

Dweck Law Firm, LLP v Sarada
2010 NY Slip Op 32789(U)
September 29, 2010
Supreme Court, New York County
Docket Number: 116957/09
Judge: Paul Wooten
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

THE DWECK LAW FIRM, LLP.
Plaintiff,

INDEX NO. 116957/09

-against-

MOTION DATE _____

UMAMAHESWARI SARADA,
Defendants.

MOTION SEQ. NO. 03

MOTION CAL. NO. _____

The following papers, numbered 1 to 2 were read on this motion by plaintiff(s) for an order for summary Judgement and defendants cross motion for summary judgement per CPLR 3212 .

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits (Memo) _____
Replying Affidavits (Reply Memo) _____

FILED
OCT 07 2010
NEW YORK
COUNTY CLERK'S OFFICE

PAPERS NUMBERED	
1	_____

Cross-Motion: Yes No

This case involves an attorney fee dispute between the defendant and her attorney. Defendant hired plaintiff to filed an employment discrimination case in federal court. The parties herein agree that the issue involves their second duly executed retainer agreement, dated September 11, 2008, but both claim different interpretations of the language of that agreement and thus, different amounts for the attorney fee.

The plaintiff, the Dweck Law Firm, now moves for summary judgement pursuant to CPLR 3212 for its attorney fee compensation. Defendant opposes plaintiff's motion and cross moves for summary judgement pursuant to CPLR 3212, asserting she has already overpaid plaintiff's attorney fee.

BACKGROUND

The defendant claims she was unlawfully dismissed by her former employer. According to the defendant her former employer offered her \$ 177,911.90 to settle her claims. (See

defendant's Affidavit ¶ 4.) Plaintiff claims defendant's former employer offered her \$ 143,220.00 to settle her claims. (See plaintiff's Affidavit ¶ 8.) Thereafter, the defendant engaged the plaintiff's law firm to file her discrimination action in federal court. The parties herein executed a retainer agreement letter dated September 23, 1998 and subsequently executed a second retainer agreement, dated September 11, 2008. In pertinent part the second retainer agreement provides:

In consideration of services rendered and to be rendered by you, the undersigned hereby agrees to pay you the sum of ten thousand dollars and 00/00 (\$ 10,000.00) Dollars and you are authorized to retain *out of any monies that may come into your hands* [emphasis added] by reason of the above claim, thirty three and one third (33 1/3 %) percent of the sum recovered whether by suit settlement or otherwise in excess of what has been previously offered to the undersigned by the former employer of the undersigned.

Thereafter, the plaintiff and defendant appeared together and entered into private mediation with JAMS Endispute and on October 19, 2009, settled defendant's federal court action. Plaintiff claims defendant's total gross recovery *through the direct efforts of the plaintiff* is \$493,660.00. Plaintiff calculated his attorney fee to be \$116,813.33 and \$ 3,618.01 in out of pocket disbursements equals his final compensation to be \$120,431.34. (See defendant's invoice defendant's exhibit 7 and plaintiff's attorney affidavit ¶ 8.)

The cash settlement for the case was \$ 194,503.00 reduced by statutory deductions, (Federal Income, Social Security tax, Medicare, etc.) to \$ 167,054.68 and paid to the plaintiff law firm in two checks. One check was made payable to the plaintiff, law firm and the defendant for \$ 114,981.68 and the other made payable to the plaintiff law firm only was for \$ 52,073.00. Plaintiff now seeks \$120,431.34 of the \$ 167,054.68 cash payment made on behalf of the defendant to the plaintiff's law firm.

On January 7, 2010, the parties agreed by stipulation and paid plaintiff \$ 47,469.00, as *undisputed attorneys' fees... with undisputed disbursements* for \$ 3,618.01 and paid defendant

\$ 46,623.34 representing undisputed amounts due defendant. The remaining balance of \$ 72,962.34 was held in plaintiff's escrow account. (See defendant's cross motion exhibit 2, Stipulation, ¶¶ 3, 4 and 5.) However, the stipulation states that *deposits and distributions are without prejudice to either party with respect to their claims against each other.* (Id. ¶ 6)

DISCUSSION

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." *Dallas-Stephenson v Waisman*, 39 AD3d 303,306 (1st Dept 2007), citing *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 (1985). Upon proffer of evidence establishing a prima facie case by the movant, "the party opposing a motion for summary judgment bears the burden of 'produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact.'" *People v Grasso*, 50 AD3d 535, 545 (1st Dept 2008), quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied. *Rotuba Extruders v Cøppos*, 46 NY2d 223 (1978); *Gross v Amalgamated Housing Corporation*, 298 AD2d 224 (1st Dept 2002).

In deciding a summary judgment motion, the court must bear in mind that issue finding rather than issue determination is the key to summary judgment. See *Sillman v Twentieth Century Fox Film Corporation*, 3 NY2d 395, 165 NYS2d 489 (1957). Furthermore, since summary judgment is a drastic remedy which deprives a litigant of her day in court, the evidence adduced on the motion must be liberally construed in the light most favorable to the opposing party. See *Kesselman v Lever House Restaurant*, 816 NYS2d 13, 29 AD3d 302, [1 Dept 2006]; *Goldman v Metropolitan Life insurance Company*, 788 NYS2d 25, 13 AD3d 289, [1 Dept 2004]).

In support of the motion for summary judgment, plaintiff proffers, *inter alia*, a copy of the pleadings, an attorney affirmation, a copy of the September 11, 2008-retainer agreement

and an uncertified and unsworn document, attached to prove that defendants increased *future* pension benefits from years 2017 to 2035 are calculated to be \$341,684.03. Plaintiff proffers that he settled the defendant's employment discrimination case, with the defendant present, for a gross amount of \$493,660.00 and his attorney fee should be calculated from this gross recovery award. Plaintiff calculated the gross amount to be the total cash award before withholding taxes (\$ 194,503.00) plus the difference between defendant's original pension value and her increased future pension benefits gained through the efforts of the plaintiff (alleged to be valued at \$341,684.03).

Thus, plaintiff calculates his attorney fee from the total settlement package of valued at \$493,660.00, minus \$ 143, 220. 00, the amount plaintiff asserted was previously offered to the defendant by the former employer, for a total of \$ 350,440.00. Plaintiff then requests thirty three and one third (33 1/3 %) percent of the \$ 350,440.00, for his fee of \$ 116,813.33. Plaintiff claims his attorney fee plus \$ 3,618.01 in out of pocket disbursements equals his final compensation to be \$120.431.34. (See plaintiff's attorney affidavit ¶ 8.) Thus, the plaintiff has requested to be paid his \$120.431.34 attorney compensation from the defendant's cash recovery, after withholding taxes, of \$167,054.68.

Defendant opposes plaintiff's motion and cross moves for summary judgement. She offers, *inter alia*, her affidavit and the September 11, 2008 retainer agreement and a stipulation between the parties indicating that she already paid the plaintiff \$ 43,850.99 in attorney fees. Defendant proffers the same language in the retainer agreement as plaintiff, but claims the gross recovery of *monies that may come into [plaintiff's] hands* , is \$167,054.68. Therefore, defendant further claims that plaintiff's, attorney fee is thirty three and one third percent (33 1/3 %) of \$167,054.68, minus \$ 177, 911. 90, the amount defendant asserts the former employer previously offered to the defendant. (See defendant's affidavit ¶ 4-6 and 9). The total amount is less than zero and defendant now claims that the payment she made to plaintiff for \$

43,850.99 in attorney fees, pursuant to a stipulation, under was under duress, (plaintiff's affidavit ¶ 19 and 20). Thus, she now claims that the plaintiff has been overcompensated.

The Court finds that plaintiff does not meet his burden of proof for summary judgement as a matter of law. Plaintiff has failed to meet the burden of proving that there are no material triable issues of material fact, requiring a jury trial.

First, he fails to establish that the retainer agreement is clear and unambiguous. The ambiguity of the retainer agreement raises a triable issue of fact of whether the monies in hand constitute the gross recovery, allegedly \$493,660.00 or the \$ 167,054.68 gross cash payment, after taxes or \$ 194,503.00, gross cash payment before statutory withholding taxes?

In addition, defendant's increased future pension benefits value is a triable issue of fact. Plaintiff's documentation in support of his motion the proffers the pension value to be \$ 341,000.00 is inadmissible, as its documentation is uncertified and/or unsworn, (plaintiff's exhibit two). Finally, the amount that defendant's former employer offered her before she commenced litigation is a triable issue of fact. Plaintiff asserts in his affidavit that defendant's former employer previously offered defendant a settlement for \$ 143, 220. 00, while the defendant proffers, in her affidavit that amount to be \$ 177, 911. 90. Hence, summary judgement must be denied.

Defendants cross motion for summary for summary judgement is also denied, as there are the material triable issues of fact, some indicated in plaintiff's motion discussion. There is an issue of fact of whether the attorney fee payments made to plaintiff pursuant to the stipulation were undisputed payment, or payments improperly made because the defendant was under duress or because the parties agreed they were made without prejudice to either side. Defendant self-serving affidavit statements submitted in an attempt to retract a previous statement in the stipulation is insufficient to support a summary judgement finding. *Lupinsky v Windham Construction Corp.* 739 NYS2d 717 [1st Dept 2002].

Windham Construction Corp. 739 NYS2d 717 [1st Dept 2002].

For these reasons and upon the foregoing papers, it is,

ORDERED that the plaintiff's motion for summary judgment is denied, and it is further

ORDERED that the defendant's cross motion for summary judgment is denied, and it is

further

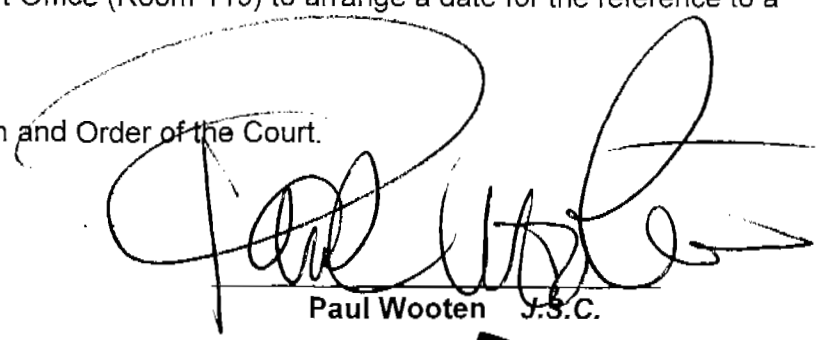
ORDERED, that the issue of the amount of the plaintiff's attorneys fee, including discovery and a hearing, is referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon filing of a stipulation of the parties, as permitted by CPLR § 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issues; and it is further,

ORDERED that this complaint, determining the amount of the attorneys fee, to which he is entitled, in connection with the settlement obtained for plaintiff, is held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR § 4403 or receipt of the determination of the Special Referee or the designated referee; and it is further,

ORDERED that a copy of this order with notice of entry shall be served on the Special Referee Clerk of the Motion Support Office (Room 119) to arrange a date for the reference to a special referee.

This constitutes the Decision and Order of the Court.

Dated: September 29, 2010


Paul Wooten J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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