

Stark v Molod Spitz & DeSantis

2004 NY Slip Op 30150(U)

February 5, 2004

Supreme Court, New York County

Docket Number: 0109625/2003

Judge: Marylin G. Diamond

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

PRESENT: HON. MARYLIN G. DIAMOND

PART 48

Justice

LINDA A. STARK, ESQ.,

Plaintiff,

INDEX NO. 109625/03

-against-

RECORDED
FEB 05 2004

FILED

MOLOD SPITZ DeSANTIS, P.C. et al.,

Defendants.

MOTION SEQ. NO. 502 - 6 2004

Cross-Motion: Yes No

NEW YORK COUNTY CLERK'S OFFICE

Upon the foregoing papers, it is ordered that: Motion sequence numbers 002 and 003 are consolidated herein for decision. This is a special proceeding brought by petitioner Linda Stark, a personal injury attorney, against a law firm, Molod Spitz & DeSantis, by whom she was employed. After approximately two and one-half years with the firm, petitioner was terminated on May 22, 2003. Petitioner then commenced this special proceeding, by order to show cause, on June 27, 2003. Her petition (which she erroneously referred to as an affirmation) sought an order (1) substituting petitioner in place of the firm in various personal injury cases in which a consent to change attorney form had been signed by the clients; (2) requiring the firm to turn over to her all of its relevant case files; (3) declaring that she was not obligated to reimburse the firm for any disbursements which it may have paid in a particular case until the case has been completed; (4) compensating petitioner for the unused vacation time, unpaid salary and expenses which had accrued while she was employed by the firm; and (5) prohibiting the firm from either working on or issuing any bills in cases where the clients had indicated that they wished petitioner to be their attorney. In addition to opposing the petition, the firm cross-moved for an order directing petitioner to return various files which she was alleged to have improperly removed from the firm's offices prior to her termination.

In a stipulation "so-ordered" by the court on June 17, 2003, the parties settled the special proceeding by resolving the issues raised in the petition. The stipulation required, *inter alia*, that the firm execute substitution stipulations in cases where the clients agreed that petitioner would be taking over as the attorney of record. The firm also agreed to permit petitioner to defer the payment of disbursements to the firm until the conclusion of each case. Petitioner agreed to open an escrow account in the amount of \$38,000, to be held jointly by her and the firm, for the payment of any disbursements owed to the firm at the conclusion of each case. In a short-order form accompanying the stipulation, the court indicated that the petition had been disposed of in accordance with the stipulation. Thereafter, the case was accurately recorded as disposed on the court's computer system. However, for reasons unknown to the court, the case was subsequently restored to active status. On October 8, 2003, petitioner filed and served a summons and complaint asserting causes of action for breach of contract, violation of the New York City Human Rights Law and interference and harassment with petitioner's law practice. The complaint bears the same index number as the disposed of special proceeding which petitioner had previously brought.

Motion Sequence Number 002

In motion sequence 002, the firm moves for an order requiring petitioner to pay disbursements to the firm immediately on the ground that petitioner violated the stipulation by withdrawing the monies in the escrow account and closing the account. The firm also asks that petitioner be sanctioned for her actions and that it be awarded costs for having to make this motion. Petitioner opposes the firm's motion on the ground that she did not violate the stipulation, but simply transferred the monies to a different escrow

account. In addition, she cross-moves for an order vacating the provision of the stipulation requiring her to open an escrow account in both her name and the firm's name on the ground that the firm violated the stipulation by removing disbursement documentation from the case files which had been turned over to her. Petitioner also seeks an order compelling the firm to pay the salary and expenses which it owes her, along with treble damages.

Essentially, both parties are seeking to set aside and/or enforce the stipulation because of alleged violations committed by the other party. As a threshold matter, it is well settled that a plenary action is necessary to set aside or enforce a stipulation of settlement which terminates a lawsuit. See *Teitelbaum Holdings, Ltd. v. Gold*, 48 NY2d 51, 53 (1979); *HCE Assocs. v. 3000 Watermill Lane Realty Cor.*, 131 AD2d 543, 545 (2nd Dept. 1987). Here, in previously disposing of the petition, the court ruled that the stipulation which the parties entered into on June 17, 2003 resolved the issues raised therein and terminated the proceeding. Thus, if the parties wish to set aside or enforce the stipulation, they must institute a plenary action under a new index number and may not proceed, as here, by motion in a disposed case.

In any event, neither of the parties has established entitlement to the requested relief. A stipulation of settlement is to be strictly enforced, and a party will not be relieved from the consequences of a stipulation unless it establishes cause sufficient to invalidate a contract, such as fraud, collusion, mistake or accident. See *Quality Ceramic Tile & Marble Co., Ltd., v. Cherry Valley Limited Partnership*, 259 AD2d 607 (2nd Dept. 1999); *HCE Associates v. 3000 Watermill Lane Realty Corp.*, 131 AD2d 543 (2nd Dept. 1987). As to the respondent's motion, the evidence in the record indicates that petitioner did not violate the stipulation by improperly removing monies for her own use but, rather, merely transferred the funds to another joint escrow account without promptly notifying the firm. As to the petitioner's cross-motion, her assertion that the firm withheld disbursement documents from the case files is entirely speculative. Even if true, the firm's actions would appear to be harmless since there is nothing in the stipulation which prevents petitioner from asking for further documentation regarding disbursements. Under the circumstances, the firm's motion and the petitioner's cross-motion must be denied.

Motion Sequence Number 003

In motion sequence number 003, the firm has moved for an order dismissing the summons and complaint served by petitioner in October, 2003. Alternatively, it seeks an order, pursuant to CPLR 7503(a), staying the action and compelling petitioner to arbitrate the issues which she has raised in the complaint. The motion is denied as unnecessary since the complaint served by plaintiff is a nullity. As already noted, the summons and complaint served on the firm bears the same index number which had been assigned to petitioner's previously-disposed special proceeding. In effect, the petitioner sought to commence a separate, plenary action without purchasing a separate index number. Thus, there is no need to dismiss since no action has been commenced. In view of the court's conclusion herein, the petitioner's cross-motion for a stay of arbitration is moot since the firm only sought arbitration in the event this court found the complaint to be valid. The firm's motion and petitioner's cross-motion must therefore be denied.

Accordingly, in motion sequence number 002, the petitioner's motion and respondent's cross-motion are hereby denied. In motion sequence number 003, respondents' motion and the petitioner's cross-motion are hereby denied.

ENTER ORDER

Dated: _____



MARYLYN G. DIAMOND, J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

FILED

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