

**Hand v Kenyon & Kenyon**

2005 NY Slip Op 30307(U)

June 9, 2005

Supreme Court, New York County

Docket Number: 600160/00

Judge: Shirley Werner Kornreich

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

PRESENT: KORNREICH, SHIRLEY WERNER  
Justice

PART 54

Index Number : 600160/2000

HAND, FRANCIS C.

INDEX NO. 600160/00

vs

KENYON & KENYON LLP.

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

Sequence Number : 6

MOTION SEQ. NO. 6

SUMMARY JUDGMENT

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

this motion to (for) summary judgment

PAPERS NUMBERED

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

1, 2

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

3, 4

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

5, 6

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed Decision and Order.

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

JUN 15 2005

Dated: June 9, 2005

SHIRLEY WERNER KORNREICH  
J.S.C.  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF NEW YORK: PART 54

-----X  
 FRANCIS C. HAND

Plaintiff,

Index No.: 600160/00

-against-

**DECISION  
 and  
 ORDER**

KENYON & KENYON, a New York Partnership,

Defendant.  
 -----X

**HON. SHIRLEY WERNER KORNREICH, J.:**

This action arises from a dispute over monies allegedly owed to plaintiff, a former partner of defendant law firm. Plaintiff Francis C. Hand commenced this action against Kenyon & Kenyon (“Kenyon”).

I. **Background**

Plaintiff Francis C. Hand, initially became a partner in defendant-law firm Kenyon partnership number 22, on January 1, 1971. *See* Compl., para 4. Kenyon operated through a series of partnerships (the “Firms”), which generally existed for one-year periods. However, certain partnerships existed for other periods of time due to, *inter alia*, dissolutions caused by the withdrawal of partners. Each partnership is identified by a number. On November 8, 1991, Mr. Hand voluntarily withdrew from the law firm’s partnership Firm 49. *Id.*

Thereafter, in January 1994, Mr. Hand commenced an action against Kenyon, entitled *Francis C. Hand v. Kenyon & Kenyon* (Index No. 102701/94) (the “Prior Action”), seeking a judicial accounting. The Court (Davis, J.), in its decision dated March 23, 1995,<sup>1</sup> determined that

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<sup>1</sup> This decision was affirmed by the Appellate Division, First Department. *See Hand v. Kenyon & Kenyon*, 227 A.D.2d 137 (1st Dept. 1996) (partnership agreement signed by plaintiff

Mr. Hand was not entitled to a judicial accounting as he failed to demonstrate that an accounting provided to him by Kenyon (hereinafter, the “1994 Accounting”) was not accurate. *See* Tobin Aff., Ex. 3. Plaintiff’s motion to reargue that decision was similarly denied, as the 1994 Accounting, provided pursuant to the partnership agreement between the parties, gave plaintiff “a detailed and written accounting of his partnership interest.” *See id.*, Ex. 4. A final disposition was reached, in the Prior Action, when the Court (Ryp, J.) denied plaintiff’s motion to amend the complaint and granted Kenyon’s cross-motion for summary judgment, dismissing the complaint.<sup>2</sup> *See id.*, Ex. 7.

While a partner of Kenyon, plaintiff was allocated a certain percentage interest in the income and expenses of each Firm of which he was a partner. *See* Aff. of Robert T. Tobin, para. 11; 1994 Accounting, pp.2-3. Mr. Hand, like all partners, had a “capital account” wherein all “net income or loss (revenue less expenses) was credited or charged[.]” Tobin Aff., para. 13. Although the 1994 Accounting listed Mr. Hand’s beginning capital account balance as \$9,946, this amount was the *unaudited* balance. After audit, the beginning balance in plaintiff’s capital account was reduced to \$9,049. *See* Tobin Aff., para. 14; Ex. 13 (Kenyon’s Financial Statements

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“expressly sets forth the exclusive method for calculating and distributing the partnership’s assets upon dissolution . . . [and] plaintiff failed to establish that the written account previously provided by defendant . . . was prepared contrary to the methodology set forth in the partnership agreement”).

<sup>2</sup> This decision was also affirmed by the First Department, which found that Mr. Hand’s proposed claims for additional accounting “were properly rejected as dependent upon his previously raised and rejected argument that the partnership agreement does not govern all of the matters for which he is entitled to an accounting[.]” *Hand v. Kenyon & Kenyon*, 246 A.D.2d 446, 447 (1st Dept. 1998) (claim that Kenyon “wrongfully understated his interest in the partnership was properly rejected in the absence of evidentiary proof that defendant firm deviated from its longstanding practices in distributing profits, or otherwise breached its fiduciary duties to plaintiff in this regard”).

dated September 30, 1994 and 1993).

On or about January 13, 2000, plaintiff commenced the instant action, seeking a judicial accounting as well as damages, *inter alia*, for breach of contract. *See* Compl. In its Decision and Order dated December 31, 2002, the Court (Schoenfeld, J.) granted defendant's motion for partial summary judgment. Justice Schoenfeld found that while certain of plaintiff's claims were barred by claim preclusion, plaintiff was still allowed to pursue his claims that certain monies, although accounted for in the 1994 Accounting, were not properly paid to him. *See* Decision and Order, dated December 31, 2002, pp. 3-4. Additionally, the Court (Schoenfeld, J.) determined that the Prior Action "conclusively determined that defendant had provided plaintiff with a valid accounting [*viz.*, the 1994 Accounting.]" *Id.*, p. 1.

It is undisputed that, after he withdrew from the Kenyon partnership, plaintiff was still entitled to certain future monies. These monies, consisting of distributions of capital and income as earned by or owed to the various partnerships of which he was a member, were in Mr. Hand's so-called "pipeline" and were to be paid to him pursuant to the 1994 Accounting. The parties, however, do dispute the dollar amount of these pipeline payments. Mr. Hand claims that while the 1994 Accounting "states that the plaintiff's capital account was \$9,946 . . . [t]o date, Kenyon & Kenyon has paid Hand only \$1,716 of this amount." *See* Aff. of Francis C. Hand, para. 11.

Defendant now contends that plaintiff is no longer owed any money from his pipeline as Mr. Hand "has received every penny to which he is entitled." Tobin Aff., para. 19. Kenyon has submitted a chart, supported by evidence, which lists all the payments that Mr. Hand has received, since 1994, (the "Chart"). It asserts that "there are no further amounts due any of the [partnerships] of which Mr. Hand was a partner[.]" *Id.*, paras. 17-18.

Plaintiff disputes this, claiming that contends that defendant received certain monies owed to him “years before” it actually paid him those monies, and he never received interest thereon. *See* Aff. of Francis C. Hand, para. 31. However, the 1994 Accounting, approved by the Court in the Prior Action, provided that it was the “uniform practice of all the partnerships to treat interest and the ‘fair compensation’ and out of pocket expenses incurred for winding up the old partnerships as equal and offsetting.” *See* Tobin Aff., Ex 1, fn. 10. Thus, any interest ordinarily due plaintiff on withheld monies was used to offset other partnership expenses and Mr. Hand’s claim for interest should be dismissed.

Plaintiff further contends that he “should have received payments from a client, CTI.” Hand Aff., para. 26. He also According to Mr. Hand, he was not paid his full share of money from a certain matter known as the “Construction Technologies contingency” or the “CTI Contingency payments.” *See id.*, paras. 30-32. Specifically, plaintiff argues that defendant did not credit his capital account “in the fiscal years ended 1997, 1998, 2000 and 2001 with plaintiff’s share of the CTI Contingency collections.” *Id.*, para. 32.

Mr. Hand claims that these CTI payments were improperly offset by certain litigation expenses, which defendant charged against plaintiff’s partnership assets, or capital account. *See* Hand Aff., Ex. 19. Plaintiff seeks an inspection of Kenyon’s books and records, which will allow him to clarify whether he has indeed been paid all the monies owed to him; Mr. Hand avers that defendant has refused to allow such an inspection. Hand Aff., para. 39.

## II. Motions

Defendant Kenyon & Kenyon now moves for summary judgment. In support of its motion, it submits the affidavit of Robert T. Tobin, defendant’s managing partner and copies of:

the 1994 Accounting from the Prior Action, viz., *Francis C. Hand v. Kenyon & Kenyon* (Index No. 102701/94); the Court's (Davis, J.) Decisions from the Prior Action, dated March 23 and September 5, 1995; Appellate Division opinions from the Prior Action, dated May 2 and July 23, 1996 and January 22 and April 9, 1998; the Court's (Ryp, J.) Order from the Prior Action, dated September 16, 1996; Court of Appeals opinion, dated July 9, 1998; the Court's (Schoenfeld, J.) decisions dated December 31, 2002, April 9, 2004; Kenyon & Kenyon's Financial Statements dated September 30, 1994 and 1993; U.S. Department of Treasury, Internal Revenue Service ("IRS") K-1 forms for plaintiff, dated 1994 through 1998; the summons and complaint; the Firm 45 Partnership Agreement ("Agreement 45"); correspondence between the parties; Kenyon & Kenyon's Statement of Net Assets from September 30, 1991 and 1990; the answer; and other documentary evidence. Plaintiff has opposed, submitting his affidavit, as well as copies of: the complaint; the Court's (Schoenfeld, J.) Decision and Orders dated April 20, 2001, December 31, 2002; Agreement 45; the 1994 Accounting; Mr. Tobin's affidavit dated September 21, 2004; defendant's Firm 49 Profit and Loss Statement ("49 P&L"); defendant's IRS Form 1065 dated 1991; various correspondence between the parties; plaintiff's K-1 forms dated 1994 through 1998; and a CTI contingency payment to plaintiff in the amount of \$7,903.55. Defendant has replied.

While plaintiff has submitted a sur-reply, denominated "Supplemental Affirmation of Francis C. Hand", the Court declines to consider this submission.<sup>3</sup> Plaintiff failed to obtain the Court's express permission prior to the submission of this sur-reply. See Rules of the Justices,

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<sup>3</sup> Were the Court to consider plaintiff's "Supplemental Affirmation," the arguments therein still would not change the Court's decision on the instant motion.

New York County Supreme Court, Part III, Rule 14 (“the CPLR does not provide for sur-reply papers, however denominated”); *see also Diane Serra Inc. v. Charmer Indus.*, 190 Misc. 2d 386, 391 (S. Ct., N.Y., 2002) (Cahn, J.) (“the CPLR does not provide for submission of sur-reply papers and the Commercial Part rules do not permit such submission, absent *express prior permission*”) (emphasis supplied); *Morgado Family Partners, LP v. Lipper*, 2004 NY Slip Op 51791U (S. Ct., N.Y., 2004) (Moskowitz, J.).

### III. Discussion

To prevail on a motion for summary judgment, the movant must establish a prima facie showing of entitlement to judgment as a matter of law by producing sufficient evidence to demonstrate the absence of any material issue of fact. *Giuffrida v. Citibank Corp.*, 100 N.Y.2d 72, 81 (2003). Once a prima facie showing is made, the burden then shifts to the non-moving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues that require a trial. *Zuckerman v. New York*, 49 N.Y.2d 557, 560 (1980).

While defendant Kenyon has met its burden as to some of plaintiff’s claims, issues of fact remain as to other claims. Initially, Kenyon has demonstrated that it does not owe Mr. Hand interest on CTI payments that were withheld for certain periods of time, since the 1994 Accounting clearly demonstrates that such interest payments were used to offset other winding down costs and *were not paid out to partners*. Additionally, any claims arising from monies allegedly owed to plaintiff prior to the 1994 Accounting are barred by res judicata, pursuant to Justice Schoenfeld’s prior decisions, which are the law of the case.

On the other hand, while Kenyon has submitted some evidence detailing the amounts paid to Mr. Hand, pursuant to certain partnership agreements and the 1994 Accounting, Mr.


Hand claims that he was not paid all the monies owed to him. A question of fact exists as to whether Mr. Hand was, indeed, ever fully paid partnership monies owed to him for the years after the resolution of the First Action. In light of this disputed issue, the Court cannot appropriately grant summary judgment on these claims. Accordingly, it is

ORDERED that defendant Kenyon's motion for summary judgment is granted only to the extent that all claims of unpaid interest on withheld payments are dismissed; and it is further

ORDERED that the remainder of the action is severed and continued.

The foregoing shall constitute the Decision and Order of the Court.

Date: June 9, 2005  
New York, New York

  
\_\_\_\_\_  
SHIRLEY WERNER KORNREICH

FILED  
JUN 15 2005  
CLERK OF COURT