

Dykstra v Avalon Rest. Renovations, Inc.

2010 NY Slip Op 32819(U)

October 7, 2010

Sup Ct, NY County

Docket Number: 111212/02

Judge: Carol E. Huff

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

PRESENT: **CAROL E. HUFF**
Justice

PART 32

Index Number : 111212/2002
DYKSTRA, HEATH
VS.
AVALON RESTAURANT
SEQUENCE NUMBER : 010
OTHER RELIEFS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

NOTICE OF MOTION
Answering Affidavits — Exhibits _____
Replying Affidavits _____

Exhibits ...
PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

motion is decided in accordance
with accompanying memorandum decision

FILED
OCT 12 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: OCT 07 2010

[Signature]
CAROL E. HUFF

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 — NEW YORK COUNTY

PRESENT: **CAROL E. HUFF**

PART 32

Justice

Index Number : 111212/2002

DYKSTRA, HEATH

vs.

AVALON RESTAURANT

SEQUENCE NUMBER : 011

CONFIRM/REJECT REFEREE REPORT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION IN MOTION SEQUENCE .010**

FILED
OCT 12 2010
NEW YORK
COUNTY CLERK'S OFFICE

OCT 07 2010

Dated: _____


CAROL E. HUFF

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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 32

-----X

HEATH DYKSTRA, : Index No. 111212/02
 :
 Plaintiff, :
 :
 - against - :
 :

AVALON RESTAURANT RENOVATIONS, INC., :
 MATTHEW L. DUER, JO DUER, ABC CORP., :
 DEF CORP., GHI CORP., being owners, general :
 contractors and contractors of the subject premises and/or :
 job site where plaintiff was injured whose identities :
 are not yet known, NEW YORK CITY HEALTH & :
 HOSPITALS CORPORATION (BELLEVUE HOSPITAL :
 CENTER), JOHN DOES 1-10 and JANE DOES 1-10, :
 being doctors, nurses or other medical providers and/or :
 individuals whose identities are not yet known, :

Defendants. :

FILED
OCT 12 2010
NEW YORK
COUNTY CLERK'S OFFICE

-----X

CAROL E. HUFF, J.:

Motions with sequence numbers 010 and 011 are consolidated for disposition.

These motions concern a dispute between the attorneys who represented plaintiff in this case that culminated in a trial in 2006. Billig Law P.C. replaced Fisher Fallon P.C. on the eve of trial, in which the plaintiff won a verdict. The case eventually settled with a \$750,000 judgment.

In motion 010, Billig, for the first time in the long history of this case, seeks an order declaring that Fisher Fallon P.C. is not entitled to assert a claim for any portion of the legal fees, on the grounds that it is a foreign corporation not authorized to do business in New York; that its sole shareholder and attorney, Edward P. Kelly, Esq., does not maintain an office in New York; and that plaintiff never retained Fisher Fallon, P.C.

A non-resident attorney who seeks to practice law in New York must “at least . . . maintain an office in this state for such purpose.” Kinder Morgan Energy Partners, LP v Ace American Ins. Co., 51 AD3d 580 (1st Dept 2008); Judiciary Law § 470; Lichenstein v Emerson, 251 AD2d 64 (1st Dept 2008). The cases cited by movant each involves a motion to disqualify an attorney early in the litigation process with a motion to dismiss the complaint, and the remedy was the dismissal of the case without prejudice. It is doubtful whether Judiciary Law § 470 was intended to disqualify an attorney four years following settlement of the case in the client’s favor, upon a motion by an attorney who is seeking only to gain a greater share of the legal fees. In any event, Fisher Fallon, P.C., which is authorized in New Jersey, has sufficiently established that its sole shareholder and attorney Edward P. Kelly, Esq., maintains an office at the law offices of Michael G. O’Neill, Esq., at 30 Vesey Street, New York, New York. Moreover, Fisher Fallon LLP, in which Kelly is also the sole attorney, is authorized in New York.

Movant further contends that plaintiff signed a retainer agreement with Fisher Fallon LLP, not Fisher Fallon P.C., and that for this reason also, movant is entitled to all of the legal fees. Edward P. Kelly is the sole attorney in both Fisher Fallon entities and has appeared in numerous New York State and Federal courts. The error, while it should be avoided in the future, in this case is harmless, especially since plaintiff has not appeared for this motion and has not indicated any dissatisfaction with his representation.

Accordingly, motion 010 is denied.

In motion 011, Fisher Fallon, P.C., seeks to confirm in part and reject in part the June 14, 2010, report and recommendation of JHO Edward Lehner, who was charged with apportioning the legal fees in this case. Billig cross moves to reject the report of the JHO.

“The report of a referee should be confirmed if the findings therein are supported by the record. . . . ‘Generally, New York courts will look with favor upon a Referee's report, inasmuch as the Referee, as trier of fact, is considered to be in the best position to determine the issues presented.’” Namer v 152-54-56 West 15th St. Realty Corp., 108 AD2d 705, 706 (1st Dept 1985), quoting Matter of Holy Spirit Assn. v Tax Commn. of the City of New York, 81 AD2d 64 (1st Dept 1981).

In their papers both attorneys/movants seek to retry many of the issues that were presented before JHO Lehner in a comprehensive three-day hearing. However, his report dated June 14, 2010, is fully supported by the record, and movants have demonstrated no compelling reason to alter his recommendation.

Accordingly, it is

ORDERED that the motion (010) to declare Fisher Fallon, P.C., disqualified to receive legal fees in this case is denied; and it is further

ORDERED that the motion and cross motion (011) to reject the report and recommendations of the JHO are denied; and it is further

ORDERED that, pursuant to CPLR 4403, the report and recommendations of the JHO is confirmed in all respects, and of the total legal fee, 25% should be paid to Fisher Fallon, P.C. and 75% should be paid to Billig Law, P.C.

Dated: **OCT 07 2010**

FILED
OCT 12 2010
 NEW YORK
 COUNTY CLERK'S OFFICE


CAROL E. HUFF
 J.S.C.