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

PRESENT: LOUIS B. YORK J.S.C. PART 2

Index Number : 106470/2010
KALIR, ESQ., DORON M.
VS.
OTTINGER, ESQ., ROBERT
SEQUENCE NUMBER : 003
REARGUMENT/RECONSIDERATION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

FILED
JAN 03 2012
NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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

Dated: 12/23/11

LOUIS B. YORK J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2

----------X

DORON M. KALIR, ESQ.,

Plaintiff,

Index No. 106470/10

-against-

DECISION/ORDER

ROBERT OTTINGER, ESQ. and THE OTTINGER FIRM P.C.,

Defendants.

----------X

LOUIS B. YORK, J.S.C.:

In this action, plaintiff Doron M. Kalir ("Kalir") sued to recover fees allegedly owed to him for legal services provided to defendant Robert Ottinger ("Ottinger") and the professional corporation, co-defendant The Ottinger Firm, P.C. Kalir was hired by Ottinger, another attorney, as an independent contractor to work on the anti-trust aspects of a federal case from February 4, 2009 through July 6, 2009. The dispute centers around a series of correspondences regarding compensation schemes for Kalir's work. After Kalir's termination from the firm on July 6, 2009, he commenced this lawsuit to recover the compensation he alleges is still due to him.

On June 24, 2010, Kalir moved for summary judgment for the unpaid legal fees. He sought a trial on the issue of damages against defendants; dismissal of defendants' answer, including affirmative defenses and counterclaims; and grant of such other and further relief as may be proper. In opposition, defendants denied owing plaintiff any further fees requesting the motion be denied in its entirety. However, in lieu of an affidavit supporting its opposition to the

motion, Ottinger submitted an affirmation to the court. In deciding the summary judgment motion, this court looked to CPLR 2106, which authorizes attorneys who are not parties to an action, to make a statement which, "when subscribed and affirmed to be true under penalties of perjury, may be served and filed in an action in lieu of and with the same force and effect as an affidavit" (CPLR 2106, at 816). In these instances, the attorney need not go before either a notary or some other official who has the authority to administer oaths or affirmations (*See Doumanis v Conzo,* 265 A.D.2d 296, 296,696 N.Y.S.2d 201, 202 [2d Dept 1999](in case involving chiropractor instead of attorney). However, the statute does not afford attorneys who are parties to an action this privilege (*John Harris P.C. v. Krauss*, 87 A.D.3d 469, 469, 928 N.Y.S.2d 295, 295-96 [1st Dept. 2011]). Instead, "to make a competent, admissible affirmation," an attorney who is a party "must first appear before a notary or other such official and formally declare the truth of the contents of the document" (*Doumanis*, 265 A.D.2d at 296, 696 N.Y.S.2d at 203). Thus this court found that the purported opposition of defendants were not entitled to judicial cognizance because they were not subscribed before a notary or other authorized official, and plaintiff's motion was granted on the issue of liability.

On February 3, 2011 defendants moved pursuant to CPLR 2221 for leave to renew and/or reargue Plaintiff's Motion for Summary Judgment dated June 24, 2010. The Court issued an order on March 21, 2011 denying the motion because defendants failed to provide a copy of the prior order they sought to reargue in the motion papers.

In the motion currently before the court defendants again move pursuant to CPLR 2221 to renew and/or reargue plaintiff's motion for summary judgment. Defendants contend that their motion to renew and/or reargue plaintiff's motion for summary judgment should be granted because (1) Defendants submit the new Ottinger affidavit in place of the inadvertently submitted

affirmation; (2) Plaintiff can demonstrate no prejudice due to the prompt submission of the new Ottinger affidavit; (3) Courts have broad discretion to grant motions to renew and the substance of the initial Ottinger affirmation was sufficient to raise a material issue of fact to defeat plaintiff's motion for summary judgment.

Plaintiff raises several arguments in opposition to the motion. Plaintiff asserts that defendants have no basis in law for their motion to renew or reargue because defendants have not raised any matters of fact or law that would change the prior determination by the court. Defendants dispute this assertion. In addition, plaintiff contends that the motion should be denied because the defendant's affidavit was not submitted with an accompanying certificate necessary in oaths and affirmations taken without the state and, thus defendant again have violated CPLR 2221. Defendants also submit a reply memorandum of law in which they argue that they repeatedly identify a reasonable excuse for their submission of an affirmation instead of an affidavit in opposition to plaintiff's motion for summary judgment, and in particular, that with the submission of the certificate of conformity and the certificate of authentication in accordance with CPLR 2309(c), the new Ottinger affidavit should be accepted. For the reasons below, the Court grants defendants' leave to renew but, upon renewal, denies the underlying motion.

Plaintiff asserts that the motion to renew should be denied because of a lack of new facts not offered on the prior motion for summary judgment. However, courts "have broad discretion to grant renewal and may in appropriate circumstances do so even upon facts known to the movant at the time of the earlier motion" (*see U.S. Reinsurance Corp. v Humphreys*, 205 AD2d 187, 192, 618 N.Y.S.2d 270, 272 [1st Dept1994]; *Martinez v Hudson Armored Car & Courier*, 201 AD2d 359, 361, 607 N.Y.S.2d 644, 647[1st Dept 1994]). Although renewal is generally not available where the newly submitted material was available at the time of the original motion,

the court has the discretion to grant renewal if there is no prejudice (*Framapac Delicatessen, Inc. v Aetna Cas. and Sur. Co.*, 249 A.D.2d 36, 37, 670 N.Y.S.2d 491, 491 [1st Dept 1998]). In the case at hand, plaintiff submitted an affirmation which contained the same assertions that are in the affidavit. Thus, defendants were aware of the pertinent facts at the time of the original motion. Moreover, because the error was procedural, renewal is proper to correct the motion (*see Wilcox v Winter,* 282 AD2d 862, 864, 722 N.Y.S.2d 836, 837 [3rd Dept 2001] (applying principle to medical report which itself was not conclusory)).

In addition, plaintiff has failed to articulate any prejudice, and the submission of an affirmation instead of an affidavit was clearly inadvertent. The First Department has held that renewal may be granted "where the failure to submit an affidavit in admissible form is inadvertent and there is no showing by the opposing party of any prejudice attributable to the delay caused by the failure" (*B.B.Y. Diamonds Corp. v Five Star Designs, Inc.*, 6 AD3d 263, 264, 775 N.Y.S.2d 34, 34 [1st Dept 2004]). In *B.B.Y. Diamonds Corp.*, in support of their motion and in opposition to the plaintiff's cross motion, the defendants submitted an affidavit of the defendant that was not notarized (*id.*). On their motion to renew, the defendants submitted a re-dated and notarized affidavit and an affirmation from counsel explaining that originally he "must have overlooked the fact that the affidavit was not notarized." (*id.*) The First Department, finding that the trial court should have granted the motion to renew, noted that there was no prejudice because the two affidavits were identical except for the ministerial corrections (*id.*). Here, too, defendants' failure was demonstrably inadvertent, and their subsequent submission of a new affidavit corrects the procedural defect. Here too, plaintiff has failed to show any prejudice.

In opposition to defendant's motion, plaintiff relies solely on Second Department case law to support its assertion that, regardless of the lack of prejudice, renewal should not be granted because defendant failed to provide reasonable justification as to why the document were not in proper form when first submitted. (*E.g.*, *Singh v. Mohamed*, 54 A.D.3d 933, 864 N.Y.S.2d 498, 500 [2d Dept 2008]; *Doumanis v. Conzo,* 265 A.D.2d 296, 696 N.Y.S.2d 201, 203 [2d Dept 1999]; *Pichardo v. Blum*, 267 A.D.2d 441, 700 N.Y.S.2d 863, 864 [2d Dept 1999]). However, the First Department, which binds this Court, allows the trial court the discretion to grant renewal in the absence of prejudice, even where the original failure was due to the movant's mistake. (*Cf. Cuevas v. City of New York,* 32 A.D.3d 372, 821 N.Y.S.2d 37, [1st Dept. 2006](where party accidentally left out critical expert affidavit, trial court providently exercised its discretion in permitting renewal)). Moreover, the Court's grant of renewal under the circumstances in this motion conforms with New York's strong public policy favoring the resolution of cases, and the substantive motions which arise during the course of litigation, on their merits (*see Framapac Delicatessen, Inc. v. Aetna Cas. and Sur. Co.,* 249 A.D.2d 36, 37, 670 N.Y.S.2d 491, 492 [1st Dept 1998]).

Finally, plaintiff contends that because defendants submitted defective documents to the Court on two prior occasions, they are requesting a "second (flawed) bite of the apple," and their application should be denied (Plaintiff's Opposition at pg. 6). Although there is limited case law concerning the repeated submission of defective documents, the court applies general principals of fairness and determines that defendants' errors do not rise to the level warranting denial of this motion where, as here, they have remedied the defects. In addition, the Court notes that it denied the second motion solely because defendants did not provide a copy of all pertinent

papers and that the denial was without prejudice to defendants' right to renew the motion, annexing the proper papers.

The Court now turns to plaintiff's motion for summary judgment. Plaintiff and defendants have each set forth a multitude facts supporting their position with regard to this motion. However, the Court has examined plaintiff's papers in their entirety and found no legal arguments, case law or other authority, in support of his motion. Summary judgment facilitates the resolution of civil lawsuits by eliminating cases that can be resolved as a matter of law from the trial calendar (*Andre v Pomeroy,* 35 N.Y.2d 361, 362 N.Y.S.2d 131 (1974)). Upon moving for summary judgment, the movant has the initial burden of setting forth evidentiary facts entitling it to judgment as a matter of law (*Piccolo v. DeCarlo*, 163 A.D.2d 144, 145, 557 N.Y.S.2d 365, 367 (1st Dep't 1990)). Courts grant summary judgment motions only if "upon all the papers and proof submitted, the cause of action or defense [is] established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party" (CPLR 3212).

In the instant matter, summary judgment is inappropriate because the parties raise numerous triable issues of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562, 427 N.Y.S.2d 595, 597-98 [1980]). Indeed, the parties' versions of the facts are almost entirely at odds – plaintiff asserts that he was not fully compensated for the work he performed, and defendants argue that plaintiff is not entitled to compensation because, among other things, he overbilled clients for his personal benefit and this cost defendants money following the termination of the parties' relationship. Though plaintiff denies that this is the case, he has not satisfied his evidentiary or other burdens to refute their arguments.

Therefore, although renewal is proper, the underlying motion is not persuasive. *(see Alvira v. Residential Mgmt.*, – A.D.3d –, –, 931 N.Y.S.2d 862, 863 [1st Dept. 2011]). For the reasons above, it is

ORDERED that the motion to renew is granted; and it is further

ORDERED that, upon renewal, plaintiff's motion for summary judgment is denied.

ENTER:

Dated: 12/23/11

LOUIS B. YORK
J.S.C.

Louis B. York,

J.S.C.