

Zahavi v JS Barkats PLLC

2012 NY Slip Op 33707(U)

November 25, 2012

Supreme Court, New York County

Docket Number: 151635/13

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

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PINHAS ZAHAVI, a/k/a PINI ZAHAVI, INDEX NO. 151635/13

Plaintiff,

-against-

JS BARKATS PLLC and SUNNY J. BARKATS
a/k/a SUNNY BARKATS,

Defendants.

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JOAN A. MADDEN, J.:

Plaintiff moves to resettle this court’s decision and order dated April 15, 2014 (“the April 2014 order”) pursuant to CPLR 2001, 2221, and/or 5019 so as to direct that statutory interest be granted on the sum of \$209,671.27, previously awarded to plaintiff, and to discontinue the balance of the action without prejudice. Defendants oppose the motion and cross-move to dismiss the complaint based on plaintiff’s failure to comply with this court’s order directing plaintiff to appear at a deposition.

Plaintiff commenced this action in February 2013, seeking \$275,000 in compensatory damages and \$1,000,000 in punitive damages.¹ The complaint asserts causes of action for conversion, breach of fiduciary duties, breach of contract, fraud and legal malpractice. Defendants answered the complaint and asserted various affirmative defenses.

Plaintiff moved for summary judgment on its claim for \$275,000 and to sever the punitive damage claim. Defendants opposed the motion but also sought an order, pursuant to CPLR 1006, directing defendant law firm JS Barkats, PLLC (The “Barkats Firm” or “The Firm”) to deposit with the court the sum of \$209,671.27, which the Firm was holding in escrow.

In support of its motion summary judgment, plaintiff submitted, *inter alia*, his own

affidavit, an affidavit of non-party Baruch Yadid dated February 3, 2013, prepared in connection with plaintiff's prior action in Federal Court,¹ a July 25, 2012 retainer agreement between the Barkats firm and non-party Yadid, and records from plaintiff's bank in Switzerland. In his affidavit, plaintiff explains that in 2012, he had discussions with non-party Yadid about investing in a Liberian company, NOYA Mining Company ("NOYA"). Plaintiff states that Yadid told him that he had hired a New York attorney, defendant Sunny Barkats, to assist with the transaction, and if plaintiff was interested in investing in NOYA, he should wire \$275,000 to the Barkats firm.

According to plaintiff, he wired the funds to the Barkats firm on September 26, 2012, with the understanding that the funds would be held in escrow until plaintiff decided whether he wanted to proceed with an investment in NOYA Mines. Plaintiff explains he subsequently discovered that NOYA Mines had "lost its license," and as result, "it appeared to me that the entire investment was a sham," so he demanded that defendants return his money. The Firm refused to return the money. According to plaintiff, after instructing his attorney to commence a lawsuit and report the matter to the attorney disciplinary committee, he was told that defendants "were attempting to charge me a legal fee of \$65,348.71, and that they were holding \$209,671.27 in escrow." Plaintiff maintains that defendants initially claimed they could not release the funds without the consent of non-party Yadid, but even after Yadid consented to such release, the Firm still refused to return the funds to him.

¹According to plaintiff's counsel, this action was originally commenced in Federal Court based on diversity jurisdiction, since plaintiff is an Israeli citizen. However, it was later ascertained that Mr. Barkats has dual citizenship with Israel, diversity jurisdiction was destroyed, and the District Court dismissed the action for lack of subject matter jurisdiction.

Yadid states in his February 3, 2013 affidavit that he has been “advised” that plaintiff is seeking “to recover the sum of \$275,000 (the ‘Escrow Fund’),” which he “wired to defendants on or about September 26, 2012.” Yadid states, “I have no claim whatsoever to the Escrow Fund,” and “I never understood and never believed that the Escrow Fund, at any point, became my money or subject to my control.” He states, “I always understood and believed that unless and until [plaintiff] decided to proceed with an investment that I hoped he would make with me, the Escrow Fund remained his money and subject to his control.” Yadid explains he retained the Barkats firm “under a written retainer agreement under which they were to be paid a substantial success fee (potentially over \$500,000) if a certain reverse merger transaction proceeded in conjunction with a certain Liberian gold mine venture that I had been working on for a long time,” but the transaction “did not proceed,” and “I do not believe that defendants are entitled to charge me \$65,328.71, which defendants have paid themselves out of the Escrow Fund.” Yadid states defendants “do not have permission from me to pay themselves any legal fees from the Escrow Fund,” and “certainly not a disputed legal fee,” and “to avoid any doubt, I specifically authorize and direct defendants to return to [plaintiff] the entire Escrow Fund.”

In opposition to the motion, defendants submitted the affidavit of Mr. Barkats in which he stated, *inter alia*, that Yadid “upon information and belief, acquired money from various sources, including plaintiff” and “per our understanding, once Mr. Yadid acquired such funds, they became of the property of Mr. Yadid to do with as he wished.” He further stated that when the wire of \$275,000 was received “it was [our] understanding from our client that although the money was wired from Plaintiff’s account...the money belonged to Mr. Yadid and was to be disbursed as he dictated.” According to Mr. Barkats when “it came to our attention that Plaintiff

was making claim to the Escrow, the monies were immediately transferred to the [Barkats firm] escrow account except for approximately \$68,000 which Mr. Yadid had instructed the [Barkats firm] to pay itself as and for its legal fees.” He further states that “[o]n numerous occasions defendants offered to return the \$209,671.27,” but Yadid “refused to provide Defendants authorization to do so,” and that “I have had numerous conversations with Mr. Yadid, and to this date [May 31, 2013] he waffles as to whether or not we should return the money to plaintiff.”

In the April 2014 order, the court found plaintiff was entitled to partial summary judgment in the amount of \$209,671.27, as there was not disputed that this portion of the \$275,000 belonged to plaintiff. However, the court found issues of fact existed as to the nature of the agreements between plaintiff and Yadid, and defendants and Yadid, and whether defendants were authorized to deduct from the original \$275,000, the amount of \$65,328.71 for the attorneys fees for which Yadid was allegedly responsible.

The court also directed that the Barkats firm shall continue holding the sum of \$209,671.27, and that within 10 days of the date of the April 2014 order that the Barkats firm release such funds to plaintiff to satisfy the judgment awarded to plaintiff. On April 25, 2014, the Barkats firm issued a check to counsel for plaintiff in the amount of \$209,671.27.

Plaintiff now seeks to resettle the April 2014 order to recover statutory interest pursuant to CPLR 5001(b), on the amount of \$209,671.27, from November 15, 2012, which is the date of plaintiff's demand for the return of funds, to April 25, 2014, and requests that the court direct the Clerk to award such interest together with costs and disbursements. Plaintiff argues that the award of interest is proper since the court granted summary judgment on its claims for conversion and breach of contract. Plaintiff also seeks to discontinue the balance of the action

without prejudice.

Defendants oppose the motion, asserting that there is no basis in the CPLR for permitting plaintiff to resettle the order to include interest, costs and disbursements. Defendants also note that while the court found that plaintiff was entitled to the sum of \$209,671.27, it did not find that defendants were liable for breach of contract or conversion. Defendants further assert that the balance of the action should be dismissed with prejudice based on plaintiff's refusal to appear for a deposition.

Defendants' position is unavailing. First, even assuming *arguendo* that the CPLR provisions relied on by plaintiff do not provide a basis for awarding interest not previously included in the April 2014 order, the court retains "discretionary power" to modify the April 2014 order "for sufficient reason and in the interests of substantial justice." Goldman v. Cotter, 10 A.D.3d 289, 293 (1st Dept 2004)(internal citation and quotation omitted). Moreover, while the April 2014 order did not find that defendants were liable for breach of contract or conversion, plaintiff is nonetheless entitled to interest under CPLR 5001(a) which states that in relevant part, that "[i]nterest shall be recovered upon a sum awarded... because of an act or omission depriving or otherwise interfering with title to, or possession or enjoyment of property...." Here, plaintiff's entitlement to \$209,671.27 was established based on Yadid's affidavit dated February 3, 2013, and interest shall run from that date.

Finally, as plaintiff, in his reply, agreed to discontinue the remainder action with prejudice, defendants' cross-motion to dismiss is denied as moot.

Accordingly, it is

ORDERED that the motion is granted and the April 15, 2014 decision and order is

resettled to the extent that Clerk of the Court is directed to enter judgment for interest on the previously awarded amount of \$209, 671.27, at the statutory rate in favor of plaintiff Pinhas Zahavi a/k/a Pini Zahavi and against defendants JS Barkats, PLLC, Sunny J. Barkats jointly and severally, from February 3, 2013 to April 25, 2014, as calculated by the Clerk, together with costs and disbursements as taxed by the Clerk; and it is further

ORDERED that the remainder of the action shall be discontinued with prejudice; and it is further

ORDERED that the cross motion to dismiss is denied as moot.

DATED: November 15 2012


HON. JOAN A. MADDEN
J.S.C.