

**Desimone, Aviles, Shorter & Oxamendi, LLP v
Barrow**

2007 NY Slip Op 33620(U)

November 5, 2007

Supreme Court, NewYork County

Docket Number: 0601613/2005

Judge: Shirley W. Kornreich

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

PRESENT **HON. SHIRLEY WERNER KORNREICH**

PART 54

Index Number : 601613/2005

DESIMONE AVILES SHORTER &

vs
BARROW, JAMAAL

Sequence Number : 002

PARTIAL SUMMARY JUDGMENT

NO. 601613/05

IN DATE 8/14/07

IN SEQ. NO. 2

N CAL. NO. _____

The following papers, numbered 1 to 1 were read on this motion to/for Partial Summary Judgment

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED
<u>1</u>

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

NOV 09 2007

COUNTY CLERK'S OFFICE
NEW YORK

HON. SHIRLEY WERNER KORNREICH
[Signature]
J.S.C.

Dated: 11/5/07

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
DESIMONE, AVILES, SHORTER and
OXAMENDI, LLP,

Plaintiff,

Index No.: 601613/05

-against-

DECISION
and ORDER

JAMAAL BARROW a/k/a "SHYNE",

Defendant.

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

FILED
NOV 09 2007
COUNTY CLERK'S OFFICE
NEW YORK

This is an action to recover attorneys' fees for services rendered by plaintiff DeSimone, Aviles, Shorter & Oxamendi, LLP ("DASO") to defendant Jamaal Barrow a/k/a "Shyne" ("Barrow") in *Thompson et al v. Club 42 et al*, Index No. 50106/99, an ongoing civil action in Kings County Supreme Court ("the *Thompson Action*"). Plaintiff now moves for partial summary judgment seeking \$43,000. Defendant does not oppose.

I. *Background*

Barrow was previously convicted of assault and numerous other offenses relating to his role in a night club shooting on December, 27, 1999. On June 1, 2001, Barrow was sentenced to concurrent prison terms with a maximum term of ten years. Subsequently, the shooting victims commenced the *Thompson Action* for personal injuries. While the *Thompson Action* was pending, Barrow entered into an agreement with Island Def Jam Music Group to record several music albums ("the Def Jam Agreement"). The Def Jam Agreement called for Barrow to receive up to \$3 million for his first album and 50% of all net profits. Barrow also allegedly received an advance of \$500,000.

DASO represented Barrow in the *Thompson Action* from October 1, 2001 to July 21, 2004, when, pursuant to an order of the Hon. Michael Garson (the presiding judge in the

Thompson Action), it was relieved as counsel due to Barrow's failure to pay attorneys' fees and his lack of cooperation.

On or about August 30, 2004, the New York State Crime Victims Board notified plaintiffs in the *Thompson* Action of the Def Jam Agreement pursuant to Executive Law § 632-a, also known as the "Son of Sam" law. As a result, plaintiffs moved for a preliminary injunction to prevent Barrow from expending any funds earned under the Def Jam Agreement.

On November 5, 2004, Judge Garson ordered DASO to transfer Barrow's file to his new counsel Dershowitz, Eiger & Adelson, PC ("Dershowitz"). On November 18, 2004, the court temporarily restrained Barrow from disbursing any funds while plaintiffs' motion was pending and also ordered the release of \$100,000 to pay Barrow's prior and current legal fees as well as family related expenses.

On February 28, 2005, Judge Garson granted DASO's Order to Show Cause ordering a retaining lien of \$43,000 for attorneys' fees, costs and disbursements in favor of DASO on the Barrow file and directed the law firm of Davis, Shapiro, Lewitt, Montone and Hayes ("Davis"), as escrow agent, to conduct an accounting and then distribute \$43,000 to DASO ("the February 28 Order"). The February 28 Order was filed in the Kings County Clerk's Office on March 16, 2005. On May 4, 2005, Barrow was served with a copy of the February 28 Order with notice of entry. Defendant neither appealed the February 28 Order nor moved to renew or reargue. However, it was subsequently discovered that all of the funds being held in the escrow account managed by Davis had been removed by Barrow at his request. Barrow then was ordered to disclose the location of all funds which had been disbursed from the Davis escrow account as well as any monies which had been distributed in violation of any previous court orders.

DASO commenced the instant action in May 2005 by filing its summons with notice of motion for summary judgment in lieu of complaint. This court denied the motion on January 13, 2006, holding that DASO's application was patently deficient since the February 28 Order

was not an explicit promise to pay a sum of money and there was no evidence that the summons was properly served on the defendant. In addition to the aforementioned \$43,000, plaintiff also alleges it has incurred an additional \$50,000 worth of fees and costs in an attempt to protect its interests in this matter and from additional appearances made in the *Thompson* Action. Plaintiff filed its note of issue in this action on March 29, 2007 and moved for partial summary judgement on August 14, 2007, within the 120 period outlined in CPLR § 3212(a).

II. *Conclusions of Law*

A party moving for summary judgment must make a prima facie showing of entitlement to judgement 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).

Collateral estoppel is a component of the doctrine of res judicata, which holds that "a judgment *on the merits* by a court of competent jurisdiction is conclusive of the issues of fact and questions of law necessarily decided therein in any subsequent action[.]" *Mutual Fire, Marine & Inland Ins. Co. v. Fred S. James & Co.*, 92 A.D.2d 203, 207 (1st Dept. 1983) *aff'd* 61 N.Y.2d 680 (1984) (citations omitted) (emphasis supplied). Res judicata serves to discourage redundant litigation and is based on the premise that a person who has been afforded *a full and fair opportunity to litigate a particular issue* may not be permitted to do so again. *Id.*

Here, DASO is entitled to partial summary judgment. The February 28 Order held that DASO was owed \$43,000 worth of legal fees from Barrow as a result of representing him in the *Thompson* Action. The February 28 Order was filed in the Kings County Clerk's Office on March 16, 2005 and a copy with notice of entry was served on Barrow in May 2005. He chose not to appeal the ruling and did not move to renew or reargue. Consequently, Barrow had a full

and fair opportunity to litigate this issue in the *Thompson* Action. Plaintiff, here, has instituted a plenary action to recover the same \$43,000 worth of attorneys' fees directed to be paid by Judge Garson in the February 28 Order. See *Schneider, Klenick, Weitz, Damashek & Shoot v. City of New York*, 302 A.D.2d 183, 186 (1st Dept 2002) (attorney discharged without cause has three remedies available to recover value of legal services rendered: retaining lien, charging lien and plenary action in quantum merit...All three remedies are cumulative not exclusive of one-another.) Accordingly, it is

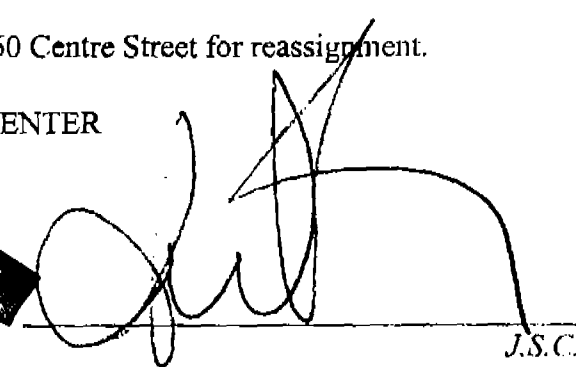
ORDERED that the motion is granted, on default, to the extent of granting partial summary judgment in favor of plaintiff and against defendant as follows:

1. Plaintiff is granted judgment in the amount of \$43,000.00, together with interest at the statutory rate from February 28, 2005 until the entry of judgment, as calculated by the Clerk of the Court, and thereafter at the statutory rate, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the remainder of the action is severed and shall continue; and it is further

ORDERED that Justice Shirley Werner Kornreich, Part 54, now recuses herself and transfers this action to the Trial Support Office at 60 Centre Street for reassignment.

ENTER



J.S.C.

FILED

NOV 09 2007

DATE: November 5, 2007
New York, NY
COUNTY CLERK'S OFFICE
NEW YORK