

Landau, P.C. v Oliveri & Schwartz, P.C.

2011 NY Slip Op 33415(U)

December 12, 2011

Supreme Court, New York County

Docket Number: 601131/2007

Judge: Saliann Scarpulla

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

PRESENT: SALIANN SCARPULLA

PART 19

Justitia

Index Number : 601131/2007

LANDAU P.C.

VS.

OLIVERI & SCHWARTZ

SEQUENCE NUMBER : 004

SUMMARY JUDGMENT

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 *is decided in accordance with the accompanying memorandum decision.*

FILED

DEC 14 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: 12/12/11

Saliann Scarpulla
SALIANN SCARPULLA *S.C.*

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):

- on January 23, 1992. Thereafter, Eisen resigned as Morris J. Eisen, P.C.'s managing partner and transferred all his shares in the firm to his daughter, Debbie Landau, an attorney duly licensed to practice law in New York. In September 1992, the firm's name was officially changed to Landau, P.C. ("Landau").

Landau pleads four causes of action in its complaint. In the first cause of action Landau alleges that Oliveri breached a referral agreement the parties entered into prior to Eisen's disbarment. Under this alleged agreement, Eisen would refer clients to Oliveri and receive 50% of the net legal fees if Oliveri settled the cases and 33 1/3% of the net legal fees if Oliveri tried them to verdict. Landau's complaint includes a partial list of clients Eisen allegedly referred to Oliveri, and Landau alleges that some of these cases have been settled or tried to verdict.

The second cause of action is for unjust enrichment. In this cause of action Landau alleges that Eisen performed uncompensated work on the cases he referred to Oliveri. In its third cause of action, Landau alleges that it has a charging lien on the referred cases. In its fourth cause of action Landau demands an accounting of all amounts Oliveri collected on the cases Eisen referred, all amounts to be due at future dates, the status of all other cases where Eisen was the attorney, and access to information relating to the referred cases.

In its verified bill of particulars, Landau provided the dates of settlement or verdict on twenty four of the cases listed in the complaint, many of which occurred after Eisen's

disbarment. Landau also described, in general terms, the work Eisen completed on the referred cases prior to his disbarment. Thus Landau stated that Eisen "interviewed the client, did an investigation, secured records and performed other services related to the case." Landau did not affirm that Eisen had appeared as the attorney of record in any of the actions. Further, Landau stated that it had not made an application in court for an order to fix compensation on the referred cases.

Oliveri now moves for summary judgment dismissing the complaint, arguing that Landau is not entitled to any referral fees because Eisen's disbarment occurred during the pendency of the actions. Oliveri argues that the unjust enrichment cause of action fails because Landau did not provide the clients with the required notice of this action. Oliveri also maintains that Landau is not entitled to a charging lien because Eisen never appeared in any of the alleged actions. Lastly, Oliveri contends that the complaint cannot state an accounting cause of action because there is no fiduciary relationship between Landau and Oliveri.

In opposition, Landau maintains that it is entitled to the contractual referral fee for all referred cases that were resolved by settlement or trial before Eisen's disbarment in 1992. Landau also argues that it will give notice to the plaintiffs on the unjust enrichment cause of action when it learns their names and addresses after further discovery.

Discussion -

A movant seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to eliminate any material issues of fact. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once a showing has been made, the burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980).

Here, Oliveri has not submitted sufficient evidence to show its entitlement to summary judgment as a matter of law dismissing the breach of contract cause of action in its entirety. A disbarred attorney “may not share in any fee for legal services performed by another attorney during the period of his removal from the bar.” 22 NYCRR § 603.13(b); *Rothman v. Benedict P. Morelli & Assoc., P.C.*, 43 A.D.3d 769, 769 (1st Dept. 2007). However, a disbarred attorney may earn commission on cases settled prior to disbarment. *Eisen v. Feder*, 307 A.D.2d 817, 818 (1st Dept. 2003). In its complaint Landau listed a number of cases allegedly subject to the referral agreement. While in its verified bill of particulars Landau was unable to confirm the settlement or verdict dates of many of the referred cases, and some of the confirmed settlement/verdict dates were after Eisen’s disbarment, at least some of the settlement/verdict dates that Landau did provide were before Eisen’s disbarment.

As both parties acknowledge, not much discovery has taken place in this action. There has been minimal exchange of documents, and no depositions have taken place. At this point Landau is only entitled to summary judgment on the breach of contract cause of action as to those cases subject to the referral agreement which were settled or tried to verdict after Eisen's disbarment.

However, Oliveri is entitled to judgment as a matter of law on the unjust enrichment cause of action. A disbarred attorney may make an application to recover on a *quantum meruit* basis for legal services the attorney provided before disbarment. 22 NYCRR § 603.13. "The amount and manner of payment of such compensation . . . shall be fixed by the court . . . on notice to the other as well as on notice to the client." 22 NYCRR § 603.13(b). Landau admits in its opposition papers that it has not given any clients notice of this lawsuit or notice that Eisen has made a claim for legal fees. Thus, the unjust enrichment cause of action must be dismissed. *See Rothman*, 43 A.D.3d at 770 (dismissing disbarred attorney's unjust enrichment cause of action arising out of alleged client referral agreement because "there [was] no evidence that any of the clients were given the requisite notice of [the] application").

Further, Landau is not entitled to a charging lien on the referred cases. A charging lien is only available to attorneys who have appeared for parties by "participating in a legal proceeding on the client's behalf or by having his [or her] name affixed to the pleadings, motions, records, briefs, or other papers submitted in the matter."

Ebert v New York City Health & Hosps. Corp., 210 A.D.2d 292, 292-93 (2d Dept. 1994).

Here, Landau does not allege, either in its complaint or in its verified bill of particulars, that Eisen actually appeared for any of the referred clients, thus Landau has failed to state a claim for a charging lien. *See Rothman*, 43 A.D.3d at 770 (dismissing a charging lien cause of action where the complaint did not allege that plaintiff, a disbarred attorney, appeared in any of the actions that plaintiff allegedly referred to defendant).

Lastly, Landau's accounting cause of action is dismissed. The right to an accounting only exists where there is a fiduciary relationship between the parties. *Palazzo v. Palazzo*, 121 A.D.2d 261, 265 (1st Dept. 1986). Here, the alleged referral contract between Eisen and Oliveri in and of itself did not establish a fiduciary relationship between them.

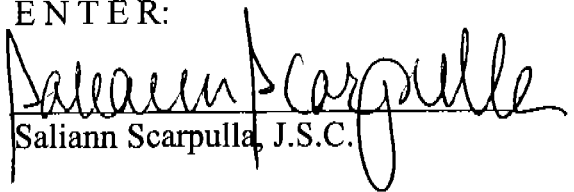
In accordance with the foregoing, it is hereby

ORDERED that defendant Oliveri & Schwartz, P.C.'s motion for summary judgment dismissing the complaint is granted to the extent that the Court dismisses the breach of contract causes of action relating to all cases settled or tried to verdict after Morris J. Eisen's disbarment; the second cause of action for unjust enrichment; the third cause of action for a charging lien; and the fourth cause of action for an accounting. That part of the breach of contract cause of action relating to cases settled or tried prior to

Eisen's disbarment is severed and shall continue. The parties are directed to appear for a -
conference on February 1, 2012, at Part 19, 80 Centre Street, Room 279, at 2:15 p.m.

This constitutes the decision and order of the Court.

Dated: New York, New York
December 13, 2011

ENTER:

Saliann Scarpulla, J.S.C.

FILED
DEC 14 2011
NEW YORK
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