

Rhobar, Inc. v NBT Bank
2013 NY Slip Op 33220(U)
December 17, 2013
Sup Ct, NY County
Docket Number: 654438/201/2
Judge: Eileen A. Rakower
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

HON. EILEEN A. RAKOWER

PRESENT: _____

Justice

PART 15

Index Number : 654438/2012
RHOBAR
vs.
NBT BANK
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

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).** 1, 2

Answering Affidavits — Exhibits _____ **No(s).** 3

Replying Affidavits _____ **No(s).** 4

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

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

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

Dated: 12/17/13


_____, J.S.C.
HON. EILEEN A. RAKOWER

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 15

-----X
RHOBAR, INC. and RHONA SILVER,

Index No.
654438/2012

Plaintiff,

- against -

**DECISION
and ORDER**

NBT BANK,

Mot. Seq. 01

Defendant.

-----X
HON. EILEEN A. RAKOWER

In this action, plaintiffs Rhobar, Inc., and Rhona Silver ("Silver") (collectively, "Plaintiffs") seek damages against defendant NBT Bank ("NBT") for accepting a check on or about June 28, 2007 from Capmark Finance for \$520,282.52 made out to Rhobar, Inc. ("the Check"), which was endorsed by Barry Newman and made payable to Rhobar Development Associates, LLC ("Rhobar Development"), and then deposited in the NBT account of Rhobar Development from which it was cashed. The Complaint alleges that accepting the check for deposit constituted breach of contract, negligence, and breach of fiduciary duty on the part of NBT to Rhobar, and Silver, the president of Plaintiff.

Defendant NBT now moves for an Order pursuant to CPLR §3212 on the grounds that the NBT became a holder in due course of the Check and therefore took it free of any claims. Defendant NBT submits the attorney affirmation of Amy Shapiro, which annexes the pleadings, Check, Silver's affidavit submitted in connection with the related pending matter *Silver v. Newman* in Suffolk County. NBT also moves for summary judgment on the basis that Plaintiffs' claims for negligence and breach of fiduciary duty are barred by the statute of limitations and Silver has no standing to bring this action.

Plaintiffs oppose because no discovery has been conducted to date. On January 18, 2013, Plaintiffs served on NBT a Notice for Discovery & Inspection and a Notice to take the deposition of Jeffrey Lake, President of NBT. Among

other items demanded, Plaintiffs sought NBT's policies concerning deposit and endorsement of checks during the relevant time, copies of signature cards for Barry Newman, Rhobar Development, Rhobar, Inc., and Silver as maintained by NBT, applications/forms to open bank accounts, account holders/individuals with access to Rhobar Development bank accounts at NBT and Rhobar, the name of the teller who deposited the check, and any video or photos of the subject transaction. These documents concern internal bank documents that would ascertain if Barry Newman had actual authority to endorse the check in question and who from Rhobar, Inc., had the authority to endorse a presented check.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557, 559 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. (*Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255, 259 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*, 145 A.D.2d 249, 251-52 [1st Dept. 1989]).

CPLR §3212(f) provides that, “[s]hould it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just.”

NBT has failed to make a prima facie showing of entitlement to summary judgment on plaintiff Rhobar, Inc.'s breach of contract claim and plaintiff Rhobar, Inc. is entitled to discovery with respect to its claim.

NBT has made a prima facie showing of entitlement to judgment as a matter of law on Plaintiffs' negligence and breach of fiduciary claims as the applicable statute of limitations has run. Plaintiffs' opposition does not address this portion of NBT's motion. Causes of action for negligence and breach of fiduciary are subject to a three year statute of limitations. CPLR 214(4). Plaintiffs' claim arose on or before June 28, 2007, when the Check was presented to NBT; however, this

action was not commenced until December 18, 2012 and therefore, those claims are untimely as a matter of law.

NBT has also made a prima facie showing of entitlement to judgment as a matter of law with respect to the claims asserted by Silver. Plaintiffs' opposition does not address this portion of NBT's motion. Silver brings this action as the "sole owner" of the corporation. "Generally corporations have an existence separate and distinct from that of their shareholders and an individual shareholder cannot secure a personal recovery for an alleged wrong done to a corporation. The fact that an individual closely affiliated with a corporation (for example a principal shareholder, or even a sole shareholder), is incidentally injured by an injury to the corporation does not confer on the injured individual standing to sue on the basis of either that indirect injury or the direct injury to the corporation." *New Castle Siding Co., Inc. v. Wolfson*, 97 A.D. 2d 501, 502 [2d Dept 1983], *aff'd* 63 N.Y.2d 782 [1984]. However, "a shareholder can pursue a direct claim against a third party where 'it appears that the injury to the shareholder resulted from the violation of a duty owing to the shareholder from the wrongdoer, having its origin in circumstances independent of and extrinsic to the corporate entity.'" *MatlinPatterson ATA Holdings LLC v Federal Express Corp.*, 87 A.D.3d 836, 839 [1st Dep't 2011]. Here, Silver has failed to establish standing to sue personally for the alleged injury to plaintiff Rhobar, Inc. as Silver does not provide any evidence to support any duty arising to Silver independent and extrinsic to Rhobar, the corporate entity

Wherefore it is hereby

ORDERED that defendant NBT Bank's motion for summary judgment is granted only to the extent that Rhobar, Inc's negligence and breach of fiduciary claims are dismissed and all claims asserted by plaintiff Rhona Silver are dismissed; and it is further

ORDERED that plaintiff Rhobar, Inc.'s breach of contract claim against defendant NBT Bank is severed and shall proceed.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: DECEMBER 17, 2013

A handwritten signature in black ink, appearing to be 'ER', written over a horizontal line.

EILEEN A. RAKOWER, J.S.C.