

**Law Offs. of Eric H. Green & Assoc. v Gertler**

2020 NY Slip Op 33163(U)

September 24, 2020

Supreme Court, New York County

Docket Number: 653369/2019

Judge: Arlene P. Bluth

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH PART IAS MOTION 14

Justice

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THE LAW OFFICES OF ERIC H. GREEN & ASSOCIATES,

Plaintiff,

- v -

MARC GERTLER,

Defendant.

-----X

INDEX NO. 653369/2019

MOTION DATE 09/21/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33

were read on this motion to/for DISMISSAL

The motion to dismiss the complaint is granted.

Background

Plaintiff brings this case concerning defendant's contentious withdrawal from plaintiff, a personal injury law firm. Plaintiff contends that defendant left the firm without cause or justification on December 31, 2018 and the parties have been in discussions about finalizing defendant's withdrawal. The key issues are assessing defendant's interest in the firm's assets as well as his responsibility for liabilities; plaintiff says defendant had a 37.5 percent interest in the firm. Plaintiff asserts one cause of action in its complaint: for an accounting of the amount owed by the firm to defendant and by defendant to the firm.

Defendant moves to dismiss on numerous grounds. He claims that plaintiff delayed filing a complaint (it started the case via summons with notice) and the complaint fails to state a cause of action. Defendant adds that plaintiff failed to allege the required elements of an accounting

cause of action and observes that the law firm continues to operate under Mr. Green's control, which means that defendant has no obligation to account under New York law.

Defendant also contends that plaintiff asks for relief against itself, the plaintiff is improperly named and therefore lacks capacity to sue. Defendant also refers to a case pending in Kings County where defendant sued Mr. Green and alleged misappropriation of defendant's capital account with the firm.

In opposition, plaintiff claims that it has been trying to reach a settlement for months but could not reach an agreement. It argues that its delay in filing a complaint was due to its preference to settle rather than litigate this case. Plaintiff observes that a key issue is the recovery of fees arising out of clients represented on a contingency-fee basis. It argues that the Kings County case has nothing to do with this matter and was filed to gain an advantage in settlement discussions.

In reply, defendant points out that the opposition papers do not address the substance of defendant's moving papers. Defendant also complains that the opposition was late.

## **Discussion**

The Court grants the motion to dismiss because plaintiff failed to offer a substantive opposition to the grounds upon which defendant moved. Defendant pointed out that plaintiff cannot state a claim for an accounting where it seeks records from a former minority shareholder while it retains control of a law firm that continues to operate. Plaintiff did not address this argument at all.

Moreover, the complaint claims "the Partnership is now entitled to an accounting of the amounts, if any owed by the Partnership to Gertler, as well as the amounts, if any owed by

Gertler to the Partnership” (NYSCEF Doc. No. 3, ¶ 10). That makes no sense: why is Court intervention necessary to tell plaintiff how much it owes defendant?

Defendant also pointed out that he believes the plaintiff named in this complaint is the wrong entity because a different entity was included in a proposed settlement agreement (NYSCEF Doc. No. 28). Plaintiff offered no response to defendant’s argument that it lacks capacity to sue defendant.

The Court recognizes that plaintiff prefers that this dispute be settled and that may be the best resolution for everyone. But that does not mean it can file a case and then raise the issue of settlement as its main opposition to a motion to dismiss. While the settlement negotiations certainly justify denial of the portion of defendant’s motion seeking dismissal for failure to timely file a complaint, it is not a shield for every argument raised by defendant.

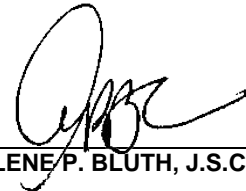
The Court also observes that the pending Kings County case has no relevance to this motion. Although the parties discussed this case in detail and engaged in a letter writing campaign about it (NYSCEF Doc. Nos. 34-37), this Court is only concerned with the papers submitted on this motion. Before this Court is a motion to dismiss that raised multiple grounds upon which the Court could dismiss and an opposition that did not sufficiently oppose those grounds. The Court has no choice but to grant the motion and dismiss the case.

Accordingly, it is hereby

ORDERED that the motion to dismiss by defendant is granted, this case is dismissed and the Clerk is directed to enter judgment when practicable in favor of defendant along with costs and disbursements after presentation of proper papers therefor.

9/24/2020

DATE



ARLENE P. BLUTH, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE