

Ripka, Rotter & King, LLP v Lemmo

2009 NY Slip Op 31219(U)

June 3, 2009

Supreme Court, New York County

Docket Number: 601796/08

Judge: Jane S. Solomon

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SCANNED ON 6/5/2009

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

PRESENT: Hon. JANE S. SOLOMON PART 55

Justice

RIPKA, ROTTER & KING, LLP,
Plaintiff,

INDEX NO 601796/2008

-against-

MOTION DATE

EDWARD A. LEMMO, EDWARD A. LEMMO,
ATTORNEY AT LAW, P.C. and KAHN
GORDON TIMKO & RODRIGUEZ, P.C.,
Defendants.

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1-12, were read on this motion to for a preliminary injunction.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-3
Answering Affidavits — Exhibits _____	4-9
Replying Affidavits _____	10-12

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed Decision and Order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

J.S.C.

*MB PC set at end of decision
7/20/09 at noon*

FILED

JUN 05 2009
COUNTY CLERK'S OFFICE
NEW YORK

DATED: 6-3-09

[Signature]
J.S.C. JANE S. SOLOMON

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

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

-----X
RIPKA, ROTTER & KING, LLP,

Plaintiff,

Index No. 601796/08

-against-

Decision and Order

EDWARD A. LEMMO, EDWARD A. LEMMO,
ATTORNEY AT LAW, P.C. and KAHN
GORDON TIMKO & RODRIGUEZ, P.C.,

Defendants.

-----X

Jane S. Solomon, J.:

INTRODUCTION

Plaintiff Ripka, Rotter & King, LLP ("Ripka"), a defunct law firm, sues defendants to recover money it claims is due under a written fee agreement it made with defendant Edward A. Lemmo ("Lemmo") on February 2, 2003 (the "Agreement"). In this motion, Ripka seeks an order enjoining and restraining the defendants from disbursing any legal fees or making any reimbursements for expenses in connection with lawsuits covered by the Agreement. Defendant Kahn Gordon Timko & Rodriguez, P.C. ("Kahn Gordon") cross-moves to dismiss. For the reasons set forth below, the motion should be denied, and the cross-motion should be granted.

FILED
JUN 05 2009
COUNTY CLERK'S OFFICE
NEW YORK

FACTS

Under the Agreement, Ripka was obligated to advance all disbursements and provide litigation support in connection with cases referred to it by Lemmo. Ripka also promised to make an office available to Lemmo for use in connection therewith. If there was a recovery, Ripka was to receive a percentage as compensation. If certain cases did not yield a recovery, Lemmo would be responsible for a portion of the disbursements.

Ripka claims that it made disbursements in the gross amount of \$97,847.56 for some of the cases covered by the Agreement. It claims that it is entitled to recoup those expenses. In addition, it seeks an unspecified amount for legal fees.

Lemmo asserts that Ripka failed to live up to the terms of the Agreement by abandoning the cases and refusing to advance disbursements when needed. He claims that, as early as 2005, Ripka failed to make disbursements for court reporters, experts, and service providers. He alleges that the situation was exacerbated by a protracted dispute between the partners of the firm, which resulted in Ripka's dissolution. Ripka admits that it canceled the Agreement in early 2006, when the firm was in the process of dissolution. Lemmo claims that he did not learn about the dissolution until after it had occurred and that he received no advance notice from the firm.

In April 2006, Lemmo began searching for a new firm to affiliate with. He was hired by Kahn Gordon as a salaried employee, and Kahn Gordon agreed to support his cases in a new fee sharing agreement. Lemmo vigorously disputes the contention that Ripka disbursed \$97,847.56 and asserts that he incurred costs when Ripka stopped providing financial support.

DISCUSSION

"A preliminary injunction may be granted . . . when the party seeking such relief demonstrates: (1) a likelihood of ultimate success on the merits; (2) the prospect of irreparable injury if the provisional relief is withheld; and (3) a balance of equities tipping in the moving parties favor." *Doe v. Axelrod*, 73 N.Y.2d 748, 750 (1988).

Here, Ripka has not demonstrated a likelihood of success. It is well established that the filing of a retainer statement is "a prerequisite to receipt of compensation for legal services." *Rabinowitz v. Cousins*, 219 A.D.2d 487, 488 (1st Dept. 1995). Under 22 NYCRR § 603.7(a)(3), an "attorney retained by another attorney, on a contingent fee basis, as trial or appeal counsel or to assist in the preparation, investigation, adjustment or settlement of any such action, claim or proceeding" is required to file a retainer statement with the Office of Court Administration. The failure to do so prevents an attorney from

sharing in a contingency fee. *Fishkin v. Taras*, 54 A.D.3d 260 (1st Dept. 2008). It is undisputed that Ripka failed to comply with this rule. As such, its claim for a portion of the legal fees is without merit.

However, 22 NYCRR § 603.7(a) does not, by its terms, preclude the recovery of disbursements, as opposed to legal fees, when a retainer statement is not filed. Nor have defendants cited any case that has stated that proposition. Nevertheless, Ripka has not shown that it is likely to prevail on the claim for disbursements. Significantly, the amount is quite high and Ripka has not submitted any substantiating evidence. Similarly, it fails to refute Lemmo's challenge to his alleged liability.

Ripka also fails to demonstrate an irreparable injury because it can be adequately compensated by an award of money damages. *Leo v. Levi*, 304 A.D.2d 621, 623 (2nd Dept. 2003). Finally, the equities do not weigh in Ripka's favor because it admits that it canceled the Agreement and stopped performing the services that it agreed to provide.

Turning to the cross-motion, Ripka's claims against Kahn Gordon are barred by the doctrine of collateral estoppel. The same issues were resolved in a related action (Index No. 7148/08; Westchester County), and a judgment was entered dismissing Ripka's claims against Kahn Gordon arising from the Agreement. In any event, as explained above, plaintiff's claim

for legal fees may not be sustained because it failed to file retainer statements.

CONCLUSION

Accordingly, it hereby is


ORDERED that plaintiff's motion for a preliminary injunction is denied; and it further is

ORDERED that the cross-motion of Kahn Gordon Timko & Rodriguez, P.C. to dismiss is granted and the Clerk shall enter judgment severing and dismissing the claims against it with costs and disbursements as taxed; and it further is

ORDERED that plaintiff and the remaining defendants shall appear for a preliminary conference in Part 55 on July 20, 2009 at 12:00 p.m.

Dated: June 3, 2009

ENTER:



J.S.C.

JANE M. BLOOM

FILED
JUN 05 2009
COUNTY CLERK'S OFFICE
NEW YORK