

**Swetnick v Bell**

2007 NY Slip Op 33242(U)

October 1, 2007

Supreme Court, New York County

Docket Number: 0116886/2006

Judge: Judith J. Gische

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

PRESENT: HON. JUDITH J. GISCHE

PART 10

Index Number : 116886/2006

SWETNICK, ROBERT N.

vs

BELL, EVAN

Sequence Number : 002

SUMMARY JUDGMENT

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

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

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

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

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for 832/2

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

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

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION and set for compliance conference 11/8/07 @ 9:30 am in Part 10

**FILED**  
OCT 10 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: OCT 01 2007

HON. JUDITH J. GISCHE J.S.C.

Check one if appropriate:  FINAL DISPOSITION  NON-FINAL DISPOSITION

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 10**

-----X  
Robert N. Swetnick, James Ryan,  
John Doe et al, individually and as  
partners in 7<sup>th</sup> Street Redevelopment  
Associates, L.P., and Gramercy  
Flower Associates, L.P.

Plaintiffs

-against-

Evan Bell, individually and  
Bell & Company a/k/a  
Bell & Company, Certified Public  
Accountants,

Defendants.

-----X

**DECISION/ORDER**

Index No.: 116886/06

Seq. No.: 002

Present:

Hon. Judith J. Gische

J.S.C.

**FILED**  
OCT 10 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of  
this/these motion(s):

<b>Papers</b>	<b>Numbered</b>
Defs n/m 3212 w/ EB affid, SS affirm, exhs .....	1
Pltff opp w/RNW affid, exhs .....	2
Def reply w/ SS affirm .....	3

*Upon the foregoing papers the court's decision is as follows:*

*GISCHE, J.;*

Plaintiffs have commenced this action against the defendants to compel financial disclosure, for a formal accounting, the underlying bases of which are allegations that the defendants have engaged in self dealing, etc. Plaintiffs also seek an award of punitive damages. Issue has been joined and defendants now move for summary judgment dismissing the complaint on the basis that it fails to state a cause of action

against defendant Evan Bell, individually or the business entities named. Since the note of issue has not yet been filed, this motion is timely and will be considered on the merits. CPLR 3212. Brill v. City of New York, 2 NY3d 648 (2004). Plaintiff opposes the motion in all respects and also on the basis that it is premature because discovery has not yet been completed. CPLR § 3212 (f)

### **Arguments**

Plaintiffs Robert N. Swetnick and James Ryan are limited partners in 7<sup>th</sup> Street Redevelopment Associates, L.P. and Gramercy Flower Associates, L.P. (collectively "the limited partnerships"). They have brought this action individually and as partners in these two limited partnerships. Defendant Evan Bell ("Mr. Bell") is the general partner of these two limited partnerships. He is also an accountant by profession, and the principal of Bell & Company a/k/a Bell & Company, CPA ("Bell & Co." or "the accounting firm") Both limited partnerships utilize Bell & Co. as their accountants. Mr. Bell is sued herein individually only, and not in his capacity as general partner.

Swetnick<sup>1</sup> contends on behalf of the plaintiffs that he has requested access to the partnerships' books and records, but been denied the information by Mr. Bell. Plaintiffs contend further that the Limited Partnership Agreement for each limited partnership refers to "other" limited partners who are supposed to be identified in Schedule "A" of each agreement, along with the amount of each of their capital contributions, and the number of units purchased. Each Schedule "A," however, is

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<sup>1</sup>Swetnick is a practicing lawyer and he is representing himself and the other plaintiffs in this action.

blank so the plaintiffs do not know the identity of the other limited partners. According to plaintiffs, defendants steadfastly refuse to provide this information. Defendants, in connection with this motion, partly dispute whether this is true, but also argue they do not have to provide the information, for reasons expounded upon further below.

As per the limited partnership agreements, the General Partner has to provide the limited partners with an annual accounting of income and retained earnings [Section 5.1. (b)] in a report prepared by the partnerships' accounting firm. Moreover, if requested by at least 30% of the partnership interests, the partnerships have to be audited as well by the accounting firm. The limited partners contend that none of this has been done. They contend further that this is because Mr. Bell is trying to avoid scrutiny, (possibly) engaging in self-dealing or wasting partnership assets, and by keeping the limited partners isolated from one another, he is trying to avoid being removed. Alternatively, they contend that Bell & Co. itself has failed to fulfill its mandate, which is to render this report, and audit the two limited partnerships.

Defendants seek summary judgment on several bases. First, that plaintiffs have not joined necessary parties to this action because they have failed to name either of the limited partnerships as named defendants. Defendants also contend that plaintiff has no basis for its claims against Mr. Bell individually, but should have sued him in his capacity as General Partner of the limited partnerships. Further, defendants argue that the accounting firm should be dismissed from this case, and has been improperly sued, because there is no contract, agreement, or privity between the plaintiffs and the firm which was hired by the partnerships.

Although plaintiffs assert eight (8) separate causes of action ("COA") against the defendants, they all have in common breach of fiduciary duty claims arising from defendants' alleged failure to provide information about the identity of the other limited partners, and their refusal to provide certain financial information, including reports (1<sup>st</sup>, 2<sup>nd</sup> 3<sup>rd</sup> COA). The 4<sup>th</sup> and 5<sup>th</sup> COA are that Mr. Bell has engaged in self-dealing, putting his own interests ahead of the partnerships'. For example, plaintiffs contend that the defendants obtained a mortgage secured by the 7<sup>th</sup> Street real property and then paid fees to themselves in connection with this transaction. Allegedly defendants have also paid themselves management fees and commissions in connection with apartment sales at the 18<sup>th</sup> Street real property. The 6<sup>th</sup> and 7<sup>th</sup> COA is for an accounting of each partnership's finances, income, and expenditures. The 8<sup>th</sup> COA is for the appointment of a receiver for each limited partnership.

Plaintiffs argue that defendants' motion is premature because there has been no discovery and this motion was brought almost immediately after the preliminary conference was held. CPLR 3212 (f). Thus, it is there contention that because discovery is incomplete, the information necessary to fully oppose this motion remains under the control of the defendants. CPLR § 3212 (f); Lewis v. Safety Disposal System of Pennsylvania, Inc., 12 AD3d 324 (1<sup>st</sup> dept. 2004); Global Minerals and Metals Corp. v. Holme, 35 AD3d 93 (1<sup>st</sup> dept 2006) (internal citations omitted).

At the preliminary conference the court ordered that defendants respond to plaintiffs' interrogatories by May 31, 2007 and that defendants make certain documents available for discovery on May 8, 2007. This motion was served May 2, 2007, and the discovery

\* 6 ]  
ordered did not take place, but was stayed by the motion. CPLR § 3212.

Plaintiffs contend that by enforcing the terms of these limited partnership agreements they are enforcing the fiduciary obligations of Mr. Bell and also of the accounting firm to the partnerships.

### **Applicable law**

On a motion for summary judgment the moving party must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. " Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact. Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986); Zuckerman v. City of New York, 49 N.Y.2d 557 (1980).

When issues of law are raised in connection with a motion for summary judgment, the court may and should resolve them without the need for a testimonial hearing. See Hindes v. Weisz, 303 A.D.2d 459 (2d. Dept. 2003).

Where a party opposed to summary judgment contends that discovery is incomplete, the court may consider whether the motion is premature because the information necessary to fully oppose the motion remains under the control of the proponent of the motion. CPLR § 3212 (f); Lewis v. Safety Disposal System of Pennsylvania, Inc., 12 AD3d 324 (1<sup>st</sup> dept. 2004); Global Minerals and Metals Corp. v. Holme, 35 AD3d 93 (1<sup>st</sup> dept 2006) (*internal citations omitted*).

General partners owe a fiduciary duty to limited partners and are obligated not to engage in self-dealing, unless the partnership agreement permits such self-dealing. Carella v. Scholet, 34 A.D.3d 915, 916 (3<sup>rd</sup> Dept 2006). Moreover, under New York law, the rights and obligations of the partners as between themselves arise from, and are fixed by, their agreement. Corr v. Hoffman, 256 N.Y. 254, 272 (1931). Limited partners may bring a derivative action on behalf of the limited partnership to enforce a partnership claim and procure a judgment in its favor. Partnership Law § 115-a; Levine v. Murray Hill Manor Co., 143 A.D.2d 298 (1<sup>st</sup> Dept. 1988). Such a claim is properly asserted if it is brought as a derivative claim on behalf of the partnership and not as one personal to the plaintiff. Strain v. Seven Hills Associates, 75 A.D.2d 360 (1<sup>st</sup> Dept 1980). In determining whether a claimed injury is derivative or personal, if the primary injury is to the partnership a direct cause of action belongs to the partnership, even though there has been a diminution in the value of the of the individual partners' interests. Alpert v. Haimnes, 64 Misc2d 608 (Sup Ct, NY Co 1980).

### **Discussion**

At the outset, the court rejects defendants' argument, that this action is improperly styled. The limited partners are asserting claims on behalf of the partnership, against Mr. Bell. Whether these claims lie against him personally, or in his capacity as general partner, remains to be seen. At this point in this litigation, there has been no discovery, although court ordered. This motion stayed discovery and effectively prevented the plaintiffs from obtaining information they needed to further develop their claims and defend against this motion. For example, in their 4<sup>th</sup> COA,

[\* 8 ]

plaintiffs contend that “Evan Bell has used his position as General Partner of 7<sup>th</sup> Street, the retaining of contractors by 7<sup>th</sup> Street, and in payment of expenses of 7<sup>th</sup> Street for his personal benefit.” The plaintiffs claim also that “Evan Bell obtained a mortgage secured by the real property owned by 7<sup>th</sup> Street in the sum of \$2,000,000 . . .” It is unclear whether these claims are against Mr. Bell, personally, or in his capacity as general partner. Plaintiffs argue persuasively that these allegations cannot, at this stage in this case, be made any more definite because there has been no discovery. CPLR § 3212 (f); Lewis v. Safety Disposal System of Pennsylvania, Inc., supra.

Therefore, this alone is a reason to deny defendants’ motion. The court also taken into consideration whether in his individual capacity, or as partner, this court has personal jurisdiction over Mr. Bell. Therefore, although not sued as the partnerships’ General Partner, this is not a reason to grant defendants summary judgment, dismissing plaintiffs’ claims. Since this is a point raised by the defendants, and they seem to agree plaintiff would have a claim (if any) against Mr. Bell, as general partner, the court sees no prejudice to allowing the plaintiffs to serve an amended complaint to add Mr. Bell, as General Partner, as a party to this action no later than **October 26, 2007**.

The court also denies defendants’ motion to have the accounting firm dismissed from this action. Article V of the Gramercy Flower limited partnership agreement provides that all decisions as to accounting principles and tax elections shall be made by the General Partner and that the General Partner will have the “Partnership’s firm of independent certified public accountants” prepare financial statements, a balance sheet, etc., each year. There are unresolved questions of fact about whether the

accounting firm has fulfilled its duties to the partnership(s), precluding the grant of summary judgment to the defendants at this time.

Other comments by defendants, that this lawsuit is fueled by animus or that the plaintiffs are "inexperienced," do not present legal arguments for why they are entitled to summary judgment, but express an opinion.

For all of the foregoing reasons, this motion by the defendants for summary judgment is denied, not only because it is premature, but also because plaintiffs have presented disputed questions of fact defeating the motion.

Since discovery was stayed by this having been brought, the time to comply with the deadlines set forth in the preliminary conference are hereby extended so that the discovery in the "additional directives" will be provided/ complied no later than **October 12, 2007**.

This matter is scheduled for a compliance conference in Part 10 on **November 8, 2007** at 9:30 a.m.

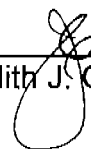
**Conclusion**

Defendants' motion for summary judgment is denied. Plaintiffs are permitted to serve an amended complaint.

Any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied.

Dated: New York, New York  
October 1, 2007

**FILED**  
OCT 10 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

So Ordered:  
  
Hon. Judith J. Gische, JSC