

Barbara King Family Trust v Voluta Ventures LLC

2005 NY Slip Op 30157(U)

August 24, 2005

Supreme Court, New York County

Docket Number: 0100219/2004

Judge: Herman Cahn

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

Herman Cohen

PART 49

F 0100219/2004

BARBARA KING FAMILY TRUST
vs
VOLUTO VENTURES LLC.

NDEX NO. _____

MOTION DATE 5/23/05

SEQ 5

MOTION SEQ. NO. 003

DISMISS

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

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION IN MOTION SEQUENCE **F I L E D****

AUG 26 2005

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 8/24/05

Herman Cohen
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 49

-----X
THE BARBARA KING FAMILY TRUST, and
BARBARA KING,

Plaintiff,

-against-

Index No. 100219/04

VOLUTO VENTURES LLC, et al.

Defendants.

-----X
CAHN, J.

Defendants Kurzman Eisenberg Corbin Lever & Goodman, LLP and Andrew Goodman (collectively, Kurzman) commenced a third-party action against Charles Brucia & Co. (Brucia), Alice F. Mason Limited, and the law offices of Robert J. Allan & Associates, seeking indemnification and contribution for any liability which may be imposed against Kurzman in the main action. Brucia now moves to dismiss the third-party complaint.

Plaintiffs in the main action, The Barbara King Family Trust and Barbara King, individually (collectively, King), commenced this action against Kurzman and the other defendants based on claims of misrepresentation, breach of fiduciary duty, unjust enrichment, breach of contract, and legal malpractice. There are two claims against Kurzman, of breach of fiduciary duty, and legal malpractice. King claims that she invested or loaned over \$4,000,000 to David Kotowski and his partner, defendant Vincent Molinari, and their business entities, Voluta Ventures, LLC and Consolidated Fibers

LLC. Brucia is alleged to have been King's financial advisor. In the fall of 2001, at Kotowski's urging, King reduced Brucia's role to that of a tax advisor, and turned to Kotowski for investment advice.

Of the several investment decisions that King made based on Kotowski's advice, King's interest in a parcel of New York City real estate, and her investment of \$2,000,000 in Voluto, are the decisions that are relevant to the claims against Kurzman.

In the fall of 2001, King became interested in purchasing a parcel of real estate known as the Chelsea Mansions, located at 337 West 22nd Street, New York, New York. King claims that Kotowski called Kurzman and asked Kurzman to represent King in the purchase of this real estate. When negotiations, which had been ongoing before Kurzman's involvement, fell through, Kurzman allegedly recommended to Kotowski that King purchase the mortgages on the property, since the property had fallen into foreclosure.

King allegedly purchased the mortgages on the Chelsea Mansions on February 6, 2002, for \$1,850,000 by transferring funds from an account at Paine Webber to Kurzman, for payment to the mortgagee. Thereafter, Kurzman submitted a proposed judgment of foreclosure to be signed by the court. Then, on March 18, 2002, Kurzman entered into a stipulation vacating the judgment of foreclosure and agreeing to extend the deadline for the sale until April 15, 2002. The stipulation listed King's legal fees owed to Kurzman at \$12,000. Sometime after March 18, King was told by Kotowski that the mortgages on

Chelsea Mansions had been satisfied, that King would earn a \$150,000 profit after the \$1,850,000 million mortgage had been paid, but that the property had been sold to someone else.

Kotowski then urged King to invest the \$2,000,000 proceeds of the mortgage satisfaction in Voluto. King claims that Kurzman represented Voluto, generally, and that no one from Kurzman discussed King's investment in Voluto with her, or Kurzman's conflict of interest in advising Voluto at the same time as they were advising her, and that no one advised her to seek independent counsel.

On March 26, 2002, Kurzman sent King a series of documents assigning the Chelsea Mansions mortgages to another party, with a request that she sign them. King executed the documents and returned them to Kurzman. Without any legal advice, King then agreed that the \$2,000,000 she was to receive in satisfaction of the mortgages could be transferred directly from Kurzman's escrow account to Voluto for use in a Voluto investment venture with BillboardLive.com. On March 27, 2002, King became a partner in Voluto's limited liability company.

On April 1, 2002, Kurzman received the proceeds of the Chelsea Mansions transaction, as King's attorney. Kurzman paid \$2,000,000 to Voluto, paid itself \$32,700.12 for its fees and disbursements, and gave King a check for the balance, \$553.18.

The main action alleges two claims against Kurzman. The eighth cause of action

alleges that Kurzman breached its fiduciary duty to King through its representation of Vولو and Kotowski, while representing King at the same time, and by raising funds for Vولو's investments, to the detriment of King. Kurzman is alleged to have been unable to give independent legal advice to King regarding her investment in BillboardLive.com, a Vولو venture, because of Kurzman's competing obligations to Vولو. King claims that Kurzman sacrificed her interests in favor of Vولو, causing her to incur damages in excess of \$2,000,000.

In the ninth cause of action, King alleges that Kurzman committed legal malpractice through a series of acts, including: failure to send King a retainer letter; failure to advise King of the risk of pursuing the purchase of a mortgage lien, rather than the real property she was interested in owning; failure to advise King of the impending sale of the subject real estate to a third party; failure to keep King informed about foreclosure proceedings relating to the mortgage lien she had purchased; and failure to inform King of Kurzman's potential conflicts of interest, or to obtain a waiver of those conflicts from her.

The third-party complaint alleges that Brucia, one of the third-party defendants, had allegedly advised King on a regular basis concerning her investments, tax ramifications of her investments, and her attempts to purchase the Chelsea Mansions. Kurzman alleges that in the summer of 2001, Kotowski assumed responsibility for advising King on certain aspects of her financial affairs, but Brucia remained King's tax

and general advisor. From 2001 through 2002, it is alleged that Brucia communicated with and advised King on a regular basis concerning her investments, tax ramifications of her investments, her attempts to purchase the Chelsea Mansions, and her \$2,000,000 investment in Voluto, as well as her prior investments in Voluto.

Kurzman seeks common-law contribution and common-law indemnification from the third-party defendants.

Brucia moves to dismiss the third-party complaint based on a failure to state a cause of action. CPLR 3211 (a) (7). On a motion to dismiss for failure to state a cause of action, every fact alleged must be assumed to be true, and the complaint is to be liberally construed. *M. Sobol, Inc. v Goldman*, 259 AD2d 526 (2nd Dept 1999). A complaint should not be dismissed so long as a cause of action exists. *Id.* “[T]he allegations of the original complaint and the third-party complaint are read together and accepted as true.” *Musco v Conte*, 22 AD2d 121, 122 (2nd Dept 1964).

Despite the liberality of the rules applied to third-party complaints, the mere fact that the third-party claim arose from the same set of facts that the main claim arose from is not enough to state a claim against a third-party defendant. *Cleveland v Farber*, 46 AD2d 733 (4th Dept 1974). Where the wrong allegedly committed by the third-party defendant is separate and distinct from the wrong allegedly committed against the plaintiff by the defendant, third-party plaintiff, the third-party complaint must be dismissed. *Id.*

Brucia has not been named as a defendant in the King action. Any potential liability against Brucia on Kurzman's claims for indemnification and contribution must arise from the same misconduct alleged against Kurzman in the main claim, namely breach of fiduciary duty, and legal malpractice.

In order to successfully plead a claim against Brucia on a theory of contribution, Kurzman must allege that both Kurzman and Brucia owed a duty to King, or to each other, and that by breaching their respective duties, they contributed to plaintiff's ultimate injuries. *Trustees of Columbia University in City of New York v Mitchell/Giurgola Assocs. et al.*, 109 AD2d 449 (1st Dept 1985). Brucia may be found liable to Kurzman for contribution, regardless of the theory of its misconduct, so long as its wrongdoing is alleged to have contributed to the damage to King, complained of in the main complaint. *Id.* at 454.

Kurzman has failed to allege how Brucia's claimed actions contributed to the damage caused to King by Kurzman's alleged breach of fiduciary duty or legal malpractice. Where the eighth cause of action in the main complaint alleges that Kurzman's wrongful conduct arose from a conflict of interest, and a failure to give King independent legal advice regarding investments in Voluta, Kurzman's claims against Brucia allege that Brucia failed to give King proper investment and tax advice regarding her investments in Voluta. Though arising from the same set of facts, even if established as true, Brucia's failure to properly advise King regarding taxes and investments in no

way contributed to Kurzman's alleged failure to give King appropriate legal advice, or to inform her of its own conflict of interest through its dual representation of Voluta, Kotowski and King. Nor can Brucia's role as a tax and investment advisor be viewed as having contributed to Kurzman's acts of legal malpractice alleged in the ninth cause of action, through a failure to send a retainer letter, and other alleged misconduct in Kurzman's representation of King during foreclosure proceedings surrounding the purchase of the Chelsea Mansions.

The claim for indemnification, too, must be dismissed. Indemnity involves the shifting of responsibility to pay for a loss from one who is compelled to pay for the loss without regard to his or her own fault, to the party who more properly bears responsibility for that loss as the actual wrongdoer. *Trustees of Columbia University of City of New York v Mitchell/Guirgola Assocs*, 109 AD2d 449, *supra*. Here, liability against Kurzman is based on its own alleged wrongful conduct, and not on any wrongful acts of Brucia. Even if Brucia was found liable for wrongful tax and investment advice, the allegations of Kurzman's liability for breach of fiduciary duty and legal malpractice rest on Kurzman's own wrongful conduct. This is not a case where responsibility for Brucia's failings has been shifted to Kurzman, and indemnification of Kurzman by Brucia is uncalled for.

Accordingly, it is

ORDERED that the motion to dismiss the third-party complaint against third-party

defendant Charles Brucia & Company is granted, and the third-party complaint against this defendant is severed and dismissed and the Clerk is directed to enter judgment in favor of said defendant; and it further

ORDERED that the remainder of this action shall continue.

Dated: August 24, 2005

ENTER:



J.S.C.

FILED
AUG 26 2005
NEW YORK
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