

Benjamin v Price

2015 NY Slip Op 30523(U)

April 2, 2015

Supreme Court, Suffolk County

Docket Number: 036708-2007

Judge: John H. Rouse

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COPY

INDEX NO. 036708-2007

RELATED CASES: *Berry v. Peter Price, Index number 001655-2011;*
and Robert Benjamin v. Peter Price, Index Number 028452-2008

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 12 - SUFFOLK COUNTY

PRESENT:

Hon. John H. Rouse
Acting Supreme Court Justice

MOTION DATE: 08/06/08
ADJ. DATE: 03/25/15
Mot. Seq. #007- MG

MOTION DATE: 10/24/08
ADJ. DATE: 03/25/15
Mot. Seq. #008- MG

MOTION DATE: 08/13/14
ADJ. DATE: 03/25/15
Mot. Seq. #009-MD

ROBERT BENJAMIN,

Plaintiffs

-against-

DECISION & ORDER

PETER R. PRICE,

Defendants

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Upon the reading and filing of the following papers in support of motions filed under Suffolk County Index No. 036708-2007, ROBERT BENJAMIN -against- PETER R. PRICE:

(1) (Mot. # 007) Order to Show Cause granted by the Hon. Jeffrey Arlen Spinner on October 23, 2008, the Affirmation of Jay Joseph Friedrich, Esq., dated October 22, 2008 and Exhibits A-F attached thereto; and

(2) (Mot. #008) Order to Show Cause, undated, but first filed on July 21, 2008 and later received by the Court on July 25, 2008 signed by the Hon. Jeffrey Arlen Spinner directing the Defendant to Show Cause why he should not be held in Contempt of Court for violating an Order of the Court dated July 16, 2008; and

(3) (Mot. # 009) Notice of Motion dated August 8, 2014, the Attorney Affirmation of Jay Joseph Friedrich dated August 8, 2014 and Exhibit A, an Amended and Verified Complaint; and

Letter by Jay Joseph Friedrich dated March 27, 2015 received by the Court on April 1, 2015 with copies made to Mr. Friedrich's clients and counsel for Peter Price, Stephen A. Grossman, Esq.

ORDERED that, this decision and order is made with respect to three motions filed under Suffolk County Index Number 036708-2007, the Court directs the Clerk of the Court to also file a copy of this decision and order in the files for the related actions: *Berry v. Peter Price, Index number 001655-2011*; and *Robert Benjamin v. Peter Price, Index Number 028452-2008*; and it is further

ORDERED that Motion Seq. 007, is granted to the extent that the Plaintiff is authorized to prove the substantive contentions made in support of the motion for contempt at the time trial on the issue of liability insofar as such conduct, if proven, tends to support the main action as it would constitute evidence of bias, interest, motive or hostility bearing upon the credibility of the Defendant which will be a central issue in this controverted case; if, however, the trial court determines such evidence is inadmissible with respect to the question of liability, then the trial court may receive such evidence outside the hearing of the jury as the court may direct at that time; and it is further

ORDERED that this case will be bifurcated between the issues of liability and damages as provided by 22 NYCRR 202.42; and it is further

ORDERED that on Motion Seq., 008, Plaintiff's motion is granted, but only to the extent that Plaintiff is directed to serve a *subpoena duces tecum* upon the Defendant which specifies the records to be produced to the Clerk of the Court, said records will be retained by the Court and counsel will have permission to review and copy said records; and with respect to the complaint, the Defendant shall serve upon the Plaintiff an answer to the complaint within 10 days of service of this decision and order together with notice of entry, should the defendant fail to serve an answer in accordance with this decision and order a default judgment shall be entered by the

court ; and it is further

ORDERED that Motion Seq. 009 is denied the Plaintiff is not authorized to amend the complaint and join a defendant for a cause of action not recognized in law; and it is further

ORDERED that Stephen A. Grossman, Esq., is directed to serve and file with the Clerk of this court a notice of appearance *if* he is representing Peter Price on the case: Berry v. Peter Price, Index number 001655-2011; and it is further

ORDERED that the Plaintiff is directed to serve a copy of this decision and order together with notice of entry upon the Defendant personally, with respect to the action in which he is proceeding *pro se*, and upon Stephen Grossman, Esq., his attorney on the other two actions.

DECISION

Action 1:

On March 25, 2015 counsel for Robert Benjamin, on the case Robert Benjamin v. Peter Price, Index number 036708-2007, appeared at a conference on this case. Counsel for Peter Price, Stephen A. Grossman, appeared at this conference.

Action 2:

Counsel for Robert Benjamin also represents Douglas Kyle Berry in Berry v. Peter Price, Index number 001655-2011. Counsel for Peter Price, Stephen A. Grossman appeared at this conference.

Action 3:

By Order dated March 6, 2015, the case of Robert Benjamin v. Peter Price, Index Number 028452-2008, was transferred to this Court, the last appearance date on this case was January 29, 2014 before the Hon. Jeffrey Arlen Spinner. Mr. Price is pro se on this case and the Plaintiff, Robert Benjamin, is represented by Jay Friedrich, Esq.

* * *

At the March 25, 2015 conference the Court's Law Clerk spoke with both counsel on Action 1 and Action 2. Action 3 was not scheduled for conference and Mr. Price did not appear as a party on any of the three cases, or pro se on Action 3 as it had not been scheduled and was not the subject of the conference.

There are 3 pending motions all on the case under INDEX NO. 036708-2007, Robert Benjamin v. Peter Price. The original return dates on these motions (Seq. # 007, 008, 009) were in 2008, 2008 and November 2014, respectively, were discussed along with the fact that this Court does not have personal knowledge of the history of any of the cases. The cases were first assigned to this court in the beginning of 2015.

1. The first motion (Mot. #007) was brought by Order to Show Cause demanding that Mr.

Price show cause why he should not be held in Contempt of Court for disobeying an order "enjoining the Defendant from manipulating or removing any files which are in Mr. Peter Price's care, custody and control in reference to any and all work on behalf of Plaintiff.

2. The second motion (Mot. #008) was also brought by Order to Show Cause to, again, to cause Peter Price to turn over books, records, ledgers and other documents previously ordered to be disclosed; and for Peter Price to Show Cause why a default should not be entered for the failure of Peter Price to file a responsive pleading to the Complaint.
3. The third motion (Mot #009), made by Notice of Motion was for permission to Amend the Complaint to add Zurich American Insurance Company and a cause of action for a declaratory judgment requiring the insurance carrier to defend and indemnify Peter Price.

At a compliance conference held on March 25, 2015, it was recommended that the three motions be withdrawn and demands be re-issued with short time lines to be imposed and strict oversight to be provided by the Court. Plaintiff's counsel was in larger measure amenable, but after further review sent to this Court the letter dated March 27, 2015 expressing his client's dismay at this proposed course. The Court is sympathetic to Plaintiff's concerns and proceeds with the objective of resolving these cases promptly.

The Court is aware that the Defendant in these three actions, Peter R. Price, was suspended from the practice of law for a period of five years which commenced on August 4, 2011. The grounds for that suspension arose on an unrelated matter. These three actions must be evaluated independently on their own merits. A digression from the principle proceedings in these cases does not advance the resolution of these actions.

The three motions are determined as follows:

Motion Seq. 007, the motion is granted to the extent the Plaintiff is authorized to prove the substantive contentions made in support of the motion for contempt upon the trial of this action insofar as such conduct, if proven, tends to support the main action as it would constitute evidence of bias, interest, motive or hostility bearing upon the credibility of the Defendant which will be a central issue in this controverted case. If the trial court determines such evidence is inadmissible with respect to the main action, then the court may receive such evidence outside the hearing of the jury as the court may direct at that time. Accordingly, this motion is granted and the Court will receive evidence, during, or immediately after trial on the issue of liability. This case will be bifurcated between the issues of liability and damages as provided by 22 NYCRR 202.42

Motion Seq., 008, this motion is granted, but only to the extent that Plaintiff is directed to serve a *subpoena duces tecum* upon the Defendant which specifies the records to be produced to the Clerk of the Court, said records will be retained by the Court and counsel will have permission to review and copy said records; and with respect to the complaint the Defendant shall serve upon

the Plaintiff an answer to the complaint within 10 days of service of this decision and order together with notice of entry, should the defendant fail to serve an answer a default judgment shall be entered by the court.

Motion Seq., 009, Plaintiff has moved to amend the complaint to add causes of action for a declaratory judgment and joining the Defendant's malpractice carrier as a party to this action. This motion is denied, the proposed declaratory judgment action does not allege that Plaintiff was an "also insured" or was otherwise in privity of contract with the Defendant's malpractice carrier, as such the proposed declaratory judgment causes of action added to the complaint fail to state a cause of action upon which relief can be granted. This motion is denied.

* * *

These three actions do not present complicated legal issues or difficult questions of fact. They are going to be resolved by determining what the Defendant did or did not do in the representation of the Plaintiffs, whether these actions or omissions fell below the appropriate standard of care, and whether the alleged malpractice was a substantial factor in causing the Plaintiffs to suffer damages. *See Smith v Kaplan Belsky Ross Bartell, LLP, ___AD3d___, (2nd Dept., March 18, 2015) citing Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer, 8 NY3d 438; and Ali v Fink, 67 AD3d 935.*

The actions apparently must proceed to trial if there is to be a resolution, and the extent to which documents and records were never created, were lost, intentionally or negligently destroyed, these are all matters the trier of fact can consider.

The foregoing shall constitute the decision and order of the court.

Dated: April 2, 2015



JOHN H. ROUSE, Acting J.S.C.

NON-FINAL DISPOSITION