

**Strougo & Blum, Esqs. v Zalman & Schnurman,
Esqs.**

2010 NY Slip Op 32106(U)

August 3, 2010

Sup Ct, NY County

Docket Number: 603665/09

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
HON. EILEEN A. RAKOWER

PRESENT: _____

PART 5

Justice

Index Number : 603665/2009
STROUGO & BLUM, ESQS.
VS.
ZALMAN & SCHNURMAN, ESQS.
SEQUENCE NUMBER : 002
DISM ACTION/INCONVENIENT FORUM

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1

2

3

4

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED

AUG 10 2010

NEW YORK
COUNTY CLERK'S OFFICE

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

Dated: 8/3/10



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 15

-----X
STROUGO & BLUM, ESQS.,

Plaintiff,

Index No.603665/09

Mot. Seq.: 002

- against -

DECISION/ORDER

ZALMAN & SCHNURMAN, ESQS., 12-14 EAST 64TH
OWNERS CORP., GOODMAN MANAGEMENT CO., INC,
and MONTROSE ADJUSTMENT CO.,

Defendants.

FILED
AUG 10 2010
NEW YORK
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HON. EILEEN A. RAKOWER, J.S.C.

Plaintiff brings this action for tortious interference with contract and civil conspiracy for the alleged acts of defendants arising out of the signing of a General Release by non-party, Verina Hixon, on December 7, 2006. Presently before the court is a motion by Montrose Adjustment Co. ("Montrose Company") and Montrose Adjustment Co., Inc. ("Montrose Incorporated") (collectively "Montrose Defendants") to dismiss Plaintiff's complaint pursuant to CPLR §3211(a)(1) & (7).

On August 23, 2002 Ms. Hixon retained plaintiff law firm to prosecute her claim against the building owner and manager¹ for damages to her property that allegedly occurred when her co-op apartment, located at 12-14 East 64th Street in the County and State of New York, was flooded with raw sewage. The retainer agreement provided that the legal fees would be payable on a contingency basis, and would consist of 1/3 of any recovery in the action. Plaintiff commenced an action and served a summons and complaint demanding \$400,000, plus punitive damages ("2002 Hixon

¹The suit also named the plumber and the architect, who were employed by the building owner.

action”). Plaintiff served the summons and complaint on or about October 3, 2002. The 2002 Hixon action was transferred to Civil Court pursuant to CPLR 325. Sometime thereafter, Hixon retained defendant law firm Zalman, to represent her in a separate negligence action as against the owner and manager² (“2004 Hixon action”). According to the complaint, Montrose Company was retained as adjuster in both actions. In this capacity, Montrose Company was responsible for assembling, photographing and listing the damaged items at issue in the lawsuits.

On December 7, 2006, Ms. Hixon executed a General Release in the 2004 Hixon action, which released the building owner, the building manager and the Adams’ from:

all actions, causes of action, suits . . . specifically with respect to damages that RELEASOR sustained which were the subject of a lawsuit pending in the Supreme Court . . .

The defendants in the 2002 Hixon action moved to amend their answer to add the release as an affirmative defense, and to dismiss the 2002 Hixon action on *collateral estoppel* and *res judicata* grounds. By Order entered August 12, 2009, Judge Jose A. Padilla, Jr. granted all aspects of the motion and dismissed as to all defendants.³ Thereafter, plaintiff brought the instant action against Zalman alleging that it fraudulently induced Ms. Hixon to sign the General Release by reassuring her that it would not effect the 2002 Hixon action. As such, plaintiff alleges, Zalman tortiously interfered with the retainer agreement between plaintiff and Ms. Hixon, and that the other named defendants (including Montrose Adjustment Co.) conspired with Zalman to do so.

The Montrose Defendants submit an affirmation in support of their motion. The Montrose Defendants argue that Montrose Incorporated has no involvement in this lawsuit, as it is a separate entity from Montrose Company, which acted as adjuster in the 2002 and 2004 actions. As for Montrose Company, the Montrose Defendants state that Montrose Company was a sole proprietorship with a d/b/a under Arthur Stern,

²The action was also commenced as against Charles and Ruth Adams, Ms. Hixon’s upstairs neighbors.

³The 2002 Hixon action was dismissed as to the plumber and architect on statute of limitation grounds.

who died on June 18, 2005. The Montrose Defendants claim that Montrose Company's affairs were wound down through Arthur Stern's estate shortly after his death. Annexed to the affirmation as exhibits are copies of a printout from the New York State Department of State indicating that Montrose Incorporated was established on June 30, 2005; Arthur Stern's death certificate; Plaintiff's verified complaint; and a copy of this court's April 5, 2010 decision and order, with notice of entry thereof.

Plaintiff opposes the Montrose Defendants' motion and cross-moves for an order (1) authorizing Plaintiff to conduct additional discovery; and (2) disqualifying counsel for the Montrose Defendants. In opposition to the Montrose Defendants' motion, Plaintiff claims that, upon information and belief, Stern's sons were authorized to, and did operate Montrose Company as agents. With respect to the cross-motion to disqualify Jeffrey A. Sunshine, Esq., counsel for the Montrose Defendants, Plaintiff states that Sunshine should be disqualified on the grounds that he "could be called as a character witness. . . to describe the personality of Verina Hixon as a client. . . ." In support of Plaintiff's opposition and cross-motion, Plaintiff submits the following exhibits: a January 11, 2007 letter from Zalman & Schnurman to Hixon advising Hixon of the settlement and providing a summary accounting of the disbursements of the proceeds (which includes \$145,000.00 "To Montrose Adjustment Co. per retainer agreement"); internet printouts from June 21, 2010 of yellowpages.com, Citysearch; and manta.com, which Plaintiff claims demonstrate the continued existence of Montrose Company; an August 24, 1999 contract between Hixon and Montrose Company; and an August 21, 2002 fax from Arthur Stern to Robert Strougo.

On a motion to dismiss pursuant to CPLR 3211(a)(1) "the court may grant dismissal when documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." (*Beal Sav. Bank v. Sommer*, 8 NY3d 318, 324 [2007]) (internal citations omitted). "On a motion to dismiss under CPLR 3211(a)(7) "...the court's task is to determine only whether the facts as alleged, accepting them as true and according plaintiff every possible favorable inference, fit within any cognizable legal theory." (*Ladenburg Thalmann & Co., Inc. v. Tim's Amusements, Inc.*, 275 AD2d 243, 245[1st Dept. 2000]).

Here, the court finds that both Montrose Defendants are entitled to dismissal. As for Montrose Company, it is undisputed that Montrose Company was a sole

* 5]

proprietorship owned by Arthur Stern, and that Arthur Stern died on June 18, 2005. As Arthur Stern operated Montrose Company as a sole proprietorship with no distinct existence apart from himself (*see Rose v. Mt. Ebo Assoc.*, 170 A.D.2d 766 [3rd Dept. 1991]), Montrose Company ceased to exist upon his death, which was almost a year and a half prior to Hixon's execution of the General Release. With respect to Montrose Incorporated, it is undisputed that this corporation is a separate and distinct legal entity from Montrose Company, and that Montrose Incorporated never had any business relationship of any kind with Hixon.

Wherefore it is hereby

ORDERED that the Montrose Defendants' motion to dismiss the complaint herein is granted and the complaint is dismissed in its entirety as against said defendants, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendants; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that Plaintiff's cross-motion is denied.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: August 3, 2010

FILED

AUG 10 2010

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EILEEN A. RAKOWER, J.S.C.