

Scarola Malone & Zubatov LLP v Ellner
2019 NY Slip Op 32011(U)
July 8, 2019
Supreme Court, New York County
Docket Number: 651324/2017
Judge: Anthony Cannataro
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. ANTHONY CANNATARO PART IAS MOTION 41EFM

Justice

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SCAROLA MALONE & ZUBATOV LLP,

Plaintiff,

- v -

ANDREW ELLNER, LIGHTBOX CAPITAL MANAGEMENT, LLC, LIGHTBOX VENTURES, LLC, BREM MOLDOVSKY, LLC

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 007) 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 246, 247, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 313, 320, 321, 322, 323, 324, 343, 344

were read on this motion to/for DISMISSAL .

The following e-filed documents, listed by NYSCEF document number (Motion 008) 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 244, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 314, 334, 335, 336, 337, 338, 339, 340, 341, 342

were read on this motion to/for SUMMARY JUDGMENT (BEFORE JOINDER) .

The following e-filed documents, listed by NYSCEF document number (Motion 010) 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 315, 326, 327, 328, 329, 330, 331, 332, 333

were read on this motion to/for SANCTIONS .

The following e-filed documents, listed by NYSCEF document number (Motion 011) 309, 310, 311, 312, 316, 317, 318, 319, 325 were read on this motion to/for STRIKE PLEADINGS.

The following e-filed documents, listed by NYSCEF document number (Motion 012) 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 373, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 420, 428, 429, 453 were read on this motion to/for DISQUALIFY COUNSEL.

In this action, plaintiff, Scarola Malone & Zubatov LLP (the Scarola Firm), seeks attorney’s fees from its former clients, defendants LightBox Capital Management, LLC, LightBox Ventures, LLC, and Andrew Ellner (all three together, the "LightBox defendants"). In its amended complaint, plaintiff included claims against defendant Brem Moldovsky, LLC, seeking a judgment declaring the priority of plaintiff’s liens. The parties have made a variety of motions, which are all now before the Court. The Lightbox defendants move to dismiss the complaint, pursuant to CPLR 3211. Plaintiff moves for partial summary judgment pursuant to CPLR 3211 and CPLR 3212. Plaintiff separately moves for sanctions against Mr. Ellner, and the Lightbox defendants cross-move for sanctions against plaintiff. The Lightbox defendants move to have defendant Brem Moldovsky, LLC replead its answer, and defendant Brem Moldovsky, LLC moves to disqualify Jonathan Miller, Esq., as counsel for the Lightbox defendants. These motions, sequence numbers 007, 008, 010, 011, and 012, are consolidated for decision herein.

The facts of this case are as follows. The Scarola firm represented the LightBox defendants in a federal case docketed in the U.S. District Court for the Southern District of New York as *Lightbox Ventures, LLC v 3rd Home Ltd., et al.*, No. 16-cv-2379 (S.D.N.Y.)

(Cote, J.), between March 2016 and February 2017. After the Lightbox defendants failed to timely pay certain of its legal fees, the Scarola firm was terminated as counsel. The Lightbox defendants then retained defendant Brem Moldovsky, LLC as replacement counsel on March 3, 2017. On March 13, 2017, plaintiff commenced this action to recover its legal fees. The Lightbox defendants ultimately prevailed in the federal action and were awarded a total of \$239,405.28, which included \$38,888.01 in discovery sanctions, \$83,338.19 in compensatory damages, \$17,179.08 in prejudgment interest, and \$100,000.00 in attorney's fees.

The Lightbox defendants' move to dismiss plaintiff's complaint. On a motion to dismiss 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 within any cognizable legal theory" (*Sokol v Leader*, 74 AD3d 1180, 1181 [2010] [internal quotation marks omitted]; see *Nonnon v City of New York*, 9 NY3d 825, 827 [2007]; *Leon v Martinez*, 84 NY2d 83, 87–88 [1994]).

CPLR 3211(a)(5) provides for dismissal of claims that are barred by reason of *res judicata* and/or collateral estoppel. *Res judicata* applies "where a judgment on the merits exists from a prior action between the same parties involving the same subject matter" (*Matter of Hunter*, 4 NY3d 260, 269 [2005]). "Collateral estoppel is an equitable doctrine that is based on the notion that a party should not be permitted to relitigate an issue previously decided against it" (*Nat'l Union Fire Ins. Co. v Hartford Ins. Co.*, 248 AD2d 78, 82 [1998]) (internal citations omitted). "The party seeking to invoke the doctrine need only establish two requirements: (1) that the identical issue was necessarily decided in the prior action and is decisive in the present action; and (2) that the party to be precluded from relitigating an issue must have had a full and fair opportunity to contest the prior determination" (*Id.*).

In her decision in the underlying federal action, Judge Cote issued a partial ruling with regard to the Scarola firm's entitlement to attorney's fees for the case. She found:

[T]he reasonable value for litigating this matter between March 2016, when the complaint was filed, and October 2016, when the Preliminary Injunction Opinion was issued, was \$100,000. Generously, a reasonable fee to litigate the following five months between October 2016 and the Scarola Firm's withdrawal in March 2017 would be substantially less than the \$216,553.41 the Scarola Firm has already been paid in addition to that \$100,000 . . . Because the Scarola Firm has already received more pursuant to its retainer agreement than the Court would award on a quantum meruit theory, it is not entitled to a charging lien.

Judge Cote went on to say that she would not address the question of whether or not the Scarola firm could recover additional damages on its breach of contract claim, because that claim was first filed with this Court, and so should be left to this Court to decide.

Under the doctrines of *res judicata* and collateral estoppel, plaintiff's cause of action seeking a charging lien, and its causes of action sounding in *quantum meruit* and unjust enrichment are all dismissed as they have already been litigated and decided in the federal action.

As to plaintiff's claims for breach of contract and account stated, it is well settled that an attorney discharged without cause is limited to compensation measured by the fair and reasonable value of the services rendered whether that be more or less than the amount provided in a retainer agreement (*Sae Hwan Kim v M & Y Gourmet Grocers*, 239 AD2d 170 [1997] citing *Matter of Montgomery*, 272 NY 323, 326-327 [1936]); see also *Liddle & Robinson, LLP v Garrett*, 720 F. Supp. 2d 417, 425 (S.D.N.Y. 2010). In contrast to claims for breach of contract, courts have held that account stated claims may be brought by

attorneys discharged without cause (see *Ferraioli ex rel. Suslak v Ferraioli*, 8 AD3d 163, 164 [2004]; *Zanani v Schwimmer*, 50 AD3d 445, 446 [2008]; *Bartning v Bartning*, 16 AD3d 249, 249–50 [2005]; see also *Banker v Esperanza Health Sys., Ltd.*, 2011 WL 838909 (S.D.N.Y. 2011), report and recommendation adopted, 2011 WL 867217 (S.D.N.Y. 2011) (whatever limitations there may be in New York to the ability of a lawyer discharged without cause to recover under breach of contract or other theories, they do not preclude a claim for account stated).

In this case, plaintiff's claim for damages arising from a breach of the terminated retainer agreement must necessarily fail, as the federal court has decided that plaintiff has already recovered fees in excess of what it would be entitled to on a theory of *quantum meruit*. As such, plaintiff's cause of action sounding in breach of contract is dismissed. However, the branch of the Lightbox defendants' motion which seeks to dismiss the cause of action for account stated is denied.

Additionally, the branch of the Lightbox defendants' motion which seeks to dismiss plaintiff's request for piercing of the corporate veil is likewise denied. "'Veil piercing is a fact-laden claim' that is not well suited for resolution upon motion to dismiss (*Damianos Realty Group, LLC*, 35 AD3d 344 [2006], quoting *First Bank of Ams. v Motor Car Funding*, 257 AD2d 287, 294 [1999]). Before dismissal can be granted, plaintiff is entitled to obtain necessary discovery to ascertain whether there are grounds to pierce the corporate veil (see *First Bank of Ams.*, 257 AD2d at 294).

The Court next addresses plaintiff's motion for partial summary judgment, the only branch of which remains is the one seeking summary judgment on its cause of action for account stated. That motion is denied without prejudice as premature under CPLR 3212(a), as issue has not yet been joined in this case.

Both sides have requested sanctions against the other. Plaintiff's motion for sanctions is based upon Mr. Ellner's alleged submission of an exhibit which contained a

forged or false signature page to the retainer agreement. While Mr. Ellner's actions were questionable, they took place in the federal court, where the error was acknowledged, rectified, and addressed. Further, upon review of the matter, the federal court declined to issue sanctions. Under these circumstances this Court will also decline to issue sanctions at this time. Nevertheless, plaintiff's actions were not frivolous in that, although the issue of the allegedly forged signature page was addressed by the federal court, the issue was not fully briefed in that forum. As such, the Lightbox defendants' cross-motion for sanctions is denied.

Although the parties' motions for sanctions are denied, it is noted that the parties, in their conduct before the court, their communications with the Court, and in their general disregard for court rules, have exhibited unusually combative behavior, unbecoming of legal professionals. If their conduct in this action continues or worsens, all parties will expose themselves to the risk of incurring sanctions.

The Court next considers defendant Brem Moldovsky, LLC's motion to disqualify Jonathan Miller, Esq., as counsel for the Lightbox defendants. That motion is denied. As decided by Judge Cote's June 26, 2018 order, Mr. Moldovsky has failed to demonstrate that Mr. Miller's prior representation of Mr. Moldovsky and his wife "substantially relates" to Mr. Moldovsky's dispute with the Lightbox defendants (*see Lightning Park v Wise Lerman & Katz*, 197 AD2d 52, 55 [1994]; *see also Nomura Secs. Intl., Inc. v Hu*, 240 AD2d 249, 250 [1997]).

Lastly, the Lightbox defendants move to have Brem Moldovsky, LLC replead its answer. That motion is denied. Upon review, the contents of the answer meet basic pleading requirements, and if the Lightbox defendants have questions regarding ambiguities contained therein, they may seek amplification of the answer through a bill of particulars and/or other discovery.

Accordingly, it is

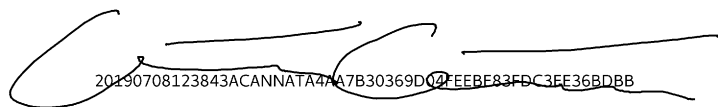
ORDERED that the Lightbox defendants' motion to dismiss the complaint is granted to the extent that the first, third, fourth, and sixth causes of action are dismissed, and otherwise denied; and it is further

ORDERED that plaintiff's motion for partial summary judgment is denied in its entirety; and it is further

ORDERED that plaintiff's and the Lightbox defendants' motions for sanctions are both denied; and it is further

ORDERED that the Lightbox defendants' motion to have defendant Brem Moldovsky, LLC replead its answer is denied; and it is further

ORDERED that defendant Brem Moldovsky, LLC's motion to disqualify Jonathan Miller, Esq., as counsel is denied, and counsel are directed to appear for a status conference in Room 490, 111 Centre Street on August 14, 2019 at 2:15PM.



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7/8/2019
DATE

ANTHONY CANNATARO, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	
<input type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED
<input type="checkbox"/>	SETTLE ORDER	
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER
<input type="checkbox"/>	SUBMIT ORDER	
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: