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SHORT FORM ORDER

SUPREME COURT: STATE OF NEW YORK
COUNTY OF NASSAU

HON. IRA B. WARSHAWSKY,
Justice.

TRIAL/IAS PART 7

MICHAEL GOLDMAN,

Plaintiff,

INDEX NO.: 009284/2010
MOTION DATE: 11/29/10
SEQUENCE NO .:01, 02

- against -

RICHARD R. RIO and LAW OFFICE OF RICHARD R. RIO, PLLC,

Defendants.

The following documents were read on this motion:

Motion for Default Judgment	1
Defendants' Affirmation in Opposition to the Motion	2
Defendants' Memorandum of Law in Opposition to the Motion	3
Cross-motion by Defendants to dismiss, deny plaintiff's motion, sanctions	4
Reply Affirmation in Further Support of Motion and Opposition to Cross-motion	5

PRELIMINARY STATEMENT

Plaintiff moves for default judgment against defendants, asserting that the summons and complaint were served on or about August 19, 2010, and additional service was made upon the New York State Secretary of State on September 1, 2010, mailed to defendants on September 23, 2010, and that all affidavits of service were timely filed in the Office of the Clerk. Defendants oppose the motion on the ground that service, made upon a person of suitable age and discretion, pursuant to CPLR § 308 (2) was not mailed within the requisite 20 days after delivery; the

summons and complaint were served without an index number in violation of CPLR §§ 305 (a) and 2101 (c) They also contend that the Certificate of Mailing was filed on October 21, 2010, and service is not complete until ten days after the mailing, October 31, 2010. Service of an answer is required within thirty days, meaning that the answer would be timely served up until November 30, 2010. Defendant annexed his answer to the Cross-motion, which was mailed on November 19, and filed with the County Clerk on November 24, making the answer timely.

Defendant cross-moves to dismiss the action on the ground of judicial estoppel, in that an action for the same relief was dismissed by Hon. Leonard Austin, and affirmed by the Appellate Division. Plaintiff relies on language in the Order of Discharge from the U.S. Bankruptcy Court, EDNY as justification for the renewal of the action.

BACKGROUND

Plaintiff and Richard D. Rio were partners in the practice of law until May 18, 2004, the day on which Goldman was suspended from practice by the Appellate Division, First Department. The Court subsequently disbarred him on October 11, 2005 based upon his failure to file an affidavit of compliance with the order of suspension, refusal to cooperate with the Committee, and his continuing to practice law during the term of his suspension.

After his disbarment, Goldman filed for Chapter 7 bankruptcy listing Richard R. Rio, Goldman and Rio, and Law Offices of Richard R. Rio, LLC as creditors. He listed no assets, including claims for a share of the assets of Goldman and Rio. On June 5, 2006 Bankruptcy Court granted a discharge. Exh. "C" to Cross-motion. After abstaining from hearing the contested matter involving Rio's proof of claim, Hon. Alan S. Trust, U.S. Bankruptcy Judge, ordered that the automatic stay provisions of 11 U.S.C. § 362 were lifted to allow Rio to pursue his Claim No. 6 to judgment and collection, and to allow the Debtor standing to pursue affirmative relief or a counterclaim against Rio to judgment and collection, all before the Supreme Court of the State of New York, County of Nassau.

Goldman commenced an action on September 26, 2006. He claimed that at the time of his suspension from practice, Goldman and Rio had assets and pending actions in which he was entitled to share. Defendants in that action, the same as in this action, moved to dismiss on the ground that Goldman lacked standing because he failed to list his equity interest in Goldman and

Rio and his right to legal fees earned by the partnership in the bankruptcy petition, and that this failure judicially estopped him from bringing an action.

By decision dated January 28, 2008, Judge Austin concluded that a party who declares bankruptcy lacks capacity to sue on a cause of action if the cause of action accrued prior to the filing of the bankruptcy petition; the plaintiff knew or should have known the cause of action existed when he filed for bankruptcy; and he failed to disclose the existence of the cause of action as an asset in the bankruptcy court. Exh. "A" to Cross-motion, at p. 4, citing *Dynamics Corp. Of America v. Marine Midland Bank New York,* 69 N.Y.2d 191 (1987); *Whelan v. Longo,* 23 A.D.3d 459 (2d Dept. 2005); and *Quiros v. Polow,* 135 A.D.2d 697 (2d Dept. 1987). The Appellate Division affirmed the determination. (*Goodman v. Rio,* 62 A.D.3d 834 [2d Dept. 2009]).

As noted in the latter decision, the complaint sought an accounting from defendants for a determination of the former partnership's affairs for the purpose of determining the amount of monies owed to him. Because these funds to which he claims entitlement accrued before he received a discharge in bankruptcy, he lacked standing enforce such a claim. *Id.* at 835.

DISCUSSION

Plaintiff's motion for default judgment is denied. Defendant correctly claims that the service of process was governed by CPLR § 308 (2). Plaintiff alleged that defendants were "doing business in New York", thereby justifying extrastate service pursuant to CPLR § 301. SIEGEL, N.Y. PRACTICE, § 100 (4th ed.). § 308 (2) provides as follows:

> 2. by delivering the summons within the state to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served and by either mailing the summons to the person to be served at his or her last known residence or by mailing the summons by first class mail to the person to be served at his or her actual place of business in an envelope bearing the legend "personal and confidential" and not indicating on the outside thereof, by return address or otherwise, that the communication is from an attorney or concerns an action against the person to be served, such delivery and mailing to be effected within twenty days of each other; proof of such service shall be filed with the clerk of the court designated in the summons within twenty days of either such delivery or mailing, whichever is

> effected later; service shall be complete ten days after such filing; proof of service shall identify such person of suitable age and discretion and state the date, time and place of service, except in matrimonial actions where service hereunder may be made pursuant to an order made in accordance with the provisions of subdivision a of section two hundred thirty-two of the domestic relations law.

The affidavit of service (Exh. "H" to Cross-motion) reflects service upon a person of suitable age and discretion at defendant Rio's office in New Jersey on September 1, 2010. Plaintiff mailed a copy of the summons and complaint on September 23, 2010. (Exh. "G" to Cross-motion). The service and mailing were not within twenty days of each other, as required by statute. Neither did the document bear an Index No. as required by CPLR § 305 (a). (Exh. "E" to Cross-motion. The certificate of mailing was filed on October 21, 2010, and service is complete ten days thereafter, meaning defendants had thirty days from October 31, 2010 to answer. Defendants verified answer was timely served by mailing on November 19, 2010. Exh. "J" to Cross-motion.

Not only was service defective in numerous ways, but the verified answer was served timely.

Defendants' Cross-motion to dismiss the complaint is granted. In this action plaintiff seeks the same relief as in the previous action under Index No. 015779/2006. Plaintiff is not entitled to an accounting of the law partnership in which he was previously a member, much less the Law Offices of Richard R. Rio, LLC, a company created October 28, 2004 (Exh. "F" to Reply Affidavit of Goldman), after he was suspended from the practice of law on May 18, 2004, and in which he was never involved.

Plaintiff asserts that since the decisions of Judge Austin and the Appellate Division "things have changed so as to bring the plaintiff into conformity with the courts' requirements as to standing to bring the case". (Reply Affidavit of Goldman at ¶ 19). He relies on the language of the Order of Allan S. Trust, United States Bankruptcy Judge. (Exh. "E" to Cross-motion), which lifted the automatic stay provisions of 11 U.S.C. § 362, allowing Rio to pursue his pursue his Claim No. 6 to judgment and collection, "and to allow the Debtor standing to pursue affirmative relief or a counterclaim against Rio to judgment and collection, all before the

Supreme Court of the State of New York, County of Nassau . . .".

The import of the Order was to permit Rio to pursue a claim against Goldman in the State Court, and, for Goldman to make whatever affirmative claim or counterclaim he may have, also in the State Court. This does not imbue Goldman's claim with legitimacy, it simply lifts the bankruptcy stay which previously prohibited pursuit of it in other than the bankruptcy proceeding.

Goldman filed his bankruptcy claim on October 16, 2006, more than two years after his suspension from practice. His bankruptcy estate included all legal or equitable interests of the debtor as of the date of filing. 11 U.S.C. § 541 (a)(1). His estate included claims to legal fees and contingency fee agreements which he earned or entered into prior to his May 18, 2004 suspension. It has been determined in the previous State Court action that Goldman failed to include any such claims for legal fees or rights under contingency fee agreements as assets of his estate in bankruptcy, thereby depriving his creditors of the benefit of these potential funds. The Court further determined that his failure to do so precluded him from seeking an accounting for the purpose of recovery after the discharge in bankruptcy.

The parties in the former and present action are identical. The doctrines of res judicata and collateral estoppel facilitate a prompt and non-repetitious judicial process. Res judicata, or claim preclusion, estops a party, or one in privity with a party, from relitigating a previously litigated action. (*Chase Manhattan Bank v. Celotex Corp.,* 56 F.3d 343 [2d Cir. 1995]; *Goldstein v. Massachusetts Mutual Life Ins. Co.,* [60 A.D.3d 506 [1st Dept. 2009]). Plaintiff has had his day in Court, and has exercised his right of appeal. There is no basis upon which to upset the determination of the prior Court, and this Court is clearly without jurisdiction to overturn the determination of the Appellate Division.

The branch of defendants' cross motion seeking sanctions is denied. Defendants seek the imposition of sanctions, costs and attorneys' fees for making a frivolous motion. Pursuant to §130-1.1 of the New York Rules of Court, the court may award sanctions costs, in the form of reimbursement for actual expenses incurred and attorneys' fees, resulting from "frivolous conduct." Conduct is frivolous when it is "completely without merit in law or fact and cannot be supported by a reasonable extension, modification or reversal of existing law," or "undertaken

borders on being frivolous, but there is possibly a rational basis for plaintiff to conclude that the Order of the Bankruptcy Court somehow enervated a claim made dormant by the prior decisions of a trial and appellate Court.

This constitutes the Decision and Order of the Court.

Dated: February 14, 2011

J.S.C.

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