

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

2010 NY Slip Op 30822(U)

April 8, 2010

Supreme Court, NY County

Docket Number: 109137/07

Judge: Doris Ling-Cohan

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

PRESENT: Hon. Ling-Cohan  
*Justice*

PART 36

Index Number : 109137/2007

**WORTH**

VS.

**BAMUNDO, STEVEN**

SEQUENCE NUMBER : 005

SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits — *Hecht Aff* Exhibits ... *Stmt of facts*

Answering Affidavits — Exhibits *Aff Stmt of disputed facts*

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

PAPERS NUMBERED	
1, 2, 3, 4	
5, 6	
7, 8	

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion *by defendants for*

*summary judgment is denied in*

*accordance with the attached memorandum*

*decision.*

**FILED**

APR 12 2010

NEW YORK  
COUNTY CLERK'S OFFICE

JUDGE DORIS LING COHAN  
JUDGE DORIS LING-COHAN

Dated: 4/8/10

*[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 36

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

Index No.: 109137/07  
DECISION/ORDER

-against-

Motion Seq. No.: 005

STEVEN BAMUNDO and BAMUNDO, ZWAL &  
SCHERMERHORN, LLP,

Defendants  
-----X

**FILED**

**APR 12 2010**  
**NEW YORK COUNTY CLERK'S OFFICE**

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

In this attorneys' fee dispute action, defendants move for summary judgment to dismiss the complaint (motion sequence number 005). For the following reasons, the motion is denied.

BACKGROUND

Defendant Steven Bamundo (Bamundo) is a New York State licensed attorney, and is now a partner in the defendant law firm of Bamundo, Zwal & Schermerhorn, LLP (BZ&S). See Notice of Motion, Exhibit A (complaint), ¶ 5. Bamundo was formerly a partner in the non-party law firm of Cooper, Bamundo, Hecht & Longworth, LLP (CBH&L), along with non-party Gregory Longworth (Longworth), another New York State licensed attorney. *Id.*; Bamundo Affidavit, ¶ 11. In 2002, William A. Hecht commenced dissolution litigation against the other partners of CBH&L. *Id.*; Bamundo Affidavit, ¶ 45. That litigation was eventually resolved via a settlement agreement, the terms of which Bamundo claims are confidential. *Id.* at ¶ 46. None of the parties herein has presented the court with a copy of the settlement agreement.

Plaintiffs Stuart London (London) and Stephen Worth (Worth) are also both New York State licensed attorneys, and are partners in the non-party law firm of London & Worth (L&W). *Id.*; Exhibit A, ¶¶ 3-4. Both London and Worth also purport to be partners in the plaintiff law

firm of Worth, Longworth, Bamundo & London, LLP (WLB&L), along with Bamundo and Longworth. *Id.*, ¶¶ 2, 5, 7. Bamundo, however, states that WLB&L was never a partnership. *Id.*; Bamundo Affidavit, ¶¶ 8-29.

Bamundo claims that WLB&L only existed “on paper,” and that it had been organized at the behest of its sole client, the Patrolmens’ Benevolent Association of the City of New York (PBA), which wished to award one single contract for the provision of certain legal services to its members to one single law firm. *Id.*, ¶¶ 10, 14. Bamundo claims that, as a result, L&W and CBH&L agreed to form WLB&L, but never treated it as a partnership, and kept their individual firm practices separate. *Id.*, ¶ 17. Bamundo asserts that there was no WLB&L partnership agreement; however, he presents a copy of the contract between the PBA and Worth, Longworth & Bamundo, which was later renamed to WLB&L (the PBA contract<sup>1</sup>), which was executed on May 1, 1998. *Id.*, ¶ 17; Exhibit B. In pertinent part, the PBA contract provides as follows:

1. Representative Partners: Stephen Worth shall be the partner responsible for the NYPD-related services and Greg Longworth shall be the partner responsible for the Civil legal representation. Other partners will be Stuart London (NYPD-related), Steven Bamundo, Peter Cooper and William Hecht (Civil).

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3. Scope of Legal Services: Reference is made to pages 3-4 and Appendix 1 of the Request for Proposals, which is hereby incorporated by reference herein. ...

4. Personnel of the Law Firm: The law firm agrees to hire exclusively for service of this contract a sufficient number of experienced associate attorneys and support personnel at competitive salary and benefits levels (the PBA shall consider the number of personnel of the prior service provider as a base line). (fn2. The law firm proposes to begin with 3 partners, 4-5 associates and 1 paralegal for NYPD-related work and 2 partners, 3 associates, 2 paralegals 1 investigator (as needed) for Civil, and combined 5 secretaries and 2 receptionists.)

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<sup>1</sup> The court notes that the submitted contract is extremely difficult to read, as the font size is small and blurry.

\* 4]

6. Offices: The principal offices of the law firm shall be [L&W's address] and the firm shall maintain a "satellite" office, presently located at [CBH&L's address]. The PBA reserves the right to review and approve the buildout design of the new principal offices.

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11. Compensation and Method of Payment: The PBA agrees to pay the law firm an annual fee of three million one hundred fifty thousand dollars (\$3,150,000) for all NYPD-related services and an annual fee of one million nine hundred fifty thousand dollars (\$1,950,000) for all Civil Legal services, for a total annual fee of five million one hundred thousand dollars (\$5,100,000) for each year of the contract. Notwithstanding the above, the partners of the law firm shall be free to allocate the compensation between themselves as they shall agree internally.

*Id.*

In this action, Bamundo asserts that, pursuant to the PBA contract, CBH&L provided the PBA with only job related civil indemnification services, while L&W provided the PBA with job related criminal/administrative services. *See Id.*; Bamundo Affidavit, ¶ 17. He also asserts that no partner of CBH&L performed any work on any criminal/administrative services case, and that no partner of L&W performed any work on any civil indemnification case. *Id.*, ¶ 17. Bamundo finally asserts that, in cases where a PBA member sought representation in a legal matter which was outside the scope of the PBA contract (e.g., personal injury, real estate, matrimonial, etc.), that individual became a client of either CBH&L or L&W *only*. *Id.*, ¶ 20.

Bamundo states that WLB&L's function was to receive a monthly payment from the PBA and to distribute it immediately to CBH&L and L&W via direct wire transfer. *Id.*, ¶ 23.

Bamundo notes that he never received either a form 1099 or K-1 statement from WLB&L. He further notes that he did receive a form K-1 from CBH&L, and states that the only income that he received came from that firm. *Id.*, ¶ 25. Bamundo finally notes that WLB&L's 1999 and 2000 tax returns state that CBH&L and L&W were WLB&L's only two members, and that WLB&L

did not report any income, because it paid out the monies that it had received from the PBA to CBH&L and L&W as reimbursement for the “cost of goods sold;” i.e., as “Legal Fees Paid.” *Id.*, ¶ 32; Exhibits C, D. Bamundo admits, however, that he held himself out as a “partner” in WLB&L in meetings and correspondence. *Id.*, ¶ 28.

Plaintiffs deny all of Bamundo’s allegations. They claim that WLB&L was a partnership, that it had a partnership agreement, and that Bamundo was a member of the partnership from the time that it was formed in 1998, until he withdrew from it in October of 2003. *See* London Affidavit in Opposition, ¶ 6; Longworth Affidavit in Opposition, ¶ 2; Worth Affidavit in Opposition, ¶ 4. Plaintiffs do not present a copy of the partnership agreement; however, they do present a certificate from the New York State Department of State, Division of Corporations, that shows that a limited liability partnership called “Worth, Longworth & Bamundo, LLP” was formed on April 7, 1998; that it changed its name to WLB&L on January 13, 1999; and changed it again to “Worth, Longworth & London, LLP” on October 20, 2003. *Id.*; London Affidavit in Opposition, Exhibit C. Plaintiffs further allege that, from July 2002 until his departure in October 2003, Bamundo received payments directly from WLB&L, rather than being paid by CBH&L after the fact. *Id.*; London Affidavit in Opposition, ¶ 10; Worth Affidavit in Opposition, ¶ 17. Plaintiffs have presented a letter agreement, signed by Bamundo and dated July 17, 2002, that memorializes that arrangement. *Id.*; Worth Affidavit in Opposition, Exhibit D. Plaintiffs finally allege that all of the members of WLB&L participated in profit and loss sharing, and in the responsibilities of operating the firm. *Id.*; London Affidavit in Opposition, ¶ 10; Longworth Affidavit in Opposition, ¶¶ 3-5; Worth Affidavit in Opposition, ¶¶ 12-23. Plaintiffs particularly note that, on April 29, 1998, all of the members of WLB&L executed a lease for office space at the address where W&L had previously been located. Worth Affidavit in Opposition, ¶ 18;

\* 6]

Exhibit E. They also claim that WLB&L suffered partnership loss in the form of an increase in its malpractice insurance premiums as a result of Bamundo's settlement of three unrelated legal malpractice actions in which he was involved. Worth Affidavit in Opposition, ¶ 22.

Plaintiffs commenced this action on July 2, 2007 by filing 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. See Notice of Motion, Exhibit A. Defendants initially filed an answer on August 16, 2007, but later sought leave to amend their answer via a motion that the court granted on December 21, 2009 (motion sequence number 004). Defendants now move for summary judgment to dismiss the complaint (motion sequence number 005).

#### DISCUSSION

When seeking summary judgment, the moving party bears the burden of proving, by competent, admissible evidence, that no material and triable issues of fact exist. See *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 (1985); *Sokolow, Dunaud, Mercadier & Carreras LLP v Lacher*, 299 AD2d 64 (1st Dept 2002). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action. See *Zuckerman v City of New York*, 49 NY2d 557 (1980); *Pemberton v New York City Tr. Auth.*, 304 AD2d 340 (1st Dept 2003). Because it deprives the litigant of his or her day in court, summary judgment is considered a drastic remedy which should be employed only when there is no doubt as to the absence of such triable issues. See *Andre v Pomeroy*, 35 NY2d 361 (1974); *Pirrelli v Long Is. R.R.*, 226 AD2d 166 (1st Dept 1996). Here, defendants have failed to meet their burden of proof to warrant the granting of summary judgment of dismissal, and therefore, defendant's motion is denied.

Defendants argue that plaintiffs' causes of action are subject to summary judgment

because there was no partnership. In opposition, plaintiffs argue that there are material issues of fact that preclude summary judgment as to whether WLB&L constituted a partnership. In reply, defendants attack the sufficiency of the documentary evidence submitted by plaintiffs. After reviewing the submissions, however, the court agrees that there are factual issues which warrant the denial of defendants' motion, including whether in fact WLB&L constituted a partnership.

Defendants' argument, that WLB&L was not an actual partnership, rests on the claims that CBH&L and L&W maintained separate law practices and rendered separate services pursuant to the PBA contract, for which they were compensated separately, with no sharing of profits and losses. *See* Notice of Motion, Bamundo Affidavit, ¶ 8. However, the submitted documentary evidence does not conclusively establish these claims. The PBA contract specifically names plaintiffs and Bamundo as "partners" in WLB&L, and, although it provides for separate payment for "NYPD-related services" and "civil legal representation," it also provides that "the partners of the law firm shall be free to allocate the compensation between themselves as they shall agree internally." *Id.*; Exhibit B, ¶11. This, coupled with the memorandum agreement that authorized direct payments from WLB&L to Bamundo commencing in 2002, constitute some evidence of both the existence of a partnership, and of the sharing of profits by the partners.<sup>2</sup> *See* London Affidavit in Opposition, Exhibit D. The Division of Corporations filing and the commercial lease that Bamundo signed in his capacity as a partner in WLB&L, likewise provide at least some evidence of the existence of a partnership and of the partners sharing of losses therein (i.e., in the form of rent). *Id.*; Exhibit E. This evidence is, to a degree, contradicted, but not negated, by the partnership tax returns for the years 1999 and 2000 that Bamundo presents. *See* Notice of Motion,

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<sup>2</sup> The court notes that Partnership Law § 11(4) creates a statutory inference that receipt of a share of the profits in a business is prima facie evidence that one is a partner.

8]

Bamundo Affidavit, Exhibits C, D. Thus, the court concludes that the documentary evidence is inconclusive as to the issue of whether WLB&L was a functioning partnership. Defendants' assertions to the contrary are merely conclusory assertions, which are insufficient to sustain a motion for summary judgment. *See e.g. Mason v Dupont Direct Fin. Holdings*, 302 AD2d 260 (1st Dept 2003). Further, in "determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility". *Garcia v. J.C. Duggan, Inc.*, 180 AD2d 579, 580 (1st Dept 1992), citing *Assaf v. Ropog Cab Corp.*, 153 AD2d 520, 521 (1st Dept 1989). Therefore, the court rejects defendants' first argument.

Defendants next assert that, at Worth's deposition, Worth made certain statements that constitute admissions that he was aware of the existence of certain legal work that Bamundo purportedly concealed (wrongfully) from WLB&L. *See* Defendants' Memorandum of Law, at 11. Defendants' also argue that they cannot be liable for fraud, as a matter of law, because Worth's admissions preclude any finding that he lacked knowledge of the matter about which he was allegedly deceived. *Id.* at 15. However, the complaint states that the matters about which plaintiffs were allegedly deceived, were not the existence of the litigation, but about Bamundo's eventual settlement of it and receipt of payment therefor. Thus, defendants' argument is misplaced. Further, as indicated above, it is axiomatic that issues of witness credibility are not appropriately resolved on a motion for summary judgment. *See e.g. Santos v Temco Serv. Indus.*, 295 AD2d 218 (1st Dept 2002). Therefore, the court rejects defendants' second argument.

Defendants next argue that "if the court were to find that a partnership exists, plaintiffs' claims would nonetheless be barred by the doctrines of res judicata and collateral estoppel." *See* Defendants' Memorandum of Law, at 16.. However, as discussed above, the court cannot

determine conclusively from the documentary evidence presented herein, that WLB&L was not an active partnership, as asserted by defendants. Therefore, it would also be improper to render a determination on Defendants' res judicata/collateral estoppel argument, at this juncture and upon the within submissions.

Defendants next argue that, because plaintiffs cannot demonstrate their compliance with the fee-sharing rules set forth in DR 2-107, they are precluded from seeking damages from defendants for Bamundo's failure to share his fees with them. *Id.* at 19-20. However, this rule only applies to lawyers who share fees with other lawyers with whom they are not partners. DR 2-107. Here, as discussed above, the court has not yet determined the existence of a partnership relationship between the attorneys who are parties to this action. Therefore, it would also be premature for the court to pass upon defendants' DR 2-107 argument at this juncture.

Finally, defendants' argue that plaintiffs are not entitled to attorneys' fees, as a matter of law, because the complaint fails to set forth any contractual or statutory basis for plaintiffs to seek such fees. *Id.* at 20. However, the complaint states that the existence of WLB&L as a partnership, and WLB&L's partnership agreement are the basis for plaintiffs' claims. *See* Notice of Motion, Bamundo Affidavit, Exhibit A, ¶¶ 7-16. Plaintiffs have presented the Division of Corporations filing as proof of the existence of WLB&L as a partnership. *See* London Affidavit in Opposition, Exhibit C. Because New York State's rules governing limited liability partnerships cover fee-sharing arrangements between partners, there is clearly at least a statutory basis for plaintiffs' claims. Further, although neither party has yet presented a copy of the WLB&L partnership agreement, there is no conclusive evidence that this document does not exist, or that plaintiffs will be unable to present it at trial or that they will not be able to provide proof of an implied contract. *See Missan v. Schoenfeld*, 95 AD2d 198 (1<sup>st</sup> Dept 1983); *Hanlon v. Melfi*, 102

Misc2d 170 (Sup Court, Suffolk County 1979). Because there may well be a contractual basis for plaintiffs' claims as well, the court believes that justice would be best served by affording plaintiffs the opportunity to present it. Therefore, the court rejects defendants' final argument.

DECISION

For the foregoing reasons, it is

ORDERED that defendants' motion for summary judgment is denied; and it is further

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

Dated: New York, New York  
*[Signature]*, 2010

*[Signature]*  
\_\_\_\_\_  
Hon. Doris Ling-Cohan, J.S.C.

J:\Summary Judgment\worthvbamundo2.lane.wpd

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