

Biton v Serour

2018 NY Slip Op 31847(U)

July 31, 2018

Supreme Court, New York County

Docket Number: 161689/2014

Judge: Adam Silvera

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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. ADAM SILVERA **PART** **IAS MOTION 22**

Justice

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INDEX NO. 161689/2014

TAMI TAL BITON AND DAVID MIHALIK, BOTH INDIVIDUALLY
AND AS PARENTS AND LEGAL GUARDIANS OF D.M., AN
INFANT.,

MOTION DATE N/A, N/A

MOTION SEQ. NO. 011

Plaintiff,

- v -

SAMEH SEROUR, EMPIRE INTERNATIONAL, LTD.,

DECISION AND ORDER

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 011) 195, 196, 197, 198, 199, 200, 201, 202, 203

were read on this motion to/for RENEW/REARGUE/RESETTLE/RECONSIDER

The following e-filed documents, listed by NYSCEF document number (Motion 012) 204, 205, 206, 207, 208, 209, 210

were read on this motion to/for ATTORNEY - FEES

Upon the foregoing documents, it is ordered that plaintiff's counsel, Halperin & Halperin, P.C.'s, motion to reargue (mot. seq. no. 011) and its order to show cause for a fee hearing (mot. seq. no. 012) is decided as indicated below.

Preliminarily, the Court notes that movant is correct in arguing that the Court misapprehended the facts in coming to the prior decision dated March 8, 2018 (hereinafter referred to as the "Prior Decision"). The Prior Decision denied movant's motion for the sole reason that this action was settled. However, movant is correct in arguing that the original motion was never decided on the merits, and that the issue of attorneys' fees survives settlement. Thus, the Court will consider the instant motion and order to show cause on the merits

Here, by Decision and Order dated January 31, 2017, the Appellate Division, First Department, decided that an issue of fact existed as to whether non-party firm (plaintiff's former

counsel, Katsandonis, P.C.) was discharged for cause and remanded the case for a hearing to make such a determination. Thereafter, by Order of Hon. Paul A. Goetz, dated March 2, 2017, “this matter [was] referred to a referee to hear and report whether non-party firm was discharged for cause”. On May 23, 2017, JHO Ira Gammernan held a hearing, took testimony, and made a recommendation that outgoing counsel Katsandonis, P.C. was not discharged for cause.

In the original motion, movant argues that JHO Gammernan’s recommendation must be rejected as plaintiff David Mihalik was unaware that his ex-wife plaintiff Tami Tal Biton retained outgoing counsel Katsandonis P.C., that plaintiff Mihalik advised outgoing counsel Katsandonis P.C. that they would be seeking other counsel, and that plaintiff Biton advised outgoing counsel Katsandonis P.C. that “it’s not a good idea we will be working together”. Hearing Transcript, p. 34, ln. 2. Movant further argues that “upon receiving instruction from plaintiff [Mihalik] to refrain from commencing suit, and upon learning that plaintiffs were together seeking other counsel, [outgoing counsel] Katsandonis P.C. filed suit soon after, on November 24, 2014, without permission and consent of his client, plaintiff [Biton] and without advising her of the same.” Notice of Motion, Exh. A, Weiskopf Aff., ¶ 4.

After a hearing, in which plaintiffs, movant, and outgoing counsel Katsandonis P.C. appeared and participated, JHO Gammernan recommended that the discharge was not for cause. The Court notes that it is undisputed that movant and both plaintiffs presented their arguments and testimony, and had the opportunity to present evidence at the hearing in front of JHO Gammernan. Of note, during the hearing, plaintiff Mihalik specifically stated that he does not remember when he told outgoing counsel Katsandonis P.C. not to file a lawsuit on behalf of his son. Plaintiff Mihalik further testified that he did not send an electronic mail or letter to outgoing counsel Katsandonis P.C. to that effect. Moreover, it is undisputed that plaintiff

Milhalik never retained outgoing counsel Katsandonis P.C., and that plaintiff Biton had the authority to retain outgoing counsel Katsandonis P.C. on behalf of their son. At the hearing, plaintiff Biton testified and stated that she discharged outgoing counsel Katsandonis P.C. due to the fact that the child's medical bills were not paid and that outgoing counsel Katsandonis P.C. permitted the adjustor to request that the child remove his pant, and to take pictures of the child's injuries. The Court notes that deference is due to the JHO Gammerman's credibility determinations as he "was in the best position to weigh the evidence and make credibility determinations". *Winopa Int'l Ltd., et. al. v Woori America Bank*, 59 AD3d 203, 204 (1st Dep't 2009); *see also Bubul v Port Parties, Ltd.*, 83 AD3d 517, 517-518 (1st Dep't 2011). Here, movant has failed to proffer any reason to disturb JHO Gammerman's determinations regarding the witnesses' credibility, or why the recommendation should not be confirmed. As such, movant's motion is denied and JHO Gammerman's recommendation that outgoing counsel Katsandonis P.C. was not discharged for cause is confirmed.

At the hearing, JHO Gammerman also stated that a recommendation on the quantum meruit value of the services outgoing counsel Katsandonis P.C. could not be determined until the case is resolved. As the action was still pending at the time of the hearing, JHO Gammerman declined to make a recommendation as to the value of the services at that time. However, this action has since settled and a determination can be made at this time. As such, movant's order to show cause is granted to the extent that movant and outgoing counsel Katsandonis P.C. shall appear for a final settlement conference on September 5, 2018 at 10:00am in room 136 of 80 Centre Street, New York, NY 10013, and to schedule a fee hearing should this matter not be settled at the conference.

Accordingly, it is

ORDERED that movant Halperin & Halperin, P.C.'s, motion to reargue (mot. seq. 011) is considered on the merits; and it is further

ORDERED that movant's motion to vacate JHO Gammerman's recommendation is denied in its entirety and JHO Gammerman's recommendation that outgoing counsel Katsandonis P.C. was not discharged for cause is confirmed; and it is further

ORDERED that movant's order to show cause (mot. seq. 012) is granted to the extent that movant and outgoing counsel Katsandonis P.C. shall appear for a final settlement conference on September 5, 2018 at 10:00am in room 136 of 80 Centre Street, New York, NY 10013; and it is further

ORDERED that within 30 days of entry, movant Halperin & Halperin, P.C. shall serve a copy of this decision/order upon all parties with notice of entry.

This constitutes the Decision/Order of the Court.

7/31/18
DATE


ADAM SILVERA, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	<input checked="" type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	<input type="checkbox"/> REFERENCE
			<input type="checkbox"/>	
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