

**Korn v Sacco & Fillas, LLP**

2021 NY Slip Op 32502(U)

November 24, 2021

Supreme Court, New York County

Docket Number: Index No. 650538/2018

Judge: Nancy M. Bannon

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. NANCY BANNON PART 42

*Justice*

-----X

JONATHAN KORN,

Plaintiff,

- v -

SACCO & FILLAS, LLP,

Defendant.

-----X

SACCO & FILLAS, LLP

Plaintiff,

-against-

JASON KRANTZ

Defendant.

-----X

INDEX NO. 650538/2018

MOTION DATE 09/30/2021

MOTION SEQ. NO. 009

**DECISION + ORDER ON  
MOTION**

Third-Party  
Index No. 595056/2019

The following e-filed documents, listed by NYSCEF document number (Motion 009) 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184

were read on this motion to/for DISCONTINUE/DISMISS.

This action arises from a dispute in the course of the representation of an individual in a personal injury action by the defendant law firm, Sacco & Fillas, LLP (Sacco & Fillas). The plaintiff, Jonathan Korn (Dr. Korn) was the consulting expert for the individual plaintiff in that action, nonparty Joan McGowan-Amandola (McGowan-Amandola). Because McGowan-Amandola lacked the funds to pay Dr. Korn for his services, she assigned to Dr. Korn the first \$53,500 received from any recovery in that action, as memorialized in an agreement dated October 26, 2010 (the assignment agreement). However, when Sacco & Fillas received the funds, it dispersed the money without paying Dr. Korn.

Dr. Korn filed the instant action on February 2, 2018. Subsequently, Sacco & Fillas interposed a third-party complaint against Jason Krantz (Krantz), McGowan-Amandola's original counsel in the underlying personal injury action. The third-party complaint asserted claims arising from Krantz's alleged breach of his retainer agreement with McGowan-Amandola based on her entry into the assignment agreement with Dr. Korn while she was represented by Krantz. The claims sounded in, *inter alia*, breach of contract, fraud, malpractice, and contribution and

indemnification. The court (Crane, J.) noted, in a June 3, 2020, Decision and Order, that these were “entirely time-barred and otherwise meritless claims in an effort to prolong and complicate [the] case.” Krantz asserted counterclaims against Sacco & Fillas sounding in breach of contract and conversion, seeking to recover fees for legal services Krantz provided in the personal injury action which he avers were improperly withheld by Sacco & Fillas, in contravention of a written agreement between Krantz and Sacco & Fillas.

By order dated July 31, 2019, the court (Crane, J.) granted Dr. Korn’s motion for summary judgment on his conversion claim and awarded him the principal amount of \$53,300. Further, the court dismissed Dr. Korn’s remaining causes of action as moot and struck Sacco & Fillas’s answer and counterclaims. The court directed that “the third-party action shall continue.” Sacco & Fillas appealed. What followed was an “extensive pattern of frivolous behavior [by Sacco & Fillas] that clearly was meant to harm [the] plaintiff,” as described in greater detail in the decision and order of the court (Crane, J.) dated June 3, 2020. By that order, the court granted the plaintiff’s motion for sanctions against Sacco & Fillas. Sacco & Fillas appealed. Both the July 31, 2019, decision and order and the June 3, 2020, decision and order were affirmed by the Appellate Division, First Department on December 22, 2020.

Sacco & Fillas now moves pursuant to CPLR 3217(b) to discontinue its third-party claims and the third-party action without prejudice to its continuing an attorney fee dispute application under Judiciary Law § 475, currently pending under the action captioned Joan McGowan-Amandola and Glenn Amandola v Federal Realty Investment Trust, Charlene Torres, and Nidia Torres, Index No. 1274/2010, in the Supreme Court, County of Suffolk. Sacco & Fillas further moves to dismiss Krantz’s counterclaims pursuant to CPLR 3211(a)(3) and (a)(7), or, in the alternative, CPLR 3212, based on the dismissal of the third-party action. Krantz opposes the motion to the limited extent that it seeks dismissal of his breach of contract counterclaim and asks that the court instead sever such counterclaim and allow it to continue. For the reasons that follow, Sacco & Fillas’s motion is granted to the extent that its third-party claims are permitted to be discontinued without prejudice, Krantz’s conversion counterclaim is dismissed, and Krantz’s third-party breach of contract counterclaim is severed and continues.

CPLR 3217(b) provides that, upon an order of the court, an action may be voluntarily discontinued “upon terms and conditions, as the court deems proper.” The authority to grant or deny a motion pursuant to CPLR 3217(b) is within the sound discretion of the trial court. See Tucker v Tucker, 55 NY2d 378 (1982). A party cannot ordinarily be compelled to litigate, and absent a showing of special circumstances, discontinuance should generally be granted. See Bank of America, Nat. Ass’n v Douglas, 110 AD3d 452 (1<sup>st</sup> Dept. 2013); see also Tucker v Tucker, supra; Burnham Service Corp. v National Council on Compensation Ins., Inc., 288 AD2d 31 (1<sup>st</sup> Dept. 2001). However, discontinuance should not be granted if the “discontinuance would prejudice a substantial right of another party, circumvent an order of the court, avoid the consequences of a potentially adverse determination, or produce other improper results.” HSBC Bank USA, Nat’l Ass’n v Kone, 188 AD3d 836 (2<sup>nd</sup> Dept. 2020) (internal quotation marks omitted) (citing Haughey v Kindschuh, 176 AD3d 785 [2<sup>nd</sup> Dept. 2019]; Marinelli v Wimmer, 139 AD3d 914 [2<sup>nd</sup> Dept. 2016]); 22 Gramercy Park, LLC v Michael

Haverland Architect, P.C., 170 AD3d 535 (1<sup>st</sup> Dept. 2019); Matter of Baltia Air Lines, Inc. v CIBC Oppenheimer Corp., 273 AD2d 55 (1<sup>st</sup> Dept. 2000). “Factors militating against discontinuance include prejudice to an opposing party as well as the imposition of one or more counterclaims.” Matter of Bronsky-Graff Orthodontics P.C., 270 AD2d 792 (3<sup>rd</sup> Dept. 2000); see Haughey v Kindschuh, *supra*; 22 Gramercy Park, LLC v Michael Haverland Architect, P.C., *supra*; 701 Rest. on Second, Inc. v Armato Properties, Inc., 83 AD3d 526 (1<sup>st</sup> Dept. 2011); Aison v Hudson River Black River Regulating Dist., 279 AD2d 754 (3<sup>rd</sup> Dept. 2001).

Krantz does not oppose the branch of Sacco & Fillas’s application seeking to discontinue its third-party claims without prejudice to its Judiciary Law § 475 application. However, he contends that in order to avoid prejudice, his breach of contract counterclaim should be severed and allowed to proceed to trial. Krantz agrees to dismissal of his second counterclaim, sounding in conversion, pursuant to CPLR 3211(a)(7) “because, among other reasons, it is duplicative of his contract claim.”

In light of the foregoing, Sacco & Fillas is granted leave to discontinue its third-party claims pursuant to CPLR 3217(b). Further, Krantz’s second counterclaim is dismissed as duplicative pursuant to CPLR 3211(a)(7). See, e.g., Johnson v Cestone, 162 AD3d 526 (1<sup>st</sup> Dept. 2018). However, Krantz’s first counterclaim, sounding in breach of contract, is not subject to dismissal on any of the grounds proffered by Sacco & Fillas. Contrary to the firm’s assertions, which are unsupported by any caselaw, Krantz is not required to adjudicate his claim pursuant to Judiciary Law § 475 and may proceed, as he does here, by a breach of contract action. See Matter of Jacob D. Fuchsberg Law Firm v Danzig, 248 AD2d 178 (1<sup>st</sup> Dept. 1998) (noting that dispute between attorneys over sharing of contingency fees should proceed as a breach of contract action); Lazenby v Codman, 116 F2d 607, 609 (2<sup>nd</sup> Cir. 1940) (remedy of Judiciary Law § 475 petition is not exclusive; “if the attorney prefers, he may proceed by plenary action to have his statutory lien adjudged and enforced”). Moreover, the absence of claims in the main action does not bar Krantz’s counterclaim given that the court (Crane, J.) has already severed the third-party action and permitted it to continue pursuant to the directives in its July 31, 2019, order. The court has considered Sacco & Fillas’ remaining arguments in favor of dismissal and likewise finds them to be without merit.

CPLR 603 provides that “[i]n furtherance of convenience or to avoid prejudice the court may order a severance of claims.” The decision to sever claims is left to the discretion of the trial court. See Haber v Cohen, 74 AD3d 1281 (2<sup>nd</sup> Dept. 2010). Further, a trial court may properly sever counterclaims upon granting discontinuance of claims pursuant to CPLR 3217. See 22 Gramercy Park, LLC v Michael Haverland Architect, P.C., 170 AD3d 535, 536 (1<sup>st</sup> Dept. 2019). In light of the facts discussed above, the court deems severance of Krantz’s first counterclaim pursuant to CPLR 603 and CPLR 1010 appropriate to avoid prejudice to Krantz, who has waited over three years to try his counterclaim and represents in his moving papers that an imminent trial date has been scheduled.

Inasmuch as Sacco & Fillas indicates it intends to move for summary judgment on Krantz’s counterclaim at some future time, the court reminds the parties that the Note of Issue

was filed on March 21, 2019, and untimely summary judgment motions may not be considered. Moreover, Sacco & Fillas has already moved, here, pursuant to CPLR 3212 for dismissal of Krantz’s counterclaims. In that regard, the court reminds the parties that “[s]uccessive motions for summary judgment should not be entertained without a showing of newly discovered evidence or other sufficient justification.” Jones v 636 Holding Corp., 73 AD3d at 409 (1<sup>st</sup> Dept. 2010); see Landis v 383 Realty Corp., 175 AD3d 1207 (1<sup>st</sup> Dept. 2019).

Accordingly, it is

ORDERED that the motion of the defendant/third-party plaintiff, Sacco & Fillas, LLP, pursuant to CPLR 3217(b) to discontinue its third-party claims and the third-party action without prejudice to its continuing an attorney fee dispute application under Judiciary Law § 475, currently pending under the action captioned Joan McGowan-Amandola and Glenn Amandola v Federal Realty Investment Trust, Charlene Torres, and Nidia Torres, Index No. 1274/2010, in the Supreme Court, County of Suffolk, and to dismiss the third-party defendant’s counterclaims pursuant to CPLR 3211(a)(3) and (a)(7), or, in the alternative, CPLR 3212, is granted to the extent that Sacco & Fillas, LLP, shall be permitted to discontinue its third-party claims without prejudice to the continuation of its attorney fee petition, and the second third-party counterclaim, sounding in conversion, is dismissed, and the motion is otherwise denied; and it is further

ORDERED that the third-party complaint is dismissed, without prejudice to the continuation of the application by Sacco & Fillas, LLP, pursuant Judiciary Law § 475, currently pending under the action captioned Joan McGowan-Amandola and Glenn Amandola v Federal Realty Investment Trust, Charlene Torres, and Nidia Torres, Index No. 1274/2010, in the Supreme Court, County of Suffolk; and it is further

ORDERED that the second third-party counterclaim, sounding in breach of contract, is severed and shall be allowed to continue and proceed to trial.

This constitutes the Decision and Order of the court.

11/24/2021  
DATE

  
NANCY M. BANNON, J.S.C.  
HON. NANCY M. BANNON

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
			DENIED		OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>
					REFERENCE