

Davidoff Hutcher & Citron LLP v Giuliani

2024 NY Slip Op 34210(U)

November 25, 2024

Supreme Court, New York County

Docket Number: Index No. 654558/2023

Judge: Louis L. Nock

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LOUIS L. NOCK **PART** **38M**

Justice

-----X

DAVIDOFF HUTCHER & CITRON LLP and ROBERT J. COSTELLO,

Plaintiffs,

- v -

RUDOLPH W. GIULIANI,

Defendant.

-----X

INDEX NO. 654558/2023

MOTION DATE 10/23/2023

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document numbers (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, and 13

were read on this motion by defendant to DISMISS CERTAIN CLAIMS IN THE COMPLAINT .

LOUIS L. NOCK, J.

Upon the foregoing documents, and after oral argument on the record held November 18, 2024, defendant’s motion to dismiss certain claims in the complaint is denied to the extent set forth in the following memorandum.

Background:

The complaint alleges that the plaintiff law firm – Davidoff Hutcher & Citron LLP (“DHC”) – furnished legal services to defendant on the force of a retainer agreement executed on November 6, 2019, by defendant and plaintiff Robert J. Costello who, at some time relevant to the complaint, was a member of DHC (*see*, Complaint ¶¶ 9-10). There is ambiguity as to the temporal span of Mr. Costello’s membership in DHC vis-à-vis the total span of time during which defendant was represented by Mr. Costello pursuant to the retainer agreement. To illustrate the ambiguity, the complaint specifies that “[a]lthough the Retainer Agreement was with Costello, the work performed *was completed* while Costello was a partner at DHC” (*id.*

[emphasis added]).¹ The complaint’s toggling between “work performed” and work “completed” implies that defendant’s initial retention of Mr. Costello preceded the latter’s membership in DHC but continued during the span of said membership. By contrast, Mr. Costello’s affidavit, submitted in opposition to defendant’s instant motion to dismiss (NYSCEF Doc. No. 9), seems to state that the execution of the retainer agreement occurred while Mr. Costello was a member of DHC (*see, id.*, ¶ 2 [“Throughout the Defendant’s representation, I was a partner at DHC”]).

Either way, though, and regardless of the aforesaid ambiguity, plaintiffs seem to be acknowledging that the only retainer agreement actually signed by defendant is one that expressly identifies only Mr. Costello as counsel, with no express indication on the face of the agreement, or within its substance, that DHC is a party to it. As defendant puts it: “In fact, the bizarre set of circumstances as to why DHC, a law firm, would have Mr. Costello enter into an agreement with Defendant, instead of the law firm, is left unexplained and unalleged” (NYSCEF Doc. No. 7 at 6).

The complaint goes on to allege that, pursuant to said retainer, “Plaintiffs performed various legal services for Defendant, at his request, in a competent and professional manner,” to the extent of \$1,574,196.10 in earned legal fees (Complaint ¶¶ 10, 13); but that said fees were only partially paid to the extent of \$214,000, leaving a balance of \$1,360,196.10 regarding which this action was commenced for the recovery of said balance (*see, id.*, ¶¶ 19-20, 27, 38, 44).

¹ Apparently resting on the principle that allegations of a complaint are taken as true on a motion to dismiss (*e.g., Leon v Martinez*, 84 NY2d 83 [1994]), none of the parties has submitted, or thought it worthwhile to submit, a copy of the referenced retainer agreement, which is a fundamental aspect of this case as the within discussion unfolds. Although the court’s analysis would have been better served by gaining access to the retainer agreement, the court does recognize that there is no dispute as to the existence of a retainer agreement between defendant and Mr. Costello for purposes of this motion to dismiss. At the same time, though, the court also takes note of defendant’s express proviso that he “does not waive any of his objections or defenses to the Complaint or admit any of the facts alleged in the Complaint at this time” (NYSCEF Doc. No. 7 at 3 n 1).

The complaint asserts three causes of action. A first, for breach of the retainer agreement; a second, for account stated; and a third, for *quantum meruit*. Defendant now moves to dismiss: (i) the *quantum meruit* cause as duplicative of the breach of contract cause; (ii) the breach of contract cause as asserted by DHC for lack of standing to sue on a retainer agreement executed not by it, but by plaintiff Costello; and (iii) the account stated cause as insufficiently pled. The motion is opposed.

The Standard on a Motion to Dismiss:

“On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction” (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). “[The court] accept[s] the facts as alleged in the complaint as true, accord[ing] plaintiffs the benefit of every possible favorable inference, and determin[ing] only whether the facts as alleged fit within any cognizable legal theory” (*id.*, at 87-88). Ambiguous allegations must be resolved in plaintiff’s favor (*JF Capital Advisors, LLC v Lightstone Group, LLC*, 25 NY3d 759, 764 [2015]).²

Discussion:

DHC’s Standing to Sue for Breach of the Costello/Giuliani Retainer Agreement

There seems to be no dispute that defendant did enter into a written retainer agreement with Mr. Costello (either prior to or during his membership in DHC); but that DHC never prepared and presented to defendant its own written retainer agreement in connection with Mr. Costello’s representation of defendant while Mr. Costello was a member of that firm. But; quite on the other hand – DHC submits documentary proof in the form of copies of checks remitted by defendant to it, and wire transfers from defendant to it, aggregating the \$214,000 paid by

² But this rule, generally advantageous to any pleading on a motion to dismiss, does not necessarily apply in the face of the contradiction noted above in the text, wherein plaintiff Costello’s own affidavit seems to contradict the allegation in the complaint regarding whether or not his representation of defendant was wholly or only partly coexistent with his membership in DHC.

defendant to it (NYSCEF Doc. No. 10), as alleged in the complaint, and which can be said to demonstrate defendant's understanding that, at least at some point in time, his retention of Mr. Costello as a member of DHC was synonymous with a retention of DHC itself. Otherwise, there would be no readily apparent reason why defendant would have made those payments to DHC and not, solely and exclusively, to Mr. Costello. But then again – DHC's legal entitlement to fees generated through Mr. Costello's representation of defendant might come into question on account of the Appellate Division's requirement for a "Written Letter of Engagement" (Part 1215) which provides that "an attorney who undertakes to represent a client and enters into an arrangement for, charges or collects any fee from a client shall provide to the client a written letter of engagement before commencing the representation" (*Id.*, § 1215.1 [a].) Apparently, DHC has never done that.

Accordingly, the court is faced with too much ambiguity derivative of an insufficient and, at a time, contradictory, record at this pre-answer stage of the case to determine, as a matter of law, that DHC's breach of contract claim – predicated solely on an agreement executed not by DHC, but by Mr. Costello – is viable or not. Accordingly, the court declines to dismiss the claim; but subject to defendant's right to move again for dismissal after further development of the record either by way of discovery or interlocutory hearing on the issue of contractual privity.

The court does note, though, that even were it to ultimately view the circumstances as a contractual relationship with Mr. Costello only, Mr. Costello's parallel contractual relationship with DHC, presumably entailing his membership arrangement with that firm to share fees derivative of his contractual relationship with defendant, would not violate the general prohibition against fee-splitting among attorneys (Rule 1.5 [g] of Part 1200 of the Rules of

Professional Conduct [Supreme Court, Appellate Division, All Departments]), seeing as division of fees is permitted among lawyers “associated in the same law firm” (*id.*).

Accordingly, and affording DHC “the benefit of every possible favorable inference” (*Leon v Martinez, supra*), insufficient grounds are now presented to warrant dismissal of DHC’s cause of action for breach of contract.³

DHC’s Ability to Assert a Claim for Account Stated

The complaint (¶¶ 31-35) alleges that:

Plaintiffs provided legal services to Defendant, who was billed for those services by Plaintiffs.

Defendant received Plaintiffs’ invoices without objection.

Defendant also made partial payments to DHC towards the outstanding legal fees.

Defendant’s last payment to DHC was on September 14, 2023 in the amount of \$10,000.

As a result of the foregoing, accounts were stated between Plaintiffs and Defendant.

Defendant has failed to pay the accounts stated in full, leaving an outstanding balance of \$1,360,196.10.

A “defendant’s receipt and retention of the plaintiff law firm’s invoices seeking payment for professional services rendered, without objection within a reasonable time, [gives] rise to an actionable account stated” (*Ruskin, Moscou, Evans & Faltischek, P.C. v FGH Realty Credit Corp.*, 228 AD2d 294, 295 [1st Dept 1996].)

³ As alluded to earlier (*supra*, note 1), this court is handicapped by the parties’ separately-arrived-at determination not to present a copy of the retainer agreement for the court’s review, which would have assisted the court in better understanding the contractual reach of Mr. Costello’s retainer agreement with the defendant. DHC’s neglect to do so is especially odd, given its determination to submit other filings which, like the agreement, go outside the four corners of the complaint, such as affidavits from Mr. Costello and another member of DHC (*see*, NYSCEF Doc. Nos. 9-11). The court assumes that a fuller record will be developed by the parties as they proceed to discovery and, perhaps, summary judgment motion practice, which could warrant further contemplation regarding the merit of DHC’s assertion of standing to sue for breach of contract.

Defendant asserts that “the Second Cause of Action [for account stated] must be dismissed because it is wholly duplicative of Plaintiffs’ [first] cause of action for breach of contract” (NYSCEF Doc. No. 7 at 7). But as the Appellate Division, First Department, has declared, “the rule in the First Department is that an account stated claim is an independent cause of action that is not duplicative of a claim for breach of contract” (*Aronson Mayefsky & Sloan, LLP v Praeger*, 228 AD3d 182, 183 [1st Dept 2024]).

Defendant seems to be further asserting that an account stated claim requires, at the pleading stage, certain specificity as to details concerning the content of the invoices and their manner of dispatch to him (*see*, NYSCEF Doc. No. 7 at 6-7). However, while such details might be important in ultimately establishing the claim at trial or on summary judgment, the court does not find the allegations of account stated, as pled, and as taken as true for now, to be so insufficient as to warrant a pre-answer dismissal of the claim.

The Plaintiffs’ Ability to Assert a Claim for *Quantum Meruit*

“[T]o state a cause of action for quantum meruit, plaintiff must allege ‘(1) the performance of the services in good faith, (2) the acceptance of the services by the person to whom they are rendered, (3) an expectation of compensation therefor, and (4) the reasonable value of the services’” (*Farina v Bastianich*, 116 AD3d 546, 547-48 [1st Dept 2014]). “The existence of a valid and enforceable written contract precludes a quantum meruit claim” (*Aviv Constr., Inc. v Antiquarium, Ltd.*, 259 AD2d 445, 446 [1st Dept 1999]). Thus, given the fact that there is no dispute whether a contract exists between Mr. Costello and defendant, Mr. Costello’s claim for *quantum meruit* compensation must be dismissed. However, given the issues of fact and law regarding DHC’s ability to sue for breach of contract, discussed above, the court finds that adequate allegations have been pled to preserve such a claim for DHC which would only be

measured by the court's assessment of "the reasonable value of [DHC's] services" (*Farina, supra*), without regard to any fee stipulated in Mr. Costello's retainer agreement with defendant or any fee billed by DHC.⁴

Accordingly, it is

ORDERED that defendant's motion to dismiss the first cause of action asserted by plaintiff Davidoff Hutcher & Citron LLP for breach of contract is denied at this time; and it is further

ORDERED that defendant's motion to dismiss the second cause of action for an account stated is denied; and it is further

ORDERED that defendant's motion to dismiss the third cause of action asserted by plaintiff Davidoff Hutcher & Citron LLP for *quantum meruit* is denied at this time; and it is further

ORDERED that defendant's motion to dismiss the third cause of action asserted by plaintiff Robert J. Costello for *quantum meruit* is granted and, therefore, said cause of action is dismissed; and it is further

ORDERED that a preliminary conference will occur on December 10, 2024, at 10:00 a.m., at the Courthouse, 111 Centre Street, Room 1166, New York, New York.

⁴ The confluence of Mr. Costello's claim for breach of contract and DHC's claim for *quantum meruit*, if both are successful at trial or on summary judgment, would mean that any DHC invoices referencing attorneys of that firm other than Mr. Costello would be assessed on the basis of "reasonable value" (*Farina, supra*) and not automatically on the basis of amounts billed in connection with such attorneys.

This will constitute the decision and order of the court.

ENTER:



<u>11/25/2024</u> DATE					<u>LOUIS L. NOCK, J.S.C.</u>
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE