

**Fletcher v Boies, Schiller & Flexner, LLP**

2008 NY Slip Op 33450(U)

December 15, 2008

Supreme Court, New York County

Docket Number: 114698/07

Judge: Richard B. Lowe

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: Part 56

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MARYANNE FLETCHER,

Plaintiff,

Index No. 114698/07

-against-

BOIES, SCHILLER & FLEXNER, LLP, DAVID  
BOIES, JONATHAN SCHILLER, DONALD  
FLEXNER, ANDREW HAYES, HAYES &  
HARDY LLP, OLOV HAAZEN, CHRISTINA  
LEWICKY, MERRILL DAVIDHOFF, BERGER &  
MONTAGUE, P.C., BRIAN A. RISHWAIN,  
JOHNSON & RISHWAIN, LLP., NEVILLE  
JOHNSON,

Defendants.

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**Richard B. Lowe, III., J.:**

In this action alleging, among other things, attorney malpractice, the following motions will be addressed: (1) plaintiff Maryanne Fletcher's motion, pursuant to CPLR 306-b, to extend the time to serve process on defendants, or to deem service timely nunc pro tunc (mot. seq. no. 001); (2) the motion brought by defendants Andrew Hayes (Hayes) and Hayes & Hardy LLP, pursuant to CPLR 3211, for an order dismissing the complaint (mot. seq. no. 003); (3) the motion brought by defendants Boies, Schiller & Flexner LLP (BSF), David Boies (Boies), Jonathan Schiller (Schiller), Donald Flexner (Flexner), Olav Haazen (Haazen), and Christina Lewicky (Lewicky)(together, the Boies defendants), pursuant to CPLR 3211, for an order dismissing the complaint (mot. seq. no. 004); (4) the motion brought by defendants Johnson & Rishwain, LLP (J&R) and Neville Johnson (Johnson) for an order dismissing the complaint

(mot. seq. no. 005); and (5) the motion brought by defendants Berger and Montague, P.C. (B&M) and Merrill G. Davidoff (s/h/i as Merrill G. Davidhoff)(Davidoff) for an order dismissing the complaint (mot. seq. no. 006). Defendant Brian Rishwain (Rishwain), by means of a "Notice of Joinder" joins in the motions to dismiss plaintiff's CPLR 306-b motion, and, by another "Notice of Joinder," joins in the motions to dismiss brought by the other parties. Hayes, by Notice of Joinder, joins in the opposition to plaintiff's CPLR 306-b motion, for the reasons put forward by the Boies defendants.

### I. Background

Plaintiff is a model who retained BSF to represent her in bringing claims against various modeling agencies for, among other things, misuse of her image and likeness, and retaliating against her when she sought recovery of losses the misuses entailed. Plaintiff had expended a considerable amount of care and time amassing evidence to support her claims against the agencies.

At the same time that plaintiff retained BSF, BSF was representing a class of models in federal and state court for the same alleged infractions.<sup>1</sup> Plaintiff alleges that it was her understanding that she, due to her understanding of the background of the models' claims, and her contribution of evidence supporting them, might be made a lead plaintiff in the federal class action.

Plaintiff maintains that BSF committed malpractice by not disclosing to her the conflict of interest BSF had in representing her both individually, and as a member (and potential lead

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<sup>1</sup>The federal class action is entitled *Fears v Wilhelmina Model Agencies, Inc.*, No. 02 Civ 4911 (SD NY). The state action is *Shelton v Elite Model Management Corp.*, Index No. 601076/03 (Sup Ct NY County).

plaintiff) of the federal class action. Although she received damages in the federal class action settlement, plaintiff believes that she should have received considerably more money had BSF used her evidence, and represented her in her individual capacity, and that her failure to obtain a bigger award was caused by BSF' conflict of interest. Plaintiff also believes that the various defendants committed fraud against her when they agreed to represent her best interests, while instead, using her evidentiary materials in support of the class action, rather than in her own.

Plaintiff's complaint, an unquestionably lengthy and at times redundant document, claims the following causes of action: (1) negligence and conflict of interest against BSF and J&R for undertaking to represent both her individual and class claims without acknowledging a conflict of interest; (2) breach of contract against all defendants for the same thing; (3) defendants' negligence in failing to file timely notice of claim in bankruptcy court; (4) punitive damages; (5) fraud and misrepresentation, occasioned by defendants' use of plaintiff's evidentiary materials to aid in the class actions, while leading plaintiff to believe that they would be used to her advantage; (6) disgorgement; (7) fraud and punitive damages, on the same basis as above; and (8) breach of fiduciary duty.

## **II. Discussion**

### **A. Plaintiff's Pursuant to CPLR 306-b**

CPLR 306-b requires that service of a summons and complaint, or a summons with notice, be made within 120 days after the filing of the summons and complaint under CPLR 304. Section 306-b continues that "[i]f service is not made upon a defendant within the time provided in this section, the court, upon motion, shall dismiss the action without prejudice as to that defendant, or upon good cause shown or in the interest of justice, extend the time for service."

Each of the defendants who have been served with process claim that service was not effected upon them within the proscribed period, and that plaintiff can show no good reason why the time for service should be extended as to them.

The Court of Appeals has held that the two standards (that of good cause shown and in the interest of justice), are “two separate standards” which “cannot be defined by use of the same criteria.” *Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 104 (2001). As such, the Court found that, while a showing of “due diligence” in attempting to effect service was required under the standard of good cause shown, it was not a “gatekeeper” to a showing that an extension of time would be in the interest of justice. *Id.* According to the Court, the interest of justice standard provided “an *additional and broader standard*” to that of good cause shown, and included such factors as “mistake, confusion or oversight, so long as there is no prejudice to the defendant [emphasis in original, citation omitted].”

In sum, the *Leader* Court stated that

[t]he interest of justice standard requires a careful judicial analysis of the factual setting of the case and a balancing of the competing interests presented by the parties. Unlike an extension request premised on good cause, a plaintiff need not establish reasonably diligent efforts at service as a threshold matter. However, the court may consider diligence, or lack thereof, along with any other relevant factor in making its determination, including expiration of the Statute of Limitations, the meritorious nature of the cause of action, the length of delay in service, the promptness of a plaintiff’s request for the extension of time, and prejudice to defendant.

*Id.* at 105-106; see also *de Vries v Metropolitan Transit Authority*, 11 AD3d 312 (1<sup>st</sup> Dept 2004).

In the present case, plaintiff filed the summons on November 1, 2007, and filed the complaint on February 27, 2008. Service was not effectuated on any party until after the 120-day period following the filing of the summons.

Service on Davidoff was allegedly made on March 4, 2008, by service of the summons on the secretary in Davidoff's office. Plaintiff then mailed a copy of the summons and complaint to an address other than that upon which she served the summons and complaint, which, Davidoff claims, was neither his actual place of business nor last known residence.

Service upon Johnson, Rishwain and J&R was allegedly made on March 6, 2008, after the expiration of the 120-day period, by service of the summons and complaint on a temporary secretary working in the firm of Johnson & Johnson LLP (J&J), a firm which was not J&R. Rishwain maintains that he has no affiliation with J&J. Johnson was, presumably, a partner in J&J at the time. Johnson maintains that only the complaint was served on the offices of J&J.

J&R had ceased all business operations in July 2007, and had left its office, located at 12121 Wilshire Boulevard in Los Angeles, California, more than a year earlier. The 12121 Wilshire Boulevard address is the one to which service of process was later mailed. According to the affidavits of service (Bluestone Aff., Ex. B), both the summons and complaint were served at the office of J&J, and that both documents were mailed to the 12121 Wilshire Boulevard address.

The Boies defendants do not dispute service, or use it as a means to seek dismissal of the complaint; these defendants entered into a stipulation extending plaintiff's time to serve on March 17, 2008. Rather, they argue that the plaintiff's motion to extend time is premature, as no party has yet moved to dismiss pursuant to CPLR 306-b, so that any decision the court might render would be impermissibly advisory in nature.

B&M have not disputed the timeliness of service, while Hayes joins in the Boies motion, with no discussion of the question of service upon him.

This court finds that plaintiff has failed to establish any ground upon which to grant an extension of time to serve the complaint pursuant to CPLR 306-b as against those parties who claim that service was not made to them within the proscribed 120 days, or completed by a proper mailing under CPLR 308. She has offered no excuse at all for not attempting service earlier, thus negating any attempt to use the standard of “good cause shown,” no diligence in attempting service having been made. The plaintiff has not argued the standard of “interest of justice” as there is no explanation or justification for the avoidance of dismissal, except for plaintiff’s argument that no defendant has been prejudiced by her failure to abide by CPLR 306-b.

Davidoff was not properly served because of a failure in proper mailing, pursuant to CPLR 308. Rishwain was not properly served as he has no relationship with J&J. Johnson and J&R were improperly served under CPLR 308, because, at the least, process was not mailed either to their “last known residence” or “actual place of business.” CPLR 308 (2). Service of process on J&R by service on the Secretary of State was ineffectual under Business Corporation Law § 307, which only applies to service on foreign corporations, not limited liability partnerships. Thus, the complaint is dismissed as against these three defendants, pursuant to CPLR 306-b, but is not dismissed as to the Boies defendants, Hayes, or B&M. This court does not agree with the Boies defendants that this decision is advisory. The time is ripe for such a determination, which is more in the nature of a declaratory judgment than an advisory opinion.

## **B. Motions to Dismiss**

### **1. Motion by the Boies Defendants**

On a motion to dismiss pursuant to CPLR 3211, we must accept as true the facts as alleged in the complaint and submissions in opposition to the motion, accord

plaintiffs the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory.

*Sokoloff v Harriman Estates Development Corp.*, 96 NY2d 409, 413 (2001); *see also Leon v Martinez*, 84 NY2d 83 (1994).

The Boies defendants' initial dissatisfaction with the complaint is that it is "a confused mass of disjointed rambling statements" (Memorandum of Boies Defendants, at 6) which should be dismissed as inimical to CPLR 3013 and 3014. CPLR 3013 requires that "[s]tatements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense." CPLR 3014 requires, among other things, that the "pleading shall consist of plain and concise statements in consecutively numbered paragraphs."

Plaintiff's response to these arguments is unconvincing suggestion that, to avoid dismissal, it is enough that the defendants can understand what she meant to say, that is, that "[t]he ability to dissect the complaint, its specific allegations and to debate whether it is correct or not, demonstrates that the complaint actually *does* state a cause of action [emphasis in original]" Plaintiff's Aff. in Opp. to Motions, at unnumbered page 3. Plaintiff also suggests that the "very vociferousness" of defendants' arguments demonstrates that the complaint states a cause of action. *Id.* She further claims that the defendants are all trying to make CPLR 3211 motions which are impermissibly based on CPLR 3212 standards.

This court agrees that the complaint is lacking in brevity and contains more information than is necessary to support its claims. However, the pleading is not as indecipherable as the Boies defendants (and the other defendants who join with the Boies defendants) make it out to be. It may be that the pleadings in the cases supplied by the Boies defendants were so "vague

and indefinite” (*A. Cohen & Sons v Ratner*, 19 AD2d 787, 787 [1<sup>st</sup> Dept 1963]), so “irrelevant and prejudicial” (*Barsella v City of New York*, 82 AD2d 747, 748 [1<sup>st</sup> Dept 1981]), and so “loosely drawn, verbose and poorly organized” (*Aetna Casualty and Surety Co. v Merchants Mutual Insurance Co.*, 84 AD2d 736, 736 [1<sup>st</sup> Dept 1981]) as to warrant dismissal with leave to replead, but the pleadings herein do not rise to that level, and dismissal will not be had on the basis of CPLR 3013 or 3014.<sup>2</sup>

The Boies defendants’ main argument is that they did reveal to plaintiff the possibility of a conflict of interest stemming from their representation of the class actions and their representation of her individual claims. This contention is based on the language of a November 13, 2003 retainer agreement which states that BSF would prosecute plaintiff’s claims “*either as an individual or as a representative of a class of plaintiffs [emphasis added]*” (Dwyer Aff., Ex. B), which should have been enough to inform plaintiff that the firm would not do both, and, more importantly, that to do both would be injurious to plaintiff. Plaintiff claims that she signed an earlier retainer agreement (which is not provided), which allegedly stated that plaintiff would be represented both as an individual and as a class representative.

The Boies defendants also claim that they withdrew as plaintiff’s attorney by means of a letter dated October 13, 2004. In the letter, Hayes, on behalf of BSF, reminded plaintiff that “I told you, during those meetings, that in the event of any conflict, we would have to stop representing you and continue representing the class plaintiffs.” Dwyer Aff., Ex. K. In the letter, Hayes highlighted the acrimony that had arisen between BSF and plaintiff, and plaintiff’s

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<sup>2</sup> Regardless, plaintiff is reminded that the mere fact that the complaint can be understood does not mean that it states any causes of action.

insistence that she had never been told that there was a conflict.

In the letter, Hayes concluded that “I do not think that we can continue to represent you, and have urged you to find other counsel to represent your interests. I should add that you should do so promptly, as the failure to do so may impair your interests.” *Id.* Therefore, the Boies defendants maintain that they are not responsible for any injuries plaintiff may claim came about as a result of the class action settlement, which occurred after BSF allegedly ceased representing plaintiff.

As an initial matter, this court does not agree that BSF was no longer plaintiff’s counsel after the October 13, 2004 letter. While an attorney may withdraw as a party’s counsel “upon a showing of good and sufficient cause, and reasonable notice to the client” (*Mason v MTA New York City Transit*, 38 AD3d 258, 258 [1<sup>st</sup> Dept 2007]), CPLR 321 (2) requires that the attorney make a motion for permission to withdraw, or provide a stipulation allowing for the withdrawal.<sup>3</sup> Pursuant to CPLR 321 (b) (2) (and, in the absence of a stipulation), “[u]ntil the attorney of record is removed by court order ... his authority as attorney for his client continues.” *Blondell v Malone*, 91 AD2d 1201, 1202 (4<sup>th</sup> Dept 1983); *see also Matter of Benjamin*, 129 AD2d 886 (3d Dept 1987)(attorney failed to withdraw as attorney when he failed to comply with CPLR 321 [b], which allows for a stipulation ending the attorney/client relationship).

In the present case, the Boies defendants are claiming that the attorney/client relationship ceased merely because they informed plaintiff that the relationship was dissolved. This is not the case, and this court finds that BSF remained plaintiff’s attorneys for the duration of the occurrences listed in the complaint, liable for any actual wrongdoing that may have occurred

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<sup>3</sup>Apparently the Boies defendants accomplished this in 2006.

during that time. There is, however, no doubt that the relationship between the parties broke down after plaintiff's refusal to sign the new retainer agreement, and that, according to the Boies defendants, they no longer dealt with her after that time.

Plaintiff's first cause of action is for "negligence" (i.e., malpractice) against the Boies defendants for failing to apprise plaintiff of the conflict of interest arising from their alleged representation of her as to her individual claims, and as a member of the class actions. She argues that the Boies defendants used the evidence and information she provided to them concerning the wrongdoing of the agency defendants, not to aid her individual claims, but in furtherance of the class claims. She claims that, but for the Boies defendants' conflict of interest, failure to include plaintiff as lead plaintiff in the federal class action,<sup>4</sup> failure to inform her of the existence of a bankruptcy proceeding against one of the agency defendants, and other acts of misfeasance, plaintiff would have received significantly larger awards of damages in both her individual and class claims than she actually received.

The basic rules for pleading and prosecuting a prima facie case in legal malpractice are well established. As we have often stated, an action for legal malpractice requires proof of the attorney's negligence, a showing that the negligence was the proximate cause of the injury, and evidence of actual damages [citations omitted]. In order to survive dismissal, the complaint must show that but for counsel's alleged malpractice, the plaintiff would not have sustained some ascertainable damages.

*Russo v Feder, Kaszovitz, Isaacson, Weber, Skala & Bass, LLP*, 301 AD2d 63, 67 (1<sup>st</sup> Dept 2002); see also *Pellegrino v File*, 291 AD2d 60 (1<sup>st</sup> Dept 2002). Speculative damages, conclusorily pled, cannot support a claim for legal malpractice. *Pellegrino, supra*.

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<sup>4</sup>Although plaintiff claims that she was not made a plaintiff in the federal class action, it appears that she received monetary compensation in that action.

The Boies defendants have provided a copy of a retainer agreement which plaintiff signed which contains language indicating that plaintiff would be represented “*either* as an individual *or* as a representative of a class of plaintiffs [emphasis added]” (Dwyer Aff., Ex. B) to establish that there was documentary evidence that plaintiff was aware of a conflict of interest arising from any dual representation of plaintiff by BSF. However, plaintiff has alleged that there was an earlier retainer which contained different language, i.e., that BSF would represent her individually *and* as a class member.

At the pleading stage, in which the court is “accept as true the facts as alleged in the complaint” and “accord plaintiffs the benefit of every possible favorable inference” (*Sokoloff v Harriman Estates Development*, 96 NY2d at 414), the Boies defendants’ submission does not call for dismissal of the complaint. Plaintiff has successfully pled, at this stage, that she was unaware of any possible conflict of interest, and that the Boies defendants acted in such a manner as to create a conflict of interest in their representation of plaintiff. It should be noted that the retainer did not specifically delineate that the “either/or” language pertained to a potential conflict of interest.

Plaintiff’s malpractice claim falters irretrievably, however, on her failure to plead that, “but for” the alleged dual representation, she would have received awards in the various actions, against various agencies, approximating \$10 million. *See* Complaint, ¶ 110. This claim is totally conclusory, wholly speculative, and insufficient to support an action for negligence or malpractice.<sup>5</sup> Consequently, plaintiff’s first cause of action is dismissed.

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<sup>5</sup>Plaintiff does not deny that she received an award in the *Fears* action which exceeded the award given to other class members, due to her extra involvement in prosecuting the action.

The malpractice claim must also be dismissed as to the individual Boies defendants based on the inadequacy of the allegations against them. As the Boies defendants point out in their brief, there are no allegations amounting to a claim against Boies, Lewicky, and Haazen. Boies Memorandum of Law, at 8-9. Plaintiff merely sets forth certain actions taken by these parties, and conclusorily states that “[a]ll defendants, jointly and severally worked together on these cases, as [BSF], its employees and attorneys worked with, associated with and shared the legal work in these cases with the remaining defendants.” Complaint ¶¶ 99, 100, 102. This general, conclusory allegation does not give notice to these parties of any claim against them. Therefore, Boies, Lewicky and Haazen are dismissed for this reason, as well as for the reason of plaintiff’s failure to state a cause of action for negligence or malpractice in general.

Defendants Boies, Schiller and Flexner, partners in BSF, are also entitled to be released from the action based on the fact that their partnership status alone does not make them liable for the acts of other members of the partnership under the New York Partnership Law.

BSF is a limited liability partnership. Under Partnership Law § 26 (b), no partner of a limited liability partnership “is liable or accountable, directly or indirectly ... , for any debts, obligations or liabilities of, or chargeable to, the registered limited liability partnership, or each other, whether arising in tort, contract or otherwise” incurred by the partnership. Under Partnership Law § 26 (c), liability will only lie against a limited liability partner if he or she is “personally and fully liable and accountable for any negligent or wrongful act or misconduct committed by him or her or by any person under his or her direct supervision and control ... .”

Plaintiff has failed to make any allegations against these parties which would allow for their liability under the Partnership Law. Therein lies another reason why the complaint should

be dismissed against these individuals.

Regardless, this court notes that the Boies defendants do not have a defense against plaintiff based on collateral estoppel. This argument arises from the fact that plaintiff, acting for herself, negotiated in the federal action by serving the federal court with a lengthy letter listing her objections to the award, which are the same allegations she raises as causes of action herein. *See Dwyer Aff., Ex. N.* The Boies defendants argue that, when plaintiff accepted a settlement in the federal action despite her objections, she forever barred herself from pursuing any claims based on those objections.

The doctrine of collateral estoppel precludes a party from relitigating an issue decided against him in a prior proceeding where he had a full and fair opportunity to litigate that point. The identical issue must have been necessarily decided in the prior proceeding, and the party seeking the benefit of collateral estoppel bears the burden of demonstrating the identity of the issues in the present litigation and the prior determination. (*see Kaufman v Eli Lilly & Co.*, 65 NY2d 449, 455-456 [1985]).

*CIBC Mellon Trust Company v Samuel Montagu & Co. Limited*, 25 AD3d 492, 492 (1<sup>st</sup> Dept 2006). There is no indication in the federal settlement that plaintiff's objection were considered or "necessarily decided" in that action against the federal court defendants. They were certainly not brought in as "claims" against the class action defendants. As a result, plaintiff would not have been collaterally estopped to bring her claim, if it had been found meritorious.

Plaintiff brings a second cause of action for negligence, based on the BSF' alleged failure to make a timely claim on plaintiff's behalf in the bankruptcy action brought by one of the federal court defendants. However, she does not dispute that she participated in the bankruptcy action, and received compensation therein, so, there is no valid claim against the Boies defendants that plaintiff would have made a different recovery "but for" the actions of the Boies

defendants.

Upon the dismissal of the cause of action for negligence/malpractice, the claims for breach of contract, breach of fiduciary duty, fraud and disgorgement also fall. A breach of contract claim can only be brought against an attorney if it alleges “a promise to achieve a particular result separate from the breach of general professional standards” (*Sarssota, Inc. v Kurzman & Eisenberg, LLP*, 28 AD3d 237, 237 [1<sup>st</sup> Dept 2006]), and is not brought on “the same facts.” *Wright v Meyers & Spencer, LLP*, 46 AD3d 805 (2d Dept 2007). Plaintiff’s breach of contract action is brought on the same facts as its malpractice claim, and so, is dismissed.

Plaintiff’s fiduciary duty claim is also dismissed, as it “merely tracks the allegations of the malpractice claim ... .” *CVC Capital Corporation v Weil, Gotshal, Manges*, 192 AD2d 324, 325 (1<sup>st</sup> Dept 1993). Plaintiff’s fraud claim is dismissed because it is “premised on the same conduct of defendant that would constitute legal malpractice in representing her, and she asserts nothing more than defendant’s failure to take appropriate steps to safeguard her interests ... .” *Ruggiero v Powers*, 284 AD2d 593, 595 (3d Dept 2001). Likewise, the claim for disgorgement is also dismissed as dupluctive, because it is based on the same allegations as the malpractice claim, and seeks malpractice damages.<sup>6</sup> *See Mecca v Shang*, 258 AD2d 569 (2d Dept 1999).

Plaintiff also has no claim for punitive damages arising from the alleged fraud, as the fraud claims are without merit. Further, there is no separate cause of action for punitive damages. *Rocanova v Equitable Life Assurance Society of U.S.*, 83 NY2d 603 (1994); *see also Kantrowitz v Allstate Indemnity Company*, 48 AD3d 753 (2d Dept 2008). Lastly, damages for emotional injury are unavailable in a malpractice action. *Epifano v Schwartz*, 279 AD2d 501 (2d

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<sup>6</sup>Plaintiff also does not dispute the Boies defendants’ claim that she paid them no fees.

Dept 2001).

As a result of the foregoing, the Boies defendants' motion to dismiss the complaint is granted.

**ii. Motion of Hayes and Hayes & Hardy LLP**

Hayes was a partner in BSF, and the primary person at that firm with whom plaintiff dealt. Hayes is now partner with Hayes & Hardy LLP.

The action is dismissed as against Hayes for the same reasons listed above concerning the inadequacies of the complaint. It is dismissed as to Hayes & Hardy LLP as well, as there are no allegations in the complaint as against this party. Apparently, Hayes & Hardy LLP never represented plaintiff in the underlying actions, or in any other capacity.

**iii. Motion of J&R and Neville Johnson (joined by Rishwain)**

As previously found, the complaint must be dismissed as against these parties pursuant to CPLR 306-b. However, it is also noted that J&R is a California firm associated with BSF, which was named in the retainer agreement as attorneys who would be representing plaintiff, allegedly as part of an agreement between J&R and BSF to always list the other firm on any retainer agreement with any client. There are no allegations in the complaint that plaintiff ever dealt with J&R, Johnson or Rishwain in any capacity, or that these parties committed any acts contributing to any cause of action. Therefore, the complaint is dismissed as against these parties. As such, it is not necessary to address their claim that there is no jurisdiction against them, pursuant to CPLR 3211 (a) (8).

**iv. Motion of B&M and Davidoff**

B&M was co-counsel in an initial Federal class action entitled *Masters v Wilhelmina*

*Model Agency* (02 Civ 4911) which apparently pre-dated the *Fears* action. The complaint is dismissed as against these two parties for the same reasons as discussed above, pertaining to the failure to state any claim. It is also dismissed as against B&M, because there is no allegation in the complaint that plaintiff ever retained B&M, or dealt with it in any way. Thus, no cause of action is pled as against it.

The complaint is also dismissed as against Davidoff, based on failure of service, and the inadequacy of the complaint. According to Davidoff, service was made upon him when a copy of the summons and complaint was served on a secretary at the office of B&M, at 1622 Locust Street, Philadelphia, Pennsylvania.<sup>7</sup> However, the affidavit of mailing shows that process was then mailed to 422 Locust Street, which is not the offices of B&M or Davidoff. Davidoff Aff., Ex. F. Plaintiff does not dispute this, and this court finds that it has no jurisdiction against Davidoff. The court notes also that the complaint contains no allegations of wrongdoing on Davidoff's part.

### III. Conclusion

This court deems service upon the Boies defendants, B&M and Davidoff to be timely nunc pro tunc, but denies this motion as to J&R, Johnson and Rishwain. Regardless, the complaint is dismissed in its entirety as to all parties for the reasons given above.

Accordingly, it is

ORDERED that the motion brought by plaintiff Maryanne Fletcher for leave to serve process upon defendants, or to declare service as timely nunc pro tunc (mot. seq. no. 001), is

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<sup>7</sup>The court cannot locate an affidavit of service on Davidoff anywhere in the parties' papers.

granted in part as to Boies, Schiller & Flexner LLP, David Boies, Jonathan Schiller, Donald Flexner, Olav Haazan, and Christina Lewicky, Berger & Montagu, P.C. and Merrill G. Davidoff (s/h/i Merrill G. Davidhoff), and is otherwise denied, and service of process is deemed timely as against these defendants nunc pro tunc; and it is further

ORDERED that the motion to dismiss the complaint brought by defendants Andrew Hayes and Hayes & Hardy LLP (mot. seq. no. 003 is granted, and the complaint is severed and dismissed as to these parties, with costs and disbursements to these parties as taxed by the Clerk of the Court; and it is further

ORDERED that the motion to dismiss the complaint brought by defendants Boies, Schiller & Flexner LLP, David Boies, Jonathan Schiller, Donald Flexner, Olav Haazan, and Christina Lewicky (mo. seq. no. 004), is granted and the complaint is severed and dismissed as to these parties, with costs and disbursements to these parties as taxed by the Clerk of the Court; and it is further

ORDERED that the motion to dismiss the complaint brought by defendants Johnson & Rishwain, LLP and Neville Johnson (mot. seq. 005) is granted, and the complaint is severed and dismissed as to these parties, with costs and disbursements to these parties as taxed by the Clerk of the Court; and it is further

ORDERED that the motion to dismiss brought by defendants Berger & Montague, P.C. and Merrill G. Davidoff (s/h/i as Merrill G. Davidhoff)(mot. seq. no. 006) is granted, and the complaint is severed and dismissed as to these parties, with costs and disbursements to these

parties as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: December 15, 2008

ENTER:

A handwritten signature in black ink, appearing to be a stylized 'J' or 'S' with a vertical line through it, positioned above a horizontal line.

J.S.C.

**FILED**

DEC 26 2008

COUNTY CLERK'S OFFICE  
NEW YORK