

**Hadar v Hadar**

2011 NY Slip Op 33782(U)

April 18, 2011

Sup Ct, NY County

Docket Number: 101961/09

Judge: Eileen Bransten

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

PRESENT: Bransten  
Justice

PART 3m

Richard Huda et al

INDEX NO. 101961/09

- v -

MOTION DATE 1/11/11

MOTION SEQ. NO. 019

Eric Huda et al

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to 3 were read on this motion to/for dismiss

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

PAPERS NUMBERED	
_____	<u>1</u>
_____	<u>2</u>
_____	<u>3</u>

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

~~IS DECIDED~~  
**IS DECIDED**  
**IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.**

Dated: 4/18/11

[Signature]  
ERIC BRANSTEN 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 3

-----X  
RICHARD HADAR, IRA YOHALEM As Trustee of  
the Joshua D. Hadar Family Trust, RHJFK LLC, JFK  
HOLDING COMPANY, LLC, ALLIED HOLDINGS  
COMPANY, ALLIED HOLDINGS COMPANY II,  
LANDPEN CO., L.P. and LAWRENCE ONE LP,

Plaintiffs,

Index No. 101961/09  
Motion Date: 1/11/11  
Motion Seq. Nos. 19-21

-against-

ERIC HADAR, ALLIED PARTNERS INC., and JFK  
MANAGEMENT COMPANY, INC.,

Defendants.

-----X  
ERIC HADAR, ALLIED PARTNERS INC., and JFK  
MANAGEMENT COMPANY, INC., Steven Simkin  
and Howard Zipser on behalf of THE ERIC D. HADAR  
FAMILY TRUST,

Counter-Plaintiffs,

-against-

RICHARD HADAR, CLAY PIERCE, MICHAEL  
ROSENBAUM, PATTERSON BELKNAP WEBB &  
TYLER LLP, ROBERT WEIR, and IRA YOHALEM,

Counter-Defendants.

-----X  
**Bransten, J.:**

The primary action herein was brought by Richard Hadar ("R. Hadar") and related entities against his son Eric Hadar ("E. Hadar") and related entities. E. Hadar and related entities, calling themselves counter-plaintiffs, brought a number of counterclaims against counter-defendants R. Hadar, Clay Pierce ("Pierce"), Michael Rosenbaum

("Rosenbaum"), Patterson Belknap Webb & Tyler LLP ("Patterson Belknap"), Robert Weir ("Weir) and Ira Yohalem ("Yohalem"). Of the counter-defendants, only R. Hadar and Yohalem were also plaintiffs in the primary action.

Along with other motion practice, Pierce, Patterson Belknap and Rosenbaum moved to dismiss the original counterclaims as against them, and Weir answered the original counterclaims. The main action, as well as the counterclaims against R. Hadar and Yohalem, were ultimately settled. Thereafter, before this court rendered a decision on the outstanding motions to dismiss the original counterclaims, the counter-plaintiffs amended their answer and counterclaims against the four remaining counter-defendants. The remaining counter-defendants were, at times relevant to the instant action, R. Hadar's attorneys, the trustee of a trust for E. Hadar and his children, and the lawyers for that trustee.

The counterclaims are related to actions the counter-defendants allegedly took in furtherance of R. Hadar's purported scheme to wrest control of certain companies and entities from E. Hadar. These actions allegedly occurred while E. Hadar was undergoing a challenging period in his life, dealing with legal, personal and health-related problems. The three motions currently before the court, consolidated herein for decision, are brought by the four remaining counter-defendants, in response to the amended counterclaims.

In motion sequence 019, Pierce and Patterson Belknap move, pursuant to CPLR 3211 (a) (6) and (a) (7), CPLR 8303 and 22 NYCRR § 130-1.1, for an order dismissing

the 1st through 4th and 6th through 8th amended counterclaims as against them. Pierce and Patterson Belknap further move to sanction counter-plaintiffs for filing frivolous amended counterclaims in bad faith.

In motion sequence 020, Rosenbaum moves, pursuant to CPLR 3211 (a) (6) and (a) (7), for an order dismissing the amended answer and counterclaims asserted as against him.

In motion sequence 021, Weir moves for an order striking the amended answer and counterclaims for failure to file the amendment in accordance with CPLR 3025.

### ANALYSIS

The first paragraph of the preliminary statement in the amended counterclaims states that the counterclaims:

arise from flagrant breaches of ethical and fiduciary duties by lawyers, law firms and accountants that aided and abetted, conspired with or blindly followed Richard Hadar in his misguided and now discredited 2009 legal campaign against his son, Eric Hadar. In exchange for the prospect of easy fees or the hopes of a continued business relationship with Richard Hadar, the Counter-Defendants herein ignored their attorney-client, confidential and/or fiduciary relationships with the Counter-Plaintiffs, and uniformly abandoned their ethical and/or fiduciary duties to Counter-Plaintiffs by joining Richard Hadar's bad faith campaign, causing Counter-Plaintiffs devastating monetary and reputational damage.

#### **A. Motion Sequence Number 021**

In motion sequence 021, Weir, previously the trustee of the Eric D. Hadar Family Trust, moves to strike the amended answer and counterclaims for failure to file the amendment in accordance with CPLR 3025. Weir points out that he filed his answer to

the original counterclaims in September 2009, and counter-plaintiffs did not file their amended counterclaims until August 2010. Weir thus argues that counter-plaintiffs were not entitled to file the amendments as of right, but rather could only amend based on a stipulation of the parties or with leave of court to amend.

The counter-plaintiffs argue that they were entitled to amend as of right because, although Weir had answered the complaint, the other counter-defendants had moved to dismiss. They assert that the filing of a motion to dismiss extends the time for a movant to file a responsive pleading, and correspondingly extends the time for a pleader to amend as of right.

Pursuant to CPLR 3025 (a) “[a] party may amend his pleading once without leave of court within twenty days after its service, or at any time before the period for responding to it expires, or within twenty days after service of a pleading responding to it.” Thus, once a defendant has filed an answer, a plaintiff can amend, as of right, within 20 days after service of the answer. If instead of filing an answer, however, a defendant files a motion to dismiss, such a motion extends the defendant’s time to answer the complaint, and also, thereby, extends the plaintiff’s time to amend the complaint. CPLR 3025 (a); *see, e.g., Polish Am. Immigration Relief Comm. v. Relax*, 172 A.D.2d 374, 375 (1st Dep’t 1991); *Johnson v. Spence*, 286 A.D.2d 481, 483 (2d Dep’t 2001).

In the instant case, there are multiple counter-defendants. One counter-defendant filed an answer, while the others filed motions to dismiss. Weir notes that the First

Department has not ruled on a similar case involving multiple defendants. Counterplaintiffs refer to *Citibank (N.Y. State), N.A. v. Suthers*, 68 AD2d 790, 794-95 (4th Dep't 1979), for the proposition that, in a case where there are multiple defendants, some of whom have answered and some of whom have moved to dismiss, the time to amend as of right has not expired while the outstanding motions to dismiss are still pending. Counterplaintiffs contend that where, as here, a pleading is directed against multiple parties, the pleader's ability to amend as of right is determined by the filing of the *last* responsive pleading. Weir argues in response, citing to *Nikolic v. Federation Empl. & Guidance Serv., Inc.*, 18 A.D.3d 522 (2d Dep't 2005), that, in the case of multiple defendants, the time to amend its pleading is based on the filing of the *first* answer.

This court finds that the reasoning of the Fourth Department in *Citibank (N.Y. State), N.A., supra*, directly applicable to the instant situation. In *Citibank*, the Fourth Department held that, in a case with multiple defendants, where some had answered the complaint and some had filed a motion to dismiss, the amendment of the pleading "as of right" was timely when it was made within twenty days of service of the answer of the *last* defendant to answer. The court reasoned that "this construction of CPLR 3025 [a] is consistent with its literal language" and that "[s]uch construction appears to us to outweigh the possible prejudice to another party served with an amended pleading beyond 20 days from the time such party responded." *Id.* at 795.

In *Nikolic, supra*, none of the defendants had moved to dismiss, and the issue before the Second Department related to the fact that, as of the time the plaintiff served an amended complaint, three of the six defendants had served their answers more than 20 days earlier, and the other three defendants had not yet been served with the original complaint. Thus, the issue in *Nikolic* differs from the one before the court, and before the Fourth Department in *Citibank (N.Y. State), N.A., supra*, where certain defendants had filed answers and others had filed pre-answer motions to dismiss. This court finds that, when one or more defendants have answered and one or more defendants have moved to dismiss, the movants' time to respond, and thus the pleading party's time to amend the pleading once as of right, is extended in light of the motions to dismiss. Therefore, Weir's motion, sequence 021, is denied.

The parties dispute whether, at oral arguments, the court forbade counter-plaintiffs from filing amended counterclaims. At oral argument on October 27, 2010, the court noted that it cannot forbid such amendments, but that it had strongly suggested that counter-plaintiffs seriously consider whether to amend their counterclaims. Counter-plaintiffs did, in fact, amend.

#### **B. Motion Sequence Numbers 019 and 020**

In motion sequences 019 and 020, the movants move to dismiss by advancing a number of legal arguments regarding the counterclaims. First, Clay and Patterson Belknap, in motion sequence 019, and Rosenbaum, in motion sequence 020, move to

dismiss the counterclaims pursuant to CPLR 3211 (a) (6), which states that a party may move to dismiss on the ground that, "with respect to a counterclaim, it may not properly be interposed in the action." Clay, Patterson Belknap and Rosenbaum assert that, pursuant to CPLR 3019, the counterclaims are not properly before the court because the counterclaims are not actually counterclaims at all. Rosenbaum notes that the so-called amended counterclaims neither fit the definition of counterclaims nor were they brought as part of a third-party action.

CPLR 3019 (a) states:

"Subject of counterclaims. A counterclaim may be any cause of action in favor of one or more defendants or a person whom a defendant represents against one or more plaintiffs, a person whom a plaintiff represents or a plaintiff and other persons alleged to be liable."

Some of the original counterclaims were brought against then-plaintiffs R. Hadar and Yohalem as well as against some of the currently remaining counter-defendants. Due to the settling of the original action, however, *none* of the plaintiffs in the original action are named as counter-defendants in the amended counterclaims. Correspondingly, none of the counter-defendants to the amended counterclaims are plaintiffs. Clearly, pursuant to CPLR 3019 (a) "counterclaims" cannot be asserted against non-plaintiffs alone ("*or* a plaintiff *and* other persons alleged to be liable"). Therefore, the so-called "counterclaims" are dismissed, pursuant to CPLR 3211 (a) (6), as against Clay, Patterson Belknap and Rosenbaum, the movants in motions sequence 019 and 020. Those two motions are thus granted.

Counter-plaintiffs' argument that some of the original counterclaims named plaintiffs to the primary action as counter-defendants is unavailing. Amended pleadings supersede the original pleadings, as if the original pleadings never existed. *Nimkoff Rosenfeld & Schechter, LLP v. O'Flaherty*, 71 A.D.3d 533 (1st Dep't 2010).

This court has previously encouraged the parties to attempt to settle the issues between them. This case has its genesis in a power struggle between a father and son over control of certain companies. Now that the father-son dispute has been settled, the son is still seeking to move forward with allegations against certain lawyers and a trustee who, according to the son, participated in and facilitated the actions of the father in seeking to improperly interfere with and gain control over the son's financial and business interests. While counter-plaintiffs assert that dismissing on procedural grounds, on the basis of CPLR 3211 (a) (6) and CPLR 3019 (a) would elevate form over substance, this court notes that form is important, especially in a case such as this, among sophisticated parties, where it is clear that the procedures of the courts of this state have not been complied with. This case has followed a complicated path from inception to its current status, in which the primary action has been settled, and none of the original plaintiffs remain, and counter-plaintiffs seek damages against parties who allegedly conspired with and enabled the 'schemes' hatched by and for the benefit of a party no longer a party to this action.

While the court again encourages the parties to attempt to resolve the disputes among them, if 'counter-plaintiffs' decide their preferred course is to commence another action, then it should be done properly and in accordance with the rules and laws governing the procedures of the courts of this state.

### ORDER

Accordingly, it is

ORDERED that the motion of "counter-defendants" Clay Pierce and Patterson Belknap Webb & Tyler LLP to dismiss the amended answer and counterclaims herein, motion sequence 019, is granted in part, to the extent that the amended answer and counterclaims are dismissed in their entirety as against said "counter-defendants," with costs and disbursements to said "counter-defendants" as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment according in favor of said "counter-defendants"; and it is further

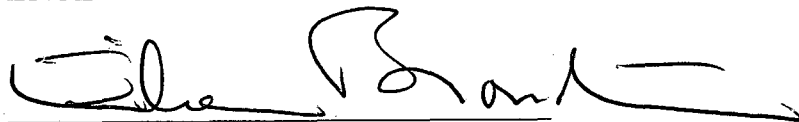
ORDERED that the motion of "counter-defendant" Michael Rosenbaum to dismiss the amended answer and counterclaims herein, motion sequence 020, is granted in part, to the extent that the amended answer and counterclaims are dismissed in their entirety as against said "counter-defendant," with costs and disbursements to said "counter-defendant" as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment according in favor of said "counter-defendants"; and it is further

ORDERED that the action is severed and continued against the remaining counter-defendant; and it is further

ORDERED that the motion to dismiss of "counter-defendant" Robert Weir, motion sequence 021, is denied.

Dated: New York, New York  
April 18, 2011

ENTER

A handwritten signature in black ink, appearing to read "Eileen Bransten", written over a horizontal line.

Hon. Eileen Bransten, J.S.C.