

**Gottlieb v Northriver Trading Co. LLC**

2013 NY Slip Op 31641(U)

February 28, 2013

Supreme Court, New York County

Docket Number: 601546/2004

Judge: Cynthia S. Kern

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SCANNED ON 3/4/2013  
[\* 1]  
**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT:** \_\_\_\_\_  
Justice

**PART** \_\_\_\_\_

Index Number : 601546/2004  
GOTTLIEB, HELENE  
VS.  
NORTHRIVER TRADING  
SEQUENCE NUMBER : 015  
STRIKE ANSWER

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_

Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_

Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_

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

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MAR 04 2013

COUNTY CLERKS OFFICE  
NEW YORK

is decided in accordance with the annexed decision.

RECEIVED

MAR 01 2013

CLERK OF THE COURT  
SUPREME COURT  
NEW YORK COUNTY

Dated: 2/28/13

OK, J.S.C.

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

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: Part 55

-----X  
HELENE GOTTLIEB

Plaintiff,

Index No.601546/2004

-against-

DECISION/ORDER

NORTHRIVER TRADING COMPANY LLC,  
STEVEN SCHLAM, ARIEL WOLFSON, ET AL,

Defendants.  
-----X

**FILED**

MAR 04 2013

HON. CYNTHIA S. KERN, J.S.C.

**COUNTY CLERK'S OFFICE  
NEW YORK**

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for : \_\_\_\_\_

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Answering Affidavits.....	_____
Cross-Motion and Affidavits Annexed.....	2
Answering Affidavits to Cross-Motion.....	3
Replying Affidavits.....	4
Exhibits.....	_____

Plaintiff has brought the present motion to compel discovery and defendants have brought a cross motion to dismiss the complaint against all of the individual defendants except for Steven Schlam. The discovery motion was resolved at oral argument before this court. For the reasons stated below, the cross motion to dismiss is denied.

Defendants have brought the present cross motion to dismiss the complaint against the individual defendants other than Schlam on the ground that there is no cause of action stated as against these individual defendants in the amended complaint which only states one cause of

action against the defendant Northriver Trading Company LLC for an accounting. The defendants previously made a motion for summary judgment to dismiss this same amended complaint against all defendants on the ground that there was no right to an accounting against a limited liability company. Although the trial court initially agreed with their argument, the First Department subsequently reversed the lower court, finding that it was inappropriate to grant summary judgment dismissing the amended complaint. At the time it made the prior motion for summary judgment in 2007, the defendants did not argue that the amended complaint should be dismissed as against the individual defendants on the ground that there was no basis for any individual liability even though this argument was available to them at that time.

Defendants' motion to dismiss the amended complaint against the individual defendants other than Steven Schlam is denied on the ground that defendants failed to raise any of these arguments in support of their prior motion for summary judgment to dismiss the amended complaint. The First Department has clearly held that "parties will not be permitted to make successive fragmentary attacks upon a cause of action but must assert all available grounds when moving for summary judgment." *Levitz v Robbins Music Corp.*, 17 A.D.2d 801 (1st Dept 1962). *See also Phoenix Four, Inc. v Albertini*, 245 A.D.2d 166 (1st Dept 1997); *Jones v 636 Holding corp.*, 73 A.D.3d 409 (1st Dept 2010)("Successive motions for summary judgment should not be entertained without a showing of newly discovered evidence or other sufficient justification"). As a result, there can be no reservation of any issue to be used upon a subsequent motion for summary judgment. *Levitz*, 17 A.D.2d at 801. "A court, upon a motion for summary judgment, must examine all of the facts presented by the affidavits, pleadings and documents and decide whether a triable issue is raised. Once having done so, a court may not on a subsequent motion

consider matter which a party has withheld or failed to urge as a ground for granting summary judgment theretofore denied. The denial of the original motion for summary judgment established the law of the case and required the denial of the subsequent motion..." *Id.* In the present case, it is undisputed that defendants previously made a motion for summary judgment to dismiss the complaint on the ground that there is no common law right to an accounting against a limited liability company. That decision is now the law of the case and defendants are prohibited from making a subsequent motion to dismiss the amended complaint against various defendants on the ground that there is no liability as against these defendants. There is no reason why the arguments being made on this motion could not have been made in 2007 when defendants initially made their motion for summary judgment to dismiss the amended complaint.

Based on the foregoing, the cross motion to dismiss the amended complaint is denied.

This constitutes the decision and order of the court.

Dated: 2/28/13

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

**FILED**

MAR 04 2013

COUNTY CLERKS OFFICE  
 NEW YORK