SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

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JAMES L. MELCHER,

Plaintiff,

- against -

GREENBERG TRAURIG LLP and LESLIE D. CORWIN,

Defendants.

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DECISION AND ORDER
Index No. 650188/2007
Mot. Seq. Nos.: 015-019

O. PETER SHERWOOD, J.:

The motions *in limine* (motion sequence numbers 015-019) are decided in accordance with the transcript of oral argument dated July 18, 2017 (*see* Transcript pp. 8, 11, 16, 18, 20, 33, 36, 37, 46-47, 54, 61-69) (hereinafter Transcript) and this Decision and Order.

Questions as to the contours of a lawyer's ethical obligations to disclosure are issues of law and jury instruction on the applicable law are within the provence of the court exclusively (*see Colon v Rent-A-Center,* 272 AD2d 58, 61 [1st Dept 2000]: *see also* this court's order in this case filed at NYSCEF Doc. No. 333]). The testimony sought to be admitted through the "expert" testimony of Patrick Conner and Roy Simon intrudes on areas reserved to the court *(see id.)* and it is also likely to confuse the jury. The jury is being called upon to determine whether Leslie Corwin, an attorney, engaged in deceit or colluded with an intent to deceive the court or a party. The jury is not being asked to resolve whether or not he violated the Code of Professional Responsibility (the Code) where the applicable standards are different than those involved here. Moreover, the concept of deceit is readily understandable and does not require interpretation by experts.

Although evidence concerning the role of the lawyer in the adversary system may be useful background, issues as to whether and when a lawyer has an obligation to speak are legal questions reserved to the court. Expert testimony is neither helpful nor permitted.

Accordingly, the motions to bar testimony of Patrick Conner and Roy Simon are granted with leave to submit revised reports that do not invade the provence of the court and are shortened

to reflect the limited role of such testimony as background. The parties shall also present proposed jury instructions as to applicable provisions of the Code[1].

Regarding damages, the testimony plaintiff seeks to offer as to what he might have been able to collect in the *Apollo* action had he been able to obtain a judgment during the time that Apollo Medical Fund was in better financial health versus the amount be obtained in settlement years later but for the deceit, is entirely speculative. The *Apollo* action which was commenced in 2003, involved issues other than those involving the alleged deceits, as the tortured history of that case shows (*see e.g. Melcher v Apollo Med. Fund Mgt., L.L.C.,* 2004 NY Misc LEXIS 3263 [Sup Ct, NY Co September 14, 2004], affd 25 AD3d 482 [1st Dept 2006] [addressing multiple issues on a motion to dismiss including statute of limitations, failure to state a cause of action, waiver and estopped and contract interpretation.]; and 52 AD3d 244 [1st Dept 2008] [regarding motions to strike the note of issue, stay trial, recusal of judge, and other matters]) (*see* also Transcript at 60). When the case went to trial more than five years after the alleged deceitful acts were disclosed, the written amendment defense was abandoned in favor of an oral contract defense. After the jury rendered its verdict in May 2009, the case dragged on for many more years while issues separate and apart from the alleged deceits were litigated (*see, e.g. Melcher v Apollo Med. Mgt. L.L.C.,* 84 AD3d 547 [1st Dept 2011]). Melcher eventually settled with Fradd and Apollo Medical Management in January 2014 (*see* Transcript p. 38). By that time, Apollo was unable to pay the full amount of the judgment (Transcript pp. 39, 41).

Plaintiff cannot show that defendant's alleged deceits were the proximate cause of any injury, except perhaps "excess legal expenses" incurred in the *Apollo* action (*see Melcher v Greenberg Traurig LLP*, 135 AD3d 547, 554 [1st Dept 2016]; *see* also *Zimmerman v Kohn*, 125 AD3d 413 [1st Dept 2015] [cited in *Melcher*]).

Plaintiff cannot establish that Corwin's alleged deceit was the proximate cause of Melcher's decision to accept less in settlement (Transcript p. 44) given the above described and several other intervening events not recounted here. The decision of the New York Court of Appeals in *Amalfitano v Rosenberg*, 12 NY3d 8 (2009) does not support plaintiff's plea for a different result.

[1] The Code applies because the conduct that is the subject of this dispute occurred prior to adoption of the Rules of Professional Conduct in 2009.

The expert testimony the parties seek to present to the jury on attorney fees shall be limited as described below. A number of these limitations are law of the case. The Appellate Division has held that "[p]lainiff in a section 487 case may recover the legal expenses incurred as a proximate result of a material misrepresentation in a prior action" *Melcher*, 135 AD3d at 552 and that "[p]laintiff here seeks to recover . . . the excess legal expenses incurred in the Apollo action as a proximate result of defendants' alleged deceit" *id* at 554.

Plaintiff cannot recover for fees earned prior to February 17, 2004 at the earliest because the "basis for Melcher's attorney deceit claim . . . did not arise until *after* Fradd had burned the amendment, while the *Apollo* action was pending" *Melcher*, 135 AD3d 547, 552 (1st Dept 2016) (emphasis in original) (Transcript p. 53). Further, not all of the legal services rendered by plaintiff's counsel after the conduct complained of flowed from the alleged deceit.

Defendants' fees expert, Beth Kaufman, proposes to opine on the standards for legal fees damages in a Section 487 action but relies on the standards applicable to statutory fee shifting cases were, unlike this case, there rarely is any direct evidence of the reasonableness of the fees being sought. Further in fee shifting cases, claimants are on notice prior to commencement of the action that they will be required to show the reasonableness of the fees being requested and therefore must keep time records with a level of detail that a paying client might not require. Here, there is direct evidence of the "reasonableness" of the fees, specifically the amount the client paid for the services performed. The rate plaintiff paid his lawyer in the underlying action cannot be met by purported "expert" testimony as to what a court might award in a fee shifting case. The rate which is reasonable here was fixed by the marketplace. Although courts routinely require lawyers in fee shifting cases to detail how time claimed was spent, paying clients often do not. To require plaintiff to break out their fees separating those earned on any given day between those associated with routine prosecution of the case and excess fees devoted to meeting alleged deceitful evidence is neither feasible nor required. Accordingly, the approach taken by Kaufman is unsupported and will not be permitted.

James Lynch and Maryann Veytsman are not being presented as expert witnesses (*see* Transcript pp. 34, 36). They will present "demonstrative evidence" aggregating facts in the record (Transcript p. 23). The extent of the intended testimony by Ms. Veytsman appears at page 33 of the July 18, 2017 transcript. Mr. Lynch's proposed testimony relates to a damages theory which

the court has rejected. Accordingly, his testimony is irrelevant to any remaining issue that may be presented to the jury.

Nothing in this Decision and Order is intended to prohibit Messrs. Simon, Kaufman, Conner or Lumpkin from presenting proper expert testimony. The parties may present new reports that are not inconsistent herewith provided such reports are exchanged by September 8, 2017. Depositions limited to these reports shall be completed by September 29, 2017. Motions *in limine*, if any, shall be filed by October 13, 2017 with opposition papers filed by October 27, 2017. Oral argument shall be held on November 13, 2017 at 10:00 AM.

It is hereby

ORDERED that the motions to exclude testimony of Patrick Conner, Roy Simon, Jonathan Lumpkin, Beth Kaufman, James Lynch and Maryann Veytsman are GRANTED except as described in the Transcript, p. 23 and without prejudice to the parties offering revised testimony as described in reports exchanged on or before September 8, 2017 in accordance with this Decision and Order; and it is further

ORDERED that all counsel for the respective parties shall appear for a pre-trial conference on Monday, September 11, 2017 at 10:30 AM in Part 49, Courtroom 252, 60 Centre Street, New York, New York.

This constitutes the decision and order of the court.

DATED: August 15, 2017

ENTER,

O. PETER SHERWOOD J.S.C.