

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

2010 NY Slip Op 33387(U)

December 6, 2010

Supreme Court, New York County

Docket Number: 603665/09

Judge: Eileen A. Rakower

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

PRESENT: HON. EILEEN A. RAKOWER

PART 15

Index Number : 603665/2009

INDEX NO.

603665/09

STROUGO & BLUM, ESQS.

MOTION DATE

vs

ZALMAN & SCHNURMAN, ESQS.

MOTION SEQ. NO.

005

Sequence Number : 005

MOTION CAL. NO.

SUMMARY JUDGMENT

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

1, 2  
3  
4, 5

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH  
THE ACCOMPANYING MEMORANDUM DECISION.

**FILED**

DEC 10 2010

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 12/6/10

  
**HON. EILEEN A. RAKOWER**

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.: 005

- against -

DECISION/ORDER

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

Defendants.

-----X  
HON. EILEEN A. RAKOWER, J.S.C.

**FILED**

DEC 10 2010

NEW YORK  
COUNTY CLERK'S OFFICE

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. Previously, defendant Zalman & Schnurman, Esqs. ("Zalman") moved to dismiss plaintiff's complaint pursuant to CPLR 3211 (a) (1) and (a) (7), and plaintiff cross moved to amend its complaint. The Court, by Order dated April 5, 2010, denied both the motion and the cross motion. Defendants 12-14 East 64<sup>th</sup> Street Owners Corp., ("the cooperative") Goodman Management Co., Inc. ("Goodman") (collectively "moving defendants") now move to for summary judgment on the second cause of action for civil conspiracy, which is the only claim alleged against moving defendants in the complaint. Montrose Management Co., Inc.<sup>1</sup> ("Montrose") does not submit papers.

On August 23, 2002 Ms. Hixon retained plaintiff law firm to prosecute her claim against the cooperative and Goodman, and management company,<sup>2</sup> for damages to her property that allegedly occurred when her co-op apartment, located at 12-14

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<sup>1</sup>Montrose was the adjuster in the 2002 Hixon Case, and is alleged to have participated in the inducement of the breach of the retainer agreement by referring Ms. Hixon to Zalman.

<sup>2</sup>The suit also named the plumber and the architect, who were employed by the building owner.

\* 3]

East 64<sup>th</sup> 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 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 manager<sup>3</sup> (“2004 Hixon action”). 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.<sup>4</sup> Thereafter, plaintiff brought the instant action against Zalman and the moving defendants, alleging that: Zalman fraudulently induced Ms. Hixon to sign the General Release by reassuring her that it would not effect the 2002 Hixon action, and alleging that Zalman and the moving defendants “agreed to commit the wrongful act of interfering with plaintiff’s retainer agreement.”

Moving defendants, in support of their motion, submit: the pleadings; the affidavit of Felicia De Sanctis, member of the Board of Directors of the cooperative; the affidavit of Arthur Meltser, former Vice President of Goodman; and the affidavit of Kevin F. Buckley, Esq., former counsel for the cooperative and Goodman. Moving defendants assert that plaintiff cannot show that they participated in any conspiracy. Moving defendants claim that they did not have any direct communication with Ms.

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<sup>3</sup>The action was also commenced as against Charles and Ruth Adams, Ms. Hixon’s upstairs neighbors.

<sup>4</sup>The 2002 Hixon action was dismissed as to the plumber and architect on statute of limitation grounds.

4] Hixon. Thus, they could not have made any promises or representations regarding the release. Nor, moving defendants assert, did they or their counsel have any discussions with Zalman regarding his privileged communications with Ms. Hixon.

Plaintiff, in opposition to the motion, and in support of its cross-motion, submits only its attorney's affirmation. Plaintiff's attorney asserts that the motion should be denied on CPLR 3212(f) grounds, and that plaintiff should be entitled to "pursue discovery proceedings, including oral depositions, to allow plaintiff to uncover facts that are in the exclusive possession of defendants which plaintiff could utilize to oppose movants' motion herein."

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557[1980]). In addition, bald, conclusory allegations, even if believable, are not enough. (*Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]).

New York does not recognize civil conspiracy as an independent tort. Thus, in order to establish a claim for civil conspiracy, plaintiff "must demonstrate the primary tort, plus the following four elements: (1) an agreement between two or more parties; (2) an overt act in furtherance of the agreement; (3) the parties' intentional participation in the furtherance of a plan or purpose; and (4) resulting damage or injury."(*Abacus Federal Savings Bank v. Lim*, 75 AD3d 472[1st Dept. 2010]).

Here, the underlying tort is that of tortious interference with contract, as alleged against Zalman. The court found, in its April 5, 2010 decision, that plaintiff had stated such a claim. However, the moving defendants have established here, through competent evidence, that the four additional elements have not been met.

In her sworn affidavit, Ms. De Sanctis states:

The Cooperative and its counsel had no direct communications with Ms.

5]

Hixon concerning the General Release . . . the Cooperative and its counsel had no discussions with Ms. Hixon's counsel, Zalman, either before or after the execution of the General Release, concerning Zalman's own discussions with Ms. Hixon regarding the General Release . . . [t]o be clear, Zalman certainly never informed the Cooperative or its counsel that Zalman intended to (or did) falsely assure Ms. Hixon that the General Release would have no effect on the 2002 Hixon Action.

Mr. Meltser and Mr. Buckley make the same, or similar, statements in their affidavits.

The moving defendants establish, as a matter of law, that they did not have any agreement with Zalman regarding representations made about the General Release. Without such agreement, there can be no conspiracy.

In opposition, plaintiff fails to raise an issue of fact. Plaintiff states generally that it needs to conduct discovery in order to allow it to "uncover facts that are in the exclusive possession of defendants which plaintiff could utilize to oppose movants' motion herein," but fails to specify what, if any, information would aide him in opposing the instant motion. It is well settled that "the mere hope" that a party might be able to uncover some evidence during the discovery process is insufficient to deny summary judgment pursuant to CPLR 3212(f). (*Pow v. Black*, 182 AD2d 484, 485[1st Dept. 1992])(internal quotes and citations omitted).

Wherefore, it is hereby

ORDERED that the motion for summary judgment is granted and the complaint is hereby severed and dismissed as against defendants 12-14 East 64<sup>th</sup> Street Owners Corp. and Goodman Management Co., Inc., and the Clerk is directed to enter judgment in favor of said defendants; and it is further

ORDERED that any and all cross-claims as against defendants 12-14 East 64<sup>th</sup> Street Owners Corp. and Goodman Management Co., Inc., are hereby dismissed; and it is further

ORDERED that the remainder of the action shall continue.

DATED: December 6, 2010

**FILED**



EILEEN A. RAKOWER, J.S.C.

DEC 10 2010

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