

**Caspi v Weinberg**

2018 NY Slip Op 30407(U)

March 12, 2018

Supreme Court, Kings County

Docket Number: 518335/2016

Judge: Debra Silber

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS : PART 9

x

AVI CASPI,

Plaintiff,

-against-

GARY WEINBERG and LAW OFFICES OF GARY  
R. WEINBERG, P.C.,

Defendants.

x

DECISION / ORDER

Index No. 518335/2016  
Motion Seq. No. 2  
Date Submitted: 3/1/18  
Cal. No. 8

*Recitation, as required by CPLR 2219(a), of the papers considered in the review of plaintiff's motion for partial summary judgment on liability.*

Papers	NYSCEF Numbered
Notice of Motion, Affidavit and Exhibits Annexed.....	<u>32-38</u>
Affirmation in Opposition, Affidavit and Exhibits.....	<u>42-49</u>
Reply.....	<u>50</u>
Memorandum of Law (plaintiff's).....	<u>39, 51</u>

**Upon the foregoing cited papers, the Decision/Order on this application is as follows:**

Plaintiff Avi Caspi and defendant Gary Weinberg are personal injury attorneys who shared an office for many years. Weinberg would refer matters that he could not settle to Caspi to litigate, as "of counsel," and they would split the legal fees, one-half each. In December 2009, plaintiff claims he was given an oral "right of first refusal" to handle the litigation on all matters that originated with defendant Weinberg that did not settle, subject to the client's approval. In 2014, Caspi learned that Weinberg had referred seven matters to other attorneys, without first honoring their oral agreement and offering Caspi an opportunity to take on those cases. When confronted, Weinberg

complained that Caspi had failed to share fees with respect to one suit brought by a Ms. Moreau, who Weinberg claimed should have been his client. Weinberg claims she came to his office without an appointment when he was away and Caspi met with her, had her sign a retainer with him and never told Weinberg about her case, despite the fact that she was referred to Weinberg by one of his friends. He also avers that Caspi "stole" other clients of his. Weinberg brought a suit under Ind. 517523/16, against Caspi. This suit followed. By order dated April 6, 2017, the court dismissed several of the causes of action in Weinberg's action and granted Weinberg 30 days to serve an amended complaint. He has not done so. Thus, only his causes of action numbered one, three, five and six remain, for breach of contract, breach of fiduciary duty, conversion and unjust enrichment.

Plaintiff herein avers that, in resolution of their dispute, the parties entered into a September 9, 2014 written agreement, whereby they agreed to split Caspi's fee on the Moreau litigation, and that Caspi would receive 25% of the legal fees on the seven matters which Weinberg had referred to other attorneys. Pursuant to the agreement, Caspi paid Weinberg \$283,311.83 in connection with the Moreau litigation. Weinberg subsequently refused to honor the agreement to pay Caspi 25% of the fees earned on the seven cases he had referred to other attorneys.

The instant action includes, *inter alia*, claims for breach of contract and quantum meruit, in connection with the September 9, 2014 written agreement. Caspi now moves for partial summary judgment on liability on his eighth cause of action for breach of contract, or, alternatively, on his ninth cause of action for quantum meruit. Weinberg opposes, and argues that the fee spitting agreement is unenforceable as "void against public policy" because plaintiff did no work on the seven matters, and that Weinberg

should be permitted to retain the funds he was paid by Caspi on the Moreau matter, because Moreau was referred to Weinberg by a friend, and Caspi “stole” her, and the settlement fees (Affidavit in Opposition ¶¶ 15 and 19).

A party moving for summary judgment must show his prima facie entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Friends of Thayer Lake LLC v Brown.*, 27 NY3d 1039, 1043 [2016]; CPLR 3212 [b]). To defeat summary judgment, the party opposing the motion has to show that there is a material question of fact that requires a trial (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 82 [1st Dept 2013]; see *Hoover v New Holland N. Am., Inc.*, 23 NY3d 41, 56 [2014]). In deciding a motion for summary judgment, the court should interpret the evidence in the manner that most favors the opposing party (see *Kershaw v Hospital for Special Surgery*, 114 AD3d at 82).

Caspi has established his entitlement to summary judgment and Weinberg has failed to raise an issue of fact to the contrary. Despite any ethical lapses (see *Witt v Cohen*, 192 AD2d 528, 529 [2<sup>nd</sup> Dept 1993]) the parties herein charted their own course by entering into the written agreement to resolve their dispute by specifically allocating the legal fees in these eight cases. The court agrees with Caspi that defendant Weinberg's claim of an ethical violation should not allow Weinberg to avoid his obligations under the agreement, an agreement that he has benefitted from, as the clients were not themselves adversely affected by any alleged ethical breach (see *Marin v Constitution Realty, LLC*, 28 NY3d 666, 672 [2017]). “[I]t ill becomes defendants, who are also bound by the Code of Professional Responsibility, to seek to avoid on ‘ethical’ grounds the obligations of an agreement to which they freely assented

and from which they reaped the benefits" (*Benjamin v Koeppele*, 85 NY2d 549, 556 [1995] [citation omitted]; see also *Samuel v Druckman & Sinel, LLP*, 12 NY3d 205, 210 [2009]; *Wolfe & Yukelson, PLLC v Davis, Saperstein & Salomon, P.C.*, 153 AD3d 585, 588 [2d Dept 2017]).

Indeed, while Weinberg claims that Caspi did not do any work on the seven matters he referred elsewhere, which Caspi disputes, Weinberg similarly did no work on the Moreau matter, which he was compensated for under the subject agreement. Further, any alleged fraud on the part of Caspi in obtaining a retainer agreement from Moreau is an issue separate and apart from the written fee splitting agreement between Caspi and Weinberg. Further, this claim of fraud was known to Weinberg at the time he entered into the September 9, 2014 written agreement.

Accordingly, it is

**ORDERED** that plaintiff is granted partial summary judgment on liability on his eighth cause of action for breach of contract. This claim shall proceed to trial solely on the issue of damages once the Note of Issue is filed.

The parties are directed to appear in the Intake Part on April 30, 2018 for a Preliminary Conference in both actions, this one and Weinberg's action (Ind. 517523/16). Plaintiff must serve a copy of this order on the Clerk of the Intake Part so the two cases will be placed on the Intake Part calendar.

This shall constitute the decision and order of the court.

Dated: March 12, 2018

ENTER:



Hon. Debra Silber, J.S.C.  
Hon. Debra Silber  
Justice Supreme Court