

Scott v Jacobs

2008 NY Slip Op 32912(U)

October 23, 2008

Supreme Court, New York County

Docket Number: 105387/08

Judge: Martin J. Schulman

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

MARTIN SHULMAN

PRESENT: J.S.C.

PART 1

Justice

Index Number : 105387/2008

SCOTT, DAVID ESQ.

vs.

JACOBS, GARY

SEQUENCE NUMBER : # 001

DEFAULT JUDGMENT

INDEX NO. 10538708

MOTION DATE

MOTION SEQ. NO. #001

MOTION CAL. NO.

were read on this motion to/for

PAPERS NUMBERED

Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits A-D

~~Cross-motion~~ + Answering Affidavits — Exhibits A-F

Replying Affidavits + ~~Exhs.~~ A-B

1

2,3

4

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion and cross-motion are decided in accordance with the attached decision, order and judgment.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: OCT 23 2008

MARTIN SHULMAN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: 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 : IAS PART 1

----- X
DAVID SCOTT, ESQ.,

Plaintiff,

Index No. 105387/08

-against-

Decision, Order and
Judgment

GARY JACOBS,

Defendant

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk
and notice of entry has not been given to the parties.
To obtain entry, the parties must appear in person at the
County Clerk's Office.

----- X

MARTIN SHULMAN, J.:

Plaintiff, David Scott, Esq. ("plaintiff" or "Scott"), brings this action against defendant, Gary Jacobs ("defendant" or "Jacobs"), his former client, for *inter alia* outstanding legal fees for representing defendant in a Family Court proceeding. Of the six causes of action originally alleged in the complaint, only the fifth and sixth remain.¹ The fifth cause of action seeks a declaration that Scott is entitled to a retaining lien on Jacobs' client file in the Family Court matter until all outstanding fees and disbursements are paid. The sixth cause of action alleges tortious interference with contractual relations.

Plaintiff now moves for a default judgment against defendant based upon his failure to timely answer the complaint. Defendant opposes the motion and cross-moves to dismiss the complaint and for an award of legal fees and expenses attendant to defending this allegedly frivolous action. In his cross-motion, Jacobs contends that he discharged Scott for cause and that this action is premature in light of his election to

¹ Plaintiff discontinued the first four causes of action seeking monetary relief after defendant timely exercised his right to pursue mandatory fee arbitration pursuant to 22 NYCRR Part 137.

pursue mandatory fee arbitration as provided in 22 NYCRR Parts 137 and 1400 and the parties' retainer agreement. In response to the cross-motion, plaintiff argues that the remaining fifth and sixth causes of action are not subject to fee dispute arbitration and the motion to dismiss is untimely.

Retaining Lien

As previously stated, the fifth cause of action seeks a declaration that Scott is entitled to a retaining lien on Jacobs' client file in the Family Court matter until all outstanding fees and disbursements are paid. A retaining lien, which attaches automatically upon the commencement of the representation, is a security interest in any documents or other items of the client that are in the possession of the attorney and is extinguished when the possession terminates other than by court order (*see, Matter of Cooper*, 291 N.Y. 255 [1943]; *Matter of Heinsheimer*, 214 N.Y. 361 [1915]; *Kaplan v. Reuss*, 113 A.D.2d 184, 186, 495 N.Y.S.2d 404 [2d Dept. 1985], *affd.* 68 N.Y.2d 693, 506 N.Y.S.2d 304 [1986]).

In order to successfully oppose a motion for a default judgment, a defendant must demonstrate a justifiable excuse for his default and a meritorious defense. *Johnson v. Deas*, 32 A.D.3d 253, 819 N.Y.S.2d 751 (1st Dept., 2006). Here, as more fully set forth below, defendant's opposition is wholly devoid of any allegations which would establish a reasonable excuse for his default, nor does defendant allege a meritorious defense to the action.²

² Defendant has not submitted a proposed answer or cross-moved to vacate his default or to compel plaintiff's acceptance of a late answer.

The one exception to an attorney's entitlement to protect his or her fee by the assertion of a lien is the situation presented where the attorney is discharged for cause, i.e., as a result of attorney misconduct or the unjustifiable abandonment of the representation, in which case a retaining lien may not be asserted (*see, Klein v. Eubank*, 87 N.Y.2d 459, 464, 640 N.Y.S.2d 443 [1996]; *Shalom Toy, Inc. v. Each & Every One of the Members of the New York Property Underwriting Assn.*, 239 A.D.2d 196, 198, 658 N.Y.S.2d 1 [1st Dept.1997]). Here, in opposition to the motion, Jacobs proffers only conclusory allegations that plaintiff was discharged for cause.

For example, defendant fails to elaborate upon how plaintiff allegedly "fail[ed] to comply with the mandatory billing requirements . . . regarding legal fees in matrimonial and family court actions". Additionally, Jacobs' claims of excessive billing (i.e., the fee amount) are more properly asserted in the pending arbitration proceeding. While the issue of whether an attorney was discharged with or without cause is normally determined by a timely hearing (*see, Matter of Clark v. Vitiello*, 261 A.D.2d 824, 689 N.Y.S.2d 568 [4th Dept.1999]; *Marschke v. Cross*, 82 A.D.2d 944, 440 N.Y.S.2d 740 [3d Dept.1981]), here, in response to the motion for a default judgment, defendant's claims are insufficient to establish a meritorious defense and as such, no hearing is warranted.

Further, this court rejects Jacobs' argument that the pending arbitration proceeding bars plaintiff's two remaining causes of action and warrants the complaint's dismissal. The mandatory arbitration rules limit the scope of arbitration to the reasonableness of the fee charged. See 22 NYCRR §137.0. Nothing in the rules abrogates an attorney's common law right to a retaining lien. *See generally, Rotker v. Rotker*, 195 Misc.2d 768, 774, 761 N.Y.S.2d 787, 792 (Sup. Ct., Westchester Cty.,

2003). Accordingly, the non-fee related fifth cause of action for declaratory relief and the sixth cause of action for interference with contractual relations are unaffected by the arbitration. As defendant fails to set forth a meritorious defense to Scott's fifth cause of action and Scott has otherwise established his right to a retaining lien, the motion for a default judgment is granted and the cross-motion is denied.

As a final matter, where, as here, a retaining lien is asserted, the attorney is entitled to a prompt hearing to fix the amount of the lien (see, *Katsaros v. Katsaros*, 152 A.D.2d 539, 543 N.Y.S.2d 478 [2d Dept. 1989]; *Rosen v. Rosen*, 97 A.D.2d 837, 468 N.Y.S.2d 723 [2d Dept. 1983]; see also, *Butler, Fitzgerald & Potter v. Gelmin*, 235 A.D.2d 218, 651 N.Y.S.2d 525 [1st Dept. 1997]). As noted in *Rotker v. Rotker*, 195 Misc.2d at 771, 761 N.Y.S.2d at 790, "[f]ixing the amount of the lien is now complicated by the rules of the Appellate Divisions that establish a clear public policy in favor of the arbitration of attorney-client-fee disputes (citations omitted), in accordance with procedures established by the rules of the Chief Administrator of the Courts (22 NYCRR part 137)." Here, it is unnecessary for this court to set the matter down for a hearing to fix the lien amount, since this issue must be determined at arbitration. *Id.*

Tortious Interference With Contractual Relations

Turning to the sixth cause of action for tortious interference with contractual relations, Scott's allegations, though scant, nonetheless are sufficient to withstand Jacobs' cross-motion to dismiss and establish a *prima facie* case. Plaintiff sets forth the basic elements of such a cause of action, to wit: (1) the existence of a contract between plaintiff and a third party; (2) defendant's knowledge of the contract; (3) defendant's intentional inducement of the third party to breach or otherwise render performance

impossible; and (4) damages to plaintiff. See *Kronos, Inc. v. AVX Corp.*, 81 N.Y.2d 90, 94, 595 N.Y.S.2d 931 (1993).

Defendant's opposition only summarily addresses this cause of action, alleging only that "although plaintiff claims fees from an unrelated UGMA Cause of Action involving my sons, he never entered into any separate retainer agreement with them and merely improperly combined his billings with my family court matter in gross derogation of his obligations under the rules of court." Jacobs Aff. at ¶11. Jacobs having again failed to assert a meritorious defense to the sixth cause of action, the motion for a default judgment is granted, the matter is set down for an inquest to assess damages and the cross-motion is denied. Accordingly, it is hereby

ORDERED that plaintiff's motion is granted and defendant's cross-motion is denied; and it is further

ORDERED, ADJUDGED and DECLARED that plaintiff David Scott, Esq. is entitled to a retaining lien on defendant Gary Jacobs' client files in his possession until all outstanding fees and disbursements are paid; and it is further

ORDERED that the Clerk is directed to enter judgment on the fifth cause of action accordingly; and it is further

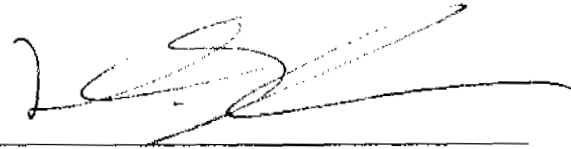
ORDERED that the sixth cause of action is severed and continued and an inquest for the assessment of damages against defendant is hereby directed; and it is further

ORDERED that plaintiff shall file with the Clerk of the Trial Support Office a copy of this order with notice of entry and a note of issue and shall pay the appropriate fee,

and said Clerk is directed thereupon to place this matter on the appropriate trial calendar for the assessment herein above directed.

The foregoing is the decision, order and judgment of this court. A copy of this decision, order and judgment has been sent to counsel for the parties.

Dated: New York, New York
October 23, 2008



Hon. Martin Shulman, J.S.C.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be given as provided hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1415).