SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : **IAS PART 3**

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FERSTER BRUCKMAN WOHL MOST & ROTHMAN, LLP, formerly known as FINKELSTEIN BRUCKMAN WOHL MOST & ROTHMAN, LLP,

Index No. 115490/97

Plaintiff,

Sequence No. 001

- against -

HAROLD A. HOROWITZ and SUSAN BLECH,

Defendants.

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HAROLD A. HOROWITZ and SUSAN BLECH,

Third-Party Plaintiffs,

Index No. 590760/99

- against -

GEORGE FERSTER, GEORGE BRUCKMAN, ALLEN FINKELSTEIN, JACK MOST, BERNARD ROTHMAN, RICHARD SCHWARTZ, RONALD WOHL, and GOETZ FITZPATRICK MOST & BRUCKMAN, LLP.,

Third-Party Defendants.

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BARRY A. COZIER, J.:

Plaintiff law firm, Ferster Bruckman Wohl Most & Rothman, LLP (the "Ferster Firm"), formerly known as Finkelstein Bruckman Wohl Most & Rothman, LLP. (the "Finkelstein Firm"), commenced this action against defendants Harold A. Horowitz ("Horowitz"), a former partner of the law firm, and Susan Blech ("Blech"), his secretary, to recover damages for, *inter alia*, the alleged breach of two partnership agreements. Thereafter, Horowitz and Blech commenced a third-party action against Goetz Fitzpatrick Most & Bruckman, LLP. (the "Goetz Firm"), alleged successor in interest of the Finkelstein Firm and

Ferster Firm, and its individual partners George Ferster ("Ferster"),[1] George Bruckman ("Bruckman"), Allen Finkelstein ("Finkelstein"), Jack Most ("Most"), Richard Schwartz ("Schwartz") and Ronald Wohl ("Wohl").

Third-party defendants Ferster, Bruckman, Finkelstein, Most Wohl and the Goetz Firm now move, pursuant to CPLR 3211(a)(1), (5) and (7), to dismiss the third-party complaint.[2] The movants also seek the imposition of sanctions against plaintiffs for refusing to withdraw their third-party claims.

FACTUAL ALLEGATIONS

By letter agreement, dated September 4, 1990, Horowitz became a contract partner for the Finkelstein Firm. Thereafter, by written partnership agreement, dated January 1, 1993, he became an equity partner in that firm from January 1, 1993 to September 30, 1995. The letter and partnership agreements reportedly required partners to turn over to either the Ferster Firm or the Finkelstein Firm all compensation received from clients. By Certificate of Registration, dated May 1, 1995, and executed by several partners including Horowitz, the Finkelstein Firm became a limited liability partnership, pursuant to Partnership Law §121-1500(a). Horowitz withdrew from the Finkelstein firm effective September 30, 1995.

The Ferster Firm succeeded the Finkelstein Firm. In addition, by limited liability partnership agreement, dated January 1, 1999, the Goetz Firm amended its partnership agreement

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[1] Third-party defendants assert that the correct name of the former partner is Bernard Ferster.

[2] Finkelstein withdrew from the Ferster Firm in July 1997, and moves separately from the other third-party defendants. In addition, the submissions are silent as to Schwartz.

to admit Ferster, Bruckman and Most as new partners. The limited liability partnership agreement expressly stated that the Goetz Firm and its other partners "assume[d] no liability, present or future, fixed or contingent, arising out of any aspect of the business of the [Ferster Firm] or any law firm under any other name that [Ferster, Bruckman and Most] may have been associated with up to and including December 31, 1998." In addition, the limited liability partnership agreement provided that the Goetz Firm "[wa]s not acquiring any interest in the assets of Most, Bruckman and Ferster, [the Ferster Firm], or any other law firm they were associated with or were members of" prior to the effective date of said agreement, and that the Goetz Firm "[wa]s not a successor in interest to those business ventures."

The Ferster Firm commenced this action alleging causes of action against Horowitz for breach of the letter and partnership agreements (first cause of action), against Horowitz and Blech for conversion (second cause of action), against Horowitz for breach of fiduciary duty (third cause of action), against Horowitz for breach of the duty of good faith and fair dealing (fourth cause of action), against Blech for breach of the duty of loyalty, good faith and fair dealing (fifth cause of action), against Horowitz and Blech for the imposition of a constructive trust (sixth cause of action), against Horowitz and Blech for an accounting (seventh cause of action), against Horowitz and Blech for a declaratory judgment (eighth cause of action), and against Horowitz and Blech for unjust enrichment (ninth cause of action). The gravamen of the complaint is that Horowitz breached the terms of the letter and partnership agreements by, *inter alia*, accepting funds, shares of stock, stock options, warrants and other compensation from certain clients of the Finkelstein Firm and Ferster Firm, including Microtel International, Inc.,

Juniper Features, Ltd., Kleer Vu Industries, Inc., and that Blech, acting on behalf of Horowitz, improperly retained shares of stock from clients of the Finkelstein Firm and the Ferster Firm.

Defendants answered, generally denying the allegations in the complaint, and asserting several affirmative defenses. Defendants also counterclaimed for breach of the letter and partnership agreements, an accounting, negligent or intentional infliction of emotional distress, punitive damages and conversion. Defendants essentially claimed that the Finkelstein Firm and its partners failed to compensate Horowitz for the value of his capital account, his share of accounts receivable, or services rendered pursuant to the letter and partnership agreements. Defendants also claimed that the Finkelstein Firm and its partners breached their fiduciary duty, as well as their duty of good faith and fair dealing, by harassing Horowitz, causing him to experience deteriorating health, and ultimately compelling him to withdraw from the firm. Defendants further alleged that the Finkelstein Firm and its partners converted Horowitz's personal effects.

In addition, on May 24, 1999, Horowitz and Blech filed a third-party complaint essentially restating their counterclaims in the main action. Specifically, third-party plaintiffs claimed that third-party defendants breached the letter agreement between Horowitz and the Finkelstein Firm by failing to compensate Horowitz for the value of the his capital account or his share of accounts receivable, and as such, Horowitz is entitled to an accounting (first and second causes of action); that third-party defendants breached the terms of the letter agreement by failing to compensate Horowitz for services rendered thereunder, and as such, he is entitled to an accounting (third and fourth causes of action); that third-party defendants breached their fiduciary duty, and duty of good faith and fair dealing, by harassing Horowitz, causing him to

experience deteriorating health, and ultimately compelling him to withdraw from the firm (fifth cause of action); that Horowitz is entitled to punitive damages for the wrongful conduct of third-party defendants (sixth cause of action); that third-party defendants converted Horowitz's personal effects (seventh cause of action); that the third-party defendants are jointly and severally liable for the injuries and damages sustained by Horowitz (eighth, ninth and tenth causes of action); that the Ferster Firm, Finkelstein Firm and individual partners harassed Blech, during her employment, causing her to sustain emotional distress and physical injury, and entitling her to punitive damages (eleventh and twelvth causes of action); and that third-party defendants are jointly and severally liable for the injuries sustained by Blech (thirteenth and fourteenth causes of action).

Ferster, Bruckman, Finkelstein, Most, Wohl and the Goetz Firm now seek to dismiss the third-party complaint on the ground that it fails to state appropriate third-party claims. Alternatively, the movants assert that the third-party complaint should be dismissed because, among other things, documentary evidence exists to defeat the claims therein.

DISCUSSION

At the outset, the Court concludes that the use of a third-party complaint in this instance is improper since defendants do not purport to "proceed against a person not a party who is or may be liable to [them] for all or part of plaintiff's claim against [them]." CPLR 1007. Although CPLR 1007 is to be liberally construed to promote judicial economy and to avoid multiplicity of actions (*George Cohen Agency, Inc. v. Donald S. Perlman Agency, Inc.*, 51 N.Y.2d 358, 365 (1980)), it still remains that the third-party claim must be sufficiently related to the main action so as to raise the issue of whether the third-party defendant may be liable to

defendant-third-party-plaintiff, for whatever reason, for the damages for which the latter may be liable to plaintiff. *Rausch v. Garland*, 88 A.D.2d 1021, 1022 (3d Dept. 1982).

The allegations in the third-party complaint, even if proven, would not result in any liability on the part of the Goetz Firm or its individual partners for breach the letter and partnership agreements between Horowitz and the Finkelstein Firm. As stated, the Goetz Firm limited liability partnership agreement expressly states that it is not a successor in interest to the Finkelstein Firm or the Ferster Firm. Moreover, for that reason, the Court need not treat the allegations in the third-party complaint as counterclaims. *See, McNamara v. Banney*, 227 A.D.2d 892 (4th Dept 1996). In any event, had the Court decided to treat the third-party claims as counterclaims, said claims would nevertheless not survive a motion to dismiss.

It is well-settled that on a motion to dismiss, "the pleading is to be afforded a liberal construction." CPLR 3026; *Leon v. Martinez*, 84 N.Y.2d 83, 87 (1994). The Court must accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every favorable inference, and determine whether the facts as alleged fit within any cognizable legal theory. *Id.* at 87-88.

Furthermore, on a motion to dismiss based on documentary evidence, the document relied upon must definitively dispose of the plaintiff's claim. *See*, CPLR 3211(a)(1); *Leon v. Martinez*, *supra*, at 88. However, in assessing a motion under CPLR 3211(a)(7), the Court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint. *Id.*

Here, documentary evidence clearly exists to definitively dispose of the claims by Horowitz and Blech against the Goetz Firm. As discussed, the Goetz Firm limited liability

partnership agreement unequivocally states that the Goetz Firm is not a successor in interest to the Ferster Firm, and that neither the Goetz Firm nor any of its partners, including the former partners of the Ferster Firm or its predecessor, intended to assume any liability arising out of any aspect of the business of said law firm.

The claims against the individual third-party defendants must also be dismissed. As to the claims for breach of contract and an accounting, New York Partnership Law §26(b) provides, in part:

> Except as provided by subdivisions (c) and (d) of this section, no partner of a partnership which is a registered limited liability partnership is liable or accountable, directly or indirectly * * * for any debts, obligations or liabilities of, or chargeable to, the registered limited liability partnership or each other, whether arising in tort, contract or otherwise, which are incurred, created or assumed by such partnership while such partnership is a registered limited liability partnership, solely by reason of being such a partner or acting (or committing to act) in such capacity * * *.

Under subdivision (c), the limitation on personal liability is lifted "for any negligent or wrongful act or misconduct" committed by the partners or by any persons under their direct supervision and control while rendering professional services on behalf of the limited liability partnership. Subdivision (d) imposes liability on specified limited liability partners who agree to be liable to specified partnership debts.

It is undisputed that the breach of contract and accounting claims against the individual third-party defendants arose after the Finkelstein Firm became a limited liability partnership. Thus, said claims, essentially seeking to recover from the individual partners for the alleged debts of the limited liability partnership, solely because of their status as partners, must fail.

The third-party causes of action for breach of fiduciary duty and the duty of good faith and fair dealing must also fail since the factual allegations therein lack specificity and omit the element of deceitful intent on the part of third-party defendants. *See*, CPLR 3016(b); *Horn v. 440 East 57th Co.*, 151 A.D.2d 112, 120 (1st Dept 1989).

Furthermore, the third-party claims purporting to seek recovery for emotional harm and harassment are patently insufficient. Horowitz and Blech simply fail to allege any facts to establish that the individual third-party defendants breached a cognizable duty of care, resulting in emotional disturbance with physical manifestations (*See, Battalla v. State of New York*, 10 N.Y.2d 237 (1961)), or that third-party defendants engaged in "extreme and outrageous conduct, which so transends the bounds of decency as to be regarded as atrocious and intolerable in a civilized society." *See, Freihofer v. Hearst Corp.*, 65 N.Y.2d 135, 143 (1985) (citations omitted).

The third-party claim for conversion must also be dismissed. Conversion is the unauthorized assumption and exercise of the right of ownership over goods belonging to another. *Peters Griffin Woodward, Inc. v. WCSC, Inc.*, 88 AD2d 883 (1st Dept 1982). To establish a cause of action for conversion, third-party plaintiffs must allege legal ownership or an immediate superior right of possession of specifically identifiable property, and the exercise of unauthorized dominion over said property by third-party defendants. *William Beeferman, Inc. v. W.J.K. Assocs., Inc.*, 151 A.D.1d 233, 234 (1st Dept 1989). The third-party plaintiffs allege that after Horowitz withdrew from the Finkelstein Firm he sought unsuccessfully to recover his papers, personal effects and personally owned furniture. Thus, it appears that Horowitz's quarrel is with

the Finkelstein Firm, which, as repeatedly stated, is not a predecessor in interest to the Goetz Firm or its partners.

The claim for punitive damages must similarly be dismissed since punitive damages are not recoverable where, as here, their purpose is to remedy a private wrong. *Rocanova v. Equitable Life Assur. Socy. of the United States*, 83 N.Y.2d 603, 613 (1994).

While it is clear that the third-party complaint in this action cannot be sustained, the Court, declines to impose sanctions against the third-party plaintiffs for frivolous motion practice. *See*, 22 NYCRR 130-1.1.

Accordingly, it is

ORDERED that the motions to dismiss the third-party complaint are granted and the third-party complaint is dismissed with costs and disbursements to said third-party defendants as taxed by the Clerk of the Court; and it is further

ORDERED that the main action is severed and continued as against the defendants; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.

DATED: June 2, 2000

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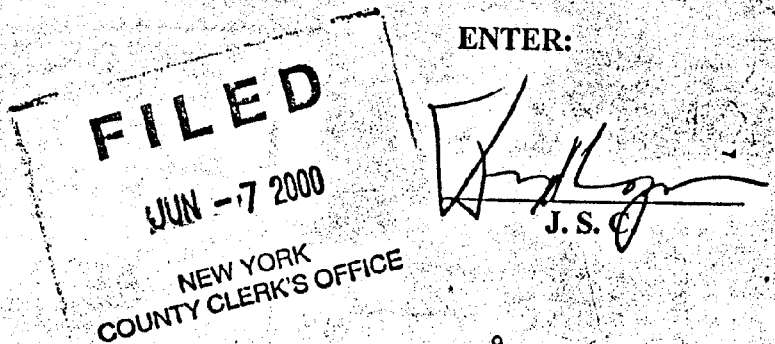

J. S. C.