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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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JAFFE & ASHER LLP,

Plaintiff,

- v -

HORIZON BUSINESS FUNDING LLC AND PEARL CAPITAL RIVIS VENTURES LLC,

Defendants.

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Index No.
152106/2015

DECISION and ORDER

Mot. Seq. #002

HON. EILEEN A. RAKOWER, J.S.C.

Plaintiff, Jaffe & Asher LLP ("Plaintiff"), brings this action for unpaid legal fees for legal services allegedly rendered to defendants, Horizon Business Funding LLC ("Horizon") and Pearl Capital Rivis Ventures LLC ("Pearl") (collectively, "Defendants").

Plaintiff now moves for an Order, pursuant to CPLR § 602, consolidating the above captioned action (the "J&A Action") with the action with the action captioned *Pearl Capital Rivis Ventures, LLC and Horizon Business Funding, LLC v. Jaffe & Asher, LLP, Sanford D. Asher, Lawrence M. Nessenson, David B. Joyandeh, Gregory E. Galterio, J.D. Rainey, Brian J. Goldblatt, Scott A. Ross, Gillian R. Cassell-Stiga, and Michael J. Hoefs*, under the Index No. 155497/2015 (the "Horizon Action").

Defendants oppose. Defendants cross-move for an Order directing Plaintiff to preserve certain documents.

Plaintiff opposes Defendants' cross-motion.

Turning first to Plaintiff's motion, CPLR § 602(a) gives the trial court discretion to consolidate actions involving common questions of law or fact. "'[C]onsolidation is generally favored by the courts in the interest of judicial economy and ease of decision making where there are common questions of law and

fact, unless the party opposing the motion demonstrates that consolidation will prejudice a substantial right' (*Amtorg Trading Corp. v Broadway & 56th St. Assoc.*, 191 AD2d 212, 213, 594 NYS2d 204 [1993]). The burden of demonstrating prejudice to a substantial right is on the party opposing consolidation. (*Sokolow, Dunaud, Mercadier & Carreras v Lacher*, 299 AD2d 64, 74, 747 NYS2d 441 [2002])." (*Amcan Holdings, Inc. v. Torys LLP*, 32 A.D.3d 337, 339 [1st Dep't 2006]).

Plaintiff argues that the J&A Action and the Horizon Action involve common questions of law and fact arising from a retainer agreement (the "Retainer Agreement") between Plaintiff and Defendants. Plaintiff argues that both actions allege that the Retainer Agreement required Plaintiff to perform debt collection services on Defendants' behalf, and that Plaintiff was entitled to compensation for work performed pursuant to the Retainer Agreement. Plaintiff argues that in the J&A action, Plaintiff alleges that it terminated the Retainer Agreement on or about January 9, 2015 due to Defendants' breach of their contractual duties, and that, in the Horizon Action, Defendants claim to have discharged Plaintiff due to attorney misconduct.

Defendants, in turn, argue that Plaintiff's motion to consolidate is premature. However, Defendants do not dispute Plaintiff's contention that the J&A Action and the Horizon Action involve common questions of law and fact arising out of the Retainer Agreement.

Accordingly, consolidation for purposes of discovery and trial is warranted in the interest of judicial economy and ease of decision-making. These actions share common questions of law and fact, and Defendants fail to demonstrate that such consolidation will prejudice a substantial right.

As for Defendants' cross-motion, CPLR § 3101(a) generally provides that, "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action." (CPLR § 3101[a]). The Court of Appeals has held that the term "material and necessary" is to be given a liberal interpretation in favor of the disclosure of "any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity," and that "[t]he test is one of usefulness and reason." (*Allen v. Cromwell-Collier Publishing Co.*, 21 N.Y.2d 403, 406 [1968]).

Pursuant to CPLR § 3126, a court may impose sanctions when a party willfully fails to disclose information which the court finds ought to have been

disclosed. (CPLR § 3126; *Strong v City of New York*, 112 A.D.3d 15, 21 [1st Dep't 2013]). This statute "covers" a refusal to comply with a discovery order or a willful failure to disclose. (*Strong v. City of New York*, 112 A.D.3d 15, 21 [1st Dep't 2013]). Under the common law doctrine of spoliation, a court may impose sanctions for negligent destruction of evidence, as long as the alleged spoliator was "on notice that [the evidence] would be relevant to anticipated litigation." (*Duluc v. AC & L Food Corp.*, 119 A.D.3d 450, 454 [1st Dep't 2014]; *Strong v. City of New York*, 112 A.D.3d 15, 21 [1st Dep't 2013]). In a case of negligent spoliation, "while severe sanctions such as striking pleadings or an order of preclusion may be excessive . . . other, less severe sanctions such as an adverse inference charge may nevertheless be appropriate." (*Duluc*, 119 A.D.3d at 455).

Additionally, under CPLR § 3103:

> The court may at any time on its own initiative, or on motion of any party or of any person from whom discovery is sought, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts.

(CPLR 3103[a]).

Here, Defendants seek an Order directing Plaintiff to preserve certain of Plaintiff's internal emails. Defendants argue that Defendants sent Plaintiff a notice, by letter dated June 19, 2015, informing Plaintiff that such emails must be preserved so as to avoid spoliation. Defendants argue that Plaintiff did not respond to Defendants' June 19, 2015 letter, and now seek an Order directing the items referenced in Defendants' June 19, 2015 letter to be preserved until further order of the court.

However, Defendants do not claim that Plaintiff has failed to comply with any discovery or preservation obligations thus far, nor do Defendants make any showing that any such noncompliance or spoliation is likely to occur. Accordingly, Defendants fail to demonstrate that judicial intervention is warranted to regulate disclosure at this time.

Wherefore, it is hereby

ORDERED that Plaintiff's motion for consolidation is granted only to the extent that the above-captioned action in its amended form is joined for purposes of trial and discovery with the Horizon Action, and the two actions shall travel together; and it is further

ORDERED that movant is directed to serve a copy of this order with notice of entry on the County Clerk (Room 141 B), who shall consolidate the papers in the actions hereby consolidated and shall mark his records to reflect the consolidation; and it is further

ORDERED that movant is directed to serve a copy of this order with notice of entry on the Clerk of the Trial Support Office (Room 158), who is hereby directed to mark the court's records to reflect the consolidation; and it is further

ORDERED that Defendants' cross-motion is denied.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: October 6 2015

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EILEEN A. RAKOWER, J.S.C.