

**Kingston Check Cashing Corp. v Nussbaum Yates
Berg Klein & Wolpow, LLP**

2019 NY Slip Op 35012(U)

January 24, 2019

Supreme Court, Kings County

Docket Number: Index No. 502993/15

Judge: Lawrence Knipel

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Commercial Part 4 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 24th day of January, 2019.

P R E S E N T:

HON. LAWRENCE KNIPEL,
Justice.

-----X

KINGSTON CHECK CASHING CORP.,

Plaintiff,

- against -

NUSSBAUM YATES BERG KLEIN & WOLPOW, LLP,
and STEVEN CHAIM GOLDBERGER, a/k/a
CHAIM GOLDBERGER,

Defendants.

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NUSSBAUM YATES BERG KLEIN & WOLPOW, LLP,

Third-Party Plaintiff,

- against -

REPUBLIC BANK OF CHICAGO,

Third-Party Defendant.

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NUSSBAUM YATES BERG KLEIN & WOLPOW, LLP,

Second Third-Party Plaintiff,

- against -

WINNE BANTA BASRALIAN & KAHN, P.C., and
WINNE BANTA HETHERINGTON BASRALIAN & KAHN, P.C.,

Second Third-Party Defendants.

-----X

The following e-filed papers read herein:

Notice of Motion, Affirmation, Memorandum of Law,
and Exhibits Annexed _____
Affidavit in Opposition, Memorandum of Law,
and Exhibits Annexed _____
Reply Memorandum of Law _____

DECISION AND ORDER

Index No. 502993/15

Mot. Seq. No. 11

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In this action to recover damages for accounting malpractice, the second third-party defendants Winne Banta Basralian & Kahn, P.C., and Winne Banta Hetherington Basralian & Kahn, P.C. (collectively, Winne Banta), move to dismiss the second third-party complaint of the defendant/third-party plaintiff/second-third plaintiff Nussbaum Yates Berg Klein & Wolpov, LLP (Nussbaum), for failure to state a claim under CPLR 3211 (a) (7).

This action arises out of a course of alleged embezzlement and outright fraud committed by the defendant-in-default Steven Chaim Goldberger, also known as Chaim Goldberger (Goldberger), during his employment as the manager of the Fort Hamilton, Brooklyn, location of the plaintiff Kingston Check Cashing Corp. (Kingston), a licensed check-cashing establishment governed by the Anti-Money Laundering (AML) statutes and regulations. During Goldberger's tenure at Kingston, Nussbaum acted as its accountant, and Winne Banta acted as its outside counsel, as well as its Independent Examiner for purposes of its AML compliance program. Kingston's discovery of Goldberger's defalcations prompted it to sue Nussbaum for accounting malpractice. Nussbaum, in turn, impleaded Winne Banta, among others, for contribution, as more fully alleged in its amended third-party complaint, dated August 22, 2018 (the amended complaint or AC), to which the instant motion to dismiss under CPLR 3211 (a) (7) is directed.¹

¹ As Winne Banta has elected to apply its motion to dismiss to the amended complaint which superseded the original complaint, the court considers its motion as directed against the amended complaint (*see Sobel v Ansanelli*, 98 AD3d 1020, 1022 [2d Dept 2012]).

“A claim for contribution may be established, among other ways, where the party from whom contribution is sought owed a duty to the injured plaintiff, and a breach of this duty contributed to the plaintiff’s alleged injury” (*Razdolskaya v Lyubarsky*, 160 AD3d 994, 997 [2d Dept 2018]).

Contrary to Winne Banta’s contentions, Nussbaum has sufficiently pleaded a claim for contribution against it. The amended complaint alleges, in relevant part, that:

(1) “Winne Banta was engaged by . . . Kingston to ensure that Kingston’s policies and procedures designed to prevent and detect fraud were being properly implemented, monitored and maintained” (AC, ¶ 8).

(2) “Winne Banta failed to adequately review [and monitor] Kingston’s policies and procedures designed to . . . prevent and detect fraud” (AC, ¶¶ 13-14).

(3) “Winne Banta failed to adequately advise Kingston as to the deficiencies with Kingston’s policies and procedures designed to . . . prevent and detect fraud” (AC, ¶¶ 15).

(4) “These failures by . . . Winne Banta . . . in its capacity as Kingston’s counsel . . . amount to a deviation from the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession” (AC, ¶ 17).

(5) “[B]ut for” Winne Banta’s aforementioned failures, Goldberger would not have been able to defraud Kingston or, in the alternative, Goldberger’s fraud would have been discovered sooner (AC, ¶¶ 22-23).

(6) As a result of the foregoing, Winne Banta is “liable to . . . Kingston for the tort of professional negligence” (AC, ¶ 24).

(7) “[I]f . . . Kingston was damaged as a result of the alleged thefts by . . . Goldberger, the professional negligence . . . by . . . Winne Banta is the true cause of any damages incurred by . . . Kingston” (AC, ¶ 28).

(8) “[I]f . . . Kingston was damaged as a result of the alleged thefts by . . . Goldberger, the professional negligence . . . by . . . Winne Banta exacerbated any damages incurred by . . . Kingston” (AC, ¶ 29).

Winne Banta's evidentiary submissions fail to show that the material facts claimed by Nussbaum to be facts were not facts at all and that no significant dispute exists regarding them (*see Nilazra v Karakus*, 136 AD3d 994, 997 [2d Dept 2016]). That Winne Banta functioned as Kingston's Independent Examiner for the AML compliance program during Goldberger's tenure with Kingston is not the end of an inquiry. Whereas the AML compliance program generally addressed *external* fraud (*i.e.*, fraud committed by Kingston's customers), the amended complaint is broadly drafted to encompass the prevention and detection of *any* type of fraud (including *internal* fraud committed by Kingston's employee Goldberger).² The limited, pre-discovery record in the second third-party action does not conclusively establish that Winne Banta has a complete defense to Nussbaum's claim (*see Bivona v Danna & Assoc., P.C.*, 123 AD3d 956, 959 [2d Dept 2014]). The court is satisfied that the amended complaint meets the low threshold for defeating a motion to dismiss for failure to state a claim under CPLR 3211 (a) (7) (*accord Kamchi v Weissman*, 125 AD3d 142, 161 [2d Dept 2014]).

Accordingly, it is

ORDERED that Winne Banta's motion in Seq. No. 11 to dismiss the amended complaint in the second third-party action for failure to state a claim under CPLR 3211 (a) (7) is *denied*; and it is further

² The exact nature of the legal services provided by Winne Banta to Kingston is presumably set forth in the retainer agreement which, for reasons unexplained in the record, is not included with Winne Banta's moving papers.

ORDERED that Winne Banta is directed to serve an answer to the amended complaint in the second third-party action within 20 days of the date of electronic service of this decision and order with notice of entry by Nussbaum's counsel on Winne Banta's counsel and on other counsel who have appeared in this case.

The parties are reminded of their previously scheduled appearance in Commercial Part 4 on February 1, 2019.

This constitutes the decision and order of the court.

ENTER FORTHWITH,



J. S. C.

HON. LAWRENCE KNIPEL
Administrative Judge

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