SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: ~~JOAN M. KENNEY~~ PART 8

Index Number : 102758/2007

MINTZ & GOLD, LLP

VS

ZIMMERMAN, DANIEL

Sequence Number : 011

PARTIAL SUMMARY JUDGMENT

INDEX NO. 102758/07

MOTION DATE 9/13/11

MOTION SEQ. NO. 011

MOTION CAL. NO. _____

The following papers, numbered 1 to 41 were read on this motion to/for SJ Motion

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... + Memo of Law	1 - 23
Answering Affidavits — Exhibits + X Motion + Memo of Law	24 - 36
Replying Affidavits + to Notice of Motion + Opp + Memo of Law Reply to X Motion	37 - 40 41

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION

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

Dated: December 12, 2011

JOAN M. KENNEY J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 8

----------X

MINTZ & GOLD LLP,

Plaintiff,

-against-

DANIEL ZIMMERMAN, STEVEN COHN, P.C., and DEAN EVAN HART,

Defendants.

----------X

Motion Sequence: 011
Index No. 102758/07

JOAN KENNEY, J.S.C.:

Plaintiff Mintz & Gold LLP moves for partial summary judgment as to defendants' liability under Civil Rights Law § 70. Defendants Daniel A. Zimmerman, pro se, and Steve Cohn, P.C. (the Firm), pro se, cross-move for summary judgment dismissing the complaint.

As stated in this court's prior decision in this action, the underlying facts are reported in *Mintz & Gold, LLP v Zimmerman* (17 Misc 3d 972 [Sup Ct, NY County 2007], *affd* 56 AD3d 358 [1st Dept 2008]); *see also Mintz & Gold, LLP v Zimmerman*, 71 AD3d 600 (1st Dept 2010). Briefly, they are as follows. The underlying lawsuit (*Tri-State Consumer, Inc. v Mintz & Gold, LLP*, Nassau County Index No. 005054/05, *appeal dismissed* 45 AD3d 575 [2d Dept 2007]) was brought against plaintiff by nonparty Tri-State Consumer, Inc. (TSC), which was represented by the Firm, of which defendant Zimmerman was an associate. That lawsuit was itself the outgrowth of an earlier action commenced by former defendant Dean Evan Hart against his sister, nonparty Penny Fern Hart. Dean and Penny were the directors and equal co-owners of TSC. Penny was president.

Dean was vice-president. In that first action, in which the Firm represented Dean, and plaintiff represented Penny, the court (Justice Warshawsky) granted Dean's motion for summary judgment on his claim for specific performance of an arbitration agreement that he and Penny had executed, naming their father, Ronald Hart, as arbiter. Dean and Penny proceeded to arbitration, and by award, dated July 27, 2004, Ronald deemed himself appointed as a third director of TSC. Dean noticed a meeting of the board of directors for August 13, 2004, at which time Dean and Ronald elected Dean as president, ousting Penny from that position, and adjourned the meeting to October 20, 2004. By order, dated September 30, 2004, the court granted Dean's motion to confirm the arbitration. Penny filed a notice of appeal. At the October 20, 2004 meeting, the board confirmed the election of Dean as president and passed a resolution authorizing the commencement of the underlying action, and authorizing Dean to arrange to have such action commenced. In that second action, TSC sought to recover from plaintiff fees that Penny had allegedly caused TSC to pay to plaintiff for legal services provided to her personally. On May 16, 2005, the Appellate Division, Second Department, vacated the order compelling arbitration, on the ground that Dean had waived arbitration by commencing the action against Penny, reversed the order denying Penny's motion to vacate the award, reversed the order confirming the award, and vacated the award. *Hart v Tri-State Consumer, Inc.*, 18 AD3d 613 (2d Dept 2005). Penny, thereupon, notified the Firm that she was, once again, the president of TSC, that she was

discharging the Firm as counsel to TSC, and instructing it to withdraw the action that had been commenced against plaintiff. The Firm disputed Penny's claim that she was president, and it continued to litigate the TSC action against plaintiff.

Civil Rights Law § 70 provides, in relevant part, that:

> [i]f a person vexatiously or maliciously, in the name of another but without the latter's consent ..., commences or continues ... an action or special proceeding ... an action to recover damages therefor may be maintained against him by the adverse party to the action or special proceeding ... .

Plaintiff acknowledges that the underlying action was commenced with the consent of TSC, but it argues that the continuation of that action, after the Appellate Division's May 16, 2005 order, was carried out without the consent of TSC.

It is established that, upon the reversal of a judgment, the parties are restored to the rights and positions that they enjoyed prior to the first judgment. *Golde Clothes Shops, Inc. v Loew's Buffalo Theatres, Inc.*, 236 NY 465 (1923); *Bank of the United States v Bank of Washington*, 31 US 8 (1832). It is a "principle, long established and of general application, that a party against whom an erroneous judgment or decree has been carried into effect is entitled, in the event of a reversal, to be restored by his adversary to that which he has lost thereby." *Arkadelphia Milling Co. v St. Louis S.W. Ry. Co.*, 249 US 134, 145 (1919); *see also Lemish v East-West Renovating Co.*, 156 AD2d 313, 314 (1st Dept 1989) (As between parties, "[v]acatur of the judgment ... removes the lawful basis" for what is done in reliance upon that judgment).

Here, upon the vacatur of the arbitral award, Penny was

restored to her position as president of TSC, and all of the TSC resolutions passed by virtue of the award became null. Defendants appear to argue that the vacatur of the arbitral award could not affect TSC's claim against plaintiff, because the reversal of a judgment cannot affect the rights of a third party who is a stranger to the controversy. To be sure, "as it respects third persons, whatever has been done under the judgment, whilst it remained in full force, is valid and binding." *Bank of the United States*, 31 US at 17. Here, however, what is at issue is not a benefit or a right that plaintiff received pursuant to the award, but rather, the right that Dean and Ronald received, pursuant to that award, to authorize the action against plaintiff. That right expired with the vacatur of the award. *Mintz & Gold, LLP v Zimmerman*, 56 AD3d 358 (1st Dept 2008).

The sole remaining issue is whether the parties have shown that, as a matter of law, defendants acted vexatiously or maliciously, or that they did not so act. The parties agree that a major factor, as to that issue, is whether defendants had reasonable grounds to believe, after the May 16, 2005 decision, that the resolution directing the commencement of the action against plaintiff remained in force. In its initial memorandum of law, plaintiff fails to cite a single case in support of its argument that the resolution became a nullity upon the vacatur of the award. *See* Plaintiff's Mem. of Law, 14-15. Accordingly, I take with somewhat more than the proverbial grain of salt plaintiff's contention that, by virtue of defendants' long

experience as lawyers, they should have understood, immediately upon the issuance of the May 16, 2005 decision, or upon receipt of Penny's letter, that TSC was no longer their client. That contention of plaintiff's is all the more doubtful because Zimmerman avers, and plaintiff does not dispute, that: shortly after the May 16, 2005 decision, he received a letter from nonparty Dreier LLP (Dreier), which was then representing plaintiff in the second action, demanding the withdrawal of the complaint in the second action; he requested that Dreier provide legal support for its position; but Dreier failed to respond. *See* Zimmerman Aff., at 4 and Exh. E. In short, plaintiff has failed to provide any evidence that, for some time after May 16, 2005, Zimmerman did not sincerely believe, albeit mistakenly, that the resolution authorizing the bringing of the second action remained in force despite the May 16, 2005 decision. Consequently, plaintiff has failed to show that, as of late May 2005, Zimmerman was acting maliciously.

However, no later than November 28, 2006, Zimmerman must have understood that the Firm was no longer authorized to represent TSC, because on that date he acknowledged that Dean and Penny, the two equal co-owners of TSC, were giving him contrary instructions. *See* Mintz Aff.. Exh. 11, at 5. Accordingly, his and the Firm's continuation of the TSC action past that time may be inferred to have been motivated by malice. Defendants offer no evidence to the contrary. Accordingly, plaintiff is entitled to summary judgment with respect to the period commencing on November 28, 2006, and

ending on November 7, 2007, the date on which the Appellate Division, Second Department, dismissed TSC's appeal of the dismissal of its action. I note that the TSC action continued until December 21, 2007, the date upon which the Appellate Division, Second Department, issued an order denying that branch of plaintiff's motion which sought to impose costs and sanctions, but, inasmuch as plaintiff sought such relief solely as against Dean and the Firm, plaintiff cannot now contend that defendants purported to represent TSC in the litigation of that branch of plaintiff's motion. *See* Zimmerman Aff. Exh. J.

Accordingly, it is hereby

ORDERED that plaintiff's motion for partial summary judgment as to liability is granted with respect to the period from November 28, 2006, to November 7, 2007; and it is further

ORDERED that defendants' cross motion is denied; and it is further

ORDERED that the parties proceed to mediation.

Dated: December 12, 2011

Enter:

Hon. Joan M. Kenney
J.C.C.