

Signature Bank v W.H.S. Kenney Dept. Stores, Inc.

2011 NY Slip Op 34038(U)

October 31, 2011

Sup Ct, New York County

Docket Number: 651094/2010

Judge: Eileen Bransten

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY
PRESENT: Hon. Eileen Bransten, Justice PART 3

-----X
SIGNATURE BANK,

Plaintiff,

-against-

Index No.: 651094/10
Motion Date: 7/20/11
Motion Seq. Nos.:003

W.H.S. KENNY DEPARTMENT STORES, INC.,
DEALS 4 LESS and ERIC BIEDERMAN,

Defendants.

-----X

The following papers, numbered 1, was read on this motion for turnover of collateral proceeds.

Papers Numbered

Notice of Motion/Order to Show Cause - Affidavits - Exhibits	<u>1</u>
Answering Affidavits - Exhibits	<u>2</u>
Replying Affidavits	<u>3</u>
Cross-Motion: <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	

IS DECIDED
IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

Dated: October 31, 2011



Hon. Eileen Bransten, J.S.C.

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE SETTLE/SUBMITORDER/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 THREE

-----X
SIGNATURE BANK,

Plaintiff,

-against-

Index No. 651094/2010
Motion Date: 7/20/11
Motion Seq. No.: 003

W.H.S. KENNY DEPARTMENT STORES, INC.,
DEALS 4 LESS LLC and ERIC BIEDERMAN,

Defendants.

-----X

PRESENT: EILEEN BRANSTEN, J.

Plaintiff Signature Bank (“Signature” or “Plaintiff”) seeks the turnover of collateral proceeds of \$68,707.49 from Defendants’ law firm, Olshan Grundman Frome Rosenzweig & Wolosky LLP (“Olshan”). Plaintiff additionally seeks sanctions against Olshan for violating Rule 8.4 of the New York Rules of Professional Conduct and treble damages of \$206,122.47 (inclusive of the \$68,707.49) for violating Judiciary Law § 487. Nonparty Olshan opposes the motion.

BACKGROUND

Underlying Financial Documents

On or about December 18, 2009, Signature loaned W.H.S. Kenny Department Stores, Inc. (“Kenny”) \$3,530,000 pursuant to a promissory note (the “Note”). Affidavit of Salvatore Trifiletti in Support of Motion for Turnover of Collateral and Sanctions (“Trifiletti Aff.”), ¶ 6. The Note matured on February 28, 2010. *Id.* Signature and Kenny entered into a security agreement dated August 18, 2004 to secure Kenny’s obligations (the “Kenny

Security Agreement”). The Kenny Security Agreement was modified by an amendment effective on March 30, 2010 (the “Kenny Amendment”). *Id.*, ¶ 7.

Deals 4 Less and Eric Biederman secured Kenny’s obligations by executing guaranties with Signature. Trifiletti Aff., ¶¶ 9-12. Deals 4 Less executed a guaranty on or about August 18, 2004 that was secured by a security agreement dated August 9, 2004 and modified by a subsequent amendment dated March 30, 2010. *Id.* Similarly, Biederman executed a guaranty on or about August 18, 2004. Trifiletti Aff., ¶ 12.

All three Defendants defaulted. Trifiletti Aff., ¶¶ 13-14. Kenny defaulted under the Note and the Kenny Amendment. Trifiletti Aff., ¶ 13. Deals 4 Less and Biederman defaulted under their respective guaranties. Trifiletti Aff., ¶ 14.

On or about April 23, 2010, the parties entered into a Forbearance Agreement. Trifiletti Aff., ¶ 15; *see also* Trifiletti Aff., Ex. L (“Forbearance Agreement”). This agreement fixed an amount due from Defendants to Signature and required Defendants to liquidate both Kenny’s and Deals 4 Less’s assets. Trifiletti Aff., ¶ 18. Upon receiving proceeds, Defendants were to deposit those funds into an account maintained by Signature. *Id.* The Forbearance Agreement also established a pay schedule for minimum amounts due to Signature. *Id.* The agreement indicated that a minimum payment of \$500,000 was due by July 1, 2010 and \$1,000,000 by August 15, 2010. Forbearance Agreement, ¶ 7.

Defendants failed to comply with the terms of the Forbearance Agreement. Trifiletti Aff., ¶ 20. Defendants only made three payments for a total of \$63,362.15. Trifiletti Aff.,

¶ 19. Upon Defendants' failure to comply with the payment obligation and in accordance with the Forbearance Agreement, all sums became due. Trifiletti Aff., ¶ 22.

Litigation

On July 26, 2010, Signature filed a complaint to recover the balance of the obligations due from Defendants and the possession of the collateral pledged under the various security agreements. Trifiletti Aff., ¶ 23.

During the pending litigation, Kenny received twenty checks for "accounts receivables and sales of product" beginning on July 29, 2009 and ending on December 7, 2010. Affirmation of Michael S. Fox on Behalf of Olshan Grundman Frome Rosenzweig & Wolosky LLP in Opposition to Plaintiff's Motion Brought by Order [to] Show Cause Dated May 25, 2011 ("Fox Affirm."), ¶ 7; Trifiletti Aff., Ex. Y. Those checks were deposited into an escrow account controlled by Defendants' law firm, Olshan. Fox Affirm., ¶ 7.

On or about November 9, 2010, Signature filed a motion for summary judgment. Trifiletti Aff., ¶ 30. Signature sought, among other things, money damages and possession of the collateral pledged under the Security Agreements. *Id.* Under the Kenny Security Agreement, Kenny granted Signature a security interest in all assets of Kenny ("collateral proceeds"). Complaint, ¶ 15. Defendants' attorney did not appear at oral arguments and the court reached Defendants' attorney by phone. Trifiletti Aff., ¶ 36; *see also* Trifiletti Aff., Ex. W (Transcript of Proceedings of January 18, 2011).

This court issued an order dated January 18, 2011. Trifiletti Aff., ¶ 36. The order stated:

...ORDERED that the plaintiff's summary judgment motion on its 2nd cause of action against defendant, W.H.S. KENNY DEPARTMENT STORES, Inc. for judgment awarding immediate possession of the collateral pledged by W.H.S. KENNY DEPARTMENT STORES, Inc. is GRANTED...

Trifiletti Aff., Ex. W ("1/18/11 Order"), p. 2.

Plaintiff submitted a proposed judgment with a settlement date of February 28, 2011. Reply Affirmation of Robert M. Tils in Further Support of Motion for Turnover of Collateral and Sanctions ("Tils Reply Affirm."), ¶ 15. The Office of the Clerk of New York County entered judgment on July 25, 2011. Notice of Entry (NYSCEF Document No. 37 filed on July 27, 2011).

Nonparty Olshan

Nonparty Olshan has represented Kenny and Deals 4 Less since July 2005. Fox Affirm., ¶ 1 (Michael S. Fox, a partner at Olshan, has "personally handled or supervised the firm's representation of Kenny and Deals 4 Less in various matters since [he] arrived at the firm in July, 2005."). By March 1, 2010, Fox, on behalf of Kenny and Deals 4 Less, entered into discussions with Plaintiff and Plaintiff's attorney to arrange an orderly liquidation of Kenny and Deals 4 Less. Fox Affirm., ¶ 3. Olshan and Fox represented the interests of

Kenny and Deals 4 Less in the negotiation and execution of subsequent financial documents resulting from those discussions, which included the Forbearance Agreement dated April 23, 2010. *Id.*

Accounting

Olshan issued an accounting to Signature of the escrow account on or about March 9, 2011. Trifiletti Aff., Ex. Y (“Accounting Doc.”). According to Olshan, the escrow account “was a separate account opened for the deposit of checks written to Kenny.” Fox Affirm, ¶ 8. The accounting shows that Defendants made twenty deposits and six withdrawals from July 29, 2010, through February 17, 2011. Accounting Doc., p. 2.

The accounting reflects that Olshan withdrew \$68,707.49 for its legal fees from July 29, 2010, through February 17, 2011. Olshan contends that each disbursement of funds from the escrow account was made “only on written authorization of Kenny’s President, Eric Biederman.” Fox Affirm., ¶ 9. Three days after Plaintiff filed its complaint, Defendants withdrew \$18,900 to pay Olshan for legal fees. *Id.* On October 21, 2010, Defendants withdrew an additional \$25,807.49 to pay Olshan. *Id.* A payment of \$12,000 was paid to Olshan on November 23, 2010. *Id.* On January 18, 2011, this court granted Plaintiff’s motion for summary judgment and approximately one month later, Defendants withdrew an additional \$12,000 to pay Olshan on February 17, 2011. *Id.*

The accounting also reflects a payment of \$131,724.15 made to Signature. On December 7, 2010, Defendant Biederman sent an email to Salvatore Trifiletti stating, “Sal - Just left you a voice mail, I am coming over to your office and dropping off a check for all funds that were held in escrow by Olshan.” Trifiletti Aff., Ex. U. On that same day, a check was issued to Plaintiff for \$131,724.15. Fox Affirm, ¶ 9.

Plaintiff's Motion for Turnover of Collateral and Sanctions

Plaintiff now moves for the turnover of \$68,707.49 from Defendants' law firm, Olshan. Plaintiff argues that Olshan should not have withdrawn any of the money held in escrow for Defendants to pay for legal fees, that Olshan misappropriated the funds and that such conduct amounted to conversion. Additionally, Plaintiff seeks sanctions against Olshan for allegedly violating New York Professional Conduct Rule 8.4. Plaintiff also seeks treble damages of \$206,122.47 for violation of Judiciary Law § 487.

STANDARD OF LAW

Under Article 71 of the CPLR, a party may seek the recovery of chattel. CPLR § 7101. In evaluating an Article 71 action, the court determines “which party has a superior possessory right to the collateral.” *HSBC Bank USA v. National Equity Corp.*, 279 A.D.2d 251, 253-4 (1st Dep't 2001); *see also Christie's Inc. v. Davis, et al.*, 247 F. Supp. 2d 414, 419 (S.D.N.Y. 2002) (citation omitted) (applying New York law and stating that under CPLR

§ 7101, the “sole issue is which party has the ‘superior possessor right’ to the chattels”). The First Department has held that “a secured party’s right to possession of collateral upon default may be asserted against a third party in possession, and that party in possession may not refuse the secured party’s request to turn over the collateral.” *SK Global America, Inc. v. John Roberts, Inc.*, 6 A.D. 3d 179, 180 (1st Dep’t 2004) citing *Bank of India v. Weg & Myers*, 257 A.D.2d 183, 191-2 (1999). In *SK Global*, the First Department also stated that “[a]t the very least, the party in possession should seek judicial direction before disposing of the disputed proceeds.” *Id.* The court advised that, “[o]nce the party in possession receives notice of an outstanding right of possession by a secured creditor, it becomes a stakeholder as to the disputed proceeds.” *Id.*

ANALYSIS

A. Nonparty Olshan is to turnover collateral proceeds to Plaintiff.

Plaintiff moves for the turnover of \$68,707.49 from Olshan. Plaintiff argues that Defendants’ law firm, Olshan, conspired with Defendants to hide collateral proceeds from Plaintiff by authorizing withdrawals from Defendants’ escrow account to pay Olshan’s attorney’s fees. Plaintiff’s Memorandum of Law in Support of its Motion Seeking Turnover Order and Sanctions against Olshan Grundman Frome Rosenzweig & Wolosky LLP (“Pl. Mem.”), pp. 2-3.

Plaintiff contends that Olshan was aware of “Signature’s perfected rights” on any proceeds arising from the liquidation of Defendants’ entities. Trifiletti Aff., ¶ 47. According to Plaintiff, these proceeds were to be deposited into restricted accounts with Plaintiff pursuant to the Forbearance Agreement. Trifiletti Aff., ¶ 25. Further, Plaintiff alleges that nonparty Olshan was aware of Plaintiff’s claim on these proceeds due to the filing of the underlying complaint on July 26, 2010. Pl. Mem., p. 2.

This court’s 1/18/11 Order awarded Plaintiff, among other things, possession of the collateral. Plaintiff contends that nonparty Olshan, as Defendant’s attorneys, had knowledge of Plaintiff’s claims on Defendants’ collateral proceeds and improperly withdrew payment of its attorneys’ fees from the escrow account. Pl. Mem., p. 5.

Plaintiff argues that the First Department in *Bank of India v. Weg and Myers, P.C.* found that a law firm’s use of collateral proceeds to pay its legal fees instead of turning over the entire proceeds to the secured lender amounted to conversion and violated that lender’s equitable lien. Pl. Mem., p. 5. Plaintiff suggests Olshan, as with the law firm in *Bank of India*, converted the collateral proceeds and subsequently violated Signature’s rights. *Id.*

In opposition, nonparty Olshan argues that Plaintiff’s motion should be barred procedurally. Memorandum of Nonparty Olshan Grundman Frome Rosenzweig & Wolosky LLP in Opposition to Plaintiff’s Motion Brought by Order [to] Show Cause Dated May 25,

2011 and Entered May 26, 2011 (“Olshan Mem.”), p. 1. Olshan argues that it is not a party to this case and that in order for Plaintiff to enforce a judgment, Plaintiff must first proceed under Article 52 of the CPLR. Olshan Mem., p. 6-7. Olshan contends that Plaintiff seeks the requested relief pursuant to CPLR § 5225(b), which permits a special proceeding to enter a judgment by ordering a garnishee to deliver the money or property which a judgment debtor has an interest in. *Id.* Olshan argues that there is a statutory requirement for the judgment creditor to file a special proceeding and Plaintiff is bypassing the clear tenets of CPLR § 5225. *Id.*

Additionally, Olshan argues that Plaintiff’s reliance on *Bank of India* is improper. Olshan Mem., p. 8. First, Olshan states that in *Bank of India*, the law firm was named as a defendant, whereas in this matter Olshan is a nonparty. *Id.* Second, Olshan points to the factual differences between *Bank of India* and this case. Olshan argues that in *Bank of India*, the law firm, although aware that the bank had a security interest in proceeds, paid itself for its legal fees and then paid the remaining balance to the borrower, instead of the bank. Olshan contends that it paid Signature “the vast majority of all funds received in its escrow account.” Olshan Mem., p. 9. Lastly, Olshan construes Plaintiff’s requested relief as an attempt to hold Olshan responsible for advice it gave Defendants as their attorneys. *Id.*

In its reply, Plaintiff argues that it seeks the turnover of funds based on its perfected security interest in collateral proceeds. Tils Reply Affirm., ¶¶ 16- 17. According to Plaintiff, CPLR Article 71 permits a creditor to obtain pre-judgment possession of its collateral against a third party in possession. *Id.* Plaintiff relies upon its status as a secured creditor who has perfected its interest, in accordance with Article 9 of the Uniform Commercial Code, to proceed with this turnover proceeding. *Id.*, ¶ 17.

This court finds that Plaintiff is permitted to proceed against a nonparty for the right to possession of its collateral pursuant to Article 71 of the CPLR. *SK Global America*, 6 A.D. 3d at 180. As stated in *SK Global*, “a secured party’s right to possession of collateral upon default may be asserted against a third party in possession, and that party in possession may not refuse the secured party’s request to turn over the collateral.” *Id.* Although judgment has now been entered in this case, Plaintiff moved for the turnover of collateral proceeds pursuant to Article 71 of the CPLR and prior to the entry of judgment. Plaintiff is not moving to collect on the debts of the parties. Instead, Plaintiff alleges that Defendants’ law firm, Olshan, improperly withdrew amounts from the collateral proceeds prejudgment. Thus, CPLR Article 52 is not applicable, and Article 71 applies.

To determine whether the collateral proceeds should be turned over to Signature, this court will review the procedural history of this case.

Plaintiff filed its complaint against Defendants on July 26, 2010. Plaintiff filed a motion for summary judgment and Olshan, as Defendants' representative, did not oppose that motion. Subsequently, this court issued its decision on January 18, 2011. The 1/18/11 Order indicated that the court called Defendants' counsel who stated that, "a) he knew about the Summary Judgment motion; and b) that he did not intend to oppose it as he had no defenses to the motion." 1/18/11 Order, p. 2. The court ordered "the immediate possession of the collateral" to Plaintiff. *Id.* Thus, there is no dispute that Plaintiff had rights to the collateral proceeds.

Although Olshan is not a party to this litigation, it acted as Defendants' legal representative throughout this case. Olshan thus, had actual knowledge of the parties' interests. Moreover, Olshan represented Kenny and Deals 4 Less in negotiations with Plaintiff since July 2005. Fox Affirm., ¶ 1. Olshan represented Defendants' interest in negotiations with Plaintiff and coordinated the execution of various financial documents, including the Forbearance Agreement. Fox Affirm., ¶ 3.

Based on this court's review of the accounting provided by Olshan, it appears that proceeds from the liquidation of Kenny's assets were periodically deposited in the escrow account. There is no dispute that the money held in escrow by Olshan reflects collateral

proceeds. However, the parties *do* dispute whether the proceeds had to be held in an account controlled by Plaintiff in accordance with the Forbearance Agreement or whether Defendants' law firm could store those proceeds in an escrow account. Regardless where the proceeds were to be held, Olshan was aware that Plaintiff claimed rights over these proceeds at least by the time the complaint was filed on July 26, 2010.

Three days after filing the complaint, Olshan withdrew amounts from the escrow account containing collateral proceeds to pay its legal fees. Accounting Doc., p. 2. Thus, while Olshan was aware of Plaintiff's claim over these proceeds, Olshan proceeded to withdraw funds from Defendants' escrow account. After Plaintiff filed this complaint, Olshan made three withdrawals for attorneys's fees for a total of \$56,707.49. This court issued its order on January 18, 2011, granting Signature "immediate possession of possession of the collateral." On February 17, 2011, Olshan withdrew an additional \$12,000 from the escrow account to pay for its legal fees.

The First Department, in *SK Global*, acknowledged that a third party in possession of disputed funds should, at the very least, seek judicial direction prior to disposing disputed funds. *SK Global America*, 6 A.D. 3d at 180. Olshan, knowing that Plaintiff had asserted claims over Defendants' collateral, and the collateral was therefore in dispute, should not have withdrawn funds for its own use without seeking judicial direction.¹ Defendants should

¹ This court does not dispute that Olshan may be owed fees for its legal services; however, payment for those fees should not have been withdrawn from the contested proceeds in the escrow account.

not have authorized its law firm as the rights to the collateral were in dispute upon filing of the complaint. This court's 1/18/11 Order "awarding immediate possession of the collateral pledged by W.H.S. Kenny Department Stores, Inc." to Plaintiff determined that Plaintiff has rights to Kenny's collateral. For these reasons, Olshan's actions on the collateral were improper and the court orders Olshan to turnover \$68,707.49 in collateral proceeds to Plaintiff.

B. The court declines to determine whether nonparty Olshan's conduct violates NY Rule of Professional Conduct 8.4.

Under New York Rule of Professional Conduct 8.4, "A lawyer or law firm shall not: engage in conduct involving dishonesty, fraud, deceit or misrepresentation."

Plaintiff argues that Olshan's conduct violates New York Rule of Professional Conduct 8.4 and that the conduct warrants sanctions to be imposed by the court. Pl. Mem., pp. 4-7. Plaintiff states it had a superior right of possession in the collateral, Olshan was aware of Plaintiff's claim and that Olshan's conduct of withdrawing funds from the escrow account amounted to conversion. Pl. Mem., pp. 4-5. Further, Plaintiff argues that Olshan conspired to hide the collateral proceeds in Olshan's escrow account and to use a portion of it to pay its own fees, Pl. Mem., p. 6-7. For support, Plaintiff argues that Olshan had actual knowledge of Signature's perfected security interest, pointing to correspondence sent by Plaintiff's counsel to Olshan making repeated demands for an accounting of the escrow

account. Trifeletti Aff., ¶¶ 25-29. Plaintiff also alleges that Olshan was aware of this court's 1/18/11 Order awarding Plaintiff possession of the collateral. *Id.* Further, Plaintiff contends that Olshan's conduct violates Rule 8.4 because courts have suspended attorneys under similar circumstances of mishandling funds in an escrow account and characterized such conduct as dishonest, fraudulent, or deceitful. Pl. Mem., pp. 6-7.

In opposition, Olshan argues that Plaintiff's request for a monetary sanction is procedurally improper. Olshan Mem., p. 10. Olshan argues that the cases cited by Plaintiff are inapplicable. According to Olshan, those cases involve matters in which formal disciplinary proceedings had already been asserted against an attorney, whereas, in this matter, no disciplinary charges against Olshan have yet been filed. *Id.* Olshan argues that Plaintiff only seeks sanctions based on an alleged violation of a rule of professional conduct against a nonparty. *Id.* Olshan also argues that Plaintiff's claim fails on its merits because Plaintiff cannot point to any instance of "dishonesty, fraud, deceit, or misrepresentations" by Olshan. Olshan Mem., p. 10. Olshan contends that Plaintiff only points to email correspondence from defendant Biederman indicating he would deliver a check. Olshan Mem., pp. 10-11. Thus, Olshan argues that Plaintiff is attempting to hold Olshan accountable for a statement by Biederman. *Id.*

However, there is no private right of action for a violation of the rules of professional conduct. *Arkin Kaplan LLP v. Jones*, 42 A.D.3d 362, 366 (1st Dep't 2007) (stating that "even if a violation of the Code of Professional Responsibility had occurred, that, in itself, would not create a private right of action.").

Additionally, Olshan is not a party to this lawsuit. Signature has not stated with specificity what Olshan attorneys did or did not do that would amount to “conduct involving dishonesty, fraud, deceit or misrepresentation.” See N.Y. Rule of Professional Conduct 8.4. Signature has not set forth any basis for holding a law firm accountable for the alleged improper actions of its attorneys.

For these reasons, this court finds that Plaintiff’s request for sanctions against Olshan for a violation of New York Rule of Professional Conduct is denied.

C. *The Court declines to decide whether monparty Olshan’s conduct violates Judiciary Section § 487.*

Under New York Judiciary Law § 487, an attorney who is “guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party...forfeits to the party injured treble damages, to be recovered in a civil action.” Judiciary Law § 487. The “alleged deceit forming the basis of such a cause of action, if it is not directed at a court, must occur during the course of a ‘pending judicial proceeding.’” *Costalas v. Amalfitano*, 305 A.D.2d 202, 203-204 (1st Dep’t 2003) (applying Judiciary Law § 487). The First Department has also indicated that the attorney must have engaged in “chronic, extreme, pattern of legal delinquency” to find a violation. *Schindler v. Issler & Schrage, P.C.*, 262 A.D.2d 226, 228 (1st Dep’t 1999).

Plaintiff argues that Olshan’s alleged misconduct in handling Defendants’ proceeds amounts to a violation of Judiciary Law § 487. Pl. Mem., p. 7. Plaintiff contends that

Olshan stored the proceeds of Defendants' collateral in an escrow account and, subsequently, improperly diverted portions of those proceeds to pay for its own attorneys' fees. *Id.* Plaintiff argues that such conduct is so improper that treble damages are warranted. *Id.*

In opposition, Olshan argues that Plaintiff cannot seek damages under Judiciary Law § 487 without bringing a civil action against Olshan. Olshan Mem., p. 12. Olshan argues that for its alleged conduct to fall under Judiciary Law § 487, it must occur in the course of pending judicial proceedings and Plaintiff has not filed a civil action against Olshan. Olshan Mem., p. 13.

Olshan also contends that Plaintiff's argument fails on its merits. Olshan argues that Plaintiff has not shown that Olshan had intended to deceive it, and Signature has not shown how it has been damaged. Olshan argues that Signature has not set forth any allegations from which damages were proximately caused by the failure to disclose the existence of the escrow account. Olshan Mem., pp. 14-15.

In reply, Signature argues that § 487 is silent on whether the improper conduct refers to the civil action in which the alleged conduct takes place or a separate civil action. Plaintiff's Reply Memorandum of Law in Further Support of its Motion Seeking a Turnover Order and Sanctions ("Reply Mem."), p. 4. Additionally, Signature contends that courts have the "inherent authority to do whatever is necessary to ensure the integrity of the proceedings before it." *Id.*

Plaintiff's motion for treble damages pursuant to a violation of Judiciary Law § 487 is denied. In *Bankers Trust Co. v. Cerrato, Sweeney, Cohn, Stahl & Vaccaro, et al.*, the First Department upheld a lower court's dismissal of a claim against a law firm for treble damages under Judiciary Law § 487. *Bankers Trust Co. v. Cerrato, Sweeney, Cohn, Stahl, & Vaccaro*, 187 A.D.2d 384, 385 (1st Dep't 1992). Plaintiff had alleged the law firm's "participation in the concealment, misappropriation and diversion of money assigned to it by letter agreement and assignment of the proceeds of a lawsuit." *Id.* The First Department based its decision on the fact that "the alleged deceit did not occur during a pending judicial proceeding in which plaintiff was a party." *Id.* at 386. In this matter, Olshan is not a party to the action in which Plaintiff moves.

Further, there are issues of fact in dispute that cannot summarily be decided. A violation of Judiciary Law § 487 requires a "chronic, extreme, pattern of legal delinquency." *Schindler v. Issler & Schrage, P.C.*, 262 A.D.2d at 228. Here, no formal claims have yet been asserted against Olshan, and, thus, Plaintiff has not alleged chronic or extreme examples of legal delinquency. This court cannot evaluate whether any of Olshan's alleged conduct amounts to a violation of Judiciary Law § 487.

For all of these reasons, Plaintiff's motion for treble damages for a violation of Judiciary Law § 487 is denied without prejudice.

The court has reviewed the parties' other arguments and find them without merit.

ORDER

Accordingly, it is hereby:

ADJUDGED that the Plaintiff's motion for turnover of collateral proceeds is granted, and it is further

ORDERED and ADJUDGED that Olshan Grundman Frome Rosenzweig & Wolosky LLP is directed, upon receipt of a certified copy of this order and judgment, to turn over to the plaintiff, Signature Bank, funds in the amount of \$68,707.49;

ORDERED that Plaintiff's motion for sanctions pursuant to New York Rule of Professional Conduct 8.4 is denied;

ORDERED that Plaintiff's motion for treble damages pursuant to Judiciary Law § 487 is denied.

Dated: New York, New York
October 3, 2011

ENTER:



Hon. Eileen Bransten, J.S.C.