

Goldman & Greenbaum, P.C. v Djeddah
2011 NY Slip Op 31163(U)
March 30, 2011
Supreme Court, New York County
Docket Number: 102768/10
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

GOLDMAN & GREENBAUM, P.C.,
Plaintiff,

INDEX NO. 102768/10

MOTION DATE _____

- v -

MOTION SEQ. NO. 001

RICHARD DJEDDAH,
Defendant.

MOTION CAL. NO. _____

The following papers, numbered 1 to 2 were read on the Order to Show Cause by defendant to dismiss the complaint as against it.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

1

Answering Affidavits — Exhibits (Memo)

2

FILED

Replying Affidavits (Reply Memo)

Cross-Motion: Yes No

APR 15 2011

This is an action for legal fees in connection with plaintiff Goldman & Greenbaum, P.C. ("G&G") law firm's representation of defendant Richard Djeddah ("Djeddah") in prior matrimonial proceedings. Djeddah moves by Order to Show Cause for an order dismissing the complaint as against him pursuant to CPLR § 3211(a)(2) and (a)(4), for declaratory judgment, for an injunction, and for sanctions pursuant to 22 NYCRR § 130-1.1.

BACKGROUND

This matter arose from G&G's representation of Djeddah in divorce proceedings ("matrimonial proceedings") that occurred in New York County and resulted in a Judgment of Divorce March 8, 2008. (Djeddah exhibit C (1) & (2)). Subsequently, On February 23, 2010, Djeddah commenced an action against G&G in the Supreme Court, Queens County ("Queens

County Case”), under the Index No. 4403/2010, sounding primarily in legal malpractice (Djeddah exhibit A). On March 4, 2010, C&C commenced the instant action (“NY County Case”), by service of the summons and complaint on defendant at his Park Avenue residence in New York County, for *inter alia* legal fees in connection with G&G’s representation of Djeddah in the matrimonial proceeding (Djeddah exhibit B).¹

Djeddah now moves, by Order to Show Cause dated June 16, 2010, for the following relief: (1) Dismiss G&G’s summons and complaint, pursuant to CPLR § 3211(a)(2), on the basis that the court lacks in personam jurisdiction over Djeddah²; (2) Dismiss G&G’s summons and complaint, pursuant to CPLR § 3211(a)(4) on the basis that there is a prior pending action in Queens County between the same parties for the same cause of action, and the filing of the instant action constitutes frivolous conduct, pursuant to 22 NYCRR §130-1.1; (3) Declaratory judgment stating that, having made an election of remedies by bringing the NY County Case, any attempt by G&G to now move under the matrimonial index number for a charging lien or seeking other relief against Djeddah constitutes additional frivolous conduct, pursuant to 22 NYCRR §130-1.1; (4) An injunction prohibiting any attempt by G&G to now move under the matrimonial index number for a charging lien or seeking other relief against Djeddah; and (5) Sanctions against G&G, pursuant to 22 NYCRR §130-1.1.

The Court notes that after the herein motion was brought, yet before this decision, in an Order dated November 18, 2010 (“Consolidation Order”) by Justice Strauss, the Judge in the Queens Action, granted a motion by G&G to change venue and consolidate the two actions from

¹On September 8, 2010 Djeddah filed for bankruptcy whereby the New York County action was stayed until January 28, 2011, when the stay was lifted.

²Djeddah improperly moves to dismiss under CPLR § 3211(a)(2) for lack of in personam jurisdiction. CPLR § 3211(a)(2), allows a party to move to dismiss on the grounds that the court lacks subject matter jurisdiction. However, the Court will treat this portion of the motion as if it was brought pursuant to CPLR § 3211(a)(8), which allows a party to move to dismiss based upon lack of in personam jurisdiction.

Queens County to New York County. Justice Strauss's Consolidation Order also determined that G&G has made a sufficient showing that Djeddah's actual place of abode at the time of commencement of the NY County Action was New York County, which is where G&G served Djeddah with its summons and complaint. Accordingly, the Consolidation Order found that this Court has in personam jurisdiction over Djeddah as he was properly served at his Park Avenue residence in New York County.

DISCUSSION

A. CPLR § 3211(a)(2) and (a)(4)

Djeddah moves to dismiss the complaint on the grounds that G&G did not properly serve its summons and complaint in the herein action, and as a result the Court lacks in personam jurisdiction over him. Djeddah proffers that he resides in Queens County, and because service of the summons and complaint was not properly effected at his Queens residence, he was not properly served. In opposition, G&G argues that many of the documents Djeddah provides to suggest that he resides in Queens County are either undated or dated subsequent to the commencement of the NY County Case. However, this issue was already decided in Justice Strauss's Consolidation Order, which found that this Court has in personam jurisdiction over Djeddah because he failed to establish a bona fide residence in Queens County. Accordingly, the portion of Djeddah's motion to dismiss the complaint for lack of in personam jurisdiction is denied as moot.

Djeddah also moves to dismiss the complaint, pursuant to CPLR § 3211(a)(4), on the basis that there is a prior pending action in Queens County between the same parties for the same cause of action. However, Justice Strauss's Consolidation Order consolidated the two actions from Queens County to New York County. As a result, no prior action is currently pending in Queens County. Thus, the portion of Djeddah's motion seeking to dismiss the complaint based on CPLR § 3211(a)(4) is denied as moot. Accordingly, the portions of

Djeddah's motion to dismiss the complaint for lack of in personam jurisdiction and pursuant to CPLR § 3211(a)(4), are denied as moot.

B. Declaratory Judgment and Injunction

Djeddah also moves for a declaratory judgment stating that G&G has made an election of remedies by bringing the herein action, and any attempt by G&G to move under the matrimonial index number for a charging lien constitutes additional frivolous conduct, pursuant to 22 NYCRR §130-1.1. However, the Court finds Djeddah's argument to be unavailing as an attorney's "commencement of a plenary action to recover his fee" does "not constitute an election of remedies precluding him from pursuing his rights under Judiciary Law § 475 in the main action" (*Anonymous v Anonymous*, 258 AD2d 279 [1st Dept 1999]; see also *Butler, Fitzgerald & Potter v Gelmin*, 235 AD2d 218, 219 [1st Dept 1997]). The remedies available to an attorney to recover the value of his legal services are cumulative and not exclusive (see *Butler* 235 AD2d at 219). Thus, G&G has not made an election of remedies by bringing the NY County Case for fees, and may also move for a charging lien under the matrimonial index, and the portion of Djeddah's motion seeking a declaratory judgment is therefore denied.

Additionally, Djeddah moves for an injunction prohibiting G&G from moving for a charging lien under the matrimonial index. However, Djeddah has failed to meet his burden to demonstrate a "likelihood of success on the merits, irreparable injury in [the] absence of such relief and a balancing of the equities in his favor" (*Kalyanaram v. New York Institute of Technology*, 63 AD3d 435, [1st Dept 2009] citing *Matter of Non-Emergency Transporters of N.Y. v Hammons*, 249 AD2d 124, 127 [1998]). Accordingly, the portions of Djeddah's motion seeking a declaratory judgment that G&G has made an election of remedies and for an injunction prohibiting G&G from moving for a charging lien under the matrimonial index are denied.

C. Sanctions.

Part 130 of the Rules of the Chief Administrator permits courts to sanction attorneys for engaging in frivolous conduct, which includes conduct: (1) “completely without merit in law”; (2) “undertaken primarily to... harass or maliciously injure another”; or (3) “assert[ing] material factual statements that are false” (see 22 NYCRR § 130-1.1; *Tavella v Tavella*, 25 AD3d 523, 524 [1st Dept 2006]). Here, Djeddah moves for sanctions against G&G, pursuant to 22 NYCRR §130-1.1 on the grounds that: (1) G&G’s filing of the New York County action constitutes frivolous conduct, pursuant to CPLR § 3211(a)(4), on the basis that there is a prior pending action in Queens County between the same parties for the same cause of action; and (2) on the grounds that, having made an election of remedies by bringing the New York County action for legal fees, any attempt by G&G to now move under the matrimonial index for a charging lien or seeking other relief against Djeddah constitutes additional frivolous conduct.

As previously discussed, Justice Strauss’s Consolidation Order changing venue and consolidating both actions to New York County moots the first ground upon which Djeddah moves for sanctions against G&G, as there is no longer a prior pending action in Queens County. As a result, the first ground on which Djeddah moves for sanctions against G&G is denied as moot.

The second ground on which Djeddah seeks sanctions against G&G is based on the unavailing argument that G&G has made an election of remedies by bringing the herein action for legal fees (*see Butler* 235 AD2d at 219). As discussed above, an attorney’s remedies for recovering legal fees are cumulative and not exclusive, and accordingly the Court finds that G&G’s conduct in bringing the herein action was not frivolous within the meaning of 22 NYCRR § 130-1.1 (*see Anonymous* 258 AD2d at 279; *M&A Oasis v MTM Assoc.*, 307 AD2d 872, 875 [1st Dept 2003]). Accordingly, the portions of Djeddah’s motion seeking sanctions against G&G are denied.

The Court notes that from this point forward, as per Justice Strauss's Consolidation Order, the consolidated action shall bear the following caption:

-----X

RICHARD DJEDDAH,

Plaintiff,

Index No. 102768/10

-against-

GOLDMAN & GREENBAUM, P.C.,

Defendant.

-----X

The Court has considered Djeddah's remaining arguments and finds them unavailing.

CONCLUSION

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

ORDERED that the portions of defendant RICHARD DJEDDAH'S motion to dismiss plaintiff's complaint pursuant to CPLR § 3211(a)(2) and (a)(4), are denied as moot; and it is further,

ORDERED that the portion of defendant RICHARD DJEDDAH'S motion seeking a declaratory judgment is denied; and it is further,

ORDERED that the portion of defendant RICHARD DJEDDAH'S motion seeking a preliminary injunction is denied; and it is further,

ORDERED that the portions of defendant RICHARD DJEDDAH'S motion seeking sanctions against GOLDMAN & GREENBAUM, P.C., pursuant to 22 NYCRR § 130.1.1 are denied; and it is further,

ORDERED that the plaintiff GOLDMAN & GREENBAUM, P.C. shall serve a copy of this order with notice of entry upon all parties; and it is further,

ORDERED that a copy of this order with notice of entry shall also be served upon the Clerk of the Trial Support Office and the County Clerk, who are hereby directed to mark the court's records to reflect the consolidation; and it is further,

ORDERED that the parties are directed to appear for a preliminary conference on June 1, 2011 at 2:30 p.m., in Part 7, Room 341 at 60 Centre Street.

This constitutes the Decision and Order of the Court.

Dated: 4/15/11

Paul Wooten
Paul Wooten J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST

FILED

APR 15 2011

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