

Gaulsh v Diefenbach PLLC

2020 NY Slip Op 31533(U)

May 22, 2020

Supreme Court, New York County

Docket Number: 654346/2015

Judge: Barbara Jaffe

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE PART IAS MOTION 12EFM

Justice

-----X

SUNE GAULSH,

Plaintiff,

- v -

DIEFENBACH PLLC,

Defendant.

-----X

INDEX NO. 654346/2015

MOTION DATE

MOTION SEQ. NO. 004 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 133, 134, 138, 139, 141-159, 183, 184, 186-188

were read on this motion for protective order.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 163-166, 171-174, 189

were read on this motion for interim relief.

In this action, plaintiff seeks reimbursement for attorney fees paid. He advances four causes of action: breach of contract arising from defendant's "unreasonable and excessive fees," fraudulent inducement and duress associated with his execution of a second retainer agreement, and a breach of fiduciary duty arising from defendant's alleged failure to keep accounts as specified and required in the disciplinary rules. (NYSCEF 2). A default judgment was rendered against defendant (NYSCEF 58). Consequently, the sole issue remaining outstanding is damages.

By third amended notice of motion, defendant moves pursuant to CPLR 3013 for an order granting it a protective order and related relief, directing plaintiff to file a note of issue, and granting sanctions against plaintiff (mot. seq. four; NYSCEF 143, 144). Plaintiff opposes, and cross-moves for an order issuing subpoenas, directing defendant to respond to discovery requests, and granting sanctions against defendant, among other relief. (NYSCEF 153-157).

Defendant opposes the cross motion. (NYSCEF 183).

By order to show cause, plaintiff seeks an order directing defendant to preserve certain documents and other relief (mot. seq. five). Defendant opposes.

I. PROCEDURAL BACKGROUND

After filing a notice of motion and supporting affirmation on February 3 and properly noticing the motion to be heard on February 13, 2020 (CPLR 2214[b]), defendant's counsel amended each on February 4 and again on February 5 (mot. seq. 4; NYSCEF 133, 141, 143). There was nothing inappropriate about filing the amended motions as CPLR 3025 applies to pleadings, not motions. Nor was CPLR 2214(b) violated as each amended notice of motion and supporting document was filed no less than eight days before the motion's return date.

On February 9, plaintiff filed his opposition to defendant's motion and a cross motion in a submission of some 57 pages in length, in violation of my part rules (NYSCEF 145, 146). On February 12, defendant duly objected on that basis (NYSCEF 150).

Then, on February 13, the return date of defendant's motion, plaintiff filed separate affidavits in opposition to and in support of, respectively, defendant's motion and plaintiff's cross motion, and two similarly separate memoranda of law, totaling some 68 pages.

Court records reflect that on February 13 and March 5, defendant was granted additional time to respond to plaintiff's papers, the latter adjournment to March 11. Although counsel acknowledged in his March 5 request for an adjournment that plaintiff had filed new papers, he objected to them on the ground that they remained noncompliant, as plaintiff's affidavits and memoranda interweave his argument in opposition and in support of the cross motion (NYSCEF 159). Plaintiff objected to the adjournment and denied that his papers were noncompliant. (NYSCEF 160).

On March 10, plaintiff efiled an order to show cause containing no request for temporary injunctive relief (mot. seq. 5; NYSCEF 163). The order was signed on March 13 and adjourned to March 25 for argument, with the proviso that defendant need not address plaintiff's request that J.P. Morgan Bank be ordered to preserve defendant's account records (NYSCEF 165).

In the meantime, effective March 17, 2020, due to the COVID-19 crisis, the Chief Administrative Judge ordered that "[f]ully briefed motions previously scheduled for oral argument will be marked submitted on the scheduled date without oral argument, unless otherwise directed by the assigned Justice at a later date . . ."

(<https://www.nycourts.gov/legacypdfs/courts/1jd/supctmanh/PDF/Temporary-Procedures.pdf>).

Judicial notice is taken of an order dated March 22, by which the Chief Administrative Judge directed that, as pertinent here, "effective immediately and until further order, no papers shall be accepted for filing by a county clerk or a court." (<https://www.nycourts.gov/whatsnew/pdf/AO-78-2020.pdf>).

Consequently, although defendant's motion sequence five would have been submitted on March 25, consonant with the administrative order that became effective March 17 order, due to the intervening March 22 moratorium on the filing of papers, the motion went unnoticed, as did defendant's motion sequence four, until May 4, when the moratorium on efileing was lifted (<https://www.nycourts.gov/whatsnew/pdf/AO-87-20.pdf>).

Both parties nonetheless efiled papers during the moratorium which were apparently accepted without notice to me: On March 24, plaintiff filed a reply affidavit relating to his order to show cause (NYSCEF 172) to which defendant objected by letter efiled that day on the grounds that plaintiff was not given leave to file a reply and that it was filed in violation of the moratorium (NYSCEF 174). And on April 12, defendant filed its opposition to plaintiff's cross

motion and reply to plaintiff's opposition to its motion. (NYSCEF 183).

Then, on May 5, the day that the moratorium was lifted on e-filing, defendant e-filed an affidavit, a supplemental affidavit, and a supplemental affirmation to replace the earlier supporting affirmations of its principal, now counsel, filed on February 3, 4, and 5 (NYSCEF 186, 187, 188), along with an affidavit to replace that filed in opposition to plaintiff's show cause order (NYSCEF 171, 189).

Defendant also that day filed an order to show cause with a request for temporary injunctive relief (mot. seq. six; NYSCEF 190), which was signed on May 11, and by which plaintiff was temporarily restrained, pending the hearing and determination of the motion, from engaging in certain conduct relating to discovery (NYSCEF 197). Thus, pursuant to CPLR 6313 ("Upon granting a temporary restraining order, the court shall set the hearing for the preliminary injunction at the earliest possible time."), argument was immediately scheduled for May 13, with motion sequence six duly taking precedence over motion sequence numbers four and five.

Following the argument, conducted by Skype conference by virtue of the continued health crisis, by decision and order dated May 14, I held, *inter alia*, that the bank records that plaintiff had sought to be ordered preserved by the bank, including those of defendant's principal, "are irrelevant to the prospective inquest, the sole purpose of which is to determine plaintiff's damages," and that plaintiff had not demonstrated otherwise. I also observed that defendant had sufficiently demonstrated that plaintiff had "no legitimate reason for transmitting, along with the notice to Chase, the blank subpoena and blank order to show cause," and rejected as incredible plaintiff's denial of an intent to mislead absent any indication that it was necessary to attach those blank documents (NYSCEF 200). Therefore, plaintiff was preliminarily enjoined from:

- (1) serving, faxing, writing, communicating, telephoning to, or communicating in any way, with J.P Morgan Chase Bank, NA related to his notice dated March 14, 2020 without an Order of the Court;
- (2) sending or serving to any third-parties a non-judicial subpoena as he is not an attorney; and
- (3) serving, sending by mail or emailing, or faxing to any third party a Litigation Hold Notice or a copy of a subpoena, in whatever form, unless the document to be sent to a third party is first approved by the Court.

(*Id.*).

II. CONTENTIONS

A. Motion seq. 4

As defendant's third notice of motion and affirmation (NYSCEF 143, 144) purport to amend the earlier ones (NYSCEF 133, 134, 141, 142), they are exclusively addressed here. And, as defendant thereafter filed supplemental affidavits and a supplemental affirmation (NYSCEF 186-188) without explaining how they differ from those previously filed, they are not considered except to the extent that any impropriety in having filed affirmations in lieu of affidavits is overlooked.

In his third amended notice of motion, defendant seeks orders (1) precluding plaintiff from applying for subpoenas to obtain defendant's IOLA account information as it is irrelevant to this case; (2) compelling plaintiff to "turn over the name of the attorney that is assisting [him] in the filing of sanctionable discovery demands and other sanctionable conduct detailed in the supporting supplemental affirmation"; (3) requiring that plaintiff seek the court's permission before making additional discovery motions; (4) desist from writing letters to the court as per her

part rules; (5) file a note of issue on or before a date certain to be set by the court; and (6) pay monetary sanctions “for his willful and sanctionable conduct pursuant to 22 NYCRR Part 130-1.1(a)”; and (7) pursuant to CPLR 3103, for an order directing plaintiff to answer in open court or provide an affidavit explaining how he procured a document from a sealed case, and for an order that he not upload to NYSCEF any portion of the file the sealed file, and an order sanctioning plaintiff for such illegal conduct. (NYSCEF 143).

Defendant alleges in his supplemental affirmation that plaintiff efiled in this case pages from state and federal court files pertaining to petitions for a name change filed under seal by defendant’s principal. While defendant acknowledges that plaintiff did not efile pages containing the substance of the petitions, it asserts that they contain personal information that would cause its principal expense, embarrassment, disadvantage, and prejudice. Defendant also reports that plaintiff improperly procured his home address from a court website and included it in the same exhibit as the sealed pages. Defendant thus asks not only that the pages be removed from NYSCEF, but that plaintiff be ordered to cease from efilings any documents from the other court files, provide it with copies of any documents he was able to procure from those files, and for an order sanctioning plaintiff for such conduct. And, as plaintiff’s action is for attorney fees only, defendant complains that his creation of “an avalanche of destruction [has] wasted time for all.” It asks that the inquest be promptly scheduled whereby any unearned legal fees will be returned to plaintiff. (NYSCEF 188).

In opposition, plaintiff claims that discovery remains outstanding, and denies having subpoenaed the bank accounts, that defendant is entitled to oppose the issuance of so-ordered subpoenas on third parties, and that the bank accounts are irrelevant absent any authority for defendant’s contention that his funds became its funds before they were earned. Moreover, he

claims that defendant's alleged mishandling of his funds may warrant a disgorgement of fees in connection with his cause of action for breach of fiduciary duty. He acknowledges having he sent me a letter without copying defendant, contends that defendant has filed more documents seeking relief than he has, and asks that certain allegations contained within defendant's affidavit be stricken as false, irrelevant, slanderous, moronic, idiotic, frivolous, and malicious. Plaintiff also advances allegations concerning conduct that are either irrelevant to damages or are unsupported, and to the extent that they are relevant to damages, they are best raised at the inquest. (NYSCEF 154).

In his cross motion, plaintiff seeks orders (1) approving the issuance of a subpoena for defendant's operating account at JPMorgan Chase Bank NA; (2) directing defendant to comply with the outstanding discovery as set forth in NYSCEF 132, 135, 157 (¶¶23-25, 32, 34 ,37, 40); (3) striking, pursuant to CPLR 3024[b] ¶¶3, 5, and 8 of defendant's affirmations dated January 28, 2020 (NYSCEF 134), and ¶¶5 and 6, and February 4, 2020 (NYSCEF 142); (4) directing defendant and its principal to preserve all financial information and documents pertaining to any all of its financial accounts from March 1, 2013, through now; (5) (i) reprimanding defendant and its principal for filing papers while being represented by former counsel and (ii) prohibiting defendant's principal from filing papers while former counsel is the attorney of record; (6) referring counsel/defendant's principal to the Appellate Division First Department Disciplinary Committee; and (7) taking judicial notice of: (i) the full record of a federal case, (ii) a state case in another county; and (iii) of whoever electronically filed documents in the federal case. Plaintiff also seeks order imposing sanctions on both defendant and its principal for seeking sanctions in connection with documents allegedly culled from the federal case; for asserting false material statements under penalty of perjury concerning the federal documents;

for seeking sanctions for falsely alleging under penalty of perjury that plaintiff had procured his home address and that he was not allowed to upload it to NYSCEF; and for seeking sanctions against him. (NYSCEF 155). Defendant opposes. (NYSCEF 183).

B. Motion seq. 5

By order to show cause efiled on March 13, 2020, plaintiff sought to enjoin, temporarily and preliminarily, defendant, defendant's principal, and their bank to preserve i) any and all account statements from any financial accounts they own, control, or are authorized users of, from March 11, 2013, through present; and ii) details of all checks, deposits or transfers, received for the same dates. I granted the temporary relief solely to the extent of ordering defendant and its principal to preserve the account statements (mot. seq. 5; NYSCEF 165). Defendant opposed. (NYSCEF 189).

Absent permission to file a reply affidavit, plaintiff's reply is not considered. The affidavit in opposition filed by defendant to replace the affirmation (NYSCEF 189) is also not considered except to the extent that any impropriety in having filed an affirmation in lieu of an affidavit is overlooked.

III. ANALYSIS

I begin with the law that governs much of the parties' arguments:

In *Filler v Motta*, the court considered a retainer agreement which provided that, "future services and disbursements will be credited" against the retainer amount, and held that the retainer constituted "an advance payment retainer, intended to cover payment of the legal fees expected to be earned during the representation, and need not have been placed in a client trust account" (45 Misc 3d 41, 46 [App Term, 11th & 13th Jud Dists 2014], citing NY St. Bar Assn Comm on Prof Ethics Op 816 [2007]).

Thus, plaintiff's assertion that defendant improperly commingled his retainer with those of other clients has no merit, as the retainer agreement, like that addressed in *Filler v Motta*, *supra*, provides, in section three, that once paid, the retainer will be deposited into defendant's operating account and is defendant's property and that only the unearned portion of it will be refunded upon a discontinuation of services; it creates no security interest (NYSCEF 184). (*Cf* 22 NYCRR § 1200.0(1.5[d] [lawyer is prohibited from entering into arrangement for, charge or collect, in pertinent part, "any fee in a domestic relations matter if the written retainer agreement contains a security interest"])).

For these reasons, defendant was not prohibited from depositing and using plaintiff's retainer, and thus, none of the bank accounts *INFORMATION?* plaintiff seeks is discoverable, as indicated in my May 14 decision and order. Plaintiff sole reliance on the "Rules of Professional Conduct," and "22 NYCRR § 1200.0" in support of his argument that defendant commingled his retainer with those of other clients is insufficient to warrant relief.

A. Motion sequence four

As none of the accounts sought by plaintiff is discoverable, there is no need for an order precluding plaintiff from applying for subpoenas to obtain them. Nor is there a need to compel plaintiff to turn over the name of an attorney assisting him, absent a basis for defendant's allegation in that regard. As there is no relevant outstanding discovery in this action, there is no need to require that plaintiff seek permission before filing additional discovery motions, and as plaintiff acknowledges that he improperly attempted to communicate with the court *ex parte*, he need not be ordered to desist from doing so. Defendant's request for an order that plaintiff file a note of issue on or before a date certain is meritorious. Defendant's motion for an order imposing monetary sanctions on plaintiff is denied without prejudice.

Plaintiff's cross motion is resolved as follows:

(1) the request for the approval of a subpoena for defendant's operating account at JPMorgan Chase Bank NA is denied.

(2) the request for an order directing defendant to comply with the outstanding discovery as set forth in NYSCEF 132, 135, 157 (¶¶23-25, 32, 34, 37, 40) is denied as defendant satisfactorily demonstrates that none of the material referenced in the so-ordered stipulation dated December 18, 2019 is in his possession. (NYSCEF 131). That plaintiff does not agree is immaterial. In any event, plaintiff fails to specify any relevant discovery beyond referring to documents that were previously filed. Given the prolixity of plaintiff's written submissions and his repeated references to irrelevant matters, his failure to specify the allegedly relevant outstanding discovery warrants the inference that none exists.

(3) the request for an order striking, pursuant to CPLR 3024(b), certain material in certain paragraphs of affirmations previously filed by defendant is denied for the same reason.

(4) the request for an order directing defendant and its principal to preserve all financial information and documents pertaining to any all of its financial accounts from March 1, 2013, through now, is denied as moot.

(5) the request for an order (i) reprimanding defendant and its principal for filing papers while being represented by former counsel and (ii) prohibiting defendant's principal from filing papers while former counsel is the attorney of record is denied as moot.

(6) the request for an order referring counsel/defendant's principal to the Appellate Division First Department Disciplinary Committee is denied.

(7) the request for an order taking judicial notice of: (i) the full record of a federal case, (ii) a state case in another county; and (iii) of whoever electronically filed documents in the

federal case, is denied in its entirety.

Plaintiff's request that sanctions be imposed on both defendant and its principal for seeking sanctions in connection with documents allegedly culled from the federal case; for asserting false material statements under penalty of perjury concerning the federal documents; for seeking sanctions for falsely alleging under penalty of perjury that plaintiff had procured his home address and that he was not allowed to upload it to NYSCEF; and for seeking sanctions against him is denied in its entirety.

Any requests not addressed are deemed denied.

B. Motion sequence five

As all of the bank accounts sought by defendant are irrelevant to plaintiff's damages, there is no need to further address plaintiff's order to show cause under this motion sequence.

Any requests not addressed are deemed denied.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that motion sequence four is resolved to the extent indicated above; it is further

ORDERED, that plaintiff's cross motion to motion sequence four is denied; it is further

ORDERED, that motion sequence five is denied; and it is further

ORDERED, that plaintiff efile his note of issue within 20 days of the date of this order.

The failure to do so will result in the dismissal of this action.

5/22/2020

DATE

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BARBARA JAFFE, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE