

Rudes v Heller

2006 NY Slip Op 30865(U)

March 9, 2006

Supreme Court, New York County

Docket Number: 114298-04

Judge: Rosalyn H. Richter

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 24

-----x
SAUL RUDES,

Plaintiff,

-against-

KENNETH HELLER,

Defendant

-----x
ROSALYN RICHTER, J.S.C.:

FILED
MAR 13 2006
COUNTY CLERK'S OFFICE
NEW YORK

DECISION AND ORDER
Index No. 114298-04
Motion Sequence Nos. 6 and 9

In this action, plaintiff Saul Rudes, an attorney, alleges that he was retained by defendant Kenneth Heller, a former attorney, as appellate counsel in the matter of *Pires v. Frota Oceanica Brasileira, S.A.*, N. Y. Cty. Index No. 23829-76. According to the complaint, Heller and Rudes agreed that Rudes's fee would be ten percent of Heller's net fee in the underlying action. Rudes alleges that he worked on the appeal but that Heller never remitted his fee and thus breached their contract. Rudes also alleges that Heller has breached his fiduciary duties, converted the funds and committed fraud.

Heller now moves pursuant to C.P.L.R. § 3211[a][7] to dismiss the action for failure to state a claim (Motion Sequence No. 9). The Court denies the motion since the complaint, when read in the light most favorable to Rudes, properly states a cause of action. The allegations contained in Heller's affidavit that Rudes violated disciplinary rules and neglected to file a retainer statement cannot be considered on this motion to dismiss and must be further explored in discovery. *See, e.g., Skillgames, LLC v. Brody*, 1 A.D.3d 247 (1st Dept. 2003) ("affidavits submitted in support of defendant's CPLR 3211(a)(7) motion do not 'conclusively establish that [plaintiff] has no cause of action'"); *Pietrosanto v. NYNEX Corp.*, 195 A.D.2d 843 (3d Dept. 1993) (court not entitled to consider defendant's affidavit for the purpose of determining whether there is evidentiary support

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for the complaint). Thus, Heller's motion to dismiss is denied at this stage of the proceedings.

Heller also moves to dismiss the complaint on statute of limitations grounds (Motion Sequence No. 9). However, Heller's contention that the three year limitations period governing maritime law claims applies to this action is misplaced. This action is not a maritime action but rather sounds in breach of contract. The fact that the underlying matter in *Pires v. Frota Oceanica Brasileira, S.A.* was a maritime claim does not convert this independent contract action into a maritime action. *See Pires and Rudes v. Heller*, 04 Civ. 9069 (RJH) (S.D.N.Y. November 19, 2004)(denying Heller's motion to remove this action to federal court because claims herein insufficient to invoke federal court's maritime jurisdiction).

In Motion Sequence No. 6, Rudes moves for the appointment of a temporary receiver to collect the income from a Manhattan parking lot and to manage other property located in Bedford, New York, both of which are purportedly owned by Heller. Rudes's motion is denied because the property in question is not the subject of this action for attorney's fees. *See C.P.L.R. § 6401[a]; Puro v. Puro*, 162 A.D.2d 227 (1st Dept. 1990). Nor has Rudes shown, as he must, that the property is in danger of being lost, injured or destroyed. *See Secured Capital Corp. v. Dansker*, 263 A.D.2d 503 (2d Dept. 1999).

At the inception of this case, Rudes and S.M. Pires, who was formerly a plaintiff in this action, moved, on notice, for an order of attachment against Heller. On January 14, 2005, Justice Karen Smith granted the motion and issued an order of attachment in the amount of \$4,176,539.54, which represented the value of the claims asserted by Rudes and Pires. After Pires withdrew his claim, Heller moved to vacate and/or stay the attachment. On April 22, 2005, Justice Smith granted Heller's motion to the extent of reducing the value of the property to be attached to \$600,000, the

approximate value of Rudes's claims. Heller now moves once again to vacate the attachment pursuant to C.P.L.R. § 6223 (Motion Sequence No 6 [cross-motion] and Motion Sequence No. 9).

Heller's motion is denied since Justice Smith has already ruled on his previous motion to vacate. *See Henry Stuart (Fabrics) Ltd. v. Jules Moskowitz & Co., Inc.*, 44 A.D.2d 798 (1st Dept. 1974) ("since on a prior motion to vacate, it was determined that the order of attachment herein was properly issued, it was error for the court below to thereafter vacate pursuant to CPLR 6223"). This present motion to vacate the attachment was originally filed on May 26, 2005, just one month after Justice Smith issued her decision on the previous motion to vacate. Heller does not point to any new information that had not been previously presented to Justice Smith that would provide cause for this Court to grant the motion.

Although Heller asserts that Justice Smith's decision was based on an affidavit of Susan Harmon which has been subsequently disavowed, the Court notes that Harmon's affidavit pre-dated Justice Smith's April 22, 2005 order, and thus Justice Smith may well have considered it when she issued her decision. In any event, Harmon's earlier affidavit merely presented hearsay allegations concerning Heller's fraudulent intent to transfer funds. Notably, Pires, although withdrawing his claims, has not submitted an affidavit disavowing his allegations that Heller has transferred funds to foreign bank accounts, upon which Justice Smith relied in originally granting the order of attachment. Heller cannot return to this Court to once again ask for relief that already been denied; rather his remedy is to appeal Justice Smith's April 22, 2005 order, which he has already done.¹

¹ The only other reason advanced by Heller to vacate the attachment is based on his contention that the complaint should be dismissed. In light of this Court's denial of Heller's motion to dismiss, the motion to vacate the attachment on this ground is denied.

Finally, the Court denies Rudes's motion to compel Heller to deliver to the Sheriff certain stock certificates for corporations in which Heller purportedly has an interest. Rudes has failed to indicate whether or not the Sheriff has already levied upon Heller's interest in this property. Absent a valid levy, the Court is not empowered to direct Heller to deliver the stock certificates to the Sheriff. See C.P.L.R. § 6214[d]. The Sheriff of course is free to levy upon any interest Heller has in any real or personal property under the provisions of C.P.L.R. §§ 6214, 6215 and 6216. Accordingly, it is

ORDERED that Heller's motion to dismiss the complaint (Motion Sequence No. 9) is denied; and it is further

ORDERED that Rudes's motion to appoint a temporary receiver is denied (Motion Sequence No. 6); and it is further

ORDERED that Heller's motion to vacate the attachment (Motion Sequence No 6 [cross-motion] and Motion Sequence No. 9) is denied; and it is further

ORDERED that Rudes's motion to compel Heller to deliver the stock certificates to the Sheriff (Motion Sequence No. 6) is denied.

This constitutes the decision and order of the Court.



Justice Rosalyn Richter

FILED

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