

Cohen v Finz & Finz, P.C.

2014 NY Slip Op 33683(U)

June 16, 2014

Supreme Court, Nassau County

Docket Number: 600762/14

Judge: Antonio I. Brandveen

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: ANTONIO I. BRANDVEEN
J. S. C.

MARISSA COHEN,

Plaintiff,

- against -

FINZ & FINZ, P.C., LEONARD L. FINZ, CHERI
EINBINDER and STUART L. FINZ,

Defendants.

TRIAL / IAS PART 31
NASSAU COUNTY

Index No. 600762/14

Motion Sequence No. 001

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits	<u>1</u>
Answering Affidavits	<u>2</u>
Replying Affidavits	<u>3</u>
Briefs: Plaintiff's / Petitioner's	<u> </u>
Defendant's / Respondent's	<u> </u>

The defendants Finz & Finz, P.C., Leonard L. Finz, Cheri Einbinder and Stuart L. Finz move pursuant to CPLR 3211(a)(7) to dismiss the complaint against them, to dismiss the former employee plaintiff's unjust enrichment claim against the Finz & Finz, P.C. and pursuant to 22 NYCRR § 130-1.1 to award the defendants costs and attorney's fees resulting from the plaintiff's frivolous conduct.

The plaintiff opposes the motion. The plaintiff asserts the motion should be denied because the plaintiff timely amended the pleadings pursuant to CPLR 3025(a), and that amendment supercedes the initial complaint.

The defendants reply to the plaintiff's opposition. The defense contends the plaintiff's service of an amended complaint does not abate this motion to dismiss.

The plaintiff alleges commencing employment at Finz & Finz, P.C. on December 11, 2013, as a paralegal at a weekly rate of compensation. The plaintiff alleges causes of action against the defendants for violations of Labor Law §§ 191 and 195 with unjust enrichment. The plaintiff contends the each individual defendant was one of 10 shareholders of Finz & Finz, P.C. personally liable for all debts, wages and salaries due and owing to the plaintiff for services performed for Finz & Finz, P.C. pursuant to Business Corporation Law § 630.

It is well established that in the absence of some constitutional, statutory or charter provision, the shareholders of a corporation are not liable for its contractual obligations and that parties having business dealings with a corporation must look to the corporation itself and not the shareholders for payment of their claims. Indeed, this insulation from individual liability for corporate obligations is one of the fundamental purposes of operating through the corporate form. Where the Legislature has intended to depart from this general rule of limited liability and impose the obligations of the corporation upon the individual shareholder, it has made explicit provisions for such obligations (*see, e.g.*, Business Corporation Law, §630, imposing liability upon the 10 largest shareholders of a corporation, the shares of which are not publicly traded, for wages and salaries of its laborers, servants and employees) [citations omitted]

We're Assoc. Co. v Cohen, Stracher & Bloom, 103 A.D.2d 130, 132-133.

While the lower court cases are in conflict over whether the filing of an amended pleading automatically abates a motion to dismiss that was addressed to the original pleading, we prefer the rule set forth in *Sholom* that the moving party has the option to decide whether its motion should be applied to the new pleadings. This approach also finds support in Siegel, Practice Commentaries (McKinney's Cons Laws of NY, Book 7B, CPLR C3211:65, at 94)

Sage Realty Corp. v Proskauer Rose, 251 A.D.2d 35, 38.

Business Corporation Law § 630(a) provides, in pertinent part: “An action to enforce such liability shall be commenced within ninety days after the return of an execution unsatisfied against the corporation upon a judgment recovered against it for such services.” Here, the plaintiff fails to show a judgment has been obtained against Finz & Finz, P.C. (*see generally Andux v. Woodbury Auto Park, Inc.*, 30 A.D.3d 362; *see also Renzler v D.F. White, Inc.*, 267 A.D.2d 443). The plaintiff fails to cure that defect by removing allegations that Leonard L. Finz, Cheri Einbinder and Stuart L. Finz that they are personally liable for all debts, wages and salaries due and owing to the plaintiff for services performed by the plaintiff for Finz & Finz, P.C. pursuant to Business Corporation Law § 630. The plaintiff retains claims against Leonard L. Finz, Cheri Einbinder and Stuart L. Finz in the complaint, hence there is no change to the alleged liability of Leonard L. Finz, Cheri Einbinder and Stuart L. Finz for violations of Labor Law Article 6 (*Renzler v D.F. White, Inc.*, 267 A.D.2d, *supra*).

This Court determines the defendants satisfy their burden by demonstrating the plaintiff has not shown a claim for unjust enrichment against Leonard L. Finz, Cheri Einbinder and Stuart L. Finz because the plaintiff fails to show there is some constitutional, statutory or charter provision making Leonard L. Finz, Cheri Einbinder and Stuart L. Finz, as shareholders of Finz & Finz, P.C. liable for the contractual obligations of Finz & Finz, P.C. (*We're Assoc. Co. v Cohen, Stracher & Bloom*, 103

A.D.2d, *supra*). In opposition, the plaintiff fails to show otherwise.

The doctrine of unjust enrichment invokes an “obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties concerned” (*IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009] [emphasis added]). “[A] party may not recover in . . . unjust enrichment where the parties have entered into a contract that governs the subject matter” (*Cox v NAP Constr. Co., Inc.*, 10 NY3d 592, 607 [2008])

Pappas v Tzolis, 20 N.Y.3d 228, 234.

This Court determines the defendants also satisfy their burden by showing the plaintiff fails to address or dispute that there was an oral agreement with Finz & Finz, P.C. which precludes the plaintiff from the unjust enrichment claim against Finz & Finz, P.C. Since the employment was governed by the parties’ oral agreement, the plaintiff’s “unjust enrichment claim fails as a matter of law” (*Pappas v Tzolis*, 20 N.Y.3d, at 234; *see also Rashid v. B. Taxi Management Inc.*, 107 A.D.3d 555).

Conduct during litigation, including on an appeal, is frivolous and subject to sanction and/or the award of costs when it is completely without merit in law or fact and cannot be supported by a reasonable argument for the extension, modification, or reversal of existing law; it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or it asserts material factual statements that are false [citations omitted]

Mascia v. Maresco, 39 A.D.3d 504, 505

The plaintiff’s assertions here demonstrate support by reasonable argument under existing law. The conduct by the plaintiff does not appear to have intended to primarily harass the defendants (22 NYCRR 130-1.1; *cf. Yan v. Klein*, 35 A.D.3d 729). This Court concludes that sanctions are unwarranted here, because the defendants fail to satisfy their

burden of showing the conduct by the plaintiff is frivolous under 22 NYCRR § 130-1.1 (see *Martin v. Burns*, 77 A.D.3d 633, 635, 909 N.Y.S.2d 98).

ORDERED, that branch of the defense motion is granted seeking to dismiss the complaint against Leonard L. Finz, Cheri Einbinder and Stuart L. Finz pursuant to CPLR 3211(a)(7), and it also,

ORDERED, that branch of the defense motion is granted seeking to dismiss the unjust enrichment claim against the Finz & Finz, P.C., and it also,

ORDERED, that branch of the defense motion is denied seeking pursuant to 22 NYCRR § 130-1.1 to award the defendants costs and attorney's fees resulting from the plaintiff's alleged frivolous conduct.

So ordered.

Dated: **June 16, 2014**

ENTER:



J. S. C.

NON FINAL DISPOSITION

ENTERED

JUN 18 2014

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**