

150 Broadway N.Y. Assoc., L.P. v Shandell

2011 NY Slip Op 32913(U)

November 1, 2011

Supreme Court, New York County

Docket Number: 601950/2009

Judge: Judith J. Gische

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SCANNED ON 11/2/2011

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

PRESENT: HON. JUDITH J. GIBSON
J.S.C.

PART 10

Justice

Index Number : 601950/2009
150 BROADWAY N.Y.ASSOCIATES
vs.
SHANDELL, RICHARD
SEQUENCE NUMBER : 007
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. 007
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

FILED

Upon the foregoing papers, It is ordered that this motion

NOV 02 2011

NEW YORK
COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.

*and status conf scheduled
for Jan 26, 2012 at 9:30 am +
NOI extended to 1/27/2012*

NOV 01 2011

Dated: _____

HON. JUDITH J. GIBSON J.S.C.
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

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

-----X

150 Broadway N.Y. Associates, L.P.,

Plaintiff (s),

-against-

Richard Shandell, Bert Blitz, Arthur Blitz,
Shosana Bookson, Shandell Blitz Blitz &
Bookson, LLP, Shandell Blitz Blitz &
Ashley, LLP, Mitchell H. Ashley, Esquire,
Ashley Law Firm, Ameer Benno, Esquire,
Drew Benenson, CPA and James H.
Shenwick, Esquire,

Defendant (s).

-----X

DECISION/ ORDER
Index No.: 601950/09
Seq. No.: 006, 007,
008

PRESENT:
Hon. Judith J. Gische

FILED

NOV 02 2011

NEW YORK
COUNTY CLERK'S OFFICE

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

PAPERS	NUMBERED
<u>Motion Seq No. 6</u>	
SBBA, Ashley, Benno n/m (3211) w/ LJS affirm, MA affid, exhs	1
150 Bway x/m (3025) w/ARV affirm, exhs	2
Bookson opp w/ STB affid, exhs	3
SBBA, Ashley, Benno opp w/LJS affirm in opp to x/m, exhs	4
Shenwick opp w/EDM, exhs	5
150 Bway reply w/ARV affirm	6
Bookson supp affirm w/PK affirm, exhs	7
 <u>Motion Seq No. 7</u>	
Benenson n/m (3211, 3212) w/JB affirm, DB affid, exhs	8, 9, 10
150 Bway opp w/JLJ affid, ARV affirm, exhs	11
Benenson reply	12
 <u>Motion Seq No. 8</u>	
150 Bway w/ARV affirm, DM affid, exhs	13
SBBA, Ashley, Benno w/LJS affirm	14
150 Bway reply w/ARV	15
Transcript OA 7/14/11	16

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

GISCHE J.:

This is an action by plaintiff for unpaid fixed rent, additional rent and other arrears (hereinafter "rent"). The various defendants are law firms, attorneys affiliated with those firms and an accountant. Richard Shandell, Esq. is no longer in this action, as his motion for summary judgment was previously granted by the court (Gische, J., Order, 5/10/10) ("5/10/10 order"). Plaintiff's motion for summary judgment was granted as to Arthur Blitz but denied as against Shoshana Bookson (see 5/10/10 order). Bert Blitz has defaulted in this action and no determination has been made as to him (see 5/10/10 order). James H. Shenwick, Esq.'s motion, for the pre-answer dismissal of the claim against him for an accounting was granted pursuant to this court's prior order dated January 3, 2011 ("1/3/11 order").

Presently before the court are three motions and one cross motion. Defendant Drew Benenson ("Benenson"), a Certified Public Accountant, has answered the First Amended Complaint and he seeks dismissal (motion seq no. 6) thereof pursuant to CPLR 3211 [a][7] or, alternatively, summary judgment pursuant to CPLR 3212.

Shandell Blitz Bookson & Ashley, Mitchell Ashley, Esq., The Ashley Law firm and Ameer Benno, Esq. have answered First Amended Complaint and they have jointly moved (motion seq no. 7) for dismissal thereof pursuant to CPLR 3211 [a][7] or, alternatively, summary judgment pursuant to CPLR 3212.

Plaintiff has cross moved to amend the complaint pursuant to CPLR 3025 and seeks leave from the court to serve its Second Amended Complaint so as to assert new claims against Shandell Blitz Bookson & Ashley, Mitchell Ashley, Esq., The Ashley Law

Firm and Ameer Benno, Esq. The motions and cross motions are consolidated for decision because the issues, arguments and claims are closely related.

Bookson opposes the motion by Shandell Blitz Bookson & Ashley, Mitchell Ashley, Esq., The Ashley Law Firm and Ameer Benno, Esq. as does plaintiff. Shandell Blitz Bookson & Ashley Mitchell Ashley, Esq., The Ashley Law Firm and Ameer Benno, Esq. oppose the cross motion and motion brought by plaintiff. Shenwick sparsely opposes plaintiff's motion to serve an amending complaint arguing that he has been dismissed from the case, but the proposed Second Amended Complaint still has claims against him, identical to those that were already dismissed .

Although the moving defendants seek "dismissal" of plaintiff's claims or "summary judgment" in their favor, each of them have answered the First Amended complaint and issue has been joined. Therefore, what each of the moving defendants actually seeks is dismissal of the claims against them on the merits, based upon one of the enumerated grounds in CPLR 3211, or phrased differently, summary judgment dismissing the complaint for failure to state a cause of action. Accordingly, each moving defendant bears the initial burden of setting forth evidentiary facts to prove his or its *prima facie* case such he or it would be entitled to judgment in his or its favor, without the need for a trial (Zuckerman v. City of New York, 49 N.Y.2d 557, 562 [1980]). Only if the moving defendants meet this burden does it then shift to plaintiff to submit evidentiary facts to controvert the allegations set forth in the defendants' papers to 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, *supra*).

Given the extensive litigation in this case and the court's prior detailed and

comprehensive decisions and orders, the reader presumed to be familiar with the underlying facts of this case. They will not be repeated here. Although the parties sometimes identify Shandell Blitz Bookson & Ashley as "Shandell Bookson" or "SBBA," the court will continue to refer to this firm as "Shandell Ashley," consistent with prior orders.

Facts alleged and arguments presented

Plaintiff was the landlord for Shandell Blitz Blitz & Bookson, LLP (SBB&B), a law firm. SBB&B eventually fell into arrears on its rent and plaintiff brought a nonpayment proceeding against SBB&B and obtained a money judgment dated June 17, 2009 against SBB&B in the principal sum of \$257,378.72. Thereafter, on June 24, 2009, plaintiff served a Restraining Notice ("restraining notice") on "Shandell Blitz Blitz & Bookson, LLP also known as Shandell Blitz Blitz & Ashley, LLP... judgment debtor." The notice was hand delivered to and accepted by Mitchell Ashley, Esq., a member of Shandell Ashley.

SBB&B has since dissolved and plaintiff seeks to enforce the SBB&B money judgment against the attorneys who personally guaranteed SBB&B's obligations under the lease. In its proposed Second Amended Complaint, plaintiff now also seeks to enforce the SBB&B money judgment against Shandell Ashley, based upon claims of successor liability and the New York Debtor and Creditor Laws.

In its 1/3/11 order, the court dismissed plaintiff's claims against Shenwick for breach of fiduciary duty. Shenwick was the lawyer who assisted Shandell Ashley in its dissolution. In that order, the court held that Shenwick and plaintiff did not have a fiduciary relationship based upon confidence and, therefore, plaintiff had no cause of

action against Shenwick for breach of fiduciary duty and an accounting.

Benenson, a CPA, is the principal of Tarlow & Co, an accounting firm that has provided the Shandell Blitz/ Shandell Ashley law firms with accounting services for several years. Benenson urges the court to dismiss plaintiff's 5th cause of action against him because the 5th cause of action was asserted against him and Shenwick based upon identical claims and facts. Like Shenwick, Benenson claims he has no fiduciary duty to the plaintiff and, therefore, the plaintiff has no claim against him for breach thereof or for an accounting.

Although the complaint states that Benenson drafted the Notice of Dissolution ("Notice") that was sent to creditors (and also to plaintiff), Benenson denies having any involvement whatsoever with the drafting of this document or its contents. The Notice advises creditors to "send a letter detailing their claims against the Partnership and supporting materials to Drew Benenson, CPA at Tarlow & Co. and to James H. Shenwick, Esq." The Notice also identifies Benenson as "the liquidating agent for the Partnership" and states that he "will distribute monies to creditors on a quarterly basis and provide them with a report detailing the monies collected by the Partnership and the payment to various creditors. . . ."

Benenson states that he did not know the Notice had been mailed out until the law firm's creditors began sending him demands for payment. Once that occurred, he started to keep track of the information in an internal accounting system and prepared checks for Mitchell Ashley to sign. Benenson denies he acted as a "liquidating agent" for Shandell Ashley or that he made any substantive decisions about what bills would or would not be paid by the firm. According to Benenson, such decisions were made

exclusively by Mitchell Ashley and he (Benenson) acted solely at the direction of and on behalf of his client.

Plaintiff argues that Benenson is not entitled to summary judgment dismissing the complaint against him. Plaintiff reasons that because Shandell Ashley has a fiduciary relationship with its creditors and Shandell Ashley did not abide by its representation, that Benenson was the firm's liquidating agent and payments would be made to its creditors, Benenson had a relationship of confidence with the plaintiff. Thus, plaintiff argues that once Benenson learned that he had been identified as the "liquidating agent" for the firm, he should have immediately notified plaintiff that a mistake had been made. Consequently, plaintiff states that he relied on the representation that Benenson was Shandell Ashley's liquidating agent, this was detrimental to the plaintiff's rights, and Benson assumed a fiduciary duty to the plaintiff that he then breached.

Plaintiff's 4th cause of action in the First Amended Complaint seeks injunctive relief against SBB&B, Mitchell Ashley, Esq., the Ashley Law Firm and Benno, preventing them from disbursing or distributing of legal fees until such time as the court approves a formula allocating such fees between those attorneys and/or SBB&B and Shandell Ashley. In their motion seeking summary judgment dismissing this claim, SBB&B, Mitchell Ashley, Esq., the Ashley Law Firm and Ameer Benno, Esq. argue that where creditors are unsecured, the debtor has the right to prefer one creditor over another.

Mitchell Ashley states in his supporting affidavit that he endeavored to pay some money to each of Shandell Ashley's unsecured creditors, including plaintiff, which is

why he sent plaintiff \$5,000. According to Mitchell Ashley this was the largest payment he made. He states that he was able to negotiate with other unsecured creditors who accepted between 5 and 20 cents on the dollar and that this is why some other unsecured debt was satisfied.

According to Mitchell Ashley, Capital One Bank, a secured creditor, demanded that its secured interest be satisfied before Shandell Ashley/Mitchell Ashley made any further payments toward unsecured debt. Upon that demand being made, Mitchell Ashley and the bank entered into an agreement that required the firm to pay the bank 60% of any legal fees received and/or collected. Those payments continue to be made as are payments to the unsecured creditors who accepted a discount of their claims.

Plaintiff's proposed Second Amended Complaint seeks to add three (3) new causes of action all based upon factual claims that SBB&B changed its name to Shandell Blitz Blitz & Ashley and these two entities are exactly the same, permitting plaintiff the judgment against SBB&B to be enforced against Shandell Ashley. The proposed new 4th cause of action against Mitchell Ashley, the Ashley Law Firm¹ and Benno, an attorney with Shandell Ashley, alleges fraudulent conveyances and violations of Debtor Creditor Law ("DCL § __"), DCL §§ 273-A and 278. The proposed new 5th cause of action is for injunctive relief, enjoining Mitchell Ashley, the Ashley firm and Benno from disbursing any money that they receive or collect as legal fees. The proposed new 7th cause of action is against Mitchell Ashley, alleging violation of a restraining notice served June 24, 2009 upon SBB&B. The 9th proposed cause of

¹The body of the proposed complaint refers to the "Ashley Law Firm, PLLC" but this is not reflected in the caption.

action is against Shandell Ashley for rent due under the lease.

Bookson endorses the arguments raised by the plaintiff insofar as plaintiff opposes those defendants' motion for summary judgment. She also supports plaintiff's cross motion, for leave to serve the proposed Second Amended Complaint.

In opposition to plaintiff's motion, Mitchell Ashley, the Ashley Law Firm and Benno present the following arguments: 1) plaintiff should not be allowed to serve a Second Amended Complaint because it served the First Amended Complaint without leave of court, 2) the motion was improperly served, 3) the claims have no merit because the judgment was obtained against and the restraining notice issued to SBB&B, not Mitchell Ashley, the Ashley Law Firm or Benno, 4) the restraining notice has expired, 5) Capital One has priority as a secured creditor and, 5) plaintiff is accusing them of unethical conduct because Mitchell Ashley and Benno did not nor where they ethically allowed to pay Shandell Ashley for the privilege of taking over cases.

After these motions were brought, plaintiff moved to enlarge the record (motion sequence no. 8). According to plaintiff it subsequently learned that Mitchell Ashley took in more than \$1,100,000 in funds after June 30, 2009, the date on which plaintiff served its restraining notice on SBB&B/Shandell Ashley and that Mitchell Ashley billed Shandell Ashley for his services during the process of winding down. Though plaintiff agrees a restraining notice expires after a year, it argues that where the notice is served on a judgment debtor, it remains effective until the judgment is satisfied or vacated, therefore arguments by Mitchell Ashley for the dismissal of the 7th cause of action are unavailing.

Discussion

Benenson's motion

Absent a statutory right or fiduciary relationship, plaintiff has no right to an accounting (see In re Hunter, 4 N.Y.3d 260 [2005]; Hathaway v. Clendening Co., 135 A.D. 407 [1st Dept. 1909]). In deciding whether a fiduciary relationship exists between parties, the court looks at "whether a party reposed confidence in another and reasonably relied on the other's superior expertise or knowledge" (Wiener v. Lazard Freres & Co., 241 A.D.2d 114, 12 [1998]).

Benenson has raised issues of law in his motion for summary judgment. 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 [2nd Dept 2003]). Benenson has proved that he and the plaintiff did not have a fiduciary relationship. Benenson's client was the Shandell Ashley firm/Mitchell Ashley. This is clearly stated in the dissolution notice the firm sent to plaintiff and other creditors identifying Benenson as their liquidating "agent." Thus, Benenson's job was to serve his client and follow their instructions.

Although plaintiff argues that it was misled by the notice and it expected its judgment to be paid in due course, this argument is unavailing against Benenson. Nothing in the notice made express promises to the plaintiff about the judgment being paid or that Benenson would be the decision maker.

Plaintiff's alternative claim, that he detrimentally relied on statements in the notice, is equally unhelpful. Leaving aside the issue that plaintiff has not asserted a claim against Benenson for detrimental reliance, even if it had, that cause of action is not available to plaintiff. There is no agreement between Benenson and plaintiff and

there can only be detrimental reliance if a plaintiff's interpretation of an agreement is reasonable and consistent with its plain meaning, giving effect to all of its terms (Bank of New York v. Murphy, 230 AD2d 607 [1st Dept. 1996]). The notice makes no representation or promise to plaintiff that any action would be taken on its claim, let alone an agreement or representation that the judgment will be paid in whole or in part. The notice only asks that claims be submitted for consideration.

Benenson has proved that plaintiff does not have the cause of action asserted against him and plaintiff has failed to raise triable issues of fact that require a trial. Benenson was the agent for his principal and he did not have a fiduciary relationship with plaintiff based upon confidence. Therefore, Benenson is entitled to summary judgment dismissing the First Amended Complaint (5th cause of action) against him for breach of fiduciary duty and an accounting.

SBB&B, Mitchell Ashley, Ashley Law Firm and Benno's motion

The issue of whether defendants are entitled to summary judgment dismissing the 4th cause of action in the First Amended Complaint is closely tied with plaintiff's motion to add two new causes of action against Mitchell Ashley, the Ashley Law Firm and Benno, based upon claims that they fraudulently transferred assets to avoid paying the judgment plaintiff obtained against SBB&B. For the reasons that follow, plaintiff's motion for leave to serve the Second Amended Complaint, as proposed, is granted in part only to allow plaintiff to assert the proposed new 4th, 5th, 7th and 9th causes of action.

A movant seeking leave to amend its pleadings must make some evidentiary showing that the proposed amendment has merit, and a proposed pleading

that fails to state a cause of action or is plainly lacking in merit will not be permitted (Eighth Ave. Garage Corp. v H. K.L. Realty Corp. et al., 60 AD3d 404 [1st Dept 2009]). Once this requirement is satisfied, the party opposing the motion must “overcome a presumption of validity in the moving party’s favor, and demonstrate that the facts alleged and relied upon in the moving papers are obviously unreliable or insufficient to support the amendment” (Peach Parking Corp. v 346 West 40th Street, 42 AD3d 82, 86 [1st Dept 2007] internal citations omitted).

The proposed new causes of action capsule plaintiff’s assertions throughout this litigation, that “Shandell Blitz Blitz & Ashley” (i.e. Shandell Ashley) is simply a name change for the old SBB&B, the two entities are the same, transfers of assets have been made to avoid plaintiff’s judgment and plaintiff should be permitted to enforce the judgment against Shandell Ashley, Mitchell Ashley, the Ashley law firm and/or Benno. The defendants have not shown prejudice and, equally important, they have not met their burden in proving their entitlement to summary judgment as a matter of law on the First Amended Complaint. Consequently, the motion by SBB&B, Mitchell Ashley, Ashley Law Firm and Benno for summary judgment dismissing the 4th and 5th causes of action in the First Amended Complaint is denied and plaintiff may serve an amended complaint to assert these two new causes of action.

The new 7th cause of action in the proposed Second Amended Complaint is against Mitchell Ashley for violation of a restraining notice. CPLR 5222[b] provides that a judgment debtor or obligor served with a restraining notice is “forbidden to make or suffer any sale, assignment, transfer or interference with any property in which he or she has an interest...until the judgment or order is satisfied or vacated.” However, a

restraining notice "served upon a person other than the judgment debtor or obligor is effective only if, at the time of service, he or she owes a debt to the judgment debtor or obligor or he or she is in the possession or custody of property in which he or she knows or has reason to believe the judgment debtor or obligor has an interest..." (CPLR 5222[b]).

Plaintiff has provided facts to support this new (7th cause of action) and it will be permitted. Mitchell Ashley did not move to quash the notice when it was served on him in 2009 and plaintiff alleges that Mitchell Ashley may have been in possession or custody of property that SBB&B had an interest in, but was transferred to avoid plaintiff's judgment. Thus, at this stage, it is unclear whether the notice expired in due course after a year or remained active (see CPLR 5222[b]).

The 9th cause of action seeks to hold Shandell Ashley responsible for unpaid rent due under the lease based upon claims similar to those made in the 4th and 5th causes of action, above. Since it is unclear whether SBB&B and Shandell Ashley are the same entities, plaintiff has stated a cause of action and it will be allowed.

To the extent that plaintiff seeks any other amendments to the First Amended Complaint, plaintiff's motion is denied. Furthermore, to the extent the Second Amended Complaint still identifies claims against defendants, which were already dismissed by the court, those claims are not revived, but remain dismissed. This addresses concerns by Shenwick that he not be brought back into this case.

The court has considered, but rejected, arguments by defendants that the Second Amended Complaint should not be allowed because plaintiff served its First Amended Complaint without permission from the court. That is not a defense to the

motion to amend presently before the court. Motions to amend the pleadings are permitted at any stage in a case upon a proper showing (see Edenwald Contracting Co., Inc. v. City of New York, 60 N.Y.2d 957 [1983]).

Plaintiff may serve an amended complaint, in the form consistent with this court's decision, within Ten (10) Days after this decision/order appears as having been filed with the County Clerk on SCROLL (the Supreme Court Records On-Line Library). Defendants' time to answer shall be pursuant to the CPLR.

Recapitulation and Conclusion

In accordance with the forgoing,

It is hereby

ORDERED that the motion by Drew Benenson, CPA for summary judgment dismissing the complaint against him (5th cause of action in the First Amended Complaint) is granted; the complaint against defendant Drew Benenson, CPA is hereby dismissed and the Clerk shall enter judgment in favor of defendant Drew Benenson, CPA, against plaintiff 150 Broadway N.Y. Associates L.P.; and it is further

ORDERED that the motion by defendants SBB&B, Mitchell Ashley, Ashley Law Firm and Benno for summary judgment is denied; and it is further

ORDERED that the cross motion by plaintiff for permission to serve a Second Amended Complaint is granted only to the extent provided (i.e. as to the new 4th, 5th, 7th and 9th causes of action), otherwise it is denied; and it is further

ORDERED that the plaintiff's separate motion to amplify the record on these motions is also granted and the amplifications were considered; and it is further

ORDERED that to the extent the Second Amended Complaint still contains claims

against defendants who were already dismissed from this action, the complaint is inoperative and the claims against defendants Richard Shandell and James H. Shenwick, Esq. remain dismissed; and it is further

ORDERED that the plaintiff may, within Ten (10) Days after this decision/order appears as having been filed with the County Clerk on SCROLL (the Supreme Court Records On-Line Library), serve an amended complaint in the form consistent with this court's decision; defendants' time to answer the amended complaint shall be pursuant to the CPLR; and it is further

ORDERED that the parties shall appear for a **status conference on January 26, 2012** at 9:30 a.m. in Part 10 and the Note of Issue is extended to January 27, 2012

ORDERED that any relief requested but not specifically addressed is hereby denied; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, New York
November 1, 2011

So Ordered:

FILED

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NEW YORK
COUNTY CLERK'S OFFICE



Hon. Judith L. Gische, JSC