

<b>Coby Group, LLC v Kriss</b>
2008 NY Slip Op 31855(U)
June 27, 2008
Supreme Court, New York County
Docket Number: 0111818/2006
Judge: Michael D. Stallman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY  
PRESENT: Hon. MICHAEL D. STALLMAN PART 7  
*Justice*

THE COBY GROUP, LLC,

Plaintiff,

- v -

DAVID KRISS and KRISS FEUERSTEIN &  
KATZ, LLP,

Defendants.

INDEX NO. 111818/2006

MOTION DATE 11/29/07

MOTION SEQ. NO. 002

MOTION CAL. NO. 11

The following papers, numbered 1 to 8 were read on this motion for summary judgment

	PAPERS NUMBERED
Notice of Motion— Affidavits — Exhibits A-H	<u>1-4</u>
Answering Affidavits — Exhibits 1-7; 1-2	<u>5-6</u>
Replying Affidavit — Exhibit A	<u>7</u>
Supplemental Affirmation (And Supplemental Memoranda & Supplemental Reply Memoranda)	<u>8</u>

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion to dismiss, converted to a motion for summary judgment by order dated September 4, 2007, is decided in accordance with the annexed memorandum decision and order.

**FILED**  
JUL - 2 2008  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 6/27/08  
New York, New York

[Signature]  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE

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

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 7**

-----X  
THE COBY GROUP, LLC,

Plaintiff,

Index No. 111818/08

- against -

DAVID KRISS and KRISS FEUERSTEIN & KATZ, LLP,

**Decision and Order**

Defendants.

-----X

**HON. MICHAEL D. STALLMAN, J.:**

In this action, plaintiff The Coby Group LLC alleges that defendants David Kriss, and his law firm, Kriss Feuerstein & Katz, LLP committed malpractice, negligence, breach of fiduciary duty, and fraud in their alleged representation of plaintiff in connection with the purchase of real estate in Florida. Plaintiff alleges that Kriss represented plaintiff in connection with plaintiff's efforts to obtain bank financing to close upon the real estate deal, in connection with tax matters and issues pertaining to the planned purchase, and allegedly negotiated several contracts with prospective purchases for a "flip" sale of the real estate. Verified Amended Complaint ¶¶ 19-23. Plaintiff alleges that, at the same time, Kriss represented and continued to represent Alex Adjmi and Robert Cayre, who were to become members of The Coby Group LLC, by delivering, among other things, \$4.5 million as an additional deposit on the real estate deal. Plaintiff alleges that Kriss and his firm betrayed plaintiff by representing Adjmi and Cayre, whose interests allegedly became adverse to plaintiff. Adjmi and Cayre brought suit against plaintiff, its members, and MCZ/Centrum, the prospective purchaser of the real estate under a flip sale. Cayre and Adjmi v Westreich et al., 111983/2004. That action was settled, and several releases were exchanged.

Defendants now move to dismiss the complaint, and the motion was converted to a motion for summary judgment by order dated September 4, 2007.

### DISCUSSION

Defendants argue that they are entitled to summary judgment dismissing the complaint, based on the releases exchanged in Cayre and Adjmi v Westreich, 111983/2004. The August 27, 2007 release executed by The Coby Group, LLC states, in pertinent part:

“The undersigned, THE COBY GROUP, LLC . . . does hereby:

1. release ROBERT CAYRE and ALEX ADJMI..., and their...agents **and attorneys**, from any and all liability and accountability, directly or derivatively through Coby or otherwise, with respect to any and all actions, causes of action, suits, debts, dues, sums of money, damages, judgments, executions, **claims and demands whatsoever**, in law or in equity, known or unknown, which the undersigned ever had, now have or may hereafter have, for, upon, or by reason of any matter, cause or thing whatsoever from the beginning of the world to the date of this Release, **including but not limited to** any matter, cause or thing relating to (1) the above litigation..., (2) the Purchase and Sale Agreement between Coby and Archstone-Smith Operating Trust dated as of May 17, 2004; (3) the Purchase and Sale Agreement between Coby and MCZ/Centrum Florida III Owner, LLC, dated as of July 21, 2004, (4) the agreement dated May 17, 2004 by and among Morty J. Yashar, Leslie M. Westreich, Alex Adjmi and Robert Cayre..., (5) the Letters of Intent..., (6) Coby, (7) the joint venture..., or (8) the real estate properties located 3801, 3901 and 4001 South Ocean Drive, Hollywood Florida, known as the "Ocean Crest Beach Apartments... provided however, that nothing contained in this Release shall release any person or entity from any obligation with respect to or under the stipulation of Settlement dated August 26, 2004, in the above action. . . .”

Furman Aff., Ex D (emphasis added). Westreich and Yashar, who are members of The Coby Group, LLC, also executed a release with identical pertinent language. Ibid.

Plaintiff argues that the release does not bar its claims against Kriss and his law firm, because it is suing defendants in their capacity as plaintiff's attorneys, not in their capacity as Cayre and Adjmi's attorneys. Plaintiff does not dispute that Kriss and his law firm acted as Cayre and Adjmi's

[\* 4 ]

attorneys. On the contrary, the gravamen of the complaint is that Kriss acted in the interests of Cayre and Adjmi to the detriment of the Coby Group, LLC. See Amended Verified Complaint ¶¶ 47, 64, 66-67. Because the release includes Cayre and Adjmi's attorneys, the release applies to Kriss and his law firm, as if they were specifically named in the release. See Wells v Shearson Lehman/American Express, 72 NY2d 11, 24 (1988)(New York law does not demand that every discharged party be specifically named or identified); Berkowitz v Fischbein, Badillo, Wagner & Harding, 7 AD3d 385, 387 (1st Dept 2004); Argyle Capital Mgt. Corp. v Lowenthal, Landau, Fischer & Bring, P.C., 261 AD2d 282, 282 (1st Dept 1999).

Plaintiff fails to raise a triable issue of fact as to the scope of the release. Kriss was a principal actor in the relevant events; Kriss allegedly sent a letter on August 6, 2004 to MCZ/Centrum, which plaintiff claims was an attempt to block and prevent plaintiff from closing on a deal with MCZ/Centrum. Verified Amended Complaint ¶ 68. Although plaintiff claims that it did not have all of the facts at the time of the release (Opp. Mem. at 9), plaintiff was aware that it had potential claims against Kriss when the release was executed, but plaintiff did not carve out those claims from the broad, general release. Cf. Argyle Capital Mgt. Corp., 261 AD2d at 283. The release expressly includes causes of actions and claims “known or unknown, which the undersigned ever had, now have or may hereafter have . . . .” Furman Aff., Ex D.

Plaintiff's argument that the release barred only those claims against Kriss and his firm only in their capacity as Adjmi and Cayre's attorneys is unpersuasive. The cases construing the language “agents and attorneys” in releases do not ascribe to these words the limited scope which plaintiff urges. Wells, 72 NY2d 11, supra, Berkowitz, 7 AD3d 385, supra; Argyle Capital Mgt. Corp., 261 AD2d 282, supra.

[\* 5 ]

“The mere assertion by a party that contract language means something other than what is clear when read in conjunction with the whole contract is not enough to create an ambiguity sufficient to raise a triable issue of fact.” New York City Off-Track Betting Corp. v Safe Factory Outlet, Inc., 28 AD3d 175, 177-178 (1st Dept 2006). “The court should not find the language ambiguous on the basis of the interpretation urged by one party, where that interpretation would ‘strain the contract language beyond its reasonable and ordinary meaning.’” Consolidated Edison Co. of N.Y. v United Coastal Ins. Co., 216 AD2d 137, 137 (1st Dept 1995). In any event, at the time the release was executed, Kriss and his firm was not acting in any other capacity other than as attorneys to Adjmi & Cayre. By letter dated July 22, 2004, Kriss made it clear that he was representing only Adjmi and Cayre's interests. Furman Reply Aff, Ex A. Accordingly, plaintiff's reliance on Adams v Judson is misplaced (243 AD 404 [1<sup>st</sup> Dept 1935] [Court found that a release of claims against corporation's “officers and/or directors” was ambiguous as to release of claims against persons in their individual capacity]). Thus, there is no basis to conclude that the wording of the release was intended to carve out any claims against Kriss and his law firm.


Because the release is unambiguous, plaintiff's argument that summary judgment should be denied as premature is unavailing. The Court does not address defendants' other arguments in support of their motion.

### CONCLUSION

Accordingly, it is hereby

**ORDERED** that defendants' motion to dismiss, converted to a motion for summary judgment by order dated September 4, 2007, is granted, the complaint is dismissed, and the Clerk is directed to enter judgment in defendants' favor accordingly.

Dated: 6/27/08  
New York, New York

ENTER:   
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J.S.C.

**FILED**

JUL - 2 2008

NEW YORK  
COUNTY CLERK'S OFFICE