

**Kasowitz, Benson, Torres & Friedman LLP v
Coleman**

2014 NY Slip Op 30270(U)

January 30, 2014

Supreme Court, New York County

Docket Number: 151970/12

Judge: Anil C. Singh

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

HON. ANIL C. SINGH
SUPREME COURT JUSTICE

PRESENT: _____

PART 61

Index Number : 151970/2012
KASOWITZ, BENSON, TORRES &
vs
COLEMAN, JOHN
Sequence Number : 002
REARGUMENT/RECONSIDERATION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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 *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: 1/30/2014

Acc, J.S.C.
HON. ANIL C. SINGH
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: PART 61

-----X
KASOWITZ, BENSON, TORRES & FRIEDMAN LLP,

Plaintiff,

DECISION AND
ORDER

-against-

Index No.
151970/12

JOHN COLEMAN,

Defendant.

-----X

HON. ANIL C. SINGH, J.:

Plaintiff moves pursuant to CPLR 2221(d)(2) for leave to reargue our order dated April 12, 2013, denying plaintiff’s motion for summary judgment on its claims for unpaid legal fees. Defendant has neither served nor filed opposition papers, so the motion to reargue is unopposed.

“A motion for reargument, addressed to the discretion of the court, is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law. Its purpose is not to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided. Nor does reargument serve to provide a party an opportunity to advance arguments different from those tendered on the original application. It may not be employed as a device for the

unsuccessful party to assume a different position inconsistent with that taken on the original motion.” (Foley v. Roche, 68 A.D.2d 558, 567-568 [1st Dept., 1979]).

We agree with plaintiff’s contention that the Court did not fully address plaintiff’s assertion that it is entitled to summary judgment on collateral estoppel grounds. Accordingly, we will now address that specific issue.

Plaintiff exhibits the sworn affidavit of Matthew B. Stein, Esq., who states that he is an associate of plaintiff Kasowitz, Benson, Torres & Friedman, LLP (“KBTF”). He contends that pursuant to a written Fee Payment Agreement dated January 6, 2011, between defendant John Coleman and KBTF, Coleman agreed to pay the fees and disbursements of KBTF incurred in connection with its engagement on behalf of Alcorn Elston, LLC, as debtor in the underlying proceeding in Bankruptcy Court. According to Stein, Coleman advised KBTF that he was the managing member of the debtor and that he and/or members of his family owned 100% of the equity interests in the debtor, a single-asset entity and owner of the Elston Plaza Shopping Center located in Chicago, Illinois. Stein asserts that on January 23, 2012, the Bankruptcy Court entered an order approving KBTF’s fees in the amount of \$440,841.14 and its expenses in the amount of \$3,837.56; no objections were filed by Coleman with respect to approval of KBTF’s fees and expenses; nor were any objections raised by Coleman at the

hearing before the Bankruptcy Court on KBTF's application. Finally, Stein states that KBTF applied Coleman's retainer balance and all fees received from the debtor to Coleman's unpaid balance, leaving a remaining balance owed by Coleman to KBTF in the amount of \$241,803.90.

A copy of the Fee Payment Agreement is annexed as an exhibit to Mr. Stein's affidavit. The agreement states in part:

You have advised us that you are the managing member of the debtor and that you and/or members of your family own 100% of the equity interests in the debtor.

...

This letter confirms your agreement to pay the fees and disbursements of Kasowitz incurred in connection with the firm's engagement. Because (i) the debtor is not able under applicable bankruptcy law to use the lender's cash collateral to pay the firm's fees and disbursements in the absence of the lender's consent or an order of the court authorizing such use and (ii) the debtor has no other funds, other than the Lender's cash collateral, with which to pay the firm's fees and disbursements, the firm cannot, and, you and we have agreed, has no obligation to, seek payment of its fees and disbursements from the debtor in the first instance or otherwise. Therefore, your agreement to pay the firm's fees and disbursements is a primary obligation on your part.

(Motion to Reargue, exhibit 2).

Plaintiff contends that defendant is contractually bound under the Fee Payment Agreement to pay the debtor's legal fees, and that the determination by the Bankruptcy Court that those fees are reasonable are indisputably decisive of

the present action. Plaintiff contends that, as the sole manager/member of Acorn Elston, Coleman's privity and control over the debtor is "apparent."

The Court finds that the sworn affidavit of Matthew B. Stein, Esq., and the Fee Payment Agreement are sufficient to make out a prima facie case for summary judgment in plaintiff's favor on the first cause of action for breach of contract.

It is undisputed that no objections were raised by Coleman at the hearing before the Bankruptcy Court on KBTF's fee application.

The doctrine of collateral estoppel has been summarized as follows:

Collateral estoppel precludes a party from re-litigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity. Two requirements must be met before collateral estoppel can be invoked. There must be an identity of issue which has necessarily been decided in the prior action and is decisive of the present action, and there must have been a full and fair opportunity to contest the decision now said to be controlling. The litigant seeking the benefit of collateral estoppel must demonstrate that the decisive issue was necessarily decided in the prior action against a party, or one in privity with a party. The party to be precluded from re-litigating the issue bears the burden of demonstrating the absence of a full and fair opportunity to contest the prior determination.

(Lumbermens Mutual Casualty Co. v. 606 Restaurant, Inc., 31 A.D.3d 334, 334

[1st Dept., 2006] (internal citations and quotation marks omitted)).

"In view of the rule that a party is barred, under the doctrines of res judicata and collateral estoppel, from relitigating its liability in a state action where the

issue raised is identical to that litigated and resolved in the prior federal action, the principles of res judicata and collateral estoppel apply to decisions of the federal bankruptcy courts” (73A N.Y.Jur.2d Judgments section 446).

The issue here is whether defendant was in privity with the debtor in the bankruptcy proceedings.

“For collateral estoppel purposes, privity does not have a technical and well-defined meaning but is an amorphous term or concept not susceptible to ease of application” (73A N.Y.Jur.2d Judgments section 369). “In addressing privity, courts must carefully analyze whether the party sought to be bound and the party against whom the litigated issue was decided have a relationship that would justify preclusion and whether preclusion, with its severe consequences, would be fair under the particular circumstances” (Id.; see, for example, All Terrain Props. v. Hoy, 265 A.D.2d 87 [1st Dept., 2000]).

In the instant action, two facts support a finding that the defendant was, in fact, in privity with the debtor in the bankruptcy proceeding. First, the Fee Payment Agreement states clearly that the defendant’s agreement to pay plaintiff’s fees and disbursements “is a primary obligation on your part.” Second, it is undisputed that the defendant was the managing member of the debtor and that he and/or members of his family owned 100% of the equity interests in the debtor.

Under such circumstances, the Court finds that the defendant was connected with the debtor in the bankruptcy proceedings to such an extent that the defendant should be treated as if he was a party.

Accordingly, it is

ORDERED that the motion of plaintiff for leave to reargue its motion for summary judgment is granted, and it is further

ORDERED that, upon reargument, the Court vacates its prior order, dated April 12, 2013, and grants plaintiff's motion for summary judgment as to the first cause of action for breach of contract; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of plaintiff and against defendant in the amount of \$241,803.90, together with interest at the statutory rate from the date of April 8, 2011, as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs.

The foregoing constitutes the decision and order of the court.

Date: 1/30/2014
New York, New York



Anil C. Singh

HON. ANIL C. SINGH
SUPREME COURT JUSTICE