

**Haberman v Xander Corp.**

2012 NY Slip Op 31645(U)

June 11, 2012

Sup Ct, Nassau County

Docket Number: 021508/10

Judge: Randy Sue Marber

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**

**JUSTICE**

TRIAL/IAS PART 14

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SINCLAIR HABERMAN and BELAIR  
BUILDING, LLC,

Plaintiffs,

-against-

Index No.: 021508/10  
Motion Sequence...01, 02, 03  
Motion Date...03/15/12

XANDER CORP., AARON WAGNER, DENNIS  
BERKOWSKY, HERMAN NEUMAN,  
JEANETTE IANNUCCI and FIDELITY AND  
DEPOSIT COMPANY OF MARYLAND,

Defendants.

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XANDER CORP.,

Third-Party Plaintiff,

-against-

MICHAEL G. ZAPSON and DAVIDOFF,  
MALITO & HUTCHER, LLP,

Third-Party Defendants.

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- Papers Submitted:
- Notice of Motion (Mot. Seq. 01).....X
- Memorandum of Law.....X
- Affirmation in Opposition.....X
- Reply Affirmation.....X

Order to Show Cause (Mot Seq. 02).....X  
 Affirmation in Opposition.....X  
 Notice of Motion (Mot. Seq. 03).....X  
 Affirmation in Reply.....X

Upon the foregoing papers, the motion (Mot. Seq. 01) pursuant to CPLR § 3211 (a) (1), (4) and (7) by the Third-Party Defendant, Michael Zapson and Davidoff Malito and Hutcher, LLP (DMH) seeking to dismiss the Third-Party complaint; the Order to Show Cause (Mot. Seq. 02) brought pursuant to CPLR § 602 by the Defendant/Third-Party Plaintiff, Xander Corp. (Xander) seeking consolidation of an action pending in the Supreme Court: Nassau County before the Hon. Antonio Brandveen under Index No. 002946/10, entitled *Davidoff Malito & Hutcher v. Xander Corp.*,<sup>1</sup> with the instant action (Index No. 021508/10) or for joint trial; and the Cross-motion (Mot. Seq. 03) brought pursuant to CPLR § 3025 (b) by the Defendant/Third-Party Plaintiff, Xander, seeking to amend the Third-Party complaint in the form annexed to the moving papers are determined as provided herein.

It appears from the Third-Party complaint that in or about October 2002, the Third-Party Defendant, Michael Zapson,<sup>2</sup> and later the Defendant, DMH, was retained by the Defendant/Third-Party Plaintiff, Xander, to represent it in connection with a legal matter relating to a parcel of real property known as 350 Shore Road, Long Beach, New York,

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<sup>1</sup>Although the *Davidoff Malito & Hutcher* action was commenced prior to the third-party action, it is referred to by the movant as Action No. 2.

<sup>2</sup>When Michael Zapson joined the firm of Davidoff Malito & Hatcher, Xander became a client of said firm which provided legal services to Xander through Michael Zapson and other lawyers in the firm. Davidoff Malito & Hutcher, LLP is a successor firm to Davidoff & Malito.

owned by the Plaintiffs herein and located adjacent to the west of real property known as 360 Shore Road owned by the Defendant/Third-Party Plaintiff, Xander. The Plaintiffs, Sinclair Haberman and Belair Building, LLC (Haberman/Belair) were the developers of the property on which several multiple dwelling buildings were to be constructed over several years. After all of the units in Xander's building (Tower "A"), the first to be constructed, located at 360 Shore Road, had been sold, the Plaintiffs, Haberman/Belair, sought to develop the adjacent property where they proposed to construct Tower "B." The building permit issued on August 12, 2003, permitting construction of the second building was, however, revoked by decision of the Zoning Board of Appeals of the City of Long Beach dated December 29, 2003.

In or about September 2003, the Third-Party Defendants, on behalf of the Defendant/Third-Party Plaintiff, Xander, filed a Petition (bearing Index No. 014069/03) to determine title by adverse possession to, and/or a prescriptive easement over, part of 350 Shore Road for the purpose, *inter alia*, of preserving the parking plan of 360 Shore Road. The litigation, which continued for seven years, culminated in a bench trial which resulted in dismissal of Xander's Petition by order of the Hon. William R. LaMarca entered January 15, 2010.

As a consequence of that dismissal, the Plaintiffs, Haberman/Belair, commenced this action against the Defendant, Xander, and its board members alleging that, because of the preliminary injunction obtained by Xander, the Plaintiffs were wrongfully

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prevented from proceeding with construction of Tower "B" at 350 Shore Road. The Plaintiffs allege that the adverse possession action prosecuted by Xander constituted malicious prosecution for which they seek to recover damages as well as the amount of the undertaking.

In the amended Third-Party complaint, the Third-Party Plaintiff seeks indemnification and contribution from DMH for any damages Haberman/Belair may recover against Xander, based on the claim that the legal services rendered were inadequate, improper, negligent and contrary to the legal, equitable and economic interests of Xander and its shareholders and board members.

The Third-Party Defendant, DMH's dismissal motion is predicated on the ground that the Third-Party Plaintiff, Xander's bare, conclusory allegations of DMH's breach of contract, negligence and breach of fiduciary duty are legally insufficient to establish a *prima facie* case of legal malpractice. Further, the Third-Party Defendant, DMH, argues for dismissal pursuant to CPLR § 3211 (a) (4) based on the pendency of a prior action which was brought by the Third-Party Defendant, DMH, to recover unpaid legal fees in the amount of \$237,593.42, plus interest, from their former client, the Defendant/Third-Party Plaintiff, Xander.

In the action (Index No. 002496/10), before the Hon. Antonio Brandveen, commenced in February 2010, Xander asserted a cross-claim for breach of contract and sought to recoup a portion of the attorneys' fees already paid based on allegations, *inter alia*,

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that their attorneys knew or should have known that there was insufficient evidence to prove the adverse possession/ prescriptive easement claims asserted against Haberman/Belair and did not adequately advise Xander about the merits of the lawsuit and the likelihood of success after trial. A note of issue was filed in that case on September 20, 2011 and it was marked "Settled before Trial" on June 1, 2012. As this Court has not been advised whether the settlement of the action (Index No. 002496/10), before the Hon. Antonio Brandveen also resolved the claims of Xander in this action, this Court will render its decision assuming that Xander's claims in this action remain viable.

In opposition to the Third-Party Defendant, DMH's dismissal motion, the Defendant/Third-Party Plaintiff, Xander, has cross-moved to amend the Third-Party complaint to omit the cause of action to recover a portion of the sum previously paid to the Third-Party Defendant as and for legal fees, and to assert causes of action for indemnification and contribution based on the Third-Party Defendant, DMH's alleged professional negligence, i.e., legal malpractice, in failing to advise Xander as to the appropriate course of action to be taken against Haberman/Belair *vis-a-vis* the adverse possession claim, and in selecting and pursuing inappropriate and unsupportable claims for which Xander may be liable in damages.

A motion to dismiss a complaint pursuant to CPLR § 3211 (a) (1) may be granted only if the documentary evidence submitted by the moving party refutes the factual allegations of the complaint and conclusively establishes a defense to the claims as a matter

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of law.” (*Kopelowitz v. Mann*, 83 A.D.3d 793, 796 [2<sup>nd</sup> Dept. 2011]). “In order for evidence to qualify as documentary, it must be unambiguous, authentic, and undeniable.” (*Id.* [internal quotation marks and citations omitted]; *see also Fontanetta v. John Doe 1*, 73 A.D.3d 78, 86 [2<sup>nd</sup> Dept. 2010]). No such evidence has been presented.

On a CPLR § 3211 (a) (7) motion, the court must afford the pleading at issue a liberal construction, accept all facts as alleged in the pleading to be true, accord the pleader the benefit of every possible inference and determine whether the facts as alleged fit within any cognizable legal theory. *Young v. Campbell*, 87 A.D.3d 692, 693-94 (2<sup>nd</sup> Dept. 2011) (internal quotation marks and citations omitted).

Generally, leave to amend a pleading is committed to the sound discretion of the court and will be freely given in the absence of prejudice to the non-moving party resulting from any delay and where the amendment is not patently lacking in merit. *Corwise v. Lefrak Org.*, 93 A.D.3d 754 (2<sup>nd</sup> Dept. 2012). Here the proposed amendment is not patently devoid of merit nor has the Third-Party Defendant shown any manner in which it would be prejudiced or surprised by the proposed amendment.

Inasmuch as the relief sought in the counterclaim asserted by Xander in the action (Index No. 002496/10), before the Hon. Antonio Brandveen, i.e., “damages in an amount to be determined at trial to recoup part of the attorneys’ fees it has already paid as a result of plaintiff DMH’s conduct” is different from the indemnification and/or contribution claims Xander asserts in the amended Third-Party complaint in this action, there is no basis

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to dismiss the Third-Party complaint on CPLR § 3211 (a) (4) grounds as there are not two action(s) pending between the same parties for the same cause of action in a court of any state or the United States. Nor was there any basis to order consolidation of the two actions.

A motion for joint trial pursuant to CPLR § 602 (a) rests in the sound discretion of the court. *Nationwide Assoc. v. Targee St. Internal Med. Group, P.C.*, 286 A.D.2d 717, 718 (2<sup>nd</sup> Dept. 2001). Where common questions of law or fact exist, a motion to consolidate or for a joint trial pursuant to CPLR § 602 (a) will be granted absent a showing of prejudice to a substantial right of the party opposing the motion. *Whitman v. Parsons Transp. Group of N.Y., Inc.*, 72 A.D.3d 677, 678 (2<sup>nd</sup> Dept. 2010).

The court finds no basis, equitable or otherwise, that the claim by the Defendant/Third-Party Xander's former attorneys for unpaid counsel fees for services rendered, settled on June 1, 2012, should have been delayed or resolved in the context of the malicious prosecution claim in which the Defendant/Third-Party Plaintiff, Xander, seeks contribution and indemnification for any damages the Plaintiff, Haberman/Belair, may recover against it in this action.

The Plaintiffs in the action (Index No. 002496/10), which was pending before the Hon. Antonio Brandveen would have been severely prejudiced by consolidating an action ready for trial with one in which discovery has not yet begun. The interests of justice and judicial economy would not have been served by a joint trial of these actions.

Here the instant Third-Party action and the action (Index No. 002496/10),



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before the Hon. Antonio Brandveen, brought by the Defendant/Third-Party Plaintiff's prior attorneys, DMH, was not for the same causes of action and did not involve common questions of law or fact. Further, since a note of issue was filed in the action (Index No. 002496/10), that was before the Hon. Antonio Brandveen on September 22, 2011 and that action has been settled, there is no need to further consider the Defendant/Third-Party Plaintiff, Xander's Order to Show Cause (Mot. Seq. 02) seeking the consolidation or joint trial of this action with the action (Index No. 002496/10), which was before the Hon. Antonio Brandveen.

Accordingly, it is hereby

**ORDERED**, that the motion (Mot. Seq. 01) pursuant to CPLR § 3211 (a) (1), (4) and (7) by the Third-Party Defendant, Michael Zapson and Davidoff Malito and Hutcher, LLP (DMH) seeking to dismiss the Third-Party complaint is **DENIED**; and it is further

**ORDERED**, that the Order to Show Cause (Mot. Seq. 02) brought pursuant to CPLR § 602 by the Defendant/Third-Party Plaintiff, Xander Corp. (Xander) seeking consolidation of an action pending in the Supreme Court: Nassau County before the Hon. Antonio Brandveen under Index No. 002946/10, entitled *Davidoff Malito & Hutcher v. Xander Corp.* with the instant action (Index No. 021508/10) or for joint trial is **DENIED** as moot; and it is further


**ORDERED**, that the Cross-motion brought pursuant to CPLR § 3025 (b) by the Defendant/Third-Party Plaintiff, Xander, seeking to amend the Third-Party complaint in

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the form annexed to the moving papers is **GRANTED**.

All matters not decided herein are hereby denied.

This constitutes the decision and order of this court.

DATED: Mineola, New York  
June 11, 2012

  
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Hon. Randy Sue Marber, J.S.C.

**ENTERED**  
JUN 14 2012  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE