

Arrowhead Capital Fin., Ltd. v Cheyne Specialty Fin. Fund L.P.
2016 NY Slip Op 31407(U)
July 21, 2016
Supreme Court, New York County
Docket Number: 651962/2014
Judge: Shirley Werner Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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ARROWHEAD CAPITAL FINANCE, LTD.,

Plaintiff,

Index No. 651962/2014

-against-

DECISION & ORDER

CHEYNE SPECIALTY FINANCE FUND
L.P. and CHEYNE SPECIALTY FINANCE
FUND GENERAL PARTNER aka
CHEYNE SPECIALTY FINANCE GENERAL
PARTNER, INC.,

Defendants.

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SHIRLEY WERNER KORNREICH, J.

Defendant Cheyne Specialty Finance Fund L.P.,¹ moves to dismiss the complaint of plaintiff, Arrowhead Capital Finance, Ltd., pursuant to Judiciary Law §470, on the ground that plaintiff's attorney, Barry Goldin, does not, and did not when he filed the summons and complaint, maintain a New York office "for the transaction of law business." Motion Sequence 004. The motion is granted and the complaint is dismissed without prejudice for the reasons that follow.

I. Background

Goldin is registered as an attorney licensed to practice in New York, but his registration lists what he refers to as his "main office" in Pennsylvania (PA Office). When he filed the summons and complaint in this action, on June 27, 2014, he listed his PA Office and its

¹ The action was dismissed against the other defendant, Cheyne Specialty Finance Fund General Partner a/k/a Cheyne Specialty Finance General Partner, Inc., pursuant to a decision and order of this court, dated December 4, 2015, entered December 7, 2015. Dkt 303. References to "Dkt" followed by a number, refer to documents filed in this action in the New York State Courts Electronic Filing System (NYSCEFS).

telephone and fax numbers, as well as an address at 240 Madison Avenue, 3rd Floor, NY, NY 10016 (240 Madison). The court's electronic filing system listed only his PA Office and phone, until May 16, 2016, when a New York firm, Wollmuth Maher & Deutsch LLP (Wollmuth Firm), filed a notice of appearance as co-counsel for plaintiff. Dkt 345. Goldin defends on the grounds that: 1) when the action was filed he had use of 240 Madison, the office of Edit Ltd (Edit), a former client; 2) the Wollmuth Firm's appearance in 2016 cured the violation; and 3) before the Court of Appeals and Second Circuit made their recent decisions in *Schoenfeld v State*, 25 NY3d 22 (2015), and *Schoenfeld v Schneiderman*, 821 F3d 273 (2d Cir 2016), there was no requirement for him to maintain a New York office for the practice of law.

In support of the motion, defendant's attorney, Jeffrey Korn, submitted an affirmation in which he averred that he went to 240 Madison on April 27, 2015, and May 11, 2016, and saw no visible sign for Goldin outside the building, in the lobby, on the building directory, or on the third floor, where Edit's office is located. He further submits a hearsay statement that during his 2016 visit, the lobby attendant allegedly told him that Goldin had no office in the building. Korn also points to Goldin's stationery letterhead, which contains the PA Office only, and email from Goldin in which he complained that Korn delivered documents to 240 Madison "which accepts mail for me" but the PA Office "is the preferred address to send documents for me."

Goldin submitted two affidavits, his own, and the affidavit of a former attorney with whom he was affiliated, Deyan Brashich, who was suspended from practicing law in 2003 and never sought reinstatement. Dkt 362, Brashich Affidavit, fn 1. Both Goldin and Brashich state that they had the use of Edit's office during two cases that they worked on together. One case, in which Brashich was co-counsel, ended in 2002, before he was suspended. The court takes

judicial notice that the other case, in which Goldin represented Edit, was marked disposed in 2010.²

Both Goldin and Brashich aver that Goldin had the use of Edit's New York office on East 38th Street, notably not 240 Madison, free of charge during the Edit Action, when Brashich functioned as Goldin's assistant (as he was no longer an admitted attorney) and was paid by Goldin for his services. At that time, they "used" *Edit's office* for meetings and storage and production of documents.

In 2014, Edit moved to 240 Madison. Brashich avers that after the move *he continued to share the office with Edit* and to assist Goldin, who continued to pay him. Brashich says that "we" received documents and packages in the Edit offices in midtown Manhattan, including documents from defendant's current counsel. Brashich says that when they received deliveries for Goldin, "they" contacted him and Goldin picked them up or had them sent to his PA Office. Brashich asserts that in 2014, Goldin purchased a sign for himself for 240 Madison that was "prominently displayed in the Edit Ltd offices during the latter half of 2014 and much of 2015, so that anyone exiting the elevator on the third floor at 240 Madison would immediately see that signage." However, Brashich admits that the sign is no longer there.

Goldin avers that during the case in which he was co-counsel with Brashich, which ended in 2002, he used Edit's office on 38th Street for various things and from that office, Brashich continued to assist him. However, after Edit and Brashich moved "*their offices*" to 240 Madison "in or about May 2014," i.e., the month before this action was filed, Goldin says that he received documents, packages and boxes at 240 Madison and would pick them up, or have them forwarded to his PA Office. He also says the same thing as Brashich concerning his sign and

² *Edit Ltd v Brunswick & Fils, Inc.*, Sup Ct NY Co. Index No.102114/2010 (Edit Case).

how it was displayed during the latter half of 2014 and much of 2015, before it was removed. Goldin does not say that he ever had a phone at 240 Madison or paid rent. Neither Brashich nor Goldin state that the sign was up when this action was filed.

In reply, defendant offers the affidavit of an investigator, Harlin Parker, who went to 240 Madison on July 24, 2014, approximately one month after this action was filed. Parker avers that Goldin's name was not on the directory in the lobby, and that he saw no sign on the third floor for Goldin or any law office. In addition, Korn's reply affirmation annexes various filings Goldin made in federal courts in Louisiana, Pennsylvania and Florida between February 2014 through April 2016, in which Goldin listed only his PA Office address. Dkt 383-386.

II. Discussion

Judiciary Law §470 provides that:

A person, regularly admitted to practice as an attorney and counsellor, in the courts of record of this state, whose office for the transaction of law business is within the state, may practice as such attorney or counsellor, although he resides in an adjoining state.

The Court of Appeals recently ruled, in response to a certified question by the Second Circuit Court of Appeals as to the minimum requirements for such an office, that “the statute requires nonresident attorneys to maintain a physical office in New York.” *Schoenfeld v State of New York, supra*. The Court rejected the argument that §470 “can be read merely to require nonresident attorneys to have some type of physical presence for the receipt of service—either an address or the appointment of an agent within the State.” *Id*, at 27. Subsequently, the Second Circuit ruled that §470 does not violate the United States Constitution because attorneys seeking to practice law in New York without a physical presence in the state are looking to be treated differently from, not the same as, New York resident attorneys, and differential treatment is not required by the Privileges and Immunities Clause. *Schoenfeld v Schneiderman, supra*.

Numerous case in the First Department have held, before the recent *Schoenefeld* rulings, that a court should strike a pleading, without prejudice, where it is filed by an attorney who fails to maintain a local office, as required by §470. *Salt Aire Trading LLC v Sidley Austin Brown & Wood, LLP*, 93 AD3d 452, 453 (1st Dept 2012); *Empire Healthchoice Assur., Inc. v Lester*, 81 AD3d 570, 571 (1st Dept 2011); *Kinder Morgan*, 51 AD3d 580 (1st Dept 2008); *Neal v Energy Transp. Group*, 296 AD2d 339 (2002); *cf Reem Contr. v Altschul & Altschul*, 117 AD3d 583, 584 (1st Dept 2014) (finding no §470 violation where firm leased and used New York office with telephone). The appellate precedents cited by Goldin that permitted an action to proceed based upon a later cure were not issued by the First Department and were decided before the Court of Appeals' ruling in *Schoenefeld*.

Here, there is no evidence that Goldin maintained an office or a phone in New York when this action was filed in June 2014. The record reflects that from May 2014 onward, he used the office of Edit and Brashich, whom he employed as an assistant, to receive packages and mail. Although there is an issue of fact as to whether Goldin had a sign, which defendant's investigator did not see in July 2014, anyone can hang a sign. Receiving mail and documents is insufficient to constitute maintenance of an office. *Schoenefeld, supra*. This court holds that hanging a sign coupled with receipt of deliveries would not satisfy the statute. Furthermore, there is evidence that Goldin criticized defendant for serving documents at 240 Madison and directed Korn to use the PA Office address, an address he has consistently used in litigation. The remaining arguments of Goldin have been considered and found to be without merit.

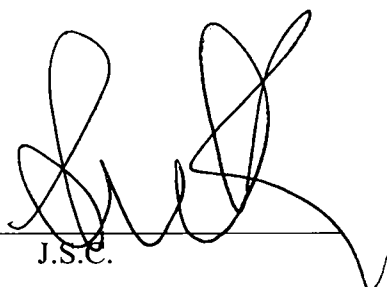
Accordingly, it is

ORDERED that the motion by defendant CHEYNE SPECIALTY FINANCE FUND

L.P. to dismiss the complaint (Motion Sequence 004) is granted, the complaint is dismissed without prejudice, and, upon service upon him of a copy of this order with notice of entry, the Clerk is directed to enter judgment accordingly.

Dated: July 21, 2016

ENTER:



J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C.