

Hurley v Beulah Church of God in Christ Jesus, Inc.
2009 NY Slip Op 32147(U)
September 18, 2009
Supreme Court, New York County
Docket Number: 102584-07
Judge: Judith J. Gische
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JUDITH J. GISCHE

PART 10

Justice

Index Number : 102584/2007

HURLEY JR., ESQ. JAMES E.

VS.

BEULAH CHURCH OF GOD IN CHRIST

SEQUENCE NUMBER : 006

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 006

MOTION CAL. NO. _____

this motion to/for _____

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

FILED


SEP 22 2009

COUNTY CLERK'S OFFICE

NEW YORK

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

Dated: Sept 18, 2009



HON. JUDITH J. GISCHE *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: PART 10**

-----X

James E. Hurley, Jr. d/b/a
Law Offices of James E. Hurley, Jr., PLLC

Plaintiff (s),

-against-

Beulah Church of God in Christ Jesus, Inc.,

Defendant (s).

-----X

DECISION/ORDER

Index No.: 102584-07

Seq. No.: 001

PRESENT:

Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	Numbered
Pltf's nm (§3212) w/JEH affid, exhs	1
Def's opp w/WLJ, PAR affid, exh	2
Pltf's reply to PAR affid w/JEH affid,	3
Pltf's reply to WLJ affid w/JEH affid	4
CES affid	5
Steno Minutes 7/30/09	6

Upon the foregoing papers, the decision and order of the court is as follows:

Plaintiff is a lawyer seeking to recover unpaid legal fees from his former client, the defendant Church of God in Christ Jesus, Inc. ("church"). Issue was joined by the church who has asserted counterclaims. Plaintiff filed the note of issue on February 4, 2009 and now moves for summary judgment on the complaint and to dismiss the counterclaims. The church is opposed. Since this motion is timely, it will be decided on the merits. CPLR § 3212; Brill v. City of New York, 2 NY3d 648 (2004). The court's decision is as follows:

Arguments Presented

Plaintiff, an attorney admitted to practice in New York, was retained by Deacon Wayne Richards ("Deacon Richards") to render legal services to the defendant-church in connection with their Chapter 11 filing for reorganization in Bankruptcy Court (*In re Beulah Church, etc.*, U.S. Bankruptcy Court, S.D.N.Y., Pet No. 03-42705-rdd) ("bankruptcy court action"). The retainer agreement, dated December 30, 2003 ("retainer"), was executed by Deacon Richards on behalf of the church and also personally guaranteed by him. Deacon Richards was, but is no longer, a member of the church's board of directors. A letter signed by Deacon Howard Tate, the co-chairman of the church's board, verifies that Deacon Richards is authorized to "represent [the church in] all "Chapter 11" proceedings." A second letter dated January 27, 2004 states the same thing.

In support of his motion, the plaintiff provides the pleadings, his sworn affidavits, the sworn affidavit of Charles Simpson, Esq. ("Simpson") another lawyer who represented the church in Bankruptcy Court and the transcript of Bishop Wilbur L. Jones Jr.'s ("Bishop Jones") examination before trial. Bishop Jones is the pastor of the church and a member of its board. Plaintiff provides other documents, including the docket from the bankruptcy court action and statement of his legal services rendered to the church. The defendant did not depose plaintiff and no argument is made that it tried to but could not do so.

Plaintiff claims that he is owed unpaid legal from September 13, 2005 through December 4, 2006 in the amount of \$33,330 plus costs and interest. Although the bankruptcy case was closed by Judge Drain's order dated October 6, 2005, plaintiff

contends he continued to do work thereafter not only to effectuate the Bankruptcy Court's order of reorganization, but also at Deacon Richard's specific request, and in accordance with plaintiff's retainer agreement with the church.

The order of the Bankruptcy Court approving the reorganization plan names plaintiff and Simpson the Distribution Agents of the church's money. According to plaintiff, he provided legal services which included making payments to the church's creditors from the church's \$1,437,619.99 debtor-in-possession money market account at J.P. Morgan Chase Bank. He also worked with the various taxing authorities to prove the church paid post petition taxes and prepared the final Decree and report for the Bankruptcy Court. According to plaintiff, he completed these tasks in December 2006.

After paying off the creditors, tax liens, etc., \$149,381.16 remained in the church's account. According to plaintiff, he disbursed \$100,000 to Deacon Richards at his request. Plaintiff also obtained Deacon Richards' permission to deposit the remaining funds into his IOLA account because of the post-closing work he was expected to perform, and pending the submission of plaintiff's final bill for services rendered, as well as his expected motion for substitution as counsel. There was other pending and unresolved litigation involving the church, including an appeal and adversary proceeding; the plaintiff did not represent the church in those actions. These claims are memorialized in plaintiff's letter to Deacon Richards dated April 28, 2006. The letter includes copies of the deposit slips for each account.

Plaintiff brought a motion in Bankruptcy Court for his compensation. By that point his hourly rate of \$350 had already been approved by the court and, as per Judge Drain's order dated October 6, 2005, plaintiff's motion for legal fees was granted.

Plaintiff was awarded legal and other fees (compensation) of \$131,962.50 for the period of October 1, 2004 through September 13, 2005. In his motion, plaintiff had asked for fees in a slightly higher amount (\$156,000).

Before commencing this action, plaintiff brought a motion in Bankruptcy Court to reopen that action so the legal fees dispute now before this court could be decided. Judge Drain denied that motion, without prejudice. In doing so, Judge Drain noted that the fees were for "post closing" work and could easily be decided in another forum instead of reopening the bankruptcy case. Steno Minutes 1/23/07

Plaintiff argues that he is entitled to summary judgment on his complaint, allowing him to satisfy his attorney's lien from the money that he has been holding in his escrow account. He also seeks summary judgment dismissing the church's counterclaims against him. He maintains that there is no legal or factual basis for the church's counterclaim to have him disgorge any of the fees it paid him pursuant to Judge Drain's order. Plaintiff argues that church had notice of his motion for compensation and it could have opposed the motion then, challenging those fees. It did not, however, do so and they were approved after they were scrutinized by the Bankruptcy Court.

He argues there are no facts offered by the church to support its counterclaim for malpractice. Plaintiff contends the church has not identified how he was negligent and he contends he obtained a very favorable result for the defendant in its reorganization. Finally, plaintiff denies that the church's claim for interest on the money he has in escrow is without any basis because it was deposited into his attorney account, as had been agreed, and the interest on such accounts are regulated by statute.

The church contends that Deacon Richards resigned sometime in July 2006 because of misconduct and he may have embezzled money from the church. The church maintains that plaintiff was terminated "for cause" in April 2005 and he should have stopped working on all bankruptcy matters then. At his examination before trial, Bishop Jones testified about a termination letter that Deacon Richards reportedly sent to plaintiff notifying him that Simpson would be completing the bankruptcy case for the church instead of plaintiff. Although Bishop Jones does not have personal knowledge of this letter, and has no proof it was ever sent or served on the plaintiff or Simpson, Bishop Jones claims it was, in fact, sent to both lawyers. Plaintiff subpoenaed Simpson. Simpson has provided his sworn affidavit that he never saw this letter nor it served on him. He contends it is "highly unlikely that [the church] would have sought to replace Hurley with [Simpson's firm]" since the church had opposed Simpson's firm's motion for legal fees, insisting it had been overcharged legal fees.

Defendants contend they have been unable to locate the original of the April 11, 2005 letter which is handwritten and has several words crossed out. They have not explained what efforts they made to locate the original. The church did not depose Deacon Richards, although they know he now lives in Georgia. Nonetheless, Bishop Jones testified the signature on the letter belongs to Deacon Richards and, therefore, plaintiff was terminated for cause as of April 11, 2005.

When asked about the bills plaintiff sent to Deacon Richards, particularly entries involving legal services provided directly to or benefitting Bishop Jones and other church members, the Bishop acknowledged the work was done. Such work by plaintiff included addressing collection efforts involving cars used by church members. Bishop

Jones also testified that plaintiff was not terminated because he did anything wrong in particular, but because "we thought you were overpaid" and the church wanted its money back. Bishop Jones acknowledges that the church did not object to any of plaintiff's legal fees until after they were approved by the Bankruptcy Court. There is no record of the church's objections, but in opposition to plaintiff's motion, the church asks for more time to locate such letters stating objections even though the church freely admits "[i]t is quite possible that the document(s) do not exist . . ."

Discussion

A movant seeking summary judgment in its favor must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. " Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985). The evidentiary proof tendered, however, must be in admissible form. Friends of Animals v. Assoc. Fur Manufacturers, 46 N.Y.2d 1065 (1979). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact. Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986); Zuckerman v. City of New York, 49 N.Y.2d 557 (1980).

Plaintiff has established he had a retainer agreement with the church and that the only motions made in the bankruptcy court action involving his legal fees and representation of the church were made by him. He first brought a motion to have his compensation approved and it was granted. He then brought a motion to withdraw as counsel because the bankruptcy case was completed and he did not represent the church in the adversary proceeding. The church did not oppose either motion, although it could have. The church did oppose Simpson's motion for compensation and

challenge his fees. There is no disputed issue of fact that the church had notice of both of plaintiff's motions in Bankruptcy Court.

Although Judge Drain approved plaintiff's fees and compensation, it was only for work done by him up until the reorganization plan was approved. Thus, the post-closing or distribution related fees for professional services by the plaintiff were never decided by the Bankruptcy Court and they remain to be decided, now by this court.

Plaintiff has also proved he was named one of the Distribution Agents in Judge Drain's order, and that he was ordered to distribute the assets of the church as per the reorganization plan. The remaining proceeds were distributed to the church (\$100,000) and the balance put into plaintiff's escrow account, to offset post closing legal work.

An attorney who is discharged by a client for cause has no right to compensation or a retaining lien, notwithstanding a specific retainer agreement. Teichner by Teichner v. W & J Holsteins, Inc., 64 N.Y.2d 977 (1985). The church argues that plaintiff was terminated for cause, relying solely upon a copy of letter purportedly sent to plaintiff and Simpson in April 2005. The best evidence rule provides where the contents of a document are in dispute and sought to be proven, the original writing must be produced or a satisfactory reason given for its non-production. Schozer v. William Penn Life Ins. Co. of New York, 84 N.Y.2d 639 (1994).

Bishop Jones does not have personal knowledge of this putative termination letter. He does not know what happened to the original or whether it was sent. He does not even know if the author was actually Deacon Richards. The document provided to the court is replete with cross outs. One part of the letter is in script, another in block letters. The signature on the letter and the plaintiff's retainer

agreement are dissimilar. The photocopy provided is not evidence in admissible form of the contents the church seeks to prove. No explanation has been provided about where the original of that document is, what efforts have been made to find it or why it cannot be found. Deacon Richards, reportedly the author of the letter, was not deposed. Thus the copy of the letter is the only "evidence" that the church produced that it terminated plaintiff "for cause" and he did not withdraw.

Since the copy is not evidence in admissible form and no one has any personal knowledge of its contents or has otherwise produced any evidence that plaintiff was terminated for cause, plaintiff has failed to establish there is a disputed triable issue of fact that plaintiff did not withdraw as counsel, but was terminated for cause before he brought his motion in bankruptcy court. *compare* Genton v. Arpeggio Restaurant, Inc., 232 A.D.2d 274 (1st Dept. 1996).

Having moved to withdraw as counsel, and that motion having been granted by order of the Bankruptcy Court dated February 2, 2007, plaintiff can recover, and is entitled to be paid, for his legal services through the end of December 2006. Ulico Cas. Co. v. Wilson, Elser, Moskowitz, Edelman & Dicker, 56 A.D.3d 1 (1st Dept. 2008).

Other opposition by the church, that the plaintiff was "overpaid" legal fees and they want some of their money back does not defeat plaintiff's motion. Assuming this argument is not precluded, it can only apply to the fees that were scrutinized, approved and ordered by the Bankruptcy Court. That objection has no bearing on whether he is now entitled to recover the post closing fees. The church raises no disputed issue of fact that bills were sent, they kept them and did not object to them. Plaintiff billed the church for post-closing work the same hourly rate the Bankruptcy Court approved for

work he did will the bankruptcy case was active. The rate of \$350 an hour does not appear unreasonable, and the church does not provide any facts why it is. Since the defense of unreasonableness is without any factual basis, it does not defeat plaintiff's motion for summary judgment.

On this motion plaintiff has successfully established that he: 1) owed unpaid legal fees; 2) was not discharged for cause, but withdraw as counsel with court approval; 3) deposited money into his attorney escrow account to be applied to post closing matters, like distribution of money to creditors, etc.; and 4) Deacon Richards was authorized to attend to the church's financial matters with respect to the reorganization. Thus, plaintiff has proved he is owed unpaid legal fees and other fees for professional services rendered from September 13, 2005 through December 28, 2006 in the amount of \$31,418 and the church did not object, but has not paid, those fees. Plaintiff has also proved he is entitled to summary judgment dismissing the counterclaims against him. There are no facts to support the church's malpractice claim. Bishop Jones acknowledged the church was unhappy with how much they paid plaintiff when they realized how much it was. None of the results achieved by him either before or after the bankruptcy action were challenged by the church. There is also no factual or legal basis for the church's claim that plaintiff should disgorge the legal fees that Judge Drain reviewed and ordered be paid to him.

Plaintiff is, therefore, entitled to summary judgment on the complaint against the church and his motion is granted. He is also entitled to summary judgment dismissing the counterclaims against him and that motion is granted as well.

The Clerk shall enter judgment in favor of plaintiff against defendant for

professional services rendered from September 13, 2005 though December 28, 2006 in the amount of \$31,418.

Although plaintiff alleges professional fees in a slightly higher amount (\$33,330.00 plus costs), that sum is due to his collection efforts. Since he has not provided an affidavit of services for the difference, that branch of his motion is denied, without prejudice.

The retainer provides for interest of 18% per annum (1 ½ % per month) to be charged and paid on open balances. Since the statement provided has not calculated the interest, the court awards interest from a reasonable intermediate date, as provided under CPLR 5001 (b). That date is March 12, 2006.

Conclusion

Based upon the foregoing,

It is hereby

ORDERED that plaintiff's motion for summary judgment against defendant Beulah Church of God in Christ Jesus, Inc. is granted; and it is further

ORDERED that the Clerk shall enter a money judgment in favor of plaintiff James E. Hurley, Jr. d/b/a Law Offices of James E. Hurley, Jr., PLLC, against defendant Beulah Church of God in Christ Jesus, Inc. in the principal amount of Thirty One Thousand Four Hundred Eighteen Dollars (\$31,418.00) for professional services rendered from September 13, 2005 though December 28, 2006, with interest at the rate of 18% per annum (1 ½ % per month) from March 12, 2006 to the date of entry, that being a reasonable intermediate date, as per CPLR 5001 (b); thereafter, interest shall

accrue at the statutory rate; and it is further

ORDERED that plaintiff is granted summary judgment, dismissing the counterclaims asserted against him by defendant Beulah Church of God in Christ Jesus, Inc.; the Clerk shall enter judgment in favor of plaintiff James E. Hurley, Jr. d/b/a Law Offices of James E. Hurley, Jr., PLLC, against defendant Beulah Church of God in Christ Jesus, Inc., dismissing the answer and counterclaims; and it is further

ORDERED that any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, New York
September 18, 2009

So Ordered:



Hon. Judith J. Gische, J.S.C.

FILED
SEP 22 2009
COUNTY CLERK'S OFFICE
NEW YORK