SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

----------x

SCHAIN LEIFER GURALNICK,

Index No.: 101414-2011

Plaintiff,

- against -

Motion Seq. 002

BENJAMIN GREENBAUM,

Defendant.

----------x

HON. CAROL R. EDMEAD, J.S.C.

MEMORANDUM DECISION

In this action for, *inter alia*, defamation, plaintiff Schain Leifer Guralnick ("plaintiff") moves for summary judgment on its third cause of action and for a declaration that defendant is not and never has been an equity partner of plaintiff's firm and to dismiss defendant's counterclaims.

Factual Background

Plaintiff alleges that defendant became its employee in 1988, and seven years later, in 1995, gave him the title of "income" or "contract" partner. Defendant did not originate any new business and his compensation was based on an amount determined by the Senior Partner, Howard Schain ("Schain"). Defendant made no capital contributions or loans to plaintiff, or shared in any losses or liabilities of plaintiff. His compensation bore no relation to the profits or losses of plaintiff. Defendant never prepared plaintiff's annual budgets, had no authority to negotiate contracts, sign checks, or perform management duties, including hiring or firing employees, on plaintiff's behalf. All of the business clients for whom defendant performed services consisted of business clients cultivated and developed by plaintiff, at considerable expense to plaintiff, and introduced to defendant with whom such aforesaid business clients

("Plaintiff Originated Business Clients") had no previous relationship.

On or about August 18, 2010, plaintiff notified defendant that his services for plaintiff would no longer be required ("Notice of Termination") as of a date, at that time unspecified, in the future. The purpose of providing an unspecified termination date was to afford defendant the opportunity to find another job while he was still working at plaintiff so as to improve his prospects of obtaining new employment.

Plaintiff claims that while working at plaintiff, defendant and/or his representatives published false statements that plaintiff is "breaking up" and that its clients are leaving the firm as a result. Thus, in its first and second causes of action, plaintiff seeks compensatory and punitive damages against defendant for defamation and trade libel. Plaintiff also demands compensatory and punitive damages against defendant for breach of fiduciary duty, in that defendant, while still working at plaintiff and receiving compensation, actively solicited clients to leave plaintiff and join defendant at his new accounting firm and copied plaintiff's files for use at his new accounting firm.

Plaintiff also alleges that on November 29, 2010, defendant, through his counsel, claimed that he was a "partner" of plaintiff and was entitled to remedies against plaintiff, including an accounting and dissolution. Plaintiff asserts that defendant was never an equity partner of plaintiff and, as such, is not entitled to seek an accounting or dissolution of plaintiff. There is an actual case in controversy between plaintiff and defendant concerning defendant's status and whether he was an equity partner. While plaintiff was entitled to terminate defendant, whose behavior alienated co-workers and clients, defendant insists that plaintiff was either required to continue employing him or dissolve the firm and pay him a percentage of its assets after a

winding-down period even though defendant was a mere employee. Thus, in its third cause of action, plaintiff seeks a judgment declaring that defendant is not, and never was, an equity partner of plaintiff.

Defendant counterclaims that his termination was wrongful, that "Plaintiffs breached their fiduciary duties" to him, failed to account to defendant for the income and expenses of the partnership, and for conversion, thereby entitling him to *inter alia*, damages in the form of loss of his equity share in the firm, loss of back pay, and other employment benefits, a dissolution of the plaintiff, and an accounting.

In support of summary judgment on the third cause of action, plaintiff submits, in addition to the pleadings, an affidavit by Schain, wherein he reiterates the allegations in the complaint, and states that when defendant became a "contract" or "income" partner in 1988, he retained his status as a "mere accountant." The new title did not make defendant a business owner or equity partner in any respect, or give him any ownership interest in plaintiff; instead, ownership interests are limited to "equity" partners such as Schain. Plaintiff also submits defendant's income tax returns to show that defendant had no ownership interest in plaintiff, and that he had no share of plaintiff's losses and capital. Based on the tax returns and the above, plaintiff is entitled to the declaration it seeks.

In opposition, defendant contends that the motion is premature, as critical outstanding discovery is owed by plaintiff and necessary to determine liability. Plaintiff required that defendant sign a confidentiality stipulation prior to providing certain discovery, which is unwarranted. Plaintiff also failed to provide all contracts defendant signed on behalf of plaintiff, settlement letters, litigation documents, lease contract for plaintiff's printers and printer ink

usage, any of plaintiff's partnership returns or tax returns of the individual partners, and a copy of the application/contract for life insurance on Schain's life. Further, court-ordered depositions were not held, and Schain's self-serving affidavit is insufficient.

Defendant contends that he was hired by Richard Guralnick as "senior accountant" of Bernam Schaffet and Schain ("BSS"), and was promoted two years later in 1990 to "senior supervisor." Prior to July 1995, the General Partners of plaintiff, formerly known as BSS, included Schain and Barry Leifer.

Defendant was promoted to "partner" of plaintiff, a fact reported in Crain's and on plaintiff's website, even though no partnership agreement was ever executed. Schain informed defendant that he was a "sweat equity partner." Defendant cites to a letter dated March 15, 2012 which provided for his Schedule K-1 for the tax year ending June 30, 2011.

Prior to becoming an "equity" partner, defendant was a salaried employee and received a W-2 accordingly. However, when he became an equity partner, he obtained an ownership interest in plaintiff, which is borne out of the partnership tax returns, Form 1065, Schedule K-1, book, and records reflecting the Partner's share of income, credits, and deductions.

Defendant became responsible for cultivating client base, providing primary accounting and financial planning services for clients, consult clients regarding financial goals, tax matters, and estate/wealth transfer planning, interface with outside professionals concerning such matters, and supervising and evaluating plaintiff's staff accountants. Defendant insists that he originated, cultivated, and developed business clients, individual clients, and fiduciary clients on plaintiff's behalf, made capital contributions as shown on his K-1 statements, and there were no losses of plaintiff to report. Defendant entered into various contracts on behalf of plaintiff, such as for

printers, ink usage, application and contract for Schain's life, and litigation releases. He approved monthly operating reports prepared by one of plaintiff's larger client, and all invoices related to this client, and appeared as a representative of plaintiff in court in relation to this client. As an equity partner, he was completely exposed to all liabilities. Defendant and the other partners were also jointly and severally liable on claims/litigation brought against the firm. Further, a certain Term Sheet was signed by the partners, including defendant in their capacities as equity partners.

In reply, plaintiff argues that the K-1s annexed to defendant's papers conclusively establish that he has no ownership interest in plaintiff at all. Each K-1 establishes that defendant has never had an equity interest in plaintiff. The other documents defendant submitted are irrelevant and inadmissible, do not mention defendant as an "equity" partner, and violative of the exclusionary rule in CPLR 4547, such as the drafts prepared "For Settlement Negotiations Only." or unsigned proposed drafts of settlement agreements with third parties.

In any event, the terms of such documents would have imposed 100% liability upon Schain, with no prospective risk of loss upon defendant, which is consistent with the information on the K-1s. All of the tax schedules have always shown his 0% share of the firm's profits and losses, and capital, which schedules were incorporated into defendant's own personal tax returns. No agreement to share in profits and losses is even alleged.

Further, discovery is complete, and defendant failed to explain which discovery is needed to establish his alleged "equity" partnership. The discovery previously demanded by defendant is irrelevant, intended to harass plaintiff and coerce a settlement, and is otherwise an improper attempt to circumvent the accounting to which defendant claims he is entitled. Plaintiff provided

all relevant discovery demanded by defendant, and if defendant had an objection to plaintiff's production, defendant should have moved to compel. More than a year has passed and defendant has not moved or demanded further responses as directed by the compliance conference order of September 17, 2013.

Discussion

As the proponent of the motion for summary judgment, plaintiff must establish its cause of action or defense sufficiently to warrant the court directing judgment in its favor as a matter of law in (CPLR §3212 [b]; *VisionChina Media Inc. v Shareholder Representative Services, LLC*, 109 AD3d 49, 967 NYS2d 338 [1st Dept 2013]; *Ryan v Trustees of Columbia University in City of New York, Inc.*, 96 AD3d 551, 947 NYS2d 85 [1st Dept 2012]). This standard requires that the proponent of a motion for summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*People ex rel. Cuomo v Greenberg*, 95 AD3d 474, 946 NYS2d 1 [1st Dept 2012]; *Madeline D'Anthony Enterprises, Inc. v Sokolowsky*, 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012], *citing Alvarez v Prospect Hosp.*, 68 NY2d 320, 324, 508 NYS2d 923, 501 NE2d 572 [1986] and *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Thus, the motion must be supported "by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions" (CPLR § 3212 [b]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any material issue of fact (CPLR §3212[b]). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the

burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action (*Wing Wong Realty Corp. v. Flintlock Const. Services, LLC*, 95 AD3d 709, 945 NYS2d 62 [1st Dept 2012] *citing Alvarez v Prospect Hosp.*, 68 NY2d 320, 501 NE2d 572 [1986]; *Ostrov v Rozbruch*, 91 AD3d 147, 936 NYS2d 31 [1st Dept 2012]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman* at 562; *IDX Capital, LLC v Phoenix Partners Group*, 83 AD3d 569, 922 NYS2d 304 [1st Dept 2011]).

The defendant "must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist" *(Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772 [1st Dept 1983], *affd* 62 NY2d 686 [1984]; *see Machado v Henry*, 96 AD3d 437, 945 NYS2d 552 [1st Dept 2012]; *Garber v Stevens*, 94 AD3d 426, 941 NYS2d 127 [1st Dept 2012], *citing Pippo v City of New York*, 43 AD3d 303, 304, 842 NYS2d 367 [1st Dept 2007] ["(a) party's affidavit that contradicts (his or) her prior sworn testimony creates only a feigned issue of fact, and is insufficient to defeat a properly supported motion for summary judgment"]). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Siegel v City of New York*, 86 AD3d 452, 928 NYS2d 1 [1st Dept 2011] *citing Zuckerman v City of New York*, 49 NY2d 557, 562, 427 NYS2d 595, 404 NE2d 718 [1980]).

In deciding whether a partnership exists, "the factors to be considered are the intent of the parties (express or implied), whether there was joint control and management of the business, whether there was a sharing of the profits as well as a sharing of the losses, and whether there was a combination of property, skill or knowledge" (*Kyle v. Brenton*, 184 A.D.2d 1036, 584

N.Y.S.2d 698 [4th Dept 1992]). "No one factor is determinative; it is necessary to examine the parties' relationship as a whole (*id.*) However, whether the parties shared in plaintiff's profits or losses are "essential elements of a partnership agreement" (*Shine & Company LLP v. Natoli*, 89 A.D.3d 523, 932 N.Y.S.2d 479 [1st Dept 2011]).

Here, Schain's attestation, that defendant remained a mere partner, with no ownership interest in plaintiff, is disputed by defendant's attestation that Schain advised defendant that he was a "sweat equity partner." Likewise, the remaining statements Schain makes to further show that defendant was not an "equity" partner are contested by defendant: contrary to plaintiffs' claims, defendant attests that (1) he "originated 28 Individual Client, 9 Corporations/ Partnerships, 2 Estates, and 7 Trusts" (as opposed to Schain and the remaining partners solely); (2) he "Cultivated and Developed 19 Individual Clients, and 16 Corporation/Partnerships (as opposed to Schein and the remaining partners solely); (3) he made capital contributions as he claims is shown on his tax return (see New York Statements "FYE: 6/30/2010, indicating cash contributions (50%) in the amount of $194) (a fact which is denied by Schein); and (4) entered into a lease contract for printer and printer ink, signed a life insurance application and contract for Schein's life, and approved operating reports (all of which Schein disagrees).

And, as to defendant's additional claim that the K-1s preparations are inconsistent, the Court notes that the record fails to explain the differences appearing on defendant's K-1 between the references to 0% assigned to categories of "Partner share of profit, loss, and capital," and the references to both the dollar amounts shown on Form 1065 (Defendant's Exhibit S) and numerous dollar amounts assigned to "L. Partner's capital account analysis." *(cf., Shine & Company LLP v. Natoli*, 89 A.D.3d 523, 932 N.Y.S.2d 479 [1st Dept 2011] (finding defendant

was not an equity partner, where defendant's receipt of a 1099, *as opposed to a K-1*, "meant that his compensation was not from profits and that he would not share in losses")).

And, while several of the documents submitted by defendant are inadmissible, depositions are necessary to further explore Schein's claim that defendant's compensation bore no relationship to the profits or losses of the firm, whether the K-1s accurately reflect the absence of losses shared by defendant as claimed by plaintiffs, the extent of defendant's management authority on plaintiff's behalf, and the issues raised by the competing affidavits and tax returns. Further documentation including, but not limited to, the partnership's tax returns, may also shed light as to whether defendant shared in the profits and losses of plaintiff.

Furthermore, while plaintiff faults defendant for failing to demand further discovery in accordance with the compliance conference order, the note of issue has not been filed in this case, despite the January 31, 2014 deadline set forth in the compliance conference order.

Based on the above, and in the absence of depositions and/or additional documentation, it cannot be said, as a matter of law at this juncture, that defendant was not an "equity" partner as plaintiff asserts (*cf. Le Bel v. Donovan*, 117 A.D.3d 553, 986 N.Y.S.2d 80 [1st Dept 2014] (finding issue of fact as to whether a partner was actually an equity partner, where partnership agreement referred to her as an equity partner and purported to give her a 5% interest in the firm, but partner made no capital contribution to the firm, received monthly guaranteed payments as a salary, and only nominally shared in 5% of the firm's potential profits and losses)).

Conclusion

Therefore, based on the foregoing, it is hereby

ORDERED that the motion by plaintiff for summary judgment on its third cause of action

for a declaration that defendant is not and never has been an equity partner of plaintiff's firm and to dismiss defendant's counterclaims, is denied, at this juncture, without prejudice; and it is further

ORDERED that the parties shall appear for a status conference in Part 35, presently scheduled for December 9, 2014 to resolve outstanding discovery; and it is further

ORDERED that plaintiff shall serve a copy of this order with notice of entry upon defendant within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: October 17, 2014

Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD