

**3 E. 54th St. N.Y. LLC v Patriarch Partners Agency
Servs. LLC**

2012 NY Slip Op 33276(U)

July 27, 2012

Sup Ct, NY County

Docket Number: 600176/09E

Judge: Paul G. Feinman

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. PAUL G. FEINMAN
Justice

PART 12

Index Number : 600176/2009 E
3 EAST 54TH STREET NEW YORK
vs.
PETRY MEDIA
SEQUENCE NUMBER : 015
DISMISS

INDEX NO. 600176/2009
MOTION DATE _____
MOTION SEQ. NO. 015

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____	No(s). _____
Answering Affidavits — Exhibits _____	No(s). _____
Replying Affidavits _____	No(s). _____

Upon the foregoing papers, it is ordered that this motion is

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ANNEXED DECISION AND ORDER.**

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

*cc re any remaining dependants
on 9/12/12 at 2:15pm*

Dated: 7/27/2012

[Signature], J.S.C.

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: IA PART 12

-----X

3 EAST 54TH STREET NEW YORK LLC, a New York
Limited Liability Company,
Plaintiff,

-against-

Index No. 600176/09E
Mot. Seq. No. 015

PATRIARCH PARTNERS AGENCY SERVICES LLC,
LYNN TILTON, PETRY MEDIA CORP., PETRY
TELEVISION, INC., BLAIR TELEVISION,
INC., ARK INVESTMENT PARTNERS, II, LP,
ARK CLO 2001-1, LIMITED, SANDLER
MEZZANINE T.E. PARTNERS, L.P., SANDLER
MEZZANINE FOREIGN PARTNERS, L.P., ZOHAR
II CDO 2003-1, LIMITED, ZOHAR II
2005-1, LIMITED, RICHARD INTRATOR,
ARNOLD SHEIFFER, TIMOTHY MCAULIFF, VAL
NAPOLITANO, LEE MACCOURTNEY, and
MOIRA MITCHELL,

DECISION & ORDER

Defendants.

-----X

For Plaintiff:
Itzkowitz & Harwood
By: Donald A. Harwood, Esq.
305 Broadway, 7th fl.
New York NY 10007
(212) 822-1400
dharwood@itkowitz.com

For Defendant-Movant Petry Holding, Inc.:
Fox Rothschild LLP
By: Daniel A. Schnapp, Esq
100 Park Avenue, ste. 1500
New York NY 10017
(212) 878-7900
dschnapp@foxrothschild.com

Papers considered on review of this motion to dismiss:

PAPERS
Notice of Motion, Schnapp Aff. in Support, Exhibits A - J
Harwood Aff. in Opp., Exhibits 1 - 4, Memorandum of Law in Opposition
Schnapp Aff. in Reply, Exhibits A - I

E-FILING DOCUMENT NOS.
209 - 220
221 - 222
223 - 232

PAUL G. FEINMAN, J.:

Petry Holding, Inc. (Petry Holding) moves, pursuant to CPLR 3211 (a) (5) and (7), to
dismiss plaintiff's amended complaint as asserted against it. For the reasons set forth below, the
motion is granted.

BACKGROUND

The facts of this case have been previously stated in detail in the prior decisions of this court and the Appellate Division, First Department and will therefore not be reiterated (*see 3 East 54th Street New York, LLC, v Patriarch Partners, LLC, et al.*, Sup Ct, NY County, January 8, 2010, Feinman, J., index no. 600176/2009E, mot. seq. no. 003 [doc. no. 70]; *3 East 54th Street New York, LLC, v Patriarch Partners Agency Services, LLC, et al.*, Sup Ct, NY County, January 11, 2011, Feinman, J., index no. 600176/2009E, mots. seq. nos. 008, 009, 010 & 011 [doc. no. 117]; *3 East 54th Street New York, LLC, v Patriarch Partners Agency Services, LLC, et al.*, Sup Ct, NY County, October 21, 2011, Feinman, J., index no. 600176/2009E, mots. seq. nos. 012 & 013 [doc. no. 189]; and *3 E. 54th St. N.Y., LLC v Patriarch Partners, LLC*, 90 AD3d 418 (1st Dept. 2011).

Previously, this court dismissed all but plaintiff's first cause of action for breach of contract, which was not asserted as against Petry Holding, asserted as against Petry Media Corp., Petry Television, Inc. and Blair Television, Inc., and declined to permit plaintiff to amend the pleadings to include Petry Holding. (doc. nos. 117 & 189). That decision was appealed, and on appeal the Appellate Division affirmed this court's order, with the exception of modifying the decision to deem the caption amended to include Petry Holding. *3 East 54th Street New York, LLC v Patriarch Partners, LLC, supra*. The Appellate Division specifically held that plaintiff failed to allege any fraud, aside from mere conclusory statements, which "are not entitled to be accepted as true on a motion to dismiss on the pleadings." *Id.* at 419. Additionally, the Court held that plaintiff failed to state a cause of action based on a theory of alter ego liability, and found all of plaintiff's arguments to be "without merit." *Id.* at 420.

It is Petry Holding's contention that, based on the determination of the Appellate Division, although it is now added to the caption as a defendant, plaintiff has failed to allege any viable cause of action against it. The complaint only alleges that Petry Holding is a holding company and successor to the other named defendants, and, since the Appellate Division found that the complaint was properly dismissed as against all of the defendants, except for those named in the first cause of action, Petry Holding maintains that the complaint must be similarly dismissed as against it.

In opposition to the instant motion, plaintiff asserts that, by allowing the complaint to be amended to include Petry Holding, the Appellate Division found that plaintiff may have stated valid claims against that entity, even though it dismissed the complaint as asserted against the other defendants.

In reply, Petry Holding avers that all of the arguments posited against Petry Holding were presented to the First Department in plaintiff's brief and, as stated above, except for amending the complaint to include Petry Holding, the Appellate Division found all of plaintiff's other arguments to be without merit. Hence, Petry Holding argues that the appellate decision is the law of the case and that, since the appellate court dismissed the complaint as being without merit, the complaint should be dismissed as against Petry Holding as well.

The court notes that Petry Holding filed the instant motion in response to a letter sent to it by plaintiff in which plaintiff said that it would move for a default judgment against Petry Holding if it did not answer the complaint, based on the appellate decision herein discussed (Not. of Motion, Ex. A; doc. no. 211).

DISCUSSION

CPLR 3211 (a), governing motions to dismiss a cause of action, states that

“[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

(1) a defense is founded upon documentary evidence; or

(5) the cause of action may not be maintained because of ... collateral estoppel, ... res judicata, ...; or

(7) the pleading fails to state a cause of action”

On a motion to dismiss pursuant to CPLR 3211, the pleading should be liberally construed, the facts alleged by the plaintiff should be accepted as true, and all inferences should be drawn in the plaintiff’s favor (*Leon v Martinez*, 84 NY2d 83 [1994]); however, the court must determine whether the alleged facts “fit within any cognizable legal theory.” *Id.* at 87-88.

Further, “[a]llegations consisting of bare legal conclusions ... are not presumed to be true [or] accorded every favorable inference [internal quotation marks and citation omitted].” *Biondi v Beekman Hill House Apartment Corp.*, 257 AD2d 76, 81 (1st Dept 1999), *affd* 94 NY2d 659 (2000).

Petry Holding’s motion is granted and the complaint is dismissed as asserted against it.

In both its civil reargument statement (Not. of Mot., Ex. G; doc. no. 217) and appellate brief filed with the Appellate Division (Not. of Mot., Ex. H; doc. no. 218), plaintiff argued that Petry Holding should be added to the caption because its omission from the caption was just a “de minimus oversight.” *Id.* at 58. Further, plaintiff maintained that “counsel for Petry Holding, Fox Rothschild, LLP, *appeared on behalf of Petry Holding* (S.R. 1473), and fully argued the merits in its motion to dismiss the First Amended Complaint against it ... [emphasis in the

original].” *Id.* After arguing that the omission of Petry Holding from the caption was a mere clerical error, plaintiff then went on to assert its claims against Petry Holding, specifically averring that Petry Holding is liable to it based on the theories of successor liability and alter ego. *Id.* at 60-64.

The Appellate Division agreed with plaintiff that this court should have permitted amendment to include Petry Holding in the caption, but it specifically found all of plaintiff’s other arguments to be without merit, which would include plaintiff’s theories of liability based on successor and alter ego liability. The only logical reading of the appellate decision is that Petry Holding was deemed part of the caption due to plaintiff’s “de minimus” oversight, but that the claims asserted against Petry Holding were “without merit,” as they were with respect to all of the other defendants named in the appeal.

“Under the doctrine of collateral estoppel, a party is precluded from relitigating an issue which has been previously decided against him in a prior proceeding where he had a full and fair opportunity to litigate such issue.”

Luscher v Arrua, 21 AD3d 1005, 1007 (2d Dept 2005). By admission in its appellate brief, plaintiff conceded that these issues were fully argued by it and opposed by Petry Holding’s counsel. Therefore, plaintiff’s amended complaint as asserted against Petry Holding must be dismissed.

The court is unpersuaded by plaintiff’s other argument that Petry Holding’s motion acts as a concession that the Appellate Division intended the claims asserted as against it to be litigated. As noted above, Petry Holding only filed this motion in response to the letter from plaintiff’s counsel indicating that plaintiff would seek a default judgment against Petry Holding if

it did not answer the first amended complaint.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that defendant Petry Holding, Inc.'s motion to dismiss the first amended complaint as asserted against it is granted and the complaint is dismissed as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk upon submission of an appropriate bill of costs, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the complaint is severed and continued as to any remaining defendants not previously dismissed; and it is further

ORDERED that the plaintiff shall serve a copy of this order on any remaining defendants and that plaintiff and said remaining defendants shall appear for a compliance conference on Wednesday, September 12, 2012 at 2:15 p.m., or, if there are no remaining defendants, the plaintiff's counsel shall so inform the Clerk of Part 12, Mr. Michael Kasper at (646) 386-3273, who shall then mark this matter as disposed.

Dated: July 27, 2012
New York, New York



J.S.C.