

Ohrenstein & Brown, LLP v Schorr Org.

2009 NY Slip Op 31695(U)

July 29, 2009

Supreme Court, New York County

Docket Number: 601782/06

Judge: Walter B. Tolub

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

PRESENT:

T. Tolub
WALTER B. TOLUB
Justice

PART *15*

OHANOWSKI & BROWN

INDEX NO.

60782/06

MOTION DATE

MOTION SEQ. NO.

3

THE SCHAMA ORGANIZATION

MOTION CAL. NO.

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

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

Answering Affidavits — Exhibits

Replying Affidavits

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *is denied in accordance with the accompanying memoranda herein.*

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

FILED
JUL 30 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: *7/15/09*

W
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

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OHRENSTEIN & BROWN, LLP

Plaintiff,

-against-

THE SCHORR ORGANIZATION,

Defendant

- and -

MANFRIED OHRENSTEIN,

Additional Defendant on
The Counterclaims Pursuant to
CPLR 3019(d)

Index No. 601782/06
Mtn Seq. 003

FILED
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NEW YORK

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WALTER B. TOLUB, J.:

This action arises out of a claim for unpaid legal fees and expenses. By this motion, plaintiff moves for an order pursuant to CPLR 2221(e) renewing this court's September 9, 2008 decision so as to allow the court to consider documents produced by defendant, the Schorr Organization, on March 19, 2009. Plaintiff argues that the newly produced evidence demonstrate that there is no merit to defendant's counterclaim for overpayment of legal fees in the amount of \$26,580. Upon renewal, plaintiff seeks an order dismissing defendant's counterclaim, and directing the Clerk of the Court to enter judgment in favor of plaintiff. Alternatively, plaintiff seeks an order pursuant to CPLR 3025 granting leave to amend the portion of its answer responsive to defendant's counterclaim, and for an order allowing for the

addition of Seymour Schorr as an additional named counterclaim defendant pursuant to CPLR 3019(d). Plaintiff further seeks, as alternative relief, an order directing defendant to post a security to plaintiff in the amount of \$99,480.93, and for an order staying trial of the defendant's counterclaim.

Background

Briefly revisited, plaintiff is a law firm which claims to have provided defendant various legal services between 1998 and April of 2005. In particular, plaintiff claims that defendant incurred a total of \$469,178.04 in legal fees and expenses, a portion of which remained unpaid.

In May, 2005, defendant's principal executed a promissory note confirming the validity and the amount of defendant's outstanding obligation in the amount of 99,480.93. In October of 2006, plaintiff moved for summary judgment in lieu of complaint on the unpaid promissory note. Defendant opposed the motion, claiming that the fees charged were excessive and the legal representation inadequate. Based on these allegations, the motion was denied so as to allow for discovery into the validity of defendant's claims.

Note of Issue was filed in December 2007, and in May of 2008, plaintiff moved for summary judgment on the unpaid promissory note. This court granted summary judgment on the unpaid promissory note, and left open for trial only the issue as

to whether there was any merit to defendant's claim that they were entitled to \$26,580.00 for 'fees overpaid' (see decision dated September 8, 2008).¹ The court notes that this figure was derived from defendant's claim that they had paid plaintiff approximately \$370,000 in legal fees, and not \$343,117.12 as claimed by plaintiff.

The instant motion to renew followed.

Discussion

The general rule under the CPLR is that a motion to renew is limited to new or additional facts which could not have been presented to the court on the original motion. The caveat, however, is that the party seeking renewal must demonstrate that the evidence either did not exist or was unknown (see, Mangine v. Keller, 182 AD2d 476 [1st Dept 1992]), and must also present a justifiable excuse for not bringing the evidence to the court's attention on the original motion (CPLR 2221(e)(2)(3); Martin v. Triborough Bridge and Tunnel Authority, 180 AD2d 596 [1st Dept 1992]).

Review of the papers submitted in the instant motion warrant the granting of the motion to renew.

In the weeks following this court's decision, defendant, on October 18, 2008, served plaintiff with a Supplemental Summons

¹The court notes, that contrary to defendant's arguments, the claims advanced raising issues of malpractice and excessive fees were rejected.

advancing three counterclaims for (1) overpayment of \$26,580.00; (2) disgorgement of \$270,000 in unreasonable fees; and (3) inadequate representation (Order to Show Cause, Exhibit 6). Ten days later, plaintiff responded with service of amendments to its affirmative defenses, asserting claims of unclean hands, fraud, mistake, and estoppel.

Plaintiff deposed Seymour Schorr on October 28, 2008, during which time Mr. Schorr testified that ten days after having plaintiff commence the underlying litigation, Gardadaq Holding Ltd. v. Holderbank Financiere Glaris, Ltd., (New York County Index No. 601070/2000), Mr. Schorr pleaded guilty to two felony counts of tax fraud and bankruptcy fraud (Order to Show Cause, Exhibits 8, 9). Mr. Schorr testified that he did not disclose his felony convictions to plaintiff because he did not believe it was relevant (id. Exhibit 8).

As part of the Mr. Schorr's deposition, plaintiff requested production of copies of the checks supporting defendant's claim of the alleged \$26,580 overpayment of legal fees. In March of 2009, defendants produced a ledger report responsive to this request which indicates that defendant paid plaintiff \$343,117.12 (Order to Show Cause, Exhibit 2), and that there was no overpayment of \$26,580 as previously claimed (id.).

There are two things that are evident from this newly discovered information. First, it is clear that plaintiff has a

very valid excuse for why it was not brought to this court's attention earlier. Second, and perhaps more significantly, the evidence produced by defendant does not support their claim that they overpaid plaintiff \$26,850.00 in legal fees.

Accordingly, upon renewal of the underlying motion for summary judgment in lieu of complaint, it is

ORDERED that the decision issued on September 8, 2008 is upheld to the extent of granting plaintiff an award of summary judgment on the executed, and yet unpaid, promissory note in the amount of \$99,480.93; and it is further

ORDERED that the Clerk of Court enter judgment in favor of the plaintiff; and it is further

ORDERED that the portion of this court's September 8, 2008 decision which directed a trial on the issue as to whether or not defendant was entitled to \$26,580.00 for fees overpaid is, upon renewal pursuant to CPLR 2221, reconsidered and dismissed inasmuch as the evidence presented by defendant does not support the claim advanced.

The alternative relief sought by plaintiff is denied as moot.

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

Dated:

7/29/09

FILED

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JUL 30 2009

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

COUNTY CLERK'S OFFICE
NEW YORK