UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION
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In re: Case No. 9:15-bk-04241-FMD
Chapter 7

Benjamin H. Yormak,

Debtor.
_____/

ORDER DENYING DEBTOR'S AMENDED MOTION FOR PARTIAL SUMMARY JUDGMENT (Doc. No. 418)

THIS CASE came on for consideration of Debtor's *Amended Motion for Partial Summary Judgment and Incorporated Memorandum of Law* (Doc. No. 418) (the "Motion for Summary Judgment"), Creditor Steven Yormak's response (Doc. No. 452), and Debtor's reply (Doc. No. 457). For the following reasons, the Court will deny the Motion for Summary Judgment.

I. Summary Judgment Standard

Under Federal Rule of Civil Procedure 56, incorporated by Federal Rule of Bankruptcy Procedure 7056, a moving party is entitled to summary judgment if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[1] A factual issue is genuine if the evidence is such that the fact finder could return a verdict for the nonmovant. Facts are material if, under applicable law, they would affect the outcome of the suit.[2]

The moving party bears the initial burden of showing the absence of a genuine issue of material fact by identifying portions of the pleadings, depositions, answers to interrogatories, admissions, and affidavits that support the motion.[3] In deciding whether the movant has met this burden, the court must view all record evidence and draw all reasonable inferences in favor of the nonmoving party.[4] If the movant makes such an affirmative showing, the burden then shifts to the nonmoving party to go beyond the pleadings and to designate specific facts showing there is a genuine issue of material fact.[5]

II. History of the Case

Debtor, a Florida attorney, and Steven Yormak, an attorney licensed in Canada and the State of Massachusetts, are father and son. Debtor and Steven Yormak entered into three separate consulting agreements in connection with Debtor's Florida law practice. The first consulting agreement (the "Initial Agreement"), provided for Debtor to pay Steven Yormak $20,000 per month for consulting services on a number of client files.[6] In the event of termination, paragraph 11 of the Initial Agreement provides for the payment of $660,000 to Steven Yormak for service rendered from May 1, 2011 to July 1, 2012.[7]

The second and third consulting agreements are the subject of this Summary Judgment Motion. The second consulting agreement (the "Barnes Qui Tam Agreement"), dated August 16, 2012, provides for Debtor to pay 70% of the fees he was to receive in the future in connection with a specific qui tam case (the "Barnes Qui Tam") to a charitable organization as directed by Steven Yormak in consideration of his consulting services.[8] Neither the Class Action Agreement nor the Barnes Qui Tam Agreement contain a termination clause. The third consulting agreement (the "Funari Class Action Agreement"), dated August 18, 2012, provides for Debtor to pay 70% of the fees he was to receive in the future on a specific class action case (the "Funari Class Action") to a charitable organization as directed by

[1] Fed. R. Civ. P. 56(a).
[2] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).
[3] *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).
[4] *In re Harwell*, 628 F.3d 1312, 1316 (11th Cir. 2010) (citing *Loren v. Sasser*, 309 F.3d 1296, 1301-02 (11th Cir. 2002)).
[5] *United of Omaha Life Ins. Co. v. Sun Life Ins. Co. of America*, 894 F.2d 1555 (11th Cir. 1990); *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112 (11th Cir. 1993).
[6] Claim 4-2, p.11.
[7] Claim 4-2, p.13.
[8] Claim 4-2, pp.25-26.

Steven Yormak in consideration of his consulting services.[9] Together the Barnes Agreement and the Funari Agreement are referred to herein as the "Agreements."

On December 4, 2012, Steven Yormak terminated the Agreements.[10] In 2013, Steven Yormak sued Debtor in state court for, among other things, breach of contract.[11] Debtor removed the case to the United States District Court for the Middle District of Florida, Case No. 2:14-cv-033-JES (the "District Court Case").

Debtor filed a Chapter 13 bankruptcy case, staying the District Court Case. Steven Yormak filed a proof of claim in the amount of "$724,275 plus Qui Tam (70%) + Class Action (70%)" (the "Claim"),[12] to which Debtor objected (the "Objection to Claim").[13] The Objection to Claim was on the grounds that the Claim is unenforceable because the Claim asserts a request to split legal fees with a non-Florida lawyer, that the Claim is contingent and unliquidated, and that Steven Yormak has failed to set forth a clear and concise basis upon which to value the claim.

On December 29, 2016, Steven Yormak filed an amended Proof of Claim that increased the amount of the Claim, without explanation for the increase, to "$1,095,275.00 + 70% Class action + interest."[14] Debtor filed a Second Amended Objection to the Claim,[15] and Steven Yormak filed a response.[16]

Debtor moves for partial summary judgment as to Steven Yormak's claims under the Agreements on three grounds: (1) because the Agreements were terminable at will, Steven Yormak can prove no damages; (2) because compensation under the Agreements was payable to a charity, and not to Steven Yormak, he is not a party in interest with standing to enforce a claim for compensation; and, (3) because the Agreements are contingent fee contracts that were terminated prior to the occurrence of the contingency, Steven Yormak may not recover his contingent fee and is limited to a quantum meruit claim.

In Debtor's affidavit in support of the Motion for Summary Judgment, he attests that the term "Funari Class Action" was named for a client in an employment case in which the theory for a potential class action arose. Debtor further attests that he was not retained by a client in connection with this potential class action until February 16, 2016.

In response to the Motion for Summary Judgment, Steven Yormak contends (1) he was not Debtor's "employee;" (2) the law regarding the termination of an at-will employee does not apply; (3) his termination of the Agreements was due to Debtor's fraud and dishonesty; (4) he has standing to pursue his claims; and (5) contrary to his affidavit, Debtor had been retained by a client in connection with the Funari Class Action in November 2012.

III. Analysis

A. At-Will Contracts

The Agreements provide that they should be interpreted, construed and enforced in accordance with Florida law. Under Florida law, "[w]hen a contract does not contain an express statement as to duration, the court should determine the intent of the parties by examining the surrounding circumstances and by reasonably construing the agreement as a whole."[17] And "[w]hile termination of a terminable at will contract will not support a breach of contract claim, allegations that the terminable at will contract was breached during the time it was in effect between the parties will support such a claim."[18] This principal applies to contracts generally, and is not limited to employment

[9] Claim 4-2, pp.23-24.
[10] Affidavit of Steven Yormak, Doc. No. 452, p. 20. Steven Yormak claims that the Agreements were constructively terminated.
[11] Case No. 11-2013-CA-003394-0001-XX filed in the Circuit Court in and for Lee County, Florida.
[12] Proof of Claim No. 4-1.
[13] Doc. No. 36
[14] Proof of Claim No. 4-2.
[15] Doc. No. 397.
[16] Doc. No. 458.
[17] *City of Homestead v. Beard*, 600 So. 2d 450, 453 (Fla. 1992).
[18] *Williams v. Heritage Operating, L.P.*, 23 So. 3d 806, 807 (Fla. 2d DCA 2009).

contracts. Therefore, there is no need for the Court to determine whether Steven Yormak was Debtor's employee, as Debtor contends, or as Steven Yormak contends, an independent contractor.[19]

Although Debtor is correct that termination of an at-will contract generally does not support a breach of contract claim, a cause of action for breach of the contract may be stated if the breach occurred before the contract was terminated.[20] Here, Steven Yormak contends he terminated the Agreements as a direct result of Debtor's breaches. Therefore, the Court finds that Debtor has not met his burden to show the absence of a genuine issue of material fact regarding Steven Yormak's claim for breach of the Agreements.

B. Contingent Fee Contracts

Next, Debtor argues that Florida law precludes recovery for a party who voluntarily terminates a contingency contract prior to the contingency occurring. Debtor contends that the Agreements are contingent fee contracts, that Steven Yormak voluntarily terminated both Agreements before the contingency occurred, and, as a result, he is precluded from recovery.

In the alternative, Debtor contends that even if Debtor terminated the contracts, the only relief available to Steven Yormak is under the theory of quantum meruit, a claim for relief that Steven Yormak dismissed in the District Court Case in 2015. In response, Steven Yormak argues that he is entitled to payment based on the theories of condition precedent or unjust enrichment.

The cases that Debtor cites to support his arguments are in the context of attorney contingency fee agreements. The Florida Supreme Court differentiated attorney fee agreements from other contracts, holding that "the nature of the attorney-client relationship requires an analysis that differs from the principles of compensation that are applicable in other contractual relationships."[21] And in even in the context of an attorney contingency fee agreement, Debtor's position that Steven Yormak is not entitled to compensation because he voluntarily terminated the Agreements, is not entirely accurate. In *Faro v. Romani*, the Florida Supreme Court held that "[i]f the client's conduct makes that attorney's continued performance of the contract either legally impossible or would cause the attorney to violate an ethical rule of the Rules Regulating The Florida Bar, that attorney may be entitled to a fee when the contingency of an award occurs."[22]

Therefore, if Steven Yormak had good cause for terminating the Agreements, he may be entitled to recovery. And whether Steven Yormak had good cause is a genuine issue of material fact.

In addition, there does not appear to be a clear record on the issue of Steven Yormak's termination of the Agreements. Debtor contends that the termination occurred on December 4, 2012, which Steven Yormak does not appear to dispute. However, the record includes an email dated December 4, 2012 which states in part,

> I presume if asked by clients or anyone else you will advise that I have elected to sever professional ties with the firm save and except the two ongoing matter being the Barnes (Qui Tam) and class action (Funari) which we can continue to collaborate on.[23]

And on January 10, 2013, Debtor's counsel emailed Steven Yormak written rescission of the Agreements, "which included the Funari and Barnes."[24] This conflicting evidence also creates a genuine issue of material fact.

C. Party In Interest

Lastly, Debtor argues that because the Agreements provide that 70% of the fees received by Debtor in those cases is to be paid to a charitable organization of Steven Yormak's choosing, Steven Yormak is not a party in interest to the Agreements and therefore has no standing to sue for damages.

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[19] Without deciding this issue, the Court notes that the language of the Agreements does not appear to give rise to an employer-employee relationship.
[20] *Williams v. Heritage Operating, L.P.*, at 807.
[21] *Faro v. Romani*, 641 So. 2d 69, 70 (Fla. 1994).
[22] *Id.* at 71.
[23] Doc. No. 452, p. 134.
[24] Doc. No. 418, Exh. B, p.4.

But the focus of the standing inquiry is "whether the plaintiff is the proper party to bring this suit."[25] And a party to a contract enjoys standing to sue for an alleged breach of contract.[26] In addition, "[i]t is well settled that a party may pursue an action for breach of contract even in the absence of, or inability to properly prove, actual damages."[27] "In such a case, the plaintiff is entitled to nominal damages because 'there is a legal remedy for every legal wrong and, thus, a cause of action exists for every breach of contract,' even for 'an aggrieved party who has suffered no damage.'"[28]

Here, Steven Yormak is a party to the Agreements and is the only party, other than the Debtor, with standing to sue for enforcement of the Agreements. As a result, the Court will deny summary judgment on this issue.

IV. Conclusion

For the foregoing reasons, the Court finds that Debtor has not met his initial burden on summary judgment and will deny the Motion for Summary Judgment. Accordingly, it is

ORDERED that the Motion for Summary Judgment is **DENIED**.

DATED: June 6, 2019.

/s/ Caryl E. Delano

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Caryl E. Delano
United States Bankruptcy Judge

[25] *Bochese v. Town of Ponce Inlet*, 405 F.3d 964, 981 (11th Cir. 2005) (quoting *Raines v. Byrd*, 521 U.S. 811, 818 (1997)).

[26] *Kona Spring Water Distribg., Ltd. v. World Triathlon Corp.*, 8:05CV119 T23TBM, 2007 WL 842969, at *1 (M.D. Fla. Mar. 19, 2007).

[27] *Swipe for Life, LLC v. XM Labs, LCC*, 10-22337-CIV, 2012 WL 1289726, at *5 (S.D. Fla. Apr. 16, 2012) (citing *Walter Int'l Prods., Inc. v. Salinas*, 650 F.3d 1402, 1418 (11th Cir. 2011)).

[28] *Swipe for Life, LLC v. XM Labs, LCC*, 10-22337-CIV, 2012 WL 1289726, at *5 (S.D. Fla. Apr. 16, 2012) (quoting *AMC/Jeep of Vero Beach, Inc. v. Funston*, 403 So.2d 602, 605 (Fla. 4th DCA 1981)).