

Seldon v Rebenack, Aronow & Mascolo, LLP

2011 NY Slip Op 32364(U)

August 15, 2011

Sup Ct, NY County

Docket Number: 101042/11

Judge: Eileen A. Rakower

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

PRESENT: HON. EILEEN A. RAKOWER

PART 15

Index Number : 101042/2011

SELDON, PHILIP

vs.

REBENACK, ARONOW & MASCOLO,

SEQUENCE NUMBER : 001

DISMISS ACTION

INDEX NO. 101042/11

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

this motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

FILED

AUG 18 2011

NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION TO BE GRANTED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

Dated: 8/15/11


J.S.C.

HON. EILEEN A. RAKOWER

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

-----X
PHILIP SELDON,

Plaintiff,

Index No.
101042/11

- against -

Seq No.: 001

Decision and
Order

REBENACK, ARONOW & MASCOLO, LLP and
JAY MASCOLO,

FILED

Defendants.

AUG 18 2011

-----X
HON. EILEEN A. RAKOWER, J.S.C.

NEW YORK
COUNTY CLERK'S OFFICE

Plaintiff, Philip Seldon, brings this action for legal malpractice as the result of defendants' representation of plaintiff's New Jersey based companies beginning in June of 2007. Defendants now move to dismiss, pursuant to CPLR 3211(a)(8) for lack of personal jurisdiction. Plaintiff, acting *pro se*, opposes the motion.

In November 2006, a judgment was entered against Seldon in Supreme Court, New York County, and in favor of Andrew J. Spinnell, in the amount of \$515,013.00. Defendants did not represent plaintiff in the New York action. In an effort to collect the judgment, Spinnell docketed his New York judgment in Superior Court of New Jersey. As a result, a bank affiliated with two of Seldon's companies, restricted those companies from accessing funds.

Thereafter, Seldon was referred by the Middlesex County Bar Association to defendants Rebenack, Aronow & Mascolo, LLP ("Rebenack"), a New Jersey law firm. Plaintiff signed a retainer agreement with Rebenack on June 27, 2007. Rebenack commenced an action ("the bank action"), and filed an order to show cause in Superior Court, seeking to lift the restrictions. The Order to Show Cause was denied and the court permitted Spinnell to withdraw certain funds in satisfaction of his

judgment. In October 2007 Spinnell filed a separate action, also in Superior Court, alleging that plaintiff, individually, and through his corporations, had fraudulently conveyed funds. In May 2009 a Superior Court judge decided that Spinnell's claims were barred because he failed to assert them in the bank action. In July 2010, the Superior Court Appellate Division reversed the lower court and remanded the action to trial court to determine "whether there were any issues of material fact."

In December 2010 the action was tried and the judge found that Seldon fraudulently conveyed his funds and was directed to pay Spinnell the monies owed on the New York judgment. At the trial Rebenack represented the corporations and Seldon appeared *pro se*. Thereafter, Seldon commenced the instant malpractice action by service of a Summons with Notice on January 26, 2011, alleging that Rebenack failed to properly prepare him for trial, and failed to properly represent him.

Rebenack, in support of its motion, submits: the complaint; a copy of the Appellate Division decision; a copy of the retainer agreement; and a copy of a Superior Court "Order and Judgment." Rebenack argues that it is a New Jersey firm that does not advertise or conduct business in New York. The underlying matter, Rebenack asserts, arose out of New Jersey litigation, and all meetings, and preparation for trial were done in New Jersey.

Rebenack admits that it "shared a single office" in New York City with a New York attorney from 2009 until January 2011, but, through the affidavit of defendant Jay Mascolo, claims that it had no staff or telephone listing for that office, and that the firm did not hold a New York bank account. Rebenack further concedes that the New York address was listed on its letterhead during that period, but asserts that the office was only used three times to hold EBTs in unrelated insurance matters, and that the office was now closed due to non-use.

Seldon, in opposition, claims that:

Jay Mascolo repeatedly telephoned [him] in New York City regarding his representation as well as e-mailing and faxing him in New York City. He specifically arranged to provide representation to . . . Seldon by telephone in New York City on December 18, 2010 to prepare him for trial in a tape recorded telephone meeting where he devoted half an hour in preparing for trial. During the course of his attorney/client

relationship Jay Mascolo participated in more than fifty telephone conversations with . . . Seldon and sent him more than thirty emails to his office in New York City . . .

CPLR 3211(a)(8) states:

. . . A party may move for judgment dismissing one or more caused of action asserted against him on the ground that:

(8) the court has not jurisdiction of the person of the defendant . . .

New York courts have jurisdiction over a non-domiciliary if that entity “transacts any business within the state or contracts anywhere to supply goods or services in the state . . .” “A non-domiciliary . . . may . . . reasonably foresee the prospect of defending a suit there if it purposefully avails itself of the privilege of conducting activities within the forum State.” (*LaMarca v. Pak-Mor Manufacturing Co.*, 95 NY2d 210,216[2000])(internal citations omitted). “The focus is on the contacts between the nonresident defendant and the business centered in New York . . . the salient consideration . . . is whether the assertion of jurisdiction comports with due process . . . (*Pramer S.C.A. v. Abaplus International Corporation*, 2010 WL 2302367(N.Y.A.D. 1 Dept.).

Plaintiff urges that defendant was transacting business pursuant to CPLR 302, as evidenced by “fifty telephone calls” and “thirty emails” defendant made to plaintiff in New York. Plaintiff cites to *Fischbarg v. Doucet* (9 NY3d 375 [2007]) to support his contention that such communications with plaintiff while plaintiff was in New York are sufficient to confer jurisdiction. However, unlike *Fischbarg*, defendant did not solicit plaintiff in New York. Rather, plaintiff sought a New Jersey attorney and contacted Rebenack in New Jersey based upon a referral from a New Jersey Bar Association.

In order to determine whether a foreign corporation is “doing business” in New York, pursuant to CPLR 301, “there is no precise test of the nature or extent of the business that must be done, all that is requisite is that enough be done to enable us to say that the corporation is here . . . [i]f it is here it may be served.” (*Tauza v. Susquehanna Coal Co.*, 220 NY 259[1917]).

Although a plaintiff bears the ultimate burden of proof on the issue of personal jurisdiction, in opposing a motion to dismiss pursuant to CPLR 3211(a)(8) on the ground that discovery on the issue of personal jurisdiction is necessary, plaintiffs need not make a prima facie showing of jurisdiction, but instead must only set forth "a sufficient start," and "should have further opportunity to prove other contacts and activities of the defendant in New York as might confer jurisdiction under the long arm statute, thus enabling them to oppose the motion to dismiss." (*Peterson v. Spartan Industries, Inc.*, 33 NY2d 463[1974]).

Rebenack maintained an office in New York until January 2011, in or around the time the summons and notice would have been served. Additionally, the New York address was listed on Rebenack's letterhead during the period from 2009 through January 2011. Thus, there is sufficient basis to deny Rebenack's motion and permit discovery on the issue of whether Rebenack was "doing business" in New York. (*see*; CPLR 3211[d]).

Wherefore it is hereby

ORDERED that defendant's motion is denied without prejudice to a new motion at the close of discovery on the jurisdictional issue; and it is further

ORDERED that the parties shall appear for a Preliminary Conference on Tuesday October 11, 2011 at 9:30 a.m. in Room 308 at 80 Centre Street.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: August 15, 2011


EILEEN A. RAKOWER, J.S.C.
FILED

AUG 18 2011

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