

Rubin v Napoli Bern Ripka Shkolnik, LLP
2016 NY Slip Op 31096(U)
June 15, 2016
Supreme Court, New York County
Docket Number: 154060/2015
Judge: Cynthia S. Kern
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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DENISE A. RUBIN,

Plaintiff,

-against-

Index No. 154060/2015

DECISION/ORDER

NAPOLI BERN RIPKA SHKOLNIK, LLP,
WORBY GRONER EDELMAN & NAPOI BERN, LLP,
NAPOLI BERN & ASSOCIATES, LLP and PAUL J.
NAPOLI,

Defendants.
-----X

HON. CYNTHIA KERN, J.S.C.

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
Affidavits in Opposition.....	2
Replying Affidavits.....	3
Exhibits.....	4

Plaintiff Denise Rubin commenced the instant action alleging employment discrimination and breach of contract against her former law firms and one of its managing partners. Plaintiff now moves for an Order pursuant to CPLR § 3011 striking and/or dismissing defendant Paul J. Napoli's ("Napoli") first amended counterclaims on the ground that, *inter alia*, stand-alone counterclaims are not permitted, sanctioning defendant Napoli and his counsel and disqualifying Napoli's counsel on the ground that his counsel, and all the lawyers at his counsel's law firm, are essential witnesses to the allegations of the counterclaims. For the reasons set forth below, plaintiff's motion is granted in part and denied in part.

The relevant facts and procedural history of this case are as follows. On or about April

24, 2015, plaintiff commenced the instant action against Napoli in his individual capacity and against the law firm entities by which she was employed and at which Napoli was a partner asserting four causes of action for: (1) violation of New York Administrative Code 8-107, for alleged sex discrimination; (2) breach of contract for failure to pay bonuses/salary increases; (3) breach of contract for the failure to pay plaintiff from October 14, 2014 through November, 2014; and (4) *quantum meruit*. Thereafter, Napoli moved to dismiss the action as against him individually, which this court granted pursuant to Partnership Law § 26 on the ground that “the Firms are all limited liability partnerships and plaintiff fails to allege that Napoli personally committed a discriminatory act against her to hold him personally liable.”

Thereafter, plaintiff commenced an action under a separate index number against Napoli in his individual capacity asserting one cause of action for employment discrimination. Napoli then moved to dismiss the action in its entirety or, in the alternative, for an Order consolidating the new action with the instant action. This court denied Napoli’s motion to dismiss finding that “the complaint in [the new] action sufficiently corrects the defects and omissions which were fatal to the complaint in the [instant action]” but granted Napoli’s motion to consolidate the new action with the instant action. On or about March 30, 2016, Napoli filed an answer to the complaint in the consolidated action but did not assert a counterclaim against plaintiff. However, also on that date, Napoli’s “counterclaim counsel,” Napoli Shkolnik, PLLC, filed a document entitled “Counterclaims of Napoli Bern Ripka Shkolnik, LLP, Worby Groner Edelman & Napoli Bern, LLP, Napoli Bern, LLP, Napoli Bern & Associates, LLP and Paul J. Napoli” which asserts eight separate counterclaims against plaintiff. On or about April 5, 2016, Napoli Shkolnik, PLLC filed the “First Amended Counterclaim” which asserts five counterclaims solely

on behalf of Napoli in his individual capacity. Plaintiff now seeks to dismiss these counterclaims.

This court finds that that portion of plaintiff's motion for an Order pursuant to CPLR § 3011 striking and/or dismissing Napoli's First Amended Counterclaims must be granted on the ground that standalone counterclaims are procedurally improper. Pursuant to CPLR § 3011, "[t]here shall be a complaint and an answer. An answer may include a counterclaim against a plaintiff and a cross-claim against a defendant... There shall be no other pleading unless the court orders otherwise." It is well-settled that a "stand-alone counterclaim... [must be] dismissed as violative of CPLR § 3011." *Roth v. McCutcheon*, 2015 WL 4467755 *2 (Sup. Ct. N.Y. County 2015). *See also Newman v. Newman*, 245 A.D.2d 353, 354 (2d Dept 1997)(holding that "a counterclaim may only be interposed through service of an answer.")

Napoli's assertion that his stand-alone counterclaims should be allowed because such counterclaims are generally allowed in New Jersey is without merit. Specifically, Napoli asserts that no counterclaims were asserted in his answer because he was being represented by insurance defense counsel who would not file counterclaims on his behalf and cites to New Jersey case law for the proposition that when a carrier controls a subrogation action, the insured may file separate affirmative claims. However, Napoli has failed to provide any New York case law carving out such an exception to CPLR § 3011 and indeed, Napoli acknowledges in his opposition that "New York is silent on the matter."

As the court has dismissed the counterclaims on the ground that they are procedurally improper, the court declines to address those portions of plaintiff's motion for an Order dismissing the counterclaims on any other ground.

