

<b>Landau, P.C. v Goldstein</b>
2011 NY Slip Op 32353(U)
September 1, 2011
Sup Ct, NY County
Docket Number: 114485/08
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*

*Jordan PC et al*

Plaintiff (s),

INDEX NO. 114485/08

- v -

*Royd Goldstein*

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 004

MOTION CAL. NO. \_\_\_\_\_

Defendant (s) *et al*

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for §3212

PAPERS NUMBERED

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, the court's decision on this (these) motion (s) is as follows:

**FILED**

SEP 02 2011

NEW YORK  
COUNTY CLERK'S OFFICE

Motion (s) decided in accordance with  
the accompanying memorandum decision

*and compliance conference  
scheduled for Oct 27, 2011 in  
Part 10 @ 7:30 am*

Dated: Sept 1, 2011

*[Signature]*  
Hon. Judith J. Gische, J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE  SETTLE/SUBMIT ORDER

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  
LANDAU, P.C., f/k/a MORRIS J. EISEN, P.C.,  
and MORRIS J. EISEN, individually,

Plaintiffs,

-against-

LLOYD GOLDSTEIN and KENNETH F. KAPLAN,

Defendants.

Decision and Order  
Index No.: 114485/08  
Seq No.: 004

Present:  
Hon. Judith J. Gische  
J.S.C.

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

PAPERS	NUMBERED
Def's n/m (3212) w/LFG affirm, exhs . . . . .	1
Landau and Eisen opp w/MP affirm, MJE affid, exhs	2
Def's reply w/LG affirm . . . . .	3

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

**FILED**

JUDITH J. GISCHE, J.:

**SEP 02 2011**

Defendant pro se Lloyd Goldstein (Goldstein), pursuant  
to CPLR 3212, for summary judgment dismissing the complaint  
asserted as against him.<sup>1</sup> Since issue has been joined, the Note  
of Issue has not yet been filed, summary judgment relief is

\_\_\_\_\_  
<sup>1</sup>Defendant Kenneth F. Kaplan, an attorney who was disbarred  
after Eisen allegedly referred cases to him, made his own motion  
to dismiss, which was granted with respect to the second and  
third causes of action.

available (Myung Chun v. North American Mortgage Co., 285 AD2d 42  
(1st Dept. 2001).

#### BACKGROUND

According to the complaint, plaintiff Morris J. Eisen  
(Eisen), an attorney, was the sole member of Morris J. Eisen,  
P.C. until January 23, 1992, when Eisen was disbarred.  
Thereafter, the name Morris J. Eisen, P.C. was changed to Landau,  
P.C. (Landau), by the filing of a certificate of change of name  
with the New York Secretary of State, and Eisen withdrew from the  
firm.

Eisen, for several years prior to his disbarment, and Landau  
as Morris J. Eisen, P.C.'s successor-in-interest, allegedly  
entered into several oral agreements with defendants to turn over  
certain cases, a list of the names of the presumptive clients  
being attached to the complaint as its Exhibit A, and defendants  
allegedly agreed thereby to turn over a percentage of the legal  
fees earned as remuneration for Eisen's uncompensated work,  
disbursements and services rendered prior to Eisen's disbarment.  
Plaintiffs assert that no such fees have been turned over to them  
pursuant to these oral agreements.

The complaint alleges four causes of action: (1) breach of  
contract; (2) unjust enrichment; (3) attorney's lien, pursuant to

Judiciary Law § 474; and (4) an accounting.

The only demand for payment was by letter from Eisen dated January 10, 2003 (Motion, Ex. D); however, a copy of this letter has not been appended to the instant motion. Goldstein does not deny that there was an oral agreement between the parties, by which defendants would receive 50% of any net fee received by Landau from the settlement of the referred cases, and 33 1/3 % of the net fees received by Landau if the referred case was tried to verdict.

According to the verified bill of particulars, Landau and Eisen were only able to produce retainer statements for ten (10) of the allegedly hundreds of clients referred to Goldstein by Eisen. Motion, Ex. H. However, according to Goldstein, Eisen has been unable to produce any evidence that he performed any work on behalf of these clients.

In this court's prior decision, filed August 13, 2010, it was held that Landau's unjust enrichment and Judiciary Law claims would be time-barred if the cases had been resolved more than six years before the instant suit was filed (October 28, 2002). Goldstein asserts that the evidence proves that all of the cases were resolved more than six years prior to October 28, 2002, and, hence, are time-barred. Further, Goldstein maintains that

current law mandates dismissal of Landau's breach of contract claim, premised on fee referrals, for actions resolved during the period of the referring attorney's disbarment.

Goldstein states that, of the ten (10) clients for which Landau can produce retainer statements naming (10) Eisen as the referring attorney, four of those client's cases were resolved during the period of Eisen's disbarment. Also, whereas Goldstein allows that Landau may be entitled to be compensated under a theory of quantum meruit for work performed prior to disbarment, Goldstein maintains that Eisen has failed to produce any evidence that he provided services to the clients before January 23, 1992, the date of Eisen's disbarment.

Goldstein also contends that there can be no recovery under a claim for breach of contract, the Judiciary Law or an accounting where the matter was settled before any appearance was made, and Goldstein asserts that Eisen has provided no evidence that he made any appearances in the referred matters.

Lastly, Goldstein contends that, since all of the cases appearing in the verified bill of particulars were resolved, at the latest by July 14, 1995, all of Landau's claims are time-barred, and that Eisen is not entitled to a defense of laches, because there is no evidence that Goldstein engaged in any

wrongdoing so as to prevent Landau from asserting its claims.

In opposition to the instant motion, Eisen has provided an affidavit in which he avers that:

"In all of the cases that were referred to the defendants in this action, there were legal services performed on each case by my law firm. In each case the client was interviewed, an investigation was made, a Retainer Agreement was entered into with the client, necessary records such as police reports, MV104 forms and hospital records, etc. were secured all of which took place before the cases were referred to the defendants."

Aff. in Opp.

The court notes that the opposition papers include a verified bill of particulars that is far more extensive than the one provided in the moving papers, although both documents have the same date. Opp., Ex. B. The court also notes that the copy attached by Landau includes many clients who were referred to Goldstein by an attorney other than Eisen, and no evidence has been produced as to those referring attorneys' relationship to Eisen. Eisen asserts that he is still reviewing records for documents indicating the work that his law firm performed for the referred clients prior to his disbarment.

Eisen also avers that Goldstein failed to file closing statements and that all of the records concerning referred cases are available to Goldstein by making a request to the Office of

Court Administration.

In reply, Goldstein argues that plaintiffs have failed to provide any opposition to the contention that there can be no recovery for claims asserted under the Judiciary Law, for breach of contract or for an accounting, where the matters were settled prior to an appearance having been made. Therefore, Goldstein says, plaintiffs cannot recover on six of the ten referred cases, since there is no evidence that Eisen made any appearance in those matters.

Lastly, Goldstein maintains that the action is time-barred, since all of the referrals for which plaintiffs might be entitled to recover were concluded beyond the statutory period and Eisen has failed to produce any evidence that would entitle him to the defense of laches.

#### DISCUSSION

"The proponent of a summary judgment motion 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 [internal quotation marks and citation omitted]." *Santiago v Filstein*, 35 AD3d 184, 185-186 (1<sup>st</sup> Dept 2006). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to

raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1<sup>st</sup> Dept 2006); see *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. See *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

In this court's prior decision, filed on August 13, 2010, it was held that plaintiffs' cause of action for breach of contract was not necessarily time-barred, that the cause of action for unjust enrichment, basically plaintiffs' quantum meruit argument, was not time-barred for matters resolved within the six years prior to the institution of the present lawsuit, that the cause of action pursuant to the Judiciary Law is not time-barred for matters resolved within the six years prior to the institution of the present litigation, and that the cause of action for breach of fiduciary obligation has yet to run. However, this court also stated that there was insufficient evidence as to when these referred cases were resolved so as to make a final determination regarding whether the actions were in fact time-barred, and that no determination was being made as to whether a fiduciary relationship existed between the parties.

For the same reasons indicated in the prior order,

Goldstein's motion is denied. There are too many material questions of fact precluding the court from granting summary judgment.

It is well settled that

"[a] disbarred or suspended attorney may not share in any fee for legal services during the period of his or her removal from the bar. However, the attorney may be compensated ... for legal services rendered and disbursements incurred prior to the effective date of the disbarment, suspension order, or resignation ... [internal citation omitted]."

*Glinkenhouse v Karp*, 60 AD3d 630, 632 (2d Dept 2009); *Rothman v Benedict P. Morelli & Associates, P.C.*, 43 AD3d 769 (1<sup>st</sup> Dept 2007).

With respect to Eisen himself, the Appellate Court has stated, in similar lawsuits:

"[Eisen] may recover on his breach of contract claims for cases he referred and which were disposed of prior to his disbarment on January 23, 1992, and on a quantum meruit basis, for cases on which he worked and were still pending at the time of his disbarment."

*Eisen v Feder*, 47 AD3d 595, 596 (1<sup>st</sup> Dept 2008); *Eisen v Feder*, 307 AD2d 817 (1<sup>st</sup> Dept 2003).

However, although Goldstein avers that the referred cases for which Eisen has produced retainer records were resolved no later than 1995, he has produced no evidence as to the dates of those matters' resolutions. Similarly, whereas Goldstein states

that Eisen made no appearances with respect to several of the referred cases, he has failed to support those statements with any evidence in admissible form. Moreover, neither party has addressed, with sufficient particularity, the cause of action based on a breach of fiduciary relationship.

Since Goldstein has failed to meet his burden of proof with respect to the instant motion, the court need not address the sparseness of Landau's evidence submitted in opposition.

#### CONCLUSION

Based on the foregoing, it is hereby

ORDERED that Lloyd Goldstein's motion for summary judgment is denied; and it is further

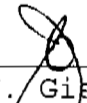
ORDERED that a compliance conference is scheduled in Part 10, October 27, 2011 at 9:30 a.m.

Dated: New York, New York  
September 1, 2011

So Ordered:

**FILED**

**SEP 02 2011**

  
\_\_\_\_\_  
Judith J. Gische, J.S.C.

NEW YORK  
COUNTY CLERK'S OFFICE