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No. 16617/06

SUPREME COURT - STATE OF NEW YORK
IAS TERM PART 14 NASSAU COUNTY

PRESENT:
HONORABLE LEONARD B. AUSTIN
Justice

Motion R/D:11-27-07
Submission Date: 11-27-07
Motion Sequence No.: 003/MOT D

ALAN GLICKENHOUSE, PHILIP FLOUMANHAFT and ALAN QUEEN,

Plaintiffs,

- against -

SELWYN KARP,

Defendant.

COUNSEL FOR PLAINTIFF
Moss & Kalish, PLLC
122 East 42nd Street, Suite 2100
New York, New York 10168

COUNSEL FOR DEFENDANT
Pollack Pollack Isaac & DeCicco, Esqs.
225 Broadway, Suite 307
New York, New York 10007

ORDER

The following papers were read on Plaintiffs' motion to reargue:

Order to Show Cause dated November 13, 2007;
Affirmation of David B. Gelfarb, Esq. dated November 11, 2007;
Plaintiffs' Memorandum of Law;
Affirmation of Brian J. Isaac, Esq. dated November 26, 2007.

Plaintiffs move to reargue the order of this Court dated October 3, 2007, which denied Plaintiffs motion for summary judgment and granted Defendants cross-motion for summary judgment dismissing the complaint. Upon reargument, the Plaintiffs assert

the Court should grant them summary judgment and deny Defendant's cross-motion for summary judgment.

BACKGROUND

A. Factual

From 1997 through March 31, 1999. Plaintiffs. Philip Floumanhaft ("Floumanhaft"), and Alan Glickenhouse ("Glickenhouse"), Defendants, Selwyn Karp ("Karp"), and Stephen Silver ("Silver") practiced law as a partnership under the name of Karp, Silver, Glickenhouse & Floumanhaft ("KSG&F").

On March 31, 1999, Karp withdrew as a partner in KSG&F.

By written agreement dated March 31, 1999 ("1999 Agreement"), Karp transferred his interest in KSG&F to a new partnership consisting of Silver, Glickenhouse, Floumanhaft and Plaintiff, Alan Queen ("Queen"), to be known as Silver, Glickenhouse, Floumanhaft & Queen ("SGF&Q").

Silver, Glickenhouse, Floumanhaft and Queen agreed to buy out Karp's partnership interest over an 8 year period with the first payment due on May 1, 1999 and with monthly payments due thereafter on the first day of each month. During the first three years, payment were allocated to a restrictive covenant, recoupment of prepaid expenses, good will, office equipment and furniture and work in progress.[1]

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[1]The amount allocated to recoupment of expenses represents amounts advanced on behalf of clients in connection with on-going litigations. The amounts allocated to office equipment and furniture represents office infrastructure and equipment, office furniture and decorations, software and the library.

Over the final 5 years of the Agreement, the payments were allocated to a restrictive covenant, good will and work in progress.

The 1999 Agreement has a provision for accelerating the payments should Silver cease to be an active member of SGF&Q, should Silver's equity share in SGF&Q fall below 20% or should SGF&Q cease to maintain its principal offices at 1600 Central Avenue, Far Rockaway. Silver, Glickenhouse, Floumanhaft and Queen personally guaranteed the payment due Karp pursuant to the Agreement.

By order of the Appellate Division, Second Department dated July 29, 1999, Karp was suspended from the practice of law based upon his having plead guilty to the crime of commercial bribery in the second degree (Penal Law §180.00), which is a class A misdemeanor. Karp was sentenced to a conditional discharge and $1,000 fine.

By order of the Appellate Division, Second Department dated April 16, 2001, Karp was suspended from the practice of law for 3 years. See, Matter of Karp, 282 A.D.2d 127 (2nd Dept. 2001).

Glickenhouse, Floumanhaft, Queen and Karp entered in an Agreement dated December 28, 2004 ("2004 Agreement") which modified the terms of the 1999 Agreement. The 2004 Agreement provided for Glickenhouse, Floumanhaft and Queen to pay to Karp certain sums in January 2005. Timely payment of these sums would constitute full payment to Karp of all money due him under the terms of the 1999 Agreement. If the payments provided for in the 2004 Agreement were not timely made, then Silver, Glickenhouse, Floumanhaft and Queen would owe Karp the balance due

pursuant to the terms of the 1999 Agreement with credit being given for any payments made pursuant to the 2004 Agreement.

Plaintiffs have paid Karp over $1 million on account of the 1999 Agreement and the 2004 Agreement.

B. Prior Motion

Plaintiffs moved for summary judgment on their complaint. They sought to have the Court declare that the 1999 Agreement and the 2004 Agreement were void *ab initio* on the grounds that: (a) they are in violation of the common law and public policy; and (b) they are in violation of the Code of Professional Responsibility. See, 22 NYCRR 1200 *et seq.*

Plaintiffs sought to recover the money paid to Karp pursuant to the terms of these agreements.

Karp cross-moved for summary judgment dismissing the complaint. Alternatively, if the Court found the 1999 Agreement and 2004 Agreement were void, Karp requested an accounting of all cases pending with KSG&F as of the date of his suspension from practice to determine the amount due him on a *quantum meruit* basis.

By order dated October 3, 2007, this Court granted Defendant's cross-motion for summary judgment dismissing the complaint and denied Plaintiffs' motion for summary judgment. The Court found that the Code of Professional Responsibility does not prevent a retiring attorney from selling his or her interest in a firm. The agreements did not violate the common law or public policy of the State of New York. The Court further

found that Plaintiffs who availed themselves of the benefit of the agreements were estopped from contesting their validity and enforceability.

C. Motion to Reargue

Plaintiffs allege that the Court overlooked or misapplied relevant statutes, regulations and case law. Had the court properly considered and applied these statutes regulations or case law, Plaintiffs contend, the Court would have granted Plaintiffs' motion and denied Defendant's cross-motion.

DISCUSSION

A motion to reargue must be so designated, shall be based upon an assertion that the court overlooked or misapprehended matters of law or fact when it decided the prior motion and shall be made within 30 days of service of the order with notice of entry from which reargument is sought. CPLR 2221(d).

A motion to reargue is addressed to the discretion of the court and may be granted upon a showing that the court overlooked relevant facts or misapplied or misapprehended the applicable law or for some other reason improperly decided the prior motion. Carrillo v. PM Realty Group, 16 A.D.3d 611 (2nd Dept. 2005); Hoey-Kennedy v. Kennedy, 294 A.D.2d 573 (2nd Dept. 2003); and Foley v. Roche, 68 A.D.2d 558 (1st Dept. 1979).

On a motion to reargue the movant can only rely upon the papers submitted in connection with the prior motion. New facts may not be submitted or considered by the

court. James v. Nestor, 120 A.D.2d 442 (1st Dept. 1986); and Philips v. Village of Oriskany, 57 A.D.2d 110 (4th Dept. 1997).

A motion to reargue is not a means by which the unsuccessful party can obtain a second opportunity to argue issues decided in the prior motion or to present new and different arguments relating to the previously decided issues. Gellert & Rodner v. Gem Community Mgt., Inc., 20 A.D.3d 388 (2nd Dept. 2005); and McGill v. Goldman, 261 A.D.2d 593 (2nd Dept. 1993)

Plaintiffs assert the court overlooked 22 NYCRR 691.10 in deciding the prior motion. 22 NYCRR 691.10(a) requires a suspended or disbarred attorney to comply with Judiciary Law §§478, 479, 484 and 489.

Judiciary Law §478 prohibits one from practicing law, appearing as an attorney for another person or furnishing legal advice to another person or from holding oneself out at an attorney unless one is duly admitted to practice law in New York. Plaintiffs do not allege or provide any facts establishing that Karp held himself out as an attorney or engaged in the practice of law after his suspension. Plaintiffs do not allege or provide any facts establishing that Karp held himself out as having any affiliation with either KSG&F or SGF&Q after his resignation or suspension. Thus, this statute is inapplicable to this case.

Judiciary Law §479 make it illegal to solicit legal business. Plaintiffs do not allege that Karp solicited business for himself or SGF&Q after his suspension from practice.

Judiciary Law §484 prohibits anyone who is not admitted to practice law from receiving a fee for appearing before a court or preparing certain legal documents. Plaintiffs do not assert that Karp engaged in any of these activities either individually or on behalf of SGF&Q after his suspension.

Judiciary Law §486 makes it a misdemeanor for a person who has been suspended, disbarred or convicted of a felony from practicing law. As with the other sections, Plaintiffs do not allege that Karp engaged in the practice of law after his suspension.

Since these statutes are not applicable to this case and/or Plaintiffs do not allege Karp engaged in any of the enumerated improper activities after his suspension from practice, they do not provide a basis for reargument.

22 NYCRR 691.10(b) prohibits a disbarred, suspended or resigned attorney from sharing in legal fees for services rendered by another attorney during the period of removal from the bar. This regulation, however, permits the disbarred, suspended or resigned attorney to be compensated on a *quantum meruit* basis for work performed prior to the effective date of his/her disbarment, suspension or resignation.

This regulation is not applicable to this case. The Code of Professional Responsibility, 22 NYCRR 1200.15-a [DR2-111] permits a lawyer retiring from private practice to sell his or her practice. This is precisely what Karp did. He sold his interest in the law firm to his partners who were bringing in Queen as a partner and continuing the firm. The 1999 Agreement does not provide for Karp to be paid for work performed

by any attorney after his suspension. Rather, the 1999 Agreement provides for Karp to be paid an amount for "Work in Progress" as of the date of his resignation from the firm.

Plaintiffs' reliance upon Rothman v. Benedict P. Morelli & Assocs., P.C., 43 A.D.2d 769 (1st Dept. 2007); and Lessoff v. Berger, 2 A.D.3d 127 (1st Dept. 2003) is misplaced. Neither of these cases bar attorneys from selling their interest in a firm or receiving the *quantum meruit* value of their services rendered prior to their suspension or disbarment. In fact, both cases recognize that a suspended or disbarred attorney can recover on cases opened prior to their suspension or disbarment the *quantum meruit* value of services rendered prior to their suspension or disbarment .[2]

The fatal flaw in Plaintiffs' argument is that they fail to place before the Court any evidence that any amount paid to Karp constitutes fees for legal services rendered by another attorney after Karp had been suspended from practice.

This is especially true when it is remembered that, at the time of the 1999 Agreement, Karp was neither suspended nor disbarred.

The party moving for summary judgment is required to make a *prima facie* showing of entitlement to judgment as a matter of law. Alvarez v. Prospect Hosp., 68 N.Y.2d 320 (1986); and Zuckerman v. City of New York, 49 N.Y.2d 557 (1980). If the party moving for summary judgment fails to make a *prima facie* showing of entitlement

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[2]In *Rothman,* the court denied recovery in *quantum meruit* because of plaintiff's failure to comply with the court rules relating to such an application, (22 NYCRR 603.13[b]). In *Lessoff,* the court permitted Plaintiff to recover the *quantum meruit* value of fees paid after his suspension on cases that were open and due at the time of his suspension.

to judgment as a matter of law, the motion must be denied. Winegrad v. New York University Medical Center, 64 N.Y.2d 851 (1985); Widmaier v. Master Products, Mfg., 9 A.D.3d 362 (2nd Dept. 2004); and Ron v. New York City Housing Auth., 262 A.D.2d 76 (1st Dept. 1999). Plaintiffs fail to establish that the amounts paid to Karp under either agreement represents anything other than an agreed upon value of legal services rendered by Karp on open cases or files prior to his suspension from the practice of law.

The Court will not look behind a fee sharing agreement as long as the attorney seeking a share of the fee has contributed some work, labor or services towards the earning of the fee. Witt v. Cohen, 192 A.D.2d 528 (2nd Dept. 1993). The 1999 Agreement indicates that Karp was being paid for "Work in Progress". Thus, the 1999 Agreement, by its own terms establishes the *quantum meruit* value of Karp's services.

The 1999 Agreement further provided that the amount due to Karp would be paid "...even if the retiring partner shall be suspended, disbarred or meet his untimely demise." All of the Plaintiffs are attorneys who negotiated the 1999 Agreement and were bound by the applicable ethical precepts as well.

The Plaintiffs, who are also bound by the Code of Professional Responsibility, cannot "...avoid on 'ethical' grounds the obligations of an agreement to which they freely assented and from which they reaped the benefits. (ABA Comm of Professional Ethics, Informal Opn No. 870)." Benjamin v. Koeppel, 85 N.Y.2d 549, 556 (1995).

The Court did not overlook or misapply any facts or law. Reargument does not lie.

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Accordingly, it is,

ORDERED, that Plaintiffs' motion to reargue is **denied**.

This constitutes the decision and Order of the Court.

Dated: Mineola, NY
March 17, 2008

Hon. LEONARD B. AUSTIN, J.S.C.

ENTERED

MAR 20 2008
NASSAU COUNTY
COUNTY CLERKS OFFICE