

Citrin v Baratta and Goldstein

2008 NY Slip Op 30407(U)

February 8, 2008

Supreme Court, New York County

Docket Number: 0602119/2007

Judge: Barbara Kapnick

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

BARBARA R. KAPNICK

PRESENT:

PART 12

Index Number : 602119/2007

602119/07

CITRIN, RITA

INDEX NO.

vs

MOTION DATE

BARATTA & GOLDSTRIN

MOTION SEQ. NO.

Sequence Number : 001

001

DISMISS ACTION

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

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 IS DECIDED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION**

FILED

FEB 13 2008

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 2/8/08

BARBARA R. KAPNICK J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 12

-----X
RITA CITRIN,

Plaintiff,

-against-

BARATTA AND GOLDSTEIN, JOSEPH
P. BARATTA, HOWARD J. GOLDSTEIN
and BARATTA BARATTA and AIDALA
LLP,

Defendants.

-----X
BARBARA R. KAPNICK, J.:

DECISION/ORDER
Index No. 602119/07
Motion Seq. No. 001

FILED
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COUNTY CLERK'S OFFICE

In this action for legal malpractice, plaintiff Rita Citrin alleges that the defendants Baratta and Goldstein, Joseph P. Baratta, Howard J. Goldstein, and Baratta Baratta and Aidala LLP ("BB&A") had a conflict of interest, committed negligence and breached their retainer agreement in a prior action, JAG Technical Associates, Inc., et al. v. Meryl Bernstein, Rita Citrin, Datalink Corporation, Datalink International Business Services, Inc., All Star Computer Consulting Inc., Maxemmum Consulting, and Jane Does 1-10 and John Does 1-10, Index No. 602649/03.

The underlying action was commenced by twelve computer consultants ("the consultants") hired by a company known as Datalink Corporation ("Datalink"), a headhunting firm, to perform services for clients of Datalink. Meryl Bernstein operated Datalink, and Citrin was a creditor, having loaned \$750,000 to the company.

After a five-day jury trial before Justice Rolando T. Acosta, the jury found that Citrin and Bernstein, who were both represented by Baratta and Goldstein, conspired to recoup Citrin's \$750,000 loan at the expense of the unpaid consultants and other corporate creditors, by shutting down Datalink and opening up another headhunting firm, All Star Consulting ("All Star").

The jury returned a verdict in favor of the consultants and against defendants Citrin, Bernstein, Datalink and All Star for compensatory damages in the amount of \$465,338, plus interest, and punitive damages in the amount of \$500,000 against each defendant.

By Decision/Order dated June 13, 2006, Justice Acosta denied a motion for a judgment notwithstanding the verdict or for a new trial, finding, in relevant part, as follows:

Here, this Court ... finds that Citrin conspired to conceal the formation of All Star for the express purpose of recouping her investment and defrauding the consultants and other creditors.

* * *

Last, Citrin's claim that there was a conflict of interest because the attorney represented both Citrin and Bernstein has no merit since she waived any potential conflict. It should also be noted that Citrin is a very sophisticated investor with extensive real estate holdings, who hired her trial counsel. For her to complain about trial counsel at this juncture is disingenuous.

Citrin, through a successor counsel, and the consultants ultimately settled the matter, pursuant to 'Stipulation and Order Vacating Memorandum Decision' dated May 7, 2007, so-ordered by Justice Acosta. An appeal of the judgment was accordingly withdrawn pursuant to Stipulation of the parties, so-ordered on May 21, 2007.

Defendants now move for an order pursuant to CPLR § 3211(a) (5) dismissing the Complaint on the grounds that plaintiff is collaterally estopped from bringing this action.

Plaintiff argues in the first instance that Justice Acosta's decision cannot be given collateral estoppel effect since the May 7, 2007 so-ordered Stipulation provided that "the plaintiffs and Citrin have agreed that a necessary part of the settlement is that the [June 13, 2006] Memorandum Decision be vacated by the Court as it pertains to Citrin".¹

Moreover, plaintiff argues that Justice Acosta's decision cannot be given collateral estoppel effect because there is no identity of issues and there was no 'full and fair opportunity' to

¹ Defendants apparently had not obtained a copy of this Stipulation prior to the making of this motion and were not aware of this provision.

litigate the malpractice and conflict of interest issues raised herein.

Defendants argue in reply that the Stipulation may be interpreted to vacate Justice Acosta's decision strictly as to Citrin's liability under the judgment. They contend that the findings set forth therein, including the finding that plaintiff waived the conflict of interest claim, stand.

Based on the papers submitted and the oral argument held on the record on December 5, 2007, this Court finds that the so-ordered Stipulation was not so limited, but rather vacated the Decision in its entirety with respect to Citrin.

Accordingly, that portion of the motion seeking to dismiss this action on collateral estoppel grounds based on said decision must be denied.

Defendants alternatively argue that the Complaint must be dismissed against the firm of BB&A because the new firm was first formed five months after the jury verdict against Citrin, had no attorney-client relationship with Citrin, and did not represent Citrin in any capacity.

Plaintiff, however, argues that there are triable issues of fact as to whether the formation of BB&A on June 13, 2006, the date of Justice Acosta's decision, when the defendants were already aware that plaintiff had a potential malpractice claim against them, constituted a *de facto* merger of the prior firm.

"It is the general rule that a corporation which acquires the assets of another is not liable for the torts of its predecessor" (*Schumacher v. Richards Shear Co., Inc.*, 59 N.Y.2d 239, 244, 464 N.Y.S.2d 437, 451 N.E.2d 195 [1983] [citations omitted]). There is an exception to this rule, however, for cases in which there has been "a consolidation or merger of seller and purchaser" (*id.* at 245, 464 N.Y.S.2d 437, 451 N.E.2d 195). [footnote omitted]. A transaction structured as a purchase-of-assets may be deemed to fall within this exception as a "de facto" merger, even if the parties chose not to effect a formal merger, if the following factors are present: (1) continuity of ownership; (2) cessation of ordinary business operations and the dissolution of the selling corporation as soon as possible after the transaction; (3) the buyer's assumption of the liabilities ordinarily necessary for the uninterrupted continuation of the seller's business; and (4) continuity of management, personnel, physical location, assets and general business operation (*see Fitzgerald v. Fahnstock & Co.*, 286 A.D.2d 573, 574, 730 N.Y.S.2d 70 [2001], *citing Sweatland v. Park Corp.*, 181 A.D.2d 243, 245-246, 587 N.Y.S.2d 54 [1992]).

In re New York City Asbestos Litigation, 15 A.D.3d 254, 255-256 (1st Dep't 2005).

This Court finds that there are issues of fact to be explored during discovery as to whether or not there was a *de facto* merger

of the prior firm. Accordingly, this branch of the motion is denied as premature.

Defendants shall serve an Answer to plaintiff's Complaint within 20 days of service of a copy of this order with notice of entry.

A preliminary conference shall be held in IA Part 12, 60 Centre Street, Room 341 on March 19, 2008 at 9:30 a.m.

This constitutes the decision and order of this Court.

Dated: February 8, 2008


Barbara R. Kapnick
J.S.C.

BARBARA R. KAPNICK
J.S.C.

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