

**Mizrahi v Kellner**

2013 NY Slip Op 33684(U)

January 10, 2013

Supreme Court, New York County

Docket Number: 118321/09

Judge: Manuel J. Mendez

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. MANUEL J. MENDEZ PART 13  
*Justice*

YGAL MIZRAHI and CORNELIA COMMERCIAL HOLDING CORP.

Plaintiff(s).

- v -

INDEX NO. 118321/09  
MOTION DATE 01-02-2013  
MOTION SEQ. NO. 003  
MOTION CAL. NO. \_\_\_\_\_

DOUGLAS KELLNER, KELLNER HERLIHY GETTY & FRIEDMAN, LLP, and KELLNER CHEHEBAR & DEVENEY,

Defendant(s).

The following papers, numbered 1 to 11, were read on this motion and cross-motion to/ for Strike Note of Issue and Summary Judgment :

**FILED**

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...	<u>1 - 3, 4 - 8</u>
Answering Affidavits -- Exhibits _____ cross motion	<u>JAN 15 2013</u> <u>9 - 10</u>
Replying Affidavits _____	<u>NEW YORK</u> <u>11</u>

COUNTY CLERK'S OFFICE

Cross-Motion:  Yes  No

Upon a reading of the foregoing cited papers, it is Ordered that Defendants Douglas Kellner's ("Kellner"), Kellner Herlihy Getty & Friedman, LLP's, and Kellner Chehebar & Deveney's Motion to Strike the Note of Issue is granted. The Note of Issue and Certificate of Readiness are vacated. Plaintiffs' Cross-Motion for partial summary judgment is denied. Plaintiffs' Cross-Motion for a protective order pursuant to CPLR Section §3103 is also denied.

In the present action, Plaintiffs allege legal malpractice against Defendants in connection with legal services Defendants provided Plaintiffs over the course of many years. Most of the legal services concerned real estate and business ventures by Plaintiffs. Plaintiffs are alleging conversion, fraud, breach of fiduciary duty, breach of escrow duties, and gross negligence. Plaintiffs allege that Defendants failed to keep proper records of the services provided to Plaintiffs, failed to provide Plaintiffs with engagement letters or proper invoices, withdrew funds from Plaintiffs' escrow accounts without Plaintiffs' consent, failed to keep accurate records of escrow account withdrawals, and made several misrepresentations to Plaintiffs during the course of their legal representation which resulted in business losses for Plaintiffs.

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

On or about August 17, 2012, Defendants received from Plaintiffs a Note of Issue and Certificate of Readiness alleging, among other things, that "discovery proceedings now known to be necessary were completed." The Certificate of Readiness also stated, as required by Section 202.21(b) of the Uniform Rules for the New York Trial Courts, that "[t]here are no outstanding requests for discovery and [t]here has been compliance with any order issued pursuant to section 202.12 of the Rules of the Chief Administrator (22 NYCRR 202.12)."

Section 202.21(e) of the Uniform Rules for the New York State Trial Courts provides that,

[w]ithin 20 days after service of a note of issue and certificate of readiness, any party to the action or special proceeding may move to vacate the note of issue, upon affidavit showing in what respects the case is not ready for trial, and the court may vacate the note of issue if it appears that a material fact in the certificate of readiness is incorrect...After such period, except in a tax assessment review proceeding, no such motion shall be allowed except for good cause shown.

The Defendants made the instant motion on or about September 19, 2012. This is more than 20 days after the Plaintiffs filed the Note of Issue. However, the Parties appeared before this Court for a Status Conference on August 22, 2012. At that time, Defendants discussed the necessity of making a Motion to Strike the Note of Issue because both Parties were seeking then outstanding and further discovery. Defendants were dissuaded from making the Motion to Strike the Note of Issue by this Court's assessment that all necessary discovery could be completed promptly and assurances from this Court that the Court Order issued that day would have the effect of tolling the Note of Issue. However, outstanding discovery has not been completed, facts elicited at depositions of the Plaintiffs conducted after the August 22, 2012 Conference necessitated the depositions of additional non-party witnesses, and the Court's assurance that the Court Order would toll the Note of Issue appear to have misled Defendants.

The fact that this Court dissuaded Defendants from filing the Motion to Strike the Note of Issue strikes this Court as good cause shown for failing to comply with the 20 day filing requirement.

Additionally, this Court notes that NYCRR 202.21 (e) also states that, "[a]t any time, the court on its own motion may vacate a note of issue if it

appears that a material fact in the certificate of readiness is incorrect, or that the certificate of readiness fails to comply with the requirements of this section in some material respect." Even if the good cause shown exception were not available, this Court would avail itself of this authority to Strike the Note of Issue because of the significant discovery still outstanding and necessary in this case.

The fact that at a Status Conference, less than a week after filing the Note of Issue, Plaintiffs requested to further depose Defendant Kellner makes it clear to this Court that Plaintiffs' statement that *discovery proceedings now known to be necessary were completed* made in the Certificate of Readiness is a material fact that is incorrect. Additionally, discovery ordered in previous Status Conference Orders was/is still outstanding and the Parties continue to make additional discovery requests of each other. Defendants have provided an Affidavit stating many of the issues outstanding that keep this case from being ready for trial.

Next, this Court must consider Plaintiffs' cross-motions. In order to prevail on a motion for Summary Judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence demonstrating the absence of any material issue of fact. *See Klein v. City of New York*, 89 N.Y.2d 833, 652 N.Y.S.2d 723 (1996); *Ayotte v. Gervasio*, 81 N.Y.2d 1062, 601 N.Y.S.2d 463 (1993); *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986). In determining the motion, the court must construe the evidence in the light most favorable to the non-moving party. *See SSBS Realty Corp. v. Public Service Mut. Ins. Co.*, 253 A.D.2d 583, 677 N.Y.S.2d 136 (N.Y.A.D. 1<sup>st</sup> Dept. 1998); *Martin v. Briggs*, 235 A.D.2d 192, 663 N.Y.S.2d 184 (N.Y.A.D. 1<sup>st</sup> Dept. 1997).

In the present case, each side has a very different account of the relationship between Plaintiffs and their Defendant attorneys. There are material issues of fact regarding the documentation provided to Plaintiffs by Defendants in the course of their representation, the standard of representation established by the Parties through their course of conduct, and the administration of Plaintiffs' escrow accounts. Therefore, Plaintiffs have not met their burden and are not entitled to summary judgement at this time.

CPLR Section §3103(a) empowers courts to issue protective orders to "prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice." In the present case, Defendants detail how Plaintiffs routinely intermingled the business accounts of their many business ventures and their personal finances. For this reason, it is not unreasonable for

Defendants to seek discovery related to the finances of possibly intermingled businesses and individual finances of Plaintiffs. Plaintiffs' general statements that there has already been enough disclosure in this case or that further disclosure is irrelevant are not enough to convince this Court that a protective order is necessary.

Accordingly, it is ORDERED that Defendants' Motion to strike the Note of Issue is granted, the Note of Issue is stricken, Plaintiffs' Cross-Motions for Summary Judgment and for a Protective Order are denied, and it is further,

ORDERED, that the parties shall appear for a Status Conference on March 27, 2013 at 9:30 A.M. in Part 13 located at 71 Thomas Street, Room 210, and it is further,

ORDERED, that the Moving Defendant shall serve a copy of this Decision with Notice of Entry on all Parties and on the Clerk of the Trial Support Office (Room 158) at 60 Centre Street within 30 days from the date of this Order. The Clerk is directed to vacate the Note of Issue in this case.

ENTER:

Dated: January 10, 2013

  
\_\_\_\_\_  
MANUEL J. MENDEZ

J.S.C. MANUEL J. MENDEZ  
J.S.C.

Check one:  FINAL DISPOSITION    X NON-FINAL DISPOSITION

Check if appropriate:     DO NOT POST                     REFERENCE

**FILED**  
JAN 15 2013  
NEW YORK  
COUNTY CLERK'S OFFICE