

**Appel-Hole v Wyeth-Ayerst Labs.**

2012 NY Slip Op 33340(U)

July 9, 2012

Sup Ct, NY County

Docket Number: 105122/09

Judge: Charles E. Ramos

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SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

RAMOS

PART S3

P Index Number : 105122/2009

- APPEL-HOLE, CLARA

vs.

WYETH-AYERST LABORATORIES

SEQUENCE NUMBER : 005

- DISMISS

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INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

offer \_\_\_\_\_

\_\_\_\_\_ No(s) \_\_\_\_\_

\_\_\_\_\_ No(s) \_\_\_\_\_

\_\_\_\_\_ No(s) \_\_\_\_\_

Answering Affidavits \_\_\_\_\_

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

Upon the foregoing papers, it is ordered that this motion is

Motion is decided in accordance with  
accompanying Memorandum Decision.

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

Dated: 7/26/12

  
\_\_\_\_\_, J.S.C.

**CHARLES E. RAMOS**

1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION  
-----X

CLARA APPEL-HOLE and ALAN HOLE,

Plaintiffs,

-against-

Index No.  
105122/09

WYETH-AYERST LABORATORIES, A DIVISION  
OF AMERICAN HOME PRODUCTIONS CORP.,  
AMERICAN HOME PRODUCTS CORP., WYETH  
LABS, INC., and INTERNEURON PHARMACEUTICALS,  
INC.,

Defendants.

PARKER & WAICHMAN, LLP et al.,  
-----X

Parker & Waichman, LLP et al.,

Intervenor Plaintiffs,

-against-

PAUL J. NAPOLI, GERALD KAISER, MARC J.  
BERN, MARIE KAISER NAPOLI, NAPOLI, KAISER  
& ASSOCIATES LLP, NAPOLI, KAISER, BERN LLP,  
NAPOLI, KAISER, BERN & ASSOCIATES LLP, LAW  
OFFICES OF MARC JAY BERN, P.C., and NAPOLI,  
KAISER & BERN, P.C.,

Intervenor Defendants.  
-----X

**Charles Edward Ramos, J.S.C.:**

In motion sequence 004, defendants Paul J. Napoli, Gerald  
Kaiser, Marc J. Bern, Napoli, Kaiser & Associates LLC, Napoli,  
Kaiser, Bern LLP, Napoli, Kaiser, Bern & Associates LLP, Law  
Offices of Marc Jay Bern, P.C., and Napoli, Kaiser & Bern, P.C.  
(together, the NKB Defendants) move to dismiss in part the second

amended intervenor complaint and to stay the claims of deceased intervenor plaintiffs.

In motion sequence 005, defendant Marie Kaiser Napoli (MK) moves to dismiss the claims in the second amended intervenor complaint as against her, pursuant to CPLR 3211 (a) (1), (5), and (7).

### **Background**

For a full recitation of the factual background in this action, see this Court's decision in the *Matter of New York Diet Drug Litig.*, 15 Misc 3d 1114(A) (Sup. Ct., NY County 2007).

This action arose out of the settlement of mass tort litigation known as *New York Diet Drug Litigation*. In the original action (Original Action),<sup>1</sup> plaintiffs asserted claims of personal injury due to the ingestion of "fen-phen" diet drugs.

In November 2001, the Original Action was settled, and the settlement approved by a predecessor court. At or around this time, the concern was raised that the settlement and disbursements obtained had been manipulated and misallocated by settling counsel, defendants herein, Napoli Bern & Kaiser, LLP (NKB), to clients other than those referred to by Parker & Waichman, LLP (P&W). At the time that P&W referred clients, NKB agreed to represent them and to share attorneys' fees with P&W.

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<sup>1</sup> The original action bears the index number 700000/98.

Shortly after approval of the settlement, P&W commenced an action against NKB alleging misrepresentations in connection with that settlement, entitled *P&W v Napoli*, and bearing the index number 605388/01 (P&W Action). This Court largely dismissed the action on the ground that P&W lacked standing to assert claims of breach of contract between the referred clients and NKB, and because it constituted a collateral attack on the settlement, which was affirmed (*Parker & Waichman*, 29 AD3d 396 [1<sup>st</sup> Dept 2006]). A claim for an accounting remains in the pending P&W Action.

In 2003, P&W and 389 of its referred clients commenced another, closely related action entitled *Abramova v Napoli*, and bearing the index number 601332/03 (Abramova Action). This action is stayed while most of the referred clients pursue their claims in this action (the Appel-hole Action).

In 2006, P&W and proposed intervenor plaintiffs sought the Court's permission to commence this action against NKB and its three named partners, Paul Napoli, Gerald Kaiser, and Marc Bern, in order to assert claims for fraud and violation of Judiciary Law § 487. The Court granted the motion to intervene, which was subsequently affirmed (*New York Diet Drug Litig.*, 47 AD3d 586 [1<sup>st</sup> Dept 2008]) (Intervenor Action). The intervenor plaintiffs are individual clients and representatives of deceased clients formerly represented by NKB and previously referred by P&W.

P&W alleges that NKB committed fraud to deprive it of its contractual share of attorneys' fees, by deliberately allocating more settlement funds to its own direct clients than to comparable referred cases in order to minimize fee-splitting with P&W, and assessed bogus disbursements and expenses to the referred clients, which decreased the net settlement amount used to calculate P&W's fees.

In April 2009, the intervenor plaintiffs served an initial complaint. NKB moved to dismiss the complaint, which was granted by this Court. The intervenor plaintiffs were permitted to file an amended complaint remedying the defects in the initial complaint (Exhibit C, annexed to the Stone Aff.).

In May 2010, the intervenor plaintiffs filed an amended complaint. NKB again moved to dismiss, which was subsequently withdrawn without prejudice to re-file after the intervenor plaintiffs filed the second amended complaint.

In December 2010, intervenor plaintiffs filed the second amended complaint (Complaint) naming Marie Kaiser Napoli (MK), as an additional defendant. MK is an attorney, a member of NKB, and the wife of defendant Paul Napoli.

On February 29, 2012, this Court held oral arguments on defendants' motions to dismiss. For the reasons set forth in the transcript, the Court granted the NKB Defendants' motion (sequence 004), permitted the intervenor plaintiffs to remedy the

deficiencies in pleading, and reserved decision on MK's motion (sequence 005) (2/29/12 Tr:24-25).

#### **Discussion**

MK moves to dismiss the claims against her on the ground that she never worked on the *Diet Drug Litigation* and had no part in the 2001 court-approved settlement. As set forth in her affidavit, she is retired from the practice of law since February of 2000, prior to the alleged misconduct at issue. Further, although she had not formally withdraw from the partnership at the time that the facts at issue in this action occurred, she asserts that, under New York Limited Liability Company Law (LLCL) § 609 (a), an innocent partner of a limited liability partnership is not liable for the tortious acts of other partners. NKB represents that it is a registered limited partnership.

With respect to an unregistered general partnership, all partners are jointly and severally liable for the wrongful acts of the partnership or of a partner (NY Partnership Law §§ 24-25), and are liable jointly but not severally liable for all other debts and obligations of the partnership (Partnership Law § 26 [a] [2]).

In contrast, upon registration, the partners of an LLP are not personally liable for the debts, obligations or liabilities incurred by the limited partnership whether arising in tort or contract (Partnership Law § 26 [b], [c], [d]; Partnership Law §

121-1500). In this regard, an LLP acquires certain limited liability characteristics upon registration with the Secretary of State (see LLCL § 609 [a]).

Here, the Complaint merely alleges that MK was a partner of the NKB, an LLP, at or around the time that the alleged misconduct occurred. The Complaint does not allege that she personally engaged in any wrongdoing. Under New York law, there is no basis upon which to maintain a fraud claim against MK personally solely as a consequence of her membership in NKB, a registered limited liability partnership, that is itself a defendant in this action.<sup>2</sup> Therefore, the fraud claim must be dismissed as against MK.

Accordingly, it is hereby

ORDERED that motion sequence 004 is granted; and it is further

ORDERED that motion sequence 005 is granted, and the complaint is dismissed in its entirety as against Marie Kaiser, and the Clerk is directed to enter judgment accordingly in her favor; and it is further

ORDERED that the action is severed and continued against the

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<sup>2</sup> Notwithstanding the limitation of liability on a partner in a registered LLP, a partner of an LLP is personally and fully liable and accountable for any negligent or wrongful act or misconduct committed by him or her or by any person under his or her direct supervision and control while rendering professional services on behalf of the LLP (NY Partnership Law § 26 [c] [i]).


remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry and the Clerk of the Trial Support Office (Room 158), who are directed to mark the court's records to reflect the change in the caption herein.

The parties are directed to schedule a status conference by contacting the Part Clerk.

Date: July 9, 2012

ENTER:  


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J.S.C.

**CHARLES E. RAMOS**