

Ripka, Rotter & King, LLP v Lemmo

2011 NY Slip Op 33454(U)

December 16, 2011

Sup Ct, NY County

Docket Number: 601496/08

Judge: Jane S. Solomon

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JANE S. SOLOMON
Justice

PART 55

Ripke, Doherty + King, LLP
- v -
Edward A. Lemno

INDEX NO. 601796/08
MOTION DATE 8/22/11
MOTION SEQ. NO. 007
MOTION CAL. NO. _____

The following papers, numbered 1 to 10 were read on this motion to/for compel

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1-3</u>
Answering Affidavits — Exhibits _____	<u>4-6</u>
Replying Affidavits _____	<u>7-10</u>

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the enclosed memorandum decision and order.

N.B. - this action is transferred to the Medication Part with an appearance on January 23, 2012 at 9:30 AM.

FILED

DEC 16 2011

Dated: 12/15/11
NEW YORK COUNTY CLERK'S OFFICE
JANE S. SOLOMON S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE
 SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 55

-----X
RIPKA, ROTTER & KING, LLP,

Plaintiff,

-against-

Index No. 601796/08

EDWARD A. LEMMO, EDWARD A. LEMMO,
ATTORNEY AT LAW, P.C. and KAHN GORDON
TIMKO & RODRIQUEZ, P.C.,

Defendants.

FILED

DEC 16 2011

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JANE S. SOLOMON, J.:

NEW YORK
COUNTY CLERK'S OFFICE

The plaintiff Ripka, Rotter & King, LLP (Ripka Rotter) moves, pursuant to CPLR 3124, for an order compelling the defendants Edward A. Lemmo and Edward A. Lemmo Attorney at Law, P.C. (jointly Lemmo) to provide full and complete responses to discovery demands dated August 8, 2010, including the production in camera of copies of any and all filings made with the Office of Court Administration, whether retainer statements, closing statements, or otherwise, for cases included in the contract between the plaintiff and the defendants, and compelling Lemmo to appear for a deposition.

In an interim order dated June 6, 2011, this Court granted Ripka Rotter's discovery motion.

Lemmo cross-moves, pursuant to CPLR 3212, for an order granting summary judgment dismissing the complaint.

Preliminarily the Court notes that the cross motion was untimely made on May 31, 2011, 92 days after the note of issue was filed on February 28, 2011, well outside the preliminary conference order's 60-day deadline for dispositive motions (Exhibit "9" to Varcadipane affirmation). Since no good cause is shown for the delay in making the cross motion for summary judgment, it must be denied. Even were the Court to reach the merits, it would still deny the cross motion for summary

judgment.

The parties to this action are lawyers. This is an action to recover damages for the alleged breach of a written contract entered into in 2003, whereby Ripka Rotter provided services, advanced disbursements, and acted as trial counsel, in personal injury cases referred to it by the defendant Lemmo. In 2006, Ripka Rotter dissolved, and ended its contract with Lemmo. The complaint seeks Ripka Rotter's share of the gross attorneys' fees in those cases referred by Lemmo to Ripka Rotter, as well as reimbursement for the disbursements advanced.

In support of his cross motion for summary judgment, the defendant Lemmo argues that Ripka Rotter is barred from recovering a portion of the contingency fees, because it did not file retainer statements with the Office of Court Administration (OCA) as required by 22 NYCRR § 603.7. Lemmo also argues that the small amount of disbursements potentially in dispute have been withheld as an offset for Ripka Rotter's alleged defaults in providing trial assistance and office space.

In opposition to the cross motion for summary judgment Ripka Rotter argues that the failure to file a retainer statement does not bar a breach of contract claim.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact from the case (*Smalls v AJI Indus., Inc.* 10 NY3d 733, 735, *rearg denied* 10 NY3d 885 [2008]; *JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d 373, 384 [2005]). The “[f]ailure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material

issues of fact which require a trial of the action. Mere conclusions, expressions of hope, or unsubstantiated allegations are insufficient for this purpose (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

In *Law Offs. of K.C. Okoli, P.C. v Maduegbuna* (62 AD3d 477 [1st Dept 2009], *Lv dismissed* 13 NY3d 771 [2009]), the plaintiff attorney alleged that he assisted the defendant attorneys in a contingency fee case, for which they paid him 20% of the fee they realized on settlement, in breach of an oral agreement calling for a division of the fee as the parties "had done in the past," and that in all previous contingency-fee cases procured by defendants on which plaintiff had worked, they had paid him 50% of the fee. The First Department held that the defendants could not avoid a fee-sharing agreement on ethical grounds if they freely agreed to be bound by and received the benefit of same.

In *Giano v Ioannou* (78 AD3d 768 [2d Dept 2010]) the plaintiff and defendant, both of whom were attorneys, entered into an agreement whereby the plaintiff agreed to refer cases to the defendant who would process them to completion in exchange for 50% of the fee. The plaintiff became dissatisfied with the defendant's handling of the cases referred to him and brought an action against him alleging, inter alia, breach of contract. The plaintiff sought 100%, rather than 50%, of the fees. The Second Department held that nunc pro tunc filing of retainer statements may be sufficient to preserve an attorney's right to recover fees where the attorney seeks leave of court to file the statements nunc pro tunc. However, the defendant did not obtain leave of court to file the statements nunc pro tunc, and, indeed, filed the statements only after the judgment against him had been entered, and failed to present any evidence justifying his failure to comply with these regulations. Under these circumstances, the defendant's belated filing of retainer statements was insufficient to preserve his right to recover a fee.

In this case, both Ripka Rotter and Lemmo filed retainer statements long after this litigation was underway. This motion represents Lemmo's attempt to prevent Ripka Rotter from enforcing the terms of their contract because it engaged in the same sloppy non-compliance with OCA rules as he did. If Lemmo's argument were accepted at face value, he would not be entitled to keep any part of the legal fees to which he claims sole ownership. Since Lemmo saw fit to file retainer statements just recently and rely upon that filing in arguing for dispositive relief in this lawsuit, he cannot be heard to complain if leave is granted nunc pro tunc to both parties for those retainer statements filed to date.

Therefore, Ripka Rotter's alleged failure to file retainer statements in compliance with Rules of the Appellate Division, First Department (22 NYCRR § 603.7 [a] [3]), is not fatal to its contract claims, and Lemmo's cross motion for summary judgment dismissing the claims for a share of the counsel fees, and the disbursements, must be denied (*Fishkin v Taras*, 54 AD3d 260 [1st Dept 2008]).

Accordingly, it is

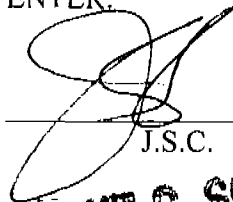
ORDERED that the cross motion is denied; and it further is

ORDERED that sua sponte leave is granted nunc pro tunc to plaintiff and Lemmo as to retainer statements filed prior hereto in accordance with 22 NYCRR § 603.7 (a)(3), for an action related to the dispute in this lawsuit; and it further is

ORDERED that this matter is transferred to the Mediation Part, 80 Centre Street, Room 106, New York, NY, where counsel shall appear on January 23, 2012 at 9:30 AM.

Dated: December 15, 2011

FILED
DEC 16 2011
NEW YORK
COUNTY CLERK'S OFFICE

ENTER:


J.S.C.
JANE S. SOLOMON