

**Strumwasser v Zeiderman**

2011 NY Slip Op 32971(U)

October 18, 2011

Supreme Court, New York County

Docket Number: 113524/10

Judge: Joan A. Madden

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

PRESENT: How Joan A. Madden

PART U

Index Number : 113524/2010  
**STRUMWASSER, STUART**  
vs.  
**ZEIDERMAN, ESQ., LISA**  
SEQUENCE NUMBER : 001  
DISMISS

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

PAPERS NUMBERED

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the answered ~~Memorandum~~ Memorandum ~~Decision~~ Decision and order.

**FILED**

NOV 09 2011

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: October 18, 2011

[Signature]  
J.S.C.

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 11

-----x  
STUART STRUMWASSER,

Plaintiff,

Index No.: 113524/10

-against-

LISA ZEIDERMAN, ESQ., MARTIN BLAUSTEIN,  
ABV/CPA, MICHAEL MCLAUGHLIN, CPA,  
JOHNSON & COHEN, LLP, EISNERAMPER, LLP  
(FORMERLY KNOWN AS AMPER, POLITZINER &  
MATTIA ACCOUNTING),

Defendants.

-----x  
JOAN A. MADDEN, J.:

**FILED**

NOV 09 2011

NEW YORK  
COUNTY CLERK'S OFFICE

Defendants Lisa Zeiderman Esq. (Zeiderman) and Johnson and Cohen, LLP (J&C) (together, the law firm) move, pursuant to CPLR 3211 (a) (1) and (7), to dismiss plaintiff's amended complaint asserted as against them with prejudice (motion seq. no. 001).

Defendants Martin Blaustein, CPA/ABV (Blaustein), Michael McLaughlin, CPA (McLaughlin), and EisnerAmper LLP f/k/a Amper, Politziner & Mattia (collectively, the EisnerAmper defendants) move, pursuant to CPLR 3211 (a) (7) to dismiss any and all claims asserted as against them (motion seq. no. 002).<sup>1</sup>

Plaintiff opposes both motions, which are granted for the

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<sup>1</sup>Motion sequence numbered 001 and 002 are consolidated for disposition.

[\* 3]  
reasons below.

#### BACKGROUND

According to the complaint, plaintiff and his former wife (Wife) were married on December 6, 2003, and, in March of 2005, he started a business by the name of Snow Beverages. As part of starting Snow Beverages, plaintiff created a business plan containing financial projections, and he received start-up capital from investors in the amount of \$1.4 million. In September, 2006, plaintiff's wife filed for divorce.

Plaintiff alleges that at the time that the divorce proceedings commenced, Snow Beverages was operating at a loss. Complaint ¶ 20. Also at that time, plaintiff had individual assets of \$250,000.00, Wife had individual assets of \$2 million, and the couple had essentially no joint assets except for a minority interest in Snow Beverages. *Id.* ¶¶ 21 & 22.

Prior to the law firm's retention, Wife's prior counsel asked for an appraisal of the couple's jointly held stock in Snow Beverages, and Richard Friedman (Friedman) was appointed by the court to conduct the appraisal. *Id.* ¶¶ 26-28. The complaint alleges that Friedman conducted the appraisal and submitted his written report to the court in June of 2007. *Id.* ¶¶ 29-37.

In August of 2007, J&C was retained by Wife to assume her representation in the divorce action, and, in September, 2007, the law firm offered to settle the divorce action pursuant to

terms that sought no compensation for the Snow Beverages stock. *Id.* ¶¶ 39 & 44. Plaintiff refused the settlement offer, and plaintiff's counsel filed a motion seeking to be relieved of the cost of the Friedman appraisal, which he deemed to be unnecessary, and seeking counsel fees for alleged "dilatatory delay tactics." *Id.* ¶ 45.

In opposition to plaintiff's motion, the law firm submitted a copy of the Snow Beverages business plan, which plaintiff alleges purposely misled the court by removing one page from that document. *Id.* ¶¶ 46-53. The page that was allegedly missing reads:

\*Seed Investment to Date: \$337K  
 \*Total Capital Raise: \$1.85MM  
 \*Funds still needed: \$1MM  
 \*Use of Funds (Summary Totals in Year One for Major Item):  
 -Salaries (executive, salespeople and consultants): \$528K  
 -Advertising/Consumer-Marketing in NYC, Dallas and Boston):  
   \$350K  
 -Sampling Demonstrations in various markets at major  
   retailers: \$325K  
 -General Marketing/Promotion/Free Goods/Etc.: \$218K  
 \*Liquidity Events:  
 It is the company's intention to attempt to create liquidity for investors within five years through one of two possible scenarios: sell the business to a larger food or beverage industry player; do a public offering of stock.

This document is for information only and is not an offering for sale of any securities of the company. Information disclosed herein should be considered proprietary and confidential. The document is the property of Snow Beverages and may not be disclosed, distributed, or reproduced without the express written permission of Snow Beverages."

Motion, Ex. B.

Plaintiff maintains that it was deceitful for the law firm to represent that the financial projections were anything other

than informational, and bases the allegation of deceit on this representation.

The law firm contends that it was arguing, on behalf of Wife, that the issue of the value of the jointly-held stock in Snow Beverages was an issue for consideration in the distribution of marital assets. The law firm maintains that its presentation of the business plan was to oppose plaintiff's motion to be relieved of the cost of the court-appointed appraisal, and that the presentation of the business plan was to provide evidence to the court that plaintiff had ascribed a value to Snow Beverages' stock. According to the law firm, it is irrelevant whether the business plan was designed for informational or investment purposes; its import was to demonstrate plaintiff's own concept of the value of the stock.

In the complaint, plaintiff also alleges that it was deceitful for the law firm to represent that Snow Beverages was profitable since, at the time of the divorce proceedings, it was losing money. Complaint, ¶¶ 59-63. In support of its instant motion, the law firm has attached a copy of the Snow Beverages' website of December 15, 2010, that indicates that the company was still operating as of that date. Motion, Ex. C.

The complaint further alleges that the law firm, on behalf of Wife, engaged a second appraiser, co-defendant Blaustein, to appraise the value of the Snow Beverages stock, which, plaintiff

asserts, was a retaliatory tactic on the part of the law firm. Complaint ¶¶ 68-70. Blaustein valued the Snow Beverages' stock at over \$1.5 million, whereas Friedman, the court-appointed expert, determined that it was worthless. *Id.* ¶ 73. Plaintiff maintains that when he moved the court to preclude the Blaustein appraisal on procedural grounds, the court relied on the informational and hypothetical business plan's financial projections. *Id.* ¶ 76.

At this stage in the divorce proceedings, plaintiff decided to settle the divorce action because of what he characterizes as the "leverage unethically gained" by the law firm. *Id.* ¶¶ 81-83. Plaintiff further alleges that his divorce attorney advised him that the issue of the valuation of a pre-revenue entity would be complicated and costly, and plaintiff alleges that his decision to settle was based on his financial inability to afford the cost of a trial. *Id.* ¶¶ 86-88.

The stipulation of settlement entered into by plaintiff and Wife included the following representations:

"WHEREAS the parties hereto each warrant and represent to one another that they, and each of them, fully understands all of the terms, covenants, conditions, provisions and obligations incumbent upon each of them by virtue of this Stipulation to be performed or contemplated by each of them hereunder, and each believes the same to be fair, just, reasonable and to his or her respective individual best interests;

\* \* \*

ARTICLE XV  
FULL DISCLOSURE

(a) Each of the parties represents that both the legal

\* 7]

and practical effect of this Stipulation in each and every respect has been explained to them by their respective attorneys and that each has executed this Stipulation of their own free choosing; further, that each of the parties fully understands the facts and circumstances involved herein and has been fully informed of his and/or her respective legal rights, benefits and liabilities; each party has received advice and counsel from his or her respective attorneys, and the parties believe that this is a fair, just and reasonable Stipulation; that the same has not been entered into as a result of fraud, duress or undue influence exercised by either party upon the other or by any other person or persons upon either of them . . . ."

Motion, Ex. D.

In April of 2008, plaintiff filed a grievance against Zeiderman with the Grievance Committee for the Ninth Judicial District of New York, in which he alleged basically the same allegations as those in the complaint. Complaint, ¶ 91. By letter dated May 20, 2009, the Grievance Committee determined that Zeiderman "did not mislead or attempt to mislead the court as alleged in your complaint." Motion, Ex. F.

The complaint alleges the following causes of action against Zeiderman and J&C: first cause of action for fraud, altering evidence and making false statements, asserted as against Zeiderman; second cause of action for violation of Judiciary Law § 487 asserted as against Zeiderman; fifth cause of action for fraud, altering evidence and making false statements asserted as against J&C; and sixth cause of action for violation of Judiciary Law § 487 asserted as against J&C.

The law firm maintains that it was simply zealously

representing its client and that plaintiff has failed to allege any fraudulent conduct or violation of the Judiciary Law. The law firm maintains that plaintiff's position rests with his concept of the value of Snow Beverages, but that he never asserts that he relied on any of the valuation documents that he alleges were fraudulently introduced to the court in the divorce proceedings. Nor, states the law firm, has plaintiff alleged any conduct that violates Judiciary Law § 487, which requires a chronic and extreme pattern of legal delinquency. Moreover, the law firm points out that the Grievance Committee determined that Zeiderman had not violated that section of the Judiciary Law, which should be determinative in the instant matter.

In opposition to the law firm's motion, plaintiff contends that the law firm fabricated evidence and deliberately made false statements to the court and was not merely zealously representing Wife as the law firm claims. Plaintiff maintains that these deceitful actions on the part of the law firm forced him into agreeing to a settlement because he could no longer afford to contest the proceedings. Further, plaintiff avers that he provided all of the documentation that Friedman required, and that the law firm's characterization of the business plan as being essential is incorrect.

Plaintiff contends that he has made out a prima facie case for all of the causes of action alleged as against the law firm

so as to withstand the instant motion, and that the determination of the grievance committee has no collateral estoppel or res judicata effect on the current action.

In reply, the law firm states that plaintiff initially appeared pro se but subsequently retained his current counsel to oppose the instant motion. However, the law firm asserts that plaintiff's counsel, while admitted to practice in New York, does not maintain an office in this state and is, therefore, in violation of Judiciary Law § 470 and may not represent plaintiff. Otherwise, the law firm reiterates its initial position.

In motion sequence number 002, the EisnerAmper defendants state that they were engaged by Wife to re-evaluate the value of the Snow Beverages' stock that was jointly held by plaintiff and Wife because the law firm did not believe that the first evaluation was accurate. In their written report, which was completed on November 19, 2007, they determined that the value of the jointly held stock was approximately \$1.5 million, based on generally accepted valuation methods. The EisnerAmper defendants state that, although plaintiff disagrees with this report, he claimed that he did not engage his own experts because he could not afford the expense of the litigation.

The EisnerAmper defendants contend that the basis of Blaustein's evaluation was a transaction that only occurred close to the date of the evaluation that involved an investment of

capital by a third party for an ownership interest in return for Snow Beverages' stock. Motion, Ex. A. The EisnerAmper defendants aver that plaintiff never alleges that he learned of any fraudulent statements in the Blaustein valuation after agreeing to settle with Wife.

The complaint alleges the following causes of action as against the EisnerAmper defendants: third cause of action for fraud asserted as against Blaustein; fourth cause of action for fraud as against Michael McLaughlin (McLaughlin), who allegedly assisted in the preparation of the Blaustein report; and seventh cause of action for fraud asserted as against EisnerAmper LLC.

The EisnerAmper defendants argue that the complaint must be dismissed as against them since there is no viable cause of action against an adversary's expert. Further, plaintiff cannot show fraud since he has not alleged justifiable reliance on his adversary's expert report. Lastly, the EisnerAmper defendants maintain that no cause of action based on a theory of respondeat superior can be maintained against EisnerAmper LLP.

In opposition to the motion by EisnerAmper defendants, plaintiff asserts that the law firm demanded a second appraisal of Snow Beverages in retaliation as he refused to settle the matter after Friedman's evaluation was submitted because the settlement was dependent upon his relinquishing his right to submit a motion seeking sanctions and a reallocation of fees.

Plaintiff maintains that the law firm fabricated an argument that he failed to provide Friedman with Snow Beverages' business plan, which, the law firm argued, was essential to a complete evaluation of the entity's worth. The complaint states that Friedman wrote to the Grievance Committee indicating that plaintiff fully complied with all of his document requests. Complaint, ¶ 96. Hence, plaintiff maintains that the EisnerAmper defendants acted in collusion with the law firm to falsify the report that it submitted to the court.

Plaintiff argues that he may maintain an action against an adversary's expert if the expert is involved in a larger fraudulent scheme, such as he has alleged in his complaint. Further, plaintiff contends that justifiable reliance is a question for a jury and cannot be dismissed by dispositive motion.

In reply, the EisnerAmper defendants assert that the exception to suing an adversary's expert as being part of a larger fraudulent scheme is inapplicable to the case at bar, since plaintiff had every opportunity to refute the Blaustein report and the report was prepared only for a determination of equitable distribution in a divorce proceeding. The EisnerAmper defendants say that plaintiff has not alleged a fraud for any larger purpose. Moreover, the EisnerAmper defendants point out that the settlement was overseen and approved by the matrimonial



1999). Further, if any question of fact exists with respect to the meaning and intent of the contract in question, based on the documentary evidence supplied to the motion court, a dismissal pursuant to CPLR 3211 is precluded. *Khayyam v Doyle*, 231 AD2d 475 (1<sup>st</sup> Dept 1996).

The law firm's motion to dismiss the complaint asserted as against Zeiderman and J&C (motion sequence number 001) is granted.

The basis of plaintiff's complaint is his disagreement with his wife's expert's valuation of Snow Beverages. The thrust of plaintiff's causes of action asserted as against the law firm is that the law firm presented a valuation to the court which included his business plan but excluded one page from that document that stated that the business plan was intended for informational purposes only. Plaintiff contends that the business plan was improperly included in Blaustein's analysis for this reason.

The court notes that plaintiff never alleges that he believed the valuation for Snow Beverages prepared by Blaustein, but merely asserts that, on the advice of his own counsel, he decided to settle the matter rather than incur the expense of challenging the appraisal.

In order to allege a cause of action for fraud, the person

claiming injury must state

"'a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury' [citation omitted]."

*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178 (2011).

A clear reading of the complaint indicates that plaintiff never believed the valuation and never relied upon it. Instead, the complaint alleges that plaintiff relied upon the representation of his own counsel that challenging the valuation would be expensive, and his counsel's advice to settle. Furthermore, the alleged misrepresentation was not made to plaintiff, according to the complaint, but was made to the court, which never relied upon it because the parties settled. In addition, plaintiff signed the stipulation of settlement in which he affirmatively stated that he was not fraudulently induced to enter into the agreement. Therefore, by his own admission, no fraud was perpetrated on him.

"To prevail on a claim of fraud, a plaintiff must show that [he] actually relied on the purported fraudulent statements and that [his] reliance was reasonable or justifiable. ... Here, the plaintiff, who was represented by counsel, decided to proceed with the [settlement], despite knowing [that the valuation was flawed]; thus [his] reliance cannot be considered reasonable or justifiable."

*KNK Enterprises, Inc. v Harriman Enterprises, Inc.*, 33 AD3d 872, 872 (2d Dept 2006).

It is clear from the four corners of the complaint that plaintiff's decision to settle resulted from his own evaluation of what was in his best interests at the time and not on any reliance on Blaustein's report. *J.A.O. Acquisition Corp. v Stavitsky*, 8 NY3d 144 (2007).

Based on the foregoing, plaintiff's causes of action for fraud asserted as against Zeiderman and J&C are dismissed.

As for plaintiff's causes of action based on an alleged violation of Judiciary Law § 487, while the court agrees with plaintiff that the Grievance Committee's determination does not operate as res judicata or to collaterally estop the instant claim (*Bennardo v Equitable Land Services, Inc.*, 244 AD2d 304 [2d Dept 1997]),

"[plaintiff has] failed to establish a chronic or extreme pattern of legal delinquency that would warrant civil relief and the imposition of treble damages pursuant to Judiciary Law § 487."

*Cohen v Law Offices of Leonard & Robert Shapiro*, 18 AD3d 219, 220 (1<sup>st</sup> Dept 2005); *Kaminsky v Herrick, Feinstein LLP*, 59 AD3d 1 (1<sup>st</sup> Dept 2008); *Markard v Bloom*, 4 AD3d 128 (1<sup>st</sup> Dept 2004); *Havell v Islam*, 292 AD2d 210 (1<sup>st</sup> Dept 2002).

Since plaintiff has failed articulate or allege a chronic or extreme pattern of behavior on the part of the law firm, plaintiff's causes of action asserted as against Zeiderman and J&C for violation of the Judiciary Law are dismissed.

As the court is granting the law firm's motion to dismiss

the complaint for failure to state a claim and based on documentary evidence, it need not address the law firm's argument that the complaint should be stricken based on plaintiff's counsel's alleged violation of Judiciary Law § 470, which requires that an attorney maintain an office in New York in order to practice law in the state.<sup>2</sup>

The EisnerAmper defendants' motion to dismiss the complaint as asserted against them (motion sequence number 002) is also granted.

That portion of plaintiff's complaint alleging fraud and deceit as against Blaustein and McLaughlin is dismissed.

The alleged fraud and deceit concerns the report prepared by Blaustein as an appraisal of the value of the Snow Beverages' stock for the purpose of the equitable distribution of marital assets.

"Statements made by parties, attorneys, and witnesses in the course of a judicial or quasi-judicial proceeding are absolutely privileged, notwithstanding the motive with which they are made, so long as they are material and pertinent to the issue to be resolved in the proceeding."

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<sup>2</sup>It has been held that when an attorney violates Judiciary Law § 470 by failing to maintain a New York office, any pleadings drafted and filed by him or her may be stricken. *Empire HealthChoice Assurance, Inc. v Lester*, 81 AD3d 570 (1<sup>st</sup> Dept 2011); compare *Elm Mgt. v. Sprung*, 33 AD2d 75 [2d Dept 2006]. Notably, however, in the instant case, the attorney did not provide any affirmation in support of plaintiff's opposition or file or prepare any pleadings, but wrote plaintiff's opposition memorandum of law, in which his name, address and telephone number are clearly indicated.

*Sinrod v Stone*, 20 AD3d 560, 561 (2d Dept 2005); *Mosesson v Jacob D. Fuchsberg Law Firm*, 257 AD2d 381 (1<sup>st</sup> Dept 1999).

As experts preparing a report for evidentiary use in a judicial proceeding, Blaustein and McLaughlin are entitled to absolute immunity from the type of claims herein asserted by plaintiff.

In opposition to this motion, plaintiff, relying on *Newin Corp. v Hartford Accident & Indemnity Co.* (37 NY2d 211, 217 [1975]), contends that the report was part of a "larger fraudulent scheme" to entice him to enter into the stipulation of settlement and, hence, comes within the exception enunciated in *Newin*. However, the Court in the *Newin* explained the exception to the general rule of absolute privilege for a witness' testimony and evidence "is based upon the principle that a fraudulent scheme which is greater in scope than the issues that were determined in the action or proceeding may become the basis of an action [internal quotation marks and citation omitted]." *Id.* at 217-218. In the *Newin* case, the "greater fraud" concerned all excess coverage bonds issued by the defendant, not just the bonds that were the subject of the underlying proceedings.

In the case at bar, taking the pleadings in a light most favorable to plaintiff, plaintiff has only alleged that the deceit involved the resolution of that one divorce proceeding, and did not involve any other issues. Further, the court finds that

there is no question that an appraisal of jointly-held stock in a close corporation is material to the issue of the equitable distribution of marital property.

Therefore, despite the exception for absolute immunity for a witness' testimony and evidence if it is part of a larger scheme outside of the issues under consideration, "plaintiff[ has] not alleged facts from which a larger fraudulent design may be inferred." *Martinson v Blau*, 292 AD2d 234, 235 (1<sup>st</sup> Dept 2002). "[P]laintiff's conclusory allegation of a larger fraudulent scheme appears to be 'a transparent and patently insufficient attempt to bring this action within the *Newin* exception' [internal citation omitted]." *Cattani v Marfuggi*, 74 AD3d 553, 555 (1<sup>st</sup> Dept 2010).

In addition, for the reasons articulated above with respect to plaintiff's causes of action sounding in fraud asserted as against the law firm, the complaint specifically states that plaintiff did not rely on the Blaustein report, which defeats any cause of action for fraud. *Leonard v Gateway II, LLC*, 68 AD3d 408 (1<sup>st</sup> Dept 2009). Even though plaintiff argues that reasonable reliance cannot generally be established by a motion for summary judgment, the complaint never alleges that he relied on the report and, hence, these causes of action asserted as against Blaustein and McLaughlin are dismissed.

The seventh cause of action, asserted as against

EisnerAmper, is also dismissed, since it is based on a theory of respondeat superior and negligent supervision. Since the claims asserted as against the employees have been dismissed, the cause of action asserted as against the employer is also dismissed. *Ramautar v Wainfeld*, 273 AD2d 214 (2d Dept 2000).

**CONCLUSION**

Based on the foregoing, it is hereby

ORDERED that the motion of defendants Lisa Zeiderman and Johnson & Cohen LLP (motion sequence number 001) is granted and the complaint is dismissed as against said defendants, and the Clerk is directed to enter judgment accordingly in favor of said defendants; and it is further

ORDERED that the motion of defendants Martin Blaustein, ABV/CPA, Michael McLaughlin, CPA, and EisnerAmper LLP (formerly known as Amper, Politziner & Mattia) (motion sequence number 002) is granted and the complaint is dismissed as against said defendants, and the Clerk is directed to enter judgment accordingly in favor of said defendants.

Dated: October 18, 2011

**FILED**

ENTER: NOV 09 2011

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