| **Tofel v Hubbard** |
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| 2017 NY Slip Op 31405(U) |
| June 29, 2017 |
| Supreme Court, New York County |
| Docket Number: 652404/16 |
| Judge: Debra A. James |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 59
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LAWRENCE TOFEL, as successor to
TOFEL & PARTNERS, LLP,

Plaintiff,

-against-

Index No. 652404/16

BRUCE A. HUBBARD and
BRUCE A. HUBBARD, P.C.

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HON. DEBRA A. JAMES

In motion sequence number 001, plaintiff Lawrence Tofel (Tofel) moves for summary judgment in the amount of $44,000. In motion sequence number 002, defendants Bruce A. Hubbard (Hubbard) and Bruce A. Hubbard, P.C. move for summary judgment dismissing the action.

CONCLUSION

The court shall grant plaintiff's motion for summary judgment against defendants BRUCE A. HUBBARD and BRUCE A. HUBBARD, P.C. in part, and shall deny defendants' motion for summary judgment against plaintiff, and the issue of damages to be assessed against defendants BRUCE A. HUBBARD and BRUCE A. HUBBARD, P.C. shall be referred for determination to a Special Referee.

FACTS

The complaint alleges that Tofel is the successor to Tofel & Partners, LLP, a law firm (the firm) in which Tofel and his

father, Robert Tofel, were partners. Defendants, Hubbard and his professional corporation, occupied a portion of the firm's offices under a series of oral and written agreements. When Tofel moved to another building in January 2010, defendants moved to the same quarters and continued to rent space from the firm.

Tofel alleges that, upon the move, the firm and Hubbard entered into a lease, entitled "Term Sheet," which is appended to the complaint. The one-page "Term Sheet" recites that Bruce Hubbard is "sublessee/licensee," that Tofel is "sublandlord," that Hubbard agrees to vacate the space promptly upon notice if Tofel vacates, and that the base rent is $3,800 a month. The contract is dated as written "January ___, 2010", but is not signed and defendants deny ever signing it or any other lease or agreement with Tofel or the firm.

Tofel alleges that "over time," Hubbard fell behind on the rent. The firm "closed" effective December 31, 2013 due to "business issues" and Robert Tofel's declining health. By the time that the firm closed, Hubbard had "acknowledged and agreed" that he owed it $70,401.13. In December 2013 and January 2014, Tofel and Hubbard prepared, exchanged, and edited agreements providing for Hubbard to pay the amount owed.

The record before this court is unclear as to when the Tofel law firm vacated the premises, but defendants moved out in January 2014. After that, Tofel alleges, Hubbard refused to sign

any agreement but began to make payments of $1,000, "essentially monthly." The firm accepted the payments although no agreement for a payment schedule had been reached. After the firm closed, Tofel accepted the payments. The payments became "increasingly late."

Altered and edited agreements, none of which are finalized or signed, are attached to the complaint. The parties did not reach a final written agreement.

There is no dispute that Robert Tofel passed away in 2015.

Hubbard paid the firm a total of $26,401.13. The last payment was made on April 25, 2016. The "Consent to Sublease" attached by Tofel states that the firm may sublease premises to Bruce Hubbard, PC. The check is for $1,000 and is a "Bruce A. Hubbard PC" check, made out to Tofel, made by hand, and signed by Hubbard. On the bottom left line, an illegible word and next to it, "$44,000" are written.

Tofel brought this action to recover $44,000 along with interest from December 31, 2013. The complaint contains causes of action for breach of contract against Hubbard, breach of contract against Hubbard PC, and quantum meruit against both. In addition, Tofel seeks sanctions in the form of attorneys' fees, alleging that defendants have no excuse or justification for not paying and that they acted in bad faith by refusing service of process. Alternatively, should Hubbard be determined not to be

personally liable, Tofel seeks summary judgment against Hubbard PC.

In their answer, defendants admit to the allegations in the following paragraphs:

¶ 14 - Hubbard fell behind on monthly payments.

¶ 15 - By the time that the firm closed effective December 31, 2013, Hubbard "acknowledged and agreed" that he was indebted to the Law Firm for $70,401.13.

¶ 16 - In December 2013 through January 2014, Hubbard and Tofel made efforts to agree on payment of the debt for $70,401.13.

¶ 17 - Hubbard prepared a draft agreement, which Tofel edited and returned.

¶ 18 - Further drafts were exchanged and redlined in January 2014. Tofel was prepared to accept payment over time. Hubbard attempted to shift liability to Hubbard PC but plaintiff did not find this acceptable.

¶ 20 - "With the payment last made," Hubbard claimed that the balance due had been reduced since December 2013, such that $44,000 remains still due.

¶ 25 - Although the written agreement was with Hubbard and not Hubbard PC, Hubbard denies personal liability and puts the onus on Hubbard PC.

The complaint alleges that Hubbard fell behind on the monthly payments and that Hubbard acknowledged that he was liable for the sum of $70,401.13, while defendants' answer denies Hubbard's personal liability.

ANALYSIS

Outstanding Accrued Rent

Defendants have admitted that they are liable for $44,000,

and their argument that the admissions are not effective is without merit.

Facts admitted in a party's pleadings constitute formal judicial admissions, and are conclusive of the facts admitted in the action in which they are made (DeSouza v Khan, 128 AD3d 756, 758 [2d Dept 2015]). The failure to deny an allegation in a complaint constitutes an admission to the truth of that allegation (id.; CPLR 3018; Kimso Apts., LLC v Gandhi, 24 NY3d 403, 412 [2014]; GMS Batching, Inc. v TADCO Constr. Corp., 120 AD3d 549, 551 [2d Dept 2014]). Admissions made in a pleading concede the truth of the statements and dispense with the production of evidence (Roxborough Apts. Corp. v Kalish, 29 Misc 3d 41, 42-43 [App Term, 1st Dept 2010]).

While admitting owing $44,000, defendants state that plaintiffs have presented no calculations for any other the amount. In this regard, the court agrees with defendants as there is an issue of fact with respect to the total amount of the judgment.

Personal Liability of Hubbard

In addition, while Tofel seeks judgment against Hubbard and Hubbard, PC, he has not met his burden of establishing personal liability against Hubbard and the fact that the April 2016 check bears the name of Hubbard PC is some evidence that the debt is that of the PC. Business Corporation Law § 1505 (a) precludes

imposition of personal shareholder liability, where the liability does not result from the direct rendition of professional services (We're Assocs. Co. v Cohen, Stracher & Bloom, P.C., 65 NY2d 148, 151 [1985]). "Even single-person businesses are allowed to incorporate, and, so long as no fraud is committed and the corporate form is respected, no individual liability will result" (id. at 152; Lichtman v Estrin, 282 AD2d 326, 329 [1st Dept 2001]). Absent clear evidence of an intent to assume personal liability, a shareholder or corporate officer will not be bound to an agreement made between the corporation and a third party (210 E. 86th St. Corp. v Grasso, 305 AD2d 156, 156 [1st Dept 2003]; Star Video Entertainment, LP v J & I Video Distrib., Inc., 268 AD2d 423, 424 [2d Dept 2000]; Paribas Props., Inc. v Benson, 146 AD2d 522, 525 [1st Dept 1989]).

Notice of Close of Tofel Law Firm

Defendants assert a defense based upon Tofel's failure to give them 90 days notice that the lease between the landlord and the firm was terminating as of December 31, 2013. Tofel counters that there were numerous direct conversations in spring and summer 2013 regarding Robert Tofel's increasing disability for work; that "it was well known and generally understood that the law firm would close at year end if it could not work out a different arrangement with its landlord"; that Hubbard knew by October 2013 that the partnership's lease was up by the end of

2013 and that the partnership would leave the premises if the partnership could not work out a better deal with the landlord; and that Hubbard negotiated with the landlord on Tofel's behalf. None of these allegations are denied by defendants. In any event, defendants assert no damages as there is no dispute that they continued in occupancy during the period for which plaintiff asserts his right to rent.

Interest

Lacking merit is defendants' argument that by accepting $1,000 a month for 28 months without interest, plaintiff waived his right to interest. Under CPLR 5001, in an action for breach of contract, plaintiff is entitled to interest at the statutory rate set forth in CPLR 5004. The conduct of plaintiff in accepting partial payments did not indicate mutual assent to rescind the defendants' obligation to pay interest on the indebtedness. (See Davison v Klaess, 280 NY2 252 [1939]).

Tofel's Standing

Defendants challenge Tofel's right to be paid a debt owing to the Tofel firm, and argue that the absence of evidence that he succeeded to the rights of the firm bars his recovery. However, Tofel establishes his prima facie right to prosecute claims on behalf of the firm, which was a limited liability partnership, as there is no dispute that his father and sole partner, deceased in 2015. Further, Tofel attaches the 2014 K-1 schedules for Robert

Tofel and for Tofel. There is no dispute that the Schedule K-1 is a tax document used to report the incomes, losses and dividends of a partnership, and that the Schedule K-1 document is prepared for each individual partner and is included with the partner's personal tax return". The Schedule K-1 for Robert Tofel indicates "Final K-1" and his share of profits, losses, and capital is zero. Tofel's K-1 also indicates that it is final, but his share of profit, loss, and capital is 100%. Such documents are evidence that the law firm closed as of January 2014.

The definition of partnership includes a limited liability partnership (Partnership Law §10 [2]). The Partnership Law applies to limited liability partnerships, except as inconsistent with the statutes expressly applicable to limited liability partnerships (see Conolly v Thuillez, 6 Misc 3d 1007 [A], *5, 2005 NY Slip Op 50003[U] [Sup Ct, Albany County 2005], *affd as mod* 26 AD3d 720 [3d Dept 2006]).

A partnership dissolves when the partners determine to discontinue business (Partnership Law § 60; Bayer v Bayer, 215 App Div 454, 473 [1st Dept 1926]). Upon dissolution, any partner has the right to wind up the partnership (Stark v Utica Screw Prods., Inc., 103 Misc 2d 163, 165 [City Court, Utica County 1980]). Winding up means the process of settling partnership affairs after dissolution, including collecting claims due the

partnership, paying its debts and, completing unfinished transactions (Scholastic, Inc. v Harris, 259 F3d 73, 85 [2d Cir 2001]; Silberfield v Swiss Bank Corp., 273 App Div 686, 688 [1st Dept], *affd* 298 NY 776 [1948]; *Chazen v Dutchess Props.*, 107 Misc 2d 254, 257 [County Ct, Dutchess County 1980]). Dissolution is not the same as termination (Scholastic, 259 F3d at 85). The partnership terminates, not when it is dissolved, but when the winding up is completed (Partnership Law § 61; Ebker v Tan Jay Intl., Ltd., 741 F Supp 448, 468 [SD NY 1990], *affd* 930 F2d 909 [2d Cir 1991]; *111-115* Broadway Ltd. Partnership v Minter & Gay, 255 AD2d 192, 192 [1st Dept 1998]; Bayer, 215 App Div at 473). Until then, "[T]he partnership continues to be responsible for its obligations and debts, and third parties are responsible to the partnership for obligations which they owe said partnership" (Stark, 103 Misc 2d at 167).

After Robert Tofel left the law firm, and certainly as of his father's death, Tofel could not continue the partnership. A partnership must be composed of at least two people (Partnership Law § 10). The evidence establishes not that the law firm closed or terminated on December 31, 2013 or in 2015 when Robert Tofel died, but that it dissolved on either of such dates. Thus, as a matter of law, Tofel became the partner responsible for winding up the firm's business (Partnership Law § § 68, 74; In re Dunn, 53 F2d 516, 517 [ED NY 1931]), and has the authority to collect

debts that arose before the firm dissolved.

"[T]he surviving partner is entitled to all choses in action, and the other evidences of debt belonging to the firm,...must be collected in his name, and he is entitled to exclusive custody and control of them" (Murray v Mumford, 6 Cow. 441, 443 [First Department 1826]; see also In re Allen Street, 148 Misc. 488, 491 [Sup. Ct., NY Cty 1933]).

Statute of Limitations

Defendants object that the action is untimely. The action commenced on May 5, 2016. Under CPLR 213 (2), an action based on contract must be commenced within six years of accrual, which is when the contract is breached (Ely-Cruikshank Co. v Bank of Montreal, 81 NY2d 399, 402 [1993]). Defendants argue that, if, as Tofel claims, the parties entered into the Term Sheet in January 2010, any contract claim expired in January 2016. Hubbard contends in his memorandum of law that the contract was breached in January 2010, as soon as it was made. Even if the allegations in the memorandum of law were taken as probative, a bare conclusory statement is not adequate evidence of precisely when the breach of contract took place.

Moreover, Hubbard alleges in his complaint that by the time that the firm closed effective December 31, 2013, Hubbard "acknowledged and agreed" that he owed the firm $70,401.13. That sum, divided by $3,800, the monthly rent, comes to 18.5 months of

rent, which would mean that defendants owed more than 18 months of rent by December 2013. Tofel therefore alleges that defendants stopped paying the rent eighteen months before December 2013, placing the breach in 2012. As such allegations are that breach took place after May 5, 2010, the action is timely.

Statute of Frauds

The sublease between the parties was a month-to-month lease and therefore not barred by the statute of frauds, and defendants were the firm's month to month tenant at a rental rate of $3,800 per month.

Hubbard argues that the sublease at bar is barred by GOL § 5-703 (statute of frauds), which provides that a lease for over one year must be in writing and executed by the party to be charged. The alleged lease in this case was not signed by either party. Hubbard is correct that the purported lease does not satisfy the statute of frauds. Nonetheless, where there is no writing at all, the lessee's occupancy is on a month to month basis (see International Bus. Machs. Corp. v Stevens & Co., 300 AD2d 222, 223 [1st Dept 2002]; Mulford v Borg-Warner Acceptance Corp., 115 AD2d 163, 164 [3d Dept 1985]).

Attorneys Fees and Sanctions

Tofel is entitled to neither attorneys fees nor sanctions against defendants. It is horn book law that attorneys fees may

not be awarded unless there is a written agreement or statutory basis for such an award. Hubbard's defense of plaintiff's claims are not bereft of merit such that sanctions are warranted.

Accordingly, It is

ORDERED that to the extent of $44,000, plaintiff's motion for summary judgment against defendants BRUCE A. HUBBARD and BRUCE A. HUBBARD, P.C. (Motion sequence number 001) is GRANTED, but is denied to the extent it seeks damages in excess of $44,000; and it is further

ORDERED that defendants' motion for summary judgment against plaintiff (motion sequence number 002) is DENIED; and it is further

ORDERED that the issue of damages in excess of $44,000 to be assessed against defendants BRUCE A. HUBBARD and/or BRUCE A. HUBBARD, P.C. is referred for determination pursuant CPLR 3215 (b) to a Special Referee and that within 60 days from the date of this Order the plaintiff shall cause a copy of this order with notice of entry, including proof of service thereof, to be filed with the Special Referee clerk (Room 119M, 646-386-3028 or spref@courts.state.ny.us) to arrange a date for a reference to determine pursuant to CPLR 4317 (b); and it is further

ORDERED and ADJUDGED that pursuant to CPLR 3215 (b) the Clerk is directed to enter judgment against defendants BRUCE A. HUBBARD and/or BRUCE A. HUBBARD, P.C. in accordance with the

report of the aforementioned Special Referee without any further application.

This is the decision and order of the court.

**Dated:** June 29, 2017 ENTER:

J.S.C.
DEBRA A. JAMES