SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**
Justice

TRIAL/IAS PART 14

_____X

JAY LANDA,

Plaintiff,

-against-

Index No.: 008391/09
Motion Sequence...05
Motion Date...03/06/12

CHRISTINE SHERMAN,

Defendant.

_____X

Papers Submitted:
Notice of Motion.....x
Affirmation.....x
Reply Affidavit.....x

Upon the foregoing papers, the Plaintiff, Jay Landa, proceeding *pro se*, moves for the following relief: (1) an order "[g]ranting, with respect to Plaintiff's Second, Fourth, Sixth, Eighth & Tenth Causes of Action for Account Stated, his motion in limine to exclude the use of any evidence by the Defendant which may pertain to her First, Second, Third, Fourth, Eighth & Ninth Affirmative Defenses, inasmuch as such defenses do not pertain to any action based upon an Account Stated, and would thus be inadmissible, immaterial, and prejudicial; (2) [g]ranting the Plaintiff's motion to dismiss Defendant's First Affirmative

Defense, inasmuch as such defense is inconsistent with the law; (3) [g]ranting, with respect to Plaintiffs' First, Second, Fourth, Sixth, Eighth, Ninth & Tenth Causes of Action for legal services and Account Stated, his motion in limine to exclude the use of any evidence by the Defendant which may pertain to her First Affirmative Defense, inasmuch as such defense is inconsistent with the law, and would thus be inadmissible, immaterial, and prejudicial; (4) [g]ranting, with respect to the Plaintiff's First Cause of Action for legal services, and with respect to the Plaintiff's Second Cause of Action for Account Stated, his motion in limine to exclude the use of any evidence by Defendant which may pertain to her Second and Third Affirmative Defenses, inasmuch as such defenses do not pertain to services rendered prior to the entry of the Judgment of Divorce on August 24, 2001, and would thus be inadmissible, immaterial, and prejudicial; (5) [g]ranting, with respect to all of Plaintiff's Causes of Action, his motion in limine to exclude the use of any evidence by Defendant which may pertain to her Second & Third Affirmative Defenses, inasmuch as such Plaintiff had not been retained by Defendant to appeal from that part of the Judgment of Divorce which denied her application for counsel fees; (6) [g]ranting, with respect to the Plaintiff's Seventh & Ninth Causes of Action for legal services, and with respect to the Plaintiff's Eighth & Tenth Cause of Action for Account Stated, his motion in limine to exclude the use of any evidence by the Defendant which may pertain to her Second & Third Affirmative Defense, inasmuch as said defenses do not pertain to services rendered subsequent to the execution of the parties' third retainer agreement on October 29, 2003, and would thus be inadmissible, immaterial, and

prejudicial; (7) [g]ranting Plaintiff an Age Related Preference pursuant to CPLR § 3402 (a) (3)[1], and; (8) [g]ranting such other and further relief as may be just and proper, including an award of costs pursuant to CPLR § 8202, plus $45 for disbursement incurred in filing this motion".

By way of an abbreviated background, the Plaintiff, Jay Landa, represented the Defendant, Christine Sherman (now known as Christine Bardy), in a matrimonial action in which she was the Plaintiff.[2] As a result thereof, a fee dispute arose in connection to which Mr. Landa commenced the underlying action to recover those fees which remained outstanding. During the course of the within litigation, the Plaintiff served a Second Amended complaint dated March 3, 2010, which contained a total of ten (10) causes of action, five (5) of which sought fees based upon legal services rendered and five of which sought fees based upon an account stated. In response thereto, the Defendant served an Amended Verified Answer and Counterclaim, which contained nine (9) affirmative defenses and one (1) counterclaim. The Plaintiff thereafter moved for an order seeking, *inter alia*, dismissal of all nine affirmative defenses, as well as the counterclaim.

By Short Form Order dated December 15th, 2010, the Plaintiff's application was granted to the extent that this Court dismissed the Defendants' counterclaim together with those affirmative defenses denominated Fifth, Sixth and Seventh. With respect to the

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[1] The Court notes that CPLR § 3402 (a) (3) does not exist.

[2] A full recitation of the facts relevant to the underlying action are set forth in this Court's Short Form Order dated, December 15th, 2010.

remaining affirmative defenses, the substantive allegations contained therein were as follows: the First Affirmative Defense alleged that in accordance with a decision of the Appellate Division as to post-judgment fees,[3] the Plaintiff was precluded from recovering same based upon *res judicata* and *collateral estoppel*; the Second and Third affirmative defenses each alleged negligence on the part of the Plaintiff with respect to the legal representation afforded during the matrimonial litigation; the Fourth affirmative defense alleged that had the Defendant been cognizant of certain facts she would have discharged the Plaintiff for cause, and; the Eighth and Ninth affirmative defenses each alleged that the amount of legal fees charged was excessive.

In refusing to dismiss the foregoing defenses, this Court carefully and thoughtfully evaluated each of the defenses and found same to be legally cognizable. Specifically, as to the First Affirmative Defense, given the order of the Appellate Division expressly holding that Mr. Landa "was not entitled to recover a fee for postjudgment services rendered" to the Defendant, and given that several of the Plaintiff's causes of action precisely demanded payment therefor, this Court accordingly found said defense to be viable.

As to the Second and Third affirmative defenses, this Court held that for the limited purposes of recoupment, the Defendant could assert a defense sounding in negligence, which is a legally recognized defense in actions seeking payment of counsel fees

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[3]In a decision rendered in the matrimonial action, the Appellate Division, Second Department, held that Mr. Landa "was not entitled to recover a fee for postjudgment services rendered to the appellant [Ms. Bardy]" (*Sherman v Sherman*, 34 AD3d 670 [2d Dept 2006]).

(*Rothschild v. Industrial Test Equipment Company*, 203 A.D.2d 271 [2d Dept. 1994]; *Martin, Van de Walle, Guarino & Donahue v. Yohay*, 149 A.D.2d 477 [2d Dept. 1989]; *Campagnola v. Mulholland, Minion & Roe*, 148 A.D.2d 155 [2d Dept. 1989]; *Kluczka v. Lecci,* 63 A.D.3d 796 [2d Dept. 2009]). With respect to the Fourth Affirmative Defense, this Court noted the Appellate Division had held that in the event a former client could establish that she would have been justified in discharging her attorney for cause had she been aware of certain conduct, such after acquired knowledge may be employed as a defense to a claim for counsel fees (*Coccia v. Liotti*, 70 A.D.3d 747 [2d Dept. 2010] at 757-758).

Finally, and with respect to the Eighth and Ninth Affirmative Defenses, this Court declined to dismiss same given the court's "traditional authority to 'supervise the charging of fees for legal services' "(*Koral v. Koral*, 185 A.D.2d 298 [1992] quoting *Matter of First Natl. Bank of East Islip v. Brower*, 42 N.Y.2d 471 [1977] at 474).

Notwithstanding the determinations previously rendered by this Court, the Plaintiff has interposed the within motion whereby he resurrects his assertions that the defenses set forth by the Defendant are inapplicable to the underlying action and *once again* affirmatively seeks dismissal of the First Affirmative Defense (*see* Landa Affidavit at ¶ 25). Thus, while cast as a motion *in limine*, the Plaintiff, in actuality, is seeking to reargue this Court's prior decision dated, December 15th, 2010.

It is well settled that "[m]otions for reargument are addressed to the sound discretion of the trial court which decided the prior motion and may be granted upon a

showing that the court overlooked or misapprehended the facts or law or mistakenly arrived at its earlier decision." (*Viola v. City of New York*, 13 A.D.3d 439 [2d Dept. 2004]; *Carrillo v. PM Realty Group*,16 A.D.3d 611 [2d Dept. 2005]; *Singleton v. Lenox Hill Hospital,* 61 A.D.3d 956 [2d Dept. 2009]). However, a motion to reargue is not to afford an unsuccessful party with additional opportunities to reargue issues previously decided, or to set forth arguments which differ in substance from those originally articulated (*McGill v. Goldman*, 261 A.D.2d 593 [2d Dept. 1999]; *Woody's Lumber Co., Inc. v. Jayram Realty Corp.*, 30 A.D.3d 590 [2d Dept. 2006]; *Gellert & Rodner v. Gem Community Mgt., Inc.*, 20 A.D.3d 388 [2d Dept. 2005]; *Mazinov v. Rella*, 79 A.D.3d 979 [2d Dept. 2010]).

In the application *sub judice*, the Plaintiff herein recycles and repackages the arguments which were previously considered and rejected by this Court (*id.*). Therefore, those branches of the Plaintiff's application denominated as numbers 1, 2, 3, 4, 5, 6 and 8 are hereby **DENIED** and that branch of the Plaintiff's application denominated as number 7, which seeks an age related trial preference, is hereby **GRANTED** (CPLR § 3403 [a] [4]).[4]

This constitutes the Decision and Order of the Court.

All applications not specifically addressed are denied.

DATED: Mineola, New York
April 30, 2012

Hon. Randy Sue Marber, J.S.C.

[4] CPLR § 3403 (a) (4) provides, in relevant part, that "[c]ivil cases shall be tried in the order in which notes of issue have been filed, but the following shall be entitled to a preference: * * * in any action upon the application of a party who has reached the age of seventy years." Here, the Plaintiff is 80 years of age having been born on November 19th, 1931 (*see* Landa Affidavit at ¶ 57).