SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. MELISSA A. CRANE** **PART** 60M

Justice

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SETH E. DENENBERG,

INDEX NO. 655118/2021

Plaintiff,

DECISION AFTER TRIAL

- v -

SDK HEIBERGER LLP, STEVEN B. SPERBER, ERIC H. KAHAN, JAMIE HEIBERGER HARRISON, DEBORAH J. DENENBERG

Defendant.

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Melissa Crane, JSC

This case is notable for the lack of proof on both sides, largely due to recalcitrance during discovery. The initial Preliminary Conference (PC) order warned that "All dates set by the court are final and may not be adjourned by stipulation" and that "Failure to comply with these deadlines will result in waiver, preclusion and/or other penalties as appropriate."

Nevertheless, discovery in this case was painstaking. As described in this court's decision and order on motions four and five [EDOC 191] "plaintiff's compliance throughout the discovery phase of this case was so bad, the court had to issue a conditional order (see order dated 6/16/2022 [EDOC 64] at ¶ 2)." Indeed, in determining that plaintiff had waived its right to serve discovery requests, the court noted in a conference order, dated May 3, 2022, [EDOC 41], that plaintiff had failed to comply with the deadlines in the PC order and "instead, took it upon himself to determine that he need not comply because he received an extension to reply to counterclaims." Despite this May 3, 2022 order language, plaintiff still served discovery

OTHER ORDER – NON-MOTION

requests, but not until two months later--June 25, 2022. These were so late, the court refused to enforce them.

Even with the threat of a conditional order to strike pleadings in EDOC 65, plaintiff did not comply with the court's production orders, resulting in the conference order of July 18, 2022 [EDOC 83]. Each and every conference order warned that "All dates are final and counsel may not stipulate to adjourn or extend any deadline" and that "Failure to comply with the directives in this order will result in waiver, preclusion, adverse inferences, striking the offending party's pleadings and/or other penalties as appropriate."

Despite this history, plaintiff still tried to sneak in the documents he wanted for his affirmative case during the exchange of exhibits pursuant to this court's pre-trial order. The court granted defendant's motion to preclude. (see EDOC. 191 [Decision and Order on Motion Dated 8/3/2023]). The Appellate Division, First Department largely affirmed, stating that "[t]he court properly considered plaintiff's history of egregious noncompliance with discovery orders" (237 AD3d 423 [1st Dep't 2025]).

After receiving the Appellate Division's decision regarding what trial exhibits plaintiff could use, this court held a bench trial on June 16-17, 2025. There were several issues to consider. On defendants' counterclaims, the issues were: (1) did plaintiff divert business away from defendants' firm to himself and his new firm, and (2) did plaintiff breach his contract with defendants? On plaintiff's affirmative claims, the issues were: (1) did plaintiff practice law while suspended, such that it was proper for defendants to terminate him, or, rather, was it an attempt, as plaintiff contends, to steal his business, and (2) do defendants owe any money to plaintiff under the Partnership Agreement ("PA")?

I. The Counterclaims

At trial, the court dismissed all counterclaims except for breach of contract, because defendants had failed to prove any damages (see Trial Transcript [Tr.] at pages 290-292). Defendants presented no evidence that Mr. Denenberg had diverted a single client.

For the same reason, the court now dismisses the first counterclaim for breach of contract. Simply, defendants have not carried their burden to prove damages. Defendants assert several areas of breach. They accuse plaintiff of: (1) failing to provide truthful and accurate information; (2) diverting firm assets; (3) breaching the confidentiality provisions of the Partner Agreement (PA); and (4) by providing legal advice while suspended.

As discussed, the diversion of clients, if this happened at all, resulted in no provable damage to defendants. First, defendants failed to specifically identify a single diverted client. Plaintiff testified that clients followed him to his new firm, which they were perfectly entitled to do. Under the seminal case of *In re Thelen LLP* (24 N.Y.3d 16, 29 [2014]), the Court of Appeals held that pending matters are not partnership "property" within the meaning of the Partnership Law, but rather belong to the client.

Nor have defendants identified what confidentiality provision of the PA plaintiff breached; or what confidential information plaintiff appropriated. The counterclaim that plaintiff breached the PA by providing legal advice while he was suspended is not a proper counterclaim. It is more in the nature of an affirmative defense that defendant's termination of plaintiff, for which plaintiff is suing, was appropriate. Defendants have presented no affirmative damages from plaintiff's conduct. Accordingly, the court dismisses all remaining counterclaims for failure of proof.

II Plaintiff's Claims

1. Did Plaintiff Practice Law While Suspended, such that it was Proper for Defendants to Terminate Him?

On December 29, 2020, the Appellate Division, First Department suspended plaintiff from the practice of law for a period of three months. That court further ordered that "for the period of the suspension, respondent is commanded to desist and refrain from the practice of law in any form, either as principal or agent, clerk or employee of another, …that respondent is forbidden to give another an opinion as to the law or its application or advice in relation thereto." The period of suspension was to commence on January 29, 2021. On June 1, 2021, the Appellate Division reinstated plaintiff.

However, apparently plaintiff continued or attempted to continue to practice law after his suspension, in violation of the Appellate Division's order. As both Mr. Sperber and Mr. Kahan testified, there was an incident in February 2021, where Mr. Denenberg's partners discovered he had been talking to clients, specifically someone named Alex Sobolevsky (Def. Ex D). As a result, Mr. Denenberg's access to email was cut off (*id.*). Defendants also strongly warned plaintiff to be more careful because his unauthorized practice of law placed the entire firm at risk (*id.*)

At plaintiff's urging, his email access was reinstated. However, on March 12, 2021, plaintiff was again caught engaging in the practice of law while suspended.

As Def. Ex. E demonstrates, on March 12, 2021, Mr. Denenberg, at 9:22 am, sent an email directly to "Zal" at MBJ Management, a firm client. In that email, Mr. Denenberg stated that "what we discussed that a default judgment if for possession only and not for money so it would serve no purpose if the tenant has already returned possession of the unit." Clearly, this email communicates legal advice.

A short while later, Mr. Denenberg followed up with Zal and Eric Kahan [Def Ex F]. In that email, Mr. Denenberg said he had confused the matter discussed at 9:22 with yet a different matter that he had discussed with Zal, the client, the day before: "Eric I confused this case with the other matter I spoke to Zal about yesterday." Although plaintiff testified that he accidentally left Zal on this email, the fact remains that plaintiff admitted to speaking to Zal the day before about a second matter. This was at a time when plaintiff had no reason to be speaking to clients at all.

Naturally, Mr. Kahan and his partners were alarmed. Accordingly, Mr. Kahan wrote an email to Mr. Denenberg that same day at 1:40 PM [Def. Ex F]. In that email he admonished plaintiff for again engaging in legal service to a client:

> "The last time we became aware of something like this, we shut down your office email. When we agreed to turn it back on so that you could continue to receive office email, we were very clear that if it happened again, we would have to shut off your email access again. Unfortunately, you have now put us in a position that we have no choice but to shut down your office email access because we cannot have our office system use for what we believe may amount to a violation of the Appellate Division's order forbidding you from engaging in the practice of law. We will not put ourselves or the office at risk of any form of violation."

Mr. Kahan then informed Mr. Denenberg that the firm was cutting off his email again.

At 1:59 PM, Mr. Denenberg admitted to talking on the phone to the client [Def. Ex H pg 4]. Then, at 2:14 PM, Mr. Denenberg made further admissions about speaking to a client while suspended:

> "I backed up Eric's advice telling him this is a different situation at a different building involving a different scenario. He called me because at a different building some tenants skipped out and he wanted to know how he could go after them. I told him to go to a collections firm"

[Def. Ex. H pg. 3].

Then at 5:51 PM, Mr. Denenberg contested that he had been providing legal advice. He also alluded to having previously performed additional legal work by marking up an 881 limited license agreement [Def. Ex H at pg. 2].

Mr. Kahan responded at 6:16 PM: "Your emails indicated very clearly that you were communicating about cases and giving legal advice to a client." On April 5, 2021, defendants terminated plaintiff as a partner.

Plaintiff, if nothing else, presented as someone who cared deeply about his work and is a talented lawyer, given his breadth of knowledge in his area of expertise and his impressive book of business. However, as the evidence cited above clearly demonstrates, he was practicing law or coming dangerously close to practicing law, while suspended.

The PA allows for the expulsion of a Partner if, *inter alia*, "the Partner has engaged in conduct that has or will result in material damage to the Firm's name or reputation" (PA § 13[e][i]). While Mr. Denenberg's conduct may not have been egregious enough to report, had defendants allowed it to continue, there could have been serious consequences for failing to stop plaintiff. Their own licenses could have been placed at risk. Defendants were therefore right to fire him. That the Partnership took some time to expel him is understandable. Mr. Denenberg had been their partner for many years and Mr. Denenberg was part of Mr. Sperber's family by marriage.

In an attempt to convince the court that he was not practicing law while suspended, plaintiff tried to proffer the testimony of Mark Longo as an expert. Mr. Longo sits on the grievance committee for an upstate district. However, he also was the lawyer who had represented plaintiff in front of the grievance committee in the disciplinary case underlying this dispute. He also

represented to the grievance committee in the summer of 2021 when Mr. Denenberg's subsequent firm apparently reported him for similar conduct.

Given his involvement, not only was Mr. Longo's potential testimony as an expert in this action inappropriate because he was really a fact witness, but allowing him to testify could have risked the disclosure of privileged communications and/or the use of privilege as both a sword and a shield. This is impermissible (see *United States v. Bilzerian*, 926 F2d 1285, 1292 (2d Cir. 1991) "privilege cannot at once be used as a shield and sword" in order to "prejudice [an] opponent's case or to disclose some selected communications for self-serving purposes," see also *Savor Health, LLC v. Day*, 2022 WL 17404197, at *2 [SDNY Dec. 1, 2022]["[t]he consequences of failing to make *full* disclosure of the advice that was given is that the Debtors are now precluded from offering *any* evidence of the legal advice provided to the Debtors' officers and directors that was considered in connection with the decision to enter into the RMBS Trust Settlement"]). Nor was there expert disclosure as the CPLR and the Commercial Division Rules require.

Moreover, any testimony Mr. Longo would have given was irrelevant. The court was not evaluating whether Mr. Denenberg's conduct in fact violated disciplinary rules but rather whether his conduct rose to the level under the PA such that it "has or <u>will</u> result in material damage to the Firm's name or reputation" (PA § 13[e][i]). Here, had Mr. Denenberg been allowed to continue, there was a substantial likelihood he could have tarnished the reputation of the firm with another disciplinary matter.

Finally, this court does not need an expert to discern from the above exhibits that Mr. Denenberg engaged in the practice of law while suspended (see *Matter of Gonchar*, 166 A.D.3d 91, 92–93 [1st Dep't 2018] ["The evidence on the motion establishes that respondent continued

to hold himself out as a lawyer and that he gave substantive legal advice on real estate matters to attorneys at the law firm where he worked and a non-attorney employee in flagrant violation of our suspension order and Judiciary Law §§ 478 and 486, warranting his disbarment"]).

2. Do defendants owe plaintiff any Money?

Plaintiff has failed to carry his burden that the partnership owes him money. This is because Plaintiff failed to carry his burden to show that the partnership had any value. The only proof of incoming funds is plaintiff's uncorroborated testimony that he was able to view on-line bank statements from the firm after he was suspended and witnessed bi-monthly payments of $20k each to everyone else. [1] Plaintiff only has himself to blame for his lack of proof. As discussed, he disregarded the court's discovery orders and was ultimately precluded. If plaintiff really had seen an on-line bank statement that supported his claim, he should have asked for bank records in discovery or taken a screen shot. The obstinance in discovery was all the more egregious because plaintiff is a lawyer and should have taken the court's discovery schedule seriously.

Nevertheless, even if there had been payments, as draws or otherwise, the PA, section (e), required an expelled partner to receive "a purchase price equal to Seventy-Five (75%) percent of the Buy-Out Price calculated in the manner set forth in Schedule 3." In turn, Schedule 3 required the firm's regularly employed public accountant to prepare a list of account receivables and determine the value of the firm through a set formula. Plaintiff refused to participate in this process. Thus, plaintiff's lack of proof about whether the firm was worth anything is due to the course of conduct he charted. Without any proof that the firm was profitable, plaintiff cannot recover damages.

[1] The ethics rules prohibit plaintiff from being paid for legal work while suspended.

Accordingly, the court dismisses all of plaintiff's claims and all of defendants' counterclaims.

The clerk is directed to mark this matter disposed.

DATE: 9/4/2025

MELISSA A. CRANE, JSC

Check One: [x] Case Disposed [ ] Non-Final Disposition

Check if Appropriate: [x] Other (Specify DECISION AFTER TRIAL)