ORIGINAL

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. TIMOTHY J. DUFFICY **PART 35**
Justice

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LENORE BALLAN, as Personal Representative of ELI BALLAN, deceased; and COPORAYE SUIRVEYS & ANALYSES LTD., an inactive Connecticut Corporation,

Plaintiff,

-against-

HOWARD B. SIROTA, RACHEL SIROTA, SAUL ROFFE, and SIROTA & SIROTA, LLP, aNew York Limited Liability Partnership,

Defendants.

Index No.: 702021/14
Mot. Date: 3/16/15
Mot. Cal. No. 8
Mot. Seq. 8

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The following papers numbered EF 90 to 93 and EF 97read on this motion by the plaintiffs for an order permitting them to reargue their opposition to a prior motion by the defendants which sought to dismiss the complaint against them pursuant to CPLR 3211(a)(1), (3), and (7)

	Papers Numbered
Notice of Motion - Affidavits - Exhibits.....	EF 90-93
Affirmation In Opposition-Exhibits.....	EF 97

Upon the foregoing papers it is ordered the motion is determined as follows:

The plaintiffs allege the following:

The late Eli Ballan owned stock in plaintiff Corporate Surveys & Analyses,Ltd., an inactive Connecticut corporation which acted as a consultant in securities cases. Plaintiff Lenore Ballan served as the personal representative of Eli Ballan's estate.

Defendant Sirota & Sirota, LP, a law firm located at 125 Beach 128th Street, Belle Harbor, New York, engages in litigation. Defendant Howard Sirota, acting on behalf of

himself and the other defendants, entered into an agreement with plaintiff Corporate Surveys whereby the latter provided the defendants with proprietary information pertaining to potential clients, investigated claims, interviewed potential plaintiffs, and otherwise provided the defendants with assistance in securities litigation.

In exchange for the services of Corporate Surveys, the defendants promised to pay twenty (20%) percent of the law firm's fee on a case. Corporate Surveys provided services to the defendants on hundreds of cases during the course of their business relationship. Without the specialized knowledge and efforts of Corporate Surveys, the defendants would not have been able to begin many of the lawsuits that they prosecuted over twenty-three years.

The defendants utilized the services of Corporate Surveys in connection with a lawsuit filed in the federal court for the Southern District of New York, entitled *Richard Hirsch v. Priceline.com, Inc.,* which was subsequently consolidated with other cases and recaptioned *In Re: Priceline.com Initial Public Offering Securities Litigation.*

The services provided by Corporate Surveys resulted in the federal court's appointment of defendant Sirota & Sirota as one of the lead counsel in the class action litigation. The federal court ultimately awarded defendant Sirota & Sirota attorney's fees in the amount of $12,067,377.96. However, the defendants refused to pay Corporate Surveys its twenty (20) per cent share of the fees.

The plaintiffs brought this action seeking to recover twenty (20%) percent of the $12,067,377.96 fee awarded by the federal court. According to the plaintiffs: "It was not until Defendants' continued refusal to make payment to Plaintiffs upon the final resolution of the Priceline Litigation that Plaintiffs were made aware the long-standing agreement between Plaintiffs and Defendants was prohibited by both the New York and Florida Bar Rules." (Complaint, ¶74.)

On August 25, 2014, the defendants submitted a motion for an order dismissing the complaint against them pursuant to CPLR 3211(a)(1), (3), and (7). Pursuant to this Court's Order, dated December 12, 2014, the defendants motion was granted. This Court found that plaintiff Corporate Surveys lacked the capacity to sue because the corporation was dissolved prior to the commencement of the Priceline litigation and that plaintiff Lenore Ballan lacked the capacity to prosecute this action on behalf of her husband's estate since she had been

discharged as the representative of her husband's estate. This Court refused the plaintiffs' request for a stay because it had not been notified of any progress in curing the plaintiffs' inability to sue. This Court also found that " the fee-sharing agreement in question was unenforceable under Code of Professional Responsibility DR 2-107 ***."

The plaintiffs now move to reargue their opposition to the prior motion. The plaintiffs assert that they attempted to keep the Court informed about their efforts to cure their inability to sue. They allege that, on or about August 22, 2014, they filed a notice pertaining to the corporation showing reinstatement as an active corporation (retroactive) and that on or about September 17, 2014, they filed a second notice showing that Leonore Ballan had been reinstated as the personal representative of the estate. While the plaintiffs filed these notices electronically, as this is a NYSCEF case, they failed to submit hard copies, i.e. paper copies, while the prior motion was pending or to otherwise notify the Court. They failed to present relevant evidence to the Court. Their attempt to submit these documents now amounts to an attempt to renew their opposition to those aspects of the prior motion which concern capacity, not to reargue it. (*See*, *Smith v City of New York*, 38 AD3d 641, 643 ["To the extent the plaintiff's motion was based on new evidence, it is properly construed as one to renew, not reargue ***."]) The attorney for the defendants in this case raises numerous procedural objections to the instant motion, including the impropriety of presenting new evidence on a motion labeled only as one for reargument.

However, a technical defect may be disregarded where, as here, there is no prejudice, and the opposing parties have had sufficient opportunity to be heard on the merits of the relief sought. (*See*, CPLR 2001; *Daramboukas v Samlidis*, 84 AD3d 719.) The Court will deem those branches of the instant motion which pertain to capacity to sue as being for renewal. Leave to renew is granted, and, upon renewal, the Court finds that the plaintiffs now have the capacity to sue.

Turning to those branches of the instant motion which seek to reargue the plaintiffs' opposition to the dismissal of the complaint on CPLR 3211(a)(7) grounds, the Court previously determined that " the fee sharing agreement in question was unenforceable under Code of Professional Responsibility DR 2-107 (22 NYCRR 1200.12) ***." The plaintiffs assert that despite the illegality of the agreement, they are entitled to recover in *quantum meruit* and unjust enrichment. Leave to reargue is granted. As a general rule, illegal

contracts are unenforceable. (*Lloyd Capital Corp. v. Pat Henchar, Inc.*, 80 NY2d 124.) "While the courts will generally not enforce illegal contracts, an exception to the rule is recognized where ***, the contract is merely prohibited by statute (malum prohibitum), and is not criminal in nature ***. (*Katz v. Zuckermann,* 119 AD2d 732, 733.) In the case at bar, the parties entered into a contract which was criminal in nature, and no exception to the general rule against enforcing illegal contracts or allowing recovery on an equitable theory applies. Section 491 of the Judiciary Law prohibits fee-splitting with non-attorneys, and goes on to provide: "2. Any person violating any of the provisions of this section is guilty of a misdemeanor." (*See, In re D'Emic*, 111 AD3d 158.) "The agreement alleged by the plaintiff is one between a non-lawyer and attorneys to split legal fees which is proscribed by Judiciary Law § 491.

Thus, the agreement is illegal and plaintiff is foreclosed from seeking the assistance of the courts in enforcing it ***." (*Bonilla v. Rotter,* 36 AD3d 534, 535; *see Prins v. Itkowitz & Gottlieb*, 279 AD2d 274; *Matter of Ungar v. Matarazzo Blumberg & Assocs.*, 260 AD2d 485; *Van Bergh v. Simons*, 286 F2d 325.) It does not matter that the plaintiffs are not attorneys. (*See, Bonilla v Rotter, supra*; *Prins v. Itkowitz & Gottlieb, P.C., supra*; *Matter of Ungar v. Matarazzo Blumberg & Assocs., supra.*) Finally, the plaintiffs have not sought to reargue the dismissal of their claims founded on, *inter alia*, tort, and those claims are deemed abandoned. In any event, the complaint otherwise fails to state a cause of action (*see, e.g, Merin v Precinct Developers LLC*, 74 AD3d 688), and "[i]t is a well-established principle that a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated ***. " (*Clark–Fitzpatrick, Inc. v Long Island R.R. Co.*, 70 NY2d 382, 389; *Heffez v L & G General Const., Inc.*, 56 AD3d 526.)

Accordingly, it is

ORDERED, that upon reargument, the complaint against the defendants is dismissed pursuant to CPLR 3211(a)(7).

The forgoing constitutes the decision and order of this Court.

Dated: June 9, 2015

FILED
JUN 22 2015
COUNTY CLERK
QUEENS COUNTY

TIMOTHY J. DUFFICY, J.S.C.