

**Sergeants Benevolent Association Annuity Fund v
Renck**

2005 NY Slip Op 30028(U)

May 18, 2005

Supreme Court, New York County

Docket Number:

Judge: Herman Cahn

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

PRESENT: HERMAN CAHN

PART 49

Justice

Sergeants Benevolent

INDEX NO. 601735/03

MOTION DATE 5/11/05

- v -

MOTION SEQ. NO. 013

John T. Reuck

MOTION CAL. NO. _____

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

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION IN MOTION SEQUENCE

FILED

MAY 23 2005

CLERK OF COURT

Dated: May 18, 2005

Herman Cahn
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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 49

-----X

SERGEANTS BENEVOLENT ASSOCIATION :
ANNUITY FUND, :

Plaintiff,

- against -

JOHN T. RENCK, in his individual capacity, :
JOHN J. RENCK, in his individual capacity, :
MONITORING AND EVALUATION SERVICES, INC., :
and TRAINER WORTHAM & COMPANY, INC., :

Defendants.

-----X

JOHN T. RENCK, JOHN J. RENCK and :
MONITORING AND EVALUATION SERVICES, INC., :

Plaintiffs,

- against -

SERGEANTS BENEVOLENT ASSOCIATION, INC., :
and EDWARD MULLINS, in his individual :
capacity and in his capacity as President of the :
Sergeants Benevolent Association, :

Defendants.

-----X

Herman Cahn, J.

Monitoring and Evaluation Services, Inc. ("MES") moves (seq. no. 013), *inter alia*, to strike the jury demand of Sergeants Benevolent Association Annuity Fund (the "SBA Fund" or the "Fund"), CPLR 4102.¹

¹ MES further moves for partial summary judgment. That prong of the motion was denied from the bench at the end of oral argument, since there are obvious issues of fact present.

Background:

The SBA Fund administers, invests, and oversees an annuity fund of the Sergeants Benevolent Association, an association made up of New York City Police Department Sergeants or their descendants. By a written agreement dated September 1, 1994, the SBA Fund retained MES, an investment consulting firm, to perform certain services for it.

John J. Renck is president and sole shareholder of MES and John T. Renck, his son, is its vice president. Each of the Rencks is registered as a general securities principal, introducing broker, general securities representative, and agent with the National Association of Securities Dealers and this State.

The SBA Fund trustees are Sergeants on active duty in the Police Department.

The consulting agreement obligates MES to provide quarterly annual performance measurement reports to the SBA Fund trustees. It specifies that the reports "will monitor the investment managers' investment return by . . . continuously monitoring the investment manager's performance and evaluating the investment return in accordance with the standards and objectives described in [the Fund's] Statement of Policy" (SBA Fund/MES Consulting Agreement ¶ A). The agreement also specifies the reports' content, including the market value of all assets at the beginning of a quarter; the net contributions or withdrawals for the period; income from interest from cash equivalents and bonds and stock dividends; capital appreciation or depreciation for equity and fixed income; total investment return for the quarter in dollar and percentage terms; and total market value of the portfolio at the end of the quarter, as well as the asset allocation in percentage and dollar terms.

The Agreement, at paragraph F, requires MES to provide interim reports at no

additional cost, as well as investment performance measurement reviews of past performance of an investment manager, upon reasonable request of the trustees. The Agreement, at paragraph G, further obligates MES to provide assistance in conducting investment management searches when the trustees determine revision of asset allocations are necessary.

Defendant Trainer Wortham & Company ("TWC"), an investment advisor, was retained as one of five investment portfolio managers by the SBA Fund's predecessor, the Superior Officers Council, pursuant to a written discretionary investment management agreement dated August 22, 1990, and a limited power of attorney. In the agreement, TWC expressly acknowledges that it is a "fiduciary," as that term is defined by the (Federal) Employee Retirement Income Security Act of 1974 (ERISA). As portfolio manager, TWC managed a portion of the Fund's assets. It was authorized to conduct discretionary trading consistent with the Fund's investment objectives. The primary objective, as set forth in the discretionary investment agreement and as acknowledged in TWC letters to the Fund dated August 22, 1990, and July 1, 1993, is conservative capital appreciation.

The SBA Fund commenced this action to recover more than \$27,000,000.00 in market losses incurred from March 2000 through July 2002 in the portion of the SBA Fund's portfolio managed by TWC. In the complaint, the SBA Fund asserts three causes of action against the Rencks in their individual capacities and against MES for breach of fiduciary duty. The Fund bases its claims on allegations that the Rencks, individually, and MES breached that duty by failing to rebalance the Fund asset allocation in order to meet the Fund's primary investment objective, by charging and retaining undisclosed, excessive mark-ups and commissions, and by failing to terminate TWC from its position as a portfolio manager. The

Fund further alleges that the Rencks, individually, and MES failed to recommend that the Fund take these actions. It also asserts claims against the Rencks, individually, and MES for negligent mismanagement and unjust enrichment. TWC is joined on claims of breach of contract and breach of fiduciary duty in failing to follow the primary investment objective, resulting in the loss of \$27,000,000.00 in Fund assets.

The complaint contains nine causes of action² seeking compensatory damages in the nature of losses caused by alleged mismanagement of the Fund's assets. Another cause of action (the eighth, sounding in unjust enrichment) seeks restitution of commissions retained by MES and the Rencks, and the last (the eleventh) seeks an accounting of such commissions in aid of restitution.³

MES moves to strike the SBA Fund's jury demand, arguing that by including a cause of action for an accounting – the eleventh – the Fund waived its right to a jury trial.

Discussion:

A court's determination of a motion to strike a jury demand is governed by an assessment "whether the main thrust of the action is for legal damages or for equitable relief" (*Phoenix Garden Restaurant, Inc. v. Chu*, 234 AD2d 233 [1st Dept 1996]). The inclusion of, a cause, or causes, of action which may be characterized as incidental to the main thrust of the action does not affect the overall right to a jury trial (*Lipson v Dime Sav. Bank*, 203 AD2d 161

² The first through seventh, and ninth and tenth, causes of action (O.S.C. Ex. A [Complaint]).

³ By decision and order dated March 31, 2004, the court granted the Rencks' motion to dismiss the claims asserted against them individually.

[1st Dept 1994]; see, *Pasqua v Pasqua*, 212 AD2d 356 [1st Dept 1995]).

The overwhelming character of this lawsuit is legal; not equitable. Nine out of eleven causes of action seek substantial compensatory damages, at law, on account of alleged mismanagement by MES of the Fund's assets. The Fund's losses occasioned by MES's alleged financial mismanagement permeate the complaint (Complaint ¶¶ 1-132, 136-46). Claims for money damages, even if couched in terms of fiduciary breach, are legal in nature (*Miller v Doniger*, 293 AD2d 282 [1st Dept 2002]; *Lipson, supra*).

The incidental claims for unjust enrichment/accounting are wholly distinct of the main, compensatory, goal of the complaint: to recoup losses which might not have been sustained in the event of prudent asset management by MES. The incidental claims proceed on a theory of restitution, in that they seek a disgorgement of commissions retained by MES on account of its mismanagement (Complaint ¶¶ 133-35, 147-48). Because they are incidental to the overwhelmingly legal causes of action of the complaint, the SBA Fund cannot be said to have waived its right to a jury trial of its first through seven, and ninth and tenth, causes of action for money damages (*Phoenix Garden Restaurant, Inc., supra*; *Lipson, supra*). In circumstances where legal and equitable causes of action are united in one complaint, and the right to a jury trial on the legal claims is not waived, the court may sever the legal causes of action for jury trial, and the equitable causes of action for non-jury trial (CPLR 603; *Vinlis Constr. Co. v Roreck*, 23 AD2d 895 [2d Dept 1965]).

However, the SBA Fund has consented to the dismissal of its eleventh cause of action for an accounting (Plaintiff's Mem. [5/9/05] at 29). While the foregoing consent conceptually extends to the eighth cause of action for unjust enrichment, directly facilitated by an

accounting of unjustly retained commissions, as alleged, the court is not prepared to make that assumption absent an express acknowledgment by the Fund that its consent extends to both, related, equitable, causes of action, should it be so advised.⁴

Accordingly, it is

ORDERED that the motion by Monitoring and Evaluation Services, Inc., to strike plaintiff's jury demand is denied, to the extent of its first through seventh, and ninth and tenth, causes of action; and it is further

ORDERED that plaintiff's counsel shall provide written clarification as to whether said party's consent to dismiss the eleventh cause of action for an accounting extends, as well, to the eighth cause of action for unjust enrichment, within one week from the date hereof; and it is further

ORDERED that the branch of the motion seeking partial summary judgment, is denied.

Dated: May 18, 2005

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⁴ The court is mindful of the rule that once the right to a jury trial is waived through the joinder of legal and equitable claims, it cannot be resurrected by the subsequent dismissal of the equitable claims (*Zimmer-Masiello, Inc. v Zimmer, Inc.*, 164 AD2d 845 [1st Dept 1990]). That rule has no application here, where no such waiver has been found to exist. Consequently, a withdrawal by the Fund of its equitable claims, if it be so advised, can achieve the goal of obviating any need for a non-jury trial in this action.