Pu v Dow
2018 NY Slip Op 31699(U)
July 19, 2018
Supreme Court, New York County
Docket Number: 653698/2016
Judge: Debra A. James

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DEBRA A. JAMES** **PART** **IAS MOTION 59EFM**

Justice

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RICHARD PU,

Plaintiff,

- v -

ANTONIO DOW and ZACHARY DOW,

Defendants.

INDEX NO. 653698/2016

MOTION DATE 07/17/2018

MOTION SEQ. NO. 010

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 010) 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305

were read on this motion to/for REARGUMENT/RECONSIDERATION.

ORDER

Upon the foregoing documents, it is

ORDERED that the motion of plaintiff to reargue the Order dated May 10, 2018 is DENIED, as plaintiff may not reargue a motion to reargue (see William P. Pahl Equipment Corp. v Kassis, 182 AD2d 22 [1st Dept. 1992]); and it is further

ORDERED that to the extent the motion of plaintiff may be deemed one to renew, it is DENIED, as a copy of the order dated July 28, 2016 of Bailey-Schiffman, J. was not unavailable at the time of his original motion papers; and it is further

ORDERED that pursuant to CPLR 5019(a), nunc pro tunc, the court RESETTLES the Order dated May 10, 2018 only to the extent of correcting typographical errors and an insubstantial

clarification in the decision and order, which is reissued, as corrected, as follows:

ORDER

Upon the foregoing documents, it is

ORDERED that the motion of plaintiff to reargue the Order dated March 5, 2018, which resolved Motion Sequence Number 006 (Motion Sequence Number 008) is granted, and upon reargument, the Order dated March 5, 2018 is modified only to the extent that such part of the cross motion of defendants for sanctions against plaintiff, which was granted, is hereby DENIED and the award of $500 of costs against plaintiff is VACATED and the disbursements of $369.98 assessed by plaintiff against defendant shall be deemed satisfied by a credit for plaintiff's proportionate share of the costs of the oral argument transcript that this court ordered that the parties purchase, which plaintiff has failed to pay to date in the herein action; and it is further

ORDERED that the part of the cross motion of defendants to dismiss the complaint against defendant Zachary Dow pursuant to CPLR 3211(a)(7), which was denied, is hereby GRANTED; and it is further

ORDERED that the complaint is dismissed in its entirety as against the defendants, with costs and disbursements as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly in favor of such defendants; and it is further

ORDERED that the court otherwise adheres to its prior order.

DECISION

With respect to the cross motion of defendants for sanctions against plaintiff for making a frivolous argument relating to defendants' response to interrogatories on his motion for summary judgment, the court has now more carefully reviewed plaintiff's supporting papers and memorandum of law on the motion. It finds that plaintiff made a colorable argument therein. The sanction against plaintiff was not warranted and must be vacated.

However, although the court misconstrued plaintiff's argument as based upon CPLR 3212 (a), such misconstruction was of no consequence since plaintiff was incorrect that the defendants "short-served" him and thus failed to timely oppose his motion for summary judgment for the following reasons.

The procedures entitled "Motions and Special Proceedings by Notice of Motion/Petition" published by the New York Supreme Court, Civil Branch, New York County

(www.nycourts.gov/supctmanh), state, in pertinent part:

> "Once a motion is made, counsel for all parties are strongly encouraged to agree upon a briefing schedule and submit a stipulation of adjournment reflecting that

> schedule using service or a clerk. Where a briefing schedule has not been agreed upon, the movant can avoid the need to attend simply to see if anyone will hand up opposing papers by demanding papers as provided by CPLR 2214(b). To protect movants against the submission of late opposition papers or cross-motions, the General Clerk's Office will screen motions in which such papers are submitted without a response (reply or opposition, respectively to ensure that proper time to respond has been afforded and it will sua sponte adjourn for one-week cases in which such times has not been given."

As argued by defendants, a review of the court filings reveals that, as per such procedure, both counsel at bar entered into a briefing schedule dated August 25, 2017 for Motion Sequence Number 006 and defendants' cross motion and plaintiff's reply thereto were served and filed in accordance with the timetable set forth in such stipulation. Defense counsel then filed an application dated December 6, 2017 to extend her time to respond to Motion Sequence Number 007, which the court notes sought identical relief as Motion Sequence Number 006, and the Clerk's Office adjourned the submission date of such motion, as defendants' cross motion and plaintiff's reply were both filed on January 11, 2018, and plaintiff's opposition papers respond to the merits, as well as the procedural aspects, of the defendants' cross-motion.

Moving to defendants' cross motions to dismiss pursuant to CPLR 3211(a)(7) and for summary judgment pursuant to CPLR 3212, dismissing the complaint, this court overlooked that defendants

established their prima facie entitlement to dismissal of the complaint as a matter of law and fact.

Defendants are correct that defendant Zachary Dow never retained plaintiff to represent him, as defendant Zachary Dow had no capacity to retain plaintiff because he was a minor child at the time of the agreement entered between plaintiff and defendant Antonio Dow, his father. Nonetheless, the court does not find that plaintiff's conduct in bringing the action against defendant Zachary Dow rises to the level of frivolous conduct as defined in 22 NYCRR 130-1.1(c). See Metropolitan Model Agency USA, Inc. v Rayder, 168 Misc.2d 324 (Sup Ct, NY Co 1996).

As for the remaining claim that seek a judgment for attorneys' fees based on quantum meruit against defendant Antonio Dow, the complaint alleges, in pertinent part, "Then, left with no choice, on 6/16/16 Plaintiff moved for leave to withdraw as Antonio's and Zachary's counsel." Thus, plaintiff contends that he made such motion on the same date that Judge Bailey-Schiffman (Kings County, Supreme Court) rendered her Decision and Order dismissing all the causes of action of the complaint, except the 6th (intentional infliction of emotional distress), 7th (negligent infliction of emotional distress) and ninth (replevin) in Dow v Glynn, Index No. 505080/2016, wherein plaintiff represented and appeared on behalf of defendant Antonio Dow. Plaintiff does not allege that his motion to be

relieved was ever granted. Nor is a copy of any such order appended to his papers in opposition to defendants' cross-motion for summary judgment.

> "Until an attorney of record is discharged in the manner prescribed by law, that is, by order of the court or by the filing of a consent of the retiring attorney and the party in the prescribed form (see CPLR 321, subd. (b)), the attorney represents the party".

Hess v Tyszko, 46 AD2d 980 (3rd Dept. 1974).

Without a discharge "in the manner prescribed by law", the attorneys' fees owed to plaintiff in quantum meruit cannot be determined, as a determination must be made as of the time of the discharge. Thus, plaintiff is relegated to recover attorneys' fees only on a contingency basis under the retainer agreement. See Cohen v Grainger, Tesoriero & Bell, 81 NY2d 655, 658 (1993). As there is no dispute that Dow v Glynn ultimately settled and that defendant Antonio Dow recovered no proceeds from such resolution, plaintiff is entitled to no contingent attorneys' fees.

However, notwithstanding plaintiff's concessions at his deposition that he sought quantum meruit recovery only on the dismissed causes of action in the underlying action, this court does not find Shaw v Manufacturers Hanover Trust Co., 68 NY2d 172 (1986) apposite, as it stands for the proposition that the retainer terminated upon entry of a judgment dismissing the complaint, while the underlying action was not settled and

discontinued until after the order relieving plaintiff as counsel. Though at his deposition, plaintiff disavowed that he sought attorneys' fees for the concededly weak remaining causes of action, he never formally discontinued such claims. Therefore, under Cohen, supra, after the order discharging him, he would have had a viable claim for perhaps nominal attorneys' fees on the basis of quantum meruit on such extant causes of action.

7/19/2018
DATE

DEBRA A. JAMES, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
		GRANTED	X	DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE