SCAN

SHORT FORM ORDER

SUPREME COURT: STATE OF NEW YORK
COUNTY OF NASSAU

HON. IRA B. WARSHAWSKY,
Justice.

TRIAL/IAS PART 7

ALAN GLINKENHOUSE, PHILIP FLOUMANHAFT, and

ALAN QUEEN,

Plaintiffs,

- against -

Index No.: 015268/2006
Submission Date: 12/2/11

STEPHEN SILVER,

Defendant.

STEPHEN SILVER,

Counterclaim Plaintiff,

- against -

ALAN GLINKENHOUSE, PHILIP FLOUMANHAFT, ALAN QUEEN and GLINKENHOUSE FLOUMANHAFT & QUEEN, Attorneys at Law,

Counterclaim Defendants.

The parties have submitted a joint stipulation of facts and individual memoranda of law as follows:

Stipulated Statement of Facts dated November 8, 2011	.....	1.
Memorandum of Law of Stephen Silver	.....	2.
Memorandum of Law in Support of plaintiffs in First Action	.....	3.

PRELIMINARY STATEMENT

The Court expresses its appreciation for counsel's efforts to reach agreement on a relatively straight forward series of facts, leaving the legal import of those facts for determination by the Court.

Plaintiff law firm seeks judgment vacating a June 6, 2001 agreement between the firm and an outgoing member, Stephen Silver, and directing repayment of the sum of $375,000, paid on account of the $750,000 buyout of Silver's interest in the firm. In his counterclaim, Silver claims entitlement to the balance of $375,000 and contends that firm's claim that the agreement is unenforceable must be dismissed in accordance with *Glinkenhouse v. Karp,* 60 A.D.3d 630 (2d. Dept. 2007).

BACKGROUND

The law firm plaintiff has been doubly snake bit. *Glinkenhouse v. Karp* involved an action by Glinkenhouse and Floumanhaft, as former partners of Selwyn Karp, and Alan Queen, a subsequent partner of Glinkenhouse and Floumanhaft, in which they sought to rescind a purchase agreement by which they acquired the interest of Karp in the firm. By that agreement the plaintiffs and Stephen N. Silver agreed to pay Karp the sum of $1,200,000, upon which he withdrew from the firm, and transferred his interest to a successor firm.

The Agreement was dated March 31, 1999. On April 26, 1999, Karp pled guilty to commercial bribing in the second degree, a Class A misdemeanor. By Order of the Appellate Division dated July 29, 1999, he was suspended from the practice of law pending the conclusion of a disciplinary proceeding. Upon the happening of that event, the Appellate Division imposed a three-year suspension from date of the decision and order.

Plaintiffs continued to make payments in accordance with the agreement. On December 28, 2004, the parties amended the agreement and agreed to pay Karp $219,000 in January 2005, and continue to make other specified payments for the benefit of a third party, and, if all those payments were made, Karp would acknowledge payment in full under the terms of the purchase agreement.

In October, 2006 plaintiffs commenced action to rescind the purchase agreement, as illegal and in violation of public policy, and to recoup the amounts paid. Plaintiffs moved for

summary judgment, claiming that they did not realize until 2006 that the agreement was illegal. They did not deny that they were aware of the suspension from practice. Defendant cross-moved for summary judgment dismissing the complaint, alleging that the agreement was legal, and the plaintiffs, having benefitted from the agreement, could not now seek to rescind it. The trial court denied plaintiffs' motion and granted defendant's motion.

The Court pointed out that a lawyer retiring from the practice may sell a law practice, including good will, and may agree to a restrictive covenant restricting his right to practice in return for retirement benefits. A disbarred or suspended attorney may not share in any fee for legal services during the period of removal from the bar. He is, however, entitled to recover on the basis of quantum meruit for legal services rendered or disbursements incurred prior to the effective date of the suspension or disbarment.

Citing 22 NYCRR 691.10[b] and *Matter of Haber*, 27 A.D.2d 576 (2d Dept. 1966), *affd.* 23 N.Y.2d 763 (1968), the Court stated that if the agreement, as amended, compensated Karp for legal services performed after his suspension went into effect, it was illegal. The Court concluded, however, that where parties enter into an illegal agreement, courts generally do not grant relief; and since plaintiffs paid defendant in full pursuant to the agreement as amended, and there were no allegations of fraud or misrepresentation by defendant, to the extent the agreement was illegal, plaintiffs are not entitled to any relief.

The Glinkenhouse firm now seeks to distinguish its prior experience from the facts at bar.

The Stipulated Facts

Steven Silver, Esq. was a partner in the firm of Silver, Glinkenhouse, Floumanhaft & Queen ("SGFQ") when, on June 6, 2001, he executed a Purchase Agreement. Silver withdrew as a partner, at which time the partnership was dissolved. The remaining partners, Glinkenhouse, Floumanhaft & Queen, formed a new partnership under that name, and agreed to purchase the interest of Silver, including the assets and "good will" of Silver, Glinkenhouse, Floumenhaft & Queen.

As of the date of the Agreement, the Disciplinary Committee of the Second Department had completed its investigation of Mr. Silver for violations of the Code of Professional Responsibility, and referred the matter to the Appellate Division, Second Department, for further

action. As of June 6, 2001, Mr. Silver had not yet been suspended, but by Order dated May 21, 2001, the Appellate Division had ordered his suspension, effective June 7, 2001, the date following the dissolution and purchase agreement.

On or about September 20, 2006, the dissolved partnership, SGFQ, commenced an action against Mr. Silver to invalidate the agreement, claiming that the sale of his interest violated New York law, since he faced "imminent suspension from, and subsequently was suspended from, the practice of law".

As of the commencement of the suit, plaintiffs had paid Mr. Silver $375,000 of the $750,000 purchase price provided for in the agreement. They contemporaneously ceased making payments pursuant to the agreement. Mr. Silver countersued for payment of the balance of the amount called for in the agreement.

By statement on the record on March 4, 2010, the parties stipulated that the sole issue to be determined was whether or not the agreement was enforceable, agreed to stipulate to the aforesaid facts, and posed the question to the Court for determination as follows

> Where an attorney in a law firm enters into the agreement annexed hereto as exhibit A with his partners to sell his interest in the law firm, where all of the parties to the transaction know that the attorney who is selling his interest will be suspended from the practice of law on a specific date in the future pursuant to an order issued by the Appellate Division, is the subject agreement, executed before the effective date of the suspension, enforceable in whole or in part.

Memorandum on Behalf of Glinkenhouse, Floumanhaft & Queen

Plaintiffs seek summary judgment on their behalf and denial of summary judgment on behalf of defendant. They contend that the agreement among Silver and his former partners is illegal, and void ab initio, in that it violates the Court rules governing legal practice and the public policy of the State. They rely principally on three cases to sustain their position: *Matter of Haber,* 27 A.D.2d 576 (2d Dept. 1966); aff'd. 23 N.Y.2d 763 (1968; cert.den. sub nom. *Haber v. Greason,* 394 U.S. 755 (1969); *Dercolator, Cohen & DiPrisco v. Lysaght, Lysaght & Kramer,* 304 A.D.2d 86 (1st Dept. 2003); and *Glinkenhouse v. Karp,* 60 A.D.3d 630 (2d Dept. 2007).

Matter of Haber

Prior to 1959, Zuckerman and Haber were partners in the practice of law. In 1960 they hired two associates, Sulsky and Simenowitz. Disciplinary proceedings were instituted against Zuckerman and Haber on July 12, 1961. A Special Referee conducted 14 days of hearings betweein June 11, 1962 and August 15, 1963, after which the hearings were closed. On November 11, 1963, the parties entered into a partnership agreement.

The agreement provided that Zuckerman and Haber would each have a 40% share in the partnership, with Sulsky having a 12 ½% Simenowitz 7 ½ %. Zuckerman and Haber were each to receive $500 per week, Sulsky $225, and Simenowitz $150. If for any reason Zuckerman and Haber should be unable to practice law, whether voluntarily or involuntarily, they were to receive $250,000, payable $25,000 per year each for 4 years, and $10,000 per year each for 15 years. The shares of the partnership were to revert to Sulsky and Simenowitz, with each of them jointly and severally responsible for the payments of $250,000 to the outgoing partners. Life insurance policies for Sulsky and Simenowitz secured the payments. The effective date of the agreement was January 1, 1964.

On July 27, 1964 the Special Referee filed his report on the Disciplainary Proceedings which had been concluded on November 18, 1963. Shortly after November 18, 1963, Zuckerman and Haber sent letters to clients asking that they consent to continue with the newly created partnership. In the midst of these events, on December 23, 1964, the Second Department adopted instructions for attorneys suspended from practice, effective September 1, 1965.

The disbarment and suspension of Zuckerman and Haber, respectively, were ordered on March 3, 1965, effective April 9, 1965. Respondents then advised their clients that effective April 9, Zuckerman and Haber would retire from membership in the firm, that Sulsky and Simenowitz would continue the practice from the same location, and requested that they consent to the continued representation by the remaining partners.

Based upon the 1963 partnership agreement, further disciplinary proceedings were recommended. The Justice of the Supreme Court, to whom the matter was assigned, filed his report on March 31, 1966, and the Court determined that the following findings were warranted: (a) when he entered into the partnership agreement, Haber intended to circumvent the nullify the

possibility of an adverse consequences from the pending disciplinary proceeding;
(b) Sulsky and Simenowitz, in signing the agreement, intended to, and did, aid and abet Zuckerman and respondent Haber in that intention.

The Court further found that the conduct of the respondents in entering into this agreement was highly improper, since it was "palpably designed to thwart judicial control over the privilege of membership at the Bar of this State". *Id.* at 577. The Court noted that no similar type of agreement had been passed upon by the court, and they formally condemn it as contrary to public policy. Zuckerman, who was disbarred, obtained no benefit and no action was taken against him. Sulsky and Simenowitz, who brought the matter to the court's attention by written inquiry, were publicly censured. Haber, suspended for 5 years, was not further penalized, but the matter would be considered in his application for readmission.

Justices Beldock and Benjamin dissented, considering that the arrangement provided for a continuing interest in a law firm by a disbarred and suspended attorney, they found the agreement "so evil in nature and so deliberate in purpose to frustrate the impact of any disciplinary action affecting Zuckerman and Haber that we disagree with the majority's recommendation that a public cesure is adequate punishment for such conduct". They opined that any punishment short of disbarment for the three respondents was inadequate.

Decolator, Cohen & DiPrisco v. Lysaght, Lysaght & Kramer

This case deals with the efforts of an incoming firm to limit the share of the legal fee payable to the outgoing firm, whose principals had been disbarred, to quantum meruit on an hourly basis. The underlying action was one for personal injuries sustained as the result of a slip and fall in a police station. Lysaght, Lysaght & Kramer commenced the action in 1996. During the pendency of the action, the two principals of the firm, Lysaght and Kramer, were indicted for racketeering conspiracy, involving the payment of kickbacks for legal work on behalf of the New York City Transit Police Benevolent Association. Suspended from practice on May 27, 1999, they were disbarred "effective immediately" on the basis of their their felony convictions. (*Matter of Lysaght,* 275 A.D.2d 94 [2d Dept. 2000]; *Matter of Kramer,* 275 A.D.2d 100 [2d Dept. 2000]).

Immediately after the convictions, Marshall Trager, Linda Cronin, and Byczek, associates

of Lysaght, Lysaght & Kramer, formed Trager, Cronin & Byczek ("TCB"). They hired other former associates, Joseph Decolator, Neil Cohen, and Domini DiPrisco. By contract dated February 8, 1998, effective February 3, 1998, Lysaght purported to sell all of his non-union related practice to TCB. In May 1998, Decolator, Cohen and DiPrisco left TCB and formed their own firm ("DCD"), taking some 170 matters with them. The client in the underlying matter, Farrell, discharged TCB and retained DCD. TCB then notified DCD that they asserted a charging lien on behalf of themselves and Lysaght. In February 2000 Lysaght sued TCB for $8 million for failure to pay the contract price in accordance with the 1998 agreement. The action was settled and TCB, as part of the settlement, agreed to cooperate with Lysaght in enforcing the liens against DCD.

The Farrell matter settled in March 2001, and DCD commenced a proceeding pursuant to Judiciary Law § 475 to deny Lysaght any share of the legal fee on the grounds of Lysaght's misconduct in entering into a sham contract to sell its practice and transferring its personal injury actions to TCB without client approval and before the February 8, 1998 sales contract was executed. Lysaght countered that it was entitled to a percentage of the contingent fee based upon the proportionate share of the work it performed.

Supreme Court, Kings County dismissed the claims of DCD based upon lack of standing, and determined that Lysaght was entitled to the proportionate share of the contingent fee for work performed by them. The Appellate Division affirmed.

Citing *Haber* as prohibiting, on public policy grounds, "an attorney facing imminent suspension or disbarment from disposing of his or her practice in a manner calculated to circumvent the effects of the impeding sanction", DCD argued that Lysaght, by "entering into such an illegal contract on February 8, 1998, forfeited any rights it might otherwise have for any of the legal work it performed on any of the 170 cases, including Farrell. The Court rejected DCD's claim on the basis of standing and put aside, for the purpose of deciding, the validity of DCD's claim that a claim for quantum meruit cannot be calculated on a percentage of a contingency fee. It concluded that the agreement served to transfer from Lysaght to TCB what Lysaght had, a charging lien; and, as a subsequently retained attorney, DCD was also entitled to a share of the fee calculated on its proportionate share of legal work.

Importantly, the Court held that even if the Lysaght-TCB agreement was improper, it did not deprive Lysaght of its entitlement, that is, its proportionate share of the contingent fee. The Court rejected outright any claim that the misconduct which led to disbarment in any way impacted on the entitlement to recover fees for work done prior to such disbarment. The Court cited the governing principle as follows:

> A disbarred, suspended or resigned attorney may not share in any fee for legal services performed by another attorney during the period of his removal from the bar. A disbarred, suspended or resigned attorney may be compensated on a quantum meruit basis for legal services rendered and disbursements incurred by him prior to the effective date of the disbarment or suspension order or of his resignation. The amount and manner of payment of such compensation and recoverable disbursements shall be fixed by the court on the application of either the disbarred, suspended or resigned attorney or the new attorney, on notice to the other as well as on notice to the client" (Rules of App Div, 1st Dept [22 NYCRR] § 603.13 [b]; Rules of App Div, 2d Dept [22 NYCRR] § 691.10 [b]).

In sum an substance, the Court found that the award of a legal fee to Lysaght, based upon a proportionate share of the services it performed prior to disbarment, was consistent with 22 NYCRR § 603.13.

Glinkenhouse v. Karp

This was an action to rescind a purchase agreement, as illegal and a violation of public policy. Glinkenhouse and Floumenhaft, the same parties who are plaintiffs in this action, were formerly law partners of Selwyn Karp. On March 31, 1999, Glinkenhouse, Floumenhaft, Queen, a partner, and another individual entered into a written agreement whereby defendant Karp withdrew from the partnership, and transferred his interest to a successor law firm composed of plaintiffs and non-party Silver. In return, plaintiffs and Silver agreed to pay Karp $1,200,000 in installments, payable over eight years.

On April 26, 1999 Karp pled guilty to commercial bribing in the second degree, a Class A misdemeanor. By July 29, 1999 decision and order of the Appellate Division, Second Department, he was suspended pending conclusion of the disciplinary proceedings. By order dated April 16, 2001, he was suspended from practice for three years from the date of the order.

(*Matter of Karp,* 282 A.D.2d 127 [2d Dept. 2001]).

The plaintiffs continued to pay Karp, and on December 28, 2004, the parties amended the agreement to provide for payment of $219,000 to Karp in January 2005, and to continue to make specified payments for the benefit of a third party. If all such payments were made, Karp would acknowledge full compliance with the agreement. In all, Karp received $1,090,449 in payments.

In October 2006 plaintiffs brought action to rescind the purchase agreement as a violation of public policy, and obtain repayment of the amount paid. Plaintiff moved for summary judgment, claiming that they did not realize until 2006 that the purchase agreement was illegal and violated public policy. They did not claim unawareness of the defendant's suspension from the practice of law. Karp cross-moved, claiming that the agreement, as amended, was legal, that plaintiffs, having reaped the benefit of the agreement, could not now rescind it, and that ignorance of the law was not a valid basis for a cause of action. The trial court denied the motion and granted the cross-motion.

The Court made reference to the provisions of 22 NYCRR 1200 which permitted the sale of a law practice by a retiring attorney (1200.15-a), the entry into a restrictive covenant limiting the right to practice law, in exchange for retirement benefits (1200.13), and precluded a disbarred or suspended attorney from sharing in any legal fee for legal services during the period of removal from practice (22 NYCRR 691.10[b]. Attorneys may be compensated for legal work performed prior to suspension on the basis of quantum meruit.

Citing *Matter of Haber,* 27 A.D.2d 576, supra, if the purchase agreement compensated Karp for services rendered after his suspension, the agreement was illegal. However, the Court noted that "where parties enter into illegal bargains, the courts generally do not grant relief". (internal citations omitted). Because "plaintiffs had paid defendant in full, and in the absence of fraud and/or misrepresentation by the defendant, to the extent that it was illegal, if at all, the plaintiffs are not entitled to any relief".

Plaintiffs urge the court to adopt a position that a disbarred or suspended lawyer is not entitled to receive any payments in excess of the value of his services prior to the suspension or disbarment, and only based upon quantum meruit. It was the violation of this restriction which plaintiffs contend was what the court found repugnant in Haber.

They view *Decolator* as adhering to *Haber* and repeated its principle, which "prohibits, as against public policy, an attorney facing imminent suspension or disbarment from disposing of his or her practice in a manner calculated to circumvent the effects of the impending sanction". They also read *Decolator* as suggesting that the inclusion of a suspended or disbarred attorney in the term "retiring attorney" is wrong. The language of the Court which noted that the provisions of DR 2-111 (a) "expressly applies only to the sale of a practice by a retiring attorney".

The issue, as they perceive it, is whether an attorney who is on the brink of suspension, can legally sell his or her practice. They contend that Silver was closer to the brink than Karp, in that at the time of the agreement, Karp had not yet pled guilty and was not under suspension. In this case, the parties signed the agreement one day before the effective date of the already imposed sanction. Moreover, while the agreement was couched in terms of the permissible quantum meruit, they contend that it is clear that the payments exceeded that standard, and came from incoming fees, since the firm had no other asset from which to make payments.

They point to the language of the agreement in which Silver acknowledges that the $750,000 being paid to him was for his "good will", and/or the restrictive covenant and the recoupment of prepaid litigation expenses as well as his proportionate interest in any other asset of the partnership. It makes no reference to compensation on the basis of quantum meruit for the value of services provided prior to the suspension. They assert that since he was about to be suspended, he had no good will to sell, and the restrictive covenant was meaningless in view of the fact that he was prohibited from practicing law. The payments, they say, were simply a way to avoid limiting payment to quantum meruit.

Memorandum on Behalf of Silver

Defendant places significant weight upon the holding and language of *Glinkenhouse v. Karp*. The agreement between the parties was freely made; and as a result of it, Silver relinquished all control over the operation of the firm. He contends that *Karp* recognized that a disbarred or suspended attorney, or one who has voluntarily resigned from practice, may be compensated on a quantum meruit basis for services rendered and expenses incurred prior to the effective date of the sanction. *Karp* concluded that compensation may be on the basis of a contract among the parties; as long as it did not include payment for work done post suspension,

it was, although subject to the court's overview, permissible. Because Karp was fully paid, there was no reason to inquire as to the value of quantum meruit. The plaintiffs claim should be dismissed under the tenets of *Karp.*

Defendant next addresses the issue of the balance of $375,000 provided for in the contract, and contends that plaintiffs should be compelled to make such payment. He points out that the parties to the agreement all knew that Silver was facing suspension, although it had not yet occurred, nor had he made the predicate plea to a crime. He claims that plaintiffs profited greatly from the transfer of Silver's interest in the firm, to which plaintiffs object in their reply.

Karp's position is that this was a valid contract among consenting parties, each acting in their own best interests, with full knowledge of the facts, and no evidence of fraud or misrepresentation. Under such circumstances, the parties are entitled to the enforcement of their contract.

DISCUSSION

This is, when all is said and done, an action for rescission of a contract, and a counterclaim for enforcement. While plaintiffs couch their action in terms of ethical considerations, as did the petitioner in *Decolator,* the issue is not of that nature. The issue is whether parties to a contract are entitled to rescind it years after its execution, claiming that their contract vendor may have violated the Code of Professional Responsibility in the process. The action by plaintiffs is not to limit legal fees, as was the case in *Decolator.* If it were, the simple resolution would be that the outgoing suspended or disbarred attorney would be entitled to receive payment for the quantum meruit value of his services performed prior to the disciplinary action. Whether or not this can be measured in percentage of services or is limited to an hourly rate, seems to have been resolved in favor of the former in that case. *Decolator* is not determinative of the issues in this case.

Matter of Haber involved an agreement by which the ownership of the law firm would be transferred upon the occurrence, among other events, of the involuntary inability of Haber and Zuckerman to continue in the practice of law. The Court found that the agreement was "palpably designed to thwart judicial control over the privilege of membership at the Bar of this State", and determined that the issue was irrelevant to Zuckerman, who was already disbarred, and that it

would be considered in Haber's application for reinstatement at the conclusion of the suspension. Notably, this matter arose in the context of additional disciplinary proceedings, based upon the partnership agreement. The Court did not determine that the agreement was illegal, but only that it tended to frustrate the Court's control over the practice of law.

Glickenhouse v. Karp is the most similar of the major decisions on the subject. The agreement among the continuing and outgoing partners was executed less than a month before Karp pled guilty to a Class A misdemeanor, which resulted in an Appellate Division decision 3 months later, suspending him pending conclusion of the disciplinary proceedings. It was only by Order dated April 16, 2001, that he was suspended from practice for a period of 3 years from the date of the Order.

Plaintiffs seek to distinguish the determination in *Karp,* primarily upon the imminency of the fall of the disciplinary hammer upon Silver, as opposed to Karp. The Court finds this to be a difference without distinction. Plaintiffs in this action were fully aware of the disciplinary problems facing Silver when they entered into the agreement to pay him $750,000. The Court cannot speculate as to why the final determination to suspend Silver took almost two years; but it should not constitute a basis for distinguishing the cases.

As a practical matter, whether the agreement was "legal" or "illegal" is not particularly relevant. As stated by the Court in *Glickenhouse v. Karp,* " . . . where parties enter into illegal bargains, the courts generally do not grant relief". While plaintiffs herein may take some joy in dragging Silver through a further disciplinary proceeding, there is simply no reason why the parties to the bargain should not be allowed to stew in their own juices. *Melius v. Breslin,* 46 A.D.3d 524 (2d Dept. 2007), cited in *Karp,* involved an action on what was essentially a kickback arrangement, disguised as a promissory note, which the Court refused to enforce. The illegality there was a violation of Penal Law § 180.00. There is no such statutory violation alleged in this action.

There is no doubt that a departing partner is authorized to sell his interest in the law practice. The sole prohibition is that, if suspended or disbarred, he not receive payment for work performed after the effective date of the disciplinary punishment. While defendant asserts that plaintiffs have greatly profited from the arrangement, there is no reference to the amount in the

stipulated facts. What is undeniable, however, is that Silver was a moving force in the development of the practice, and that those who remained had already benefitted from his input and efforts. Unlike the situation in *Haber,* Silver did not retain a vested interest in the performance of the firm after his departure. Haber was actively involved in the retention of clients by the successor firm, because his future payments would be dependent upon the firm's successful conclusion of the pending actions.

Silver, on the other hand, would have no interest in whether or not the successor firm was successful or unsuccessful. He was entitled to $750,000 one way or the other. As such, that which the Appellate Division apparently found most repugnant in *Haber,* the continued involvement of Haber with the firm after his departure, is not present.

Plaintiffs have failed to establish any of the traditional bases for the rescission of a contract. The parties were all fully aware of the circumstances, and there is no contention that Silver in any way fraudulently induced plaintiffs to enter the contract. Nor is there a claim of mutual or unilateral mistake so as to preclude a "meeting of the minds" Rescission is, in fact, an equitable remedy, in which plaintiff must come with clean hands. In addition, where the party who paid for the benefit has already received it, there is no way in which the parties can be returned to the status quo ante, relief should be denied. (*Sokolow, Dunaud, Mercadier & Carreral LLP v. Lacher,* 299 A.D.2d 64, 71 [1st Dept. 2002]).

Plaintiffs' motion to vacate the Agreement dated March 31, 1999 is denied. Defendant and Counterclaimant Silver's motion to compel compliance with the balance of the contract is granted. This constitutes the Decision and Order of the Court.

Submit Judgment.

Dated: December 30, 2011

J.S.C.