

150 Broadway N.Y. Assoc., L.P. v Shandell

2011 NY Slip Op 30009(U)

January 3, 2011

Supreme Court, New York County

Docket Number: 601950/09

Judge: Judith J. Gische

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

PRESENT: HON. JUDITH J. GISCHE

PART 10

Index Number : 601950/2009
150 BROADWAY N.Y.ASSOCIATES

INDEX NO. _____

vs
SHANDELL, RICHARD

MOTION DATE _____

Sequence Number : 005

MOTION SEQ. NO. 005

DISM ACTION/ INCONVENIENT FORUM

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

FILED

Upon the foregoing papers, it is ordered that this motion

JAN 05 2011

NEW YORK
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

Dated: 1/3/11


HON. JUDITH J. GISCHE J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check If appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10**

-----X
150 Broadway N.Y. Associates, L.P.,

Plaintiff (s),

-against-

Richard Shandell, Bert Blitz, Arthur Blitz,
Shosana Bookson, Shandell Blitz Blitz &
Bookson, LLP, Shandell Blitz Blitz &
Ashley, LLP, Mitchell H. Ashley, Esquire,
Ashley Law Firm, Ameer Benno, Esquire,
Drew Berenson, CPA and James H.
Shenwick, Esquire,

Defendant (s).
-----X

DECISION/ ORDER

Index No.: 601950/09

Seq. No.: 005

PRESENT:

Hon. Judith J. Gische

FILED

JAN 05 2011

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COUNTY CLERK'S OFFICE

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

PAPERS

NUMBERED

Shenwick n/m (3215) w/EDM affirm, JHS affid, exhs	1
Pltf opp w/JLJ affid, ARV affirm, exhs	2
Shenwick reply w/EDM affirm	3

-----X
Upon the foregoing papers, the decision and order of the court is as follows:

GISCHE J.:

This is an action by plaintiff for unpaid rent, additional rent and other arrears (hereinafter "rent"). The various defendants are law firms and attorneys affiliated with those firms. Richard Shandell, Esq. is no longer in this action, as his motion for summary judgment was previously granted by the court (Gische, J., Order, 5/10/10) ("prior order"). Plaintiff's motion for summary judgment was granted as to Arthur Blitz but denied as against Shoshana Bookson. Bert Blitz has defaulted in this action.

Plaintiff has served an amended complaint adding new claims and new parties. Presently before the court is James H. Shenwick, Esq.'s motion for the pre-answer dismissal of the claims against him (5th cause of action) on the basis that plaintiff has failed to state a cause of action. Plaintiff opposes the motion; none of the other remaining or newly added defendants take a position on the relief sought.

In considering this motion to dismiss pursuant to CPLR 3211, the pleading will be liberally construed and the facts alleged in the complaint as true. Applying these legal principles, the court will determine whether, affording the plaintiff the benefit of every possible favorable inference, the facts, as alleged, fit within any cognizable legal theory (Leon v. Martinez, 84 N.Y.2d 83 [1994]). Whether the plaintiff can ultimately establish its allegations is not part of the calculus" (EBC I, Inc. v. Goldman, Sachs & Co., 5 N.Y.3d 11, [2005]).

The reader is presumed to be familiar with the prior order of the court.

Facts alleged and arguments presented

Plaintiff was the landlord for Shandell Blitz Blitz & Bookson, LLP (SBB&B) which later became known as Shandell Blitz Blitz & Ashley, LLP ("Shandell Ashley"). Eventually the firm fell into arrears on its rent and plaintiff brought a nonpayment proceeding against SBB&B. Plaintiff obtained a money judgment against SBB&B for \$257,378.72. The action at bar seeks to enforce the judgment the attorneys who personally guaranteed SBB&B's obligations under the lease.

The new claims that plaintiff has added are (among others) against Drew Berenson, CPA and James Shenwick, Esq. Plaintiff alleges that after it obtained the money judgment in Civil Court, Shandell Ashley (as the SBB&B law firm was then

known) sent out a "Notice of Dissolution," notifying its creditors that the firm was winding down its affairs. The Notice of Dissolution (undated), addressed to "Whom it may Concern" stated that the partnership had elected to close for business effective June 30, 2009 and that the partnership operations would continue only to liquidate its assets, transfer its inventory of cases to other lawyers for trial or settlement and satisfy the claims of its creditors and partners. Shandell Ashley partnership assets would be "distributed in accordance with the terms of the Partnership Agreement."

The Notice of Dissolution advised creditors to "send a letter detailing their claims against the Partnership and supporting materials to Drew Berenson, CPA at Tarlow & Co. and to James H. Shenwick, Esq." The Notice of Dissolution identifies Berenson as "the liquidating agent for the Partnership and will distribute monies to creditors on a quarterly basis and provide them with a report detailing the monies collected by the Partnership and the payment to various creditors. . . ." The Notice also states that "Shenwick & Associates has been retained as counsel for the Partnership . . ."

Plaintiff has asserted a claim for "an accounting of prior monies received" against Shenwick, based on claims that Shenwick and Berenson (the CPA) "received various monies and properties belonging to [SBB&B and/or Shandell Ashley] without accounting" and that Berenson and or Shenwick distributed the funds "arbitrarily, unreasonably and capriciously to the detriment and harm of the Plaintiff." Stating that it has only received a single payment of \$5,000 payment, plaintiff states that it is entitled to a "pro-rata distribution of all the monies collected to date by Berenson and Shenwick."

In a sworn affidavit, the president of plaintiff ("Jerome") amplifies that he

expected the money owed by Shandell Ashley would be paid by Berenson who was "under the supervision of Shenwick." Jerome states this is not an action for attorney malpractice (negligence), but for an accounting because Shenwick assisted with the winding down of the firm's business and he monitored the firm's assets and payments.

Shenwick maintains that plaintiff lacks standing to bring this action for an accounting against him because plaintiff was neither his client nor his fiduciary. Shenwick maintains that his client was Shandell Ashley and he provided his services solely for Shandell Ashley's benefit, a fact that plaintiff was well aware of.

Discussion

Plaintiff does not squarely identify its claim against Shenwick as being for negligence or a tort. Absent fraud, collusion, malicious acts or other special circumstances, an attorney is not liable to third parties for caused by professional negligence (Chinello v. Nixon Hargrave et al., 15 AD3d 894 [4th Dept 2005]). Furthermore, unless the attorney placed his or her own interests above that of his or fiduciary, the attorney is not liable for breach of fiduciary duty to a third party with whom s/he is not in privity (Chinello v. Nixon Hargrave et al., supra).

Breach of Fiduciary Duty, on the other hand, is a tort. In deciding whether there is a fiduciary relationship, the a court will look to see "whether a party reposed confidence in another and reasonably relied on the other's superior expertise or knowledge" (Wiener v. Lazard Freres & Co., 241 A.D.2d 114, 12 [1998]).

It is unrefuted that Shenwick was hired to assist Shandell Ashley in winding up its affairs and the partnership was his client (see Gaillard Realty v. Manhattan Brass Co., 238 AD 84 [1st Dept 1933]). This is clearly stated in the Notice of Dissolution that

Shandell Ashley sent to plaintiff and other creditors. The Notice identifies Berenson as the liquidating agent and Shenwick's firm as the partnership's attorneys.

All of Shenwick's interaction with plaintiff was as an attorney with the law firm acting on behalf of Shandlel Ashley. Even assuming Shenwick answered any of the liquidation agent's legal inquiries, Shenwick provided such advice, direction, etc., on behalf of his client, Shandell Ashley, not for the particular benefit of the plaintiff or any other creditor. There is no claim by plaintiff that Shenwick acted out of self interest (Chinello v. Nixon Hargrave et al., supra).

Any claim by plaintiff that it had a fiduciary relationship with Shenwick is without any factual basis, since Shenwick and plaintiff did not have a relationship based upon confidence.

Absent a statutory right or fiduciary relationship, plaintiff has no right to an accounting (*see In re Hunter*, 4 N.Y.3d 260 [2005]; Hathaway v. Clendening Co., 135 A.D. 407 [1st Dept. 1909]). Affording the complaint a liberal construction, plaintiff has failed to state a cause of action against defendant Shewick and the fifth cause of action against him for an accounting is hereby dismissed.

Conclusion

The motion by James H. Shenwick, Esq. for the pre-answer dismissal of the claims against him is granted in all respects.

It is hereby,

ORDERED that the Clerk shall enter judgment in favor of defendant James H.

* 7]
Shenwick, Esquire dismissing the complaint against him; and it is further

ORDERED that any relief requested but not specifically addressed is hereby denied; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, New York
January 3, 2011

So Ordered:



Hon. Judith J. Gische, J.S.C.

FILED

JAN 05 2011

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