

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

SCHRIER FISCELLA & SUSSMAN, LLC,
RICHARD E. SCHRIER, individually and on
behalf of SCHRIER FISCELLA & SUSSMAN,
L.L.C, SCHRIER SHAYNE KOENIG SAMBERG
& RYNE, P.C. and KOENIG AND SAMBERG,

TRIAL/IAS, PART 1
NASSAU COUNTY

INDEX No. 10451/13

MOTION DATE: May 5, 2016
Motion Sequence # 003, 004

Plaintiffs,

-against-

JAMES B. FISCELLA, AMY R. SUSSMAN,
JAMES B. FISCELLA, ESQ., P.C., AMY R.
SUSSMAN, ESQ., P.C. and FISCELLA &
SUSSMAN LLC,

Defendants.

The following papers read on this motion:

Notice of Motion..... X
Order to Show Cause..... X
Affirmation/Affidavit in Support..... XX
Affirmation in Opposition..... XX
Supplemental Affidavit in Support..... X
Affirmation in Reply and Further Support. X

Motion by defendants James Fiscella, Amy Sussman, and Fiscella & Sussman, LLC for summary judgment dismissing the complaint is **granted** to the extent indicated below. Motion by plaintiffs to consolidate the above action with landlord-tenant proceeding Index No. 1608/16 pending in District Court is **denied**.

This is an action for breach of fiduciary duty. Plaintiff Richard Schrier is an attorney. Defendants James Fiscella and Amy Sussman are attorneys with whom Schrier shared office space in Suite 320 at 825 East Gate Boulevard in Garden City. On December 31, 2003, the parties formed plaintiff Schrier Fiscella & Sussman, LLC for the purpose of sharing rent, overhead, and other expenses of their respective practices. It appears that the parties also assisted each other as attorneys from time to time. On March 7, 2011, Schrier, purporting to act on behalf of Schrier Fiscella & Sussman, entered into a sublease, covering two offices within the suite, with plaintiff Koenig and Samberg as subtenants (Def't's ex K).

Plaintiffs allege that for the period 2004-2010, the parties maintained a common attorney trust account in the name of Schrier Fiscella & Sussman, LLC. Plaintiffs further allege that during this period the parties deposited all fees into Schrier Fiscella & Sussman's operating account and paid all rent and overhead expenses from the operating account.

Plaintiffs allege that commencing January 1, 2011, and continuing through April 10, 2013, Fiscella deposited legal fees into a separate bank account which he controlled, rather than into the Schrier Fiscella & Sussman operating account. Plaintiffs allege that Sussman also deposited the fees which she earned into a separate account. Schrier subsequently began to deposit fees which he earned into a separate account, allegedly with the consent of the defendants.

Around May 2011, a dispute arose between Schrier and Fiscella concerning the distribution of the legal fee earned representing a client, Robert Denenberg. Plaintiffs allege that on December 28, 2012, Fiscella withdrew money from the firm's lawyer's account without Schrier's knowledge or consent. Plaintiffs further allege that Fiscella withdrew \$17,191.48 from Schrier's account, which he deposited into the firm account, but then withdrew the funds by a check payable to Fiscella.

On April 15, 2013, Fiscella and Sussman began practicing as defendant Fiscella & Sussman, LLC. On May 15, 2013, Schrier formed a new firm known as plaintiff Schrier Shayne Koenig Samberg & Ryne, PC. On May 22, 2013, Schrier, purporting to act on behalf of Schrier, Fiscella & Sussman, LLC subleased four offices within the suite to Schrier Shayne Koenig Samberg & Ryne (plaintiff's ex E). On June 1, 2013, Fiscella and Sussman, purporting to act on behalf of Schrier Fiscella & Sussman, LLC, assigned the main lease to the office suite to Fiscella & Sussman, LLC.

This action was commenced August 23, 2013. In the first cause of action, plaintiffs assert a claim for breach of fiduciary duty based upon unahthorized transfers from the Schrier Fiscella & Sussman account. The second cause of action is for conversion of funds from the Schrier Fiscella & Sussman account. The third cause of action is for unjust enrichment based upon withdrawal of funds from the former firm account. The fourth cause of action is for an accounting. The fifth cause of action is for a declaratory judgment with respect to ownership of firm phone and fax numbers. The sixth cause of action is for an injunction restraining interference with Schrier's telephone and fax numbers. The seventh cause of action is for specific performance of an alleged agreement with respect to disposition of the phone and fax numbers. The eighth cause of action is for a declaratory judgment as to the validity of the May 22, 2013 sublease with Schrier, Fiscella & Sussman as sublandlord and Schrier Shayne Koenig Samberg & Ryne as subtenant. The ninth cause of action is for an injunction restraining defendants from evicting Schrier, or his new associates, from the premises. The tenth cause of action is for breach of the March 7, 2011 sublease by failing to return the \$5,000 security deposit to Koenig and Samberg. The eleventh cause of action is for tortious interference with Schrier's business relations with his clients. The twelfth cause of action is for fraud.. The court notes that plaintiffs do not seek dissolution of the limited liability company, Schrier, Fiscella & Sussman, LLC. On November 25, 2013, defendants filed their answer without asserting any counterclaim.

By order to show cause dated August 23, 2013, the court temporarily restrained defendants from, among other things, interfering with the business of Schrier Shayne Koenig and Samberg & Ryne, evicting Koenig and Samberg, or assigning the lease to the premises. The temporary restraining order was vacated by this court on March 3, 2016.

Meanwhile, on September 7, 2014, Schrier filed a Chapter 11 bankruptcy petition with the United States Bankruptcy Court for the Eastern District of New York. The present cause of action was not listed on the debtor's schedule of personal property. On June 5, 2015, the bankruptcy judge converted the case to Chapter 7. On September 17, 2015, Fiscella & Sussman moved the bankruptcy court for relief from the automatic stay "to proceed in the State Court action against the Debtor to regain possession of the premises occupied by the Debtor at 825 East Gate Boulevard, Suite 320..." On October 13, 2015, the bankruptcy court terminated the automatic stay as to Fiscella & Sussman in order for them to "proceed with the State Court action and..take any and all action under applicable state law so as to assert their rights to the Property...."

By notice of motion dated March 22, 2016, defendants move for summary judgment dismissing the complaint. Defendants argue that plaintiff Schrier lacks standing to maintain

the action because the claim vested in the bankruptcy trustee upon the filing of the bankruptcy petition. With regard to the tenth cause of action, defendants argue that Koenig and Samberg may not seek the return of their security deposit because they are in default of the sublease by failing to pay rent to Fiscella & Sussman. Finally, defendants argue that plaintiff Schrier cannot maintain a derivative action on behalf of Schrier Fiscella & Sussman because he failed to make a demand that the board of directors bring the action.

On March 30, 2016, Fiscella & Sussman commenced a summary non-payment proceeding against Koenig & Samberg in the landlord tenant part of District Court, Index No. 1608/16. On April 15, 2016, counsel to Schrier's bankruptcy trustee stated that the trustee intended to abandon his interest in the present action (plaintiff's ex B). By order to show cause dated April 21, 2016, plaintiffs seek to consolidate the landlord tenant proceeding with the above action. Plaintiffs argue that they are lawfully in possession by virtue of the May 22, 2013 sublease and are not in default because they have paid rent to the master landlord.

Pursuant to 11 U.S.C. § 362(a), the filing of a bankruptcy petition operates as an automatic stay of any action against the debtor. Since the present action was commenced by the debtor, it is not effected by the automatic stay. In view of the trustee's stated intention to abandon the action, defendants' motion to dismiss for lack of standing is **denied**.

Once dissolution proceedings have commenced, shareholders in a corporation are prohibited from engaging in self-help with respect to distribution of the assets of the corporation (Business Corporation Law § 1114; *Sutton v Burdick*, 135 AD3d 1016 [3d Dept 2016]). As noted, no formal proceeding for the judicial dissolution of Schrier, Fiscella & Sussman, LLC has been commenced. Nevertheless, once dissension had ensued, the parties should not have engaged in self dealing measures with regard to the firm's leasehold. Accordingly, defendants' motion to dismiss the eighth and ninth causes of action is **granted** to the extent that the court issues a declaratory judgment that the May 22, 2013 sublease and the June 1, 2013 assignment of lease are both void and of no force and effect.

Where there has been no breach of an existing contract, but only interference with prospective economic relations, plaintiff must show "more culpable conduct," such as physical violence, fraud or misrepresentation, abuse of process, or economic pressure (*Carvel Corp. v Noonan*, 3 NY3d 182, 191 [2004]). Persuasion alone is not sufficient (*Id.*). The conduct must be directed not at the plaintiff itself, but at the party with whom plaintiff has or seeks to have a relationship (*Id.* at 192). Schrier does not allege that defendants engaged in any wrongful conduct directed at Schrier's clients. Accordingly, defendants' motion to

dismiss the eleventh cause of action for tortious interference for failure to state a cause of action is **granted**.

CPLR 3016(b) provides that where a cause of action or defense is founded upon fraud, the circumstances constituting the wrong shall be stated in detail. The purpose of Rule 3016 is to inform a defendant of the complained of incidents (*Eurycleia v Seward & Kissel*, 12 NY3d 553, 559 [2009]). As plaintiffs' fraud claim is stated in conclusory fashion, defendants' motion to dismiss plaintiffs' twelfth cause of action is **granted**.

[C]ourts are generally loath to intercede in squabbles between partners that result in piece-meal adjudications, preferring that partners either settle their own differences amicably or dissolve and finally conclude their affairs by a full accounting" (*Gramercy Equities Corp. v Dumont*, 72 NY2d 560,564-65 [1988]). In the present case, the court is particularly reluctant to engage in piece-meal adjudication, in view of the unexplained purpose of the partnership, i.e. whether it was an actual law firm or merely a law office management company. Accordingly, defendants' motion to dismiss the first, second, third, fourth, fifth, sixth, seventh, and tenth causes of action is **granted**, with leave to commence a dissolution proceeding.

In view of the declaratory relief with respect to the June 1, 2013 assignment of lease, plaintiffs' motion to consolidate the above action with the landlord tenant proceeding is **denied**.

This order concludes the within matter assigned to me pursuant to the Uniform Rules for New York State Trial Courts.

So ordered.

ENTERED
MAY 27 2016
NASSAU COUNTY
COUNTY CLERK'S OFFICE

Dated MAY 25 2016

 Stephen A. Bucaria
XXX J.S.C.