Richman v Reese
2019 NY Slip Op 30908(U)
April 2, 2019
Supreme Court, New York County
Docket Number: 654623/2017
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION

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KIM RICHMAN,

Plaintiff,

- v -

MICHAEL REESE, REESE LLP

Defendant.

INDEX NO. 654623/2017

MOTION DATE 10/24/2018, 10/24/2018

MOTION SEQ. NO. 001 002

DECISION AND ORDER

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HON. SALIANN SCARPULLA:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 34, 35, 36, 37, 38, 39, 40, 79, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115

were read on this motion to/for PREL INJUNCTION/TEMP REST ORDR.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, it is

In this action arising out of a dispute over an award of legal fees and costs between former law firm partners, defendants Michael R. Reese ("Reese") and Reese LLP (collectively, "Defendants") move to dismiss plaintiff Kim Richman's ("Richman") complaint pursuant to CPLR 3211(a)(1) and (7). In a separate motion, Richman moves for a preliminary injunction.

Background[1]

Richman and Reese were partners of the law firm, Reese Richman LLP (the "Firm") in which each held fifty percent equity pursuant to the Limited Liability Partnership Agreement ("Partnership Agreement"). In 2013 and 2014, Reese was allegedly engaged in a continuous pattern of misconduct, in breach of the Partnership Agreement and his fiduciary duties. In December 2014, after allegedly demanding that Reese negotiate a dissolution of their partnership, Richman learned that Reese allegedly attempted to unilaterally divert one or more attorneys' fees awards due to the Firm, without notifying Richman.

On December 5, 2014, Richman and the Firm filed an action in this court, *Richman and Reese Richman LLP v Reese*, Index No. 653742/2014 ("Prior Action"), in which they sought a temporary restraining order and preliminary injunction to prevent Reese from breaching fiduciary duties owed to Richman and the Firm and from taking actions detrimental to the Firm's clients. By stipulation and order dated December 8, 2014, the parties were ordered to engage in private mediation. On January 15, 2015 the parties conducted a mediation session with the Honorable Ariel Belen.

The parties ultimately entered into a Settlement Agreement and Agreement of Withdrawal, effective February 26, 2015 ("Agreement"). The Agreement provided for the separation of their law practices and for the division of the Firm's cases and other assets. Under the Agreement, Richman agreed to, *inter alia*, withdraw from the Firm and

[1] Unless otherwise specified, all facts are taken from the complaint, *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994), or documents referenced to by the complaint.

discontinue the Prior Action. It is undisputed that after Richman withdrew from the Firm, he formed The Richman Law Group ("Richman Law") and Reese changed the name of the Firm to Reese LLP.

The Agreement also divided the Firm's existing cases as follows: (1) cases identified in Exhibit D were transferred exclusively to Plaintiff, subject to client approval ("Richman Cases"), Art. III.A; (2) cases identified in Exhibit E remained exclusively with the Firm ("Reese Cases"), Art. III.B; and (3) the right to attorneys' fees and costs for the remaining cases were identified in Exhibit F ("Other Pending Cases"), Art. III.C.

For the Richman and Reese Cases, each attorney had the exclusive right to attorneys' fees and costs and to work on their respective cases, Art. III.A & B, however, the parties agreed to split any award of attorneys' fees and costs in two Richman Cases (Exhibit D) and one Reese Case (Exhibit E) (these three cases are collectively referred to as "Shared Fee Cases"). One of the Shared Fee Cases was the class action *Huyer, et al. v Wells Fargo & Co. et al.*, 08-cv-00507 (S.D. Iowa) ("WF Action"), in which Defendants would receive sixty percent and Richman forty percent of any fees awarded.

By order dated February 17, 2016, the proposed settlement in the WF Action was approved – the class was awarded was awarded $25,750,000, of which class counsel was entitled to receive $8,794,374.71 ($8,583,332.48 in attorneys' fees and $211,042.23 for costs incurred) ("WF Fee Award"). Allegedly, in or around April 2017, Justice Belen reached out to both parties to schedule a meeting regarding the distribution of the WF Fee Award at Richman's request, however Reese refused to participate.

By letter dated May 9, 2016, Richman's attorney wrote to Reese's attorney to confirm that Justice Belen would serve as Escrow Agent, who would receive the WF Fee Award and distribute it between the Firm and Richman, per the terms of the Agreement (forty percent to Richman and sixty percent to Defendants). In response, Reese's attorney denied that they agreed to appoint Justice Belen as Escrow Agent and stated that Richman "clouded the issue of what amount of fees he believes he is entitled to" by purportedly breaching the Agreement. As of the commencement of this action, Reese has allegedly not confirmed that he will adhere to the fee sharing arrangement for the WF Fee Award. In the Prior Action, Defendants allegedly refused to concede that Richman was entitled to forty percent of the WF Fee award.

Based on the foregoing, Richman commenced this action alleging four causes of action. The first two causes of action are based on Reese's breach or repudiation of his obligations under the Agreement to appoint Justice Belen as Escrow Agent and to pay Richman 40% of the WF Fee Award – Richman seeks specific performance of these obligations in the first cause of action and damages in the second cause of action. In the fourth cause of action, Richman seeks attorneys' fees and costs, pursuant to the Settlement Agreement.[2]

Defendants now move to dismiss the complaint pursuant to CPLR 3211(a)(1) and (7). For the first two causes of action for breach of the Agreement, Defendants argue that

[2] The complaint also alleges a third cause of action for conversion, which Defendants moved to dismiss. Because this was withdrawn by Richman, Defendants' motion with respect to the conversion cause of action is denied as moot.

they must be dismissed because Richman has neither breached nor repudiated his obligations under the Agreement. Although the complaint labels the first two causes of action as specific performance and breach of contract, they sound in causes of action for anticipatory repudiation and will be analyzed as such.[3] *See* CPLR 3013 & 3026.

Discussion

On a motion to dismiss, "the pleading is to be afforded a liberal construction" – the Court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Leon*, 84 NY2d at 87–88 (citations omitted). "However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration." *Skillgames, LLC v Brody*, 1 AD3d 247, 250 (1st Dept 2003) (citation omitted).

As an initial matter, Defendants' reliance on the complaint in the related action between the parties – *Reese, et al. v Richman, et al.*, Index No. 654393/2017 ("Reese Complaint") – to argue that it conclusively proves that Richman failed to perform his obligations and violated numerous Agreement provisions is not viable, and the portions of Defendants' motion based on this reliance are denied because I granted Richman's motion to dismiss the Reese Complaint in that action.

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[3] However, Richman concedes the portion of the motion to dismiss the breach of contract causes of action because Richman has not yet breached the Agreement; to the extent that the first two causes of action allege a breach of Reese's current obligations under the Agreement, they are dismissed.

Defendants' remaining arguments to dismiss the first two causes of action are that: (1) Richman failed to state cause of action for anticipatory repudiation because there is no allegation of definite and final communication of Reese's expression of intent not to honor Richman's entitlement to the WF Fee Award; and (2) Reese could not repudiate obligation to appoint Justice Belen because it is not an obligation under the Agreement.

To plead a cause of action for anticipatory repudiation, the complaint must allege a "definite and final communication by defendant [] of its intention to forgo its obligations under the [contract]," *Jacobs Private Equity, LLC v 450 Park LLC*, 22 AD3d 347, 347 (1st Dept 2005) (citation omitted) , or that defendant "attempt[ed] to avoid its obligations by advancing an untenable interpretation of the contract." *Kain Dev., LLC v Krause Properties, LLC*, 130 AD3d 1229, 1232 (3d Dept 2015) (citation and quotation marks omitted); *accord Meltzer v G.B.G., Inc.*, 176 AD2d 687, 688-89 (1st Dept 1991) .

Here, Richman failed to allege any "definite and final," *Jacobs Private Equity, LLC*, 22 AD3d at 347, or "positive and unequivocal," *Princes Point LLC v Muss Dev. L.L.C.*, 30 NY3d 127, 133 (2017), communication by Reese indicating that he intends to disregard Richman's entitlement to the WF Fee Award.

Nor do Defendants' assertions that they may ultimately be entitled to an offset of Richman's portion of the WF Fee Award because of Richman's purported breaches of the Agreement amount to an untenable interpretation of the Agreement sufficient to support an anticipatory repudiation cause of action. *Cf. Cole v Macklowe*, 64 AD3d 480, 480 (1st Dept 2009) (defendant repudiated agreement "when he indicated to plaintiff that he did not consider the agreement binding"). Therefore, Richman has failed to state that Reese

anticipatorily repudiated his obligation under the Agreement to split the WF Fee Award, and this portion of the first and second cause of action is dismissed.

Richman's request for leave to replead this allegation – which was submitted in opposition to Defendants' motion to dismiss – is denied because Richman has failed to articulate "how any defects would have been addressed if he had been given leave to amend the complaint and, in any event, any further amendment of the complaint would have been futile." *Cusack v Greenberg Traurig, LLP*, 109 AD3d 747, 749 (1st Dept 2013); *see* CPLR 3025.

The remaining basis for the first two causes of action is that Reese repudiated his obligations under Art. III.C.2 of the Agreement to appoint Justice Belen as Escrow Agent in connection with the distribution of the WF Fee Award. Art. III.C.2 provides that

> With regards to any case listed in Exhibit F for which fees will be shared between Richman and the Firm, . . . [a]ny fee award in connection with such case shall be wired to an account controlled by the Honorable Ariel Belen, JAMS, as escrow agent (the "Escrow Agent"), or such other neutral escrow agent as the Parties shall mutually select. Within two (2) business days of receipt of a fee award in connection with any case listed in Exhibit F for which fees will be shared between Richman and the Firm, the Escrow Agent shall mechanically disburse the fee award to Richman and the Firm pursuant to the allocation set forth in Exhibit F . . . .

Defendants argue that Art. III.C.2 does not require Justice Belen to act as the Escrow Agent for fees awarded in the WF Action because the WF Action is listed in Exhibit E, not Exhibit F of the Agreement. However, the Shared Fee Cases are only listed in Exhibits D and E of the Agreement, not in Exhibit F. The Agreement does not contain a similar provision for Shared Fee Cases listed in Exhibits D and E.

As drafted, the Agreement plainly does not accurately express the intentions of the parties – the parties intended to appoint Justice Belen or another neutral individual as Escrow Agent upon fees being awarded in at least some of the Shared Fee Cases. Because of the parties' mutual mistake, Art. III.C.2 is rendered meaningless and an Escrow Agent would never be appointed in any Shared Fee Case. For this reason, a hearing is required to determine which of the Shared Fee Cases the parties intended to be governed by Art. III.C.2. I will not address the remainder of Defendants' motion to dismiss or Richman's motion for a preliminary injunction until such determination is made.

In accordance with the foregoing, it is

ORDERED that the portion of defendants' motion to dismiss which seeks dismissal of the first and second causes of action is granted to the extent described above, and the portion of defendants' motion that seeks dismissal of the third cause of action for conversion is denied as moot because plaintiff withdrew this claim; and it is further

ORDERED that a hearing is directed to be conducted before a Special Referee to determine which of the Shared Fee Cases the parties intended to be governed by Art. III.C.2 of the Agreement. The Special Referee is to report to this Court with all convenient and deliberate speed, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR §4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforementioned issue; and it is further

ORDERED that plaintiff's motion for a preliminary injunction and the remainder of defendants' motion to dismiss is held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR §4403 or receipt of the determination of the Special Referee or the designated referee; and it is further

ORDERED that counsel for the plaintiff shall, within 30 days from the date of this order, serve a copy of the order with notice of entry, together with a completed Information Sheet, upon the Special Referee Clerk in the Motion Support Office in Room 119 at 60 Centre Street, who is directed to place this matter on the calendar of the Special Referee's Part (Part 50R) for the earliest convenient date; and it is further

ORDERED that, upon receipt of the Special Referee's report, plaintiff's motion for a preliminary injunction and the remainder of defendants' motion to dismiss shall be disposed of in accordance with the results of the Special Referee's report.

This constitutes the decision and order of the Court.

4/2/19
DATE

SALIANN SCARPULLA, J.S.C.

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