

Weinstein v Dvir

2007 NY Slip Op 32211(U)

July 19, 2007

Supreme Court, New York County

Docket Number: 0101078/2007

Judge: Jane S. Solomon

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

DEFENDANT: SOLOMON

PART 55

Index Number : 101078/2007

WEINSTEIN, KENNETH J., ESQ.

VS
DVIR, MAGDA

INDEX NO. 101078/2007

MOTION DATE 5-7-2007

Sequence Number : 001

MOTION SEQ. NO. 001

SUMMARY JUDGMNT/LIEU COMPLAINT

MOTION CAL. NO. _____

The following papers, numbered 1 to 9 were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-5

6-8

9

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion **is decided in accordance with the annexed memorandum decision and order.**

*N.B. Prelim. Conf. 8/27/07 at noon
Set at end of decision.*

FILED

JUL 23 2007

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 7/19/07


JANE S. SOLOMON J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 55

-----X

KENNETH J. WEINSTEIN, ESQ.,
Plaintiff,

INDEX NO. 101078/2007

-against-

MAGDA DVIR

DECISION AND ORDER

Defendant.

-----X

JANE S. SOLOMON, J.

In this action for the collection of legal fees, plaintiff Kenneth J. Weinstein, Esq. ("Plaintiff"), appearing pro se, moves under CPLR § 3213 for summary judgment in lieu of complaint. For the reasons discussed herein, the motion is denied.

Background

Plaintiff formerly represented Magda Dvir ("Defendant") in the prosecution of her matrimonial action entitled Dvir v. Dvir, Index No. 350605/2002, assigned to Special Referee Steven E. Liebman by another Justice of this Court. When Plaintiff sought to withdraw as Defendant's counsel before the action was concluded, Defendant stipulated on the record to have Referee Liebman hear and determine the value of his services on April 4, 2005 (the "Withdrawal Hearing"). The Referee allocuted Defendant at length and she agreed that the fair and reasonable value of fees and professional services rendered to her was \$47,931. She also undertook to be primarily liable for that amount. At the Withdrawal Hearing, she described the amount as "most worthwhile."

Defendant now contends that this statement was "conveyed in irony." At the time, the sum was understood to be a charging lien, Plaintiff having waived his retaining lien. The transcript of the Withdrawal Hearing was filed and became a Court Order on April 6, 2005 ("April 6 Order"); a copy of which is included with the motion.

Beginning on or about May 13, 2005, Plaintiff again represented Defendant in the matrimonial action, and the fees for those services are not in at issue here. As part of her settlement, Defendant received free and clear title to her former marital residence, which is valued at over \$3 million, but she received no liquid assets.

Plaintiff's previous attempt to convert the order fixing the charging lien to a money judgment in the matrimonial action was rejected by an October 25, 2006 order issued by the Honorable Justice Laura Visitation-Lewis ("October 25 Order"). The October 25 Order stated that Plaintiff's motion to convert the charging lien to a money judgment and compel Defendant to obtain a home equity loan against her former marital residence was denied because it would have permitted him to "circumvent the limitation placed upon assets to which a charging lien may attach, *i.e.*, proceeds procured by the attorney in action." The Order further stated that Plaintiff needed to proceed by a plenary action.

In January 2007, Plaintiff commenced this separate action by filing a Notice of Motion for Summary Judgment in Lieu of

Complaint pursuant to CPLR § 3213 alleging that there is an instrument for the payment of money between the parties and proof of non-payment of the amount due is established. Defendant opposes, arguing on a number of grounds.

Discussion

The issue in the instant action is whether Plaintiff can use the procedural vehicle of summary judgment in lieu of complaint to recover the amount already fixed for his charging lien. The requirement that a CPLR § 3213 action be based on an instrument for the payment of money only or a judgment is a stringent one. See Weissman v. Sinorm Deli, Inc., 88 N.Y.2d 437, 443 (1996). "[A] document comes within CPLR § 3213 if a prima facie case would be made out by the instrument and a 'failure to make the payments called for by its terms.'" Id. at 444, quoting Interman Indus. Prods. v. R.S.M. Electron Power, 37 N.Y.2d 151, 155 (1975). "The instrument does not qualify if outside proof is needed, other than simple proof of nonpayment or a similar de minimis deviation from the face of the document." Weissman, 88 N.Y.2d at 444.

While the amount due for Plaintiff's services was fixed by the April 6 Order, the transcript of the Withdrawal Hearing does not qualify as an instrument for the payment of money only. Plaintiff's reliance on Schneider, Kleinick, Weitz, Damashek & Shoot v. City of New York, 302 A.D.2d 183 (1st Dep't 2002) is misplaced.

There, there was no problem with the charging lien

attaching to the proceeds of the underlying action, which was a personal injury action with a financial recovery for plaintiff. Here, the October 25 Order expressly states that the charging lien cannot attach to the non-liquid former marital residence received by Defendant. Plaintiff has not appealed from or otherwise legally challenged the October 25 Order. Indeed, his moving papers go so far as to support its result. Plaintiff's Reply Aff. in Further Support, pp. 7-8.

At the same time, there does not appear to be any issue of fact which would defeat a post-answer summary judgment motion. The transcript of the Withdrawal Hearing is clear that Defendant voluntarily agreed to have the court determine the value of Plaintiff's services. Her contention that her statement describing Plaintiff's services as "most worthwhile" was "conveyed in irony" while being under oath and being allocuted as to her agreement cannot be considered. In addition, Defendant's asserted objections to Plaintiff's charges cannot be considered fact issues because the objections were made after the Withdrawal Hearing, where she agreed to be bound to its outcome.

Indeed, as argued by Plaintiff, Defendant never challenged the propriety of the April 6 Order, never moved to vacate it, or take an appeal. She has not submitted any proof that factual issues exist with regard to the amount. Nevertheless, as indicated above, because there is no instrument, the plenary action conventions set forth in the CPLR must be honored.

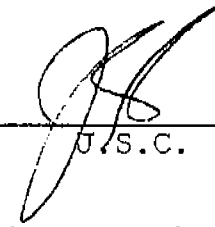
Defendant's final argument that Part 137 of the Rules of the Chief Administrator preclude recovery is erroneous. 22 N.Y.C.R.R. § 137.1(b)(5) specifically exempts attorney-client fee disputes "where the fee has been determined pursuant to court order." As the amount of the charging lien is already fixed by a court order, there is no controversy to submit to arbitration.

Accordingly, it hereby is

ORDERED that Plaintiff's motion for summary judgment in lieu of complaint pursuant to CPLR § 3213 is denied. The moving and answering papers are deemed the complaint and answer, respectively, and the parties are directed to appear in Part 55 on August 27, 2007 at 12:00 noon for a preliminary conference, at which time further proceedings herein will be scheduled if the parties cannot reach an amicable resolution.

Dated: July 19, 2007

ENTER:



U.S.C.

JANE S. SOLOMON

FILED
JUL 23 2007
NEW YORK
COUNTY CLERK'S OFFICE