

Josephs v Israel

2021 NY Slip Op 31072(U)

April 5, 2021

Supreme Court, New York County

Docket Number: 650368/2020

Judge: Melissa A. Crane

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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. MELISSA ANNE CRANE PART IAS MOTION 15EFM

Justice

-----X

JOSEPHS, ESQ., BONNIE P.

Plaintiff,

- v -

ISRAEL, GINA "SAGE"

Defendant.

-----X

INDEX NO. 650368/2020

MOTION DATE N/A

MOTION SEQ. NO. 1-4

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 10
were read on this motion to/for SEAL.

Upon the foregoing documents, it is

The court consolidates motions 1 through 4 for disposition. In this action for payment of attorneys' fees, defendant Gina "Sage" Israel, appearing *pro se*, moves to dismiss this complaint pursuant to CPLR 3211(a)(4), or, alternatively, to consolidate this action with a matrimonial action pending in Kings County. Plaintiff Bonnie P. Josephs, Esq. (Josephs), appearing *pro se*, opposes, and defendant replies.

I. BACKGROUND

As this is a motion to dismiss, the following background is taken from the complaint (NYSCEF Doc. No. 1). On or about June 27, 2018, defendant retained plaintiff's services in connection with a divorce action pending in Supreme Court, Kings County, entitled *Israel v Israel*, Index No. 50100/2019 (the "matrimonial action"), and signed a retainer agreement (Compl. ¶ 6; *id.*, Ex. A [Retainer Agreement]). Pursuant to the retainer agreement, plaintiff invoiced defendant monthly for professional services rendered and associated disbursements (Compl. ¶ 7; *id.*, Ex. B [Invoices]). On December 10, 2019, defendant consented to plaintiff's

withdrawal as her attorney in the matrimonial action (Compl. ¶ 9). Although defendant did not challenge the Invoices, she has not paid plaintiff sums owed pursuant to the Retainer Agreement despite plaintiff's demand for this payment (*id.* ¶¶ 12-13, 15). Plaintiff now seeks recovery of unpaid attorneys' fees and disbursements in the amount of \$83,124.74, plus interest, alleging claims for (i) breach of contract, (ii) quantum meruit, and (iii) unjust enrichment.

II. ARGUMENTS

A. Defendant's Affidavit in Support

Defendant begins her moving affidavit noting that she is representing herself, the matrimonial action is currently pending, and her affidavit is based on her "firsthand personal knowledge" (Def. Aff. ¶ 2 [Doc. No. 14]). Defendant further states that she cannot afford to hire an attorney in this action, but did receive help from an attorney in preparing her moving papers (*id.* ¶ 3). Defendant does not identify this attorney .

Defendant argues for dismissal because of the pending matrimonial action. Defendant argues that under New York Domestic Relations Law 237(a) an attorney who has been discharged in a matrimonial proceeding must proceed against the monied spouse in that proceeding (Def. Aff. ¶¶ 36-38; NY DCL § 273(a); *L.P. v R.P.*, 47 Misc3d 1037, 1041 [Westchester Sup Ct 2015]; *Frankel v Frankel*, 2 NY3d 601, 606 [2004]). Defendant argues that dismissal is appropriate here as plaintiff seeks substantially similar relief to what was sought in a failed pendente lite motion in the matrimonial action (*id.* ¶ 39). Defendant argues the pendente lite motion only failed because plaintiff failed to annex defendant's net worth statement to the filing and, despite its dismissal without prejudice, plaintiff failed to resubmit the motion (*id.* ¶¶ 14-20; 26-27; *id.*, Ex. A). Defendant argues that if this action proceeds, she will have to join her husband, Sam, to this action. Finally, defendant compares the present action to *Rogin v Rogin*

(90 AD3d 507, 508 [1st Dept 2011]), where a landlord sued for rental arrears. The Appellate Division, First Department held that it was improper not to join the landlord's action to the couple's divorce action where there was a guaranty between the couple (Def. Aff. ¶ 43).

B. Plaintiff's Affirmation in Opposition

In opposition, plaintiff requests, without making a cross motion, that the court find defendant in default for failing to answer the complaint in this action (Pl. Aff. ¶ 4, "5" at 3 [Doc. No. 15]; *id.*, Ex. 2 [Doc. No. 17]). Plaintiff argues that her present fee collection action does not belong with the matrimonial action because (1) the claim in this action is not pending in the matrimonial action and (2) defendant's failure to serve notice of this motion to her husband renders the motion defective (*id.* ¶¶ 7-8). Plaintiff argues she did, in fact submit defendant's net worth statement in support of the pendente lite motion (*id.* ¶¶ 9-11). Plaintiff argues that she was unable to refile the motion without additional payment as it would have required considering net worth documentation that defendant's husband submitted in opposition to the motion (*id.* ¶¶ 13-14). Plaintiff argues that before the court in the matrimonial action had a chance to hear her motion to withdraw, defendant retained new counsel rendering the withdrawal motion moot (*id.* ¶ 15). Plaintiff argues her withdrawal, with defendant's consent, precludes defendant's argument here that plaintiff should have pursued her fees in the matrimonial action (*id.* ¶ 16). Plaintiff argues this venue is proper for her fee claim as she resides and practices law in New York County (*id.* ¶ 18). Plaintiff distinguishes the present matter from the cases defendant cites by arguing that she was not "discharged" but withdrew from the matter with defendant's consent (*id.* ¶ 26).

With respect to sealing, plaintiff asserts that she "promptly applied to this Court for an Order sealing the record of this action to protect Defendant's privacy," although defendant

“refused to support the application” and the court “has not yet acted on [plaintiff’s] motion to seal the action” (*id.* ¶ 23). The court notes that the order to show cause was returned to plaintiff for correction and plaintiff has not refiled it.

C. Defendant’s Reply Affirmation

In reply, defendant argues that the court should disregard plaintiff’s affirmation in its entirety because “even those persons who are statutorily allowed to use such affirmations cannot do so when they are a party to an action” (Reply Aff. ¶ 4 [Doc. No. 19]; *Slavenburg Corp. v Opus Apparel, Inc.*, 53 NY2d 799, 801 [1981]; *Harris v Krauss*, 87 AD3d 469, 469 [1st Dept 2011]). Defendant argues that, because plaintiff is a party to this action, her affirmation should be rejected and this motion should be treated as unopposed. In response to plaintiff’s request for a default judgment, defendant argues that timely service of this motion automatically extends her time to plead until ten days after entry of the order deciding this motion (Reply Aff ¶ 6; CPLR § 3211(f)). Defendant next argues that, while plaintiff is not a party to the matrimonial action, the court has the discretion to grant relief pursuant to CPLR 3211 (a)(4) provided a substantial identity exists between the parties and the actions are substantially similar (Reply Aff. ¶ 7-8; *Scottsdales Ins. Co. v Indem. Ins. Corp. RRG*, 110 AD3d 783, 784 [2d Dept 2013]). Defendant argues that, because plaintiff was her counsel in the matrimonial action, she was effectively in defendant’s shoes in requesting that defendant’s husband pay her legal fees (Reply Aff. ¶ 7). Defendant reiterates that consolidation is appropriate here because this action would not be necessary had plaintiff properly filed the pendente lite motion in the matrimonial action (*id.* ¶ 9). Defendant argues that plaintiff has failed to cite any authority for the proposition that defendant’s husband need be served for this motion to be valid (*id.* ¶ 10). Defendant argues the cases she cited in support of her motion are not distinguishable from the present matter (*id.* ¶ 12).

Regarding plaintiff's motion to seal, defendant argues that plaintiff should never have filed documents containing her sensitive information, noting that her social security number and confidential information contained in plaintiff's invoices are still available on the public docket (*id.* ¶ 14). Defendant asserts that she recently received a voicemail suggesting that her social security number may be compromised (*id.*).

III. DISCUSSION

Both plaintiff's request for a default judgment and defendant's request to treat this motion as unopposed are denied.

A. Motion to Dismiss

Pursuant to CPLR 3211 (a)(4), a party may move to dismiss a cause of action on the ground that "there is another action pending between the same parties for the same cause of action in a court of any state or the United States; the court need not dismiss upon this ground but may make such order as justice requires." "CPLR 3211 (a)(4) vests a court with broad discretion in considering whether to dismiss an action on the ground that another action is pending between the same parties on the same cause of action" (*Whitney v Whitney*, 57 NY2d 731, 732 [1982]). "A court may dismiss an action pursuant to CPLR 3211 (a)(4) where there is a substantial identity of the parties and causes of action" (*Cherico, Cherico & Assoc. v Midollo*, 67 AD3d 622, 622 [2d Dept 2009] [internal citations omitted])

The "presence of additional parties, however, will not necessarily defeat" the motion where both "suits arise out of the same subject matter or series of alleged wrongs" (*White Light Prods. v On the Scene Prods.*, 231 AD2d 90, 94 [1st Dept 1997] [internal quotation marks and citation omitted]). "With respect to the subject of the actions, the relief sought must be the same or substantially the same. This criterion is lacking where the relief demanded is antagonistic and

inconsistent or the purposes of the two actions are entirely different” (*id.* [internal quotation marks and citations omitted]).

Defendant’s motion to dismiss pursuant to CPLR 3211(a)(4) is denied. Defendant has not shown that the claims and parties in this action are the same or similar to those in the matrimonial action. This action is for monies allegedly due and owing to plaintiff from defendant for professional services rendered to defendant. In this action, as well as the matrimonial action involving the divorce between defendant and her husband, plaintiff does not assert a claim against the husband for payment of her former client’s attorney fees and disbursements in contract, quantum meruit, unjust enrichment or otherwise¹ (*See Anonymous v Anonymous*, 136 AD3d 506, 507 (1st Dept 2016), citing *Kent Dev. Co. v Liccione*, 37 NY2d 899, 901 [1975]).

Further, the parties are not the same or substantially the same. Plaintiff is not a party to the matrimonial action between defendant and her husband, and the husband is not a party to this action. Additionally, plaintiff’s former representation of defendant in the matrimonial action does not mandate that plaintiff must subsume her own claims to that of defendant’s request for pendente lite relief, that plaintiff must proceed only against the husband, or that plaintiff must seek relief in the matrimonial action.²

Here, the retainer agreement provides that: defendant would “be billed monthly;” defendant agreed “to pay each invoice within 15 days after the date of the invoice” (Compl., Ex. A, at 2); if plaintiff withdrew, defendant would “remain obligated to pay for any unpaid”

¹ The court does not opine on the merits of the complaint or defendant’s possible defenses, affirmative defenses or claims that were asserted in these papers or might be asserted in defendant’s future responsive pleading.

² The court makes no finding herein as to whether plaintiff properly or improperly did not annex the net worth statement to the pendente motion papers, whether the husband is the monied spouse, or whether defendant’s pendente relief motion would have been granted. The court also does not opine on assertions or characterizations made in these papers regarding a party’s motivations or actions or whether certain alleged events did or did not occur.

services and disbursements (*id.* at 3); defendant’s “obligation to pay the fee and disbursements is primary (*id.* at 2); and defendant’s obligation to pay regardless of result or success (*id.*).

Defendant has not shown that plaintiff’s available remedies are exclusive and not cumulative under these circumstances or that she must pursue her claims in the same court where she rendered her services. (*see Balestriere PLLC v Banxcorp*, 96 AD3d 497, 497 [1st Dept 2012] [internal quotation marks and citations omitted]; *see also Halk v Aloi*, 47 Misc 3d 135 [A], 2015 NY Slip Op 50495[U] [App Term, 2d Dept, 2d, 11th and 13th Jud. Dists. 2015]; *Law Firm of Joel R. Brandes, P.C. v Ferraro*, 257 AD2d 610 [2d Dept 1999]).

B. Consolidation

A court may order consolidation or a joint trial of two or more actions when they involve “a common question of law or fact” (CPLR Section 602 [a]). “The trial court has broad discretion in determining whether to order consolidation” (*Hanover Ins. Group v Mezansky*, 105 AD3d 1000, 1000 [2d Dept 2013] [internal citations omitted]) “[W]hile it is not necessary that all rules and all facts be common to both actions, there must be at least some important rules of law and some substantial issues of fact to be determined that are in common to both actions” (*Gibbons v Groat*, 22 AD2d 996 [3d Dept 1964] [internal citation omitted]).

Defendant’s request for consolidation or a joint trial pursuant to CPLR 602 (a) is also denied. First, defendant failed to serve copies of her motion papers on her husband in the matrimonial action, although the motion would affect him (*see C. Cabrera Constr., LLC v BCRE/15 Union Sq. W. LLC*, 78 AD3d 440 [1st Dept 2010] [trial court’s denial of consolidation motion as premature is affirmed where movant failed to serve motion papers on the parties in the other action who would be affected]). The husband or his counsel’s awareness or reference of this action does not fulfill the notice and service requirements. provide the court with any

While defendant posits that consolidation or a joint trial of these two actions is warranted because they both involve a common question of law or fact in that at issue is plaintiff's recovery of attorneys' fees and disbursements, the court does not find her argument persuasive under these circumstances. In this action, plaintiff seeks recovery from defendant for monies defendant owes plaintiff for legal services plaintiff rendered to defendant. The retainer agreement is between plaintiff and defendant, the husband is not a signatory, and whether or not the husband, in turn, must pay defendant these legal fees is not an issue of law or fact in this action. In contrast, the issues in the matrimonial action are the divorce action between the wife and husband and issues arising out of the action, such as pendente lite relief or equitable distribution. Further, as noted above, the parties differ between this action and the matrimonial action. The legal theories in these actions are not substantially similar, and the factual and legal issues are not so intertwined that these actions must be consolidated or jointly tried.

Defendant's reliance on *Rogin v Rogin* is misplaced as that action involved a guaranty agreement that spoke directly to the issue of rental arrears the landlord was seeking, thus warranting a finding that the two actions shared "a substantial common question of law or fact (90 AD3d 507, 508 [1st Dept 2011]). Here, for the reasons set forth above, the court finds that defendant has failed to demonstrate that this action and the matrimonial action share a substantial common question of law or fact.

C. Order to Show Cause to Seal

Finally, the court turns to defendant's unnoticed request to redact certain information appearing in the complaint and its exhibits. As to defendant's social security number, the court orders plaintiff to redact or restrict from viewing the first five digits of defendant's social

security number by those other than court staff and the parties (see the Uniform Rules for the New York State Trial Courts [22 NYCRR 202.5-b]).

To the extent the court may consider the remaining redaction request (as defendant's notice of motion included a request for other relief), defendant's papers fail to sufficiently support that request. Defendant does not set forth which specific entry or portion of the invoices and time sheets should be redacted as containing privileged communications, nor the basis for her assertion.

The parties are encouraged to stipulate as to which specified portions of the invoices and time sheets, if any, constitute or, under a good faith argument, could constitute, privileged attorney-client communication, which apparently were filed in error. Upon such good faith stipulation, or in the absence of agreement, plaintiff or defendant may follow the procedure set forth in 22 NYCRR 202.5 or such other method so as to effectuate such redaction or restriction. In the event of redaction or restriction, whether and to what extent a party may thereafter submit, introduce as exhibits, or otherwise rely upon the selected portions is left for determination at a later time.

As noted, plaintiff's prior order to show cause was returned to plaintiff to be corrected and has not yet been resubmitted. There is no pending application before the court. The parties are reminded of the court's policies and practices regarding sealing (see, *inter alia*, 22 NYCRR Section 216.1[a]).

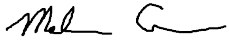
Accordingly, it is

ORDERED that the motion to dismiss pursuant to CPLR 3211 (a)(4) or to consolidate is denied; and it is further

ORDERED that plaintiff shall forthwith redact the first five number of defendant’s social security number; and it is further

ORDERED that within fourteen days of the uploading of this decision and order, plaintiff shall serve and file a copy of this decision and order, with notice of entry, upon defendant via efilng; and it is further

ORDERED that defendant shall serve and file her answer within fourteen days of plaintiff’s service upon her of the decision and order with notice of entry.

<u>4/5/2021</u>		
DATE		MELISSA ANNE CRANE, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED	<input type="checkbox"/> GRANTED IN PART
	<input checked="" type="checkbox"/> DENIED	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT
		<input type="checkbox"/> REFERENCE