

Lacher & Lovell-Taylor v Chowaiki

2013 NY Slip Op 32695(U)

October 24, 2013

Sup Ct, New York County

Docket Number: 652163/2011

Judge: Anil C. Singh

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. ANIL C. SINGH
SUPREME COURT JUSTICE
Justice

PART 61

Index Number : 652163/2011
LACHER & LOVELL-TAYLOR
vs.
CHOWAIKI, EZRA
SEQUENCE NUMBER : 003
SUMMARY JUDGEMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to 3, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). 1
Answering Affidavits — Exhibits _____ No(s). 2
Replying Affidavits _____ No(s). 3

Upon the foregoing papers, it is ordered that this motion is *decided in accordance with the annexed memorandum opinion.*

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

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

Dated: 10/24/13

ACC
HON. ANIL C. SINGH, J.S.C.
~~SUPREME COURT JUSTICE~~

- 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: IAS PART 61

-----X
LACHER & LOVELL-TAYLOR,

Plaintiff,

INDEX NO.
652163/2011

-against-

EZRA CHOWAIKI, CHOWAIKI MOSTIONZHNIK
GALLERY LTD., ZELCO LTD., CHOWAIKI & CO.,
LLC, and DAVID E. R. DANGOOR,

DECISION

Defendants.

-----X
CHOWAIKI & CO. FINE ART, LTD., CHOWAIKI
MOSIONZHNIK GALLERY, LTD., ZELCO LTD.,
DAVID E. R. DANGOOR AND EZRA CHOWAIKI,

Plaintiffs,

INDEX NO.
653237/11

-against-

MICHAEL A. LACHER,

Defendant.

-----X

HON. ANIL C. SINGH, J.:

This lawsuit pits a busy litigator against his very dissatisfied former clients. Ezra Chowaiki & Co. Fine Art, Ltd., Chowaiki Mosionzhnik Gallery, Ltd., Zelco Ltd., David R. Dangoor and Ezra Chowaiki, defendants in the first captioned matter and plaintiffs in the second are hereafter referred to collectively as the Chowaiki party, whereas Lacher and Lovell-Taylor, plaintiffs in the first captioned matter, and Michael A. Lacher, individually, defendant in the second captioned matter, are hereafter referred to collectively as the Lacher party.

Lacher and Lovell-Taylor were formally associated in a law firm, now disbanded, and

thus Lacher is sued in his individual capacity. The Chowaiki party hired the Lacher party as attorneys to obtain damages against a former shareholder in the Chowaiki party associated businesses who had allegedly engaged in various acts of fraud and breaches of fiduciary duty. It is Chowaiki party's assertion that the collective will of the Chowaiki party was overborne and intimidated by the constant demands for immediate payment of monthly invoices from the Lacher party, and misrepresentation by the latter of the mutual obligations between lawyer and client. In the top captioned case, the Lacher party sues to collect fees claimed to be due and owing from defendant for services rendered. In the bottom captioned case, the Chowaiki party demands judgment against Lacher for disgorgement of all fees previously paid.

By notice of motion dated April 25, 2013, the Lacher party requests summary judgment on the issue of liability, and dismissal of the Chowaiki party's counterclaims in the law suit in which the Lacher party is plaintiff, and summary judgment dismissing the complaint of the Chowaiki party in the cause of action in which Lacher is the defendant.

In order to prevail on its motion for summary judgment, the movant (Lacher) must make a prima facie showing of entitlement to judgment as a matter of law through admissible evidence, eliminating all material issues of fact (*Alvarez v Prospect Hospital*, 68 NY2d 320,324[1986]). Once the movant demonstrates entitlement to judgment, the burden shifts to the opponent to rebut that prima facie showing (*Bethlehem Steel Corp. v Solow*, 51 NY2d 870, 872 [1980]). In opposing such a motion, the adversary party must lay bare its evidentiary proof. Conclusory allegations are insufficient to defeat the motion; the opponent "must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact" (*Zuckerman v City of New York*, 49 NY2d 557, 562[1980]).

In deciding the motion, the court must "draw all reasonable inferences in favor of the

non-moving party” and must not decide credibility issues (*Dauman Displays, Inc. v Masturzo*, 168 AD2d 204[1st Dept 1990], *lv denied* 77 NY2d 939[1991]). As summary judgment is a drastic remedy which deprives a party of being heard, it “should not be granted where there is any doubt as to the existence of a triable issue of fact” (*Chemical Bank v West 95th Street Development Corp.*, 161 AD2d 218, 219[1st Dept 1990]), or where the issue is even arguable or debatable (*Stone v Goodson*, 8 NY2d 8, 13[1960]).

In Ezra Chowaiki’s affidavit, sworn to on July 8, 2013, the Chowaiki party raises more than sufficient disputed issues of fact to defeat the Lacher motion for summary judgment in both causes of action. The continuous use of threats to resign, to leave the Chowaiki party stranded in the middle of depositions without counsel, misrepresentation of the obligation of an attorney of record as free to resign from the case if not paid, misrepresentation of the client’ obligation to pay immediately— credited as true for purposes of this motion—are clearly breaches of Lacher’s fiduciary duty. In *Campagnola v. Mulholland*, (76 NY2d 38,43-44 [1990]) the court passed upon the special fiduciary relationship which characterizes the attorney-client association (*id.* 44). The application of ordinary contract rules are inapplicable, for when the attorney has failed in his or her obligation of undivided loyalty to the client, the attorney forfeits all the benefits of the relationship.

Lacher’s invocation of the account stated principal as a shield against Chowaiki’s claims of wrong-doing are unavailing. An account stated is predicated on the theory that the defendant has previously received bills without protest and has thus implicitly accepted their content (*Abbott Duncan and Weiner v Ragusa*, 214 AD2d 412 [1st Dept 1995]). The principal has no application to a case, where, as here, a dispute is shown to exist, but not vigorously pursued because of the wrongdoing, the misrepresentation of the billing party (*id.*; *Landa v Blocker* 87

AD3d 719, 721-22 [2^d Dept 2011]; *M & A Construction Corporation v. McTague*, 21 AD3d 610, 611 [3rd Dept 2005]).

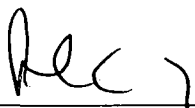
Upon the foregoing, that branch of the Lacher party's motion in the first captioned case, for summary judgment on the issue of liability, and that branch of the said motion for summary judgement dismissing the Chowaiki party's affirmative defenses and counterclaims, and that branch of the motion for summary judgment dismissing the Cowaiki party's complaint in the second captioned matter, are denied in all respects.

WHEREFORE, it is

ORDERED, that the motion by Lacher for summary judgment as to both the first and second captioned matters is denied in all respects.

This constitutes the decision and order of the court.

Dated: Oct 24, 13



J. S. C. HON. ANIL C. SINGH
SUPREME COURT JUSTICE