

**Segal v Radlin**

2022 NY Slip Op 33431(U)

October 3, 2022

Supreme Court, New York County

Docket Number: Index No. 100577/2020

Judge: Verna L. Saunders

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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. VERNA L. SAUNDERS, JSC PART 36

*Justice*

-----X  
DAVID SEGAL, INDEX NO. 100577/2020  
Plaintiff, MOTION SEQ. NO. 001; 002

- v -

DEVON WILT RADLIN, ESQ,  
Defendant.

**DECISION + ORDER ON  
MOTION**

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35

were read on this motion to/for MOTION TO OPPOSE DISMISSAL MOTION.

Plaintiff, a suspended attorney, commenced this action by summons and verified complaint against defendant, alleging, *inter alia*, that defendant breached an oral agreement whereby she assumed plaintiff's law practice until plaintiff's reinstatement to the practice of law. Plaintiff claims that the parties agreed to split evenly all fees on civil cases pending before plaintiff's suspension and that plaintiff would be reimbursed for expenses on each case prior to his suspension. Plaintiff requests a detailed and complete accounting of all civil cases transferred to defendant as of January 8, 2015, the effective date of plaintiff's suspension. Additionally, plaintiff contends that defendant breached her fiduciary duty and has violated the Rules of Professional Conduct ("RPC"). (NYSCEF Doc. No. 5, *summons and verified complaint*).

Defendant now moves, pre-answer, for an order dismissing this action pursuant to 22 NYCRR 1240.15(g), CPLR 3211(a)(7) and (a)(5) and/or based on *res judicata*. In the alternative, defendant requests an order staying discovery until resolution of this motion; an order issuing a protective order in favor of defendant and against plaintiff pursuant to CPLR 3122 and 3103 as to plaintiff's entire Notice of Discovery and Inspection ("D&I"). Defendant further requests an order pursuant to 22 NYCRR 130-1.1 imposing financial sanctions and costs for frivolous conduct by plaintiff relating to the filing of this action and service of palpably improper discovery demands meant only to harass and annoy defendant. (NYSCEF Doc. No. 3, *notice of motion*).

Specifically, defendant argues that any legal fees plaintiff is entitled to is governed by 22 NYCRR 1240.15(g), which requires him to make a motion in each separate action in which he believes he is owed a quantum merit fee, after providing notice to each client of his application. Under 22 NYCRR 1240.15(g), any agreement between the parties is rendered null and void.

Defendant further contends that plaintiff fails to assert a cognizable claim in his complaint, warranting dismissal of the pleadings. According to defendant, dismissal is also warranted pursuant to CPLR 3211(a)(5) because the oral agreement allegedly entered into in “mid December 2014” between the parties, for defendant to assume his law practice “until he is reinstated to the practice of law” due to his one (1) year suspension from the practice of law pursuant to decision of the Appellate Division, First Department dated December 9, 2014 and effective on January 8, 2015 violates the Statute of Frauds and General Obligations Law § 5-701(a)(1). The second, fourth, fifth and tenth causes of action must be dismissed because plaintiff fails to establish a fiduciary duty; that the fourth, eighth and ninth causes of action, premised on alleged violations of the RPC, do not lie since the RPC does not create a private right of action; that plaintiff has no private right of action or standing to allege damages for alleged Office of Court Administration violations by defendant, warranting dismissal of his eleventh cause of action; and that plaintiff does not have a private right to establish his first and third causes of action, premised on alleged violations of the New York Penal Law.

Additionally, defendant asserts that the D&I that was served in this case is palpably improper and seeks information that is confidential, private in nature and completely irrelevant to the alleged issues of this case. Therefore, should this court decline to dismiss the action, defendant requests a protective order with respect to the discovery sought. According to defendant, sanctions are warranted as against defendant, pursuant to 22 NYCRR 130, arguing that this action is aimed only to harass and annoy defendant, and that this is an effort by defendant to avoid his burden as required by 22 NYCRR 1240.15(g) (NYSCEF Doc. No. 4, *affirmation in support of motion*).

Although defendant’s motion is not opposed, plaintiff moved, pursuant to CPLR 2001, for an order allowing him to submit opposition to plaintiff’s motion (Mot. Seq. 002). Insofar as defendant has had an opportunity to address the arguments raised in the proposed opposition papers to the motion to dismiss, the court grants plaintiff’s application to the extent that it will consider the opposition papers in deciding defendant’s dismissal motion (*see* CPLR 2001).

In opposition to defendant’s motion to dismiss, plaintiff argues, among other things, that dismissal is not warranted here because he has alleged cognizable claims; instead, plaintiff insists that the court should order a hearing before a special referee to hear and report with respect to the *quantum meruit* fees that are to be awarded to him. Plaintiff maintains that defendant became a fiduciary when she assumed responsibility for each of his cases, whether in writing or oral. He further maintains that “[a]greements involving attorney fees can be written or oral depending on the relationship of the parties.” (NYSCEF Doc. No. 23, *affidavit in opposition to defendant’s motion to dismiss*).

Defendant opposes plaintiff’s motion and contends, *inter alia*, that plaintiff fails to refute that the oral agreement is barred by the statute of frauds; that no fiduciary relationship exists between an incoming attorney and a prior attorney who was suspended, and that plaintiff has failed to submit any caselaw to the contrary. She further argues that plaintiff has demonstrated a pattern of willful and contumacious conduct in this frivolous litigation (NYSCEF Doc. No. 29, *defendant’s opposition to plaintiff’s motion*).

Plaintiff replies, reiterating the arguments raised in his opposition papers (NYSCEF Doc. No. 34, *reply papers*).

22 NYCRR § 1240.15(g) provides that:

“A respondent who has been disbarred or suspended from the practice of law may not share in any fee for legal services rendered by another attorney during the period of disbarment or suspension but may be compensated on a quantum meruit basis for services rendered prior to the effective date of the disbarment or suspension. On motion of the respondent, with notice to the respondent’s client, the amount and manner of compensation shall be determined by the court or agency where the action is pending or, if an action has not been commenced, at a special term of the Supreme Court in the county where the respondent maintained an office. The total amount of the legal fee shall not exceed the amount that the client would have owed if no substitution of counsel had been required.”

Here, upon review of the allegations in the complaint and, after applying a liberal construction to the pleadings as required under CPLR 3211, this court finds that defendant has established her entitlement to dismissal of plaintiff’s claims. The complaint, wherein plaintiff asserts eleven causes of action, premised predominantly on the breach of the December 2014 oral agreement, fails to comply with 22 NYCRR § 1240.15(g). Plaintiff fails to identify any clients for whom he rendered legal services prior to his suspension and there is no indication that any client was notified of his attempt to obtain legal fees for services rendered prior to said suspension.

Moreover, to the extent plaintiff asserts claims based on a breach of the oral fee sharing agreement, this agreement is barred by the statute of frauds. “Under General Obligations Law § 5-701(a)(1), an oral agreement is void unless there is some writing subscribed by the party to be charged, if such agreement by its terms could not be performed within one year from its making” (*Labor Law 240 Risk Mgt., LLC v CRC Ins. Servs., Inc.*, 2018 NY Slip Op 30859[U], \*16 [Sup Ct, NY County 2018].) Plaintiff alleges that, in December 2014, the parties entered into an oral agreement that defendant would assume his law practice “until he is reinstated to the practice of law.” Insofar as plaintiff was suspended for one (1) year, effective January 8, 2015, this court finds that the agreement could not be performed within one year from its making and is therefore null and void. Therefore, dismissal is warranted pursuant to CPLR 3211(a)(5). The remaining claims, premised on breach of fiduciary duty, violations of the RPC and penal law are equally lacking in merit and fail to state a cause of action, warranting dismissal. All other reliefs are denied. Furthermore, all arguments not addressed herein have been considered and are either without merit or need not be addressed given the findings above. Accordingly, it is hereby

**ORDERED** that defendant’s motion is granted to the extent that the action is dismissed, and it is otherwise denied; and it is further

**ORDERED** that plaintiff’s motion, pursuant to 2001, is granted the extent that this court has considered his papers in opposition to the motion to dismiss; and it is further

**ORDERED** that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for defendant shall serve a copy of this decision and order, with notice of entry, upon plaintiff, as well as the Clerk of the Court, who shall enter judgment accordingly.

This constitutes the decision and order of this court.

October 3, 2022

HON. VERA L. SAUNDERS, JSC

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