

**Worth, Longworth, Bamundo & London, LLP v
Bamundo**

2009 NY Slip Op 33107(U)

December 21, 2009

Supreme Court, New York County

Docket Number: 109137/07

Judge: Doris Ling-Cohan

Republished from New York State Unified Court
System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

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

PRESENT: Hon. Ling - Cohan

PART 36

Index Number : 109137/2007

WORTH

VS.

BAMUNDO, STEVEN

SEQUENCE NUMBER : 004

AMEND SUPPLEMENT PLEADINGS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for Amend answer

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

1, 2

3, 4

5, 6

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *by defendants to amend their answer is granted in accordance with the attached memorandum decision.*

FILED

JAN 05 2010

NEW YORK COUNTY CLERK'S OFFICE

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

Dated: 12/21/09

~~JUSTICE DORIS LING COHAN~~

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 36

-----X
WORTH, LONGWORTH, BAMUNDO & LONDON,
LLP, STUART LONDON and STEPHEN WORTH,
Plaintiffs,

Index No.: 109137/07
DECISION/ORDER

-against-

Motion Seq. No.: 004

STEVEN BAMUNDO and BAMUNDO, ZWAL &
SCHERMERHORN, LLP,
Defendants.

-----X
HON. DORIS LING-COHAN, J.S.C.:

In this action for money damages between attorneys, defendants move for leave to amend their answer (motion sequence number 004). For the following reasons, this motion is granted.

BACKGROUND

Defendant Steven Bamundo (Bamundo) is a New York State licensed attorney and currently a member of the defendant law firm of Bamundo, Zwal & Schermerhorn, LLP (BZS). See Notice of Motion, Bamundo Affidavit, ¶ 13; Exhibit A (proposed amended answer), ¶ 5. Plaintiffs Stuart London (London) and Stephen Worth (Worth) are also both New York State licensed attorneys, and claim to be members of the plaintiff law firm of Worth, Longworth, Bamundo & London, LLP (WLBL). See Worth Affirmation in Opposition, Exhibit A (complaint), ¶¶ 2-4. Bamundo, however, claims that no such partnership legally existed.

Bamundo asserts that WLBL was never organized as a partnership at all. See Notice of Motion, Bamundo Affidavit, ¶¶ 9, 12. Rather, he claims that, in 1998, two law firms - his former firm of Cooper, Bamundo, Hecht & Longworth, LLP (CBHL) and plaintiffs' firm of London &

Worth, LLP (L&W) - formed the entity known as WLBL for the sole, limited purpose of obtaining a contract to provide legal representation to members of the Patrolmens' Benevolent Association of the City of New York (PBA). *Id.*, ¶¶ 13-20. He further claims that these two firms handled all of their business, including the allocation of risk and payments, separately and without any of the normal indicia of partnership. *Id.*, ¶¶ 21-30. Bamundo has presented a copy of WLBL's 1999 tax return, that names CBHL and L&W as the official "members" of WLBL, as proof of his position. *Id.*, ¶¶ 31-38; Exhibits E. Bamundo has also presented a copy of the contract, dated May 1, 1998, between the PBA and a law firm called "Worth, Longworth & Bamundo, LLP," that states that the representation shall be divided into NYPD-related work and civil work, and that names Worth and London as the "partners" responsible for the former and Greg Longworth, Bamundo, Peter Cooper and William Hecht as the "partners" responsible for the latter. *Id.*; Exhibit D.

Plaintiffs deny Bamundo's claims, and have presented copies of a quantity of correspondence with and from Bamundo that they assert disclose the existence of a partnership relationship in WLBL between them and his membership therein. *See* Worth Affidavit in Opposition, ¶5, Exhibits C-J. A dispute eventually arose between Bamundo and the other litigants herein over compensation for services that WLBL had rendered to the PBA, and, on October 14, 2003, Bamundo wrote plaintiffs that he was "resigning as a partner from the partnership of [WLBL]." *Id.*; Exhibit G.

Plaintiffs commenced this action on July 2, 2007 by serving a summons and complaint that set forth causes of action for: 1) fraud; 2) breach of fiduciary duty; 3) conversion; 4) an accounting; and 5) unjust enrichment. *Id.*; Exhibit A. Defendants filed an answer on August 16, 2007 that sets forth the affirmative defenses of: 1) failure to state a claim; 2) failure to name

* 4]

necessary parties; 3) lack of capacity; 4) violation of the statute of limitations; 5) violation of rules of professional conduct; and 6) ratification. *Id.*; Exhibit B. In defendants' answer, Bamundo" admit[ted] that ... [he] was a member of the partnership of [WLBL]." *Id.*, ¶ 3. Bamundo now moves to amend defendants' answer to remove this admission, and to interpose the affirmative defenses of: 1) failure to state a claim; 2) alleging an agreement that is unenforceable as a matter of law; 3) violation of the statute of limitations; 4) failure to name necessary parties; 5) unjust enrichment; and 6) res judicata/collateral estoppel. *See* Notice of Motion, Exhibit A. The instant motion deals with Bamundo's requests for leave to amend the answer, and to interpose the sixth affirmative defense, which was not previously plead and which is the only affirmative defense which plaintiffs oppose.

DISCUSSION

CPLR 3025 (b) provides that:

A party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances.

"It is well-settled law that leave to amend should be freely granted ([pursuant to] CPLR 3025 [b]) provided there is no prejudice to the non-moving party and that the amendment is not plainly lacking in merit." *Lambert v Williams*, 218 AD2d 618, 621 (1st Dept 1995), citing *Edenwald Contracting Co., Inc. v City of New York*, 60 NY2d 957, 959 (1983). However, as the Appellate Division, First Department, also recently noted in *American Theatre for Performing Arts, Inc. v Consolidated Credit Corp.* (45 AD3d 506 [1st Dept 2007]), "[a] request to amend a pleading,

regardless of the statutory imperative that it be freely granted (CPLR 3025 [b]), requires an examination of the underlying merit to determine if there is evidentiary proof that could be considered on a motion for summary judgment.”

Here, as previously mentioned, Bamundo seeks to amend his answer to remove his admission that he “was a member of the partnership of” WLBL. To support his request, Bamundo has presented a copy of WLBL’s 1999 partnership tax return that states that the only official “members” of WLBL were the law firms CBHL and L&W. *See* Notice of Motion, Exhibit E. Bamundo argues that CBHL and L&W “never exhibited any of the legal requisites of partnership” amongst themselves, and that neither he nor co-defendant BZS “had an ownership or equity interest in WLBL or with plaintiffs Worth or London.” *See* Defendants’ Memorandum of Law, at 3.

To support this argument, Bamundo has presented a copy of a letter, dated July 2, 2002, from Worth and London to the PBA that indicates that the PBA should send L&W one check for NYPD-related representation that it had rendered, and that it should send a separate check to Greg Longworth and/or Bamundo for civil representation that they had rendered. *See* Bamundo Reply Affirmation, Exhibit C. In response, plaintiffs argue that Bamundo held himself out as a partner in WLBL between April of 1998 and October 14, 2003, and that he both received and shared that firm’s profits. *See* Worth Affirmation in Opposition, ¶¶ 2, 5. To support their argument, plaintiffs present: 1) a quantity of correspondence in which Bamundo refers to himself as a partner in WLBL; 2) copies of closing statements that detail the payments received by the law firm of “Daly, Bamundo, Zwal & Schermerhorn, LLP” for legal representation of PBA plaintiffs in civil (personal injury) actions; and 3) a check in the amount of \$4,901.04 sent by the law firm of “Daly, Bamundo, Zwal & Schermerhorn, LLP” to L&W representing the latter firm’s

share of the profits from said representation in one such matter.

Upon reviewing the evidentiary submissions, the court notes that: 1) there does not appear to be an actual WLBL partnership agreement; and 2) the PBA contract specifically recited the primary business office of the law firm of “Worth, Longworth & Bamundo, LLP” would be at 111 John St., N.Y., New York - which also appears to have been the location of the offices of CBHL. *See* Notice of Motion, Exhibit D. Nonetheless, after reviewing the foregoing, the portion of Bamundo’s motion that seeks leave to amend the answer to remove his admission that he was a partner of WLBL should be granted.¹

As previously mentioned, a motion to amend “requires an examination of the underlying merit to determine if there is evidentiary proof that could be considered on a motion for summary judgment.” *American Theatre for Performing Arts, Inc. v Consolidated Credit Corp.*, 45 AD3d at 506. Here, Bamundo has presented documentary evidence - consisting of WLBL’s 1999 tax return, the 1998 PBA contract and the July 2, 2002 letter from Worth and London to the PBA - that indicate that WLBL was operated as a joint venture by two separate law firms that acted, for the most part, separately in discharging their obligations (i.e., with L&W doing the NYPD related cases and Bamundo and the other “partners” handling the civil representation). The fact that WLBL appears not to have executed a partnership agreement of its own lends further credence to this interpretation. Thus, sufficient evidence was presented herein to warrant the granting of defendants’ motion to amend the answer.

As the Appellate Division, First Department, held in *Prince v O’Brien* (256 AD2d 208 [1st Dept 1998]), the indicia of partnership may be ascertained through the presence of the

¹ To be clear, given the liberal amendment standard, the court allows such deletion. However, this does not necessarily bar plaintiffs from using such prior “admission” at trial, if appropriate, as evidence.

following facts: (1) joint control over the enterprise; (2) profit splitting; and (3) loss sharing.

Here, the evidence indicates that WLBL was jointly controlled by two law firms - one of which Bamundo was a partner in - and that these two firms split the profits that they received from the PBA through the WLBL contract. The evidence does not disclose any indication of loss sharing, however. While, at this juncture, it does not appear that all of the traditional indicia of partnership were ever present as regards WLBL, the facts are clearly contested as to the existence of the WLBL partnership. *See* Worth Affidavit in Opposition, ¶ 5. As, “on a motion for leave to amend, there need only be a showing sufficient to enable the court to determine whether the moving party has a justiciable claim” (*Berman v Berman*, 111 AD2d 141, 142 [1st Dept 1985]), that the branch of Bamundo’s motion that seeks leave to amend the answer to remove his admission that he was a partner of WLBL is granted.

The court further grants Bamundo’s request for leave to interpose a new sixth affirmative defense of res judicata/collateral estoppel. Bamundo asserts that he wishes to raise this defense as an alternative pleading in the event that a partnership relationship is found to exist between plaintiffs and himself. *See* Defendants’ Memorandum of Law, at 6. He further asserts that plaintiffs cannot claim any prejudice or surprise because they were aware of the litigation between himself and his former firm (i.e., CBHL) that gave rise to ruling on the issue of fee allocation about which he seeks to invoke the doctrine of res judicata. *Id.* at 7. Plaintiffs’ opposition papers first argue that Bamundo has given no excuse for waiting to assert his proposed affirmative defense. *See* Plaintiffs’ Memorandum of Law, at 7-8. However, plaintiffs’ papers are devoid of any explanation as to how they will be prejudiced by Bamundo’s assertion of the res judicata/collateral estoppel defense at this early stage of the litigation. Thus, the court rejects plaintiff’s first argument. Plaintiffs next seek to argue the merits of Bamundo’s

affirmative defense, specifically asserting that it is impossible that the fee allocation ruling in the Bamundo/CBHL litigation could have any preclusive effect in this action. *Id.* at 7-9. This may well turn out to be the case at trial, however, for the reasons discussed in the preceding section of this decision with respect to the liberal standard on motions to amend, the court will permit Bamundo to amend the answer. Accordingly, that the branch of Bamundo's motion that seeks leave to assert a new sixth affirmative defense is also be granted.

DECISION

FILED
JAN 05 2010
NEW YORK
COUNTY CLERK'S OFFICE

ACCORDINGLY, for the foregoing reasons, it is

ORDERED that the motion, pursuant to CPLR 3025, of defendants Steven Bamundo and Bamundo, Zwal & Schermerhorn, LLP is granted, and the amended answer in the proposed form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is further

ORDERED that the plaintiffs shall serve a response within 20 days from the date of said service; it is further

ORDERED that within 30 days of entry, defendants shall serve a copy of this order upon all parties with notice of entry.

Dated: New York, New York
December 21, 2009


Hon. Doris Ling-Cohan, J.S.C.

JUSTICE DORIS LING-COHAN