

Gaulsh v Diefenbach PLLC

2020 NY Slip Op 32635(U)

August 11, 2020

Supreme Court, New York County

Docket Number: 654346/2015

Judge: Barbara Jaffe

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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. 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. 008

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 008) 211, 212, 217, 220, 221, 225, 226

were read on this motion for reargument/sanctions/other relief.

By notice of motion, plaintiff moves for an order granting him leave to reargue a May 22, 2020 decision (NYSCEF 201), and upon granting reargument, an order reversing or vacating the findings related to motion sequence four that: 1) plaintiff’s retainer payments were not improperly held and/or commingled; 2) defendant’s Chase statements and transactions for its “operating account” are not relevant; and 3) plaintiff is not entitled to the Chase disclosure, and vacating the decision as to motion sequence five in which plaintiff’s request for a preservation order was denied. If the decision is reversed, plaintiff seeks an order vacating his note of issue so that he may obtain the requested discovery and potentially move for sanctions related to it. Defendant opposes.

I. PERTINENT BACKGROUND

A. Complaint (NYSCEF 2)

In this action, as discussed in other decisions, plaintiff sues defendant, a law firm that

previously represented him, for breach of contract based on the firm's alleged unreasonable and excessive fees, fraudulent inducement based on its alleged false representations intended to induce him to sign a second retainer agreement, duress in inducing him to sign the second agreement, and breach of fiduciary duty based on the following allegations:

- 1) The defendant has include[d] language in The Initial Retainer Agreement and The Second Retainer Agreement that states: "...once the retainer is paid to our firm it shall be deposited into our firm's operating account and is the property of our firm.."
- 2) This is a clear violation of the Rules of Professional Conduct 22 N.Y.C.R.R. Part 1200, specifically, Rule 1.15(a) and Rule 1.15(b), which governs attorney's fiduciary responsibility.
- 3) Rules of Professional Conduct 22 N.Y.C.R.R. Part 1200 Rule 1.15(j) states that "A lawyer who does not maintain and keep the accounts and records as specified and required by this Rule...shall be deemed in violation of these Rules and shall be subject to disciplinary proceedings."
- 4) Plaintiff has suffered a breach of fiduciary trust and ask (sic) the Court to disgorge defendant's fees in full or in part as the Court deems appropriate and determined at trial, and any sanctions, against the defendant, as the Court finds appropriate.

Other than these allegations, there are no other facts set forth in the complaint that are related to the alleged breach of fiduciary duty; the retainer agreement or the alleged violation of Part 1200 is not otherwise mentioned.

B. Default judgment decisions

On March 10, 2017, another justice of this court denied plaintiff's motion for a default judgment against defendant. (NYSCEF 37). That motion was supported by plaintiff's affidavit, by which he sought as damages the amount of the retainers he paid to defendant, \$60,000, plus interest, costs, disbursements, and punitive damages. (NYSCEF 6).

By decision dated June 26, 2018, the March 2017 decision was reversed and plaintiff's motion for a default judgment was granted. The Court found that plaintiff had established his

entitlement to a default judgment and that defendant had failed to demonstrate a reasonable excuse for the default or a meritorious defense to the action. (NYSCEF 58).

C. Decision of May 22, 2020 (NYSCEF 201)

In motion sequence four, defendant moved for a protective order against certain of plaintiff's discovery demands, and related relief. Plaintiff opposed and cross-moved for an order issuing subpoenas and directing defendant to respond to discovery requests. By motion sequence five, plaintiff sought an order directing defendant to preserve certain financial records. Defendant opposed.

The main issue to be resolved was whether plaintiff was entitled to records of defendant's operating account based on his allegation that defendant had improperly commingled his retainer funds in that account rather than segregating them in an escrow account. Defendant conceded that he had deposited plaintiff's retainer into his operating account and argued that he was not prohibited from doing so.

I found as follows:

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 . . . For these reasons, defendant was not prohibited from depositing and using plaintiff's retainer, and thus, none of the bank accounts 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.

(citations omitted).

Motion sequence four was thus granted to the extent that a protective order issued for defendant's operating account records and the cross motion was denied in its entirety; motion

sequence five was also denied.

II. DISCUSSION

CPLR 2221(d)(2) permits reargument on a showing that matters of fact or law were overlooked or misapprehended by the court in determining the prior motion. It is not designed as a means for the unsuccessful party to reargue issues that were already decided. (*Setters v AI Props. and Devs. [USA] Corp.*, 139 AD3d 492 [1st Dept 2016]).

Here, plaintiff does not argue that any issues of fact or law were overlooked or misapprehended. Rather, he improperly repeats the same arguments that he previously advanced.

To the extent that plaintiff's citation to 22 NYCRR § 1400 in support of his argument that his retainer funds were improperly commingled was overlooked, plaintiff did not advance it in either his complaint or in his motion for a default judgment. Rather, he contended only that defendant had violated 22 NYCRR § 1200. Consequently, he may not rely on this new alleged violation to support his claim that he is entitled to discovery related to it in order to establish his damages at the inquest. (*See e.g., P&K Marble, Inc. v Pearce*, 168 AD2d 439 [2d Dept 1990] [pleadings may not be amended at inquest to broaden scope of inquest and increase amount of damages]).

Moreover, as plaintiff did not allege a violation of 22 NYCRR § 1400 in his pleadings or on his default judgment motion, defendant did not admit to having violated it by defaulting, nor did the court so hold. (*Cf Woodson v Mendon Leasing Corp.*, 100 NY2d 62 [2003] [defaulting party is deemed to admit to all factual allegations in complaint]; *cf Halle v Fernandez*, 186 AD2d 662 [2d Dept 2001] [plaintiff could not recover at inquest damages for unpleaded loss]; *R.D. Smithtown, LLC v Lucille Roberts Figure Salons*, 277 AD2d 439 [2d Dept 2000] [court erred in granting damages at inquest for claim not contained in complaint]).

Additionally, 22 NYCRR 1200.1.15(j) provides that a violation of the rules requiring the safekeeping of client funds, including the improper commingling of funds, subjects the attorney to disciplinary proceedings. Nowhere does it provide for a cause of action for damages related to a violation thereof, nor does an ethical violation give rise to a duty for which a client may recover damages. (*Art Cap. Group, LLC v Neuhaus*, 70 AD3d 605 [1st Dept 2010]). “[T]he mere violation of an attorney disciplinary rule will only create liability if actual damages are incurred as a result of the violating conduct.” (*Law Offices of Ira H. Leibowitz v Landmark Ventures, Inc.*, 131 AD3d 583 [2d Dept 2015]).

Here, plaintiff alleges no damages resulting from defendant’s commingling, and to the extent that he seeks a return of his retainer funds, he seeks the same damages for his other claims. Therefore, even had defendant violated 22 NYCRR § 1200.1.15, plaintiff does not show that he incurred actual damages as a result.

While disgorgement of legal fees may be directed if an attorney is discharged for cause due to an ethical violation regardless of whether other damages are alleged (*Baughner v Cullen and Dykman, LLP*, 173 AD3d 959 [2d Dept 2019]), plaintiff does not allege in his complaint that he terminated defendant because of improper commingling or other ethical violations. (NYSCEF 2).

Moreover, even if plaintiff’s argument related to a violation of Part 1400 is considered, if an attorney violates Part 1400 in the drafting of a retainer agreement, she does not thereby forfeit her right to keep payment for services already provided. (*Medina v Richard A. Kraslow, P.C.*, 149 AD3d 928 [2d Dept 2017] [while attorney’s retainer agreement violated Part 1400, attorney could retain properly earned fees that client had already paid]; *Law Off. of Sheldon Eisenberger v Blisko*, 106 AD3d 650 [1st Dept 2013] [“When a client is seeking the return of funds already

paid to the attorney, the attorney does not need to show substantial compliance with 22 NYCRR § 1400.3, but only that the fees paid were properly earned.”]). Thus, as it is undisputed that plaintiff paid defendant a \$60,000 retainer and that defendant deposited it into his operating account, the issue to be resolved at the inquest on damages would be whether defendant earned the retainer, which is unrelated to any information that would be conveyed by recourse to the operating account.

III. CONCLUSION

For all of the above reasons, plaintiff does not demonstrate that any issue of fact or law was overlooked or misapprehended in determining that discovery of defendant’s operating account records is neither material nor necessary to plaintiff’s claims. Absent a basis for reargument, the remainder of plaintiff’s motion for sanctions related to the discovery at issue is denied as academic.

Accordingly, it is hereby

ORDERED, that plaintiff’s motion for leave to reargue is denied in its entirety.

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BARBARA JAFFE, J.S.C.

8/11/2020
DATE

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