Bashian & Farber, LLP v Syms
2015 NY Slip Op 32671(U)
May 19, 2015
Supreme Court, Westchester County
Docket Number: 60595/2014
Judge: Charles D. Wood

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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BASHIAN & FARBER, LLP and GARY E. BASHIAN, P.C.,

Plaintiffs,

-against-

RICHARD SYMS, RICHARD SYMS AS TRUSTEE OF THE SYMS FAMILY REVOCABLE TRUST DATED MARCH 11, 2014; INEVA SYMS aka I. EVE SYMS aka EVE SYMS; INVEVA SYMS aka I, EVE SYMS as TRUSTEE OF THE SYMS FAMILY REVOCABLE TRUST DATED MARCH 11, 2014; THE SYMS FAMILY REVOCABLE TRUST DATED MARCH 11, 2014; and John Does #1-10,

Defendants.

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DECISION & ORDER
On Motion to Reargue
Index No.: 60595/2014
Sequence No. 4

WOOD, J.

The following documents were read in connection with plaintiffs' motion to reargue:

Plaintiffs' Notice of Motion, Hyer Affidavit, Memorandum of Law, Exhibits.
Defendant's Memorandum of Law in Opposition.
Plaintiffs' Memorandum of Law in further Support.

The plaintiffs' underlying action was to recover reasonable legal fees from Defendant Richard Syms, which remain unpaid in the amount of $329,068.90. Plaintiffs now move pursuant

to CPLR §2221, to reargue the Decision and Order of the Honorable Charles D. Wood, entered on December 7, 2014 ("prior determination"), limited to this court's determination denying plaintiff's request for summary judgment against defendant Richard Syms on the cause of action of account stated. This court found that plaintiffs established their prima facie entitlement to judgment as a matter of law on the cause of action to recover on an account stated for legal fees against the defendant Richard Syms, by submitting copies of its invoices for professional services setting forth the billable hours expended and identifying the services rendered, and by demonstrating that Richard Syms received and retained the invoices without objecting to them within a reasonable time, and made partial payment on the invoices. Defendants objected that the legal fees are unreasonable, and demonstrated a number of irregularities and apparent overcharges in the invoices. They offered to discuss, and sought to have corrections made where appropriate, which they argued, has not occurred. Plaintiffs acknowledges that there were arithmetic errors in the bills of $6,309.71. As a result, plaintiffs reduced the balance to $322,759.19.

Now, plaintiffs aver that no material issues of fact exist, as this court has no jurisdiction to sua sponte review the attorneys fees of plaintiffs. In support of its motion, plaintiffs rely on a recent First Department case that held, "we distinguished between the inherent power of courts to promulgate rules of general applicability regarding attorneys' fees, and an individual judge's authority to conduct 'a sua sponte inquiry into the appropriate amount of attorneys' fees'. In the latter case, the Supreme Court 'ha[s] no authority or jurisdiction sua sponte to make an independent inquiry into the amount or method used in fixing the attorneys' fees'" (Stewart v. New York City Transit Auth., 125 AD3d 129, 134 [1st Dept 2014]). Plaintiffs assert that the court overlooked or misapprehended matters of fact or law in adjudicating the prior determination.

Plaintiffs argue that this matter does not fall within either of the categories where the court has jurisdiction through its inherent authority over plaintiffs' attorneys fees. First, plaintiffs are not seeking court approval of plaintiffs' attorneys fees. Second, defendants alleged questioning of plaintiff's attorneys' fees does not constitute a genuine "complaint" as referenced by the Appellate Division.

Defendants' counsel retorts that this case clearly does constitute a complaint about attorneys fees *inter alia,* defendants have challenged whether plaintiffs violated their own retainer agreement; whether there were nearly $100,000 in overcharges; whether plaintiffs ignored commitments they had made; and whether plaintiffs engaged in impropriety by assigning a brand-new attorney to address a broad range of complex legal issues, and thus incurring $150,000 in fees over a short period of time.

Under CPLR §2221(d), motions for reargument are "addressed to the sound discretion of the court which decided the prior motion and may be granted upon a showing that the court overlooked or misapprehended the facts or law or for some [other] reason mistakenly arrived at its earlier decision" (Mazzei v Licardi, 47 AD3d 774 [2d Dept 2008], *citing* Carillo v PM Realty Group, 16 AD3d 611 [2d Dept 2005]; Singleton v Lenox Hill Hospital, 61 AD3d 956, 957 [2d Dept 2009]). A motion for reargument is "not designed to provide an unsuccessful party with successive opportunities to present arguments different from those originally presented" (Gellert & Rodner v Gem Community Management, Inc. 20 AD3d 388 [2d Dept 2005]; McGill v Goldman, 261 AD2d 593, 594 [2d Dept 1999]). Nor does it function as a forum to proffer arguments "different from those originally tendered" (Amato v Lord & Taylor, 10 AD3d 374, 375 [2d Dept 2004]) or on a new theory of law not previously advanced (Frisenda v X Large Enterprises, Inc., 280 AD2d 514, 515 [2d

Dept 2001]). Rather, the movant must satisfactorily demonstrate matters of fact or law allegedly overlooked or misapprehended on the prior motion (Matter of Hoffman v Debello-Teheny, 27 AD3d 743 [2d Dept 2006]). New facts may not be submitted or considered by the court (Trahan v Gallea, 48 AD3d 791, 792 [2d Dept 2008]; Quinn v Menzel, 282 AD2d 513 [2d Dept 2001]). Moreover, a motion for leave to reargue must be identified specifically as such, and must be made within 30 days after service of a copy of the order determining the prior motion and written notice of its entry (*see* CPLR 2221(d)(3)). Courts have allowed a motion for reargument to be made after the CPLR 2221(d)(3) statutory time frames have expired if a timely notice of appeal has been served and filed (Itzkowitz v. King Kullen Grocery *Co,* 22 AD3d 636 [2d Dept 2005]). This court has discretion pursuant to CPLR §2004 to extend the time fixed by statute "as may be just and upon good cause shown" CPLR §2004; *Itzkowitz at 638.* In addition, courts have automatically denied motions to reargue based upon the movant's failure to include with the motion a complete set of the original papers, as they are germane to said motion to reargue (*see,* Connors, Supplementary Practice Commentaries McKinney's Cons. Laws of N.Y. C2221:7).

After a thorough review of the papers presented in the prior determination, the court finds that there was a substantial basis for its decision. In reaching its decision to deny reargument, the merits of plaintiffs' position have not been addressed herein, because to do so might trigger an appealable issue where normally an appeal does not lie in a reargument motion (Price v Palagonia, 212 AD2d 765 [2d Dept 1995]; Navarette v. Alexiades, 50 AD3d 873 [2d Dept 2008]). Since plaintiffs failed to show that the court overlooked or misapprehended the facts or law or for some other reason mistakenly arrived at its earlier decision, plaintiffs' application for reargument is not supported by the record or the case law, and is denied.

In view of the foregoing, it is

ORDERED, that plaintiffs' motion to reargue the court's prior determination is Denied; and it is further

ORDERED, that the parties shall appear in the Compliance Part, Room 800, on June 3, 2015, at 9:30 A.M.; and it is further

ORDERED, that plaintiffs shall serve a copy of this order with notice of entry upon the parties to this matter within ten (10) days of entry, and file proof of service within five (5) days of service.

All other relief requested and not decided herein is denied.

This constitutes the Decision and Order of this Court.

Dated: May 19, 2015
White Plains, New York

HON. CHARLES D. WOOD
Justice of the Supreme Court

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