Richman v Reese
2020 NY Slip Op 31735(U)
June 3, 2020
Supreme Court, New York County
Docket Number: 654623/2017
Judge: Saliann Scarpulla

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 39EFM

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KIM RICHMAN,

Plaintiff,

- v -

MICHAEL REESE, REESE LLP

Defendant.

INDEX NO. 654623/2017

MOTION DATE 02/25/2020

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

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HON. SALIANN SCARPULLA:

The following e-filed documents, listed by NYSCEF document number (Motion 004) 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 166

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, it is

In this action arising out of a dispute over an award of legal fees and costs between former law firm partners, defendants Michael R. Reese ("Reese") and Reese LLP (collectively, "Defendants") move by order to show cause to: (1) stay the hearing before the special referee until Defendants' second motion to dismiss is decided; (2) dismiss the action pursuant to CPLR 3211(a)(7); and (3) deny the pending preliminary injunction motion filed by plaintiff Kim Richman ("Richman") as moot.

The underlying facts of this case have been set forth in detail in this and a related action and will only be repeated herein to the extent necessary. *See Richman v Reese*, 2019 N.Y. Slip Op. 30908[U] (Sup Ct, NY County 2019) ("2019 Decision"); *Reese v Richman*, 2019 N.Y. Slip Op. 30885[U] (Sup Ct, NY County 2019).

Procedural History

After service of Richman's complaint, Reese initially moved for dismissal and for a preliminary injunction. In the 2019 Decision, I found that Richman failed to state a claim that Reese anticipatorily repudiated his obligation under a settlement agreement – which provided for the separation of the parties' law practice and for the division of their prior firm's cases and other assets ("Agreement") – to pay Reese the attorneys' fee awarded ("WF Fee Award") from the settlement one of the prior firm's shared fee cases ("Shared Fee Cases").

Richman also alleged that Reese repudiated his obligations to Richman under Art. III.C.2 of the Agreement to appoint Justice Ariel Belen as the escrow agent in connection with WF Fee Award. The complaint alleges that, in May 2017, Defendants denied that the parties agreed to the appointment of Justice Belen as the escrow agent. Regarding these allegations, I found that the Agreement contained a mutual mistake and failed to accurately express the intentions of the parties. I determined that a hearing was required before a special referee to determine which of the Shared Fee Cases the parties intended to be governed by Art. III.C.2 of the Agreement.

The remainder of Defendants' motion to dismiss, including determination of whether the cause of action seeking attorney's fees as the prevailing party pursuant to the Agreement should be dismissed, and Richman's request for a preliminary injunction, was held in abeyance pending the receipt of the report and recommendations from the special referee. The parties have since engaged in limited discovery for this hearing before the special referee.

After the 2019 Decision was issued, the parties entered into a stipulation that was so-ordered on July 24, 2019, agreeing, *inter alia*, that all fees owed to Reese LLP in connection with the Wells Fargo Action would be allocated and paid 60% to Reese LLP and 40% to Richman ("July 2019 Stipulation"). While Defendants acknowledge Richman's right to his portion of the WF Fee Award in the July 2019 Stipulation, Defendants dispute whether Richman is entitled to prejudgment interest or attorneys' fees under the Agreement and maintain that it was actually Richman who caused the delay in the distribution of the funds at issue.

Discussion

Defendants have already moved to dismiss the complaint, and I have ruled, in part, on that motion. Serial motions to dismiss are not permitted and I would ordinarily deny this second motion to dismiss on that ground. However, because Defendants' current motion is akin to a motion to reargue the 2019 Decision, it will be treated as such.

In a motion seeking leave to reargue pursuant to CPLR 2221(d), the movant must establish that the court "overlooked or misapprehended the facts or law in arriving at its earlier decision." *Opton Handler Gottlieb Feiler Landau & Hirsch v Patel*, 203 AD2d 72, 74 (1st Dept 1994) (internal citations omitted). Absent mistake on the Court's part, the Court will adhere to its original decision; "[r]eargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided ... or to present arguments different from those originally asserted." *Setters v AI Properties and Developments (USA) Corp.*, 139 AD3d 492, 492 (1st Dept 2016) (citations omitted).

Defendants argue that because of the parties' mutual mistake, as a matter of law, it cannot be found that Reese was obligated to appoint Justice Belen as escrow agent or that Reese attempted to avoid his obligation under the Agreement. Defendants also argue that Reese's advancement of his interpretation of the Agreement is justified and cannot be the basis for awarding Richman attorney's fees – i.e., there can be no prevailing party based upon the mutual mistake. Richman maintains that, as a matter of law, he is entitled to seek reformation of the Agreement to conform to the parties' true intentions; and to enforce the reformed contract in an action for damages, including fees and costs under the Agreement.

Defendants have failed to show that I overlooked or misapprehended the facts or law in arriving at the 2019 Decision. Contrary to Defendants' contentions, Richman may, as a matter of law, seek damages for the breach of an agreement that occurred before it was reformed; the complaint adequately alleges that the parties intended the WF Fee Award to be governed by Art. III.C.2 the Agreement. *See Empery Asset Master, Ltd v AIT Therapeutics, Inc.*, 179 AD3d 443, 443-44 (1st Dept 2020) (causes of action for breach of contract and reformation based on mistake); *see also City of Binghamton v Serafini*, 8 AD3d 835, 838 (3d Dept 2004).

Additionally, Richman may be entitled to attorney's fees under the Agreement. *See Merit U.S. Real Estate Fund III, LP v Maiden Fed LLC*, 13 AD3d 75, 76 (1st Dept 2004) ("The cause of action for reformation resulting from mutual mistake should be reinstated . . . because there is a valid claim that the $500,000 should have been included in the escrow funds, but for oversight by both parties . . . . As a result, the claims for

indemnification and attorney's fees must be reinstated to the extent they may find support in a contract that is the subject of reformation."). The cases that Defendants rely on are inapposite.[1] I have reviewed all of Defendants' remaining arguments and find that they do not warrant the grant of reargument.

As to the portion of the motion seeking the dismissal of Richman's pending motion for a preliminary injunction as moot, Defendants originally sought this relief in their prior motion to dismiss. In the 2019 Decision, I held Richman's motion in abeyance pending the determination of the special referee, which remains forthcoming. Therefore, this portion of Defendants' motion is denied.

The remaining portion of Defendants' motion, which seeks a stay of the hearing before the special referee until this motion has been decided, is denied as moot.

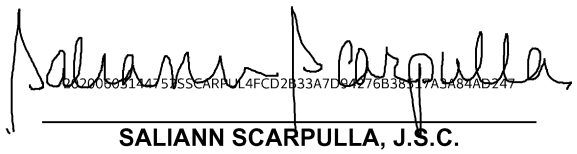
In accordance with the foregoing, it is hereby

ORDERED that defendants Michael R. Reese and Reese LLP's motion to for leave to reargue (styled as a second motion to dismiss), to stay the hearing before the

[1] *See, e.g.*, *Gottlieb v Such*, 293 AD2d 267, 267 (1st Dept 2002) (In action seeking rescission of agreement induced by fraud, "the provision entitling the prevailing party to an award of 'counsel fees ***in event of default***' [was] not implicated.") (emphasis added).

special referee, and deny the pending preliminary injunction motion is denied in its entirety.

This constitutes the decision and order of the Court.



6/3/20
DATE

SALIANN SCARPULLA, J.S.C.

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