

Kaufman v Cohen

2007 NY Slip Op 33372(U)

October 10, 2007

Supreme Court, New York County

Docket Number: 0601320/2001

Judge: Judith J. Gische

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

PRESENT: JUDITH J. GISCHE, J.S.C. Justice

PART 10

Raufman, G

INDEX NO. 601320/01

MOTION DATE _____

- v -

MOTION SEQ. NO. 013

Irwin Cohen

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 ...

PAPERS NUMBERED

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 (s) and cross-motion(s) decided in accordance with the annexed decision/order of even date.

FILED

OCT 19 2007

COUNTY OF NEW YORK CLERK'S OFFICE

Dated: 10/10/07

JUDITH J. GISCHE, J.S.C. J.S.C.

Check one: FINAL DISPOSITION
Check if appropriate: DO NOT POST

NON-FINAL DISPOSITION
 REFERENCE

Supreme Court of the State of New York
County of New York: Part 10

GERALD S. KAUFMAN and STUART E. SEIGEL, Suing Individually and as Partners in, and/or Beneficial Owners of, and on behalf of, SIG PARTNERS, a Domestic General Partnership, SIG-L.I. CITY, INC., a Foreign Corporation, and 31-02 47th AVENUE ASSOCIATES, L.P., a Foreign Limited Partnership,

Plaintiffs,

-against-

IRWIN B. COHEN,

Defendant.

Decision/Order

Index No.: 601320/01
Seq. No. : 013

Present:
Hon. Judith J. Gische
J.S.C.

Pursuant to CPLR 2219(a) the court considered the following numbered papers on this motion:

PAPERS	NUMBERED
Notice of Motion, APG affirm., exhibits.....	1
PAM affirm. In Opp., exhibits.....	2
APG Reply affirm.....	3

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OCT 19 2007
NEW YORK
COUNTY CLERK'S OFFICE

Upon the foregoing papers the decision and order of the court is as follows:

Defendant moves to: [1] strike plaintiffs' jury demand and [2] bifurcate the issue of the statute of limitations so that it can be tried before the remaining causes of action and counterclaim. Plaintiffs oppose the motion.

Motion to Strike Jury Demand

After substantial motion and appellate practice, the only claims left to be tried are

the first, second and fourth causes of action asserted in the amended verified complaint and the counterclaim. Plaintiffs' remaining claims sound in breach of fiduciary duty (1st and 2nd causes of action) and for an accounting (4th cause of action). Defendant argues that because these claims are equitable in nature, plaintiffs have no right to a jury trial. Plaintiffs not only deny that their claims are "equitable" but argue that the motion is untimely.

The court rejects plaintiffs' contention that the motion to strike their jury demand is untimely. There is no specific timetable by when a motion to strike a jury demand must be made. CPLR §§ 4101, 4102. The operative consideration is whether there is prejudice to the other side. See: AJ Fritschy v. Chase Manhattan Bank, 36 AD2d 600 (1st dept. 1971). Since this motion was brought before any trial date was actually set, and, as a consequence of this decision, the matter will be restored to its rightful place on the trial calendar, there is simply no prejudice to the plaintiffs in having the court consider the merits of defendant's motion to strike the jury demand.

It is well established that issues of law are entitled to be tried before a jury while issues in equity are not. Phoenix Mut. Life Ins. Co. v. Conway, 11 NY2d 367 (1962). Two of the remaining causes of action sound primarily in breach of fiduciary duty. The claim for an accounting, however, is solely an equitable cause of action. Breach of fiduciary duty is something of a hybrid, having been found by the courts to sometimes constitute a law claim and sometimes an equity claim. See: Kaufman v. Cohen, 307 AD2d 113 (1st dept. 2003); Zarina Zainal v. America-Europe-Asia International Trade & Management Consultants, 254 AD2d 52 (1st dept. 1998). Depending on its characterization in any particular case, a litigant may or may not be entitled to a jury

trial. See: Spitzer v. Schussel, NYLJ 9/28/07 p25 col1 (NY Co. Sup. Ct.)(and cases cited therein).

In this particular case, the Appellate Division has already decided that a six year statute of limitations applies. (Kaufman v. Cohen, 307 AD2d at 115). Although the parties argued the issue of whether the causes of action were legal or equitable in nature, the appellate court never resolved that issue. Instead, the Appellate Division found a completely different reasoning in setting the statute of limitations. It held that since the breach of fiduciary claims were grounded in allegations of fraud, either a six year fraud statute of limitations applied or a 2 year from discovery of fraud rule applied. Consequently, the issue of whether these particular breach of fiduciary claims are actions at law or equity has never been resolved in this case. Spitzer v. Schussel, *supra*.¹

In this case plaintiffs are primarily seeking money damages. The Appellate Division applied the six year statute of limitations based upon the allegations of fraud. Fraud is an action at law. Consequently, the court finds that the claims for breach of fiduciary asserted in this case are actions at law, to which the right to a jury trial attaches. Paciello v. Graffeo, 8 AD3d 543 (2004). In this regard the court also holds that the remaining equity cause of action for an accounting is only incidental to the monetary relief primarily sought by plaintiffs in this case. The main remedy plaintiffs

¹ Although plaintiffs now argue that their claims are ones at law for jury trial purposes, they previously argued before the Appellate Division that their claims were ones in equity for statute of limitations purposes. These inconsistent positions are of no moment because there has never been a court ruling on whether the actions are ones at law or equity.

seek is to disgorge for themselves the profits they claim defendant reaped as a result of diverting a partnership opportunity to himself (Gische, J. Order 1/24/07 p.10-13); Trepuk v. Frank, 104 AD2d 780 (1st dept. 1984)

The motion to strike plaintiff's jury demand is, therefore, denied.

Bifurcation

Defendant also seeks bifurcation of the statute of limitations issue, so that it may be tried and decided in advance of the underlying causes of action. CPLR § 603. Plaintiffs are opposed, claiming that this is simply a dilatory tactic and that many of the facts to be presented in connection with their underlying claim are the same as those that will be presented in connection with the statute of limitations issues.

In general the granting of a separate trial is a matter of judicial discretion which is soundly exercised where the separate trial involves an issue which does not touch upon the merits of the main controversy, but will nevertheless be dispositive of the entire action. Morford v. A. Sulka & Co., Inc. 79 AD2d 502 (1st dept. 1980). It is typically employed to address such non-merits defenses as statute of limitations, statute of frauds, release and lack of jurisdiction. Baseball Office of Com'r v. Marsh & McClennan, Inc., 295 AD2d 73 (1st dept. 2002).

Here, the Appellate Division has defined the scope of the statute of limitations issue. It held that plaintiffs' causes of action accrued, at the latest on December 8, 1994, which was six years prior to the commencement of the action. They further ruled that plaintiffs might be entitled to a discovery rule of accrual because their claims were predicated on fraud. Such discovery rule sets the statute of limitations at two years from the date the party discovered the fraud or could have discovered it with due

diligence. Thus, the issue is when plaintiffs could either have discovered or actually did discover the alleged fraud which forms the basis for the claims of breach of duty. The Appellate Division further ruled that a "clear question of fact exists as to whether plaintiffs could reasonably have inferred from the April 1994 letter, or from public documents relating to the foreclosure sale, that a fraud was perpetrated upon them."

The court holds that severance would serve the salutary goal of the efficient administration of justice. If plaintiffs' action is barred by the statute of limitations, then the court will not reach the merits of the parties' underlying claims. Defendant believes that this case will take anywhere from between six (6) to eight (8) weeks to try. The courts own experience with this complicated case believes that this assessment is realistic.

The court is not persuaded that trying the statute of limitations issue requires the court to "touch upon" the merits of the underlying action. Indeed, since the statute of limitations issue regarding when plaintiff learned of the fraud necessarily involves events that occurred after the fraud, the merits of the underlying action are fairly attenuated. Bifurcation, therefore, is not only practical, it is a fairer use of judicial and juror time. Given the expected length of the case, the court further orders that these bifurcated issues be tried before different juries.

Conclusion

In accordance herewith, it is hereby:

ORDERED that defendant's motion is granted in part and denied in part, and it is further

ORDERED that there be bifurcated trials, in front of different juries, the first trial

shall be on the issue of the statute of limitations and then, depending upon the outcome of the first trial, the second trial shall be on the remaining causes of action and counterclaim, and it is further

ORDERED that plaintiffs shall file this order with trial support within the next thirty (30) days so that it may be restored to its rightful place on the trial calendar for assignment, and it is further


ORDERED that defendants application to strike plaintiffs' jury demand is denied, and it is further

ORDERED that any requested relief not otherwise expressly granted is otherwise denied, and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, New York
October 10, 2007

SO ORDERED:



J.G. J.S.C.

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