

Shine, & Co. LLP v Natoli

2010 NY Slip Op 31992(U)

July 1, 2010

Supreme Court, New York County

Docket Number: 600551-2010

Judge: Carol R. Edmead

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

PRESENT: Edmead
Justice

PART 35

Index Number : 600551/2010
SHINE, & COMPANY LLP
VS.
NATOLI, ANGELO F.
SEQUENCE NUMBER : 001
PARTIAL SUMMARY JUDGMENT

INDEX NO. 600 551/10
MOTION DATE 6/22/10
MOTION SEQ. NO. (001)
MOTION CAL. NO. _____

this motion to/for _____

Exhibits ...
PAPERS NUMBERED

Answering Affidavits -- Exhibits _____
Replying Affidavits _____

Cross-Motion: Yes No

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1410).

Upon the foregoing papers, it is ordered that this motion

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the motion by plaintiff Shine & Company LLP for summary judgment on its first cause of action seeking a declaratory judgment that defendant Angelo F. Natoli is not entitled to share in any proceeds from the sale of all or part of Shine's accounting practice to any third-party, and dismissing defendant's first counterclaim for a judgment declaring that he was a general equity partner in Shine who is entitled to one-third of any proceeds from the sale of Shine's practice, is granted; and it is further

ORDERED that defendant's first counterclaim is severed and dismissed; and it is further ORDERED, ADJUDGED and DECLARED that defendant Angelo F. Natoli is not entitled to share in any proceeds from the sale of all or part of Shine & Company LLP's accounting practice to any third-party; and it is further

ORDERED that plaintiff serve a copy of this order with notice of entry upon all parties within 20 days of entry; and it is further

ORDERED that the Clerk may enter judgment accordingly.
This constitutes the decision and order of the Court.

Dated: 7/1/10

[Signature]
HON. CAROL EDMEAD 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 35

-----X
SHINE & COMPANY LLP,

Index No. 600551-2010

Plaintiff,

-against-

ANGELO F. NATOLI,

Defendant.

HON. CAROL EDMEAD, J.S.C.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

MEMORANDUM DECISION

In this declaratory judgment action, plaintiff Shine & Company LLP ("Shine") moved for summary judgment on its first cause of action seeking a declaratory judgment that defendant Angelo F. Natoli ("defendant") is not entitled to share in any proceeds from the sale of all or part of Shine's accounting practice to any third-party, and dismissing defendant's first counterclaim for a judgment declaring that he was a general equity partner in Shine who is entitled to one-third of any proceeds from the sale of Shine's practice.¹

Factual Background

Defendant, an experienced certified public accountant, joined Shine, an accounting firm, pursuant to a Letter of Intent ("LOI") made as of December 28, 2007, effective January 1, 2008.

The LOI provides that:

"The Parties agree to the following:
AFN's [Mr. Natoli's] STATUS AND TOTAL EARNINGS
Effective January 1, 2008, AFN will merge his accounting and tax practice with Shine and be admitted as an equity partner of Shine."

¹ Shine does not seek summary judgment on its monetary claims against defendant, including its claims based on his misappropriation of money belonging to the firm or the recovery of the significant amount by which defendant was overpaid pursuant to his agreement with Shine.

In late November, 2009, the parties agreed to practice independent of each other, and defendant was asked to confirm that he did not possess any ownership interest in Shine to enable its accounting practice to be sold to a third-party. Defendant for the first time asserted an ownership interest in Shine, and later vacated Shine's offices in early February, 2010.

Thus, in its first cause of action, plaintiff seeks a declaration that in view of the undisputed financial and other arrangements between the parties, defendant's designation as an "equity partner," in the LOI does not entitle him to share in any proceeds from the sale of all or part of Shine's accounting practice to any third-party. In response, defendant counterclaims for a judicial determination that his designation as an equity partner of Shine entitles him to a one-third share of any proceeds received as a result of such a sale.

In support of its motion for summary judgment, plaintiff argues that the rights and duties of purported partners arise from and are fixed by the terms of the parties' agreement. Such terms are contained in the LOI, the sole writing between the parties defining their relationship and the conduct of their respective accounting practices. Plaintiff maintains that the substance and not the contractually conferred form of a business relationship determines whether the relationship qualifies as a partnership. Thus, that the parties held themselves out as partners is not decisive of whether a partnership exists.

Shine's managing partner, Brian A. Pecker ("Pecker"), a certified public accountant, submits an affidavit, wherein he states that the LOI, which was not negotiated or reviewed by any attorney in advance of its execution, referred to defendant as an "equity partner" of Shine. Recognizing defendant's need and desire to maintain his stature to his clients and to the outside world, Shine agreed to refer to defendant as an "equity partner" in the LOI. However, the parties'

rights were defined by the terms and conditions of the LOI. The LOI clearly establishes that the defendant never had any *bona fide* ownership or other interest in the firm and was not an equity partner of Shine as a matter of law.

The absence of defendant's agreement to share Shine's losses is fatal to his claim that he was an equity partner. The conclusively documented fact that defendant never agreed to share in Shine's losses is, by itself, dispositive of his claim that he was a general equity partner of the firm. Since he did not possess any rights, title or interest to the assets of Shine, he is not entitled to share in the proceeds of any sale of its business.

Further, compensating an individual based on his revenue generated does not as a matter of law create a partnership relationship. Defendant's sole compensation from Shine was computed based on the express terms contained in the LOI. Defendant earned an amount equal to 55% of the collections received from his clientele. He received a \$20,000 monthly advance against such earnings in each of the 24 months to which the LOI applied. In 2009, at his request, the monthly advance payments were made payable to "Angelo F. Natoli, C.P.A., P.C." A detailed monthly schedule was maintained, to which all parties had access, to measure the amount by which defendant was over or under paid based on the amount of his fee originations. Although the LOI provided for defendant to receive a specific percentage of revenue from referring new clients to be serviced by Shine, none of those circumstances arose or at issue. Defendant never participated or shared in Shine's profits. Even assuming that these revenues were "profits" and defendant can somehow assert an agreement to share these "profits" with Shine, plaintiff's motion must nevertheless still be granted because defendant cannot demonstrate that the parties agreed to share losses.

In addition, defendant was never treated in a manner that could satisfy the requirements of being an equity partner. Pursuant to the LOI, his compensation from Shine was reported on a Form 1099. The LOI stated that the defendant was not entitled to receive a K-1, the federal tax form provided to a partner reflecting the partner's share of income, credits, deductions and related financial information for the partnership's tax year. The Schedules K-1 which the two partners of Shine, Pecker and Steven Macaluso ("Macaluso") received annually as equity partners of Shine reflected our respective percentage share of Shine's profits and losses for that year and our capital accounts at year's end. In contrast, the Form 1099 provided to defendant pursuant to the LOI did not contain any provision for his purported share of the partnership's profits, losses or capital ownership for the simple reason that he did not share in the firm's profits and losses and had no capital ownership. Defendant's Answer confirms that he filed the 2008 taxes in a manner completely inconsistent with his current claim that he was an equity partner of Shine. At no time did defendant ever assert that he was entitled to a K-1 from Shine.

Further, argues plaintiff, the absence of any *indicia* of a partnership compels the conclusion that defendant does not have any right to receive any proceeds from the sale of Shine's practice. Defendant never made any capital contribution to Shine, no capital contribution was ever required of him, and he never even had a capital account at the firm; had no actual authority to bind or obligate the Firm; was not a signatory on any Shine bank account; never attended any partnership meetings of Shine; had no authority to direct or participate in the hiring, firing or annual reviews of Shine personnel (other than his two former employees); had no right to examine the books and records of Shine except to the extent permitted by Parker or Macaluso. Defendant's inability to demonstrate any *indicia* of his status as an equity partner with any

ownership rights which would entitle him to share in the proceeds of the sale of the practice compels the same result.

Plaintiff argues that defendant was not an equity partner of Shine, and that defendant's first counterclaim for a declaration that he was an equity partner of Shine who is entitled to a one-third share of any proceeds received as a result of Shine's sale of all or part of its practice to a third-party should be denied and defendant's first counterclaim should be dismissed with prejudice.

In opposition, plaintiff argues that the parties specifically stated in the LOI that defendant is admitted as an equity partner. That the LOI was not negotiated or reviewed by an attorney is a red herring; Pecker is an experienced certified public accountant and he has been the managing partner of Shine since 1980. Pecker knows what the words "equity partner" mean; he knows the difference between an equity partner, a contract partner and a principal, and that an equity partner has an undivided partnership interest in the firm, both as to profits earned by the firm and as to capital of the firm. The parties never used the words "contract partner," either orally or in writing. The parties intended for defendant to join as an equity partner, and the LOI states that defendant was joining as an equity partner. Shine ignores its own caselaw, and requests the Court to disregard the "plain meaning" of the terms of the LOI.

It is not necessary for the Court to look to the "substance" of the business relationship to determine whether a partnership existed because the Court need only read the clear language of the LOI to determine that defendant is an equity partner. The cases Shine cites for its "substance" argument involve fact patterns where there was no written partnership agreement. Moreover, an examination of the traditional *indicia* of partnership, *i.e.*, sharing of profits/losses; ownership of

assets; management and control; intention of the parties; and contribution of capital, shows that defendant was an equity partner, and at the very least, there are material issues of fact sufficient to deny summary judgment. there are material issues of fact that require a trial.

Defendant states in his affidavit that it was his intention to join Shine as an equity partner, and only as an equity partner. In the fall of 2007, defendant was negotiating an expense sharing arrangement with another colleague, who was a friend of many years standing. The proposed arrangement would have cost defendant 30% of his gross collections for much nicer space than he eventually had at Shine. Before reaching any agreement with that colleague, however, an executive search firm introduced defendant to Pecker, who then entered into discussions with a view towards defendant joining Shine as an equity partner. Defendant had no interest in joining Shine in any other capacity. If defendant were simply going to be a contract partner, he would have made an agreement with his friend, rather than with people he had just met.

The pre-LOI email exchanges between defendant and Pecker, welcoming and treating defendant as an "equity partner," make clear that the parties intended defendant to join as an equity partner and that defendant expected to share in any losses that the firm might incur after he became an equity partner. Shine paid the executive search firm \$37,000.00 for introducing defendant and arranging the merger of the two practices. Shine would not have paid that amount for a contract partner who was not merging his practice into the firm.

Defendant shared in profits and had agreed to share in any losses. An equity partner, by definition, must share in the profits and losses. Defendant participated in the firm's profits. Although defendant's draw was based on 55% of Shine's receipts attributable to his efforts, if the firm had not been profitable, it would not have been able to make those payments. Shine has not

claimed that it was not profitable, but nevertheless paid defendant. Defendant was to receive 55% of the collections from his then existing clients, as listed on an Exhibit to the LOI. Defendant generated additional clients while he was at Shine, and he received 55% of the collections attributable to those new clients as well. These payments clearly go beyond the four corners of the LOI and represent participation in the firm's profits. Section 11(4) of the Partnership law provides that the receipt by a person of a share of the profits of a business "is prima facie evidence that he is a partner in the business." Shine has not rebutted defendant's *prima facie* case, and defendant's profit participation is sufficient to deny summary judgment.

Further, defendant had agreed to share in the losses. As an equity partner under the LOI, defendant agreed in writing to share in the losses. And, defendant's email of December 14, 2007, in which he stated that "As for the liability issue, I'm not concerned. Both you and Steve [Macaluso] appear to me to be conservative and prudent men and as such, whatever comes along should be at the least defensible," demonstrates that defendant intended to share in any losses. That there were no losses while defendant was active at Shine does not change the fact that he agreed to share in any such losses.

Shine's failure to provide a form K-1 is irrelevant. Defendant repeatedly asked for a formal partnership agreement which would necessitate his receiving a form K-1. Shine's failure to provide the form K-1 had no impact on the taxes owed and paid by defendant. Nor does Shine's choice of tax forms have any impact on whether defendant was an equity partner.

Further, defendant contributed an accounting practice valued at \$475,000.00 as a capital contribution, which included good will, accounts receivable, work in progress, furniture and equipment. That Shine failed to take the ministerial step of establishing a capital account for

defendant is attributable to its failure and deceptive practices, and has no impact on his status as an equity partner.

Defendant also had authority to bind Shine. Defendant signed clients' tax returns and financial statements on behalf of the firm. Every time he signed such a document he represented the firm, and it was bound to stand behind his signature as a matter of professional responsibility. The signing of such documents is reserved for equity partners, not independent practitioners with no interest in the firm. Further, defendant made numerous requests to become a signatory to bank accounts, but Shine kept delaying and never took the steps required to make defendant a signatory. No one from Shine ever wrote or told defendant that he was not a partner. Shine has admitted, by silence, that defendant is a partner.

Further, defendant attended numerous meetings with Pecker and Macaluso at which they discussed firm management. In fact, at defendant's specific suggestion, Shine made a switch to the tax software that he had used in his individual practice. The only reason defendant did not attend meetings concerning the proposed sale of the practice was that he was not told about them, and was deliberately excluded from such meetings by his partners.

As to Shine's contention that defendant had no authority to hire or fire, or to participate in annual reviews of employees, except for the employees he had brought with him to the firm, Shine neglects to tell the Court that those two employees became employees of Shine. Since Shine admits defendant had management responsibility with respect to them, it of necessity admits that he had management responsibility at the firm. And, in any event, defendant's management functions regarding staff did not end with those two employees; defendant participated in several staff meetings relating to compensation and bonuses for the entire staff

and assigned work to every member of Shine's staff.

Finally, argues defendant, as to his access to the firm's books and records, Shine neglects to tell the Court that defendant had access to records of all firm collections for the years 2008/2009, and he was provided with summaries of firm expenses. Pecker stated in defendant's presence that he was entitled to see all details on firm expenses. Macaluso stonewalled repeated requests to see the details, but that does not change the fact that defendant was entitled to them. Although problems arose during 2009 between the two other partners and defendants, they remained partners. Defendant only agreed to consider separating, and while he was considering it, learned that Pecker and Macaluso had been meeting with a large company with a view towards selling the practice, but excluded defendant from the deal.

The argument that defendant was not a partner is illogical. Defendant, an experienced professional, would not have merged his entire practice valued at the time at \$475,000.00 into Shine, and have agreed that the firm would be entitled to 45% of his gross collections, unless he was becoming an integral part of something larger. Prior to joining Shine, defendant's overhead was approximately 35% of his gross collections. The deal he was negotiating with his long-time colleague and friend before joining Shine would have reduced that figure to 30%. Defendant never would have agreed to contribute an additional 10% to 15% to Shine unless he was admitted as a partner, that is, unless he had equity in the firm. Defendant was prepared to take the risk of a downside, and Shine had the obligation to include him in the upside, *i.e.*, the sale of the practice.

In reply, Shine argues that defendant fails to cite any authority contesting that defendant's designation as an "equity partner" is controlling; defendant's designation as an "equity partner," in this case one used by the non-attorney draftsmen, is not dispositive.

As a matter of law, defendant did not share in Shine's profits. Therefore, defendant is not entitled to a share of the sale of Shine's assets. Pursuant to the LOI, defendant's compensation was solely a function of the revenue he originated; nothing more and nothing less. The LOI makes clear that he would not participate in the firm's overall financial performance. Defendant cites no legal authority to support his contention that he shared in Shine's profits based on the assertion that "if the Firm had not been profitable, it would not have been able to make those payments to" him. Further, compensating an individual based on the amount of revenue he has generated does not create a partnership relationship as a matter of law. There is no mutual promise of undertaking by defendant to submit to the burden of making good the losses. Further, defendant's receipt of 55% of the collections attributable to additional clients he generated does not represent participation in Shine's profits, but was based on an agreed amount he was entitled to as compensation for revenue originations, which is insufficient as a matter of law to vest him with a proprietary interest in Shine.

The terms of the LOI, *i.e.*, method of compensation, and agreement to receive a Form 1099, preclude defendant's claims to an ownership interest in Shine. Further, since both of defendant's employees went on Shine's payroll effective January 1, 2008 and were thereafter paid by the Firm, the amount defendant would have paid for overhead under this unspecified expense sharing arrangement simply provides no basis of comparison to the agreement he entered into with Shine which relieved him of the financial responsibility for his staff employees. More significantly, if defendant truly believed an expense sharing arrangement would be more advantageous financially, he was free to pursue that option.

And, defendant's assertion that he delivered his "entire" accounting practice, including

goodwill (*i.e.*, his clients), which he valued at approximately \$475,000, to Shine as his "capital contributions to the Firm" lacks evidentiary basis, and is directly contradicted by the LOI. The LOI provides that if defendant "chooses not to continue servicing and [sic] dispose of [his] clients, he agrees to sell the clients to Shine who will pay 25% of the gross fees collected from [such clients]...." Thus, the very document which defendant contends entitles him to share in the sale of Shine's assets by reason of having made a "capital contribution" demonstrates that only if defendant chose not to continue servicing his clients did he agree to convey them to Shine. It is undisputed that this never happened, and the defendant took his clients with him when he vacated Shine's offices in early 2010. The LOI conclusively refutes defendant's contention that he made a capital contribution to Shine upon joining the Firm.

Discussion

To obtain summary judgment, the movant must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor (CPLR § 3212 [b]). This standard requires that the proponent of a motion for summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinde*r, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11, 751 NYS2d 433, 434 [1st Dept 2002] [defendant not entitled to summary judgment where he failed to produce admissible evidence demonstrating that no triable issue of fact exists as to whether plaintiff would have been successful in the underlying negligence action]). Thus, the motion must be supported "by

affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions” (CPLR § 3212 [b]). A party can prove a *prima facie* entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman, supra; Prudential Securities Inc. v Rovello*, 262 AD2d 172 [1st Dept 1999]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR §3212 [b]). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman v City of New York, supra*, 49 NY2d at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 765 NYS2d 326 [1st Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman, supra* at 562). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Alvord and Swift v Steward M. Muller Constr. Co.*, 46 NY2d 276, 281-82, 413 NYS2d 309 [1978]; *Fried v Bower & Gardner*, 46 NY2d 765, 767, 413 NYS2d 650 [1978]; *Platzman v American Totalisator Co.*, 45 NY2d 910, 912, 411 NYS2d 230 [1978]; *Mallad Const. Corp. v County Fed. Sav. & Loan Assn.*, 32 NY2d 285, 290, 344 NYS2d 925 [1973]; *Plantamura v Penske Truck Leasing, Inc.*, 246 AD2d 347, 668 NYS2d 157 [1st Dept 1998]).

“A partnership is defined to be a contract of two or more persons, to place their money,

effects, labor or skill, or some or all of them, in lawful commerce or business, and to divide the profits and bear the loss in certain proportions” (*Joachim v Flanzig*, 3 Misc 3d 371; 773 NYS2d 267 [Sup Ct Nassau County 2004] citing *Pattison v Blanchard*, 5 NY 186, 189 [1851], *Manning v Whalen*, 259 AD 490, 20 NYS2d 364 [3d Dept 1940] and 15A N.Y. Jur.2d Business Relationships § 1379). A partnership results from an express or implied contract and the rights and obligations of the partners arise from, and are fixed by, their agreement (*Joachim v Flanzig*, supra citing *Martin v Peyton*, 246 NY 213 [1927], Partnership Law §§ 10, 11, and *Levy v Leavitt*, 257 NY 461 [1931]). The fundamental, neutral precept of contract interpretation is that agreements are construed in accord with the parties' intent (*see Slatt v Slatt*, 64 NY2d 966, 967, 488 NYS2d 645, rearg denied 65 NY2d 785, 492 NYS2d 1026 [1985]), and the “best evidence of what parties to a written agreement intend is what they say in their writing” (*Slamow v Del Col*, 79 NY2d 1016, 1018, 584 NYS2d 424 [1992]). Thus, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms (*see e.g. R/S Assoc. v New York Job Dev. Auth.*, 98 NY2d 29, 32, 744 NYS2d 358, rearg denied 98 NY2d 693, 747 NYS2d 411 [2002]; *W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162, 565 NYS2d 440 [1990]). Further, it “is a court's task to enforce a clear and complete written agreement according to the plain meaning of its terms, without looking to extrinsic evidence to create ambiguities not present on the face of the document” (*150 Broadway N.Y. Assoc., L.P. v Bodner*, 14 AD3d 1, 6 [2004]).

Both parties acknowledge that their December 28, 2007 LOI is the sole agreement defining their financial and working relationship. The issue is whether the parties intended to make defendant an “equity partner” entitled to receive a share in any proceeds from the sale of all

or part of Shine's accounting practice to any third-party. The party asserting the existence of a partnership bears the burden of proving its existence (*Galasso v Eisman, Zucker, Klein & Ruttenberg*, 310 F Supp2d 569 [SDNY 2004] citing *North American Knitting Mills, Inc. v International Women's Apparel, Inc.*, No. 99 Civ. 4643, 2000 WL 1290608, *1, 2000 LEXIS 1319, *3 [SDNY 2000], quoting *Central National Bank, Canajoharie v Purdy*, 249 AD2d 825, 826, 671 NYS2d 866 [3d Dept 1998]).

“The customary *indicia* of equity partners include profit and loss sharing, control over the partnership affairs, contribution to capital and possession of an ownership interest” (*Lynn v Corcoran*, 1994 WL 123519 [Sup Ct Nassau County 1994] citing *M.I.F. Securities Co. v Stam & Co.*, 94 AD2d 211, 214, *affd.*, 60 NY2d 936).

As to whether the Court may look to these factors in addition to the express identification of defendant as “equity” partner in the LOI, *Zito v Fischbein Badillo Wagner Harding* (11 Misc 3d 713, 809 NYS2d 444 [Sup Ct New York County 2006]) is instructive. In *Zito*, plaintiff, an attorney, was employed at defendant law firm Fischbein, Badillo, Wagner, Harding (“FBWH”). Plaintiff allegedly performed services at FBWH pursuant to an agreement, similar to the LOI herein, that provided that it would compensate him in an amount that includes the sums that FBWH collected from clients that plaintiff introduced to the firm and sums for services that plaintiff performed on matters for other firm clients whom he did not introduce to the firm, less his proportionate share of the firm's overhead expenses. FBWH allegedly failed to compensate him as agreed, and plaintiff sued FBWH. FBWH argued that plaintiff was always an at-will, salaried employee, and not a partner of the firm, although he was allowed to use the title “contract partner.” FBWH, like plaintiff herein, asserted that plaintiff was never a party to any

firm partnership agreement, never guaranteed or agreed to be responsible for any of its debts, did not share in its losses, never received an IRS Form K-1 (partnership form) from it, and never had an equity interest in it. Plaintiff was granted leave to amend the complaint to add only those individuals who were “equity” partners of FBWH during the relevant period. When Menachem Kastner (“Kastner”) was named as a defendant, he moved to dismiss on the ground that he was not an equity partner so as to be held liable to the plaintiff.

The Court first looked to Kastner’s “Employment Agreement,” which afforded him the choice of being called “a contract partner or ... a senior attorney.” It fixed his annual compensation, and made clear that Kastner “will not be entitled to any equity, accounts receivable or assets of the Firm as a result of this agreement.... The Employment Agreement contains a term of one year, and refers to Kastner’s relationship to FBWH as an “affiliation.” The Court noted that significantly, “no provision, at all, is made for loss sharing on movant’s part.” The Employment Agreement concluded with the sentence: “I elect to be a contract partner/senior associate (circle one),” and Kastner circled the “contract partner” option.

The Court proceeded to list three *indicia* of partnership: (1) joint control over the enterprise; (2) profit splitting; and (3) loss sharing. The Court held:

the absence of any of the foregoing factors, especially the third, militates in favor of a finding that movant was not a partner of FBWH, within the meaning of the Partnership Law. Thus, movant cannot be held personally liable for alleged wrongs by FBWH or its partners. In addition to the Employment Agreement, movant submits a copy of his I.R.S. Form W-2 (Wage and Tax Statement), issued to him by FBWH. . . . This stands as an affirmative indication that he was an employee of that firm; not a true partner, for a partner would have had to receive a Form K-1 to record his partnership distribution for the tax year.

The Court also rejected plaintiff’s attempt to use a document, “FBWH Partners 2001

Bonus Compensation [for] Robert Zito” to show that annual compensation factored in overhead of the firm's office. The Court stated “Again, absent evidence that movant undertook to share losses of the firm, or other indicia of partnership, the mere fact of his election to be called a “contract partner” does not make him a partner for liability purposes. Any practice by FBWH to spread overhead costs throughout the payroll, asserted by plaintiff's counsel, does not constitute loss sharing; and does not prove the necessary elements of partnership.” Thus, based on the Employment Agreement *and* IRS Form W-2, the Complaint was dismissed as against Kastner.

The Court did not rely solely on the clear and unambiguous phrase “contract partner” in the parties' Employment Agreement to determine whether Kastner was a “true partner” who can be held liable to plaintiff. The Court looked to whether the *indicia* of partnership existed. Therefore, while the determination of whether defendant was an equity partner of Shine entitled to receive a share in any proceeds from the sale of all or part of Shine's accounting practice to any third-party is a matter of contract interpretation based on the LOI, such determination does not rest exclusively on whether reference therein is made to defendant as “equity partner.” The relationship of the parties, expressed in the LOI, must demonstrate (1) profit and loss sharing, (2) control over the partnership affairs, (3) contribution to capital, and (4) possession of an ownership interest, and the absence of any of the foregoing factors, militates in favor of a finding that defendant was not an equity partner of Shine (*see also Shaw v Irby*, 2008 WL 1956100 [Sup. Ct. New York County 2008] (“While the draft partnership agreement tends to show that a partnership may have been contemplated, this agreement contains no agreement to the essential elements of a partnership, *i.e.*, profits and losses”); *cf. Joachim v Flanzig*, 3 Misc 3d 371, 773 NYS2d 267 Sup. Ct. Nassau County 2004] [“the agreement between the parties is clear and

unequivocal. The May 25, 1999 agreement states that Frommer is a ten (10%) percent equity partner in J & F. The agreement provides that Frommer is to be allocated ten (10%) percent of the profits *and bear ten (10%) percent of the losses.*²

The LOI herein refers to defendant as “equity partner,” but includes a provision whereby the parties agreed to list defendant as a “partner” on Shine’s letterhead: “Shine will revise its firm letterhead and list ANF [defendant] as 'Partner.’” Thus, whether the parties intended to treat defendant as an “equity” partner cannot be determined by reference to defendant as an equity partner alone. Looking to the balance of the LOI, the Court notes that the LOI contains no language indicating that defendant possessed *any ownership interest* in Shine, and the LOI contains no language as to whether defendant was to bear *any percentage of the losses* of Shine. The LOI also expressly provided that defendant would not receive a K-1,³ and that defendant acknowledges that he repeatedly asked for a formal partnership agreement which would necessitate his receiving a form K-1 militates against his contention that he was a true partner. Instead, the LOI provides that defendant would receive a Form 1099, which does not reflect any share of the partnership's profits, losses or capital ownership by defendant, and the absence of any agreement by defendant to share Shine's losses is fatal to his claim that he was an equity

² It is noted that plaintiff's reliance on *Kyle v Breton* (184 AD2d 1036, 1037 [4th Dept 1992]), *Brodsky v Stadlen* (138 AD 2d 662 [2d Dept 1988]) and *D'Amour v Ohrenstein & Brown, LLP* (17 Misc 3d 1130 (Sup. Ct. New York County 2007)) for the proposition that the fact that the parties held themselves out as partners is not decisive, is misplaced. None of these cases involved the interpretation of a written agreement. Indeed, two of the cases expressly stated that there was no written agreement, and the other case failed to mention the existence of any written agreement.

³ It is undisputed that a schedule K-1 is an Internal Revenue Service form which a partnership provides to its partners to reflect the partner's share of income, credits, deductions and related financial information for the partnership's tax year. The form includes the name and tax identification number of the partner and partnership, the partner's percentage of profit sharing, loss sharing, ownership of capital and the partner's distributive share of the partnership's income, deductions and credits.

partner (*Chanler v Roberts*, 200 AD2d 489, 606 NYS2d 649, 650 [1st Dept 1994] ("an undertaking to share in profits without submitting to the burden of making good the losses renders such an agreement a nullity under partnership law"). Defendant's contention that he was prepared to take the risk of a downside, is unsupported by the language (or absence thereof) of any such agreement in the LOI.

The method of defendant's compensation, in that he received 55% of the collection derived from his own clients, and of newly generated additional clients, does not establish that he shared in Shine's profits (*99 Realty Company v Eikenberry*, 242 AD2d 215, 216, 660 NYS2d 583, 584-85 [1st Dept 1997] (considering a non-equity partner as one "whose earnings consisted of the proceeds from his own billings")). While the LOI appears to permit defendant to receive a share of the profits of Shine, stating that defendant "will earn 25% of net financial services fees received by Shine for 2 years," this one factor, in and of itself, especially in the absence of any mention of defendant's agreement to share in the losses of Shine, fails to establish that defendant was an equity partner, entitled to receive a share in proceeds of the sale of Shine (*Boyarsky v Froccaro*, 131 AD2d 710, 516 NYS2d 775 [2d Dept 1987] (share of the profits is not dispositive, since all of the elements of the relationship must be considered *citing Heye v Tilford*, 2 AD 346, 37 NYS 751 [1st Dept 1896] (stating "There is no reason why they may not enter into an agreement whereby one of them shall participate in the profits arising from the management of particular property without his becoming a partner with the others."))).

Further, there is no mention of whether defendant was to maintain any level of control over the partnership affairs.

And, even if the Court were to consider whether defendant made capital contributions to

Shine, the LOI provides that if defendant “chooses not to continue servicing and [sic] dispose of [his] clients, he agrees to sell the clients to Shine who will pay 25% of the gross fees collected from [such clients]....” This section of the LOI undermines defendant’s contention that he contributed \$475,000 in capital contributions to Shine.

Based on an analysis of the LOI and whether such agreement between the parties reflect any of the traditional *indicia* of an equity partnership, the Court finds that defendant was not an equity partner, entitled to share in the proceeds of the sale of Shine (*see Prince v O'Brien*, 256 AD2d 208, 683 NYS2d 504, 507 [1st Dept 1998] (despite circumstantial evidence of an oral partnership agreement, there was no *indicia* of partnership where parties had not exercised joint control over the entertainment enterprise on which they collaborated, there was no evidence that they agreed to share losses, which is an “essential element” of a partnership, and the money advanced to defendant was a gift rather than a capital contribution).

Therefore, as the LOI clearly and unambiguously establishes that the parties did not intend for defendant to become an equity partner, defendant does not possess any rights, title or interest to the assets of Shine, he is not entitled to share in the proceeds of any sale of its business.⁴

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion by plaintiff Shine & Company LLP for summary judgment on

⁴ The Court need not address the effect of parol evidence, including *inter alia*, email exchanges preceding the LOI, Shine's website, letterhead, business cards, and Shine's custom and practice in light of the unambiguous terms of the LOI.

its first cause of action seeking a declaratory judgment that defendant Angelo F. Natoli is not entitled to share in any proceeds from the sale of all or part of Shine's accounting practice to any third-party, and dismissing defendant's first counterclaim for a judgment declaring that he was a general equity partner in Shine who is entitled to one-third of any proceeds from the sale of Shine's practice, is granted; and it is further

ORDERED that defendant's first counterclaim is severed and dismissed; and it is further

ORDERED, ADJUDGED and DECLARED that defendant Angelo F. Natoli is not entitled to share in any proceeds from the sale of all or part of Shine & Company LLP's accounting practice to any third-party; and it is further

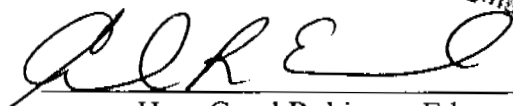
ORDERED that plaintiff serve a copy of this order with notice of entry upon all parties within 20 days of entry; and it is further

ORDERED that the Clerk may enter judgment accordingly.

This constitutes the decision and order of the Court.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: July 1, 2010



Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD