

**Law Offices of Wexler Burkhart Hirschberg, LLP v
Bingaman**

2008 NY Slip Op 33204(U)

November 18, 2008

Supreme Court, New York County

Docket Number: 8625/07

Judge: Roy S. Mahon

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SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. ROY S. MAHON

Justice

LAW OFFICES OF WEXLER BURKHART
HIRSCHBERG, LLP,

Plaintiff(s),

- against -

STEVEN BINGAMAN, GREENE SPRING
COMPANY, INC., GREEN MOUNTAIN, INC.,
and APPLEBY PARTNERS, LLC,

Defendant(s).

TRIAL/IAS PART 9

INDEX NO. 8625/07

MOTION SEQUENCE
NO. 3 & 4

MOTION SUBMISSION
DATE: September 8, 2008

The following papers read on this motion:

Notice of Motion
Opposition
Reply
Memorandum of Law

XX
X
X
XXXXX

Upon the foregoing papers, the motion by plaintiff for an Order granting plaintiff partial summary judgment without prejudice to renew, and pursuant to CPLR 2221 for leave to renew said prior motion, and pursuant to CPLR 3212 for an order granting plaintiff partial summary judgment in the amount of \$43,697.66, plus interest, jointly and severally against the defendants Steven Bingaman and Greene Spring Company, Inc., on the grounds that plaintiff inadvertently submitted on the prior motion a moving Affirmation instead of a moving Affidavit, and that the plaintiff is entitled judgment as a matter of law and the motion by the defendants for an Order pursuant to CPLR 3211(a)(7), dismissing the complaint as against defendant Appleby Partners, LLC; pursuant to CPLR 3025, granting leave to defendants Bingaman and Greene Spring to file and serve an amended answer with counterclaims; pursuant to CPLR 7502 and 22 NYCRR Part 137, dismissing plaintiff's claims based on the arbitration rules governing fee disputes and pursuant to CPLR 510 transferring this action to the Supreme Court, New York County, are both determined as hereinafter provided:

This action for an account stated for certain professional services rendered by the plaintiff arises out of retainer agreement entered into on September 18, 2006.

In pertinent part, the Court in its Order dated July 15, 2008 stated:

"The Court notes that in support of the instant application by the plaintiff, the plaintiff submits an affirmation of Norman B. Arnoff, an attorney who is "of counsel" to the plaintiff and " . . . the principal attorney that was responsible for the underlying action" (see *reply affidavit of Norman B. Arnoff*). Although the plaintiff in plaintiff's reply has "converted" the original Affirmation to an Affidavit, a reply may not be used to advance arguments in a summary judgment applications not advanced in the original application (see, **Lumbermens Mutual Casualty Company v Morsc Shoe Company d/b/a Fayva Shoe Store**, 218 AD2d 624, 630 NYS2d 1002 (First Dept., 1995). In light of the fact that the plaintiff has not submitted an affidavit from a person with knowledge as required by CPLR §3212, the plaintiff's application for an Order pursuant to 3212 granting plaintiff partial summary judgment in the amount of \$43,697.66 plus interest, jointly and severally against the defendants Steven Bingaman and Greene Spring Company, Inc., on the ground that the plaintiff is entitled judgment as a matter of law, is **denied without prejudice to renew** upon proper papers.

Based upon the fact that the defendants Steven Bingaman, Greene Spring Company, Inc. and Appleby Partners, LLC's cross-motion is addressed to issues raised in the plaintiff's application, the defendant's application is **denied without prejudice to renew** at the time of the plaintiff's submission."

Based upon the submission of an affidavit from Norman B. Arnoff, the Court **grants** the plaintiff's application for renewal.

As to the plaintiff's application for summary judgment, in light of the respective parties divergent contentions as to the events in issue including the retention of the plaintiff and the application for the temporary restraining order in New York County Supreme Court and based upon the fact that there has been no discovery undertaken in this action, the plaintiff's application for an Order granting plaintiff partial summary judgment without prejudice to renew, and pursuant to CPLR 2221 for leave to renew said prior motion, and pursuant to CPLR 3212 for an order granting plaintiff partial summary judgment in the amount of \$43,697.66, plus interest, jointly and severally against the defendants Steven Bingaman and Greene Spring Company, Inc., on the grounds that plaintiff inadvertently submitted on the prior motion a moving Affidavit instead of a moving Affidavit, and that the plaintiff is entitled judgment as a matter of law, is **denied** without prejudice to renew upon the completion of discovery.

The Court will conduct a **discovery conference** with counsel for the respective parties on **January 7, 2009 at 9:30 a.m.**

In examining an application to dismiss a complaint for a failure to state a cause of action, the Court in **Mastrocola v County of Nassau**, 248 AD2d 684, 671 NYS2d 278 (Second Dept., 1998) stated:

"[T]he sole criterion [when considering a motion to dismiss for failure to state a cause of action] is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*Guggenheimer v Ginzberg*, 43 NY2d 268, 275, 401 NYS2d 182, 372 NE2d 17). The pleadings must be liberally construed, and the facts pleaded are presumed to be true and are

[* 3]

accorded every favorable inference (see, *Doria v Masucci*, 230 AD2d 764, 765, 646 NYS2d 363). Under the circumstances of this case, the plaintiff has sufficiently pleaded a cause of action against the Village of Lake Success (see, *Anderson v Muniz*, 125 AD2d 281, 283, 508 NYS2d 567)."

Mastrocola v County of Nassau, supra at 279

A review of the Complaint in issue establishes that the Complaint state a cause of action against the defendant Appleby Partners, LLC (see, **Mastrocola v County of Nassau**, supra). As such, that branch of the defendants' application which seeks an Order pursuant to CPLR 3211(a)(7), dismissing the complaint as against defendant Appleby Partners, LLC, is denied.

Leave to amend a pleading is freely granted unless the amendment is palpably insufficient or patently devoid of merit (see, **Sampson v Contillo**, ___AD3d___, 865 NYS2d 137 (Second Dept., 2008). Accordingly, upon review of the defendants' Proposed Amended Answer and Counterclaim, (see *defendants' Exhibit 5 annexed to defendants' Exhibit C*), that portion of the defendants' motion which seeks an Order pursuant to CPLR 3025, granting leave to defendants Bingaman and Greene Spring to file and serve an amended answer with counterclaims, is granted.

Based upon the provisions of 22 NYCRR §137.1(b)(2) which provides:

"§137.1. Application

(a) This Part shall apply where representation has commenced on or after January 1, 2002, to all attorneys admitted to the bar of the State of New York who undertake to represent a client in any civil matter.

(b) This Part shall not apply to any of the following:

(2) amounts in dispute involving a sum of less than \$1000 or more than \$50,000, except that an arbitral body may hear disputes involving other amounts if the parties have consented;"

and in light of the fact that the plaintiff's Complaint seeks an amount in excess of \$50,000.00 (see *plaintiff's Exhibit 2*) that portion of the defendants' motion which seeks an Order pursuant to CPLR 7502 and 22 NYCRR Part 137, dismissing plaintiff's claims based on the arbitration rules governing fee disputes, is denied.

A review of that branch of the defendants' motion which seeks a change of venue to New York County establishes that said application is brought pursuant to the provisions of CPLR §510(3). In examining such an application, the Court in **O'Brien v Vassar Brothers Hospital**, 207 AD2d 169, 622 NYS2d 284 (Second Dept., 1995) stated:

"A review of the case law decided with reference to CPLR 510(3) and its antecedents establishes that there is a general consensus among appellate courts as to the existence, if not as to the absolute rigidity and inexorability, of four criteria which should be established by the movant in order to demonstrate his or her entitlement to relief pursuant to CPLR 510(3). The elements to be shown are as follows:

First, "[t]he affidavit in support of a motion under this section must contain the names, addresses and occupations of the prospective witnesses" (*Jurlbut v Whalen*, 58 AD2d 311, 316; see also, *Fireman's inc. Co. v Doyle Group*, 189 AD2d 711 [names and addresses]; *Quick Constr. Corp. v Loribeth Theatres*, 186 AD2d 546; *Ryan v Genovese Pharmacy*, *supra*; *Johnson v Greater NY Conference of Seventh Day Adventist Church*, *supra*; *Culhane v Jensen*, 179 AD2d 582; *Levenstein v Parks*, 163 AD2d 367; *Rodriguez v St. Paul's Catholic Church*, 162 AD2d 1017; *Andros v Roderick*, *supra*; *Timber Hill Assocs. v Schooldays*, 157 AD2d 579; *Jansen v Bernhang*, 149 AD2d 468; *Thomas v Small*, *supra*; *Morris Elecs. v Stereo E. Devs.*, 71 AD2d 1061; *McDermott v McDermott*, 267 App Div 171).

Second, a party seeking a change of venue for the convenience of witnesses is also required to disclose the facts to which the proposed witnesses will testify at the trial, so that the court may judge whether the proposed evidence of the witnesses is necessary and material (see, *Gray v Good*, 203 AD2d 422; *Erskine v Burke Scaffolding Corp.*, 202 AD2d 389; *Tricarico v Cerasuolo*, 199 AD2d 142; *Molod v Amundsen*, 194 AD2d 429; *Ryan v Genovese Pharmacy*, *supra*; *Johnson v Greater NY Conference of Seventh Day Adventist Church*, *supra*; *Cardona v Aggressive Heating*, 180 AD2d 572; *Culhane v Jensen*, *supra*; *Pantoja v Held*, 172 AD2d 599; *Alexandre v Pepsi-Cola Bottling Co.*, 150 AD2d 742; *Greene v Hillcrest Gen. Hosp.*, 130 AD2d 621; *Merrill v City of New York*, 16 AD2d 1004; *McDermott v McDermott*, *supra*).

Third, the moving party must show that the witnesses for whose convenience a change of venue is sought are in fact willing to testify (see, e.g., *Gray v Good*, *supra*; *Erskine v Burke Scaffolding Corp.*, *supra*; *Tricarico v Cerasuolo*, *supra*; *Quick Constr. Corp. v Loribeth Theatres*, 186 AD2d 546, *supra*; *Ryan v Genovese Pharmacy*, *supra*; *Johnson v Greater NY Conference of Seventh Day Adventist Church*, *supra*; *Cardona v Aggressive Heating*, *supra*; *Culhane v Jensen*, *supra*; *Simeti v Smithtown Fairfield Condominium*, 172 AD2d 513; *Pantoja v Held*, *supra*; *Aviles v CYO Whitestone Swimming Pool*, 168 AD2d 405; *Andros v Roderick*, 162 AD2d 813; *Radatron, Inc. v ZZ Auto Tel.*, 30 AD2d 760, 761; *Schwartz v Wilbur*, 211 App Div 806).

Fourth, there must be a showing as to how the witnesses in question would in fact be inconvenienced in the event a change of venue were not granted (see, e.g., *Pittman v Maher*, 202 AD2d 172, *supra*; *Molod v Amundsen*, 194 AD2d 429, *supra*; *Maynard v Elrond Realty Cor.*, 170 AD2d 401; *Clark v New Rochelle Hosp. Med. Ctr.*, 170 AD2d 271; *Wilkins v Cohen*, 169 AD2d 476; *Frey v Fun Tyme Ski Shop*, 163 AD2d 11; *Feldman v North Shore Univ. Hosp.*, 157 AD2d 831; *Firoozan v Key Food Supermarket*, 151 AD2d 334; *Losicco v Gardner's Vil.*, 97 AD2d 535)."

O'Brien v Vassar Brothers Hospital, *supra* at 172-173

Based upon the defendants' failure to make a showing as set forth in **O'Brien v Vassar Brothers**

Hospital, that branch of the defendants' motion which seeks an Order pursuant to CPLR 510 transferring this action to the Supreme Court, New York County, is denied.

SO ORDERED.

DATED: 11/18/2008

Roy C. Walker
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J.S.C.

ENTERED
NOV 21 2008
NASSAU COUNTY
COUNTY CLERK'S OFFICE