

**Ben-Zvi v Queller, Fisher, Washor, Fuchs & Kool,
LLP**

2015 NY Slip Op 30724(U)

May 4, 2015

Supreme Court, New York County

Docket Number: 651545/2014

Judge: Robert R. Reed

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 43

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LESLIE H. BEN-ZVI,

DECISION/ORDER

Plaintiff,

-against-

Index No.: 651545/2014

QUELLER, FISHER, WASHOR, FUCHS & KOOL, LLP,

Defendant,

-----X

ROBERT R. REED, J.:

This is an action by an attorney against a law firm with which he was previously aligned for breach of a joint prosecution agreement in relation to an underlying personal injury matter. On this motion, plaintiff seeks, among other things, partial summary judgment, pursuant to CPLR 3212, upon his claim for payment under the joint prosecution agreement.

FACTUAL ALLEGATIONS

On or about October 15, 2001, plaintiff and defendant entered into a joint prosecution agreement to represent Pat Roddy in a personal injury action which would eventually be entitled *Pat Roddy v. Nederlander Producing Company of America, Inc., et al.*, under Index No. 113659/2002. On or about November 20, 2001, plaintiff entered into a retainer agreement with Roddy. On or about December 22, 2006, almost five years into the action, Roddy discharged plaintiff as his attorney. On or about September 13, 2013, almost seven years after discharging plaintiff, Roddy settled his personal injury action for \$2,500,000.00. Plaintiff, by this motion, now seeks payment of 28% of the net proceedings of such settlement, asserting that he is entitled

to same pursuant to the terms of the joint prosecution agreement.

DISCUSSION

The proponent of a motion for summary judgment carries the initial burden of production of evidence as well as the burden of persuasion (*Alvarez v Prospect Hospital*, 68 NY2d 320). Thus, the moving party must tender sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact. Once that initial burden has been satisfied, the “burden of production” (not the burden of persuasion) shifts to the opponent, who must now go forward and produce sufficient evidence in admissible form to establish the existence of a triable issue of fact. The burden of persuasion, however, always remains where it began, *i.e.*, with the proponent of the motion. Thus, “if the evidence [on the motion] is evenly balanced, the party that bears the burden of persuasion must lose” (*Director, Office of Workers Compensation Programs v Greenwich Collieries*, 512 US 267, 272; *300 East 34th Street Co. v Habeeb*, 248 AD2d 50).

The court’s function on a motion for summary judgment is issue finding, rather than issue determination (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223). Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied (*Stone v Goodson*, 8 NY2d 8; *Sillman v Twentieth Century-Fox Film Corp.*, *supra.*).

Plaintiff’s position in support of the motion is simple: he relies on that portion of the 2001 joint prosecution agreement that states that he is entitled to 28% of any settlement in the underlying action. Plaintiff contends that the underlying litigation was simply reassigned to his “colleagues” at Queller, Fisher, Washor, Fuchs & Kool, LLP in December 2006 and that,

consequently, he is entitled to a portion of the September 2013 settlement. In opposition, defendant submits the affidavit of Roddy, the client, who contends that he discharged plaintiff for cause in December 2006, thereby voiding any obligations to plaintiff under the joint prosecution agreement.

Several key factual issues are disputed by the parties, precluding summary judgment. Notably, the parties disagree as to whether plaintiff was discharged for cause. Defendant contends that plaintiff's poor prosecution of the Roddy matter at some point actually resulted in a dismissal of the action while under plaintiff's stewardship. A question of fact, thus, is presented as to whether plaintiff satisfactorily performed his obligations under the joint prosecution agreement's terms. Plaintiff's motion for partial summary judgment pursuant to CPLR 3212 is, therefore, denied. For the same reasons, that portion of plaintiff's motion that seeks the depositing of undisturbed legal fees, striking of defendant's affirmative defenses, and dismissing defendant's counterclaims is also denied.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

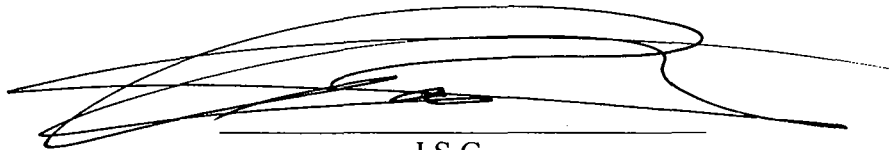
ORDERED that plaintiff's motion is denied; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Part 43, located at 111 Centre Street, Room 581, on Thursday, June 11, 2015, at 9:30 am.

The foregoing constitutes the Decision and Order of the Court.

Dated: May 4, 2015

ENTER:



J.S.C.
HON. ROBERT R. REED
J.S.C.