

**Blass v Kincaid Consulting, CPA, LLC**

2010 NY Slip Op 32898(U)

October 13, 2010

Supreme Court, New York County

Docket Number: 602259/2007

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

Alan Blass  
Kincaid Consulting, CPA, LLC  
et al

INDEX NO.

602259/07

MOTION DATE

MOTION SEQ. NO.

001

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/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

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

**FILED**

**OCT 18 2010**

**COUNTY CLERK'S OFFICE  
NEW YORK**

Dated: Oct 13, 2010

J. GISCHE  
**HON. JUDITH J. GISCHE**

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 10**

Alan Blass,  
Plaintiff,

-against-

Kincaid Consulting, CPA, LLC,  
d/b/a Kincaid Consulting, LLC,  
Karen Kincaid Balmer and Gary  
Hewitt,  
Defendants.

**DECISION/ORDER**  
Index No.: 602259/2007  
Seq. No.: 002

Present:  
Hon. Judith J. Gische  
J.S.C.

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

<b>Papers</b>	<b>Numbered</b>
Pltff's n/m § 3212 w/SKS affirm, AB affid, exhs .....	1
Def's' x/m MMR affirm, KKB affid (sep back), exhs .....	2,3,4
Pltff's opp and reply w/SKS affirm, exhs .....	5

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

This is an action for breach of contract and other claims arising from allegations by plaintiff Alan Blass ("Blass") that defendants defrauded him by making promises about his salary, and other compensation, all in an effort to have him join their accounting firm so they could obtain confidential information about his clients, or book of business. A prior motion to dismiss this action was denied for the reasons stated in the court's decision and order dated April 1, 2008 and the defendants have now answered the complaint. Blass has moved for summary judgment and defendants have cross moved for partial summary judgment, solely on the issue of damages.

Blass's motion was timely brought after he filed the Note of Issue on October 2,

2009 and it can be decided on the merits (CPLR § 3212; Brill v. City of New York, 2 NY3d 648 [2004]). However, the cross motion by defendants for partial summary judgment is solely on the issue of damages. Defendants seek an order limiting Blass's damages to six (6) months of compensation, should he prevail on his motion for summary judgment. Defendants motion is not timely as it was served May 11, 2010 and filed May 28, 2010, more than 120 days after the filing of the Note of Issue, and it is based upon different arguments than Blass' timely motion (Osario v. BRF Construction Corp., 23 AD3d 202 [1st Dept 2005]; Altschuler v. Gramatan Management, 27 AD3d 304, 304-305 [1st Dept 2006]; Conklin v. Triborough Bridge and Tunnel Authority, 49 AD3d 320 [1<sup>st</sup> Dept 2008]). Therefore, although the cross motion will be considered as opposition to Blass' motion, it is denied as an untimely cross motion for summary relief.

#### **Arguments**

Blass is a certified public accountant. Blass and "Kincaid Consulting, LLC" entered into an agreement as of May 1, 2007 ("agreement"). The preamble of the agreement identifies the parties to the contract. They are "Kincaid Consulting, LLC ("Kincaid Consulting"), a limited liability corporation [sic] having its principal office at 212 East 47<sup>th</sup> Street, 24F, New York, New York 10017." Defendant "Karen Kincaid Balmer ("Balmer"), an individual residing at...signing as Principal Partner of Kincaid Consulting, LLC." Defendant "Gary Hewitt ("Hewitt"), an individual residing at... signing as Partner of Kincaid Consulting, LLC and plaintiff "Allan Blass ("Blass") a New York resident . . ."

The agreement contains a "whereas" clause which states the following:

"WHEREAS, Kincaid Consulting, Balmer, Hewitt and Blass agree to enter into a mutual agreement whereby Blass will become an employee of Kincaid Consulting for a period of one year, at which time Blass will become a

Partner of Kincaid Consulting pursuant to the fulfillment of the provisions provided herein."

Below this clause are various other clauses, including recitals and definitions as follows:

"1. **CAPITALIZED TERMS.** As used in this Agreement, the capitalized terms listed in Section 18 shall have the meanings indicated therein. Other capitalized terms used in this Agreement shall have the meanings indicated in the Sections in which they are defined or as otherwise required by the context in which they are used. Any capitalized terms used but not defined in this Agreement shall have the respective meanings given to them in the Partnership Agreement."

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"2. **RECITALS.** Each of Kincaid Consulting and Blass is presently engaged in providing accounting and related professional services to their clients. The parties hereto believe it would be in their best interests to combine the practices of Kincaid Consulting and Blass, and have Blass join Kincaid Consulting for the period of one year as a director, thereafter as a partner, on the terms and conditions stated in this Agreement."

\*\*\*

"4.1 **ALLOCATIONS OF PROFITS AND LOSSES.** Partnership net income and losses are allocated on a prorate ownership basis. Net profits and losses are determined after normal business operating expenses, commissions and discretionary bonuses."

The agreement identifies Blass' as the "Director, Forensic Accounting and Litigation Support." The agreement also provides that Blass qualifies for profit sharing upon fulfillment of the "Partnership requirements," as set forth in paragraph 6 of the agreement:

"6. **ACQUISITION OF OWNERSHIP INTEREST.** Blass is expected to acquire an ownership interest in Kincaid Consulting in the following manner

and percentages:

6.1 June 1, 2007 through May 31, 2011. Blass will "Accrue" a 1.9% ownership interest in Kincaid Consulting upon the first \$500,000 of "New Work" generated up to a total of 8% total ownership interest..."

The parties also anticipated that disputes might arise among them which might lead to a resignation by Blass or a termination of him by them. Thus, the agreement includes the following language:

"13.3 Blass agrees to provide at least a six month notice of resignation and to work with Balmer and Pewit to continue to service clients during the work out period. Kincaid Consulting, Balmer and Hewitt agree to provide Blass with a six month notice of termination ...unless Blass is terminated for cause..."

June 4, 2007 was Blass' first day of work at Kincaid Consulting. He was terminated on June 11, 2007. The reasons for his termination are sharply disputed. According to Blass, he was lured away from his former position with promises of becoming a partner with the defendants. He contends that under the agreement, defendants were required to meet with him and discuss any problems they may be having with him before terminating him. For this argument he principally relies upon paragraph 9 in the agreement which provides, in relevant part, as follows:

"9.3 **OTHER** . . . Any deviation from the 1400 minimum billable number of hours will be discussed and a resolution agreed among Blamer, Hewitt and Blass. It is the belief of the parties that such deviations may occur and that all parties have an interest in understanding and resolving any such issues on a timely basis."

Blass contends that he has learned through discovery that there is no such entity as "Kincaid Consulting, LLC" and that it is "Kincaid Consulting, CPA, LLC" which is registered as a domestic limited liability company with the Secretary of State. Thus,

according to Blass, since there is no such company as "Kincaid Consulting, LLC," Balmer and Hewitt are doing business under an assumed name, making them each personally liable on the agreement.

Defendants raise several defenses to Blass' motion. First, Balmer, who has provided her sworn affidavit, states that the agreement was entered into between "Kincaid Consulting, CPA, LLC" and Blass. She contends the use of the name "Kincaid Consulting, LLC" was simply an abbreviation of the more complete company name and that under the Education Law (section 7400 et seq.), the company can use – or omit– the designation "CPA" in its company name. Balmer states that Hewitt is not a certified public accountant and therefore, by law, he is prohibited from being an official member of "Kincaid Consulting, CPA, LLC." Thus, according to Balmer, Kincaid Consulting, LLC and Kincaid Consulting, CPA, LLC are one and the same and Kincaid Consulting, LLC is not an assumed name. Balmer states that the agreement uses the term "partner" and "partnership" to loosely illustrate that Hewitt, Kincaid Consulting, CPA, LLC and Blass were entering into business venture which was conditioned on Blass first performing well as an employee for a period of one year.

Defendants argue that the termination notice provision in the agreement is inapplicable because Blass was terminated "for cause" and, therefore, could be fired at any time without notice. They describe how Blass failed to show up for work, missed a critical meeting and was insubordinate.

#### **Law Applicable to Motions for Summary Judgment**

"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. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 [1985]). 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]). A party may not defeat a motion for summary judgment with bare allegations of unsubstantiated facts (Zuckerman v. City of New York, *supra* at 563-64)

When an issue of law is raised in connection with a motion for summary judgment, the court may and should resolve it without the need for a testimonial hearing (See: Hindes v. Weisz, 303 A.D.2d 459 [2<sup>nd</sup> Dept 2003]).

#### Discussion

There are many factual disputes which require the denial of Blass' motion for summary judgment, the leading dispute being whether Blass was terminated "for cause." Although Blass portrays himself as an enthusiastic employee, eager to prove his skills and accrue an ownership interest in Kincaid Consulting, LLC, defendants present a strikingly different picture of him. According to defendants, Blass demonstrated a poor work ethic from the outset, and they terminated him because they had little hope he would improve. The issue of whether an employee was terminated for cause presents a factual dispute that must be decided by the trier of fact (Coritsidis v. Consumer Home Mortgage, 265 AD2d 521 [2<sup>nd</sup> Dept 1999]; Abcon Associates, Inc. v. Apollo Theatre Investor Group, 159 A.D.2d 231 [1<sup>st</sup> Dept 1990]). Therefore, for that reason alone, Blass' motion for summary judgment must be denied. Under the agreement, Blass was not entitled to notice before being terminated for cause. The notice provision applies only to situations where Blass resigns, or he is terminated

without cause.

Blass' claims against Hewitt also fail. Although Hewitt is named in the contract and there is a signature block with his name, Hewitt did not actually sign the agreement. An unsigned contract may be enforceable, provided there is objective evidence establishing that the parties intended to be bound (Flores v. Lower East Side Service Center, Inc., 4 N.Y.3d 363 [2005]). According to Blass, Hewitt is personally liable to him for damages arising from the breach of contract. However, even assuming that Hewitt is bound by the contract, although unsigned by him, the signature is in a representative capacity as "partner" of Kincaid Consulting, LLC. In her sworn affidavit, Balmer states, however, that Hewitt is not a partner of Kincaid Consulting, CPA, LLC because he is not a certified public accountant and cannot be an equitable partner in a public accounting firm. Therefore, whether Hewitt is individually liable to Blass is an issue of law resting on unresolved triable issues of fact.

The foregoing factual dispute dovetails the unresolved issue of what the legal status of "Kincaid Consulting, LLC" is. Though registered as a limited liability company, no operating agreement has been provided and the employment agreement makes references to the "corporation" the "partnership" and its "partners." A limited liability company is, however, neither a corporation nor partnership, but consists of "members." The rights, responsibilities and liabilities of its members are set forth in its operating agreement. If there is no operating agreement, then the members are bound by the minimum requirements set forth in the Limited Liability Law (LLC § 417). Without knowing the legal status of "Kincaid Consulting, LLC," or examining the operating agreement of the LLC, the personal liability of Balmer and Hewitt cannot be resolved by

the court summarily and, therefore, Blass' motion for summary judgment must be denied for that reason as well.

**Conclusion**

Blass' motion for summary judgment is denied. Defendant's cross motion is untimely, but has been considered in opposition to Blass' motion. Since Blass has not met his burden of showing there are no triable issues of fact, his motion for summary judgment is denied in its entirety.

The note of issue has been filed in this case and, therefore, it is ready for trial. Plaintiff shall serve a copy of this decision and order on the Trial Support Office so that this case can be given a trial date.

Any relief requested but not specifically addressed is hereby denied.

This constitutes the decision and order of the court.

Dated: New York, New York  
October 13, 2010

So Ordered:

**FILED**  
OCT 18 2010

COUNTY CLERKS OFFICE  
NEW YORK

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