

**Rosenbaum v Barr & Haas, LLP**

2010 NY Slip Op 32020(U)

July 27, 2010

Supreme Court, New York County

Docket Number: 601561/06

Judge: Judith J. Gische

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

PRESENT: JUDITH J. GISCHE  
*Justice*

PART 10

Rosenbaum

INDEX NO.

601561/06

- v -

MOTION DATE

001

MOTION SEQ. NO.

Barr & Hass LLP

MOTION CAL. NO.

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

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

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

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

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**motion (s) and cross-motion(s)  
decided in accordance with  
the annexed decision/order  
of even date.**

**FILED**

JUL 30 2010

NEW YORK  
COUNTY CLERK'S OFFICE

*pc set for 8/26/10 @ 9:30 -*

Dated: 7/27/10

JUDITH J. GISCHE  
HON. *JSC*

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 10

TERRY ROSENBAUM, individually and as  
Executrix of the Estate of Arthur R. Rosenbaum,  
Deceased,

**Decision/Order**  
Index# 601561/06  
Mot. Seq. # 001

Plaintiff,

-against-

BARR & HAAS, LLP, individually and as the  
Successor-in-interest of BARR & ROSENBAUM,  
LLP, HARVEY BARR, individually, and  
ELIZABETH HAAS, individually,

Defendants.

Recitation, as required by CPLR §2219(a), of the papers considered in the review  
of this (these) motion(s):

**PAPERS**

Notice of Motion, DA affirm., exhibits.....	1
Notice of X-Mot, EAH affirm in Opp, exhs.....	2
EH affirm.....	3
EH further affirm.....	4

**FILED**  
JUL 30 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

Hon. Gische, J.:

*Upon the foregoing papers the decision and order of the court is as follows:*

This is an action for an accounting of the value of the partnership interest owned  
by the late Arthur Rosenbaum ("Rosenbaum") in the law firm Barr & Rosenbaum, LLP  
("B&R"), the predecessor-in-interest to the law firm now known as Barr & Haas, LLP, as  
well as for an alleged promised payment to his estate by B&R an "equalization" with  
respect to a group life insurance policy. Plaintiff moves to dismiss the defendants'  
counterclaims and the fifth, eighth, eleventh, fourteenth, fifteenth, sixteenth and  
seventeenth affirmative defenses contained in the defendants' answer (CPLR § 3211 [a])

[5] and [7]). The defendants cross-move to dismiss the complaint as barred by laches, as well as for summary judgment dismissing the second cause of action pursuant to CPLR § 3212. The defendants also seek reimbursement for their attorneys' fees and costs.

#### Plaintiff's motion

On a motion to dismiss pursuant to CPLR § 3211 (a) (7), the court must afford the pleadings a liberal construction, take the allegations of the complaint/counterclaim as true, and provide the pleader with the benefit of every possible inference (Goshen v. Mutual Life Ins. Co. of N.Y., 98 NY2d 314, 326 [2002]; Leon v. Martinez, 84 NY2d 83 [1994]; Morone v. Morone, 50 NY2d 481 [1980]; Beattie v. Brown & Wood, 243 AD2d 395 [1st Dept 1997]).

Plaintiff seeks to dismiss the defendants' counterclaims and six of the affirmative defenses on grounds that each is barred by the applicable statute of limitations. Defendants' first counterclaim is for an alleged default under a promissory note. The counterclaim states in relevant part:

58. For valuable consideration given, on or about October 27, 1993, Rosenbaum executed and delivered a promissory note to Barr, Rosenbaum, Jeffrey S. Lewis ("Lewis"), Joseph Faerber ("Faerber"), Haas and Barry Sturtz ("Sturtz") d/b/a B&R, in the original principal amount of \$50,000.00 (the "Promissory Note").

59. Under the terms of the Promissory Note, Rosenbaum was required to pay B&R the full principal balance, together with interest thereon, on or before January 1, 1995.

Pursuant to CPLR § 213 [2], the statute of limitations for an action to recover on a promissory note is six years. The defendants concede that a direct action on the note itself would be barred, but argue that under CPLR § 203 [d], a party in an accounting action may nonetheless interpose a claim for monies owed under the note to defend

against and offset any liability that they might incur with respect to plaintiff's claims.

CPLR § 203 [d] provides that:

A defense or counterclaim is interposed when a pleading containing it is served. A defense or counterclaim is not barred if it was not barred at the time the claims asserted in the complaint were interposed, except that if the defense or counterclaim arose from the transactions, occurrences, or series of transactions or occurrences, upon which a claim asserted in the complaint depends, it is not barred to the extent of the demand in the complaint notwithstanding that it was barred at the time the claims asserted in the complaint were interposed.

CPLR §203(d) allows a defendant to assert an otherwise untimely claim that arises out of the same transactions as the claim asserted in the complaint, but only as a shield for recoupment purposes, and does not permit the defendant to obtain affirmative relief.

Bloomfield v. Bloomfield 97 NY2d 188 (2001); Carlson v. Zimmerman, 63 AD3d 772 (2<sup>nd</sup> dept. 2009). Here, the court agrees that plaintiff's claim for an accounting of B&R in part depends upon accounting for the debt reflected by the promissory note within the meaning of CPLR § 203 [d]. Although the defendants cannot affirmatively recover on the promissory note, the note nonetheless represents a liability Rosenbaum owed to B&R. Since an accounting would necessarily include a reconciliation of debits and credits between the parties, the debt may be asserted as an defense to the claims by the estate of monies owed. Therefore, although a claim for breach of the promissory note was barred at the time the complaint was filed, it is not barred to the extent that the defendants' are entitled to an offset if they prevail on the claim against any monies recovered by plaintiff in her accounting claim. Accordingly, plaintiff's motion to dismiss the first counterclaim is denied.

Similarly, plaintiff's motion to dismiss the sixth counterclaim and the eighth

affirmative defense, which sound in breach of fiduciary duty, must also be denied. The defendants allege that prior to his death, Rosenbaum colluded with his son, an associate at B&R, to improperly solicit partnership accounts for themselves, to the detriment of B&R. At this stage, the defendants have alleged sufficient facts to demonstrate that these claims arise from the same transactions, occurrences or series of transactions or occurrences upon which the complaint depends (see i.e. Fuchsberg & Fuchsberg v. Fuchsberg, 2 AD3d 158 [1st Dept 2003]; Backman v. Israel Bio-Engineering Project, L.P., 2008 WL 4903870 (Trial Order) [Sup Ct, NY Co 2008]).

The same reasoning applies to: [1] the defendant's fifth affirmative defense alleging that Rosenbaum breached his duty of fair dealing with the defendants; and [2] the defendants' fifth counterclaim for unjust enrichment.

Defendants' third counterclaim alleges that Rosenbaum made false representations to the defendants concerning his health and financial conditions in order to induce defendants to offer him a partnership interest in B&R as well as provide other financial support. In addition, defendants' eleventh and fifteenth affirmative defenses allege that plaintiff's claims are barred by Rosenbaum's intentional misrepresentations and actual fraud, and the fourteenth affirmative defense alleges that plaintiff's claims are barred by Rosenbaum's fraud in the inducement.

Under CPLR § 213 [8], the statute of limitations for both fraud and fraud in the inducement is the later of six years from the date the cause of action accrued or two years from the time it was discovered, or could have been discovered with reasonable diligence (see e.g. Pritchard v. 164 Ludlow Corp., 49 AD2d 408 [1st Dept 2008]). Claims for intentional misrepresentations are governed by a six-year statute of limitations (see

e.g. Old Republic Ins. Co. v. Hansa World Cargo Serv., Inc., 51 Fsupp2d 457 [SDNY 1999]).

B&R was formed in or about January 1995. Therefore, the time for the defendants' to raise a claim premised on fraudulent statements inducing them to form a partnership with Rosenbaum would have expired in January 2001. To the extent that the defendants rely on the date of discovery exception, this would have expired, at the latest, two years after Rosenbaum's death. The eighteen-month toll provided by CPLR § 210 [b] would not change this result, since the defendant's answer was filed on July 14, 2006.

The defendants' argument that the fraudulent misrepresentations were made after B&R was formed is rejected. Any fraudulent misrepresentations made after B&R was formed could not have possibly induced the defendants do something in the past, to wit, to offer Rosenbaum a partnership in B&R or make Rosenbaum a partner. Otherwise, fraudulent misrepresentations inducing the defendants to offer Rosenbaum a partnership interest could not possibly be intertwined with the "transaction of business by the partnership producing profits and losses to be accounted for" since B&R had yet to be formed (*cf Fuchsberg & Fuchsberg v. Fuchsberg, supra*).

The claims predicated on negligent misrepresentations also fail because they are barred by the statute of limitations. These claims (which are identical factually to the fraud claims) accrued when B & R was formed. Thus the fourth counterclaim and sixteenth affirmative defense are dismissed.

The claims of fraud otherwise fail because they are not well plead. To state a cause of action for fraudulent inducement, it is sufficient that the claim alleges a material

representation, known to be false, made with the intention of inducing reliance, upon which the victim actually relies, consequentially sustaining a detriment (Channel Master Corp. v Aluminium Ltd. Sales, 4 NY2d 403, 406-408 [1958]; Megarís Furs v Gimbel Bros., 172 AD2d 209, 213 [1991]). Claims sounding in fraud must be pled with specificity (CPLR § 3016 [b]).

The defendants allege that they would not have expended monies on Rosenbaum's behalf, paid Rosenbaum's personal expenses, assisted Rosenbaum by satisfying a judgment against him, assisted Rosenbaum in satisfying his tax liability, paid Rosenbaum's insurance premiums, paid Rosenbaum distributions and other forms of compensation not otherwise due to him, and entered into the Life Insurance Agreement or taken out the insurance policies established therein. Yet the defendants have failed to specifically allege any facts concerning the purported fraud or misrepresentations which induced them to commit these actions. Blunderbuss and general accusations cannot support a fraud claim. Accordingly, the third counterclaim is dismissed, as well as the eleventh, fourteenth and fifteenth affirmative defenses.

Plaintiff's motion to dismiss the second counterclaim for indemnification resulting from liabilities incurred by B&R is also denied. Partnership Law § 71 (d) provides:

... (1) partners shall contribute, as provided by section forty, subdivision one, the amount necessary to satisfy the liabilities; and (2) if any, but not all, of the partners are insolvent, or, not being subject to process, refuse to contribute, the other partners shall contribute their share of the liabilities, and, in the relative proportions in which they share the profits, the additional amount necessary to pay the liabilities.

The defendants claim that they were left with substantial liabilities for the partnership which required them to advance some of their own personal assets to

satisfy. Accordingly, the defendants may be entitled to reimbursement in an accounting between the partners, and the second counterclaim is adequately pled. Similarly, plaintiff's motion to dismiss the seventeenth affirmative defense sounding in indemnification is also denied.

Accordingly, plaintiff's motion is only granted to the extent that the third counterclaim, and the eleventh, fourteenth and fifteenth affirmative defenses are hereby severed and dismissed. Since the defendants have requested leave to replead, leave is granted.

#### The defendants' cross-motion

The defendants cross-move to dismiss the complaint as barred by laches, and alternatively, seek summary judgment dismissing the second cause of action seeking an "equalization" of payments due under an Insurance Agreement. Both branches of the motion are denied.

Laches is a defense, not an equitable remedy, and as such, does not effect the sufficiency of a pleading. Therefore, the court cannot dismiss on the grounds of laches (Desser v. Schatz, 182 AD2d 478 [1st Dept 1992]).

On the summary judgment, the moving party has to prove its *prima facie* case such that it would be entitled to judgment in its favor, without the need for a trial. CPLR § 3212; Winegrad v. NYU Medical Center, 64 NY2d 851 (1985); Zuckerman v. City of New York, 49 NY2d 557, 562 (1980). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact. Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986); Zuckerman v. City of New York, 49 N.Y.2d 557 (1980).. Center, 64 NY2d 851 (1985); Zuckerman v. City of New York, 49 NY2d 557, 562 (1980).

Even where a movant makes out a prima facie case for summary judgment, the motion can still be denied as premature where further discovery is needed. Betz v. NYC Premier Properties, Inc., 38 AD2d 153 (2<sup>nd</sup> dept. 2007). This is especially true where the non-moving party has not been given a reasonable time or opportunity to conduct disclosure relative to pertinent evidence within the exclusive knowledge of the movant or co-defendants. Metichecchia v. Palmeri, 23 AD3d 894 (3<sup>rd</sup> dept. 2005).

In her second cause of action, the plaintiff seeks an "equalization" of payments due under an Insurance Agreement dated March 6, 1996, which was executed by the three partners of B&R, Harvey Barr, Rosenbaum and Elizabeth Haas, and their respective spouses. In the Agreement, the parties agreed that \$500,000 would be the minimum amount any deceased partner's estate would receive in the event that said partner died. The Agreement states that the "insurance payment [wa]s intended to be payment against the amount due any deceased Partner for his or her interest in [B&R], notwithstanding the fact that the spouse of that Partner was named as beneficiary when the policy was issued."

Plaintiff claims that the parties agreed to the extent that the group life insurance policy purchased by B&R for its three equity partners was less than \$500,000 for any partner, then the firm would pay the difference between the amount of insurance and \$500,000 (the "equalization"). Therefore she seeks to recover a \$180,000 equalization payment from B&R. No mention of this equalization is made in the Agreement. Therefore, the defendants contend that the second cause of action should be dismissed because plaintiff's attempt to add new terms to the Agreement should be rejected.

In opposition, plaintiff maintains that the defendants have not met their burden,

since the Agreement does not contain a merger clause, state that it is the only or entire agreement between the parties, or otherwise refer to the issue of an equalization payment. The court agrees with plaintiff.

“[W]hen parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms” (W.W.W. Associates, Inc. v. Giancontieri, 77 NY2d 157, 162 [1990]). “Extrinsic and parol evidence is not admissible to create an ambiguity in a written agreement which is complete and clear and unambiguous upon its face” (Intercontinental Planning v. Daystrom, Inc., 24 NY2d 372, 379 [1969]; see also Chimart Assocs. v. Paul, 66 NY2d 570, 573 [1986]). Unless the court finds ambiguity, rules governing interpretation of ambiguous contracts do not come into play (R/S Associates v. New York Job Development Authority, 98 NY2d 29 [2002]). Thus, when interpreting an unambiguous contract term, evidence outside the four corners of the document is generally inadmissible to add or otherwise modify the writing (R/S Associates v. New York Job Development Authority, *supra*).

At bar, there has been no discovery in this case. Here, plaintiff has alleged that the parties entered into a further oral agreement regarding the an equalization payment. An additional agreement is not necessarily unenforceable, where here, the prior agreement does not foreclose an additional agreement. Moreover, the additional agreement does not necessarily need to be in writing; an oral agreement can be enforceable (see Muhlstock v. Cole, 245 AD2d 55 [1st Dept 1997]). The defendants have failed to establish a defense to the second cause of action as a matter of law. Accordingly, summary judgment is denied.

Finally, to the extent that the parties argue that sanctions are warranted because

their respective adversary(ies) have not provided proper discovery requests and/or responses, these arguments are rejected. There is a strong public policy in this state that matters be disposed of on their merits in the absence of real prejudice to defendant (Lirit v. S.H. Laufer World, Inc., 84 AD2d 704 [1st Dept 1981]). Therefore, actions should be decided on their merits whenever possible and the harsh penalty of striking pleadings should only be imposed where the failure to comply was willful, contumacious or due to bad faith (Bassett v. Bando Sangsa Co., 103 AD2d 728 [1st Dept 1984]; Carter v. Baldwin Transp. Corp., 215 AD2d 256 [1st Dept 1995]). Neither side has shown that the demands or failures to respond warrant draconian relief such as having a pleading struck.

However, the court notes the age of this case, and at a preliminary conference scheduled for August 26, 2010 at 9:30 am, the court will set an expedited discovery schedule.

Accordingly, the defendants' cross-motion is denied in its entirety.

### **Conclusion**

In accordance herewith it is hereby:

**ORDERED** that plaintiff's motion is only granted to the extent that the third and fourth counterclaims, and the eleventh, fourteenth, fifteenth and sixteenth affirmative defenses are hereby severed and dismissed and the remaining claims shall continue, and it is further

**ORDERED** that the defendants' cross-motion is denied in its entirety; and it is further

**ORDERED** that this matter is set for a preliminary conference before the court on

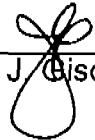
August 26, 2010 at 9:30 am.

Any requested relief not expressly granted herein is denied.

This shall constitute the decision and order of the court.

Dated: New York, New York  
July 27, 2010

SO ORDERED:

  
\_\_\_\_\_  
Hon. Judith J. Gische, J.S.C.

**FILED**  
JUL 30 2010  
NEW YORK  
COUNTY CLERK'S OFFICE