

**Filiberto v Goldberg, Scuderi, Lindenberg & Block,  
P.C.**

2009 NY Slip Op 30711(U)

March 27, 2009

Supreme Court, New York County

Docket Number: 118787/06

Judge: Walter B. Tolub

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

PRESENT: TOLUB  
Justice

PART 15

PETER FILIBERTO

- v -

GOLDEN, SCUDIBO, LINDENBERG  
& BLACK, P.C.

INDEX NO. 118797/06  
MOTION DATE 12-5-08  
MOTION SEQ. NO. 2  
MOTION CAL. NO. \_\_\_\_\_

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

**FILED**

APR 01 2009

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 3/27/09

WALTER B. TOLUB 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 15

-----x  
PETER FILIBERTO and  
FILIBERTO PROPERTIES, INC.,

Plaintiffs,

Index No. 118787/06  
Mtn Seq. 002

-against-

GOLDBERG, SCUDERI, LINDENBERG & BLOCK, PC  
and PAUL S. BLOCK,

Defendants.

-----x  
GOLDBERG, SCUDERI, LINDENBERG & BLOCK, PC  
and PAUL S. BLOCK,

Third-Party Plaintiffs,

-against-

AG WEALTH REALTY, INC., ABRAHAM GOREN,  
and SOL M. ISRAEL, ESQ.,

Third-Party Defendants.  
-----x

**WALTER B. TOLUB, J.:**

This action arises out of plaintiffs' claim that defendants/third party plaintiffs, Goldberg, Scudieri, Lindenberg & Block, P.C. and Paul S. Block, Esq. ("Mr. Block") (collectively, "GSLB") provided improper legal advice which ultimately exposed plaintiffs, Peter Filiberto and Filiberto Properties, Inc. (collectively, "Filiberto") to liability for a real estate broker's commission. By this motion, third-party defendant Sol M. Israel, Esq. ("Mr. Israel"), who was retained in connection with the underlying real estate transaction, moves

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[\* 3 ]

pursuant to CPLR §603 for an order severing the third-party action. Alternatively, Mr. Israel seeks an order vacating the Note of Issue so as to allow him to conduct discovery.

#### BACKGROUND

Filiberto is the owner of real property located at 194-200 11<sup>th</sup> Avenue in Manhattan (the "Property") (Order to Show Cause, Affirmation of William T. McCaffery, Ex. A, Complaint at ¶¶6, 10, 17). Seeking to either sell or lease the Property, Filiberto retained the services of defendant, Mr. Block, an attorney of defendant GSLB. According to the papers, Filiberto's decided to retain GSLB because the firm had presented themselves as experts and specialists in landlord-tenant and real estate law.

In December of 2005, Filiberto entered into a one-year exclusive brokerage agreement with non-party Zaleski Properties, LLC ("Zaleski"). Filiberto claims that the December, 2005 agreement ("the Zaleski Agreement") was entered into based on Mr. Block's legal advice and expertise. The Zaleski Agreement gave Zaleski the exclusive right to negotiate and secure the sale, lease, or assignment of lease of all or part of the subject Property (*id.*, Ex. A, Complaint at ¶¶11-12, 15-18; Defendants/Third Party Plaintiffs' Partial Opposition to Motion to Sever, Affirmation of Daniel G. Ecker at ¶4).

Filiberto claims that when shown a copy of the Zaleski

Agreement, Mr. Block recommended that Filiberto use another real estate broker, third-party defendants (and GSLB clients) AG Wealth Realty, Inc. and Abraham Goren (collectively, "AG") (Order to Show Cause, Ex. A; Defendants/Third Party Plaintiffs' Partial Opposition to Motion to Sever, Affirmation of Daniel G. Ecker at ¶4). Filiberto further claims that GSLB reviewed the Zaleski Agreement and, without conducting any legal research, advised that Filiberto could enter into a second exclusive real estate brokerage agreement with AG ("AG Agreement") with impunity because the Zaleski Agreement was unenforceable as a matter of law (Order to Show Cause, Ex. A; Complaint at ¶¶16-18; Affirmation of Daniel G. Ecker at ¶¶4-5). Filiberto claims that based upon this advice, they entered into a contract of sale for the Property ("the AG Contract") with a buyer procured by AG. Filiberto retained Mr. Israel to provide legal advice concerning this new contract. The Property was sold pursuant to the AG Contract, and at closing Filiberto paid AG \$665,625 in brokers' commissions plus attorneys' fees (Order to Show Cause, Ex. A, Complaint at ¶17-21; Affirmation of Daniel G. Ecker at ¶¶6-8; Affirmation of Laura M. Vasey in Support of Motion to Sever Third-Party Action and in Opposition to Motion to Vacate Note of Issue at ¶¶4-7).

Non-party Zaleski, upon learning of the sale under the AG Contract, made a claim for commissions due to them under the

Zaleski Agreement ("Zaleski Claim"). This claim was ultimately settled for \$615,000 (the "Settlement") (Order to Show Cause, Ex. A, Complaint at ¶¶22-23, 26; Affirmation of Daniel G. Ecker at ¶8; Affirmation of Laura M. Vasey in Support of Motion to Sever Third-Party Action and in Opposition to Motion to Vacate Note of Issue at ¶7).

This action for legal malpractice was commenced on December 19, 2006. Discovery ensued, and on August 1, 2008, Filiberto filed their Note of Issue.

One month later, defendant GSLB commenced the instant third-party action, impleading both AG and Mr. Israel. Comprised of fourteen (14) causes of action, GSLB's third-party complaint seeks damages from the third-party defendants based on theories of contribution and indemnification. GSLB maintains, *inter alia*, that AG and Mr. Israel knew or should have known of the existence of the two competing exclusive brokerage agreements. GSLB further claims that AG tortiously interfered with and procured a breach of the Zaleski Agreement and that Mr. Israel improperly advised Filiberto that they would not incur liability under the Zaleski Agreement by proceeding with the AG Contract (Order to Show Cause; Affirmation of William T. McCaffery at ¶¶7-9, Ex. E; Third-Party Summons and Complaint; Affirmation of Laura M. Vasey in Support of Motion to Sever Third-Party Action and in Opposition to Motion to Vacate Note of Issue at ¶¶9-10).

DISCUSSION

At the outset, the court notes that third-party defendant AG has not opposed this motion.

On a motion to sever pursuant to CPLR §603, the court must consider the issue of whether the convenience and judicial economy of disposing of multiple actions in one trial outweigh the possibility of substantial prejudice or delay to any party. Severance is generally not granted in situations where there are common questions of law or fact, or where the issues are inextricably entwined and denial of severance will not cause significant delay or prejudice to a substantial right (see *Krause v. American Guarantee & Liability Ins. Co.*, 22 N.Y.2d 147, 292 N.Y.S.2d 67 [1968]; *Cohen Agency, Inc. v. Donald S. Perlman Agency, Inc.*, 51 N.Y.2d 358 [1980]; *Erbach Finance Corp. v. Royal Bank of Canada*, 203 A.D.2d 80 [1st Dept 1994]). The court has considerable discretion in deciding whether severance is proper (see *Shanley v. Callanan Industries, Inc.*, 54 N.Y.2d 52 [1981]; CPLR §§603, 1010).

The papers presented in the instant case confirm that the main action and the third-party action are essentially one case arising out of a single transaction and involving a shared nucleus of fact (see *Sichel v. Community Synagogue*, 256 A.D.2d 276, 276 [1<sup>st</sup> Dept 1998]) ("Where two actions arise from a common nucleus of facts, a trial court should only sever the actions to

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prevent prejudice or substantial delay to one of the parties"). Inasmuch as none of the parties have demonstrated that they are, or would be, in danger of being prejudiced by a single trial, in the interest of judicial economy, the portion of the motion seeking an order severing the third-party action is denied (see *Erbach*, 203 A.D.2d 80; *Krause*, 22 N.Y.2d 147; *Sichel*, 256 A.D.2d 276; *Eugene J. Busher Co. v. Galbreath-Ruffin Realty Co.*, 16 A.D.2d 750, 227 N.Y.S.2d 532 [1<sup>st</sup> Dept 1962]).

The portion of the motion seeking an order vacating the note of issue is granted so as to allow the third-party defendant to complete discovery. Counsel however are cautioned that this will not be a protracted discovery phase, and are advised that they should expect to have discovery completed in this action by the end of this summer. With this in mind, it is

ORDERED that the portion of the motion advanced by third-party defendant Sol M. Israel, Esq. seeking an order severing the third-party action pursuant to CPLR 603 is denied; and it is further

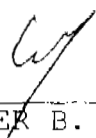
ORDERED that the portion of the motion advanced by third party defendant Sol M. Israel, Esq. seeking to strike plaintiff's Note of Issue from the calendar is granted, and it is further

ORDERED that a copy of this order with notice of entry be served upon the Trial Support Office (Room 158) to mark the record accordingly; and is further

ORDERED that within 20 days of service of a copy of this order with notice of entry, the original parties of this action shall produce and serve upon the third-party defendant copies of all discovery exchanged in this matter and deposition transcripts. Counsel for all parties are further advised that they are to appear for a Status Conference in 1A Part 15, Room 335, 60 Centre Street, New York, New York at 11:00 a.m. on June 5, 2009 at which time the third-party defendant will inform this court as to the remaining discovery necessary so that an expedited Note of Issue date may be calculated.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 3/27/09

  
 HON. WALTER B. TOLUB, J.S.C.

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 APR 01 2009  
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 NEW YORK