Landa v Blocker
2009 NY Slip Op 32032(U)
August 17, 2009
Supreme Court, New York County
Docket Number: 9732/08
Judge: Karen V. Murphy
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Short Form Order

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 20 NASSAU COUNTY

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

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JAY LANDA,

Plaintiff(s),

Index No. 9732/08

Motion Submitted: 7/7/09
Motion Sequence: 004

-against-

LYNN BLOCKER,

Defendant(s).

---x

The following papers read on this motion:

Notice of Motion/Order to Show Cause.....X
Answering Papers.....X
Reply.....X
Briefs: Plaintiff's/Petitioner's.....X
Defendant's/Respondent's.....

Motion by defendant Lynn Blocker pursuant to CPLR §2221(f) for leave to renew/reargue plaintiff's motion for summary judgment on the first cause of action of the complaint and defendant's cross motion for summary judgment dismissing plaintiff's amended complaint is denied defendant having failed to satisfy the statutory prerequisite for either reargument CPLR §2221(d) or renewal CPLR §2221(e).

By order of this court dated April 13, 2009, plaintiff's motion for summary judgment on the first cause of action of the complaint to recover outstanding legal fees based on the theory of an account stated was granted and defendant's cross motion to dismiss the amended complaint, which also sought to impose a charging lien and to recover on the basis of *quantum meruit,* was denied.

It is well settled that a motion for leave to renew or reargue is addressed to the sound discretion of the court. (***In re Swingearn***, 59 A.D.3d 556, 557, 873 N.Y.S.2d 165 (2d Dept., 2009); ***Mi Ja Lee v. Glicksman***, 14 A.D.3d 669, 670, 789 N.Y.S.2d 276 [2d Dept., 2005]). While denominated as one for leave to renew and reargue, defendant's motion is, in actuality, one for leave to reargue as it is not based on new or previously unknown facts, which were unavailable at the time that the original motion and cross motion were made (***Rosado v. Home Depot***, 4 A.D.3d 204, 205, 772 N.Y.S.2d 268 [1st Dept., 2004); ***Galaxy Export, Inc. v. Bedford Textile Products, Inc.***, 89 A.D.2d 576, 452 N.Y.S.2d 233 [2d Dept., 1982]) but rather on the assertion, *inter alia*, that

> "the Court [in reaching its prior decision] omitted certain portions of the pleading, and those which the Court did address, misstated the facts as a basis for dismissal and made conclusions as a matter of law on the face of the pleadings as if a substantive presentation had been made by the plaintiff and there was silence from the defendant, although that would not be accurate."

With respect to the renewal branch of defendant's motion, the court notes that the attestation made by defendant that she discussed the possibility of reaching a compromise settlement with respect to outstanding counsel fees with plaintiff, as evidenced by a proposed stipulation sent to her by plaintiff in March 2008, does not constitute "new matter" unavailable at the time the original motion was made, nor has she proffered a viable excuse for her failure to present this additional information *vis a vis* her alleged objection to the final bill sent to her in December, 2006 on the original motion. (***Riglioni v. Chambers Ford Tractor Sales, Inc.***, 36 A.D.3d 785, 787, 828 N.Y.S.2d 520 (2d Dept., 2007); ***Yarde v. New York City Transit Authority***, 4 A.D.3d 352, 353, 771 N.Y.S.2d 185 (2d Dept., 2004); ***CPLR 2221[e]***). Renewal is not a device designed to afford a party, who has not exercised due diligence in making her first presentation, a second chance to ameliorate the deficits therein. (***Mike v. Riverbay Corp.***, 56 A.D.3d 357, 358, 867 N.Y.S.2d 447 (1st Dept., 2008); ***American Audio Service Bureau Inc. v. AT&T Corp.***, 33 A.D.3d 473, 476, 823 N.Y.S.2d 25 [1st Dept., 2006]).

In my view, defendant has also failed to demonstrate a viable basis for reargument in that her submissions are merely a restatement of the same arguments previously advanced, which were fully addressed and were rejected by this court after due consideration. Defendant has failed to show that relevant facts or law were overlooked or misapprehended, or that any controlling principles of law were misapplied. (***Pryor v. Commonwealth Land Title Ins. Co.***, 17 A.D.3d 434, 435-36, 793 N.Y.S.2d 452 [2d Dept., 2005]).

It is undisputed that an account stated exists where, as here, a party to a contract receives bills or invoices and does not protest within a reasonable time. (***Bartning v. Bartning***, 16 A.D.3d 249, 250, 791 N.Y.S.2d 541 [1st Dept., 2005]). Defendant's request to reargue is predicated on the philosophical argument that it is inequitable to apply the account stated doctrine in a matrimonial action where, according to defendant's hypothesis, a party faced with a bill for legal fees, which he/she anticipates will be paid by another, does not possess the expertise necessary to determine the reasonableness of the itemized charges and, therefore, object to contested items on a timely basis.

Although defendant might prefer it otherwise, this is not the present state of the law and defendant has not presented a tenable basis to conclude that the legal fees at issue represent anything other than an enforceable account stated.

With respect to the defendant's right to a hearing, reliance on ***Koral v. Koral***, 185 A.D.2d 298, 586 N.Y.S.2d 288 (2d Dept., 1992), *appeal after remand* 234 A.D.2d 590, 651 N.Y.S.2d 619 (2d Dept., 1996); ***Campion v. Campion***, 32 A.D.3d 814, 821 N.Y.S.2d 232 (2d Dept., 2006) and ***Scordio v. Scordio***, 270 A.D.2d 328, 705 N.Y.S.2d 58, [2d Dept., 2000] is unavailing. In *Koral*, the matter was remitted to the Supreme Court for a hearing with respect to the reasonableness of counsel fees in the amount of $50,000, which the parties stipulated were to be paid to plaintiff's former attorney where the attorney had failed to submit an affidavit of service or any documentation establishing the value of the legal services provided. *Campion* involved a proceeding in which an attorney moved to hold his client in contempt, and/or the entry of a money judgment against the client, based on her failure to comply with a stipulation of settlement, made in open court, wherein she agreed to pay legal fees in the amount of $31,615.40 from the proceeds of certain marital property that she was to receive in equitable distribution, and the client cross moved to vacate that portion of the stipulation requiring her to pay said fees. In *Scordio*, a hearing was required, to determine a portion of a discharged attorney's fee, on a *quantum meruit* basis. None of these cases involved circumstances analogous to those herein.

Defendant further contends in support of her motion that the court failed to address the six separate affirmative defenses, and the five separate and distinct counterclaims, asserted in her answer and that, to the extent the court addressed the pleadings in this case, it misstated facts and improperly made conclusions of law solely on the face of those pleadings.

Contrary to defendant's assertions, none of the purported affirmative defenses asserted in defendant's answer constitute a defense against plaintiff's account stated cause of action given the plain language of the retainer agreement signed by defendant which provides, in pertinent part, as follows:

> "If you are unable to pay any bill on a current basis, you shall nevertheless be expected to approve such bill in writing within ten days after its receipt by you. If a bill remains unpaid for a period of 30 days we may, at our discretion, charge interest thereon at the statutory rate of 9% per annum", and
>
> "It will be your obligation to examine each bill rendered, and to promptly let us know if you have any questions or objections. While we strive to keep perfectly accurate time records, we recognize the possibility of human error, and we shall discuss with you any questions or objections regarding our bills. If no question or objection is raised within ten days, the bill will be deemed approved by you. We will respond to all questions and objections in a prompt and expeditious manner. You will not be charged for time spent in answering your inquiries.", and
>
> "All fees and disbursements collected from your spouse will be credited to your account whether received by agreement or court order. Should such an application be made to the court, then any determination resulting therefrom shall relate only to your interspousal rights and shall not affect your obligation to pay counsel fees to us pursuant to this retainer" and finally
>
> "We have discussed the nature and complexity of the contemplated proceedings, and have advised you that, unless your matter is settled at an early stage, your obligation to pay substantial fees may result. You have been made aware of the high cost of litigation. We have not, nor are we able to make any representation regarding a maximum fee, the final outcome of your case or the time it will take to conclude your matter. It is specifically acknowledged by you that we have made no representations to you, express or implied, concerning the outcome of the litigation presently pending or hereafter to be commenced between you and your spouse."

Moreover, as previously held by this court, defendant's belated objections [including, *inter alia*, plaintiff's negligence in recommending that she not appeal the decision, after trial, of the Hon. Meryl J. Berkowitz awarding Lynn Blocker (defendant herein) counsel fees in the amount of $30,000], are insufficient to raise genuine factual issues sufficient to warrant denial of plaintiff's motion for summary judgment.

The allegations of defendant's purported counterclaims sounding, *inter alia*, in fraud, breach of retainer agreement, negligence and legal malpractice simply do not withstand scrutiny when weighed against the record, including, *inter alia*, the written retainer agreement, the separation agreement and judgment of divorce and the decision in the underlying matrimonial action. The fact that Lynn Blocker was awarded counsel fees to be paid by her ex-husband in the amount of $30,000 in no way precludes her former attorney from collecting outstanding legal fees, above and beyond the $30,000 amount, from his client. It bears repeating that

> "the record at bar is devoid of any evidence of willful subterfuge on the part of plaintiff in managing defendant's matrimonial action or any evidence that he failed to exercise the degree of care, skill and diligence commonly possessed by an attorney or that 'but for' plaintiff's negligence a more favorable outcome would have been achieved."

There is simply no factual evidence to support the affirmative defenses and/or counterclaims asserted by defendant or to conclude that the court failed to properly consider/evaluate the substantive assertions of defendant's pleading [answer] in reaching its decision of April 13, 2009.

The foregoing constitutes the Order of this Court.

Dated: August 17, 2009
Mineola, N.Y.

Karen V. Murphy
J. S. C.

ENTERED
SEP 01 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE