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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SETH ROTTER,

Plaintiff,

- v -

ALAN RIPKA; PAUL NAPOLI; MARC BERN; NAPOLI BERN, LLP.; NAPOLI, BERN, RIPKA, LLP,

Defendant.

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INDEX NO. 653182/2016

MOTION DATE 3/20/2018

MOTION SEQ. NO. 004

DECISION AND ORDER

Arthur F. Engoron, J.S.C.

In compliance with CPLR 2219(a), this Court states that the following papers, numbered 1 through 5, were used on plaintiff's motion for a default judgment against the non-answering defendants, Napoli Bern, LLP and Napoli Bern Ripka, LLP; for summary judgment against defendant Alan S. Ripka; or, alternatively, for a framed issue hearing:

Papers Numbered:

Notice of Motion - Affirmation - Affidavit - Exhibits 1
Defendant Ripka Opposing Affirmation - Exhibits 2
Defendants Napoli Bern LLP and Napoli Bern Ripka LLP Opposition (memorandum of law only) 3
Reply Affidavit – Exhibits 4

Upon the foregoing papers, plaintiff's motion is granted.

Background

Plaintiff Seth R. Rotter ("Rotter") and defendant Alan S. Ripka ("Ripka") were partners in two law firms. The partnerships dissolved and litigation ensued over the parties' respective entitlement to fees in hundreds of contingent legal fee matters. On May 18, 2006, the parties entered into a Stipulation of Settlement, So-Ordered by the Court (Debra James, J.S.C) (the "Stipulation") that provides a formula by which to allocate the legal fees and disbursements between the parties. For the past twelve years, the parties have been engaged in litigation and accounting proceedings necessary for Rotter to collect the fees and disbursements to which he deems himself entitled under the Stipulation.

Rotter commenced the instant action by way of service of a summons with notice of motion for summary judgment in lieu of complaint, seeking recovery of fees and disbursements on two of the client-matters set forth in the Stipulation, to wit: (a) the Roderick Alexander matter, for which Rotter seeks $15,508.15, plus 9% interest from July 16, 2010, as and for his share of the legal fees and disbursements therein; and (b) the Jackson Hewitt matter, for which Rotter seeks $294,527.90, plus 9% interest from January 14, 2017, as and for his share of the legal fees and disbursements therein. By Decision and Order dated April 10, 2017, this Court denied Rotter's CPLR 3213 motion upon the ground that the Stipulation is not "an

instrument for the payment of money only," in that defendants' liability could only be determined by reference to outside documents, to wit: (1) the Closing Statement in the Roderick Alexander matter, which Rotter failed to attach to his moving papers; and (2) various documents, including court orders, addressing the Jackson Hewitt matter. The Court deemed the moving and opposing papers to be the complaint and answers. The Court denied the request by defendant Marc Jay Bern ("Bern") that the complaint be dismissed as to him because he is not personally liable under the Stipulation.

However, by Decision and Order dated September 26, 2017, this Court granted Bern's motion to reargue the April 10, 2017 Decision and Order, and upon reargument dismissed the complaint as to him upon the ground that, inter alia, he did not sign the Stipulation in his individual capacity. Soon thereafter, defendant Paul J. Napoli ("Napoli"), arguing that he is "identically situated to" Bern, moved for summary judgment dismissing the complaint as to him; the Court granted Bern's motion by Decision and Order dated November 15, 2017.

Consequently, as of mid-November 2017, the only remaining defendants herein are Ripka; and Napoli Bern LLP, and Napoli Bern Ripka LLP (collectively, "the Napoli Defendants"). Rotter now moves for a default judgment against the Napoli Defendants, and for summary judgment as against Ripka. The Napoli Defendants oppose the default judgment motion upon the grounds that it is untimely, and, alternatively, that their failure to answer was due to inadvertent law office failure. Ripka opposes the summary judgment motion upon the grounds that there are issues of fact as to whether the Roderick Alexander and Jackson Hewitt matters are the same as those identified in the Stipulation, and whether the "amount of the fees sought are proper," i.e., whether the case designation for these matters in the Stipulation, and pursuant to which Rotter seeks his fees, is correct.

Discussion

Default Judgment: Rotter is entitled to entry of a default judgment against the Napoli Defendants, jointly and severally, for his 50% share of fees and disbursements in the Roderick Alexander and Jackson Hewitt matters, plus interest, in that said defendants have failed to answer the complaint and their time to do so has expired. CPLR 3215(a). It is undisputed that the Napoli Defendants were timely and properly served with the summons and CPLR 3213 motion, yet failed to oppose the motion. Only the individual defendants submitted opposition papers. On April 10, 2017, this Court deemed the moving papers to be the complaint, and the individual defendants' opposition papers to be their respective answers. Having not opposed the motion, the Napoli Defendants were required to serve an answer to the complaint within twenty days of April 10, 2017, the date the complaint effectively came into existence and was served (or at least by the May 17, 2017 Preliminary Conference scheduled herein), or risk being held in default. They did not answer the complaint; they are in default. Moreover, Rotter's instant motion, filed and served on October 19, 2017, within five months of said default, is timely made.

The Court rejects, as unavailing, the Napoli Defendants' argument that their default should be excused as "law office failure." However, even if the purported "error" in failing to add the Napoli Defendants' names on one of the briefs submitted on the prior motion was inadvertent and excusable, Rotter is still entitled to a default judgment against them because they do not have a meritorious defense to Rotter's claim to recover his long over-due fees and disbursements for the Roderick Alexander and Jackson Hewitt matters. See Young v Richards, 26 AD3d 249, 250 (1st Dep't 2006) ("It is well established that to avoid entry of a default judgment upon a failure to appear or answer, a defendant is required to demonstrate both a justifiable excuse for the default and a meritorious defense."). As more fully discussed below, Rotter has demonstrated entitlement to judgment as a matter of law on his claim to collect fees, and defendants have failed to raise an issue of fact sufficient to defeat his showing.

Summary Judgment: Rotter has met his burden of establishing, as a matter of law, entitlement to

recover from Ripka (and the Napoli Defendants, all jointly and severally) the sum of $15,508.15, plus 9% interest from July 16, 2010, representing his 50% share of the fees and disbursements in the Roderick Alexander matter, and the sum of $294,527.90, plus 9% interest from January 17, 2014, representing his 50% share of the fees in the Jackson Hewitt matter. The record unequivocally demonstrates, and this Court so finds, that: (1) defendants are collaterally estopped from challenging the case designations for the Roderick Anderson matter ("RRK") and Jackson Hewitt matter ("RNS") under the Stipulation; (2) the Roderick Anderson matter listed in the Stipulation is one and the same as the Roderick Alexander matter for which defendants filed an OCA Closing Statement showing a settlement paid on July 16, 2010 in the sum of $92,500; (3) the Jackson Hewitt matter listed in the Stipulation is one and the same as the Watts Action for which defendants recovered $589,055.79 in attorney's fees on January 17, 2014; and (4) Ripka is personally liable for all of the payments due under the Stipulation.

In support of his claim for fees in the Roderick Alexander matter, Rotter submitted the following proof: (1) the Stipulation designating the matter as "RRK," thus entitling Rotter to 50% of fees and disbursements collected therein by defendants; (2) the October 29, 2013 Decision and Order of the Appellate Division First Department, in which the Court held, inter alia, that the "case designations [under the Stipulation] ... cannot be reformed"; and (3) a printout of the NYSCEF "Case Detail" from the Bronx County Supreme Court for the Roderick Alexander v Nathaniel Heath matter with a 2003 index number and showing "RRK" as the attorneys for plaintiff Alexander, together with the April 6, 2011 OCA Closing Statement for the same Roderick Alexander v Nathaniel Heath matter. Ripka failed to dispute this clear and direct proof, or even create a question of fact as to whether the Roderick Alexander matter is one and the same as the Roderick Alexander v Nathaniel Heath matter, for which Rotter is entitled to 50% of the fees and disbursements recovered therein by defendants. Ripka's argument that Rotter's failure to submit the OCA closing statement on his initial CPLR 3213 motion, is unavailing. At most, such error was inadvertent, which this Court overlooks pursuant to CPLR 2005, given the unequivocal and dispositive impact these documents have.

Similarly, Rotter met his burden of establishing, as a matter of law, that the Jackson Hewitt matter listed in the Stipulation is indeed one and the same as the Watts Action, and, therefore, that Rotter is entitled to 50% of the attorney's fees collected by defendants therein, plus interest. The overwhelming proof submitted on the instant motion – including but not limited to the client retainer agreements; Ripka's file notes, letter to an expert accountant, and statements to a newspaper reporter; and the RRK and the Napoli Defendants' expense report each showing the same disbursement – demonstrates that the Jackson Hewitt clients that retained RRK did so not only for an employment dispute, but also for potential consumer fraud claims addressing "hidden fee" and "multiplier" issues as alleged in the Watts Action, and that the initial investigation and legal work for the Jackson Hewitt/Watts Action was performed at RRK pre-dissolution.

Although all of the evidence, in total, supports the finding that the Jackson Hewitt matter and Watts Action are the same, there are two documents which particularly compel this conclusion. First, the 111 paragraph Class Action Complaint admittedly drafted by Ripka while still with RRK, which pleading is virtually identical to the Complaint filed in the Watts Action by Ripka and the Napoli Defendants. Second, defendants' acknowledgment, in writing to the Federal Court, that the Watts Action is the Jackson Hewitt matter. In a letter dated October 18, 2012 to Hon. Steven M. Gold of the U.S. District Court for the Eastern District of New York, defendants stated: "Shortly after joining the firm, Mr. Ripka began meeting with potential clients and witnesses in anticipation of preparing a Summons and Complaint *for the Jackson Hewitt matter(s) now pending before this Court*" (emphasis added). Ripka does not dispute that he contested Rotter's entitlement to 50% of the fees in the Watts Action solely upon the ground that said matter "was not in suit" when Ripka left RRK, and not because the Watts Action was "separate and distinct" from the Jackson Hewitt matter. Ripka prevailed, in a manner, before the Federal Court on this position in that only 6% (the percentage applicable to matters not in suit upon dissolution of

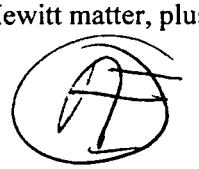
the firms), and not 50%, of the Watts Action fees were deposited in escrow pending final resolution of Rotter's claim. In this Court's considered view, having taken the position before the Federal Court that the Watts Action is the Jackson Hewitt matter, equity and fairness dictate that Ripka is estopped from now asserting, in this action, the contrary claim that Watts Action is not the Jackson Hewitt matter in order to avoid any payment of Rotter's agreed upon fees. See generally Shondel J. v Mark D., 7 NY3d 320, 326 (2006) ("The purpose of equitable estoppel is to preclude a person from asserting a right after having led another to form the reasonable belief that the right would not be asserted, and loss or prejudice to the other would result if the right were asserted. The law imposes the doctrine as a matter of fairness."); see also Herman v 36 Gramercy Park Realty Assocs., LLC, ___ AD3d ___ (1st Dep't 2018) (doctrine of judicial estoppel "prevents a party who assumed a certain position in a prior proceeding and secured a ruling in his or her favor from advancing a contrary position in another action, simply because his or her interests have changed"). As noted above, the Stipulation sets the Jackson Hewitt case designation as "RNS," which designation cannot be changed, and which entitles Rotter to 50% of fees collected therein. It is undisputed that defendants recovered $589,055.79 in attorney's fees on January 17, 2014.

In its November15, 2017 Decision and Order, this Court held, and Ripka does not dispute, that he is personally liable for all payments due to Rotter under the Stipulation.

Although plaintiff is entitled to entry of a money judgment against Ripka and the Napoli Defendants, jointly and severally, the Court declines to find that Ripka engaged in frivolous conduct within the meaning of 22 NYCRR § 130-1.1, and therefore denies Rotter's request for sanctions.

Conclusion

Motion for a default judgment against defendants Napoli Bern, LLP and Napoli Bern Ripka, LLP, and for summary judgment against defendant Alan S. Ripka, is granted. The Clerk is hereby directed to enter judgment in favor of Seth R. Rotter and against Napoli Bern, LLP, Napoli Bern Ripka, LLP, and Alan S. Ripka, jointly and severally, in the sums of: (1) $15,508.15, plus 9% interest from July 16, 2010 to the date of entry of judgment, as and for Rotter's share of the legal fees and disbursements in the Roderick Alexander matter; and (2) $294,527.90, plus 9% interest from January 14, 2017 to the date of entry of judgment, as and for Rotter's share of the legal fees in the Jackson Hewitt matter, plus costs and disbursements.



10/26/2018
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