

Spaulding v Flowers & Becker LLP

2010 NY Slip Op 31086(U)

May 5, 2010

Supreme Court, New York County

Docket Number: 102489/08

Judge: Jane S. Solomon

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

PRESENT: Solomon

PART 55

— Index Number : 102489/2008

SPAULDING, DAVID

VS.

FLOWERS & BECKER LLP

SEQUENCE NUMBER : 002

SUMMARY JUDGEMENT

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INDEX NO. _____

MOTION DATE 3/28/10

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

motion to/for _____

PAPERS NUMBERED

1-3

4-9

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the enclosed Memorandum decision and order.

N.B. -- Note of issue deadline extended to 6/30/10.

FILED

MAY 06 2010

NEW YORK COUNTY CLERK'S OFFICE

Dated: 5/6/10

JANE S. SOLOMON 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: PART 55

-----x
DAVID SPAULDING,

Plaintiff,

Index No.: 102489/08

-against-

FLOWERS & BECKER LLP, ROBERT FLOWERS,
and ROBERT BECKER,

Defendants.

JANE S. SOLOMON, J.:

Defendants Flowers & Becker, LLP (F&B) and Robert Flowers (Flowers) move, pursuant to CPLR 3212, to dismiss the complaint as against them, and for summary judgment on behalf of F&B on its first counterclaim in the sum of \$12,977.01, plus interest, representing excess distributions to plaintiff David Spaulding (Spaulding), and for summary judgment on F&B's second counterclaim in the sum of \$22,722.56, plus interest, representing sums allegedly misappropriated by Spaulding. Defendant Robert Becker (Becker) cross-moves for summary judgment dismissing the complaint as against him.

F&B is an accounting firm that has been winding down its operations since the withdrawal of Spaulding from the firm in August of 2007 and the withdrawal of Becker from the firm in January of 2008. The instant lawsuit is the last piece of unfinished business in terminating the firm.

The firm's operations are governed by a written partnership agreement dated July 1, 2002, pursuant to which

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DECISION and ORDER

Spaulding was a principal and Flowers and Becker were partners in F&B (Partnership Agreement, annexed to Motion, at Ex. C). According to the terms of the Partnership Agreement, F&B maintained partner capital accounts for each partner and principal of the firm, which accounts have periodically been increased by capital contributions and profits, and have periodically been decreased by distributions to the named individuals. Since the inception of the Partnership Agreement, the profits of F&B have been allocated by one-third to each partner/principal, with adjustments for out-of-pocket expenses.

According to the complaint, Spaulding alleges that defendants still owe him the sum of \$43,545.94 as a distribution from the capital account maintained by F&B for his benefit. The complaint asserts five causes of action: (1) conversion; (2) breach of contract; (3) conspiracy; (4) monies had and received; and (5) unjust enrichment.

According to F&B and Flowers, in 2006, Spaulding became disgruntled with the firm's method of allocating profits, and indicated that he believed that he had not received his fair share of the profit distributions. Spaulding claimed that he was bringing in a larger percentage of revenue, but was only receiving one-third of the profits. At that time, Spaulding requested a retroactive recalculation of his capital account. Allegedly, the costs and expenses of operating the firm were also

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allocated equally among Flowers, Becker and Spaulding. However, whereas the Partnership Agreement specifically states that each of those individuals has a one-third equity interest in the firm, and that each is entitled to a one-third share of the profits, the agreement is silent as to the allocation of costs and expenses.

In early 2007, Flowers and Becker met with Spaulding and told him that the Partnership Agreement did not provide for retroactive adjustments, but, in an effort to entice him to remain with the firm, Flowers avers that he and Becker told Spaulding that they would consider amending the Partnership Agreement on a prospective basis. Thereafter, each partner's/principal's revenues and attributable expenses were separately identified and reported to each individual periodically. However, the Partnership Agreement was never formally amended.

Paragraph "Thirteenth" of the Partnership Agreement states, in pertinent part:

"AMENDMENT AND TERMINATION OF AGREEMENT:

(a) This Agreement may be amended or revoked at any time by a written agreement executed by a unanimous agreement of the Partners. No change or modification of this Agreement shall be valid unless the same is in writing and signed by all parties, and no change or modification shall affect the rights and obligations of a deceased, disabled or former partner unless the said partner, or his personal representative, shall consent thereto in writing. No waiver of any provision of this Agreement shall be valid unless it is in writing."

F&B and Flowers maintain that, since the above-discussed modification was never reduced to a writing, it is unenforceable. F&B and Flowers contend that Spaulding was aware of this fact, and that he prepared two memos, dated one month apart, purportedly to memorialize the new understanding concerning the prospective amendment of the Partnership Agreement (Motion, Ex. D). In his examination before trial (EBT), Spaulding acknowledged that these memos were never signed by all of the parties (Spaulding EBT Transcript, Motion, Ex. E, at 64, 67). Spaulding also admitted that the Partnership Agreement was never modified or amended in writing (*id.* at 44). Furthermore, the memos sent by Spaulding do not contain any specific modification provision, just statements to the effect that the calculation of distributions should be reworked to reflect the actual income to the firm derived from each partner's/principal's efforts.

Spaulding eventually gave notice of his intent to withdraw from the firm, effective August 13, 2007. According to Flowers, when Spaulding announced his departure, he was informed that, pursuant to the Partnership Agreement, he was still financially obligated for certain commitments for the firm's commercial lease, salaries and telecommunications and copier equipment made by the firm while he was still a principal. Allegedly, Spaulding responded by saying that, pursuant to

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paragraph Tenth of the Partnership Agreement, he had no continuing obligation to share those costs after August 13, 2009, which was 90 days after he gave notice of his intention to withdraw.

According to paragraph Tenth of the Partnership Agreement, if a partner/principal gives three months' written notice of his intent to withdraw, after his withdrawal he would no longer be obligated by the terms of the agreement, outside of the provisions of that paragraph. Further, a withdrawing partner had the right to remain in the office space for up to one year after his withdrawal, but would be obligated to pay a proportionate share of the cost of his use of such space.

Spaulding, by e-mail, agreed to allocate \$3,000 of his realization for the September, 2007, rent (Motion, Ex. I). In addition, by letter, Spaulding requested that F&B continue to collect monies from his clients for work he performed while he was a principal with F&B, and then deposit them into his capital account (Motion, Ex. D). F&B alleges that it did collect these sums, which represented F&B billings, and were subject to the profit sharing mechanism of the Partnership Agreement, because they represented work performed by Spaulding while he was still a principal of the firm. Subject to these calculations, F&B states that the sums were then placed in Spaulding's account and periodically reported to him.

Subsequent to Spaulding's withdrawal, Becker decided to withdraw as well, and the firm has been winding down its business since December, 2007.

In its first counterclaim, F&B contends that Spaulding was overcompensated from the firm's capital account. F&B contends in its second counterclaim (for breach of fiduciary duty) that Spaulding misappropriated F&B accounts receivable. Defendants allege that Spaulding copied client and billing files from F&B, and then, after withdrawing from the firm, prepared false statements of account for firm clients on his own letterhead, which he then sent to clients, and thereby collected funds that were due and owing to the firm. Becker's first counterclaim alleges that Spaulding breached the Partnership Agreement, and demands that he return to F&B the amount he was overcompensated from the F&B capital account. Becker's second counterclaim and cross-claim alleges that Becker is entitled to an additional distribution from the F&B capital account, and the third counterclaim and cross-claim seeks an accounting of F&B's partnership transactions.

Defendants further assert that, during discovery, Spaulding was requested to provide documents relating to Spaulding's collection of funds due to F&B, and Spaulding responded by saying that he had no such documents. However, defendants were able to obtain from former clients copies of

statements that Spaulding sent to those clients under his own letterhead, allegedly showing that Spaulding sought to collect F&B invoices for himself.

When Spaulding was presented with these documents, he stated that, once he left the firm, those amounts belonged to him, not F&B (Motion, Ex. N). At his EBT, Spaulding stated that he wrote on these invoices the following:

"These were originally billed for services rendered while I was at Flowers & Becker; and now that I have left the firm, my accounts receivable are mine and you should direct payment to me."

(Motion, Ex. O, at 34).

According to Flowers, when Spaulding was then asked to re-create these bills, he claimed that they were destroyed when his hard drive crashed (Motion, Ex. P). However, according to the data recovery company contacted by Spaulding, the data was recoverable, but Spaulding refused to pay for the service (Motion, Ex. Q).

F&B has provided a list purporting to show the amount of funds that clients paid directly to Spaulding in accordance with the above-referenced bills that he sent to them. This list indicates a total sum of \$22,722.56.

In addition, F&B asserts that, due to less than anticipated collections of outstanding accounts from Spaulding's clients, Spaulding's capital account has a deficit of \$12,977.01, which he owes to F&B.

In his cross motion, Becker adopts the arguments posited by F&B and Flowers in the main motion.

In opposition, Spaulding maintains that, even if the amendment to the Partnership Agreement was never reduced to a writing, as of January 1, 2007, the new allocations were instituted as reflected in profit and loss statements and balance sheets for 2007, in which certain overhead expenses were proportionately allocated among the partners/principal according to actual use, instead of by a one-third allocation to each partner/principal (Aff. Of David Spaulding, Exs. F, G and L). Additionally, each partner's/principal's revenue is individually reported, rather than lumped together as total firm revenue. Spaulding asserts that, according to this proportionate allocation of costs, he is still owed \$43,545.94 from the firm.

It is noted that the profit and loss and balance sheets provided by Spaulding in his opposition do not reflect the manner or proportion of profit distribution to be given to each partner/principal; they simply reflect the total firm accounts of F&B and each partner's/principal's proportionate contribution.

The court notes that the opposition does not address F&B's and Flower's motion with respect to their counterclaims.

DISCUSSION

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of

law, tendering sufficient evidence to eliminate any material issues of fact from the case." (*Winegrad v NYU Med. Ctr.*, 64 NY2d 851, 853 [1985] [internal citation omitted]). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]; see *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (see *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

F&B's and Flower's motion to dismiss the complaint as against them, and Becker's cross motion to dismiss the complaint as against him, are granted.

The issue with respect to the allegations appearing in the complaint is whether the Partnership Agreement was modified so as to make its modifications enforceable against defendants.

"Generally, a written agreement which prohibits oral modification can only be changed by an 'executory agreement . . . in writing.' However, an oral modification is enforceable if the party seeking enforcement can demonstrate partial performance of the oral modification, which performance must be unequivocally referable to the modification [internal citations omitted]."

(*Calica v Reisman, Peirez & Reisman, LLP*, 296 AD2d 367, 368-369 [2d Dept 2002]).

In the instant matter, the Partnership Agreement contained a provision that required any modification of that

agreement be in writing to be enforceable, and such provisions are protected by the General Obligations Law § 15-301 (1). Further, despite Spaulding's interpretation of the profit and loss and balance sheet statements, they do not indicate any change in the manner or proportion of profit distribution that varies the terms of the Partnership Agreement. These financial documents only indicate a method of reporting revenue and expenses that Spaulding indicates is different from the Partnership Agreement; however, the Partnership Agreement contains no provision dealing with these items of account.

"There is no evidence in the record of partial performance by plaintiff or defendants that is unequivocally referable to . . . the . . . oral modifications alleged by [plaintiff].

* * *

There is also no evidence in the record that [plaintiff] changed [his] position in any way or relied to [his] detriment on any oral modification so as to estop [defendants] from asserting the absence of a writing and enforcing the original [agreement]."

(*Carlin v Jemal*, 68 AD3d 655, 656 [1st Dept 2009] [internal citations omitted]).

In *Gerard v Cahill* (20 Misc 3d 1133[A], *7, 2008 NY Slip OP 51716[U] [Sup Ct, Suffolk County 2008]), a case heavily relied upon by Spaulding, the court wrote:

"Where a subsequent oral agreement provides terms and/or conditions not covered nor contemplated by the original agreement, acts constituting partial performance of said oral agreement may be considered unequivocally referable to the oral agreement thus rendering it enforceable notwithstanding the inclusion of a 'no oral modification' clause in the original

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agreement. Where, however, the part performance is explainable with reference to the original agreement or as preparatory steps taken with a view towards consummation of an agreement in the future, such part performance will not be found to be unequivocally referable to an oral modification [emphasis added; internal citations omitted]."

The *Gerard* decision was subsequently affirmed as modified by the Appellate Division, which stated that the oral agreement in question did not modify the original agreement, but created its own, separate, oral agreement "addressing a scenario . . . not covered by the terms of the operating agreement" (66 AD3d 957, 959 [2d Dept 2009]).

In the case at bar, the parties never came to a meeting of the minds with respect to partnership distributions so as to create a binding and enforceable contract (*Joseph Martin, Jr., Delicatessen, Inc. v Schumacher*, 52 NY2d 105 [1981]; see *L.K. Station Group, LLC v Quantek Media, LLC*, 62 AD3d 487 [1st Dept 2009]). No document or other evidence indicates that the parties were doing more than investigating a different profit distribution than the one provided for in the Partnership Agreement.

Even if one were to agree that there was some oral modification with respect to the reporting mechanism to indicate individual partner/principal earnings, as evidenced by the submitted profit and loss and balance sheet statements, that, in and of itself, is insufficient to evidence a modification of the

profit distributions. "It is not sufficient . . . that the oral agreement gives significance to [the parties'] actions. Rather, the actions alone must be 'unintelligible or at least extraordinary,' explainable only with reference to the oral agreement" (*Anostario v Vicinanza*, 59 NY2d 662, 664 [1983] [internal citation omitted]).

Additionally, the documents provided by the parties state that they were reviewing the financial records with an eye to modifying the Partnership Agreement, not that they had already agreed to any specific modification. Hence, it is logical that the profit and loss and balance sheet statements prepared during 2007, reflecting each party's financial contribution to the operating revenue of the firm, were undertaken as a preliminary step to determine how the Partnership Agreement might be modified with respect to profit allocation.

Based on the foregoing, the court finds that there was no enforceable modification of the Partnership Agreement with respect to profit distribution percentages to the partners/principal, and, therefore, the complaint is dismissed.

F&B has provided sufficient documentation to make out a prima facie case for entitlement to judgment on its first and second counterclaims, and Spaulding has offered no evidence or argument in opposition. As a consequence, F&B's motion for summary judgment on its first and second counterclaims is

granted.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that the portion of defendants Flowers & Becker, LLP's and Robert Flower's motion to dismiss the complaint as against them is granted, with costs and disbursements to said defendants as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the portion of defendant Flowers & Becker, LLP's motion seeking summary judgment on its first counterclaim is granted in the amount of \$12,977.01, and that the portion of defendant Flowers & Becker, LLP's motion seeking summary judgment on its second counterclaim is granted in the amount of \$22,722.56, for a total of \$35,699.57, and the Clerk of the Court is directed to enter judgment in favor of said defendant and against plaintiff in the amount of \$35,699.57, together with interest at the statutory rate from the date of December 31, 2007 until the date of entry of judgment, as calculated by the Clerk, and thereafter at the statutory rate, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that defendant Robert Becker's cross motion for summary judgment dismissing the complaint as against him is granted with costs and disbursements to said defendant as taxed

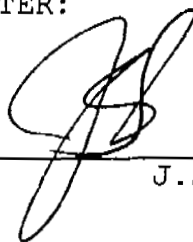
by the Clerk upon the submission of an appropriate bill of costs;
and it is further

ORDERED that the Clerk is directed to enter judgment
accordingly; and it further is

ORDERED that the time to file and serve a note of issue
with respect to Becker's counterclaims and cross-claims is
extended to June 30, 2010.

Dated: May 5, 2010

ENTER:



J.S.C.

JANE S. SOLOMON

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