Zito v Fischbein Badillo Wagner Harding
2012 NY Slip Op 33887(U)
March 1, 2012
Supreme Court, New York County
Docket Number: 602308/04
Judge: Melvin L. Schweitzer

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 45

ROBERT J. A. ZITO,	:	
Plaintiff,	:	Index No. 602308/04
-against-	:	DECISION AND ORDER
FISCHBEIN BADILLO WAGNER HARDING, et al.,	:	Sequence No. 072
Defendants.	:	
NIMKOFF ROSENFELD & SCHECHTER, LLP,	:	
Non-Party.	:	

MELVIN L. SCHWEITZER, J.:

This motion arises out of a protracted dispute between attorneys, one of which alleges, *inter alia*, claims of malpractice. The other seeks compensation for services performed.

Facts

In 2003, plaintiff, Robert A. Zito (Mr. Zito), retained Schechter & Nimkoff now Nimkoff Rosenfeld & Schechter, LLP (Nimkoff) to represent it in connection with litigation involving claims against Fischbein Badillo Wagner Harding, et al. (Fischbein). Nimkoff's representation terminated on February 29, 2008 when this court (Cahn, J.) granted Nimkoff's motion to withdraw as counsel, which was opposed by Mr. Zito (the February 2008 Order). The February 2008 Order referred Nimkoff's claims for fees and disbursements to a Special Referee to hear and report. In this connection, Nimkoff sought a retaining lien, but the court denied the request, with leave to renew after report of the Special Referee. No appeal was taken from the court's February 2008 Order. In March 10, 2008, this court (Cahn, J.) issued a *sua sponte* order

directing Nimkoff to turn over its files to Mr. Zito (Turnover Order). On appeal of the Turnover Order, the Appellate Division granted Nimkoff a retaining lien to be set by the referee saying "Absent evidence of discharge for cause, a court should not order turnover of an outgoing attorney's file before the court fully pays the attorneys's disbursements or provides security therefor. . . . The motion court improperly denied appellant a retaining lien pending a disbursement proceeding determination." *Zito v Fischbein, et al.*, 58 AD3d 532 (1st Dept 2009).

During the period relating to the appeal of the Turnover Order, Mr. Zito commenced an action against Nimkoff for, *inter alia*, malpractice, and sought declaratory relief that he had cause to terminate the attorney-client relationship with Nimkoff. Nimkoff moved to dismiss, *inter alia*, the malpractice claim and the claim for declaratory relief. This court denied Nimkoff's motion to dismiss these two claims. The Appellate Division reversed, holding Mr. Zito was collaterally estopped from seeking the declaration of a right to terminate for cause by the Appellate Division's Order on appeal of the Turnover Order, which implicitly determined Nimkoff was not discharged for cause, because it all but voluntarily withdrew.

Mr. Zito now moves to renew, and Nimkoff cross-moves for sanctions. Mr. Zito asks the court to reconsider the February 2008 Order, vacate it, and replace it with an order discharging Nimkoff "with cause." The basis for doing so are alleged new facts not available to Mr. Zito at the time of the February 2008 Order which have come to light in the Special Referee's report that warrant a discharge for cause. Nimkoff opposes, asserting *inter alia*, that the motion is barred by the law of the case doctrine and that the motion is not based on timely presented new evidence.

Discussion

Addressing the law of the case doctrine, the court notes that it is of a family of doctrines including *res judicata* (claim preclusion) and collateral estoppel (issue preclusion) designed to limit relitigation of issues. "As distinguished from issue preclusion and claim preclusion, however, law of the case addresses the potentially preclusive effect of judicial determinations made in the course of a single litigation before final judgment." *People v Evans*, 94 NY2d 499 (2000). Furthermore, while *res judicata* and collateral estoppel are rigid rules of limitation recognized in the CPLR, law of the case is a more flexible judicial policy "designed to eliminate the inefficiency and disorder that would follow if courts of coordinate jurisdiction were free to overrule one another in an ongoing case. . . . [A] court should not ordinarily reconsider, disturb or overrule an order in the same action of another court of co-ordinate jurisdiction." *People v Evans*, 94 NY2d 504. However, the term can be used to describe the doctrine of requiring a lower court to follow the mandate of a higher court on remand, and such was the case in *Spirer v Bloomingdale's*, 39 AD3d 267 (1st Dept 2009).

Here, this court has ruled with respect to Nimkoff's motion to withdraw as counsel, opposed by Mr. Zito, and granted it, obviously without a finding of cause. The Appellate Division's subsequent holding in the Turnover Order appeal formed a basis for the Appellate Division's later holding that Mr. Zito was collaterally estopped from bringing malpractice claims and seeking a declaration with respect to cause. The Appellate Division has twice visited the issue of cause with respect to Nimkoff's withdrawal as Mr. Zito's attorney, both on the appeal of the Turnover Order (58 AD3d 532) and on the appeal of the denial of declaratory relief that Nimkoff had a right to terminate for cause (80 AD3d 520). To look past these decisions and now

permit Mr. Zito to relitigate the issue a third time would certainly permit the inefficiency and disorder cited in *Evans*. In fact, the Appellate Division might sense entropy in the process. The court finds no justification for the continuation of litigation on this point.

The court has also reviewed Mr. Zito's main contention that until the Special Referee's report he was unaware Nimkoff had not advised him of a favorable settlement proposed by Fischbein. In fact, Mr. Zito's affidavit (Zito Aff. 21) submitted on this motion shows that he was aware of the alleged settlement offer in late 2010, prior to the Special Referee's hearing, and did not bring it before the court for over a year. This is not the prompt action required of a party relying on alleged new evidence when making a motion to renew. *See Levitt v County of Suffolk*, 166 AD2d 421 (2d Dept 1990); *Risley v City of New York*, 3 Misc 3d 128 (App. Term 1st Dept 2004).

The plaintiff's motion for leave to renew is denied.

The defendants' motion for sanctions is denied.

Accordingly, it is

ORDERED that, plaintiff's motion for leave to renew is denied; and it is further

ORDERED that defendants' motion for sanctions is denied.

Dated: March 1, 2012

ENTER:

J.S.C.

MELVIN L. SCHWEITZER
J.S.C.