allegations of the complaint and asserting numerous affirmative defenses and four counterclaims, to wit, breach of fiduciary duty (first counterclaim); legal malpractice (second counterclaim); unjust enrichment (third counterclaim); and fraud (fourth counterclaim).

Ruci now moves, pursuant to CPLR 510 (1) and (3), to change venue to Queens County, and Jewell now moves, pursuant to CPLR 3211(a)(7), to dismiss Ruci's counterclaims.

Motion to Change Venue

Pursuant to CPLR 510, "[t]he court, upon motion, may change the place of trial of an action where: 1. the county designated for that purpose is not a proper county; or 2. there is a reason to believe that an impartial trial cannot be had in the proper county; or 3. the convenience of material witnesses and the ends of justice will be promoted by the change." "Upon a motion made pursuant to CPLR [] 510(3), the movant bears the burden of demonstrating that the convenience of material witnesses would be better served by the change. This showing must include (1) the identity of the proposed witnesses, (2) the manner in which they will be inconvenienced by a trial in the county in which the action was commenced, (3) that the witnesses have been contacted and are available and willing to testify for the movant, (4) the nature of the anticipated testimony, and (5) the manner in which the anticipated testimony is material to the issues raised in the case." Cardona v Aggressive Heating, Inc., 180 AD2d 572, 572 (1st Dept 1992).

In support of its motion, Ruci argues that this case has no connection to New York County as Ruci resides in Queens County and the Underlying Action took place in Queens County Family Court. Ruci also argues that New York County is an inconvenient forum for six potential witnesses, all attorneys, who are allegedly available to testify; however, because they work exclusively in Queens County, they cannot participate if the case is heard in New York County. Ruci alleges that these witnesses are material to the case in that they have knowledge of the Underlying Action and will testify as to the actions of Jewell.

Here, New York County is not an improper county as Jewell is registered to do business and has its principal place of business in New York County. See CPLR 503(a) ("the place of trial shall be in the county in which one of the parties resided when it was commenced …").

Moreover, Ruci has failed to submit affidavits from his six proposed witnesses explaining why they would be inconvenienced by coming to New York County and Ruci has failed to state that the proposed witnesses have been contacted and are willing and available to testify. See Cardona, at 573 ("In this case, the claim that the identified witnesses, who either lived or worked in upper New York County, would be inconvenienced by having to testify at the Bronx County courthouse rather than at the New York County courthouse is, without further explanation, 'ludicrous on its face.'"). In any event, as matters now stand there is a good chance that all testimony will be virtual.

Ruci relies on Tricarico v Cerasuolo, 199 AD2d 142 (1st Dept 1993), for the proposition that when the balance of factors weighs heavily in favor of placing venue in a different county, then the court should not adhere to form over substance in finding that a defendant's proof is

technically insufficient under Cardona v Aggressive Heating, Inc. However, this Court finds that the balance of factors does not weigh heavily in favor of placing venue in Queens County. Therefore, Ruci's motion to change venue is denied.

Motion to Dismiss

Dismissal pursuant to CPLR 3211(a)(7) is warranted where, after accepting the facts alleged as true and according plaintiff the benefit of every possible favorable inference, the court determines that the allegations do not fit within any cognizable legal theory. Leon v Martinez, 84 NY2d 83, 87-88 (1994); see also EBC I, Inc. v Goldman, Sachs & Co., 5 NY3d 11, 19 (2005) ("[w]hether a plaintiff can ultimately establish its allegations is not part of the calculus" in determining a motion to dismiss for failure to state a cause of action). A complaint survives a motion to dismiss for failure to state a cause of action if it gives the court and the parties "notice" of what is intended to be proved and the material elements of a cause of action. CPLR 3013.

The First Counterclaim, for Breach of Fiduciary Duty

In support of this counterclaim, Ruci alleges in his answer that Jewell breached the fiduciary duty owed to Ruci by: failing to serve Ruci via certified mail with written notice to resolve their fee dispute by mediation or arbitration, in violation of the parties' agreement; failing to send invoices to Ruci on the 10th of each month, in violation of the parties' agreement; and by improperly billing Ruci (specifically, conducting various tasks without Ruci's prior approval and otherwise generally overcharging Ruci).

Jewell contends that the counterclaim for breach of fiduciary duty must be dismissed as its duplicative of Ruci's counterclaim for legal malpractice. Ruci opposes this argument, asserting that this counterclaim is not duplicative because it is based upon different facts, namely, that the breach of fiduciary duty claim relates to Jewell's billing practices and Jewell's duty to serve its clients with notice of the right to fee dispute resolution, whereas the legal malpractice claim relates to Jewell's negligence in handling the Underlying Action, which led to significant delays in Ruci being reunited with his child.

This Court finds that the breach of fiduciary duty claim is duplicative of the legal malpractice claim as they seek identical relief, namely, damages in an amount to be determined at trial, plus interest and costs. Alphas v Smith, 147 AD3d 557, 559 (1st Dept 2017) (breach of fiduciary duty claim was duplicative of malpractice claim as it sought similar damages). Furthermore, the actions of which Ruci complained are not within what this Court considers to be typical breach of fiduciary duty claims. Ruci's position proves too much; it would mean that every malpractice claim would also allow a breach of fiduciary duty claim, which is not the law.

Ruci's reliance on Ulico Cas. Co. v Wilson, Elser, Moskowitz, Edelman & Dicker, 56 AD3d 1 (1st Dept 2008), is misplaced, as the court in that case found that a breach of fiduciary duty claim was not redundant because it was based upon different facts than those underlying a claim for legal malpractice, namely, the defendant law firm in that case allegedly breached its fiduciary duty by performing acts outside the scope of its representation (i.e., by assisting a competitor to the plaintiff). Here, Ruci does not allege any acts taken by Jewell outside the scope of its representation; the breach of fiduciary claim and legal malpractice claim are premised on the same facts, i.e., Jewell's mishandling of the Underlying Action. Furthermore, Ulico made clear

that a party may not seek to recover damages for a breach of fiduciary duty "on legal grounds less rigorous than those required for recovery under a theory of legal malpractice." Id. at 8. Given that breach of fiduciary duty claims are governed by a lower standard than legal malpractice claims, this Court finds that the counterclaim for breach of fiduciary duty must be dismissed given the existence of Ruci's counterclaim for legal malpractice.

Accordingly, the first counterclaim for breach of fiduciary duty is subject to dismissal.

The Second Counterclaim, for Legal Malpractice

The answer sufficiently pleads a counterclaim against Jewell for its alleged legal malpractice. To sufficiently plead legal malpractice, the pleading must allege: "(1) the negligence of the attorney; (2) that the negligence was the proximate cause of the loss sustained; and (3) proof of actual damages." Mendoza v Schlossman, 87 AD2d 606, 607 (2nd Dept 1982). The party asserting legal malpractice "must also establish that [he or she] would have been successful in the underlying action, if [his or her] attorney had exercised due care." Parksville Mobile Modular, Inc. v Fabricant, 73 AD2d 595, 599 (2nd Dept 1979).

Jewell claims that Ruci has failed adequately to plead legal malpractice, specifically, that Ruci has failed to allege "but for" causation, because any allegation that the court in the Underlying Action would have granted unsupervised visitation while a criminal court order of protection was in effect is impermissible speculation. That is incorrect. Here, Ruci alleges that Jewell: failed to file an emergency Order to Show Cause to commence the Underlying Action, which Ruci alleges would have expedited the Underlying Action and lessened the time missed between Ruci and his child; failed to file a Writ of Habeas Corpus, as directed by Ruci; improperly interfered with Ruci's criminal case by pressuring Ruci to do certain things despite the fact that Jewell was not retained to represent him in that proceeding; failed to effectuate proper and timely service in the Underlying Action prior to the initial court date, which increased the time missed between Ruci and his child; failed to secure unsupervised parenting time for Ruci at two court dates, which increased the time missed between Ruci and his child; filed frivolous Orders to Show Cause; improperly advised Ruci that it might be possible for him to take his child out of the country; and asserted to the referee in the Underlying Action that Jewell was using electronic filing when no such electronic filing system was available in Queens County Family Court at that time. Clearly, Ruci has pleaded that but for Jewell's actions and/or inactions in the Underlying Action, Ruci would have been reunited with his child earlier than he was. Also, Ruci has adequately pleaded that he was denied visitation time, be it supervised or unsupervised.

Accordingly, the second counterclaim for legal malpractice is not subject to dismissal.

The Third Counterclaim, for Unjust Enrichment

The answer fails to state a cause of action for unjust enrichment as an unjust enrichment claim "is precluded by the existence of [a] retainer agreement[]." Gleyzerman v Law Offices of Arthur Gershfeld & Assocs., PLLC, 154 AD3d 512, 513 (1st Dept 2017) (citing to Clark-Fitzpatrick, Inc. v Long Island R.R. Co., 70 NY2d 382, 388 (1987) ("The existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter.").

In his memorandum of law in opposition, Ruci's attorney argues that because the existence and enforceability of the parties' retainer agreement has not yet been established, Ruci should not be forced to limit his remedies to contract claims and should be permitted to pursue a quasi contract claim for unjust enrichment as an alternative claim. In support of that argument, Ruci cites to two First Department cases in which the court found that quasi contract claims could be pleaded in the alternative where there were bona fide disputes as to the existence or application of a contract and where the parties sued were not parties to the contract at issue. See Wilmoth v Sandor, 259 AD2d 252 (1st Dept 1999), and Sustainable PTE Ltd. v Peak Venture Partners LLC, 150 AD3d 554 (1st Dept 2017). Here, in his answer, Ruci alleges the existence of a retainer agreement and even cites to the parties' retainer agreement to allege that Jewell failed to perform certain obligations under it (specifically, serving Ruci with fee dispute resolution paperwork). As such, this Court finds that there is no bona fide dispute as to the existence of an agreement between the parties such that a quasi contract claim could be pleaded in the alternative.

Accordingly, the third counterclaim for unjust enrichment is subject to dismissal without prejudice.

The Fourth Counterclaim, for Fraud

The answer sufficiently pleads a counterclaim against Jewell for fraud. To sufficiently plead fraud, the pleading must allege: (1) misrepresentation or concealment of a material fact; (2) falsity; (3) scienter on the part of the wrongdoer; (4) justifiable reliance; and (5) resulting injury. See MP Cool Invs. Ltd. v Forkosh, 141 AD3d 111, 117 (1st Dept 2016). Additionally, pursuant to CPLR 3016(b), where a claim is based on fraud, "the circumstances constituting the wrong shall be stated in detail."

Here, in support of his counterclaim for fraud, Ruci alleges that Jewell: conducted various tasks without Ruci's prior approval; charged Ruci for work done by an associate attorney when Jewell told Ruci that he would not charge for such work; charged Ruci excessive and illegal fees; asserted to the referee in the Underlying Action that Jewell was using electronic filing system to process certain court documents, when in fact no such electronic filing system was available in Queens County Family Court at that time; and that Jewell improperly billed Ruci by overcharging, charging for work not done, charging for repetitive work, charging Ruci while working on matters for other clients, charging Ruci for work of persons not authorized to work on Ruci's case, and double billing for tasks that were unnecessarily undertaken by more than one person. This Court finds those allegations satisfy CPLR 3016(b). This Court also finds that the fraud claim is not duplicative of the legal malpractice claim. Bad lawyer is one thing, misrepresenting facts to your client is something totally different.

Accordingly, the fourth counterclaim for fraud is not subject to dismissal.

This Court strongly encourages all parties to participate in a settlement conference, virtually or in person. An email to the Court with a copy to all parties can get the ball rolling.

Conclusion

Ruci's motion to change venue is denied; Jewell's request to dismiss the second counterclaim, for legal malpractice, is denied; Jewell's request to dismiss the fourth counterclaim, for fraud, is denied; and Jewell's request to dismiss the first and third counterclaims is granted, the dismissal of the third counterclaim being without prejudice. The Clerk is hereby directed to enter judgment accordingly.

This Courts requests that the parties contact our part clerk Margie Ramos-Ciancio via email at mciancio@nycourts.gov to schedule a preliminary conference, remembering to copy all parties on the email.

11/3/2020
DATE

ARTHUR F. ENGORON, J.S.C.

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