Mishkin v Andrea
2018 NY Slip Op 32240(U)
September 13, 2018
Supreme Court, New York County
Docket Number: 152788/2015
Judge: Arthur F. Engoron
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARTHUR F. ENGORON** **PART** **IAS MOTION 37EFM**

Justice

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MARION MISHKIN,

Plaintiff,

- v -

FRANK ANDREA, ANDREA & TOWSKY, ESQS, STEVEN BARKAN, STEVEN L BARKAN PC,JOSEPH DECOLATOR, DECOLATOR COHEN DIPRISCO LLP, JOSEPH EHRLICH, SCOTT EPSTEIN, ANTIN EHRLICH & EPSTEIN LLP, DAVID JAROSLAWICZ, JAROSLAWICZ & JAROS LLC,STANLEY KARATHARA, CANALE & KARATHARA ESQS, MICHAEL LEVINE, RAPPAPORT GLASS LEVINE & ZULLO LLP, LEONARD LINDEN, LAW OFFICE OF LEONARD J LINDEN, JOEL LUTWIN, LUTWIN & LUTWIN LLP, NEIL MOSCOLO, BARTLETT MCDONOUGH & MONAGHAN LLP, JEFFREY SINGER, SINGER NEMEROV & SEGAN PC,BRUCE RESSLER, MICHAEL RYAN, RYAN AND RYAN PC,RESSLER & RESSLER, ANDREW SMILEY, SMILEY & SMILEY LLP

Defendant.

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INDEX NO. 152788/2015

MOTION DATE 10/13/2016

MOTION SEQ. NO. 001 002 003

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 001) 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 83, 84, 85, 86, 87, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 181

were read on this motion to DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 88, 89, 90, 91, 92, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 178, 179, 180

were read on this motion to DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177

were read on this motion to DISMISS.

Upon the foregoing documents, defendants' motions to dismiss are hereby granted.

Background

Following the September 11, 2001 ("9/11") attacks on the World Trade Center ("WTC") buildings, demolition, clean-up, and other labor occurred at the site. Certain workers at the site suffered orthopedic-related bodily injuries and commenced actions in state court; these cases were then grouped together for efficient case management. In or about August 13, 2003, the Hon. Judge Michael D. Stallman appointed plaintiff, Marion Mishkin, an attorney licensed in New York, as Liaison Counsel for these cases in state court.

In August 2005, pursuant to section 408 of the Air Transportation Safety and System Stabilization Act of 2001 ("ATSSSA") – which provides the United States District Court for the Southern District of New York ("SDNY") with exclusive jurisdiction over actions "resulting from" or "relating to" the 9/11 attacks – these state court cases were removed to the SDNY before the Hon. Alvin K. Hellerstein, where they were consolidated under the docket entitled In re: World Trade Center Disaster Site Litigation, Bodily Injury, Non-Respiratory, Non-Ingestion Cases, 21-MC-100(AKH). On or about May 21, 2008, Hellerstein appointed plaintiff as Federal Liaison Counsel and directed that she be fairly compensated for liaison services. On or about August 28, 2008, Hellerstein removed plaintiff as the Federal Liaison Counsel on the basis that she "was complicating rather than simplifying the process," and found that she was "not suitable for the role of liaison counsel" where she "introduced unnecessary expense and delay and burdened the court with inappropriate and unwieldy submissions." However, by order dated April 3, 2009, Hellerstein reappointed plaintiff as Co-Liaison Counsel, delineated the specific administrative tasks she was to perform as liaison, and stated that she would be paid a reasonable fee for her liaison services.

On January 23, 2012, after the personal injury cases had been resolved, plaintiff submitted an application for $1,868,445 in fees for her work as Liaison Counsel and as Lead Counsel. Plaintiff alleges that she rendered legal counsel services from January 10, 2005 through May 20, 2008, and August 28, 2008 through April 3, 2009, at defendants' request, and functioned as *de facto* Lead Counsel to these cases, separate and apart from her function as Liaison Counsel. By order dated September 13, 2012, Hellerstein denied her application, limiting her recovery to work she performed as Federal Liaison Counsel, without prejudice to reapply for fees and expenses that "were incurred after May 21, 2008, but not between August 28, 2008 and October 3, 2008." In other words, the federal court found that plaintiff was entitled to be paid for her work as Federal Liaison Counsel, but could not seek fees for work done outside her court-ordered work as a liaison counsel or outside the prescribed time periods.

Plaintiff appealed to the United States Court of Appeals for the Second Circuit ("Second Circuit") the SDNY's order to limit her fees. On April 16, 2013, the Second Circuit dismissed her appeal, finding that no final order was issued by the SDNY; the SDNY's order denied plaintiff's fee application, but did not conclusively determine the disputed question. On April 26, 2013, plaintiff submitted a revised fee application to the SDNY seeking $418,995 in fees for work done within the time periods that the SDNY previously prescribed. On June 11, 2013, the SDNY denied plaintiff's application in full, awarding her no fee because her application sought fees for work beyond the scope of her liaison appointment order, and based on the lack of contemporaneous time records.

On July 9, 2013, plaintiff, once again, appealed to the Second Circuit. On August 26, 2014, the Second Circuit (1) vacated the SDNY's previous order in light of plaintiff's representation that she had contemporaneous records; (2) remanded the matter back to the SDNY, for the limited purpose of determining whether she kept sufficiently detailed contemporaneous records, so as to be eligible for a fee award, and that if she kept such records, to determine an appropriate fee for her work; and (3) noted that the SDNY was under no obligation to pay her what she sought, especially given that she failed to comply with the Second Circuit's earlier directive to not seek fees for services that exceeded her function as Federal Liaison Counsel.

On May 20, 2015, the SDNY granted plaintiff's application for an award of attorney's fees for services she performed as Federal Liaison Counsel in the reduced sum of $48,000 ("the Award"). Plaintiff again appealed to the Second Circuit. On April 18, 2016, the Second Circuit upheld the Award and dismissed her appeal. Plaintiff alleges that only $30,000 of the Award has been paid.

The Instant Action

On March 20, 2015, plaintiff commenced this action for legal fees, by way of a summon with notice, seeking fees for work she purportedly performed as Lead Counsel in the personal injury cases that were removed to the SDNY. Plaintiff subsequently made three separate requests to extend the time she had to serve a complaint. By orders dated July 27, 2015, November 19, 2015, and March 16, 2016 ("Ex Parte Orders"), the court granted plaintiff's request and extended her time to serve, *nunc pro tunc*, but noted that the order was "not to be considered a determination as to any tolling of the Statute of Limitations, should such issue arise." On July 14, 2016, defendants David Jaroslawicz, Esq. and Jaroslawicz & Jaros PLLC appeared and served a Demand for Complaint; on July 21, 2016, defendants Frank A. Andrea, Esq., Andrea & Towsky Esqs, Joseph Ehrlich, Esq., Scott Epstein, Esq., Antin Erlich & Epstein, LLP., Michael Scott Levine, Esq., Rappaport Glass Levine & Zullo, LLP, Joely Myron Lutwin, Esq., Lutwin & Lutwin, LLO, Michael F.X. Ryan, Esq., Ryan & Ryan P.C., Neil C. Mascolo, Jr. ("Mascolo"), Bartlett McDonough & Monaghan, LLP ("BMM"), Jeff Singer, Esq., Segan Nemerov & Singer, Andrew J. Smiley, Esq.,

and Smiley & Smiley, LLP (collectively, "the Bardavid Defendants") appeared and served a Demand for Complaint; and on July 26, 2016, defendants Joseph L. Decolator and Decolator Cohen Diprisco, LLC appeared and served a Demand for Complaint. On August 5, 2016, plaintiff served a complaint on defendants stating four causes of action: (1) breach of contract; (2) quantum meruit; (3) unjust enrichment; and (4) conversion.

As of the date hereof, the following eight defendants have not answered, moved, or otherwise appeared in this action: Steve L. Barkan, Esq., Steven L. Barkan, PC, Stanley Kalathara, Esq., Canale & Kalathara, Esqs., Leonard J. Linden, Esq., Law Office of Leonard J. Linden, Jeffrey Singer, Esq., and Segan Nemerov & Singer, PC.

The Instant Motions

The Bardavid Defendants now move, pursuant to CPLR 3211(a)(1), (5) & (7), to dismiss the complaint. The Bardavid Defendants argue, inter alia: (1) that this Court lacks subject matter jurisdiction because, as the ATSSSA prescribes, federal courts have exclusive jurisdiction over all state-law claims for actions resulting from or relating to the 9/11 attacks, and that there is no doubt that this action "relates to" the 9/11 attacks; (2) that the Statute of Limitations for each of plaintiff's causes of action have run and, thus, bars recovery, as the alleged breach occurred on April 3, 2009, the date that Hellerstein appointed plaintiff as Federal Liaison Counsel, rendering the instant action beyond the six-year limitation for breach of contract, quantum meruit, and unjust enrichment claims, and the three-year limitation for conversion claims; (3) that plaintiff failed to state a claim for which relief can be granted, as there was never a contract, express or implied, between plaintiff and defendant attorneys and law firms to perform "Lead Counsel services" or any other legal work outside her limited capacity as Liaison Counsel; (4) that the doctrine of *res judicata* bars recovery because the SDNY, as upheld by the Second Circuit, already decided on the merits of plaintiff's instant claims and conclusively determined that she was entitled to no fee award for work performed outside of her liaison role; (5) that plaintiff failed to bring any of the instant causes of action before the SDNY in conjunction with her fee application and is, thus, collaterally estopped from doing so here; and (6) that this action is barred by the Statute of Frauds, as no written agreement exists, and there is no doubt that the services plaintiff provided could not have been performed within one-year of making such an agreement.

Defendants Mascolo and BMM now move (1) pursuant to CPLR 3211(a)(2), (5), (7) & (8), to dismiss the complaint, reiterating many of the arguments the Bardavid Defendants made in their motion; (2) pursuant to New York Rules of Professional Conduct, Rule 1.5(g) ("Rule 1.5(g)"), to dismiss the complaint, as it is an unethical attempt to participate in a contingency fee because defendants' clients gave no written consent to retain plaintiff for any purpose; and (3) pursuant to CPLR 5701(a)(3) and 2221, to vacate the Ex Parte Orders, as defendants allege that they were not timely and properly served, and that plaintiff admitted that she simply did not want to pursue "adversarial proceedings" because it would hinder possible settlement.

Defendants Bruce Jeffrey Ressler, Esq. and Ressler & Ressler now move, pursuant to CPLR 3211(a)(2), (5) & (7), to dismiss the complaint, stating that the "arguments put forth by co-defendants equally apply to all claims pending against them."

In opposition, plaintiff submits an affidavit and her attorney's affirmation arguing, inter alia: (1) that after the personal injury cases were removed to federal court, she performed legal work not part of the defined Liaison Counsel role that was important to the ultimate recovery; (2) that she did not violate Rule 1.5(g), as this action does not involve any arrangement for payment from any of defendants' clients, but rather, concerns agreements the firms themselves made to compensate her fairly; (3) that the true date when the Statute of Limitations accrued is "most likely" September 13, 2012, the date that Hellerstein found that plaintiff was entitled to be paid for her work as Federal Liaison Counsel, but that there are "other dates that may [also] be deemed the accrual date including April 20, 2010 or October 29, 2010"; (4) that this Court has subject matter jurisdiction over this action because during the June 10, 2013 oral argument on plaintiff's fee motion, Hellerstein explicitly stated on the record that if plaintiff wished to pursue this claim – that defendants retained her as Lead Counsel as well as Liaison Counsel, and thus are required to fairly compensate her for both – he held that he is "without supplemental jurisdiction" and that plaintiff "can pursue that if she wants in the state court."; and (5) that this claim, which might have otherwise been barred by Statute of Frauds, should be allowed to proceed, as plaintiff's performance of legal services outside her role as Liaison Counsel was "unequivocally referable" to the alleged agreement.

Discussion

Dismissal of a complaint, pursuant to CPLR 3211, is warranted if, accepting the facts alleged as true and according plaintiff the benefit of every possible favorable inference, the court determines that the allegations do not fit within any cognizable legal theory. See Leon v Martinez, 84 NY2d 83, 87-8 (1994); Morone v Morone, 50 NY2d 481, 484 (1989).

Pursuant to CPLR 3211(a)(2), a complaint may be dismissed if "the court has not jurisdiction of the subject matter of the cause of action." Pursuant to § 408 of the ATSSSA, "all claims 'resulting from or relating to' the crashes of [9/11] are to be brought exclusively in the United States District Court for the Southern District of New York." It is also well-settled law that claims relating to respiratory injuries suffered in the massive demolition and debris-removal operation due to the 9/11 attacks is within the SDNY's exclusive jurisdiction. See In re WTC Disaster Site, 414 F3d 352, 375 (2d Cir 2005) ("it is clear from the additional provision in § 408 that the federal district court in the South District shall have *exclusive* jurisdiction over *all* actions brought for *any* claim resulting from or relating to the terrorist-related aircraft crashes of [9/11]") (internal quotations omitted). From the statute's plain language, it is clear that Congress meant to preempt state claims of those who suffered orthopedic-related bodily injuries in the aftermaths of 9/11, as well as those who suffered injuries on the date thereof. See id. at 377 ("the common theme of references to 'all lawsuits,' 'all civil litigation,' and 'all civil suits,' along with the expansive phrase 'relating to' ... strongly suggests that Congress meant the ATSSSA-created cause of action to preempt more than just the claims of persons who were on the hijacked planes or present at or in the immediate aftermath of the crashes, and more than just claims that arose during the formal search for survivors"). Here, the instant action seeks to recover fees and damages for litigation of claims "relating to" the 9/11 attacks and is inextricably intertwined with the underlying litigation that was already removed, pursuant to ATSSSA, to the SDNY. Therefore, this Court finds that it lacks subject matter jurisdiction over this action, as it belongs in the SDNY's exclusive jurisdiction.

Pursuant to CPLR 3211(a)(5), an action may also be barred by the doctrines of *res judicata* and collateral estoppel. Here, the final adjudication reached by the SDNY – finding that plaintiff was entitled to no fee award outside of her role as Liaison Counsel – must, under principles of *res judicata*, bar the instant clams that arise out of the same series of transactions, even though plaintiff asserts different theories than those she did in her prior fee applications before the SDNY. See Matter of Reilly v Reid, 45 NY2d 24, 26 (1978) ("In the earlier proceeding, petitioner alleged the same foundation facts and pressed for relief nearly identical to that requested in this proceeding. The final adjudication reached in the earlier proceeding must, under principles of *res judicata*, ... bar the cause of action now asserted"); see also O'Brien v City of Syracuse, 54 NY2d 353, 358 (1981) ("once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy"). The SDNY, as upheld by the Second Circuit, already decided on the merits of plaintiff's claim, and already evaluated the liaison and substantive legal work alleged here, and determined that plaintiff was entitled to no fee award for work performed outside of her liaison role. Pursuant to the theory of collateral estoppel, the same holds true. See Gilberg v Barbieri, 53 NY2d 285, 291 (1981) ("The doctrine of collateral estoppel is based on the notion that it is not fair to permit a party to relitigate an issue which has previously been decided against him [or her] in a proceeding in which he had a fair opportunity to fully litigate the point. ... Properly utilized it also serves to conserve the resources of courts and litigants"). Plaintiff failed to bring any of the instant four causes of action before the SDNY in conjunction with her fee application, even though she had ample opportunity thoroughly and fully to contest the SDNY's denial of her request for Lead Counsel fees through the submission of numerous applications over the course of 4-5 years, including exhausting all appeals. It would not be fair to permit plaintiff yet another bite at the apple. Plaintiff's argument that Hellerstein explicitly stated during oral arguments on one of her fee applications that she may litigate this claim in state court is unavailing; a judge's comment made at oral argument is not an order or judgment and, therefore, is not binding. This Court finds that the SDNY fully considered the merits of plaintiff's claim for Lead Counsel fees and duly dismissed it, finding that she was only entitled to Liaison Counsel fees.

Defendants have raised other plausible arguments as to why dismissal is appropriate, but the Court need to reach them, as, pursuant to CPLR 3211(a)(2) & (5) alone, the action is barred. Certain defendants' request to vacate the Ex Parte Orders is hereby denied as moot, as the action is dismissed.

The Court has considered plaintiff's other arguments and find them to be unavailing and/or non-dispositive.

Accordingly, the various defendants' motions to dismiss is hereby granted, and the complaint is dismissed in its entirety.

Conclusion
Motions to dismiss granted. The clerk is hereby directed to dismiss the complaint in its entirety.

9/13/2018
DATE

ARTHUR F. ENGORON, J.S.C.

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