

Pryor Cashman LLP v U.S. Coal Corp.
2012 NY Slip Op 33365(U)
July 19, 2012
Supreme Court, New York County
Docket Number: 651908/11
Judge: Melvin L. Schweitzer
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: MELVIN L. SCHWEITZER
Justice

PART 45

PRYOR CASHMAN LLP

INDEX NO. 651908/11

-v-

MOTION DATE _____

US COAL CORPORATION

MOTION SEQ. NO. 002

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion *is by defendant to*
pleague is GRANTED per the
attached Decision and Order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: July 19, 2012

Melvin L. Schweitzer

JUL 25 2012
NEW YORK COUNTY CLERK

1. CHECK ONE: ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: ☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ☐ SETTLE ORDER ☐ SUBMIT ORDER
- ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 45

-----X	:	
PRYOR CASHMAN LLP,	:	
	:	
Plaintiff,	:	Index No. 651908/11
	:	
-against-	:	DECISION AND ORDER
	:	
U.S. COAL CORPORATION,	:	Sequence No. 002
	:	
Defendant.	:	
-----X	:	

MELVIN L. SCHWEITZER, J.:

Defendant U.S. Coal Corporation (US Coal) moves to reargue plaintiff Pryor Cashman LLP's (Pryor Cashman) cross-motion for a protective order pursuant to CPLR 2221 (d).

Facts

In 2006, US Coal retained the law firm Pryor Cashman to act as its legal counsel in connection with various corporate and securities matters. Pryor Cashman alleges that US Coal failed to pay in full for the services performed by Pryor Cashman. In June 2011, it withdrew as legal counsel to US Coal. Pryor Cashman then brought suit asserting two causes of action – breach of contract and account stated. US Coal subsequently asserted counterclaims for breach of fiduciary duty.

On September 30, 2011, US Coal served its First Request for Production of Documents. Pryor Cashman refused to produce any documents, however, claiming that it had a retaining lien over all of US Coal's papers and files.

On December 7, 2011, US Coal filed a Motion to Compel Pryor Cashman to disclose its documents. Pryor Cashman cross-moved for a protective order requesting that the court prevent US Coal from obtaining documents protected by Pryor Cashman's retaining lien, or, if Pryor

Cashman were compelled to produce documents, to require US Coal to post a bond as security for the \$2,455,478.86 it alleges that US Coal owes Pryor Cashman.

On April 5, 2012, the court ruled that it “will not permit Pryor Cashman’s attorneys’ retaining lien to bar discovery.” The court added, though, that “security is appropriate in this case,” and that “US Coal shall post with the court a bond securing payment . . . in the amount of \$2,455,478.86 prior to Pryor Cashman’s producing the requested documents.”

On May 10, 2012, US Coal moved pursuant to CPLR 2221 (d) for leave to reargue on the grounds that matters of fact and law offered on the cross-motion were overlooked or misapprehended by the court in determining the cross-motion. It argues that the court should lift the bonding requirement, or, at the very least, exclude from its scope any documents that are not the property of US Coal and thus are not subject to a retaining lien.

Discussion

Under CPLR 2221(d), a motion for leave to reargue “shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion.” Under New York law, “the decision whether to entertain reargument is committed to the sound discretion of the court.” *Rostant v Swersky*, 79 AD3d 456 (1st Dept 2010).

US Coal argued in its brief on the original motion that “a retaining lien extends only to the *client’s* files, and not to attorney’s files on other subjects,” so the retaining lien should not bar Pryor Cashman from producing documents such as its own invoices for fees billed, its time records, or its internal policy documents. Hence, defendant’s motion for leave to reargue does not include “matters of fact not offered on the prior motion.” For this reason, if the court finds it “overlooked or misapprehended” “matters of fact or law,” it may grant US Coal’s motion.

Concerning the merits of the parties' arguments, under New York law, a retaining lien "entitles the attorney 'to retain all papers, securities or money belonging to the client' that come into the attorney's possession in the course of the representation, as security for payment of attorneys' fees." *Hoke v Ortiz*, 83 NY2d 323, 331 (1994). It covers "the papers, documents and other personal property of the client" that an attorney has gained possession of as part of his or her representation of the client. *Schneider Kleinick, Weitz, Damashek & Shoot v City of New York*, 302 AD2d 183, 186 (1st Dept 2002).

In this case, although US Coal may have requested the production of certain documents that are US Coal's property, it also has requested the production of certain documents that are not US Coal's property. For example, defendant has requested "all documents constituting or concerning any policies, guidelines, rules, regulations, practices, or requirements imposed or recommended by Pryor Cashman to or for its attorneys or other timekeepers for the recording of time or expenses to be billed to clients." It has asked for the names, addresses, and phone numbers of former Pryor Cashman employees or partners who "billed any time to any US Coal matter" while at Pryor Cashman. It also requests "documents concerning any claim by any person that Pryor Cashman . . . ever improperly billed any client of Pryor Cashman." Such claims, if they exist, are not the property of US Coal.

Plaintiff argues that defendant "improperly conflates two separate principals [sic] – the scope of a retaining lien versus the court's undeniable authority to govern discovery and order a party to post a bond" before documents are produced. Plaintiff may be correct that the scope of a retaining lien is distinct from the court's authority to govern discovery. However, it would be inappropriate in this case for the court to use its authority to require defendant to post a bond prior to plaintiff's production of documents not subject to a retaining lien, particularly since

defendant has asserted counterclaims. *See Wagner Davis, P.C. v Gargano*, 2010 NY Slip Op. 30156U (N.Y. Sup. Ct. 2010). In its original decision, the court required US Coal to post a bond. The purpose of the bond was to act as a substitute form of security. The court found that documents belonging to US Coal had to be produced, so it imposed a bond in order to replace the retaining lien as a means to maintain the “[attorney’s] right to be paid for services rendered should the [fact finder] find in its favor. *Matter of Science Dev. Corp.*, 159 AD2d 343, 344 (1st Dept 1990). Since the bond was to replace the retaining lien as a means to secure Pryor Cashman, it ought not apply to documents outside the scope of a retaining lien.

Moreover, Pryor Cashman cites no cases in which a court extended a retaining lien beyond files that were property of the client.¹ Therefore, this court declines to compel US Coal to post a bond before Pryor Cashman produces documents that are not US Coal’s property.

Given that US Coal allegedly has failed to pay Pryor Cashman’s attorneys’ fees, that Pryor Cashman was not discharged for cause, and that there has been no finding of wrongdoing against Pryor Cashman, the court reiterates that US Coal must post a bond in the amount of \$2,455,478.86 (the amount Pryor Cashman alleges it is owed by US Coal) before the firm is made to produce requested documents that are the property of US Coal. *See Matter of Science*, 159 AD2d at 344; *see also Tuff & Rumble Mgmt. v Landmark Distribs.*, 254 AD2d 15 (1st Dept 1998) (noting that “absent proof of discharge for cause,” attorney cannot be compelled to hand over client’s file without being “paid or secured”).

¹ *Matter of Science Dev. Corp. (Schonberger)*, 159 AD2d 343, 344 (1st Dept 1990), states that the attorney has a retaining lien “on the file in its possession.” However, this case provides no reason to deviate from the prevailing view that a retaining lien covers only property of the client. This case does not specify what documents are covered by the lien, and every case cited in the parties’ briefs that explicitly deals with the scope of a retaining lien limits the retaining lien to property of the client.

Accordingly, it is

ORDERED that defendant's motion to reargue is granted; and it is further

ORDERED that Pryor Cashman produce all documents requested by US Coal that are not US Coal's property without US Coal being required to post a bond with respect to these documents; and it is further

ORDERED that US Coal must post with the court a bond securing payment (or deposit payment in escrow) in the amount of \$2,455,478.86 prior to Pryor Cashman being required to produce requested documents that are US Coal's property.

Dated: July 19, 2012

ENTER:

J.S.C.

MELVIN L. SCHWEITZER
J.S.C.