

Chelli v The Kelly Group, P.C.

2009 NY Slip Op 30359(U)

February 19, 2009

Supreme Court, New York County

Docket Number: 102175/2008

Judge: Walter B. Tolub

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

PRESENT: Tolub
Justice

PART 15

Chelli, Jorge

INDEX NO.

102175/08

MOTION DATE

MOTION SEQ. NO.

92

MOTION CAL. NO.

Kelly Group

- v -

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

Vacate Default Judgment

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

IS DECIDED

IN ACCORDANCE WITH ACCORD

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

Dated: 2/19/09

WALTER B. TOLUB J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

-----x
JORGE CHELLI

Plaintiff,

Index No.102175/2008
Mtn Seq.002

-against-

THE KELLY GROUP, PC, KELLY MURRAY &
BALBER, LLP, KELLY & BALBER, LLP,
and JOHN Q. KELLY, ESQ.,

Defendant.

-----x
WALTER B. TOLUB, J.:

This is Defendants' motion for an Order (1) vacating this Court's January 14, 2009 Order striking Defendants' Verified Answer; (2) vacating Plaintiff's Note of Issue and Certificate of Readiness; and (3) precluding Plaintiff from introducing evidence requested but not produced to Defendants.

Facts

On August 21, 2000, Plaintiff, an elevator worker, was struck in the head by a falling piece of steel. Plaintiff sustaining a skull fracture, brain laceration and additional brain injuries.

On December 27, 2000 an associate of Kelly & Barber LLP went to Plaintiff and had him sign a retainer agreement (Retainer). The Retainer provided that Jorge Chelli retained John Q. Kelly, Esq., to prosecute claims for damages arising from injuries

sustained on August 21, 2000 and that "[t]he Client hereby gives Attorney the exclusive right to take all legal steps to enforce this claim through trial and appeal." The Retainer further provided for the contingency fee of thirty-three and one third percent of the *gross* sum recovered (emphasis added)¹. The Retainer was filed with OCA on March 17, 2003².

On January 11, 2001 Kelly and Balber commenced an action on Plaintiff's behalf in Queens County Supreme Court (Chelli v. Banle Associates, LLC Index No. 841/01). Defendant John Kelly (Defendant Kelly or Mr. Kelly) was the main attorney handling all aspects of the action. At the conclusion of the trial, the jury awarded Plaintiff \$11,473,842.

After the jury verdict, the Defendant in that action, Banle Associates, filed a motion to set aside the verdict. Defendant John Kelly opposed the motion on behalf of the Plaintiff. On April 25, 2003, Justice Sampson denied the Banle motion.

Thereafter, Defendant John Kelly represented Plaintiff on Banle Associates appeal from the jury verdict. Plaintiff was charged \$50,000 for Mr. Kelly's representation on appeal. On

¹22 NYCRR 603.7 provides that a percentage not exceeding 33 1/3 percent of the sum recovered may be taken as a contingency fee and that such percentage shall be computed on the net sum recovered after deducting from the amount recovered expenses and disbursements.

²22 NYCRR 603.7 provides that when compensation is contingent on the successful prosecution or settlement of a matter, the Retainer is to be filed with the Office of Court Administration within 30 days of the signing thereof. Here, although with permission, the Retainer was filed over 2 years after it was signed.

October 31, 2005, the Second Department modified the jury award in the Banle action reducing the pain and suffering aspect of the verdict by \$1,000,000. Plaintiff's resulting recovery in the action was \$12,107,268.71, including statutory interest. Mr. Kelly collected \$4,102,055.39 in attorney fees.

Plaintiff commenced this action for a forfeiture of Mr. Kelly's legal fees and for treble damages in February 2008³ claiming that Mr. Kelly's representation was wrought with unethical and improper conduct. Specifically, Plaintiff claims that (1) the Retainer violates 22 NYCRR 603.7, which states that an attorney may recover 33 1/3% of the net recovery; (2) that Defendant violated 22 NYCRR 603.7 by not filing the Retainer with OCA within 30 days; (3) that Mr. Kelly improperly charged Plaintiff \$50,000 for his appellate services; (4) that Plaintiff had to borrow the \$50,000 from Mr. Kelly at an interest rate of 9% which was miscalculated [resulting in \$17,146.43 in interest]; (5) that in drafting the Amended Judgment, Mr. Kelly failed to calculate interest from the date of liability determination resulting in a loss of \$229,909.84; (6) that Mr. Kelly improperly charged \$26,022.41 in interest on litigation expenses; (7) that Plaintiff was charged \$27,822.87 for litigation expenses without an accounting; and (8) that there was an additional \$10,651.73

³It should be noted that in April 2007 the parties entered into unsuccessful settlement negotiations. Defendants made a payment to the Plaintiff in the amount of \$116,329.46.

additional unexplained shortfall in distribution.

Defendants submitted a counterclaim in quantum meruit.

The parties were scheduled to appear in this matter on September 19, 2008 for a preliminary conference. Defendant was not present at the call of the calendar. Plaintiff's attorney was asked by this court to call defense counsel and advise him of the appearance. Defendant appeared two hours late for the conference stating that the conference was not on the firm calendar. The conference took place with this court ordering the exchange of discovery and directing counsel to appear for a compliance conference on December 12, 2008. On December 12, 2008, Defendant again failed to appear at the call of the calendar. This court then issued an Order striking Defendants' Answer, set the matter down for a inquest on damages and directed Plaintiff to File a Note of Issue. The Order was entered on January 14, 2009.

Defendants now move to vacate this court's January 14, 2009 Order striking Defendants' Answer; (2) vacating Plaintiff's Note of Issue and Certificate of Readiness; and (3) precluding Plaintiff from introducing evidence requested but not produced to Defendants.

Discussion

CPLR §5015(a) provides, inter alia, that the court which rendered the judgment or order may relieve a party from such

order upon such terms as may be just upon the ground of excusable default and a meritorious defense. Courts have routinely recognized that there is a strong preference for adjudicating matters on the merits rather than relying on procedural issues. (Campos v. New York City Health and Hospitals Corp., 307 AD2d 785 [1st Dept 2003]). Where the party's default resulted from a mistake and an inadvertent assumption, courts have granted motions to vacate. (Connolly v. Tuan, 12 Misc.3d 1172(A) [Sup. Ct. NY Co. June 23, 2006]).

However, when there is a pattern of non-compliance with court orders, law office failure is an unacceptable excuse for missing conferences and an order striking the Answer may be justified (Cha v. Warwick Hotel, 272 AD2d 154 [1st dept 2000] citing Forum Ins. Co. v. Judd, 91 AD2d 230 and Metropolitan Life Ins. Co. v. Falk and Co., 265 AD2d 203).

Moreover, Defendants have not proffered a meritorious defense to this action. In order to demonstrate the requisite merit to vacate a default, there must be an affidavit from a person with knowledge setting forth sufficient evidentiary facts (Peacock v. Kalikow, 239 AD2d 188 [1st Dept 1997]). The affidavit must do more than merely make conclusory allegations or vague assertions (Id.; National recovery Systems v. Weiss, 226 AD2d 289 [1st Ddept 1996]).

Mr. Kelly's affidavit states that he performed all of the

services Plaintiff hired him to perform and that he performed the services well. Mr. Kelly's statements are misguided because the issue is not whether Mr. Kelly properly performed services in the underlying lawsuit, rather the central issues are whether Mr. Kelly acted ethically and properly paid Plaintiff all monies due and owing to him. Neither Mr. Kelly nor the sticken Answer adequately address the core issues in this matter. Mr. Kelly does not address his late filing of the Retainer. Mr. Kelly does not address the impropriety of the contingency fee being based on the gross recovery. Mr. Kelly does not address charging Plaintiff double/miscalculated interest.

Mr. Kelly's counterclaim for quantum meruit also fails to meet the threshold since the Answer, does not more than state that Mr. Kelly performed services for the Plaintiff. There are no question that Mr. Kelly performed services for the Plaintiff. However, there was not an adequate accounting of services performed and disbursement of funds. These issues can be and will be resolved at the time of the inquest.

Defendants have failed to show a reasonable excuse in their failure to appear for a compliance conference and have failed to assert facts constituting a meritorious defense. It follows that Defendants' motion to vacate the default judgment entered on January 14, 2009 is denied.

After considering Defendants' remaining arguments, the Court

finds them unavailing and the remainder of Defendants' motion is also denied.

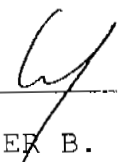
Accordingly, it is

ORDERED that Defendants' motion is denied in its entirety.

Counsel for the parties are directed to appear as scheduled on Monday February 23, 2009 at 9:30AM in Room 335 at 60 Centre Street for an Inquest as to damages with all of their proofs present.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 2/19/09



HON. WALTER B. TOLUB, J.S.C.