Epstein v Cantor
2020 NY Slip Op 34088(U)
December 11, 2020
Supreme Court, Kings County
Docket Number: 506730/2019
Judge: Larry D. Martin

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS
COMMERCIAL PART 12

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SCOTT EPSTEIN, individually and as a Partner of: Cantor, Epstein & Mazzola, LLP,

Plaintiff(s) **Index: 506730/2019**

-against-

DECISION/ORDER

ROBERT I. CANTOR, ROBERT I. CANTOR : PLLC, BRYAN J. MAZZOLA, W. TODD BOYD, : BOYD, RICHARDS PARKER COLONELLI, P.L., : and BOYD RICHARDS NY, LLC, **Motion No. 2, 3, 7 & 8**

Defendant(s)

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Recitation, as required by CPLR 2219(a), of the papers considered on the review of this motions to dismiss

PAPERS	NUMBERED
Notice of Motion and Affidavits Annexed	1
Answering Affidavits	2, 3 & 4
Memoranda of Law	5, 6 & 7
Notice of Motion and Affidavits Annexed	8
Answering Affidavits	9, 10 & 11
Replying Affidavits	12
Memoranda of Law	13, 14 & 15

Upon the foregoing cited papers, the Decision/Order on this motion is as follows:

Plaintiff and defendant Cantor were involved in a business relationship which involved the practice of law since 1995. The nature of that relationship is disputed and is a critical issue in the motions before this court as it is determinative as to whether Cantor or any of the co-defendants owed Epstein a fiduciary duty.

The gist of this action involves a letter to the clients of the Cantor firm advising them of the firm's demise, that the associates who had worked on their matters would be soliciting their business and that the firm had no objection to the solicitation. Epstein asserts that he, in fact, had strenuous objection to the solicitation. The complaint alleges, inter alia, that Cantor breach his fiduciary duty to Epstein by not raising objection to the solicitation.

Epstein brought this action against Cantor, Cantor's new law firm, Mazzola, an associate at Cantor's defunct law firm, who allegedly solicited the firm's clients, and the "Boyd defendants"

consisting of W. Todd Boyd, an attorney, Boyd Richards Parker Colonnelli, P.L., a Florida limited liability company, and Boyd Richards NY, LLC., a New York limited liability company.

Turning first to Cantor's motion, Cantor moves to dismiss the Second, Third and Fourth cause of action pursuant to CPLR 3211 asserting that the documentary evidence establishes that the relationship between the parties was not a partnership.

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction and the plaintiff's allegations are accepted as true and accorded the benefit of every possible favorable inference" (Granada Condominium III Assn. v. Palomino, 78 A.D.3d 996, 996, 913 N.Y.S.2d 668; see Leon v. Martinez, 84 N.Y.2d 83, 87, 614 N.Y.S.2d 972, 638 N.E.2d 511). A motion pursuant to CPLR 3211(a)(1) to dismiss a complaint on the ground that a defense is founded on documentary evidence "may be appropriately granted only where the documentary evidence utterly refutes [the] plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (Goshen v. Mutual Life Ins. Co. of N.Y., 98 N.Y.2d 314, 326, 746 N.Y.S.2d 858, 774 N.E.2d 1190; see Rodolico v. Rubin & Licatesi, P.C., 114 A.D.3d 923, 924–925, 981 N.Y.S.2d 144). (Attias v. Costiera, 120 A.D.3d 1281, 993 N.Y.S.2d 59, 2014 N.Y. Slip Op. 06163 [2d Dept., 2014]).

"In considering a motion to dismiss pursuant to CPLR 3211(a)(7), the court should...determine only whether the facts as alleged fit within any cognizable legal theory" (Simos v. Vic–Armen Realty, LLC, 92 A.D.3d 760, 761, 938 N.Y.S.2d 609, quoting Leon v. Martinez, 84 N.Y.2d 83, 87–88, 614 N.Y.S.2d 972, 638 N.E.2d 511; see Sinensky v. Rokowsky, 22 A.D.3d 563, 564, 802 N.Y.S.2d 491). (Black v. New York City Housing Authority, 120 A.D.3d 731, 991 N.Y.S.2d 337, 2014 N.Y. Slip Op. 05936 [2d Dept. 2014]). "In opposition to a motion to dismiss pursuant to CPLR 3211(a)(7), the plaintiff may submit an affidavit to remedy any defects in the complaint (see Rovello v. Orofino Realty Co., 40 N.Y.2d 633, 635–636, 389 N.Y.S.2d 314, 357 N.E.2d 970)." (Igneri v. Igneri, 125 A.D.3d 813, 4 N.Y.S.3d 272, 2015 N.Y. Slip Op. 01419 [2d Dept., 2015]).

By agreement dated October 1, 1995, Epstein and Cantor entered into an agreement. The agreement purports to form a partnership. However, it is clear that whatever relationship this agreement did create, it did not form a full partnership between the parties. Most tellingly, Section 7.2 of the agreement affords Epstein the right to elect to become "a foil (sic) and equal partner" and provides a variety of effects of such an election. It is undisputed that Epstein never made the election under Section 7.2 of the agreement to become a full and equal partner in the enterprise.

Several facets of this agreement are worth noting. Under the terms of this agreement, Epstein was not required to make any capital contribution to the firm and did not share in the profits and losses of the firm. Pursuant to the agreement Epstein received twenty-five percent of the gross income received from certain clients and from additional clients that Epstein brought to the firm. Epstein was not required to perform work for the firm other than to be available for consultation and in the event he did perform any legal services for the firm he was entitled to an hourly rate for the work performed.

Defendant Cantor asserts that the relationship between Epstein and Cantor lacked the essential elements of a partnership. Most importantly Section 6.1 of the 1995 agreement makes it clear that Epstein did not share in the losses and profits generated by the enterprise.

New York Partnership Law § 10 provides, in relevant part, "[a] partnership is an association of two or more persons to carry on as co-owners a business for profit and includes for all purposes of the laws of this state, a registered limited liability partnership." New York Partnership Law § 11, provides, in part, , that "[t]he receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business…" Section 11, however, also provides that "[t]he sharing of gross returns does not of itself establish a partnership, whether or not the persons sharing them have a joint or common right or interest in any property from which the returns are derived."

Pursuant to Section 6.2[a] of the agreement Epstein was to receive "twenty-five percent (25%) of the gross income (excluding reimbursement of disbursements) received by the Partnership from fees paid" by clients he had referred to the firm. In contradistinction, Section 6.1 expressly provides that "[a]ll net profits and losses generated by the Partnership shall be allocable to Cantor…"

The case law makes it clear that sharing in profits and losses is a critical element of a partnership. "An indispensable essential of a contract of partnership or joint venture, both under common law and statutory law, is a mutual promise or undertaking of the parties to share in the profits of the business and submit to the burden of making good the losses. Reynolds v. Searle, 186 App.Div. 202, 203, 174 N.Y.S. 137, 138." (Steinbeck v. Gerosa, 4 N.Y.2d 302, 317 [1958]). "In order to properly plead the existence of a joint venture agreement, a plaintiff must allege "acts manifesting the intent of the parties to be associated as joint venturers, mutual contribution to the joint undertaking through a combination of property, financial resources, effort, skill or knowledge, a measure of joint proprietorship and control over the enterprise, and a provision for the sharing of profits and losses" (47 Richbell Info. Servs. v. Jupiter Partners, 309 A.D.2d 288, 298, 765 N.Y.S.2d 575 [1st Dept. 2003])." (Slabakis v. Schik, 164 A.D.3d 454, 84 N.Y.S.3d 45, 2018 N.Y. Slip Op. 05962 [1st Dept. 2018]). The Second Department is in accord that sharing in control and in the losses are essential elements of a partnership or joint venture. (See, for example: Grand Pacific Finance Corp. v. 97–111 Hale, LLC, 123 A.D.3d 764, 1 N.Y.S.3d 115, 2014 N.Y. Slip Op. 08604 [2nd Dept. 2014]).

"Generally, where parties have entered into a contract, courts look to that agreement to 'discover ... the nexus of [the parties'] relationship and the particular contractual expression establishing the parties' interdependency. If the parties ... do not create their own relationship of higher trust, courts should not ordinarily transport them to the higher realm of relationship and fashion the stricter duty for them' " (EBC I, Inc. v. Goldman, Sachs & Co., 5 N.Y.3d 11, 19–20, 799 N.Y.S.2d 170, 832 N.E.2d 26 [citation omitted], quoting Northeast Gen. Corp. v. Wellington 119 Adv., 82 N.Y.2d 158, 160, 162, 604 N.Y.S.2d 1, 624 N.E.2d 129; see Oddo Asset Mgt. v. Barclays Bank PLC, 19 N.Y.3d 584, 593, 950 N.Y.S.2d 325, 973 N.E.2d 735; First Keystone Consultants, Inc. v. DDR Constr. Servs., 74 A.D.3d 1135, 1136, 904 N.Y.S.2d 113). Grand Pacific Finance Corp. v. 97–111 Hale, LLC, 123 A.D.3d 764, 1 N.Y.S.3d 115, 2014 N.Y. Slip Op. 08604 [2nd Dept. 2014]).

Under the circumstances present, the court cannot find that the relationship between Epstein and Cantor was a partnership or joint venture as Epstein was not required to contribute to the capital account or share in the losses of the venture. Moreover, Epstein had little, if any, control over the its operation; the two instances in which Epstein asserts he was called upon to negotiate a resolution over the twenty plus year relationship only serve to highlight his lack of control and responsibility for the ongoing operations of the firm.

Under the circumstances, the court finds that the documentary evidence established that the relationship between the parties was not a partnership and that Cantor and the entity did not owe Epstein a fiduciary duty. The motion is granted and the Second, Third and Fourth causes of action must be dismissed.

Turning then to the motion of Bryan J. Mazzola, W. Todd Boyd, Boyd Richards Parker & Colonnelli, P.L. and Boyd Richards NY, LLC to dismiss the complaint as against those defendants.

In the first instance, as a result of the Court's determination that Epstein was not a partner in the entity the claims made by Epstein on behalf of the entity must be dismissed. Moreover, to the extent that the claims are for breach of fiduciary duty or lack of loyalty to the entity the claims must also be dismissed.

It is clear from the submissions that Cantor managed and controlled the entity and that the actions of Mazzola and the Boyd defendants were undertaken with his consent, if not at his direction, in what Cantor believed to be the best interests of the entity's clients. In this regard it is worth noting that it does not appear that Epstein maintained a substantial relationship with these clients. To the extent that Epstein conflates a relationship with the insurers to one with the clients he is mistaken; a lawyer has an ethical duty to the clients and not to the insurers, or, indeed, anyone who may pay the legal fees.

As a result of Epstein not being a partner in the enterprise many of the claims in the complaint fail to state a cause of action. Epstein does not have a claim against the Boyd defendants for "corporate raiding", the Eighth cause of action, or unfair competition, the Tenth Cause of action. To the extent that such a claims might be brought they would have to be brought on behalf of the entity. As noted, Cantor, as manager of the entity, encouraged its employees to join the Boyd firm, and continue to service the needs of the clients that elected to stay with them.

Epstein's claims against Mazzola and the Boyd defendants all suffer from similar defects. His claim for conversion fails because he had no ownership interest in the clients or the entity's files or information. His claim for tortious interference with contract fails because the submissions establish that these defendants did not procure a breach of the contract; to the extent the contract was breached it resulted from Cantor's decision to retire from the practice and Epstein's failure to take steps to protect himself from that decision. The fact that Mazzola and the Boyd defendants may have benefited from these circumstances does not show that they procured it.

For the foregoing reasons, to the motion of Bryan J. Mazzola, W. Todd Boyd, Boyd Richards Parker & Colonnelli, P.L. and Boyd Richards NY, LLC to dismiss the complaint as against those defendants must be granted. The Second, Third, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth and Eleventh causes of action are hereby dismissed.

The cross motion for sanctions is denied. The submission of the first letter to clients, while omitting the second letter to clients among the submissions, is not frivolous. Plaintiff promptly corrected the omission. The cross motion to strike portions of the Aiello affirmation is denied.

The motions are granted and the Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth and Eleventh causes of action are hereby dismissed. The cross motions are denied.

Dated: December 11, 2020

LDM

HON. LARRY D. MARTIN
J.S.C.