

Nick v Schneider

2015 NY Slip Op 32733(U)

October 21, 2015

Supreme Court, Nassau County

Docket Number: 011894-13

Judge: Timothy S. Driscoll

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----x
NORMAN NICK, individually, and as President
of The Ashley Group, THE ASHLEY GROUP and
THE MAST GROUP INC.,

Plaintiffs,

-against-

IRWIN N. SCHNEIDER, JOEL C. SCHNEIDER,
ESQ., ESTATE OF HERBERT H. SOMMER, ESQ.,
Deceased, and SOMMER & SCHNEIDER, P.A.,

Defendants.
-----x

TRIAL/IAS PART: 14
NASSAU COUNTY

Index No: 011894-13
Motion Seq. Nos. 5 and 6
Submission Date: 8-28-15

The following papers having been read on these motions:

- Notice of Motion, Affirmation in Support and Exhibits.....x
- Notice of Motion, Affirmation in Support and Exhibits.....x
- Affidavit in Opposition and Exhibits.....x

This matter is before the Court for decision on 1) the motion by Plaintiffs Norman Nick, Individually, and as President of the Ashley Group, The Ashley Group and The Mast Group, Inc. ("Plaintiffs") filed August 10, 2015, and 2) the motion by Plaintiffs filed August 12, 2015, both of which were submitted August 28, 2015. For the reasons set forth below, the Court denies the motions.

BACKGROUND

A. Relief Sought

In their motion filed August 10, 2015, Plaintiffs move for an Order 1) pursuant to CPLR § 3124, compelling Defendants Joel C. Schneider ("Joel") and Sommer & Schneider LLP (S&S) ("Defendants") to fully and reasonably comply and respond to Plaintiffs' Demand for Production of Documents (Ex. 2 to Weber Aff. in Supp.), specifically Demands Number 4, 5, 11, 12, 13 and

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24; 2) pursuant to CPLR § 3124, compelling Defendants to prepare and serve on counsel for Plaintiffs ("Plaintiffs' Counsel") a privilege log setting forth the reasons for all redactions contained in the Monthly Bank Statements of the S&S IOLA Escrow Account for the period of January 2010 through December 2012; 3) pursuant to CPLR § 3124, compelling Defendants to fully and reasonably comply and respond to Plaintiffs' Demand for Disclosure of Names and Addresses of Witnesses (Ex. 3 to Weber Aff. in Supp.), specifically Demands 2, 3, 10, 11 and 12; and 4) pursuant to CPLR § 3126, issuing a conditional order directing that, if Defendants refuse to obey an order for disclosure or wilfully fail to disclose information which the Court finds ought to have been disclosed, the Court will impose penalties and sanctions including, but not limited to, a) striking the disobedient party's answer; b) finding that the issues to which the information is relevant shall be deemed resolved for purposes of the action or any pending motions in accordance with the claims of the party obtaining the order; c) rendering a judgment by default against the disobedient party; and d) imposing monetary sanctions and awarding attorney's fees.

Plaintiffs also move for an Order 1) pursuant to CPLR § 2221(e), granting Plaintiffs leave to renew the prior decision ("Prior Dismissal Decision") of the Court dated December 3, 2014 based on newly discovered facts not available to Plaintiffs and not offered on Defendant Irwin Schneider ("Irwin's") prior motion to dismiss ("Prior Dismissal Motion") or on the prior motion to renew ("Prior Renewal Motion") that would change the Prior Decision; and 2) in the event that the Court grants leave to renew, modifying the Prior Decision by denying the Prior Motion to Dismiss on the grounds that Irwin was engaged in business in the State of New York as described in the July 15, 2015 Opinion and Order of the Appellate Division, Second Department which directed that Defendant Joel C. Schneider, Esq. is disbarred ("Disbarment Order"). Irwin opposes Plaintiffs' instant motion to renew.

B. The Parties' History

The parties' history is outlined in detail in a prior Order ("Prior Order") of the Court dated April 3, 2014 in which the Court reserved decision on the Prior Dismissal Motion and permitted discovery on the issue of personal jurisdiction so that the parties could submit supplemental papers in support of their respective positions on the motion. Plaintiffs

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subsequently filed a motion for an Order, pursuant to CPLR §§ 3124 and 3126, compelling Defendants to comply with certain of Plaintiffs' discovery demands. In its prior decision dated September 25, 2014 ("Discovery Decision"), the Court denied Plaintiffs' motion to compel, and for other related relief, based on its conclusion that Defendants had complied with their discovery obligations and that Plaintiffs had received extensive discovery which, by their own admission, contained information supporting their position that the Court has personal jurisdiction over Irwin. In the Discovery Decision, the Court also directed counsel for the parties to submit their supplemental submissions regarding the Prior Motion and, pursuant to that direction, counsel submitted their supplemental submissions regarding the Prior Motion which made reference to information obtained during discovery.

In its Prior Dismissal Decision dated December 3, 2014 (Ex. 1 to Weber 8/6/15 Aff. in Supp.), the Court granted Irwin's Prior Dismissal Motion on the basis of lack of personal jurisdiction. The Court incorporates the Prior Order, Prior Discovery Decision and Prior Dismissal Decision by reference as if set forth in full herein. As noted in the Prior Order and Prior Decisions, Plaintiffs allege that Defendants induced Plaintiff Norman Nick ("Nick") to deposit monies in their attorney escrow account and made false and fraudulent representations that they would use the funds to make investments in legitimate business ventures. Plaintiffs allege that Nick deposited the "investment" money in the escrow account of S&S and that the proceeds of the investments were used by the Defendants for personal obligations. Defendants have allegedly refused to provide Plaintiffs with an accounting or to return any money to the Plaintiffs, except for the sum of \$22,000 that was returned by Joel on or about March 14, 2012. Irwin was, and continues to be, a resident of the State of Florida. The Complaint alleges that Irwin was previously an attorney admitted to practice in New York and before the Securities and Exchange Commission, who was suspended from the practice of law in 1989 as a result of his conviction for a felony and was convicted again in 1999 of conspiracy to violate securities laws. Defendants Joel and Herbert F. Sommer ("Sommer"), now deceased, the son and son-in-law respectively of Irwin, were attorneys who engaged in the practice of securities law. Joel was and is, and Sommer was, a resident of New York. S&S is a New York partnership that maintains an office for the practice of law in Garden City, New York.

In the Prior Dismissal Decision, the Court concluded that none of the provisions of CPLR § 302(a) discussed in the Prior Dismissal Decision warranted exercising personal jurisdiction over Irwin in a New York State court. The Court concluded that Plaintiff's submissions did not establish that Irwin knowingly participated with defendants Joel, Herbert and/or Sommer & Schneider in the fraud that is the basis of the Complaint., beyond the bare-bones assertions that Irwin and the other Defendants conspired with each other in committing a fraud on Plaintiffs, and that Joel and Herbert "have and continue to engage in a continuing conspiracy to enable said Defendant [Irwin] to conduct his fraudulent business practices." Complaint at para. 21. The Court held that the record before it merely established that Irwin sent numerous communications to Joel. It did not establish that Irwin participated in any alleged wrongdoing in New York State with Joel, Herbert or Sommer & Schneider. Under these circumstances, the Court could not conclude that Irwin was transacting business in New York, or otherwise participated in conduct that would make it appropriate to exercise jurisdiction over Irwin in New York. Accordingly, the Court granted Irwin's Prior Dismissal Motion and dismissed the Complaint as asserted against Defendant Irwin Schneider.

In their Prior Renewal Motion, Plaintiffs moved for an Order 1) pursuant to CPLR § 2221(d), granting Plaintiffs leave to renew the Prior Dismissal Decision based on matters of fact or law allegedly overlooked or misapprehended by the Court in determining the Prior Dismissal Motion; 2) pursuant to CPLR § 2221(e), granting Plaintiffs leave to reargue based on new facts not offered on the Prior Dismissal Motion that would change the Prior Dismissal Decision; and 3) upon granting Plaintiffs leave to renew and argue, directing Irwin to produce copies of his bank records, and a fully executed copy of the escrow agreement annexed as an exhibit to Plaintiffs' Prior Renewal Motion. In its decision dated July 17, 2015 (Ex. 3 to Weber 8/6/15 Aff. in Supp.), the Court denied the Prior Renewal Motion based on its conclusion that 1) the purportedly new evidence on which Plaintiffs relied in support of their Prior Renewal Motion had been presented in opposition to the Prior Dismissal Motion; and 2) a consideration of that evidence would not change the Prior Dismissal Decision.

In support of Plaintiffs' motions now before the Court, Plaintiffs' Counsel affirms that Plaintiffs recently learned that on July 15, 2015, two days prior to the last court appearance in this action, the Appellate Division, Second Judicial Department issued the Disbarment Order (Ex. 1 to Weber 8/3/15 Aff. in Supp.) which included the Second Department's determination that, by Joel's own admission, "his status as an attorney was the entire reason that his escrow account was employed for the Nick transaction and other transactions involving his father" (p. 8). In addition, Joel "conceded that he was an 'escrow agent'" (p. 8) and admitted that he knew that \$80,000 was wired into his firm's escrow account, and that the funds came from Nick (p. 8). In the Disbarment Order, the Appellate Division concluded that Joel had violated his fiduciary duties as an escrow agent. Notwithstanding the mitigating factors offered by Joel, including that he mistakenly trusted his father Irwin (p. 9), the Second Department concluded that Joel "has demonstrated by his conduct an utter disregard for the fiduciary obligations attendant to the maintenance of escrow accounts by misappropriating funds on deposit in his escrow account [and] abdicated total control over his escrow account to a disbarred attorney" (p. 9). The Disbarment Order includes the Second Department's determinations *inter alia*, that 1) Nick wired funds into Joel's escrow account at the direction of Irwin (p. 2); 2) Joel never represented Nick in any legal matter and never represented any other party in connection with a legal matter involving Nick (p. 2); 3) between August 3, 2011 and March 2012, Joel never communicated with Nick regarding the wired funds (p. 2); and 4) Joel "abdicated total control over his escrow account to [his father Irwin,] a disbarred attorney" (p. 9).

Plaintiffs' Counsel also submits that Defendants Joel and S&S failed to respond to Plaintiffs' demands, specifically Plaintiffs' March 4, 2015 Demand for Production of Documents (Ex. 2 to Weber 8/3/15 Aff. in Supp.) and Plaintiffs' March 3, 2015 Demand for Disclosure of Names & Addresses of Witnesses Pursuant to CPLR § 3101 (Ex. 3 to Weber 8/3/15 Aff. in Supp.). Instead, by email dated April 22, 2015 (Ex. 4 to 8/3/15 Weber Aff. in Supp.), attorney David Bolton ("Bolton"), who represented Defendants Joel and S&S at the time and has since been relieved by the Court, advised Plaintiffs' Counsel that he would be sending him documents numbered JS 262 to 467 which were S&S IOLA account bank statements, redacted so as not to show unrelated transactions, and that Plaintiffs' Counsel would be provided with a link that he

could use to download the documents. By email to Bolton dated March 24, 2015, Joel advised Bolton that, “[r]elying on the Rule of Privilege,” Joel did not authorize the release of any information regarding deposits that he may have made, directly or indirectly, to the escrow accounts of S&S. Plaintiffs’ Counsel affirms that there were no other affidavits or documents submitted in response to Plaintiffs’ demands. He submits that Defendants “must state under oath if any of the documents requested are no longer available and give an explanation of why they are not available” (Weber 8/3/15 Aff. in Supp. at ¶ 10).

Plaintiffs’ Counsel outlines other correspondence between Bolton, Joel and Plaintiffs’ Counsel regarding Plaintiffs’ discovery demands and the manner in which Defendants Joel and S&S have allegedly failed to comply with those demands (*see* Weber 8/3/15 Aff. in Supp. at ¶¶ 11-21). That correspondence includes a letter from Joel to Bolton dated May 2, 2015 (Ex. 10 to Weber 8/3/5 Aff. in Supp.) in which Joel, responding to a letter dated April 28, 2015 from Plaintiffs’ Counsel, provides information regarding several of Plaintiffs’ demands.

In opposition, Irwin affirms that in the period between 2010 and 2012, only four (4) transactions in which he was involved resulted in funds being deposited into the S&S escrow account. Irwin submits that the Court reviewed and considered those transactions in reaching the Prior Dismissal Decision.

Irwin also disputes Joel’s representations in connection with his disbarment proceedings. Irwin submits that Joel’s assertions are “unequivocally false and are nothing more than the attempt to mitigate his wrongdoing by blaming his deceased partner and his father, a disbarred attorney and thrice convicted felon” (Irwin Aff. in Opp. at ¶ 7). Irwin also, however, attaches selected portions of Joel’s deposition testimony (Ex. 3 to Irwin Aff. in Opp.) which includes Joel’s testimony that “I never managed the escrow account. I never made an online transaction in my life. I don’t even have online access to the account. All those wire transfers were done online by Herb Sommer” (Tr. at p. 38). That testimony is consistent with the Second Department’s conclusion that Joel violated his professional obligations by failing to properly supervise his law firm’s escrow account.

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On September 11, 2015, the Court held a conference on this matter. Defendant Joel Schneider, who is not proceeding *pro se*, failed to appear at that conference, and no representative of S&S appeared on its behalf. At that conference, the Court gave Plaintiffs permission to move for a default judgment against Defendants Joel and S&S.

C. The Parties' Positions

Plaintiffs ask the Court to direct Defendants Joel and S&S to respond more fully to Plaintiffs' demands served in March 2015. Plaintiffs submit that the Disbarment Order demonstrates that Defendants Joel and S&S have not fully responded to those demands.

Plaintiffs also seek renewal of the Prior Dismissal Motion in light of the Disbarment Order. Plaintiffs submit that the Disbarment Order establishes that Irwin was doing business in New York and, therefore, that the Court has jurisdiction over Irwin. Irwin opposes the motion submitting, *inter alia*, that the Court already considered evidence referred to in the Disbarment Order in ruling on the Prior Dismissal Motion.

RULING OF THE COURT

A. Leave to Renew

A motion for leave to renew must be supported by new or additional facts not offered on the prior motion that would change the prior determination, and shall contain reasonable justification for the failure to present such facts on the prior motion. *Schenectady Steel Co., Inc. v. Meyer Contracting Corp.*, 73 A.D.3d 1013, 1015 (2d Dept. 2010), quoting CPLR §§ 2221(e)(2) and (3) and citing, *inter alia*, *Barnett v. Smith*, 64 A.D.3d 669 (2d Dept. 2009) and *Chernysheva v. Pinchuk*, 57 A.D.3d 936 (2d Dept. 2008).

B. Collateral Estoppel

Collateral estoppel, or issue preclusion, precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party, whether or not the tribunals or causes of action are the same. *Storman v. Storman*, 90 A.D.3d 895, 897 (2d Dept. 2011) citing *Parker v. Blauvelt Volunteer Fire Co.*, 93 N.Y.2d 343, 349 (1999) quoting *Ryan v. New York Tel. Co.*, 62 N.Y.2d 494, 500 (1984). The doctrine applies if the issue in the second action is identical to an issue which was raised, necessarily decided and material in the first action, and the plaintiff had a full and fair

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opportunity to litigate the issue in the earlier action. *Storman v. Storman*, 90 A.D.3d at 897, quoting *Parker v. Blauvelt Volunteer Fire Co.*, 93 N.Y.2d at 349.

In *Gloria Vanderbilt Home Furnishings, Inc. v. Cooper*, 215 A.D.2d 162, the Appellate Division, First Department held that the trial court had properly determined that the findings and conclusions of the Hearing Panel of the First Department's Departmental Disciplinary Committee with respect to defendant Cooper's former attorney, who was a shareholder in the plaintiff corporation, were not entitled to preclusive effect with respect to the action before the court in which the plaintiff corporation sought damages and an injunction enjoining defendants, *inter alia*, from tortiously interfering with its contractual relations with its licensees, because defendants had failed to establish an identity of issue which had necessarily been decided in the prior action and that there was a full and fair opportunity for plaintiff to contest the decision now claimed to be controlling. *Id.* at 162-163 citing *Gilberg v. Barbieri*, 53 N.Y.2d 285, 291 (1981). In so ruling, the First Department noted that the issues decided in the disciplinary action pertained to the attorney's fitness to practice law and did not determine the validity and enforceability of agreements that defendant Cooper had entered into relinquishing entitlement to licenses for her name. *Id.* at 163. The application of collateral estoppel requires that there be an "identity of issue." *Kenny v. New York City Transit Auth.*, 275 A.D.2d 639, 640 (1st Dept. 2000), quoting *Gloria Vanderbilt Home Furnishings, Inc. v. Cooper*, 215 A.D.2d at 163.

C. Application of these Principles to the Instant Action

The Court denies the motion to renew. Plaintiffs named Joel and S&S as Defendants in the Complaint and specifically alleged that Irwin, who is undisputedly a resident of Florida, acted in concert with Joel and S&S, residents of New York, in engaging in wrongdoing against Plaintiff. The Court granted Irwin's motion to dismiss because the record before the Court did not support that allegation and, therefore, the purported basis for the exercise of jurisdiction over Irwin in New York did not exist. While the Court is mindful of the Disbarment Order, and Joel's improper conduct vis-a-vis his escrow account that prompted his disbarment, the Disbarment Order addressed the issue of whether Joel violated the Rules of Professional Conduct and should be disbarred. This action, on the other hand, involves Plaintiffs' allegation that Irwin and Joel/S&S acted together to commit a wrong against Plaintiffs. The Court concludes that

Plaintiffs are not entitled to the benefit of the collateral estoppel doctrine with respect to the Disbarment Order because the issues before the Second Department (whether Joel violated the Rules of Professional Conduct and should be suspended from the practice of law), were not identical to the issues in this action (whether Joel engaged in conduct that makes him liable to Plaintiff under the causes of action in the Complaint).

Moreover, even assuming *arguendo* that the collateral estoppel doctrine is applicable to the Disbarment Order, the Second Department's conclusions in that Order do not support Plaintiffs' allegation that Joel induced Nick to deposit monies in his escrow account and/or made false representations to Nick about how those funds would be used; on the contrary, the Disbarment Order supports the conclusion that Joel had virtually no contact or relationship with Nick and that Joel and Irwin were not, as Plaintiffs allege, "working together." Accordingly, the Disbarment Order would not prompt the Court to modify its Prior Dismissal Decision. The Disbarment Order, while recognizing that Joel improperly permitted Irwin to make use of his escrow account, does not include any finding that Joel committed any impropriety towards Plaintiffs. As noted in a prior decision in this action, the Complaint alleges *inter alia* that "The Defendants induced Plaintiff Norman Nick to deposit monies in their attorney escrow account and made false and fraudulent representations that they would use the funds to make investments in legitimate business ventures." Plaintiffs' Counsel confirms that this is Plaintiffs' theory, affirming that "[e]ssentially, plaintiffs claim defendants [Irwin] and [Joel], acting together, induced them to deposit money into the [S&S escrow account] on three occasions" (Weber 8/3/15 Aff. in Supp. at ¶ 2). As the Disbarment Order does not support that allegation, renewal is not warranted.

The Court also denies the motion to compel. As it appears that Defendants Joel and S&S have made efforts to comply with Plaintiffs' demands, and in light of the Court having granted Plaintiffs permission to move for a default judgment against Defendants Joel and S&S, the Court denies the motion.

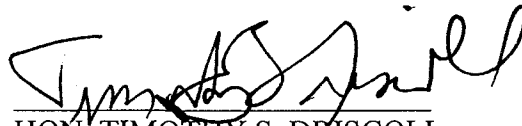
All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court reminds counsel for the parties of their required appearance before the Court for a conference on November 13, 2015 at 9:30 a.m.

ENTER

DATED: Mineola, NY
October 21, 2015


HON. TIMOTHY S. DRISCOLL
J.S.C.

ENTERED

OCT 29 2015

NASSAU COUNTY
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