

JS Barkats PLLC v Berko & Assoc. LLC
2020 NY Slip Op 30799(U)
March 11, 2020
Supreme Court, New York County
Docket Number: 656245/2016
Judge: Gerald Lebovits
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. GERALD LEOVITS PART IAS MOTION 7EFM

Justice

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INDEX NO. 656245/2016

JS BARKATS PLLC AND LAW OFFICES OF MICHAEL B. WOLK, P.C.,

MOTION DATE _____

Plaintiffs,

MOTION SEQ. NO. 006 007

- v -

BERKO & ASSOCIATES LLC, JOSEPH BERKO, MARC BLOCK, LITTLETON JOYCE UGHETTA PARK & KELLY LLP,

DECISION + ORDER ON MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 006) 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 185, 186, 187, 204, 210, 212

were read on this motion for RELEASE OF MONEY IN ESCROW

The following e-filed documents, listed by NYSCEF document number (Motion 007) 182, 183, 184, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 199, 200, 201, 202, 203, 205, 206, 207, 208, 209, 211

were read on this motion for ATTORNEY FEES

Gerald Lebovits, J.:

This motion arises out of a dispute over attorney fees. Plaintiff, JS Barkats PLLC represented defendants Joseph Berko and Joseph Berko & Associates LLC in a prior lawsuit. The representation was provided on a contingency basis, pursuant to a written retainer agreement. The prior action was resolved by a \$500,000 judgment in favor of Berko and Joseph Berko & Associates.

JS Barkats, represented by co-plaintiff Law Offices of Michael B. Wolk, P.C. (Wolk) later brought this action in quantum meruit for unpaid attorney fees. JS Barkats sued not only its former clients (the Berko defendants), but also the Berko defendants' successor counsel, the law firm of Littleton Joyce Ughetta Park & Kelly, LLP. To secure JS Barkats's claim for fees, the Littleton firm put \$70,000 of the \$500,000 judgment from the prior action into escrow.

In June 2018, this court granted the Littleton firm's motion to dismiss JS Barkats's claim against it on the ground that the written retainer agreement barred JS Barkats's quantum-meruit claim. The court declined to dismiss JS Barkats's quantum-meruit claim against the Berko defendants, but only because the Berko defendants had not sought that relief on motion sequence 005. (See NYSCEF No. 153.)

Instead, the court directed JS Barkats and the Berko defendants to proceed to non-binding mediation over JS Barkats's claim to fees, as provided for in their written retainer agreement. (*See* NYSCEF No. 153.) The parties were unable to mediate the fee dispute, however, because JS Barkats insisted that the Berko defendants bear all of the mediation expenses.

In November 2018, this court dismissed JS Barkats's fee claim as against the Berko defendants on three independent grounds: (i) JS Barkats had failed to appear at oral argument on motion sequence 004; (ii) a written and enforceable retainer agreement covered the issue of fees and therefore barred a claim in quantum meruit; (iii) JS Barkats had failed to mediate, as required both by the retainer agreement and this court's June 2018 order. (*See* NYSCEF No. 161.) JS Barkats did not move to reargue or notice an appeal from this order.

The Berko defendants now move in motion sequence 006 for the release of the \$70,000 in escrow held by the Littleton firm, given the dismissal of JS Barkats's claim for fees. Wolk, claiming an entitlement to 50% of JS Barkats's fees under a separate agreement between them, opposes release of the escrowed funds to the Berko defendants. Wolk also moves in motion sequence 007 for an award to itself of 50% of the fees owed to JS Barkats. Non-party U.S. Suite LLC/U-Trend New York Investment L.P., claiming that it has a lien on any judgment paid to JS Barkats, cross-moves in motion sequence 007 for release of the funds held in escrow by the Littleton firm to U.S. Suite instead.

Motion Sequence Nos. 006 and 007 are consolidated here for disposition.

I. Motion Sequence 006

The Berko defendants move to authorize and direct the Littleton firm to release to the Berko defendants the \$70,000 held in escrow. The motion is granted.

The Littleton firm kept settlement funds in escrow to secure payment to JS Barkats in the event that this court found for JS Barkats in their action against the defendants. However, because this court dismissed JS Barkats's fee claim as against the Littleton firm in June 2018, and as against the Berko defendants in November 2018, there is no basis to require the Littleton firm to continue to retain the funds in escrow.

Wolk and U.S. Suite argue in opposition to the motion that because the November 2018 order provides that the retainer agreement was a valid contract, any contingency fee that follows from that retainer agreement should be considered separately from the dismissed quantum-meruit claim. Even if one were to assume that JS Barkats pursued a contractual fee claim based upon the retainer agreement (*but see* Am. Compl., NYSCEF No. 43 at 5), this court held in its November 2018 order that the *entire action* should be dismissed—among other things because JS Barkats failed to mediate its attorney-fee claim, as required both by this court's June 2018 order and by the retainer agreement itself. (*See* NYSCEF No. 161.)

The escrow held by the Littleton firm exists only to secure JS Barkats's claim for fees against the Berko defendants. This court dismissed JS Barkats's effort to pursue that claim for

fees, leaving nothing left to be secured. This court therefore grants the Berko defendants' motion authorizing and directing the Littleton firm to release the \$70,000 that it is holding in escrow.

II. Motion Sequence 007

A. Wolk's Motion to Enforce Its Charging Lien against the Littleton Firm's Escrow

Wolk also moves in motion sequence 007 for an award of 50% of the sum the Littleton firm holds in escrow based on a putative charging lien held by Wolk on that sum. This motion is denied.

If Wolk's charging lien is valid, Wolk would be entitled to 50% of the amount awarded to JS Barkats in counsel fees. But this court dismissed JS Barkats's fee claims as against all defendants. (*See* NYSCEF Nos. 153, 161.) It necessarily follows that Wolk lacks any claim to the escrowed funds.

Wolk asserts that the dismissal of JS Barkats' claim as against the Berko defendants was due only to counsel's failure to appear for argument. That is incorrect. The November 2018 order expressly provides that in addition to the lack of appearance, the court was dismissing the action on two additional merits-related grounds. In any event, neither JS Barkats nor Wolk ever sought to vacate the November 2018 order on the ground that the failure to appear for argument was an excusable default.

B. U.S. Suite's Cross-Motion to Obtain the Escrowed Funds

U.S. Suite cross-moves in motion sequence 007 for an order directing the Littleton firm to release the funds held in escrow to U.S. Suite instead of Wolk. U.S. Suite claims that it has a superior lien on the funds in escrow arising out of two prior judgments against Barkats. The cross-motion is denied in light of this court's ruling on motion sequence 006.

U.S. Suite has a claim on the escrowed funds only to the extent that the funds are in the possession of JS Barkats. Since this court has ruled that JS Barkats cannot maintain a claim to the escrowed funds—and therefore also ruled that the escrowed funds should be released—U.S. Suite cannot maintain a claim to the funds either.

Accordingly, it is

ORDERED that the Berko defendants' motion to authorize and direct the return of monies held in escrow (motion sequence 006) is granted; and it is further

ORDERED that the Law Offices of Michael B. Wolk's motion for an award of 50% of any amount awarded to JS Barkats (motion sequence 007) is denied; and it is further

ORDERED that U.S. Suite LLC/U-Trend New York Investment L.P.'s cross-motion directing release of the escrowed funds to itself (motion sequence 007) is denied.

3/11/2020
DATE



GERALD LEOVITS, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE