

**Liebman Goldberg & Hymowitz LLP v Michael R.  
Drogin CPA, P.C.**

2011 NY Slip Op 33654(U)

February 4, 2011

Supreme Court, Nassau County

Docket Number: 010233-10

Judge: Timothy S. Driscoll

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**SUPREME COURT-STATE OF NEW YORK  
SHORT FORM ORDER**

**Present:**

**HON. TIMOTHY S. DRISCOLL**  
**Justice Supreme Court**

-----X  
**LIEBMAN GOLDBERG & HYMOWITZ LLP, fka  
LIEBMAN GOLDBERG & DROGIN, LLP,**

**Plaintiff,**

**-against-**

**MICHAEL R. DROGIN CPA, P.C. and  
MICHAEL R. DROGIN**

**Defendants.**  
-----X

**TRIAL/IAS PART: 20  
NASSAU COUNTY**

**Index No: 010233-10**

**Motion Seq. No: 1  
Submission Date: 11/5/10**

**The following papers having been read on this motion:**

- Notice of Motion, Affidavit in Support and Exhibits.....X**
- Affirmation and Exhibit.....X**
- Defendants' Memorandum of Law.....X**
- Affirmation in Opposition and Exhibit.....X**
- Reply Affirmation and Exhibits.....X**

This matter is before the Court for decision on the motion filed by Defendants Michael R. Drogin CPA, P.C. ("Drogin PC") and Michael R. Drogin ("Drogin") (collectively "Defendants") on July 6, 2010 and submitted on November 5, 2010. For the reasons set forth below, the Court grants the motion and dismisses the Complaint without prejudice.

**BACKGROUND**

**A. Relief Sought**

Defendants move for an Order, pursuant to CPLR §§ 3211(a)(1), (5), (7), and (10), dismissing the Complaint. Plaintiff opposes Defendants' motion. Plaintiff also requests that, if the Court determines that Elliot H. Goldberg, CPA, P.C. ("Goldberg, P.C.") and J. Liebman,

CPA, P.C. ("Liebman P.C.") are indispensable parties insofar as the first cause of action is concerned, the Court permit the Summons to be amended pursuant to CPLR §305(c) to add those parties as plaintiffs in this action.

B. The Parties' History

This action involves a dispute regarding the former accounting firm of Liebman Goldberg & Drogin, LLP ("Former Partnership"). The partners of the Former Partnership consisted of three professional corporations: Goldberg P.C., Liebman P.C. and Michael R. Drogin, CPA, P.C. ("Drogin P.C.").

The Verified Complaint ("Complaint") (Ex. A to Russ Aff. in Supp.) alleges that, on or about January 13, 2009, Drogin withdrew as a partner of Plaintiff pursuant to a verbal agreement among Drogin, acting on behalf of Drogin P.C., Elliot H. Goldberg ("Goldberg"), acting on behalf of Goldberg P.C., and Joel Leibman ("Leibman"), acting on behalf of Liebman P.C.

In 2009, Leibman and Goldberg commenced an action against Drogin titled *Joel Liebman and Elliot Goldberg v. Michael Drogin*, Nassau County Index Number 11002-09 ("Prior Action"). In the Prior Action, Drogin moved for an Order dismissing the complaint pursuant to CPLR §§ 3211(a)(1), (7) and (10), and plaintiffs cross-moved for an order granting leave to file an amended complaint.

By order dated December 30, 2009 ("Prior Decision") (Ex. B to Russ Aff. in Supp.), the Honorable Karen V. Murphy granted defendants' motion to dismiss and denied plaintiffs' cross-motion. In so ruling, Justice Murphy noted, in pertinent part, as follows:

This action involves allegations of damages upon the dissolution of an accounting firm of which Plaintiffs and Defendants were members. The instant action only alleges causes of action against the Defendant as an individual, not in any corporate capacity. The documentation attached to this motion establishes that there is no personal liability or guaranty for this named Defendant. In fact, the contract involved is not between any of the parties named in this lawsuit. Without opposition, the motion is granted and the complaint is dismissed.

Prior Decision at p. 1

Justice Murphy also denied the plaintiff's cross-motion for leave to file an amended complaint, on the grounds that "[a]ll parties in the amended complaint are different and the complaint alleges a completely new and different theory of liability." *Id.* at p. 2.

Subsequently, Liebman Goldberg & Hymowitz LLP, f/k/a Liebman Goldberg & Drogin, LLP commenced this action against Michael R. Drogin, CPA, P.C. and Michael R. Drogin. The Complaint contains two (2) causes of action. In the first, asserted against Drogin, P.C., Plaintiff alleges that Drogin, P.C. misappropriated fees to which Plaintiff was entitled, and seeks a judgment for an accounting, as well as a direction that Drogin, P.C. pay to Plaintiff any sum found to be due to Plaintiff. In the second cause of action, Plaintiff alleges that Drogin misappropriated funds, and seeks a judgment against Drogin for damages in the sum of \$200,000.

C. The Parties' Positions

Defendants move for dismissal of the Complaint on the grounds that the Plaintiff in this action, Liebman Goldberg & Hymowitz LLP (the "New LLP"), is an improper party and lacks standing to pursue this lawsuit which asserts claims arising out of the Former Partnership. Defendants submit that dismissal is particularly appropriate in light of the fact that the Former Partnership was dissolved by operation of law when Drogin withdrew as a partner pursuant to a verbal agreement.

Defendants also argue that the New LLP is collaterally estopped from pursuing claims against Drogin in light of Justice Murphy's determination, as set forth in the Prior Decision, that Drogin has no personal liability.

Defendants further submit that Plaintiff's sole remedy is an action at law which does not lie until there has been a full accounting and a balance sheet, or an express agreement to pay, citing, *inter alia*, *Wiesenthal v. Wiesenthal*, 40 A.D.3d 1078,1080 (2d Dept. 2007). No such accounting has taken place with respect to the termination of the partnership at issue.

Finally, Defendants seek the imposition of sanctions for Plaintiff's allegedly frivolous conduct in commencing this action.

In opposition to defendants' motion, Plaintiff asserts that this action is not barred by collateral estoppel because Plaintiffs' claims, and those of Goldberg P.C. and Liebman P.C., were not adjudicated in the prior action.

Additionally, Plaintiff requests that, if the Court finds that Goldberg, P.C. and Liebman, P.C. are indispensable parties to this action, the Court permit the summons to be amended pursuant to CPLR § 305 (c) to add those parties.

With respect to the branch of the motion which seeks sanctions, Plaintiff contend that it has not engaged in frivolous conduct.

### RULING OF THE COURT

#### A. Standards for Dismissal

A complaint may be dismissed based upon documentary evidence pursuant to CPLR § 3211(a)(1) only if the factual allegations contained therein are definitively contradicted by the evidence submitted or a defense is conclusively established thereby. *Yew Prospect, LLC v. Szulman*, 305 A.D.2d 588 (2d Dept. 2003); *Sta-Bright Services, Inc. v. Sutton*, 17 A.D.3d 570 (2d Dept. 2005).

In addition, it is well settled that a motion interposed pursuant to CPLR §3211 (a)(7), which seeks to dismiss a complaint for failure to state a cause of action, must be denied if the factual allegations contained in the complaint constitute a cause of action cognizable at law. *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268 (1977); *511 W. 232<sup>nd</sup> Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144 (2002). When entertaining such an application, the Court must liberally construe the pleading. In so doing, the Court must accept the facts alleged as true and accord to the plaintiff every favorable inference which may be drawn therefrom. *Leon v. Martinez*, 84 N.Y.2d 83 (1994). On such a motion, however, the Court will not presume as true bare legal conclusions and factual claims which are flatly contradicted by the evidence. *Palazzolo v. Herrick, Feinstein*, 298 A.D.2d 372 (2d Dept. 2002).

With respect to Defendants' motion pursuant to CPLR § 3211(a)(5), the doctrine of collateral estoppel precludes a party from relitigating an issue that was previously decided against that party, or those in privity, in a proceeding in which there was a fair opportunity to fully litigate the matter. *Strough v. Incorp. Vill. of West Hampton Dunes*, 912 N.Y.S.2d 82, 84 (2d Dept. 2010). To invoke this doctrine, 1) the identical issue must have been necessarily decided in the prior action and must be decisive in the present action; and 2) the party who is precluded from relitigating the issue must have had a full and fair opportunity to contest the matter in the prior action. *Id.*

CPLR § 3211(a)(10) provides for dismissal of an action when "the court should not proceed in the absence of a person who should be a party." The definition of a necessary party

has been strictly construed and is limited to those cases where the determination of the court will adversely affect the rights of the nonparties. *Matter of Schulz v. De Santis*, 218 A.D.2d 256, 259-260 (3d Dept. 1996), quoting *Matter of Castaways Motel v. Schuyler*, 24 N.Y.2d 120, 125 (1969). The question is whether the nonparty may be inequitably affected by a judgment rendered in its absence, *id.* at 260, citing CPLR § 1001(a) and *Town of Brookhaven v. Chun Enters.*, 71 N.Y.2d 953 (1988), or the nonparty is one whose presence is necessary if complete relief is to be accorded to the parties in the action, *id.*, citing *Joanne S. v. Carey*, 115 A.D.2d 4, 7 (1<sup>st</sup> Dept. 1986).

CPLR § 3211(a)(3) provides for dismissal of an action where the party asserting the cause of action lacks the legal capacity to sue. Standing involves a determination of whether the party seeking relief has a sufficiently cognizable stake in the outcome so as to cast the dispute in a form traditionally capable of judicial resolution. *Graziano v. County of Albany*, 3 N.Y.3d 475, 479 (2004), quoting *Community Bd. 7 of Borough of Manhattan v. Schaffer*, 84 N.Y.2d 148, 155 (1994). A plaintiff, to have standing in a particular dispute, must demonstrate an injury in fact that falls within the relevant zone of interests sought to be protected by law. *Caprer v. Nussbaum*, 36 A.D.3d 176, 183 (2d Dept. 2006), citing *Matter of Fritz v. Huntington Hosp.*, 39 N.Y.2d 339 (1976). Standing goes to the jurisdictional basis of a court's authority to adjudicate a dispute. *Matter of Eaton Assoc. Inc. v. Egan*, 142 AD2d 330, 334-335 (3d Dept. 1988), citing *Allen v. Wright*, 468 U.S. 737, 750-751 (1984), *reh. den.*, 468 U.S. 1250 (1984).

A plaintiff generally has standing only to assert claims on his own behalf. *Caprer, supra*, 36 A.D.3d at 182. An entity that is not a party to an agreement lacks standing to enforce the terms of that agreement. *VAC Service Corp. v. Technology Ins. Co., Inc.*, 49 A.D.3d 524 (2d Dept. 2008), citing, *inter alia*, *DeRaffele v. 210-220-230 Owners Corp.*, 33 A.D.3d 752 (2d Dept. 2006). *See also Roberto v. Vill. of New Hyde Park*, 2009 N.Y. Misc. LEXIS 4921 (Sup. Ct. Nass. Cty. 2009) (to have standing to enforce contract, entity must be party thereto or third beneficiary thereof, citing *VAC Service Corp., supra*).

#### B. Amendment of Complaint

Leave to amend is to be freely given, absent prejudice or surprise directly resulting from the delay in seeking leave, unless the proposed amendment is palpably insufficient or patently devoid of merit. *Aurora Loan Services, LLC v. Thomas*, 70 A.D.3d 986, 987 (2d Dept. 2010),

citing CLR § 3025(b); *Lucido v. Mancuso*, 49 A.D.3d 220, 222 (2d Dept. 2008).

C. Effect of Dismissal

When a complaint is dismissed for legal insufficiency or other defect in the pleading, it does not act as a bar to the commencement of a new action for the same relief unless the dismissal was expressly made on the merits or the new complaint fails to correct the defects or omissions fatal to the prior one. *Furia v. Furia*, 116 A.D.2d 694, 695 (2d Dept. 1986), quoting *Deacon's Bench v. Hoffman*, 101 A.D.2d 971, 972 (3d Dept. 1984) (internal citations omitted).

D. Frivolous Conduct

22 NYCRR § 130-1.1(a) authorizes the court, in its discretion, to award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct. Section 130-1.1(c) provides that conduct is frivolous if: (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false.

E. Application of these Principles to the Instant Action

The Court concludes that dismissal of this action is appropriate due to lack of standing. It is undisputed that Plaintiff is not a party to any agreement. Plaintiff, however, seeks to circumvent traditional standing principles by requesting leave to amend the summons pursuant to CPLR § 305(c).

The Complaint specifically alleges that the partners of Liebman Goldberg & Drogin, LLP were “Joel Liebman, CPA, P.C.,” “Elliot Goldberg, CPA, P.C.,” and “Michael Drogin, CPA, P.C.” (*see* Complaint at ¶¶ 1-3). As alleged in the Complaint, each of the partners of Liebman Goldberg & Drogin, LLP is a Professional Corporation, not an individual. Any claims should be asserted against Michael Drogin, CPA, P.C. by the other Professional Corporation partners, who are not parties to this action, rather than by the plaintiffs as individuals.

Dismissal is also warranted, pursuant to CPLR §3211(a)(1), based on documentary evidence, including the Certificate of Incorporation of Michael R. Drogin, CPA, P.C., and the redacted Federal Tax return of Liebman Goldberg & Drogin, LLP (Ex. B to Reply Aff.). This

evidence establishes that the true partners of the accounting firm are "Joel Liebman, CPA, P.C.," "Elliot Goldberg, CPA, P.C." and "Michael R. Drogin, CPA, P.C." The plaintiffs herein are improper parties, and the claims are not properly brought against Drogin individually.

The Court denies Plaintiff's application to amend. The Court notes that is Plaintiff's second attempt to file a viable action in this matter, and that the current Complaint does not address the concerns outlined in the Prior Decision. In addition, Plaintiff has not furnished the Court with a proposed new pleading as well as affidavits containing facts to support the proposed amendment. *See Souveran Fabrics Corp. v Virginia Fibre Corp.*, 37 A.D.2d 925 (1st Dept. 1971).

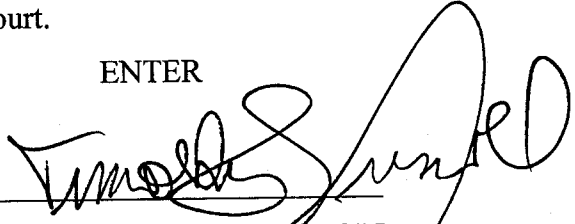
In light of the foregoing, the Court dismisses the Complaint. This dismissal is without prejudice to the commencement of a new action.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

DATED: Mineola, NY  
February 4, 2011

ENTER

  
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HON. TIMOTHY S. DRISCOLL

J.S.C.

**ENTERED**

FEB 09 2011

NASSAU COUNTY  
COUNTY CLERK'S OFFICE