

Pu v Dow

2018 NY Slip Op 30914(U)

May 10, 2018

Supreme Court, New York County

Docket Number: 653698/2016

Judge: Debra A. James

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DEBRA A. JAMES

PART 59

Justice

-----X

RICHARD PU,

INDEX NO. 653698/2016

Plaintiff,

MOTION DATE 05/01/2018

- v -

ANTONIO DOW, ZACHARY DOW,

MOTION SEQ. NO. 008 009

Defendant.

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 008) 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271

were read on this application to/for REARGUMENT/RECONSIDERATION.

The following e-filed documents, listed by NYSCEF document number (Motion 009) 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288

were read on this application to/for RENEW/REARGUE/RESETTLE/RECONSIDER.

Upon the foregoing documents, it is

ORDERED that the motion of plaintiff to reargue the Order dated March 5, 2018, which resolved Motion Sequence Number 006 (Motion Sequence Number 008) is granted, and upon reargument, the Order dated March 5, 2018 is modified only to the extent that such part of the cross motion of defendants for sanctions against plaintiff, which was granted, is hereby DENIED and the award of \$500 of costs against plaintiff is vacated and the disbursements of \$369.98 assessed by plaintiff against defendant shall be deemed satisfied by the proportionate share of the costs of the transcript that this court ordered that the parties

purchase, which plaintiff has failed to pay to date, in the herein action; and the part of the cross motion of defendants to dismiss the complaint against defendant Zachary Dow pursuant to CPLR 3211(a)(7), which was denied, is hereby GRANTED; and as the such motion and cross motion, the court otherwise adheres to the Order dated March 5, 2018, and it is further

ORDERED that the motion of defendants to reargue the Order dated March 5, 2018, which resolved Motion Sequence Number 007 (Motion Sequence Number 009) is granted, and upon reargument, the Order dated March 5, 2018 is modified only to the extent that the cross motion of defendant Antonio Dow for summary judgment (Motion Sequence Number 007), which was denied, is GRANTED, and the court otherwise adheres to its Order dated March 5, 2018; and it is further

ORDERED that the Clerk shall enter judgment in favor of defendants and against plaintiff, dismissing the complaint, accordingly.

DECISION

With respect to the cross motion of defendants for sanctions against plaintiff for making a frivolous argument relating to defendants' response to interrogatories on his motion for summary judgment, the court has now more carefully reviewed plaintiff's supporting papers and memorandum of law on the motion. It finds that plaintiff made a colorable argument

therein. The sanction against plaintiff was not warranted and must be vacated.

However, although the court misconstrued plaintiff's argument as based upon CPLR 3212 (a), it was of no consequence since plaintiff was incorrect that the defendants "short-served" him and thus failed to timely oppose his motion for summary judgment for the following reasons.

The procedures entitled "Motions and Special Proceedings by Notice of Motion/Petition" published by the New York Supreme Court, Civil Branch, New York County (www.nycourts.gov/supctmanh), state, in pertinent part:

"Once a motion is made, counsel for all parties are strongly encouraged to agree upon a briefing schedule and submit a stipulation of adjournment reflecting that schedule using service or a clerk. Where a briefing schedule has not been agreed upon, the movant can avoid the need to attend simply to see if anyone will hand up opposing papers by demanding papers as provided by CPLR 2214(b). To protect movants against the submission of late opposition papers or cross-motions, the General Clerk's Office will screen motions in which such papers are submitted without a response (reply or opposition, respectively to ensure that proper time to respond has been afforded and it will sua sponte adjourn for one-week cases in which such times has not been given."

As argued by defendants, a review of the court filings reveals that, as per such procedure, both counsel at bar entered into a briefing schedule dated August 25, 2017 for Motion Sequence Number 006 and defendants' cross motion and plaintiff's reply thereto were served and filed in accordance with the

timetable set forth in such stipulation. Defense counsel then filed an application dated December 6, 2017 to extend her time to respond to Motion Sequence Number 007, which the court notes sought identical relief as Motion Sequence Number 006, and the Clerk's Office adjourned the submission date of such motion, as defendants' cross motion and plaintiff's reply were both filed on January 11, 2018, and plaintiff's opposition papers respond to the merits, as well as the procedural aspects, of the defendants' cross-motion.

Moving to defendants' cross motions to dismiss pursuant to CPLR 3211(a)(7) and for summary judgment pursuant to CPLR 3212, dismissing the complaint, this court overlooked that defendants established their prima facie entitlement to dismissal of the complaint as a matter of law and fact.

Defendants are correct that defendant Zachary Dow never retained plaintiff to represent him, as defendant Zachary Dow had no capacity to retain plaintiff because he was a minor child at the time of the agreement entered between plaintiff and defendant Antonio Dow, his father. Nonetheless, the court does not find that plaintiff's conduct in bringing the action against defendant Zachary Dow rises to the level of frivolous conduct as defined in 22 NYCRR 130-1.1(c). See Metropolitan Model Agency USA, Inc. v Rayder, 168 Misc.2d 324 (Sup Ct, NY Co 1996).

As for the remaining claim that seek a judgment for attorneys' fees based on quantum meruit against defendant Antonio Dow, the complaint alleges, in pertinent part, "Then, left with no choice, on 6/16/16 Plaintiff moved for leave to withdraw as Antonio's and Zachary's counsel." Thus, plaintiff contends that he made such motion on the same date that the that Judge Bailey-Schiffman (Kings County, Supreme Court) rendered her Decision and Order dismissing all the causes of action of the complaint, except the 6th (intentional infliction of emotional distress), 7th (negligent infliction of emotional distress) and ninth (replevin) in Dow v Glynn, Index No. 505080/2016, wherein plaintiff represented and appeared on behalf of defendant Antonio Dow. Plaintiff does not allege that his motion to be relieved was ever granted. Nor is a copy of any such order appended to his papers in opposition to defendants' cross-motion for summary judgment.

"Until an attorney of record is discharged in the manner prescribed by law, that is, by order of the court or by the filing of a consent of the retiring attorney and the party in the prescribed form (see CPLR 321, subd. (b)), the attorney represents the party".
Hess v Tyszko, 46 AD2d 980 (3rd Dept. 1974).

Without a discharge "in the manner prescribed by law", the attorneys' fees owed to plaintiff in quantum meruit cannot be determined, as a determination must be made as of the time of the discharge. Thus, plaintiff is relegated to recover

attorneys' fees only on a contingency basis under the retainer agreement. See Cohen v Grainger, Tesoriero & Bell, 81 NY2d 655, 658 (1993). As there is no dispute that Dow v Glynn ultimately settled and that defendant Antonio Dow recovered no proceeds from such resolution, plaintiff is entitled to no contingent attorneys' fees.

5/10/2018
DATE


DEBRA A. JAMES, J.S.C.

CHECK ONE:

APPLICATION:

CHECK IF APPROPRIATE:

- CASE DISPOSED
- GRANTED
- SETTLE ORDER
- DO NOT POST

DENIED

- NON-FINAL DISPOSITION
- GRANTED IN PART
- SUBMIT ORDER
- FIDUCIARY APPOINTMENT

OTHER

REFERENCE