

William Floyd Union Free School District v Wright

2007 NY Slip Op 34248(U)

November 8, 2007

Supreme Court, Suffolk County

Docket Number: 0017855/2006

Judge: Thomas F. Whelan

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

P R E S E N T :

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 4/2/07
ADJ. DATES 6/15/07
Mot. Seq. # 001 - MG
Mot. Seq. # 002 - XMD

-----X		
WILLIAM FLOYD UNION FREE SCHOOL	:	BOND, SCHOENECK & KING, PLLC
DISTRICT.	:	Attys. For Plaintiff
	:	1399 Franklin Ave.
	:	Garden City, NY 11530
	:	
Plaintiff,	:	
	:	
-against-	:	TINARI, O'CONNELL, OSBORN ET AL
	:	Attys. For Def. Wright
JAMES A. WRIGHT and DANIEL C. CIFONELLI	:	320 Carleton Ave.
	:	Central Islip, NY 11722
	:	
Defendants.	:	SMITH, FINKELSTEIN, LUNDBERG
	:	Attys. For Def. Cifonelli
	:	P.O. Box 389
	:	Riverhead, NY 11901
	:	
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Upon the following papers numbered 1 to 20 read on this motion for summary judgment and cross motion for dismissal; Notice of Motion/Order to Show Cause and supporting papers 1-3; Notice of Cross Motion and supporting papers 4-6; Answering Affidavits and supporting papers 7-9; 10-11; Replying Affidavits and supporting papers 12-13; Other 14-15 (affidavit); 16-17 (affidavit); 18 (memorandum); 19 (memorandum); 20 (memorandum); (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion (#001) by plaintiff for an Order pursuant to CPLR 3212 granting it summary judgment as to defendants' liability and for a declaratory judgment, is granted; and it is further

ORDERED AND ADJUDGED that in view of the fact the defendants, James A. Wright and Daniel C. Cifonelli, have breached their fiduciary duties and the duty of loyalty to the plaintiff, William Floyd Union Free School District, their rights to receive deferred compensation from the plaintiff, William Floyd Union Free School District, is forfeited; and it is further

ORDERED AND ADJUDGED that in view of this decision and the fact that life insurance and health insurance benefits are forms of deferred compensation, the plaintiff, William Floyd Union Free School District, is relieved of its obligation to pay and/or provide any future medical/dental/optical/prescription and/or life insurance premium payments to or on behalf of the defendants, James A. Wright and Daniel C. Cifonelli, for a period of ten years commencing immediately upon the service of this Order with Notice of Entry upon counsel for said defendants; and it is further

ORDERED that the cross motion (#002) by the defendant, Daniel C. Cifonelli, seeking an Order pursuant to CPLR 3211 and CPLR 3212, dismissing the complaint as the plaintiff's claims are barred by the statute of limitations; that the plaintiff has failed to include necessary parties pursuant to CPLR

1001(a); and plaintiff has failed to state a cause of action for which relief can be granted, is denied; and it is further

ORDERED that a preliminary conference is scheduled for **December 18, 2007**, at 9:30 a.m., in the DCM Part, located at the courthouse at 1 Court Street, Riverhead, New York, 11901; and it is further

ORDERED that counsel for the plaintiff shall each serve upon defendants' counsel a copy of this Order with Notice of Entry within thirty (30) days of the date herein pursuant to CPLR 2103(b)(1), (2) or (3) and thereafter file the affidavit of service with the Clerk of the Court.

This action brought by the plaintiff, William Floyd Union Free School District, seeks to recover from the defendants, James A. Wright (hereinafter "Wright") and Daniel C. Cifonelli (hereinafter "Cifonelli") monies stolen by said defendants under various schemes and guises when they were employees of the District. Plaintiff also seeks to recover any deferred compensation paid to said defendants in retirement, as well as, a declaratory judgment that plaintiff is relieved from its contractual obligation to make any future payments to defendants' health and insurance coverage.

The gravamen of the first cause of action contained in plaintiff's complaint is that Wright and Cifonelli breached their fiduciary duty to the plaintiff by committing egregious acts of disloyalty, disobedience, fraud and other misconduct, which entitles plaintiff to recover all compensation paid and benefits conferred, including but not limited to, any deferred compensation in any form that was paid to said defendants while they were retired during the periods wherein the acts occurred.

In the second cause of action contained in plaintiff's complaint, plaintiff seeks a declaratory judgment under the faithless servant doctrine that it does not have to continue to pay any deferred compensation benefits to Wright and Cifonelli, pursuant to employment and post employment contracts, based upon their materially disloyal and egregious conduct. Plaintiff contends that based upon defendants' guilty pleas to grand larceny in the second degree, grand larceny in the second and third degree and money laundering in the third and fourth degree, that defendants are collaterally estopped from relitigating any issue regarding their guilt to stealing monies from plaintiff, which, in this civil action, defendants seek to reclaim. Plaintiff is in compliance with CPLR 3212(b) (*see State v Grecco*, 43 AD3d 397, 840 NYS2d 149 [2d Dept 2007]; *Leandre v Sharperson*, 96 AD2d 883, 466 NYS2d 38 [2d Dept 1983], when an attorney's affirmation is based upon documentary evidence in his possession, it is sufficient for purposes of a motion for summary judgment).

Wright opposes the motion and submits his affidavit. Cifonelli cross moves and seeks various types of relief including dismissal of the action on statute of limitations grounds pursuant to CPLR 3211 and CPLR 3212, for failure to state a cause of action, and that plaintiff failed to include a necessary party pursuant to CPLR 1001(a).

The doctrine of collateral estoppel conserves judicial resources and precludes a party from relitigating an issue already decided against it in a prior litigation (*see D'Arata v New York Cent. Mut. Fire Ins. Co.*, 76 NY2d 659, 563 NYS2d 24 [1990]). For the doctrine to apply, the issue raised in the both proceedings must be identical, must have been necessary to the decision in the prior action, and must be decisive in the pending action. Where these factors are satisfied, a party who was afforded a full and fair opportunity to litigate the issue now said to be controlling, is precluded from contesting same in a subsequent proceeding (*see Davidson v American Bio Med. Corp.*, 299 AD2d 390, 749 NYS2d 98 [2d Dept 2002]; *Kristensen v Charleston Sq. Inc.*, 295 AD2d 404, 743 NYS2d 296 [2d Dept 2002]; *Kane v City of New York*, 287 AD2d 600, 731 NYS2d 761 [2d Dept 2001]; *Kaufman v Lilly & Co.*, 65 NY2d 449, 492 NYS2d 584 [1985]; *Gilbert v Barbieri*, 53 NY2d 285, 441 NYS2d 49 [1981]). Thus, where a criminal conviction is based upon facts identical to those at issue in a related civil action, the plaintiff in the civil action can successfully invoke the doctrine of collateral estoppel to bar the convicted defendant from relitigating the facts established thereby (*see Luskin v Seone*, 226 AD2d 1144, 641 NYS2d 478 [4th Dept 1996]; *D'Arata v New York Cent. Mut. Fire Ins. Co.*, 76 NY2d 659, *supra*; *McDonald v McDonald*, 193 AD2d 590, 597 NYS2d 159 [2d Dept 1993]; *Grayes v DiStasio*,

166 AD2d 261, 560 NYS2d 636 [1st Dept 1990]; *Merchants Mut. Ins. Co. v Arzillo*, 98 AD2d 495, 472 NYS2d 97 [2d Dept 1984]).

A criminal conviction, whether by plea or after trial, is conclusive proof of its underlying facts in a subsequent civil action and collaterally estops a party from relitigating the issue (*see Merchants Mut. Ins. Co. v Arzillo*, 98 AD2d 495, *supra*; *Hooks v Middlebrooks*, 99 AD2d 663, 472 NYS2d 54 [4th Dept 1984]; *McMillan v Williams*, 116 Misc2d 171, 455 NYS2d 523 [Sup Ct, New York County 1982]; *Alexander v City of Peekskill*, 80 AD2d 626, 436 NYS2d 327 [2d Dept 1981]; *S.T. Grand, Inc. v City of New York*, 32 NY2d 300, 304-305, 344 NYS2d 938 [1973]; *Consequences of Conviction* by Robert G. Morvillo, NYLJ, 12/7/99, p. 3, col. 1).

This doctrine may be applied only in a subsequent proceeding to the detriment of a party in a prior proceeding. “The party seeking the benefit of collateral estoppel must show that the party to be estopped had a full and fair opportunity to contest the dispositive decision” (*Continental Cas. Co. v Rapid Am Corp.*, 80 NY2d 640, 649, 593 NYS2d 966 [1993] *citation omitted*; *see also Lozada v GBE Contr. Corp.*, 295 AD2d 482, 744 NYS2d 464 [2d Dept 2002]; *Graves v DiStasio*, 166 AD2d 261, 560 NYS2d 636 [1st Dept 1990]; *Gilberg v Barbieri*, 53 NY2d 285, *supra*).

Defendants, Wright and Cifonelli, were both represented by competent criminal defense attorneys throughout the criminal proceeding and had a full and fair opportunity to litigate their guilt or innocence in the criminal action (*see Blaich v Van Herwynen*, 37 AD3d 387, 829 NYS2d 639 [2d Dept 2007]). It was only after plea negotiations, while represented by counsel, that Wright and Cifonelli voluntarily waived their right to a jury trial, to present witnesses in their defense or take the witness stand in their own behalf. They plead guilty to stealing monies from plaintiff. Here, based upon the record before the Court on this motion, the Court finds persuasive evidence that there is no plausible defense to the criminal charges.

The judgment of conviction arose out of the exact same incidents upon which plaintiff presents this civil action for damages and liability. Since Wright and Cifonelli have plead guilty, they are collaterally estopped and precluded from relitigating the underlying facts of the crime or the propriety of their guilty pleas or any other issue (*see Blaich v Van Herwynen*, 37 AD3d 387, *supra*). Having been convicted of stealing, defendants may not reopen the charges on a subsequent civil action to recover damages for the exact crime for which they have plead guilty in the criminal actions (*see Colby v Crocitto*, 207 AD2d 764, 616 NYS2d 399 [2d Dept 1994]; *Read v Sacco*, 49 AD2d 471, 375 NYS2d 371 [2d Dept 1975]). The Court has read the transcripts of the underlying guilty pleas of Wright and Cifonelli (*see Matter of Estate of Savage*, 175 Misc2d 880, 670 NYS2d 716 [Surrogate's Court, Rockland County 1998]). “Whether the conviction is by plea or after a trial, all that is required to give effect to the collateral estoppel bar is that there is an identity of issues and that the defendant had a full and fair opportunity to litigate the issue in the criminal action” (*Blaich v Van Herwynen*, 37 AD3d 387, 389, *supra. citation omitted*; *see also Schwartz v Public Adm'r.*, 24 NY2d 65, 298 NYS2d 955 [1969]; *cf. Arnold v Goosby*, 186 AD2d 1037, 588 NYS2d 675 [4th Dept 1992]). “These conditions were satisfied here” (*Blaich v Van Herwynen*, 37 AD3d 387, 389, *supra, citations omitted*). Therefore, there is no question of fact as to defendants' full responsibility for the theft of the funds from the plaintiff and the issue of their liability stemming therefrom.

CPLR 3212(b) sets forth the summary judgment standard. Summary judgment will be granted if, upon on all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court, as a matter of law, in directing judgment in favor of any party. It is well settled that the remedy of summary judgment is a drastic one and there is considerable reluctance to grant summary judgment in negligence actions (*see Andre v Pomeroy*, 35 NY2d 361, 362 NYS2d 131 [1974]). The proponent of a summary judgment motion must make a primary facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of a fact from the case (*see Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 165 NYS2d 498 [1957]) or an issue of fact is even arguable since it deprives a party of his day in court (*see Henderson v City of New York*, 178 AD2d 129, 576 NYS2d 562 [1st Dept 1991]; *Andre v Pomeroy*, 35 NY2d 361, *supra*).

Issue finding rather than issue determination is the key to the procedure (see *Weiner v Ga-Ro Die Cutting, Inc.*, 104 AD2d 331, 479 NYS2d [2d Dept 1984]; *aff'd* 65 NY2d 732, 492 NYS2d 29 [1985]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, *supra*). Since summary judgment is the procedural equivalent of a trial, if there is any doubt as to the existence of a triable issue of fact, or where a material issue of fact is even arguable, summary judgment must be denied (see CPLR 3212[b]; *American Home Assurance Co. v Amerford Intl. Corp.*, 200 AD2d 472, 606 NYS2d 229 [1st Dept 1994]; *Dawman Displays, Inc. v Masturzo*, 168 AD2d 204, 562 NYS2d 89 [1st Dept 1990]; *lv den* 77 NY2d 939, 569 NYS2d 612 [1991]; *Freeman v Easy Glider Roller Rink, Inc.*, 114 AD2d 436, 494 NYS2d 351 [2d Dept 1985]; *Phillips v Kantor & Co.*, 31 NY2d 307, 338 NYS2d 882 [1982]; *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 413 NYS2d 141 [1978]; *Stone v Goodman*, 8 NY2d 8, 200 NYS2d 627 [1960]; *rearg den* 8 NY2d 934, 204 NYS2d 1025 [1960]).

CPLR 3212(b) also requires that in order for a court to grant summary judgment, the court must determine if the movant's papers justify, as a matter of law, that his cause of action or defense has merit. The evidence submitted in support of the motion must be viewed in the light most favorable to the non-movant (see *Akseizer v Kramer*, 265 AD2d 356, 969 NYS2d 849 [2d Dept 1999]; *Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610, 563 NYS2d 449 [2d Dept 1990]).

The burden is on the party moving for summary judgment to demonstrate a prima facie case of entitlement to judgment as a matter of law, by tendering sufficient evidence to demonstrate the absence of any material issue of fact (see *Ayotte v Gervasio*, 81 NY2d 1062, 601 NYS2d 463 [1993]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). Here, plaintiff has submitted sufficient evidence regarding the irrefutable guilty pleas of Wright and Cifonelli to the charges of grand larceny and money laundering in open court. Therefore, there is no question of fact as to their full responsibility and liability for the theft of funds from plaintiff and money laundering. Thus, plaintiff is prima facie entitled to summary judgment as to defendants' liability for the stolen funds from the school district.

Further, Wright and Cifonelli cannot defeat summary judgment on the issue of liability as being premature just because of the early stages of this litigation. It is well settled that summary judgment should not be denied on the mere hope that evidence sufficient to defeat the motion may be uncovered during the discovery process (see *Universal Express v McKinnon*, 37 AD3d 705, 828 NYS2d 906 [2d Dept 2007]; *Capital Funding Servs. v Focus Real Estate Mgt.*, 259 AD2d 510, 686 NYS2d 104 [2d Dept 1999]; *Marino v City of New York*, 259 AD2d 469, 686 NYS2d 77 [2d Dept 1999]; see e.g. *Guarino v Mohawk Containers Co.*, 59 NY2d 753, 463 NYS2d 433 [1983]). A claimed need for further discovery is insufficient unless an evidentiary basis is offered to suggest that discovery may lead to some relevant evidence (see CPLR 3212[f]; *Gillinder v Hemmes*, 298 AD2d 493, 748 NYS2d 786 [2d Dept 2002]; *Ruttura & Sons Constr. Co. v J. Petrocelli Constr., Inc.*, 257 AD2d 614, 684 NYS2d 268 [2d Dept 1999]; *Bosio v Selig*, 165 AD2d 822, 560 NYS2d 196 [2d Dept 1990]).

Here, neither Wright nor Cifonelli have submitted any essential evidentiary facts to justify further discovery (see *Weintraub v Levine*, 22 AD3d 664, 803 NYS2d 99 [2d Dept 2005]) especially in view of the fact that they are collaterally estopped from relitigating the issue based upon their guilty pleas of having stolen and laundered school district monies.

Plaintiff also seeks to summarily deny the payment of deferred compensation, specifically, health, dental and life insurance payments to Wright and Cifonelli based upon the faithless servant doctrine.¹ The record before the Court clearly and unequivocally establishes that the defendants engaged in purposeful acts of stealing and money laundering. Plaintiff submits the report of the Office

¹ Claims for the breach of a fiduciary duty and the faithless servant doctrine require the same elements, namely, the breach by a fiduciary duty of loyalty. For the purpose of this Order, they shall be treated as one.

of the New York State Comptroller, dated August 2006, which notes in Appendix D that 22 individual acts of theft (15 by Wright and 7 by Cifonelli) took place over a five year period and was only uncovered as a result of the retirement of Wright. “New York law with respect to disloyal or faithless performance of employment duties is grounded in the law of agency, and has been developed for well over a century” (*Phansalkar v Anderson Weinroth & Co., L.P.*, 344 F.3d 184, 200 [2d Cir. 2003], *citation omitted*).

It is a well established principle under New York law that an agent is obligated “to be loyal to his employer and is prohibited from acting in any manner inconsistent with his agency or trust and is at all times bound to exercise the utmost good faith and loyalty in the performance of his duties” (*Phansalkar v Anderson Weinroth & Co., L.P.*, 344 F.3d 184, 200, *supra*, *citation omitted*). “One who owes a duty of fidelity to a principal and who is faithless in the performance of his services is generally disentitled to recover his compensation” (*Feiger v Iral Jewelry, Ltd.*, 41 NY2d 928, 394 NYS 296 [1977], *citations omitted*; *see also* Outside Counsel, Faithless Servant Doctrine, by Gary J. Mennitt, NYLJ, 12/6/99, 1 (col. 1).

Furthermore, “a principal is entitled to recover from its unfaithful agent any commission paid by the principal” (*Weschler v Bowman*, 285 NY 284, 292 [1941]) and an employer is entitled to the return of any compensation that was paid to the employee during the period of his disloyalty (*see Maritime Fish Prods. v World-Wide Fish Prods. Inc.*, 100 AD2d 81, 474 NYS2d 281 [1st Dept 1984]; *app dism* 63 NY 675 [1984]; *see e.g.* 42-OCT B. B.J. 6). “An agent is held to *uberrimafides* in his dealings with his principal; and if he acts adversely to his employer in any part of transaction, or omits to disclose any interest which would naturally influence his conduct in dealing with the subject of his employment, it amounts to such a fraud upon the principal as to forfeit any right to compensation for services” (*Murray v Beard*, 102 NY 505, 508 [1886], *citation omitted*; *see also Frethy v Durant*, 24 AD 58, 48 NYS 839 [1st Dept 1897]).

The separate criminal acts of Wright and Cifonelli were committed over a five year period against a taxpayer supported school district by manifesting a disdain of the public trust together with faithless conduct in treating public funds as their private bank accounts in a persistent pattern of fraudulent disloyalty. The Court finds that this calculated larcenous conduct warrants the forfeiture by Wright and Cifonelli of any and all obligations by the plaintiff school district for payments to them with respect to life, health, dental and any other insurance for a period of ten years (*see e.g. National Bank of Pakistan v Basham*, 148 AD2d 399, 539 NYS2d 347 [1st Dept 1989]; *S.T. Grand, Inc. v City of New York*, 32 NY2d 300, *supra*).

In his cross motion, Cifonelli seeks to dismiss the complaint for failure to state a cause of action. A motion to dismiss a complaint for failure to state a cause of action will be denied in its entirety where, as in the instant matter before the Court, the complaint asserts more than one cause of action and at least one cause of action is legally sufficient. Here, Cifonelli’s motion is aimed at the pleading as a whole without particularizing the specific causes of action which fails to state a claim to be dismissed. Thus, any cognizable theory of recovery will defeat the motion (*see Amand v Soni*, 215 AD2d 420, 626 NYS2d 830 [2d Dept 1995]; *Martirano Const. Corp. v Briar Contr. Corp.*, 104 AD2d 1028, 481 NYS2d 105 [2d Dept 1984]).

The first cause of action alleged by plaintiff is for a breach of fiduciary duty. The elements of a claim for a breach of fiduciary duty are that an employee is prohibited from acting in any manner inconsistent with his or her employment and must exercise good faith and loyalty in performing his or her duties (*see Mega Group Inc. v Halton*, 290 AD2d 673, 736 NYS2d 444 [3d Dept 2002]; *Chemfab Corp. v Intergrated Liner Tech., Inc.*, 263 AD2d 788, 693 NYS2d 752 [3d Dept 1999]). Plaintiff’s second cause of action is for a declaratory judgment. Since plaintiff’s first cause of action does, in fact, state a claim that is legally sufficient, whether or not plaintiff’s second cause of action states a claim or not is not dispositive on this motion. Therefore, that part of the motion to dismiss for failure to state a cause of action is denied.

Under the facts and circumstances of this matter, the Court finds that part of Cifonelli's cross motion to dismiss the complaint based upon a statute of limitations defense and for failure to add a necessary party, namely DCC Consulting, Inc. (hereinafter "DCC"), to be without merit. DCC was formed by Cifonelli prior to his retirement as a salaried employee of plaintiff to enable him to perform the very same functions as a consultant as he did as a salaried employee. Although plaintiff verbally approved this arrangement with Cifonelli, it never signed a written contract with DCC. Cifonelli alone stole the money from the plaintiff school district, not DCC. Cifonelli alone plead guilty to the larcenous conduct and money laundering, not DCC. There was never any evidence or mention of DCC before the criminal court nor any allegation that DCC, as a corporate entity, committed any larcenous acts against the plaintiff school district. Additionally, there were no criminal charges brought against DCC. Cifonelli's larcenous and money laundering activities were a singular ongoing criminal course of conduct which started in 1999 after he retired. His criminal conduct, which occurred well within the statute of limitations period, constituted the causes of action set forth in plaintiff's complaint (*see Aloi v Babylon Union Free School District*, 81 AD2d 874, 439 NYS2d 169 [2d Dept 1981]) and was a continuing violation for statute of limitations purposes (*see Selkirk v State*, 249 AD2d 818, 671 NYS2d 824 [3d Dept 1998]). Cifonelli cannot ignore the doctrine of equitable estoppel. His acts of disloyalty, which culminated in a criminal plea and resultant jail term, precludes and denies to a defendant this defense when his own acts concealed the very crime he plead guilty to (*see Putter v North Shore Univ. Hosp.*, 7 NY3d 548, 825 NYS2d 435 [2006]; *General Stencils, Inc. v Chippa*, 18 NY2d 125, 272 NYS2d 337 [1996]).

CPLR 1001 directs joinder where a party to be joined is an indispensable party or a conditionally necessary party to the action and should be joined in the action (*see Kronman v Palm Pain Mgt. Assoc., Ltd. Partnership*, 276 AD2d 338, 714 NYS2d 49 [1st Dept 2000]). A conditionally necessary party is a party who ought to be joined if complete relief is to be accorded those already parties to the action. An indispensable party is one whose absence will prevent an effective determination of the controversy or whose interests are not severable or would be inequitably affected by a judgement rendered between the parties before the court.

DCC is not a conditionally necessary party because the complaint asserts no claim against it (*see Hall v Wood*, 11 Misc2d 805, 174 NYS2d 216 [Sup Ct, Suffolk County 1958]) without whose presence the court cannot proceed to judgment (*see Teachers College v Wolterding*, 75 Misc2d 465, 348 NYS2d 286 [Civil Ct, City of New York, New York County 1973]; *rev on other grounds* 77 Misc2d 81, 351 NYS2d 587 [Sup Ct, Appellate Term 1973]). "As a general rule, persons to whom or against a cause of action has accrued jointly are necessary parties" (3 Carmody-Wait 2d § 19:56; *see also Fischer v Sampson*, 27 AD3d 560, 813 NYS2d 136 [2d Dept 2006]; 82 NY Jur2d Parties § 97; *cf. Master v Pohanka*, ___ AD3d ___, ___ NYS2d ___ [2d Dept 2007]; *cf. Duquette v Town of Peru Town Bd.*, ___ AD3d ___, ___ NYS2d ___ [Sup Ct, Clinton County 2007]). Nor is DCC an indispensable party to the civil action (*see NC Venture I, L.P. v Complete Analysis, Inc.*, 22 AD3d 540, 803 NYS2d 95 [2d Dept 2005]; *Brown v Lavine*, 78 Misc2d 1085, 358 NYS2d 579 [Sup Ct, Albany County 1974]; *Happell v Genoese*, 35 Misc2d 939, 231 NYS2d 155 [Sup Ct, Queens County 1962]; 3 Carmody-Wait 2d § 19:86; 67A C.J.S. Parties § 5). Since DCC is neither an indispensable nor necessary party, that part of Cifonelli's application to dismiss the complaint for failure to join a necessary party, is denied.

Accordingly, the motion is granted and the cross motion is denied, as noted herein This constitutes the Order and Judgment of the Court.

DATED: 11/8/07



 THOMAS F. WHELAN, J.S.C.