Gaulsh v Diefenbach PLLC
2021 NY Slip Op 32349(U)
November 1, 2021
Supreme Court, New York County
Docket Number: 654346/2015
Judge: Barbara Jaffe

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. BARBARA JAFFE** **PART** 12

Justice

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SUNE GAULSH,

INDEX NO. 654346/2015

Plaintiff,

- v -

DIEFENBACH PLLC,

Defendant.

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Plaintiff brought this action against defendant for breach of contract arising from its "unreasonable and excessive fees," fraudulent inducement and duress associated with the 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 by the disciplinary rules. His motion for a default judgment was granted as to liability. (*Gaulsh v Diefenbach PLLC*, 162 AD3d 585 [1st Dept 2018]).

On September 23, 2021, an inquest into plaintiff's damages was held before me via Microsoft Teams. The burden of proof on such an inquest is on the plaintiff.

I. FINDINGS OF FACT

Based on the credible evidence presented, I find as follows:

Defendant's invoice, dated June 3, 2013, for the services rendered by Diefenbach, an experienced matrimonial attorney, reflects that plaintiff was charged for an initial consultation with Diefenbach of 1.5 hours on March 14, 2013 (P's D). Plaintiff's conclusory assertion that defendant advertised free consultations on its website is insufficient to sustain his burden of proving that he was wrongfully charged for the initial consultation.

OTHER ORDER – NON-MOTION

Thereafter, on March 15, 2013, the parties entered into an agreement whereby plaintiff retained defendant to represent him in child custody proceedings against his ex-girlfriend, the mother of his son, in the New York County Family Court at Diefenbach's regular hourly rate of $675. Plaintiff's goal was to win sole physical custody of his son with little or no visitation by the ex-girlfriend, alleged by plaintiff to be an abuser of alcohol and prescription drugs. Plaintiff did not dispute that he had told Diefenbach that he wanted to return to his home in Denmark at some future time with his son as he had no intention of remaining in the United States. Absent evidence from plaintiff as to the hourly rate charged by comparable attorneys apart from his admission that a partner in the law firm he hired following his termination of defendant's services also charged him $675 an hour, the rate charged by defendant is neither excessive nor improper. Moreover, plaintiff, a sophisticated financial professional, agreed to pay it.

Plaintiff paid defendant's standard retainer of $25,000 on March 20, 2013 (P's G[a]), and an additional $10,000 for an order to show cause. Diefenbach did not dispute that plaintiff had never seen the order to show cause or that it had never been served or filed, although defendant's invoice reflects that on April 16 he had spent 5.5 hours drafting it. Absent proof from plaintiff as to why the order to show cause was never filed or served, he fails to prove that he was wrongfully charged for the drafting of it.

Then, at 4am on April 4, 2013, plaintiff began texting Diefenbach, and testified that he did so because he had precipitously left his apartment with his mother and son, having been called by his ex-girlfriend upon her discovery that he had retained counsel with the goal of obtaining custody of their son and was threatening to contact the police. Diefenbach testified that he responded to plaintiff at 6:30am, whereas plaintiff testified that Diefenbach had responded a few hours later and instructed him to meet him at Family Court at 12:30pm.

Although defendant's invoice reflects that the parties met at its 55 Broad Street office for 3.3 hours on April 4 (P's D), plaintiff denies having met with Diefenbach at the office that day, which is corroborated by their contemporaneous texts (P's B). Plaintiff thus establishes that he was overcharged for the 3.3 hours.

The parties met that day at 12:30pm at Family Court, where Diefenbach told plaintiff that he would not appear before him unless he signed a second retainer agreement for $50,000, half payable that day. Feeling that he had no option but to sign it, plaintiff signed it. After lunch, they appeared before a Family Court referee who criticized Diefenbach for submitting the "wrong form" and directed him to correct it, serve it on the opposing side that day, and return the following day. In order to have the corrected form promptly and effectively served on plaintiff's ex-girlfriend, Diefenbach reasonably sought assistance at the 10th precinct stationhouse, to where he, plaintiff, plaintiff's mother, and plaintiff's son headed by taxicab. En route, Diefenbach received a telephone call from an FBI agent who asked if plaintiff was at Kennedy Airport because "the mother is concerned he's about to steal the child." He assured the agent that plaintiff was not at the airport and informed him that they were on their way to the 10th precinct stationhouse.

The following day, April 5, the parties again met at Family Court, where Diefenbach filed a visitation/custody petition and a family offense petition and reasonably recommended that plaintiff go before a judge instead of the referee. During that appearance, counsel for the ex-girlfriend represented that his client had discovered among plaintiff's papers the previous morning "a communication to the highest court in Denmark for the paternal grandmother on behalf of this child," which according to Diefenbach indicated that plaintiff was secretly attempting to file some type of a custody petition in Denmark . . ." (D's 1).

Diefenbach informed the court that plaintiff and his ex-girlfriend had entered into a stipulation whereby plaintiff took custody of the child pursuant to a parenting schedule, or temporary joint custody, with the conditions that the ex-girlfriend's visitation be supervised by her mother and that she be randomly tested for drugs and alcohol during the weeks of her parenting time, as arranged by Diefenbach. The court added to the stipulation a prohibition against either party removing the child from New York and ordered that "any and all passports of the child must be surrendered to the Court immediately or as soon as a passport is issued." The case was then adjourned to June 11. (D's 1). According to plaintiff, the April 5 appearance was so brief and the stipulation so simple that there was no need to go before the judge. Rather, he claimed, the stipulation could have been entered into before the referee, thereby obviating a second day in court. Plaintiff's claim in this regard is fatally speculative and baseless, absent his expertise in matrimonial practice.

At Diefenbach's direction, plaintiff drafted an affidavit in support of the petition for custody. Defendant's invoice reflects that Diefenbach spent many hours re-drafting and revising it. Thus, plaintiff's sole testimony implying that because he provided Diefenbach with a draft of the affidavit, he should not have been billed for the time Diefenbach spent on it is fatally conclusory absent evidence that plaintiff's original draft was the version that was filed. Diefenbach also annexed to the petition plaintiff's 121-page diary, the ex-girlfriend's 20-page diary, photographs, and other evidence that plaintiff had gathered of his ex-girlfriend's alleged abuse of prescription drugs and alcohol.

According to plaintiff, the April 5 appearance marked the final day that Diefenbach performed work on his case, and thus, he maintained, all charges billed thereafter are not legitimate. He claimed generally that "a number of entries" in the invoice for telephone calls

with him never occurred and that the only office conference he had with Diefenbach was the initial consultation on March 14. He objected to the charges for legal research because the case was not on for trial, he had received no legal memoranda, and no legal argument was offered at either of the two court appearances, and to being charged for Diefenbach's communications with laboratories on the ground that he had seen no evidence of them. Plaintiff otherwise explained the disorganization of defendant's invoice as evidence of Diefenbach's effort to "run down the retainer" and he complained of being charged the full hourly rate for secretarial functions Diefenbach performed. According to Diefenbach, given the demand made on him by plaintiff, he wanted to ensure that all tasks were properly performed.

Plaintiff's conclusory denials of having spoken on the telephone or attended meetings with Diefenbach at defendant's office are not only incredible under the circumstances, but given his professional acumen, his complaint of having to prove a negative rings hollow as it is reasonable to infer that he kept his own calendar with which he could have at least demonstrated that he had scheduled no such conferences. He offered, however, no evidence apart from his testimony concerning events of almost nine years ago.

Although it is undisputed that plaintiff received no tangible product of Diefenbach's legal research, absent expert evidence that a lawyer is not entitled to be paid for research if it is not reduced to a written memorandum or oral argument, plaintiff does not satisfy his burden of proving that he was wrongly billed for legal research.

It is undisputed that Diefenbach was directed by the court to arrange for the drug and alcohol tests to be conducted on plaintiff's ex-girlfriend and plaintiff offered no evidence that he did not do so. Although plaintiff complained of being charged Diefenbach's regular hourly rate for "secretarial" work, he offered no authority for the proposition that an attorney must charge a

lower rate for performing secretarial tasks nor did he offer any evidence as to the correct number of hours or proper rate.

It is undisputed that plaintiff fired Diefenbach by letter dated April 18, 2013, in which he wrote in closing that he had "no complaints or dissatisfaction with the services that were provided." He explained that this portion of the letter had been included on the recommendation of his new attorney who advised that it would facilitate the transfer of the case to the new attorney by giving Diefenbach no reason to feel as if he were "losing face." Diefenbach, however, denied having received the termination letter until a later date.

It is undisputed that plaintiff's termination letter was sent via Fed Ex, and that the Fed Ex receipt is marked as having been received and signed for on April 19. Diefenbach denied having employed anyone with the name of the person who signed the receipt, nor could he recall when he received the April 18 letter. Diefenbach's denial does not prove that he did not receive the letter on April 19. Thus, his testimony in this regard lacks credibility as to the date on which he was terminated. That plaintiff had expressed in his termination letter his satisfaction with Diefenbach's services does not rise to the level of an admission against interest here, and in any event, he credibly explained it.

II. CONCLUSIONS OF LAW

While allegations contained in a complaint are deemed admitted as a result of a default, "the legal conclusions to be drawn from such proof are reserved for the court's determination" and, if a valid claim is not stated, the party moving for judgment is not entitled to relief, even on default. (*Green v Dolphy Const. Co., Inc.*, 187 AD2d 635, 636 [2d Dept 1992]; *see also Litvinskiy v May Enter. Group, Inc.*, 44 AD3d 627 [2d Dept 2007] [absent viable claim against defendant at inquest, claim should have been dismissed]; *Zelnik v Bidermann Indus. U.S.A., Inc.*,

242 AD2d 227, 232 [1st Dept 1997] [Rubin, J., concurring] [observing that purpose of inquest is both to satisfy court that cause of action is "substantial and bona fide" (cite omitted) and determine extent of plaintiff's damages]). Thus, in *Green*, the trial court's dismissal of three causes of action after conducting an inquest on damages was upheld.

A. Duress and fraudulent inducement

Even assuming that plaintiff had entered into the second retainer agreement as a result of duress, or even if plaintiff had never signed it, having requested and accepted the benefit of Diefenbach's prompt response to his texts on April 4, he would have owed defendant for any valid charges under the first retainer agreement. He thus fails to establish that he sustained damages resulting from the alleged duress. (*Cf. Cushion v Nemes*, 266 AD2d 126 [1st Dept 1999], *lv denied* 94 NY2d 760 [2000] [law firm, discharged by plaintiff without cause and before completing services, entitled to recover fair and reasonable value of services rendered prior to termination]). Put another way, notwithstanding the alleged duress, plaintiff must demonstrate that he was damaged as a result, which he failed to do absent any dispute that he requested and received Diefenbach's services on April 4 and 5.

In any event, plaintiff's claim of duress is meritless given the exigent circumstances arising from his ex-girlfriend's discovery that he had retained counsel and her threat that she was calling the police. Thus, any duress was the product of the exigency, for which Diefenbach is not responsible. For the same reason, plaintiff fails to demonstrate that he was damaged as a result of defendant's fraudulent inducement. (*See e.g., King v Fox*, 7 NY3d 181 [2006] [client, fully-informed and possessing equal bargaining power and which knowingly and voluntarily affirms existing fee agreement with attorney that may otherwise be considered voidable and/or unconscionable, can be held to have ratified agreement, rendering it valid and enforceable]).

Thus, the causes of action for duress and fraudulent inducement are dismissed.

B. Breach of contract

Plaintiff satisfies his burden of proving that he was damaged for charges related to the $10,000 of the retainer for an order to show cause minus the 5.5 hours spent in drafting it, 3.3 hours for an office meeting that did not occur, and for work allegedly performed by Diefenbach after April 19, which were wrongfully billed.

C. Breach of fiduciary duty

By decision and order dated May 22, 2020, I held that plaintiff's assertion that defendant improperly commingled his retainer with those of other clients had no legal basis. (*Gaulsh v Diefenbach PLLC*, 2020 NY Slip Op 31533[U], *affd* 193 AD3d 530 [1st Dept 2021]). As the assertion of improper commingling is the sole basis of plaintiff's cause of action for a breach of fiduciary duty, it is dismissed and he is not entitled to damages for it.

III. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiff is awarded a judgment against defendant in the sum of $11,620, representing a reimbursement of the fees charged by defendant of: (1) $6,287.50 of the retainer for the unfiled order to show cause; (2) $2,227.50 for 3.3 hours wrongly charged for the alleged April 4 office visit; and (3) $3,105 for work performed from April 19 to 30, and the clerk is directed to enter judgment accordingly.

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DATE: 11/1/2021

BARBARA JAFFE, JSC

Check One: ☐ **Case Disposed** ☐ **Non-Final Disposition**

Check if Appropriate: ☐ **Other (Specify** _____ **)**