Person v Dedvukaj
2016 NY Slip Op 32422(U)
December 9, 2016
Supreme Court, New York County
Docket Number: 155763/2015
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. CAROL R. EDMEAD J.S.C.**
Justice

PART 35

Carl E. Person

INDEX NO. 155763/15

-v-

MOTION DATE ______

MOTION SEQ. NO. 001

Dedvukaj, Victor et al.

The following papers, numbered 1 to ____, were read on this motion to/for ______

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ______ | No(s). ______

Answering Affidavits — Exhibits ______ | No(s). ______

Replying Affidavits ______ | No(s). ______

Upon the foregoing papers, it is ordered that this motion is

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE ______
FOR THE FOLLOWING REASON(S): ______

Plaintiff Carl E. Person, Esq. ("Plaintiff"), an attorney appearing *pro se*, brings this action for unpaid legal fees against Defendants Victor, Violeta, Marash, Gjelosh, Maruka, and Gjon Dedvukaj (collectively, "Dedvukaj Defendants"), and at least one John Doe (collectively, the "Defendants"), family members alleged to have had an ownership interest in Hoti Realty Management, Co., Inc. ("Hoti Management") and/or Hoti Enterprises, L.P. ("Hoti Enterprises"; collectively the "Hoti Entities"), based on legal services rendered.

Plaintiff now moves pursuant to CPLR 3212(e) for partial summary judgment against the Dedvukaj Defendants on liability. The Dedvukaj Defendants cross-move, pursuant to CPLR 3211(a)(7), to dismiss the Complaint for failure to state a cause of action or, in the alternative, to compel Plaintiff to accept their response to Plaintiff's Notice to Admit.

Background Facts

In 2009, foreclosure proceedings were commenced against a Hoti Enterprises property managed by Hoti Management, in which Hoti Enterprises, the sole defendant in that case, defaulted by failing to answer (the "Foreclosure Action").

On October 12, 2010, Hoti Enterprises and Hoti Management filed voluntary Chapter 11 bankruptcy proceedings (*see* Bankr SDNY 10-24129, the "Bankruptcy Proceeding").

On or about June 25, 2011, Plaintiff was retained to "represent you (i.e., "Victor Dedvukaj and Hoti Enterprises . . .") in the . . . mortgage foreclosure action . . . in asserting your affirmative defenses to the action, and your offsets and counterclaims." Plaintiff also agreed to "provide consultation and assistance to your bankruptcy attorney in the related" Bankruptcy

Dated: ______ ______, J.S.C.

1. CHECK ONE: ☐ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

Proceeding (the "Retainer Agreement"). Hoti Management was dissolved by proclamation in October 26, 2011 (*NYSCEF 50*).

Thereafter, Plaintiff obtained vacatur of Hoti Enterprises' default and dismissal of the Foreclosure Action based, in part, on the plaintiff lender's lack of standing in the Action (*GECMC 2007–C1 Burnett St., LLC v. Hoti Enters., LP*, No. 5006/2009, slip op. at 2–3 [Sup Ct, Kings County Apr. 4, 2012]). However, the Second Department later reversed that decision and granted summary judgment to the plaintiff lender.[1]

On June 14, 2012, the Bankruptcy Court held a hearing on Plaintiff's motion for appointment as "special litigation counsel" to the Hoti Enterprises in the Foreclosure Action, in which Plaintiff sought *nunc pro tunc* "authority" as of June 2011 (*NYSCEF 68* [the "Transcript"] at 15). Plaintiff stated that he was retained on June 25, 2011, after which he filed the motion to vacate the default (Transcript at 15-16). The Bankruptcy Judge noted that had Plaintiff's application been timely, the Court would have authorized such appointment. However, since "the delay in seeking court approval" did not result "from extraordinary circumstances," the Bankruptcy Court granted Plaintiff's application to be retained as counsel, "*nunc pro tunc* to the date of [Plaintiff's] application, which is March 19, 2012." (Transcript at 17; *NYSCEF 66* at 4 [the "Retention Order"]). The Retention Order also ordered that Plaintiff "shall not act as counsel to the Debtors on bankruptcy matters" (Retention Order at 2).[2]

On June 19, 2012, the Third Modified Chapter 11 Plan of Reorganization was approved (*see NYSCEF 53*, the "Reorganization Plan").[3]

Thereafter, on September 19, 2012, the Bankruptcy Judge granted Plaintiff's July 23, 2012 application for fees pursuant to a Consent Order "for a first and final allowance of compensation for services rendered and for reimbursement of expenses incurred as special litigation counsel to Hoti Enterprises L.P. *and* Hoti Realty Management Co., Inc." the "debtors in these chapter 11 cases . . . ." (*NYSCEF 71*, the "Fee Order" [emphasis added]). Though Plaintiff's application was for fees covering the period of "03/20/12-07/*22*/12 " (*NYSCEF 69* [emphasis added]), the Fee Order was for the "final fee period" of "March 20, 2012-July *2*, 2012" (emphasis added). The Fee Order awarded to Plaintiff as "Special Litigation Counsel to the Debtors" the negotiated amount of $37,066.08 and expenses of $433.92.

Plaintiff subsequently filed this action to recover $99,170 in unpaid legal fees for work performed from June 2, 2011 through November 19, 2012 (Amended Complaint, ¶¶16-17) for breach of contract (against Victor Dedvukaj, Hoti Enterprises and Hoti Management), account

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[1] The decision was based, in part, on the finding that Hoti Enterprises was judicially estopped from challenging the plaintiff lender's standing to foreclose in light of Hoti Enterprises's so-ordered acknowledgment in the Bankruptcy Proceeding that the plaintiff lender possessed a "valid and secured claim." (*GECMC 2007-C1 Burnett St., LLC v Hoti Enterprises, L.P.*, 115 AD3d 642, 643 [2d Dept 2014]).

[2] However, pursuant to the Bankruptcy Court order, "the Debtors are authorized to retain" Plaintiff as Special Litigation Counsel in the Foreclosure Action "*nunc pro tunc* as of March 20, 2012" (Fee Order at 2).

[3] Pursuant to Plaintiff's inclusion of a print-out of the Bankruptcy Court's electronic docket, the Court takes judicial notice of the Bankruptcy Court's Order confirming the Reorganization Plan (SDNY Bankr 10-24129-rdd *CM/ECF Doc. Nos. 240,* the "Bankruptcy Order").

stated against the Dedvukaj Defendants (as to the liability of Victor Dedvukaj, Hoti Enterprises and Hoti Management based on bills sent to Hoti Enterprises and Victor Dedvukaj), and unlawful transfer against the Dedvukaj Defendants (as to the liability of Victor Dedvukaj, Hoti Enterprises and Hoti Management (the "Amended Complaint"). As against the Dedvukaj Defendants, Plaintiff alleges that the Dedvukaj Defendants were shareholders of Hoti Management before its dissolution, and that after Hoti Management was dissolved in October 2011, the Dedvukaj Defendants, as general partners, continued to run Hoti Management's business as a general partnership. Hoti Management, as a general partner of Hoti Enterprises, is responsible for unpaid legal services rendered to Hoti Enterprises, and the Dedvukaj Defendants are each liable for Hoti Management's responsibilities (¶¶20-23). Victor Dedvukaj, who signed the Retainer Agreement on behalf of Hoti Enterprises *and* himself, is liable personally as a former client, and his capacity as a general partner of Hoti Management, and as a general partner of the business of Hoti Management after it was dissolved (¶3).[4]

In support of summary judgment, Plaintiff argues that Defendants' failure to timely respond to Plaintiff's July 28, 2016 Notice to Admit[5] and failure to submit individually sworn responses, constitute an admission of the facts contained therein.

Plaintiff argues that, based on the above, most of the legal services he performed were directly for Victor Dedvukaj; for each of the Defendants in their role of operating Hoti Enterprises and Hoti Management and for Hoti Enterprises pursuant to the Retainer; and for Hoti Management, pursuant to Plaintiff's appointment as special litigation counsel for Hoti Enterprises and Hoti Management in the Foreclosure Action. Plaintiff argues that the Dedvukaj Defendants are personally liable for Hoti Management's unpaid legal services he rendered to Hoti Management, Hoti Enterprises and Victor Dedvukaj (prior to Hoti Management's dissolution on October 26, 2011) and for legal services he rendered to the Dedvukaj Defendants, as successors to Hoti Management's business after that entity's dissolution. And, Victor Dedvukaj is liable as result of the Retainer Agreement he signed on behalf of himself and Hoti Enterprises dated June 2, 2011. Inasmuch as most of Plaintiff's legal services were rendered after Hoti Management was dissolved, Plaintiff argues that he rendered services to the Dedvukaj Defendants directly, or as owner and partners of Hoti Management's business (and Hoti Enterprises' business) to which they succeeded as successors in interest.

Further, Plaintiff argues that Hoti Management and Hoti Enterprises were reorganized, and their debts were not discharged by any court order; rather, Hoti Enterprises' property was given to the subject mortgaged property to the mortgagee. As such, the debts of Hoti Management and Hoti Enterprises continued, and became the debts of the Dedvukaj Defendants when they succeeded as owners and operators to the business of Hoti Management (and Hoti Enterprises) as a general partnership.

Finally, Plaintiff argues that the Dedvukaj Defendants, operating as a general partnership,

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[4] Though causes of action are stated against the Hoti Defendants, they are not named or identified as direct defendants in the caption.

[5] Defendants' response, dated August 17, 2016 was allegedly served on the same date (*Defs Exh H* at 15). However, the envelope containing the response is post-marked August 18, 2016 (*see* Plaintiff's Notice of Rejection of Defendants' Response to Notice to Admit, *NYSCEF 43* at 6).

continued the business activities of Hoti Enterprises and Hoti Management, which made them successors to the liabilities and debts of both.

In opposition, and in support of their cross-motion to dismiss, Defendants argue, through the affidavit of Victor Dedvukaj, that the Complaint fails to state a cause of action, as Plaintiff admitted in the Bankruptcy Proceeding that his representation was limited to Hoti Enterprises only, that the individual defendants were not parties in the Foreclosure Action, and Plaintiff's retention and payment were approved by the Bankruptcy Court. Plaintiff's retention and representation by the "the bankrupt estate" is governed by bankruptcy law, and he can only apply to the Bankruptcy Court for any further fees and, then, only as against Hoti Enterprises, and not any other party. Defendants also dispute the amount allegedly owed.

As to the Notice to Admit, Defendants argue that it was timely served by mail and, in any event, that its subject matter is inappropriate and should therefore be stricken. Defendants also request that the Court compel Plaintiff to accept their response to Plaintiff's Notice to Admit.

In opposition to Defendants' cross-motion and in further support of his motion, Plaintiff contends that the cross-motion was untimely served two days before the return date of his motion. Plaintiff also notes that Defendants do not dispute the authenticity of the envelope showing that Defendants' Response to the Notice to Admit was untimely mailed on August 18, 2016. Plaintiff reiterates that he is owed by all Defendants for work done outside of the "Authorized Period," or, at minimum, owed by Victor Dedvukaj personally under the terms of the retainer. Plaintiff claims that the unpaid bills (at least for the period prior to the Authorized Period) were not subject to the Plan of Reorganization, which dealt with claims of creditors arising before the filing of the Bankruptcy Proceeding. According to Plaintiff, the only issue in the Bankruptcy Court was to what extent the Bankrupt entities' estates would pay his legal fees, but not the cancellation of bills for services or fees occurring after the filing of the bankruptcies.

Discussion

Because the cross-motion to dismiss raises a threshold issue concerning the ability of this Court to entertain Plaintiff's Complaint (*Defs Affirm in Opp*, ¶ 4-8), that issue is addressed first.[6]

In determining a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the Court's role is deciding "whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail" (*African Diaspora Maritime Corp. v Golden Gate Yacht Club*, 109 AD3d 204, 968 NYS2d 459 [1st Dept 2013]; *Siegmund Strauss, Inc. v East 149th Realty Corp.*, 104 AD3d 401, 960 NYS2d 404 [1st Dept 2013]). On a motion to dismiss made pursuant to CPLR § 3211, the court must "accept the facts as alleged in the complaint as true, accord plaintiffs "the benefit of every possible favorable inference," and "determine only whether the facts as alleged fit into any cognizable legal theory" (*Siegmund Strauss, Inc.*, 104 AD3d 401; *Nonnon v City of N.Y.*, 9 NY3d 825 [2007]; *Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972, 638 NE2d 511 [1994]).

However, "allegations consisting of bare legal conclusions as well as factual claims flatly

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[6] The Court considers Defendants' untimely cross-motion, as Plaintiff submitted opposition thereto and has not demonstrated prejudice from the delay (*see Keller v Merchant Capital Portfolios, LLC*, 103 AD3d 532, 532 [1st Dept 2013]).

contradicted by documentary evidence are not" presumed to be true or accorded every favorable inference (*David v Hack,* 97 AD3d 437, 948 NYS2d 583 [1st Dept 2012]; *Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81, 692 NYS2d 304 [1st Dept 1999], *affd* 94 NY2d 659, 709 NYS2d 861, 731 NE2d 577 [2000]; *Kliebert v McKoan*, 228 AD2d 232, 643 NYS2d 114 [1st Dept], *lv denied* 89 NY2d 802, 653 NYS2d 279, 675 NE2d 1232 [1996]), and the criterion becomes "whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275, 401 NYS2d 182, 372 NE2d 17 [1977]; *see also Leon*, 84 NY2d at 88; *Ark Bryant Park Corp. v Bryant Park Restoration Corp.*, 285 AD2d 143, 150, 730 NYS2d 48 [1st Dept 2001]; *WFB Telecom., Inc. v NYNEX Corp.*, 188 AD2d 257, 259, 590 NYS2d 460 [1st Dept], *lv denied* 81 NY2d 709, 599 NYS2d 804, 616 NE2d 159 [1993] [CPLR 3211 motion granted where defendant submitted letter from plaintiff's counsel which flatly contradicted plaintiff's current allegations of *prima facie* tort]).

To the extent that Defendants argue that fee applications relating to, or arising out of, the representation of entities involved in bankruptcy proceedings must be addressed by a Bankruptcy Court, they are correct. The longstanding rule is that professional services performed for a bankruptcy estate are compensable out of the assets of the estate only if such professional assistance has been authorized by the Court prior to the services being rendered (*In re Morton Shoe Companies, Inc.*, 22 BR 449, 450 [Bankr D Mass 1982], *citing In re Futuronics Corp.*, 655 F2d 463 [2d Cir 1981]; *accord Becker v Stewart*, 402 F2d 500, 501 [5th Cir 1968]; *see also In re Republic Gas Corp.*, 14 F Supp 703 [SDNY 1935] [counsel was not entitled to allowance for fees for services to debtor preceding bankruptcy proceedings, exclusive of services immediately concerning commencement of bankruptcy proceedings]).

Thus, it appears to this Court that the exclusive remedy for Plaintiff to recover fees incurred before or during the Bankruptcy Proceeding was, as Defendants point out, an application to the Bankruptcy Court pursuant to 11 USC § 330. Indeed, Plaintiff initially utilized that remedy and sought approval to act as an attorney for the Hoti Entities, *nunc pro tunc* for the period commencing June 2, 2011, though he was only granted authorization effective March 20, 2012.

Moreover, the Bankruptcy Court retained jurisdiction over such claims, among others. Though Plaintiff argues that this action is proper because at least a portion of his fees post-date the Bankruptcy Court's confirmation of the Reorganization Plan, the Reorganization plan states explicitly (and broadly) that "on or after the Effective Date, the Bankruptcy Court shall retain jurisdiction over all matters arising in, arising under, and related to the Chapter 11 Cases for, among other things, ... (h) to hear and determine all applications under sections 330, 331, and 503(b) of the Bankruptcy Code for awards of compensation for services rendered and reimbursement of expenses incurred prior to the Plan Confirmation Date" (Reorganization Plan at Section 13[h])."[7] To the extent that all of Plaintiff's causes of action relate to the bankrupt entities, dismissal is warranted in light of the Bankruptcy Court's apparent jurisdiction over Plaintiff's fee applications.

Accordingly, it is hereby

ORDERED that the Defendants' cross-motion to dismiss for failure to state a cause of action, or in the alternative, to compel Plaintiff to accept their response to Plaintiff's Notice to

[7] The final Bankruptcy Order incorporated Section 13 of the Reorganization Plan (*see fn 4, supra*).

[* 6]

Admit, is granted solely as to dismissal of the Complaint, without prejudice; and it is further

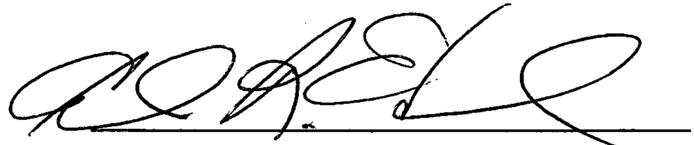
ORDERED that the action is dismissed, and the Clerk may enter judgment accordingly; and it is further

ORDERED that Plaintiff's motion for summary judgment is denied, without prejudice; and it is further

ORDERED that Plaintiff shall, within 20 days of entry, serve a copy of this Order with Notice of Entry upon all parties and the Clerk of Court.

This constitutes the decision and order of the Court.

DATED: 12/9/16



J.S.C.

HON. CAROL R. EDMEAD
J.S.C.

1. CHECK ONE : [X] CASE DISPOSED [ ] NON-FINAL DISPOSITION

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