

**Delbello , Donnellan , Weingarten, Wise &
Wiederkehr, LLP v Lopez**

2012 NY Slip Op 30082(U)

January 5, 2012

Sup Ct, Nassau County

Docket Number: 21270/10

Judge: Anthony L. Parga

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK - NASSAU COUNTY

Present:

HON. ANTHONY L. PARGA

Justice

-----X **PART 6**

DELBELLO, DONNELLAN, WEINGARTEN, WISE &
WIEDERKEHR, LLP,

Plaintiff,

-against-

SENAIDA LOPEZ,

Defendant.

INDEX NO.: 21270/10
XXX
MOTION DATE: 11/10/11
SEQUENCE NO: 001, 002

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| Notice of Motion, Affirmation & Exs..... | <u>1</u> |
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Upon the foregoing papers, plaintiff’s motion for an order compelling the defendant to accept the proposed Reply to Counterclaims, dismissing the counterclaims, and granting plaintiff summary judgment for the relief set forth in the complaint, pursuant to CPLR §3212, is granted. Defendant’s cross-motion for an order, pursuant to CPLR §3215, granting the defendant a default judgment on its counterclaims for plaintiff’s failure to reply to the defendant’s counterclaims, or, alternatively, for relief, pursuant to CPLR §3126, is denied.

The following facts are taken from pleadings and submitted papers and do not constitute findings of fact by this Court.

This is an action in which plaintiff seeks to recover monies allegedly due and owing to it from the defendant for professional legal services rendered to, and on behalf of, defendant Senaida Lopez, in a matrimonial action. Plaintiff’s complaint alleges that the amount of \$67,546.33 is due and owing to it from the defendant.

To begin, plaintiff commenced this action on or about June 21, 2010. The defendant’s

Answer with Counterclaims was served on November 12, 2010. Plaintiff failed to submit a timely Reply to the Counterclaims. As such, the defendant has refused to accept plaintiff's Reply to Counterclaim, plaintiff has moved to compel defendant's acceptance of its Reply to Counterclaim and for a dismissal of each counterclaim, and defendant has cross-moved for default judgment.

Plaintiff, through an affidavit duly executed by a partner at the plaintiff law firm who was also defendant's former attorney, Faith G. Miller, contends that plaintiff misfiled defendant's answer and, as a result, did not timely serve a Reply to the Counterclaims asserted in defendant's answer. Attorney Miller attests that the filing system at plaintiff law firm operates under separate matter identification numbers, and the actual files are maintained in separate physical files and boxes. She attests that the files concerning plaintiff's matrimonial action are stored in boxes in a file room and that the files in the instant action for legal fees are kept in the office of the handling attorney. As such, Ms. Miller attests that defendant's Answer with Counterclaims was incorrectly catalogued and filed in the boxes for defendant's matrimonial action, rather than given to the handling attorney for the instant action. Additionally, she attests that the Answer was not scanned into plaintiff's computer server and identified under either matter. She attests that the mistake was the result of a clerical staff error. She further attests that the answer was discovered when the matrimonial files were pulled from the file room for the purpose of filing the instant motion.

In addition, contrary to defendant's contentions, the affidavit submitted by Faith G. Miller, sets forth the merits of the instant action and meritorious defenses to defendant's counterclaims. Ms. Miller attests that the defendant executed a retainer agreement in September 2007, confirming plaintiff's retention as defendant's counsel for her pending matrimonial action in Westchester County. A copy of said retainer agreement is submitted with plaintiff's motion. Ms. Miller attests that from September 2007 through February 2010, plaintiff represented defendant, without complaint or objection from defendant. Ms. Miller attests to the services rendered by plaintiff in the litigation of the underlying matrimonial action and the circumstances involved in rendering said services. She further attests that plaintiff was not fully paid for the legal services rendered by plaintiff to defendant in connection with defendant's matrimonial

action. Ms. Miller attests that defendant owes to plaintiff the sum of \$67,546.33, and she submits copies of the periodic bills containing defendant's account statements. Ms. Miller attests that defendant promised repeatedly to pay said bills and never objected to any of the bills sent to her.

Ms. Miller further addresses each of defendant's six counterclaims and sets forth meritorious defenses for each, and she also contends that each should be dismissed on the merits. Defendant's first counterclaim alleges that plaintiff breached the terms of the retainer agreement by "failing to timely perform on the one crucial, threshold issue - whether the Separation Agreement was valid" and prejudicing the defendant's rights by untimely delaying in either obtaining a stipulation or making a motion to set aside said agreement. Defendant's second counterclaim alleges that "without a disposition on the Separation Agreement, discovery was futile, and the litigation expense for which she is being sued, was completely unwarranted." Defendant's third counterclaim alleges that plaintiff is barred from recovering any unpaid legal fees because it falsely claimed that the stipulation setting aside the Separation Agreement had been signed and filed and that plaintiff put its own interests over the defendant and then dropped the defendant's case after plaintiff could no longer "exploit her for any more fees." With respect to defendant's first three counterclaims, plaintiff contends that defendant executed the Separation Agreement in 2000, seven years before plaintiff was retained, against the advise of her then-counsel. Defendant accepted \$75,000 as equitable distribution at the time the Separation Agreement was signed. Thereafter, in 2006, defendant filed for divorce from her husband with a prior attorney. In August of 2006, defendant, by her prior counsel, moved for certain pendente lite and visitation relief. At said time, defendant allegedly sought enforcement of certain provisions of the Separation Agreement, and, in August 2007, the Agreement was amended. At no time prior to plaintiff's retention, seven years after the execution of the Separation Agreement, did defendant seek to vacate the agreement.

Plaintiff contends that a significant element of the matrimonial action for which it was retained involved determining and establishing the financial standing of the parties in order to prove that the Separation Agreement was no longer valid and enforceable. Plaintiff contends that it advised defendant that plaintiff would have to engage in discovery to gather documents and

information necessary to seek a vacatur of the Agreement. In addition, defendant was aware that plaintiff was negotiating with counsel for defendant's husband for modification of the Agreement. After negotiations failed and discovery was obtained, plaintiff moved to vacate the Separation Agreement. The motion to vacate was denied, however, by order of Justice La Tia W. Martin, who determined that the defendant ratified the agreement by accepting \$75,000, that defendant waited over six years to challenge the agreement, and that defendant subsequently amended the Agreement on August 13, 2007 [prior to defendant's retention of plaintiff] without any claim of duress. Accordingly, plaintiff contends that it engaged in the discovery necessary to file the motion to vacate the Separation Agreement and did not make any misrepresentations to the defendant.

With respect to defendant's fourth counterclaim, defendant alleges that she relied to her detriment on oral statements by plaintiff's partner, attorney Faith G. Miller, that the payment of legal fees relating to the matrimonial action would be obtained from the defendant's husband. Faith G. Miller, Esq. attests, however, that she did not make any such oral representations to the defendant. She also contends that the counterclaim is procedurally improper as it does not seek recovery of damages from plaintiff and reads like an assertion of an affirmative defense.

With respect to defendant's fifth counterclaim, defendant alleges that plaintiff's attorney, Faith Miller, violated the terms of the retainer agreement between the parties, which she claims stated that Faith Miller would personally represent defendant at hearings. Defendant alleges that, despite same, other attorneys appeared for her and were ineffective. Plaintiff submits the retainer agreement, however, which contains a provision entitled "Delegation of Responsibility," which specifically states that while Faith Miller will be principally responsible for the administration of defendant's matter, "other lawyers, however, may be assigned by us to work on aspects of your case, such as telephone calls, routine court appearances, correspondence, memoranda and court papers, all or which, however, shall be carried out under my supervision." It further specifically states that Evan Wiederkehr, Esq., Jennifer Jackman, Esq., and Jessica Ressler, Esq. "of this firm will be actively involved in your representation."

Lastly, defendant's sixth counterclaim alleges that plaintiff violated the Fair Debt Collections Practices Act ("FDCPA") by sending defendant a legal default notice when plaintiff

knew defendant was represented by an attorney. Plaintiff contends that it believes that defendant is referring to a Notice of Motion for default judgment, which was served on defendant on August 4, 2010, but was later withdrawn by stipulation between the parties. Further, plaintiff contends that the FDCPA applies only to “debt collectors,” and that unpaid legal fees are not “debts” within the meaning of the FDCPA.

In order to vacate a default, the movant must establish both a reasonable excuse for the default and a meritorious defense to the claims asserted against it. (*See*, CPLR §5015; *Putney v. Pearlman*, 203 D.D.2d 333, 612 N.Y.S.2d 919 (2d Dept. 1994); *Sciavetta v. McKeon*, 190 A.D.2d 724, 593 N.Y.S.2d 468 (2d Dept. 1993); *Shaw v. Shaw*, 97 A.D.2d 403, 467 N.Y.S.2d 231 (2d Dept. 1983)). The determination of the sufficiency of the excuse and the statement of merits rests within the sound discretion of the court. (*Goldman v. Cotter*, 10 A.D.2d 289, 781 N.Y.S.2d 28 (1st Dept. 2004)). Contrary to defendant’s arguments, plaintiff has set forth a reasonable excuse for its delay in replying to the defendant’s counterclaims, meritorious defenses to each of defendant’s counterclaims, and has set forth the merits of plaintiff’s action herein. The Court also notes that the defendant has failed to submit an affidavit attesting to the facts constituting the counterclaims and has not submitted any evidence that the plaintiff’s delay in answering the defendant’s counterclaims was willful or that the defendant suffered actual prejudice due to the delay. (*See generally, Stuart v. Kushner*, 39 A.D.3d 535, 833 N.Y.S.2d 187 (2d Dept. 2007)). Accordingly, defendant’s motion for default judgment on its counterclaims is denied and the plaintiff’s default in replying to the defendant’s counterclaims is hereby vacated.

With respect to the portion of plaintiff’s motion requesting dismissal of the defendant’s counterclaims on the merits, it is hereby ordered that each of defendant’s six counterclaims are dismissed. Plaintiff’s first cause of action for breach of the retainer agreement alleges that the plaintiff failed to timely perform on the “crucial issue” of whether the Separation Agreement was valid. The evidence submitted by the plaintiff demonstrates that plaintiff law firm negotiated with defendant’s husband for a modification of the Separation Agreement, performed discovery related to the finances of the parties needed to move for vacatur of the Separation Agreement, and moved to vacate the agreement after receipt of the discovery. In opposition, defendant has failed to present any evidence, in support of its first counterclaim, which demonstrates that the

plaintiff's actions in representing the defendant were in violation of the express terms of the retainer agreement. Defendant Senaida Lopez submits only an attorney's affirmation in which the defendant contends that plaintiff failed to advise her of the feasibility of vacating the Separation Agreement, failed to conduct discovery for the proper time period necessary to obtain vacatur of the Separation Agreement, and filed a motion to vacate which it knew would be unsuccessful. Defendant, however, fails to submit an affidavit attesting to any facts which show that plaintiff breached the terms of the retainer agreement and fails to support her contentions with admissible evidence. Defendant points to paragraph 23 of the affidavit of plaintiff's Faith Miller, Esq., arguing that Ms. Miller admits that the motion to vacate the Separation Agreement was going to be unsuccessful. The Court has reviewed said paragraph and notes that Ms. Miller specifically attests that the six year period of time which passed before defendant decided to challenge the Separation Agreement [referred to by Justice Martin in her decision denying the vacatur motion] was between August 2000 and August 2006, well before defendant's retention of plaintiff as counsel. Ms. Miller attests that based upon same, "and without a semblance of the financial records and documentary proof which could only have been gathered through discovery after September 2007, any motion made in September 2007 seeking vacatur of the Separation Agreement [prior to the filing of plaintiff's motion to vacate in 2009] would clearly have had no chance of success." Nowhere within Ms. Miller's affidavit does she attest that the motion made by plaintiff in 2009 was expected to be denied. As such, defendant's contention that plaintiff admitted that it knew the motion would fail is unsupported by the evidence submitted hereto.

Plaintiff's second counterclaim, which alleges that without a disposition on the Separation Agreement, discovery was futile and the litigation expenses were unwarranted, is also dismissed. Plaintiff has submitted evidence that discovery regarding the finances of the defendant's husband and the defendant herself was necessary to move for vacatur of the Separation Agreement. In opposition, defendant argues, *inter alia*, that plaintiff failed to obtain discovery relating to defendant's husband's finances from the year 2000, which is the year that the Separation Agreement was signed. Plaintiff has, however, submitted evidence that it did seek copies of the financial discovery provided by defendant's husband during negotiations held in 2000. Defendant has failed to demonstrate through admissible evidence that the discovery

engaged in by plaintiff was futile. Defendant has not submitted her own affidavit attesting to the facts regarding the handling of her underlying matrimonial action, nor has she submitted an expert affidavit stating that without a disposition on the Separation Agreement, discovery was futile (and the related legal fees were unwarranted).

Defendant's third counterclaim alleging that plaintiff is barred from recovering any unpaid legal fees because it falsely claimed that the stipulation setting aside the Separation Agreement had been signed, is also dismissed. Plaintiff has submitted admissible evidence that no such claims were made, as defendant was advised and aware that plaintiff was attempting to negotiate a modification of the agreement with defendant's husband and that plaintiff had moved to vacate the agreement. Plaintiff submits an affidavit of Karen Miller, Esq. attesting to same, as well as letters sent to defendant after the vacatur motion was denied. In opposition, defendant has failed to submit any admissible evidence, including an affidavit, to create a question of fact regarding same.

Defendant's fourth counterclaim that defendant relied to her detriment on statements by Faith Miller that plaintiff would seek its legal fees from defendant's husband is unsupported by any admissible evidence in the record before this Court. Faith Miller submits an affidavit attesting that no such representation was made, and defendant has failed to submit an affidavit, or any other admissible evidence, demonstrating otherwise. In addition, plaintiff contends that an Order to Show Cause which requested, among other items, an award to Senaida Lopez of attorney's fees from her former husband, was filed on August 2, 2006. Said application remained open through March 25, 2008, when the Court noted during a conference that the motion was outdated and needed to be re-filed with new, updated Net Worth Statements. Plaintiff contends that the updated Net Worth Statements could only be procured through the discovery process, and as such, demonstrates that said discovery was not wasteful or unnecessary.

Further, defendant's fourth counterclaim fails to state a cognizable cause of action for which relief can be granted. With respect to counterclaims, the court must determine whether the plaintiff has a legally cognizable cause of action and not whether the action has been properly plead. (*Select Construction Corp. v. 502 Old Country Road, LLC*, 11 Misc.3d 1078(A), 819 N.Y.S.2d 851 (Sup. Ct. Nassau Cty. 2006)). While factual allegations contained in the

counterclaim are deemed true, legal conclusions and facts contradicted on the record are not entitled to a presumption of truth. (*Id.*; *In re Loukoumi, Inc.*, 285 A.D.2d 595, 728 N.Y.S.2d 383 (2d Dept. 2001)(bare legal conclusions and factual claims which are contradicted by the record are not presumed to be true); *Doria v. Masucci*, 230 A.D.2d 764, 646 N.Y.S.2d 363 (2d Dept. 1996)).

In addition, with respect to plaintiff's fifth counterclaim, as noted *supra*, the express terms of the retainer agreement between the parties states that other firm lawyers, besides Faith Miller, may be assigned by plaintiff to work on defendant's case. It is the primary rule of construction of contracts that when the terms of a written contract are clear and unambiguous, the intent of the parties must be found within the four corners of the contract, giving a practical interpretation to the language employed and the parties' reasonable expectations. (*Slamow v. Delcol*, 174 A.D.2d 725, 726, 571 N.Y.S.2d 335 (2 Dept. 1991); *Van Wagner Adv. Corp. v. S & M Enters.*, 67 N.Y.2d 186, 191, 492 N.E.2d 756 (1986); *Vermont Teddy Bear Co. v. 538 Madison Realty Co.*, 1 N.Y.3d 470, 475, 807 N.E.2d 876 (2004). A court may not rewrite into a contract conditions the parties did not insert by adding or excising terms under the guise of construction, nor may it construe the language in such a way as would distort the contract's apparent meaning. (*Id.*; *See, Marine Assocs. v. New Suffolk Dev. Corp.*, 125 A.D.2d 649, 510 N.Y.S.2d 175 (2d Dept. 1986)). As such, the defendant's fifth counterclaim is dismissed.

Lastly, with respect to defendant's sixth counterclaim, the FDCPA applies only to "debt collectors," which are defined as any person or business whose principal purpose is the collection of any debts, or who regularly collects or attempts to collect debts owed or due to another. (15 USC §1692a(6)). Same applies to law firms only where such firms regularly engage in consumer debt-collection litigation on behalf of creditors clients. (*Heintz v. Jenkins*, 514 U.S. 291 (1995)). Unpaid legal fees incurred in connection with a law firm's representation of a client on a separate lawsuit are not "debts" within the meaning of the FDCPA, as they do not arise from a consumer transaction. (*Beal v. Himmel & Bernstein, LLP*, 615 F.Supp.2d 214 (SDNY 2009)). Accordingly, defendant's sixth counterclaim is hereby dismissed.

With respect to the portion of plaintiff's motion seeking an order granting it summary judgment on its complaint against the defendant, plaintiff has made a prima facie showing of

entitlement to summary judgment. The proponent of a summary judgment motion “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact.” (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 (1986)). Once the movant has demonstrated a prima facie showing of entitlement to judgment, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of a fact which require a trial of the action. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980)). Defendant has not submitted any admissible evidence in opposition sufficient to establish the existence of material issues of fact.

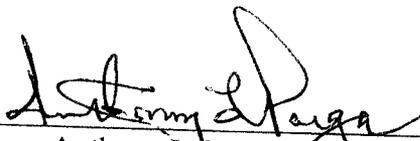
It is well-settled that a party is entitled to summary judgment for breach of contract upon establishing proof of a contract, performance of the contract by one party, breach by the other party, and damages. (*WorldCom, Inc. v. Sandoval*, 182 Misc.2d 1021, 701 N.Y.S.2d 834 (Sup Ct. N.Y. Cty. 1999); *Rexnord Holdings, Inc. v. Biderman*, 21 F.3d 522 (2d Cir. 1994)). Plaintiff has demonstrated that a retainer agreement was entered between the parties hereto and that plaintiff rendered legal services in accordance with same for which it was not fully paid. In opposition, the defendant does not dispute that she signed the retainer agreement, that an attorney-client relationship between the parties existed, that legal services were rendered by plaintiff on defendant’s behalf, or that she timely objected to the bills submitted by the plaintiff for services rendered. Defendant, through her attorney’s affirmation only, contests the necessity and reasonableness of the legal services rendered, but fails to submit evidence in admissible form to support said contentions.

Where a movant makes a prima facie showing of entitlement to summary judgment, the non-movant is required to lay bare her proof in evidentiary form showing triable issues of fact in dispute. (*Desena v. City of New York*, 65 A.D.3d 562, 884 N.Y.S.2d 138 (2d Dept. 2009)). The non-movant cannot merely cast doubt upon the movant’s evidence through conclusory assertions, but instead must set forth evidence in opposition demonstrating a triable issue of fact. (*Bank of Smithtown v. Beckhans*, 90 A.D.2d 508, 454 N.Y.S.2d 1001 (2d Dept. 1982); *Cusano v. General Electric Co.*, 111 A.D.2d 557, 489 N.Y.S.2d 622 (3d Dept. 1985)). Additionally, “mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered”

by further discovery is an insufficient basis for denying the motion. (*Woodard v. Thomas*, 77 A.D.3d 738, 913 N.Y.S.2d 103 (2d Dept. 2010); *Simpson v. New York City Transit Authority*, 44 A.D.3d 930, 844 N.Y.S.2d 108 (2d Dept. 2007); *Lightfoot v. City of New York*, 279 A.D.2d 457, 719 N.Y.S.2d 99 (2d Dept. 2001); *Lopez v. WS Distribution, Inc.*, 34 A.D.3d 759, 825 N.Y.S.2d 516 (2d Dept. 2006)).

Accordingly, plaintiff's motion for summary judgment is granted in the amount of \$67,546.33. Submit judgment on notice

Dated: January 5, 2012


Anthony L. Parga, J.S.C.

Cc: DelBello Donnellan Weingarten
Wise & Wiederkehr, LLP
One North Lexington Avenue
White Plains, NY 10601

Law Offices of Karen Winner
233 Fifth Avenue, 4th Floor
New York, NY 10016

ENTERED
JAN 09 2012
NASSAU COUNTY
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