

Shandell, Blitz, Blitz & Brookson, L.L.P. v Schiff

2007 NY Slip Op 33509(U)

October 23, 2007

Supreme Court, New York County

Docket Number: 0600739/2007

Judge: Shirley W. Kornreich

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SCANNED ON 10/29/2007
[* 1]
SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
HON. SHIRLEY WERNER KORNREICH

PART 54

Index Number : 600739/2007
SHANDELL, BLITZ, BLITZ
vs
SCHIFF, SANDRA RUTH
Sequence Number : 001
CONSOLIDATION/JOINT TRIAL

INDEX NO. 600739/07
MOTION DATE 8/2/07
MOTION SEQ. NO. 1
MOTION CAL. NO. _____

The following papers, numbered 1 to 3 were read on this motion to/for Consolidate / Joint Trial

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

PAPERS NUMBERED

1, 2

3

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION AND ORDER.**

FILED
OCT 29 2007

NEW YORK
COUNTY CLERKS OFFICE

HON. SHIRLEY WERNER KORNREICH


J.S.C.

Dated: 10/23/07

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

DO NOT POST

REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

-----X
SHANDELL, BLITZ, BLITZ & BOOKSON, L.L.P.,

Index No.: 600739/07

Plaintiff,

-against-

DECISION
and ORDER

SANDRA RUTH SCHIFF, ESQ.,

Defendant.

-----X
KORNREICH, SHIRLEY WERNER, J.:

This breach of contract action between attorneys arises out of defendant Sandra Ruth Schiff, Esq.'s ("Schiff") alleged refusal to pay plaintiff Shandell, Blitz, Blitz & Bookson, LLP ("SBBB") participation and referral fees. Schiff now moves, pursuant to CPLR § 602(a), to consolidate the above captioned action ("the SBBB Action") with *Chet W. Kern, Esq., v. Shandell, Blitz, Blitz & Bookson, LLP, Richard E. Shandell, Esq., Arthur Blitz, Esq., Bert A. Blitz, Esq., Shoshana T. Bookson, Esq., Mitchell Ashley, Esq., Helene Shandell, Marilyn Blitz, Ronnie Blitz and Saul Stromer* (Index No. 600483/07) ("the Kern Action"). SBBB opposes and cross-moves for summary judgment pursuant to CPLR § 3212.

I. *Background*

A. *The Kern Action*

On or about April 30, 1997, Chet W. Kern, Esq. ("Kern") and Richard E. Shandell, Esq. ("Shandell") executed an agreement ("the Agreement") to resolve various claims Shandell had against Katz, Katz & Erasmus ("Katz"), a dissolved law firm in which Shandell was a former partner. The Agreement called for Kern to pay Shandell \$325,000 as follows: \$25,000 up-front

and the balance of \$300,000 in six equal installments of \$50,000 from April 30, 1998 through April 30, 2003 (the "Payment Term"). During the Payment Term, the agreement also stated that Kern would give Shandell a right of first refusal on all of the cases he elected to refer to outside counsel. In return Kern would receive one-third of any fees earned by Shandell on the referred cases.

On or about October 1, 1997, an Equity Partnership Agreement (the "Partnership Agreement") was executed detailing the terms under which Kern became a partner of SBBB. Pursuant to the Partnership Agreement, Kern's capital contribution to SBBB was a list of approximately 146 cases (the "Referral List") that he had been working on. The Referral List was divided into three sections: one entitled "Pre-Note In-Suit Cases and Cases not Yet in Suit"; a second entitled "Referred Out Cases"; and a third entitled "Note of Issue Filed." Following the Partnership Agreement, Kern and his fellow partners amended the original agreement Kern made with Shandell in April 1997 (the "Amended Agreement"). The Amended Agreement called for any fees earned by Kern in connection with 10 specifically identified cases from the Referral List to be directly applied to the \$325,000 Kern had agreed to pay Shandell. Kern would then receive any excess fees that remained after the \$325,000 was paid.

On or about November 21, 2001, Kern withdrew from SBBB and entered into a separation agreement (the "Separation Agreement") with its remaining partners. Paragraph 2 of the Separation Agreement called for Kern to receive 11% of the net attorneys' fees received by SBBB in connection with the "Referred Out Cases" outlined in the Referral List. The Separation Agreement also contained a payout formula based upon Kern's equity in the firm. For all non medical malpractice cases, Kern was to receive \$3,000 and 1/3 of the net attorney' fees recovered

per case. For medical malpractice cases, Kern was to receive 30% of the attorneys' fees on the first \$250,000, 25% on the next \$250,000, 20% on the next \$500,000, 15% on the next \$250,000 and 10% on any amount over \$1,250,000.

In August 2005, *Woolfalk v. NYCHA*, one of the 10 cases specifically identified from the Referral List from which fees would be applied against the remaining \$300,000 Kern owed Shandell, resolved in SBBB's favor for \$4,800,000. Kern alleges that since he had already paid off the entire \$325,000 he owed Shandell, he was entitled to his share of the excess fees earned which was approximately \$500,000. SBBB disagreed and did not pay Kern any fees arising out of *Woolfalk*. Since payment was not made, Kern demanded that the disputed \$500,000 be held in escrow pending a resolution of the fee dispute.

Kern also alleges that SBBB did not comply with either paragraph 2 or the payout formula outlined in the Separation Agreement and therefore he is owed additional attorneys' fees from services rendered in connection with cases handled by SBBB from the Referral List.

B. The SBBB Action

SBBB and Schiff allegedly entered into an agreement where SBBB would refer Schiff certain clients for further legal services in return for a participation fee, which was a percentage of the net attorneys' fees earned, upon disposition of each referred matter. The SBBB Action alleges that Schiff breached her agreement with SBBB by providing legal services for multiple cases it referred her and then failing to forward the required participation fee.

Schiff avers that she was referred cases by SBBB only when Kern was a partner. She states that over the past four years she paid participation fees to SBBB from 10 cases SBBB sent her from the Referral List. Schiff further avers that SBBB did not pay Kern for any of these

cases. As a result, Kern wrote Schiff requesting that she place any further fees she owed SBBB from cases sent to her off the Referral List in escrow pending resolution of his fee dispute. Schiff states she placed the disputed fees in escrow and advised Shoshana Bookson, Esq. (“Bookson”), a partner at SBBB, of her actions. According to Schiff, once Bookson learned that the disputed fees had been placed in escrow, she demanded that Schiff turn them over to her immediately. Schiff refused, stating that she “was a stakeholder of the sum, which in fact is the center of the dispute between the parties in [the Kern Action]” and that since she had two parties claiming entitlement to the same funds, she could not “blindly” follow Bookson’s demand.

II. *Conclusions of Law*

A. *Schiff’s Motion for Consolidation/Joint Trial*

CPLR § 602(a) provides that where two actions involve a common question of law or fact, and are pending before a court, the court “may order a joint trial of any or all the matters in issue [or] may order the actions consolidated[.]” Once the movant demonstrates commonality of law or fact, the opponent must show prejudice to a substantial right. *See Berman v. Greenwood Village Community Dev., Inc.*, 156 A.D.2d 326, 327 (2nd Dept 1989). The mere desire for separate adjudication will not suffice. *Id.*

Here, Schiff has demonstrated that both actions contain common questions of law and fact. The Kern action revolves around Kern’s allegation that SBBB did not pay him referral fees pursuant to various agreements he executed with Shandell and SBBB before, during and after his partnership with SBBB. The SBBB action centers on fees Schiff earned from cases referred to her off of the Referral List, and then placed in escrow. SBBB and Kern both claim entitlement to those fees. Therefore, both actions concern a dispute over legal fees from cases arising from

Kern's Referral List that SBBB claims it either is owed (the SBBB Action) or does not owe (the Kern Action). Accordingly, since both actions clearly involve common questions of law and fact and SBBB has not demonstrated any prejudice that will result, both actions should be jointly tried.

B. SBBB's Motion for Summary Judgment

A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issues of fact. *Zuckerman v. City of N.Y.*, 49 N.Y.2d 557, 562 (1980). Once movant has made the requisite showing, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of a triable issue of material fact. *Giuffrida v. Citibank Corp.*, 100 N.Y.2d 72, 81 (2003).

Here, SBBB has not met its burden. It argues that since Schiff admitted to the allegations made in the complaint, namely that she accepted cases SBBB referred her, resolved them, and failed to fully remit all of the payments allegedly due, summary judgment is warranted. However, Schiff claims that all of the cases referred to her came from the Referral List and that, therefore, there is a dispute as to whether Kern is entitled to a portion of the funds she placed in escrow. At this stage, no discovery appears to have taken place. The parties have not submitted the alleged agreement between Schiff and SBBB. As a result, the court cannot assess the allegations made by either party relating to their alleged relationship. There is no way to know at this point whether or not Schiff's failure to forward SBBB the funds she placed in escrow violated her referral arrangement or whether Kern is entitled to a portion of the fees. Second, it is unclear how much money Schiff is holding in escrow and what cases this money actually relates to. These, and many other issues of fact remain at this stage in the proceeding. As a

result, SBBB's motion for summary judgment is denied. See *Exec. Aviation Servs. v. Flightways of Long Island Inc.*, 15 A.D.3d 611 (2nd Dept 2005) (summary judgment in breach of contract action was premature where substantial discovery remained outstanding). Accordingly, it is

ORDERED that Sandra Ruth Schiff Esq.'s motion is granted and the above captioned action (Index No. 600739/07) shall be jointly tried in this court with *Chet W. Kern, Esq., v. Shandell, Blitz, Blitz & Bookson, LLP, Richard E. Shandell, Esq., Arthur Blitz, Esq., Bert A. Blitz, Esq., Shoshana T. Bookson, Esq., Mitchell Ashley, Esq., Helene Shandell, Marilyn Blitz, Ronnie Blitz and Saul Stromer* (Index No. 600483/07) discovery for these actions shall be jointly conducted and the caption on these cases shall read

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

-----X
CHET W. KERN, ESQ.,

Index No.: 600483/07

Plaintiff,

-against-

SHANDELL, BLITZ, BLITZ & BOOKSON, L.L.P.,
RICHARD E. SHANDELL, ESQ., ARTHUR BLITZ., ESQ
BERT A. BLITZ, ESQ., SHOSHANA T. BOOKSON, ESQ.,
HELENE SHANDELL, MARILYN BLITZ, RONNIE BLITZ

Defendants.

-----X

SHANDELL, BLITZ, BLITZ & BOOKSON, L.L.P.,

Index No.: 600739/07

Plaintiff,

-against-

SANDRA RUTH SCHIFF, ESQ.,

Defendant.

-----X

and it is further

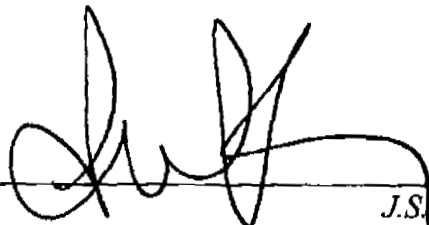
ORDERED that Shandell, Blitz, Blitz & Bookson, LLP's motion for summary judgment is denied; and it is further

ORDERED that the parties to both actions shall appear before the court for a discovery scheduling conference at 9:30 a.m. on November 29, 2007 at 111 Centre Street, Room 1227, New York, N.Y. 10013; and it is further

ORDERED that the Clerk shall notify the parties in both actions of the date for the discovery scheduling conference.

ENTER

DATE: October 23, 2007
New York, NY


_____ J.S.C.

FILED
OCT 29 2007
NEW YORK
COUNTY CLERK'S OFFICE