

Derrick v Air-Sea Packing Group, Inc.

2024 NY Slip Op 33010(U)

August 19, 2024

Supreme Court, Kings County

Docket Number: Index No. 507638/2015

Judge: Lisa S. Ottley

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS – PART 24

WYATT DERRICK,

Plaintiff,

-against-

AIR-SEA PACKING GROUP, INC., CARL CHRISTIAN
MERRICK, CONSOLIDATED EDISON COMPANY OF
NEW YORK, INC., and THE HALLEN CONSTRUCTION
COMPANY, INC.

Defendants.

AIR-SEA PACKING GROUP, INC., and CARL CHRISTIAN
MERRICK, i/s/h/a CRISTIAN MERRICK,

Third-Party Plaintiffs,

CONSOLIDATED EDISON COMPANY OF
NEW YORK, INC., and THE HALLEN CONSTRUCTION
COMPANY, INC.,

Third-Party Defendants.

HON. LISA S. OTTLEY

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this Notice of Motion submitted on March 18, 2024.

Papers	Numbered
Notice of Motion and Affirmation	1&2 [Exh. 1-6]
Affirmation/Affidavit in Opposition.....	3
Reply Affirmation	4

This matter comes before this court seeking entry of the Referee’s decision which was issued on June 30, 2021, and entered on July 8, 2021. The underlying case involved a personal injury action that was settled for 2.5 million dollars, resulting in a dispute which subsequently developed over the apportionment of attorneys’ fees between the plaintiff’s outgoing attorneys, Paul Ajlouny & Associates, P.C., and plaintiff’s new counsel, Pazar, Epstein, Jaffe & Fein.

Counsel for Paul Ajlouny & Associates, P.C., moves for (a) an order pursuant to CPLR 5016, directing entry of judgment upon the Referee's June 20, 2021, determination on the issue of the apportionment of attorneys' fees in this matter and/or (b) an Order pursuant to CPLR 2219, directing entry of an order upon the Referee's June 30, 2021, determination which decided the motion, brought by Order to Show Cause dated August 17, 2018, as to the apportionment of attorneys' fees earned in this action; and/or (c) an Order pursuant to CPLR 221, granting renewal/re-argument of this Court's Order, dated June 21, 2023.

Procedural History

On October 31, 2018, the Hon. Lara Genovese issued an order referring the matter to a Special Referee, Miriam Sunshine, to hear and determine the apportionment of attorneys' fees. The Special Referee issue a determination on June 30, 2021, finding that the outgoing attorney, Paul Ajlouny & Associates, P.C., was entitled to an 8% share of the attorneys' fee, and Pazar, Epstein, Jaffe & Fein, as incoming counsel was entitled to 92% of the attorneys' fees in the personal injury action. On July 12, 2021, the outgoing counsel filed a Notice of Appeal from the Referee's determination. Upon learning of plaintiff's counsel intention to immediately disburse the attorneys' fees in accordance with the Special Referee's determination, outgoing counsel sent a letter objecting to the disbursement of the attorneys' fees, however, the monies were released by plaintiff's counsel. On August 11, 2021, outgoing counsel moved by Order to Show Cause seeking to enjoin the distribution of the attorneys' fees until the pending appeal was decided. The relief requested was denied by the Court on September 27, 2021. Thereafter, a check was issued on September 29, 2021, in the amount of \$66,742.83, to the outgoing attorneys, representing 8% of the legal fees as per the Special Referee's determination, and the remaining 92% (\$767,554.50) was disbursed to plaintiff's incoming counsel. On January 19, 2022, the Appellate Division, Second Judicial Department, *sua sponte*, issued an order requiring, the attorneys to show cause why the appeal should not be dismissed, as an appeal from a non-appealable decision of the Special Referee. Thereafter, on July 20, 2022, the Appellate Division dismissed the appeal, on the grounds that no appeal lies from a decision from the Supreme Court.

As a result of the dismissal of the appeal, the outgoing attorneys filed a Proposed Judgment with the Judgment Clerk on February 9, 2022, which caused plaintiff's counsel to move to enjoin the County Clerk from entering Judgment. The motion was denied by the court on April 26, 2022, whereby the court issued an order holding that a sufficient argument was not made to enjoin the ministerial act of entry of judgment by the County Clerk, and the referee's determination was not subject to review by the court. Thereafter, a proposed judgment was filed on July 21, 2022, which was not entered by the Judgment Clerk on the basis that the judgment did not reflect the dollar amounts represented by the percentages apportioned to each attorney. An Order to Show Cause was filed by outgoing counsel on April 26, 2022, seeking an order directing the judgment clerk to enter judgment in accordance with the underlying Special Referee's determination. The court declined signing the Order to Show Cause and directed that a judgment on notice of settlement be filed with the numerical calculation as per the referee's determination. The proposed judgment was submitted on notice on September 18, 2022. A counter-judgment was not submitted by plaintiff's new counsel, however, a motion to renew and

reargue seeking to vacate the Court's April 26, 2022, order which directed the filing of the proposed judgment upon notice of settlement. Outgoing counsel via letter to the court requesting that the proposed judgment be signed for the appeal to move forward. On July 14, 2023, the court's order dated June 21, 2023, denied the motion on the grounds that it was moot due to the acceptance and depositing of the check by the outgoing attorneys for the attorneys' fees apportioned by the referee's determination, effectuating an accord and satisfaction, deeming the signing of the proposed judgment unnecessary.

After oral argument, careful review of the moving papers, and opposition thereto, the court finds as follows:

A motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination" (CPLR 2221[e][2]) and "shall contain reasonable justification for the failure to present such facts on the prior motion" (CPLR 2221[e][3]; see *Makropoulos v. City of New York*, 187 A.D.3d 885, 888, 130 N.Y.S.3d 378). A motion for leave to reargue must be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion but shall not include any matters of fact not offered on the prior motion. See, *Central Mtge. Co. v. McClelland*, 119 A.D.3d 885 at 886, 991 N.Y.S.2d 87 (2nd Dept., 2014).

Based on the facts before this court, the court hereby grants the motion for leave to reargue the court's prior decision dated June 21, 2023, denying the relief sought as it relates to the entry of judgment upon the Referee's determination dated June 30, 2021.

In the case at bar, the outgoing attorneys filed an appeal from the Referee's determination which apportioned the outgoing firms' attorneys' fees at 8% and the incoming attorneys' fees at 92% of the settlement in the personal injury action. The appeal was dismissed by the Appellate Division on the grounds that no appeal lies from a "decision" of the Supreme Court. Thereafter, the outgoing attorney sought specific relief from this Court seeking an order directing the entry of the judgment, which was ultimately denied based on the outgoing attorneys having accepted and deposited the check received in the amount of \$66,742.83, representing 8% of the legal fees as per the Special Referee's determination. The court in its prior order held that an accord and satisfaction rendered the signing of the proposed judgment unnecessary due to counsels' acceptance and deposit of the check representing 8% of the apportioned attorneys' fees.

Generally, acceptance of a check in full settlement of a disputed unliquidated claim operates as an accord and satisfaction discharging the claim. The party asserting the affirmative defense of accord and satisfaction must establish that there was a disputed or unliquidated claim between the parties which they mutually resolved through a new contract discharging all or part of their obligations under the original contract. See, *Huimin Sun v. Helen Cai*, 146 A.D.3d 760, 45 N.Y.S.3d 155 (2nd Dept., 2017). An accord and satisfaction constitute a contract, and it must be shown that the parties set forth the essential elements thereof and had a meeting of the minds to resolve the disputed claim. Here, a determination as to the apportionment of attorneys' fees

was decided by a referee, however, a meeting of the minds did not occur and the protest as to the apportionment of the fees was stated by the outgoing counsel. In fact, upon learning that the monies were going to be released by the plaintiff's new counsel, as per the referee's determination, the outgoing attorneys informed the plaintiff's new counsel that they objected to the disbursement, and when it was re-affirmed that the monies would still be released, outgoing counsel filed an Order to Show Cause to enjoin the distribution of the attorneys' fees until their appeal was decided.

This court finds that an accord and satisfaction was not established. Even assuming that the doctrine of accord and satisfaction has any applicability to the claim for attorneys' fees, it has no bearing on the requirement that the referee's determination be entered pursuant to CPLR 5016 and CPLR 2219.

CPLR 5016(c) reads as follows:

Judgment upon decision. Judgment upon the decision of a court or a referee to determine shall be entered by the clerk as directed therein. When relief other than for money or costs only is granted, the court or Referee shall, on motion, determine the form of the judgment.

CPLR 2219(a) reads as follows:

(a) Time and form of order determining motion, generally. An order determining a motion relating to a provisional remedy shall be made within twenty days, and an order determining any other motion shall be made within sixty days, after the motion is submitted for decision. The order shall be in writing and shall be the same in form whether made by a court or a judge out of court. An order determining a motion made upon supporting papers shall be signed with the judge's signature or initials by the judge who made it, state the court of which he or she is a judge and the place and date of the signature, recite the papers used on the motion, and give the determination or direction in such detail as the judge deems proper. Except in a town or village court or where otherwise provided by law, upon the request of any party, an order or ruling made by a judge, whether upon written or oral application or sua sponte, shall be reduced to writing or otherwise recorded.

While not seen with great frequency, there are circumstances where a litigation results in a decision and a judgment, without an order in between. That combination of documents is acceptable but with an important caveat, that if the decision is never reduced to an order, by which there is an enforceable directive, there is no appealable paper, which is precisely the issue herein. (See, *McKinney's CPLR Rule 5016, Commentary by Hon. Mark C. Dillon*). Referees within the scope of CPLR 5016(c), who are authorized by the court to hear and determine, decisions are the equivalent of a decision having come from the court itself (CPLR 4301). Since the determination did not direct any party to settle or submit a judgment to the court, the judgment could have been entered by the clerk, as indicated in one of Justice Rothenberg's prior orders. Where a matter "involves an uncomplicated disposition or simple judgment for a sum of money which speaks for itself," the judgment may be entered by the clerk without prior submission to

the court. See, *Funk v. Barry*, 89 N.Y.2d 364, 653 N.Y.S.2d 247 [1996]. However, in the matter before the court, upon submission to the judgment clerk, the outgoing attorneys' proposed judgment was not entered, and the judgment clerk directed the outgoing attorneys to include the numerical calculations for the apportionment of fees.

To date, no judgment has been entered, rendering the judgment not appealable, which resulted in the outgoing attorneys' appeal being dismissed.


In *Charlabidis v. Elnager*, 188 A.D.3d 44, 132 N.Y.S.3d 129 (2nd Dept., 2020), the court is very clear that "parties are entitled to orders that are appealable and should not be thwarted by any jurists' unwitting failure to abide by the requirements of CPLR 2219(a)." Based upon the foregoing, the court finds that the movant is entitled to the relief sought under CPLR 2219(a) and CPLR 5016(c).


Accordingly, this court hereby grants the motion for re-argument and upon re-argument grants the relief sought in its entirety, and it is hereby

ORDERED, that the clerk of the court enter judgment pursuant to the determination of the Referee's June 30, 2021, decision.

This constitutes the order of this Court.

Dated: Brooklyn, New York
August 19, 2024



HON. LISA S. OTTLEY, J.S.C.


KINGS COUNTY CLERK
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