

Molinoff v Tanenbaum
2013 NY Slip Op 33665(U)
December 6, 2013
Supreme Court, Westchester Co
Docket Number: 51064/13
Judge: Robert M. DiBella
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To commence the statutory time period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER**

-----X
DANIEL D. MOLINOFF, ESQ.,

Plaintiff,

-against-

**DECISION AND ORDER
Motion Seq. Nos. 002 & 003**

MARK TANENBAUM,

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Defendant.

-----X
DIBELLA, J.

The following papers have been read and considered on this motion by defendant to, *inter alia*, grant reargument of the Court's Decision and Order dated June 6, 2013, or, in the alternative, to strike plaintiff's complaint for plaintiff's willful failure to respond to Interrogatories and cross motion by plaintiff to dismiss defendant's counterclaim and for sanctions:

- 1) Notice of Motion (seq. no. 002); Affidavit of Good Faith of Mark Tanenbaum, Esq.; Affidavit in Support of Mark Tanenbaum, Esq.; Exhibits A-E;
- 2) Notice of Cross Motion (seq. no. 003); Affidavit of Daniel D. Molinoff, Esq.; Exhibits A-F; and
- 3) Affidavit in Opposition to Cross Motion and in Further Support of Motion of Mark Tanenbaum, Esq.

In this case concerning a legal fee dispute, defendant moves for an order granting reargument of the Court's Decision and Order dated June 6, 2013, pursuant to CPLR 2221, or, in the alternative, to strike plaintiff's complaint for plaintiff's willful failure to respond to Interrogatories, pursuant to CPLR 3216(3) and to set this matter down for an inquest on defendant's counterclaim. Plaintiff opposes the motion and cross-moves to dismiss defendant's counterclaim, to award counsel fees to plaintiff for the drafting and filing of the cross motion, to award sanctions against defendant for frivolous conduct, to preclude certain questioning at the plaintiff's deposition, and to direct defendant to accept

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plaintiff's submission of his July 22, 2013 Supplemental Answers to Interrogatories. The motion and cross motion are both denied, as set forth below.

On or about August 2009, defendant retained plaintiff to represent him in Family Court with regard to some post-divorce issues. Plaintiff alleges that defendant failed to make payment for the services he rendered and commenced this action to recover his legal fees. By Decision and Order dated June 6, 2013, the Court denied defendant's motion to dismiss the complaint, directed defendant to serve and file an Answer, and scheduled a preliminary conference.

Defendant's motion to reargue the Court's Decision and Order is denied. Pursuant to CPLR 2221(d), a motion for leave to reargue shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion and shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry. A motion to reargue is left to the sound discretion of the court and "may be granted upon a showing that the court overlooked or misapprehended the facts or law or for some reason mistakenly arrived at its earlier decision." *Carrillo v. PM Realty Group*, 16 AD3d 611 (2d Dep't 2005).

The Court denies defendant's motion for reargument, since, upon review, defendant has not demonstrated that the Court overlooked or misapprehended the facts or law. It is clear that defendant just seeks another bite of the apple, as he requests that "upon a further perusal by the Court of the plaintiff's Complaint, . . . this Court can re-evaluate the merits of the plaintiff's allegations" *Tanenbaum Aff* ¶ 17.

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As to defendant's motion to strike plaintiff's complaint, dismiss plaintiff's action, and set the matter down for an inquest on his counterclaim for plaintiff's alleged willful failure to respond to Interrogatories, pursuant to CPLR 3126(3), the motion is denied without prejudice to raise such issues before the Compliance Part, which is in place to deal with all discovery issues, and make any appropriate motion thereafter, returnable before the Compliance Part. It appears that, at the time of the filing of the motion, these issues had not been raised in the Compliance Part. However, during the pendency of the motion/cross motion, it appears that the Compliance Part may already have addressed the discovery issues raised herein by setting forth a briefing schedule on November 22, 2013.

With regard to plaintiff's cross motion to dismiss defendant's counterclaim, it is denied. Defendant has asserted a counterclaim, seeking judgment against plaintiff directing him to return to defendant the retainer amount of \$5,000 together with all other monies paid as a result of, *inter alia*, plaintiff's alleged failure of performance. Plaintiff contends that the allegations set forth in defendant's counterclaim are identical to those dismissed in a Decision and Order by the Court (Lefkowitz, J.) on January 16, 2013 in a prior action by defendant. However, a review of that Decision and Order makes clear that it was not meant to preclude defendant from seeking such relief, in fact, it specifically addressed that "[t]o the extent that Tanenbaum seeks a refund of the retainer he paid to Molinoff, he may pursue such relief in the *de novo* action commenced by Molinoff."

As for plaintiff's cross motion for sanctions, costs and attorney's fees, such request is denied.

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As for any discovery-related requests by plaintiff, plaintiff is also directed to raise any such issues before the Compliance Part.

Accordingly, it is

Ordered that defendant's motion is denied; and it is further

Ordered that plaintiff's cross motion is denied; and it is further

Ordered that, as previously scheduled, the parties are directed to appear before the Compliance Part on January 14, 2014; and it is further

Ordered that plaintiff is directed to serve a copy of this Decision and Order with notice of entry upon defendant within 30 days.

This is the Decision and Order of the Court.

Dated: December 6, 2013
White Plains, New York


Hon. Robert DiBella, JSC

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