

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

2020 NY Slip Op 35490(U)

March 2, 2020

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 2<sup>nd</sup> day of March, 2020.

PRESENT:

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.

-----X  
NUSSBAUM YATES BERG KLEIN & WOLPOW, LLP,

Third-Party Plaintiff,

- against -

REPUBLIC BANK OF CHICAGO,  
Third-Party Defendant.

-----X  
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.

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The following e-filed papers read herein:

Notice of Motion, Affirmation, and Exhibits Annexed \_\_\_\_\_  
Affirmations (Affidavits) in Opposition and Exhibits Annexed \_\_\_\_\_  
Reply Affirmations and Exhibits Annexed \_\_\_\_\_

**DECISION AND ORDER**

Index No. 502993/15

Mot. Seq. No. 16-18

KINGS COUNTY CLERK  
FILED  
2020 MAR -4 AM 8:05

NYSCEF#:

215-223, 225-231, 235-244  
245, 246-253, 254, 255, 256, 257  
259, 260-262

In this action to recover damages for accounting malpractice arising from failure to discover fraud perpetrated by a client's former employee, the following motions have been consolidated for disposition. In Seq. No. 16, the defendant/third-party plaintiff/second-third party plaintiff Nussbaum Yates Berg Klein & Wolpov, LLP (Nussbaum) moves for leave to reargue its prior motion in Seq. No. 14 (the prior motion) to the extent it sought an order determining that the subject matter of attorney-client communications between the plaintiff Kingston Check Cashing Corp. (Kingston) and the second third-party defendants Winne Banta Basralian & Kahn, P.C., and Winne Banta Hetherington Basralian & Kahn, P.C. (collectively, Winne Banta) has been placed in issue in this action, which prior motion was denied by the Court's decision and order, dated Aug. 8, 2019 (the prior order) (NYSCEF #209), and, upon reargument of the prior motion and upon resettlement of the prior order, permitting Nussbaum to depose Winne Banta "concerning advice provided by Winne Banta to Kingston during the time periods where both Winne Banta and Nussbaum represented Kingston concurrently, insofar as that advice is related to the allegations in Kingston's Complaint [as against Nussbaum]" (Attorney Affirmation in Support of Motion, ¶¶ 22, 41).<sup>1</sup> In Seq. No. 17, the third-party defendant Republic Bank of Chicago (Republic) moves for summary judgment dismissing the third-party complaint and all claims against it. In Seq. No. 18, Nussbaum moves for (1) an order pursuant to CPLR 3124, compelling Kingston to provide "adequate" responses to Nussbaum's post-deposition demands, dated May 14, 2018,

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<sup>1</sup> Nussbaum is not challenging before this Court that portion of the prior order which declined to disqualify Winne Banta.

and (2) upon granting such order, precluding Kingston from offering evidence in support of its case at trial in the event of Kingston's non-compliance with such order.

### *Background*

As noted in the prior order, 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 at Kingston, a licensed check-cashing establishment governed by the Anti-Money Laundering (AML) statutes and regulations. During Goldberger's tenure at Kingston: (1) Nussbaum acted as Kingston's outside accountant; (2) Winne Banta acted as Kingston's outside counsel and its Independent Examiner for purposes of its AML compliance program; and (3) Republic extended to Kingston a line of credit from which Goldberger stole a currency delivery in the amount of \$300,000. Goldberger's defalcations, estimated to result in losses to Kingston totaling in excess of \$2-3 million, are the basis for Kingston's action against Nussbaum. Nussbaum impleaded Republic for contribution/indemnification and Winne Banta for contribution in the first and second third-party actions, respectively. Issue has been joined in the underlying action and third-party actions. Winne Banta represents the plaintiff Kingston in the underlying action and the third-party defendant Republic in the third-party action.<sup>2</sup>

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<sup>2</sup> Separate counsel represents Winne Banta as the defendant in the second third-party action.

*Disposition of Nussbaum's Motion for Leave to Reargue and Resettle*

Leave to reargue is granted and, upon reargument, the Court adheres to its original determination for the reasons stated herein and in the prior order (*see e.g. Ballan v Sirota*, 163 AD3d 516, 518 [2d Dept 2018]). “[A] waiver [of the attorney-client privilege] may be found [1] where the client places the subject matter of the privileged communication in issue or [2] where invasion of the privilege is required to determine the validity of the client’s claim and would otherwise deprive an adversary of vital information” (*Raphael v Clune White & Nelson*, 146 AD2d 762, 763 [2d Dept 1989]).

Nussbaum in its prior motion failed to satisfy either requirement. It is undisputed that (1) Kingston has asserted no claim against Winne Banta; (2) Kingston’s claim against Nussbaum sounds in accounting malpractice; and (3) New York does not recognize an accountant-client privilege (*see Matter of People v PriceWaterhouseCoopers, LLP*, 150 AD3d 578, 579 [1st Dept. 2017], *lv denied* 29 NY3d 1117 [2017]). Equally important, Kingston’s proof of its accounting malpractice claim against Nussbaum does not require the use of any materials or communications protected by the attorney-client privilege between Kingston and Winne Banta. Finally and crucially, Nussbaum’s and Winne Banta’s respective obligations to Kingston, during the period at issue, were fundamentally different. Whereas Nussbaum, as Kingston’s accountant, was tasked with performing *monthly* reconciliations of its books and financial records to guard against, among others, *employee* fraud, Winne Banta’s task, as its Independent Examiner under the AML statutes and regulations, was to ensure its *annual* compliance with those statutes and regulations to prevent money laundering

and terrorist financing by its *customers*. What clinches the case is that Nussbaum's and Winne Banta respective obligations to Kingston were separate and non-overlapping. An outside compliance counsel to a check-cashing business which separately retained (and paid for) an outside accountant to watch over its books and records cannot be held responsible, in whole or in part, for the defalcations of an employee of that business during the accountant's watch. Under the circumstances, the prior order, insofar as it is challenged by Nussbaum's instant motion, is correct in its entirety (*see Raphael*, 146 AD2d at 763; *Jakobleff v Cerrato, Sweeney & Cohn*, 97 AD2d 834, 835 [2d Dept 1983]; *cf. 601 Realty Corp. v Conway, Farrell, Curtin & Kelly, P.C.*, 74 AD3d 1179, 1180 [2d Dept 2010]; *Posner v Mallow, Konstam & Hager, PC*, 2009 NY Slip Op 30697[U] [Sup Ct, NY County 2009]; *Goldberg v Hirschberg*, 10 Misc 3d 292, 297-298 [Sup Ct, NY County 2005]).

***Disposition of Republic's Motion for Summary Judgment***

Republic's motion for summary judgment is denied as premature with leave to renew upon the completion of discovery (*see CPLR 3212 [f]; Guerrero v New York City Tr. Auth.*, 177 AD3d 667, 668 [2d Dept 2019]).

***Disposition of Nussbaum's Discovery Motion***

Nussbaum's motion for an order compelling Kingston to provide "adequate" responses to its post-deposition demands is denied in its entirety. Kingston's initial responses, as supplemented by its counsel's representations in his affirmation in opposition, are adequate (*see e.g. Tornheim v Blue & White Food Pros. Corp.*, 73 AD3d 749, 750 [2d Dept 2010]). Nussbaum remains free to use other discovery means to test Kingston's

representations concerning the existence (or absence) of the requested records. Without specific evidence at this time raising doubt as to the veracity of Kingston's representations, the burden does not shift to Kingston to make a specific showing of the searches it performed and the results obtained.

**Conclusion**

Based on the foregoing and after oral argument, it is

ORDERED that Nussbaum's motion in Seq. No. 16 is *granted to the extent* that leave to reargue, as limited therein, is granted and, *upon reargument*, the Court *adheres to its prior determination* denying Nussbaum's prior motion in Seq. No. 14; and it is further

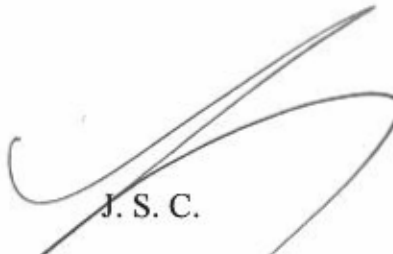
ORDERED that Republic's motion in Seq. No. 17 is *denied as premature* with leave to renew upon the completion of discovery; and it is further

ORDERED that Nussbaum's motion in Seq. No. 18 is *denied in its entirety*.

The parties are reminded of their previously scheduled appearance in Commercial Part Trial 4 on Mar. 20, 2020.

This constitutes the decision and order of the Court.

ENTER FORTHWITH,

  
J. S. C.  
Justice Lawrence Knipel

2020 MAR -4 AM 9:05  
KINGS COUNTY CLERK  
FILED