

1 SUPREME COURT OF THE STATE OF NEW YORK  
2 COUNTY OF NEW YORK : CIVIL TERM PART 48  
3 -----X  
4 HARVEY BARRISON,  
5 Plaintiff,  
6 - against -  
7 D'AMATO AND LYNCH, LLP and LUKE D. LYNCH,  
8 JR.,  
9 Defendants.  
10 -----X  
11 INDEX NO. 108580/11 60 Centre Street  
12 New York, New York  
13 December 15, 2011

14 BEFORE:  
15 THE HON. JEFFREY K. OING, J.S.C.

16 APPEARANCES:

17  
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23  
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BY: JAMES R. WILLIAMS, ESQ.  
RAVINDRA K. SHAW, ESQ.

JACK L. MORELLI  
Senior Court Reporter

## Proceedings

1 THE COURT: The Court has before it the matter  
2 of Harvey Barrison versus D'Amato and Lynch, et al., index  
3 108580 of 2011. This is Motion Sequence Number 2 and  
4 Motion Sequence Number 3. Motion Sequence Number 2 is a  
5 motion to dismiss by defendants. Motion Sequence 3 is, I  
6 think, a motion to stay discovery pending my decision and  
7 order on the motion to dismiss. So we have that for the  
8 record.

9 Please, counsel, enter your appearances for the  
10 record. For the plaintiff.

11 MR. RUSSOTTI: Philip Russotti, appearing for  
12 the plaintiff Mr. Barrison. Good morning.

13 THE COURT: For the defendant.

14 MR. WILLIAMS: Good morning. James Williams and  
15 Ravindra Shaw, from Jackson Lewis, on the behalf of the  
16 defendant.

17 THE COURT: Thank you. Okay, counsel, this is  
18 your motion to dismiss. I read the record here, I read  
19 all the papers. You took me to my word when I said where  
20 are all the other partners or attorneys in the firm and  
21 where are their affirmations. And thank goodness you  
22 didn't give me 54, but gave me close. Why should I grant  
23 your motion to dismiss?

24 MR. WILLIAMS: Well, Your Honor, let me first  
25 describe the reason for the motion. And that is that this

## Proceedings

1 is a failure by the plaintiff to state a viable cause of  
2 action. Instead he has relied upon legal conclusions  
3 which are contradicted by documentary evidence.  
4 Documentary evidence being the complaint in this matter,  
5 the partnership agreement which applies and all of the  
6 written documentation that was submitted. And you know  
7 how much has been submitted in this case.

8 THE COURT: Just so I have for the record, this  
9 is a preanswer motion to dismiss?

10 MR. WILLIAMS: Yes, it is, Your Honor.

11 There is a, contrary to what plaintiff has  
12 alleged in his complaint, a controlling unambiguous  
13 document which defines the rights of the parties and also  
14 prevails over the allegations that the plaintiff has  
15 included in his complaint. He seeks in his complaint the  
16 dissolution of a law firm and accounting.

17 THE COURT: Shouldn't I on a motion to dismiss  
18 assume that all the facts alleged are true and give him  
19 the benefit of the doubt and just let it go and --

20 MR. WILLIAMS: Well, the documentary evidence  
21 here is totally contrary to the allegations that are in  
22 the complaint. You have, for example, the very first  
23 reason for dismissal is that you have a document that  
24 clearly provides the mechanism for the dissolution of a  
25 firm. I think that Your Honor has acknowledged that

## Proceedings

1 previously.

2 THE COURT: There are only two people. Even if  
3 you consider Mr. Barrison a general partner, the only two  
4 people that can actually dissolve this firm are Mr.  
5 D'Amato and Mr. Lynch.

6 MR. WILLIAMS: For argument sake I understand,  
7 but I'm not conceding he's a general partner.

8 THE COURT: For argument sake, that branch of  
9 the seeking a dissolution.

10 MR. WILLIAMS: There is an agreement, it's  
11 controlling. It provides for only a limited number of  
12 people, two people, who could dissolve the firm. Mr.  
13 Barrison is not one of them. That's not unambiguous, it's  
14 very clear, it's controlling and it prevails. Pursuant to  
15 the Partnership Law, which would be partnerships Article  
16 74, and the law as interpreted, that you cannot get an  
17 accounting without a dissolution occurring first.

18 In this case Mr. Barrison is in no position to  
19 ask for a dissolution of this firm because there are only  
20 two people who are in a position to do so.

21 THE COURT: Unless he withdraws. Unless he  
22 decides to withdraw. Then the sell paragraph kicks in  
23 then.

24 MR. WILLIAMS: But the issue is the law is very  
25 clear, you cannot get an accounting without the

## Proceedings

1 dissolution. I mean, if it was triggered by just  
2 withdrawal then that wouldn't apply. That law has been  
3 interpreted by the courts.

4 THE COURT: So what you're saying, if I find  
5 that he has no right to dissolve the partnership, the  
6 accounting portion has to go also?

7 MR. WILLIAMS: Absolutely, Your Honor.

8 THE COURT: We're still at a pleading stage  
9 though, it's not summary judgment, correct?

10 MR. WILLIAMS: Yes, but the documentary evidence  
11 is so clear, the existing documentation is so clear on  
12 this issue, without getting to the others yet, that if you  
13 only have two people when they dissolve, and the courts  
14 have basically said, you don't get an accounting without a  
15 dissolution, you don't have the standing to do it.

16 THE COURT: Okay.

17 MR. WILLIAMS: There is in addition to this, so  
18 that the record is complete, we have taken the position  
19 that he is by definition a nonequity partner, and as such  
20 is not entitled to an accounting.

21 Now, that is based, again, on that agreement.  
22 The agreement, I refer the Court respectively to Paragraph  
23 5, is very clear saying he doesn't have those rights given  
24 the capacity that he served in. If that wasn't sufficient  
25 enough, we now have a record by counsel. And in the

## Proceedings

1 complaint itself that confirms that he did not have the  
2 requisite participation in the management of the firm.  
3 You have to have that in order to be found an equity  
4 partner entitled to an accounting.

5 He has, through counsel, admitted that he did  
6 not participate in the management of the firm. If you  
7 were to look at his complaint, he states in Paragraph 6  
8 that only Mr. Lynch could assign new clients and matters.  
9 That only Mr. Lynch set his compensation. That only Mr.  
10 Lynch, in Paragraph 5, managed the firm. In Paragraphs 6  
11 A, 6 B, 6 C and 6 D, he says that only Mr. Lynch  
12 maintained exclusive possession of all the assets of the  
13 partnership and all the partnership books and records.

14 Now, if there is anything clear and anything  
15 else that he did to that firm was, one, administrative in  
16 nature and, two, was given to him to keep Mr. Barrison  
17 busy. Now, remember how we got here first? We got here  
18 first because there was this action brought saying all of  
19 the things that I have just said acknowledging that he  
20 didn't manage the firm but that Mr. Lynch did these things  
21 exclusively and obviously had the ability to do it.

22 He has not worked one hour for the firm since we  
23 set up all of those procedures, since we set up off-site  
24 procedures. How he was going to do this and going to do  
25 that, not one hour. The man brought it upon himself.

## Proceedings

1 He's an individual who was working 700 hours and 300 hours  
2 through the mid-point of this year. Remember what he was  
3 saying, which is inconsistent with his position here, is  
4 that it's all Mr. Lynch because Mr. Lynch runs the firm.

5 So all of those elements when you put that  
6 together now, how does he respond to this? He responds to  
7 this by saying, yeah, but, you know, you have to look at  
8 K-1s, tax returns and the fact that I was held out as a  
9 partner. We have cited in our brief that there is law  
10 very clear that that is not controlling and that is not  
11 determinative.

12 THE COURT: Those are factors to look at, yes.  
13 There is the indicia of partnership has to be looked at.

14 MR. WILLIAMS: If you look at the K-1s and  
15 that's the documentary evidence that has been attached  
16 here as well, you would have to acknowledge, as he would,  
17 that, first of all, it's his federal K-1 when you look at  
18 the amount of capital contributed to the firm, zero,  
19 blank, nothing. When you look at his New Jersey K-1,  
20 where a firm is instructed to enter the partner's  
21 percentage of capital ownership, blank, zero, nothing. If  
22 you look at his New York K-1 where the firm is instructed  
23 to enter the capital contributed during the year in terms  
24 of cash and property, it's blank, it's zero.

25 So even if one were to look at those K-1s they

## Proceedings

1       can't carry the way that he's trying to ascribe to it.  
2       And, quite frankly, the courts have held that you have two  
3       separate applications of law. It's not a tax law as we  
4       pointed out in our papers, it's a situation where you  
5       can't make a partnership because you're required to make a  
6       partnership out of the requirements by the IRS to do  
7       certain things.

8               THE COURT: Because that changes every day or --

9               MR. WILLIAMS: The point is --

10              THE COURT: If they get their act together it  
11       can change rather quickly, okay.

12              MR. WILLIAMS: That is not sufficient for the  
13       purposes that he is trying to establish here.

14              So, we have a situation where it's clear he  
15       doesn't have any management in the firm. Where he has,  
16       it's acknowledged by a written agreement, that he is not  
17       someone who has all of these interests that he now says.  
18       If you look at the documentation that he's relying upon,  
19       even if he was able to do that, despite the court rulings  
20       to the contrary, that that does not support his claim in  
21       any way.

22              Now, you've already pointed out, rightfully,  
23       that we have submitted a number of affidavits. These are  
24       people on the same level with this gentleman. They have  
25       clearly stated that they knew full well what they were and



## Proceedings

1 they acknowledged it. You might also consider the fact  
2 that there isn't one affidavit by any partner supporting  
3 this gentleman, it's totally to the contrary. He didn't  
4 even plead in his complaint, by the way, if I haven't  
5 mentioned it, he hadn't made such contributions or had  
6 such interest. The whole issue is I don't get the work  
7 any more.

8 I think that I have summed up the reasons and  
9 rationale and I think that they are very clear and I think  
10 that the guidepost points here to the road to dismissal  
11 very clearly. Thank you.

12 THE COURT: Thank you. Mr. Russotti.

13 MR. RUSSOTTI: Yes, thank you, Your Honor. What  
14 we've heard is a recitation of the substance of their  
15 argument. What is confronting the Court --

16 THE COURT: This is not a summary judgment  
17 motion, I picked that up on your papers. This is  
18 purely --

19 MR. RUSSOTTI: A 3211 (a) looks at the four  
20 corners of the complaint, construes it as liberally as  
21 possible, giving the plaintiff every benefit of the doubt.

22 THE COURT: Absolutely.

23 MR. RUSSOTTI: Our other branch of the motion is  
24 that it seeks dismissal on the basis of documentary  
25 evidence, which is what I would like to address now, and

## Proceedings

1 that's what I think that the fundamental issue is before  
2 the Court at this point.

3 THE COURT: Okay.

4 MR. RUSSOTTI: The test -- well, first of all,  
5 the only documentary evidence that I see that they have  
6 submitted is the agreements signed between the D'Amato and  
7 Lynch and the affidavits, that is what they have  
8 submitted.

9 THE COURT: The attorney affidavits.

10 MR. RUSSOTTI: The attorney affidavits. The  
11 case that we cited Fontanetta 1st Department case, sets  
12 forth the test about whether or not the documents  
13 submitted are sufficient under the documentary evidence  
14 part of the motion to dismiss as follows: "Documentary  
15 evidence must resolve all factual issues as a matter of  
16 law and conclusively disposes of the plaintiff's claim."  
17 Now, I don't see, with all due respect, how this agreement  
18 can be said to do that in this case for the following  
19 reasons --

20 THE COURT: I looked at my record that we had,  
21 the transcript that we had in here, and I had a lot of  
22 questions about the agreement that is at issue here. You  
23 know, one of the points that I picked up on when I reread  
24 the record or transcript was that, you know, the  
25 partnership agreement talks about Mr. D'Amato and Mr.

## Proceedings

1 Lynch in one area, one aspect and then refers to general  
2 partners in another aspect. So, I mean, in a sense, does  
3 that mean that there is consideration that there may be  
4 other general partners and not just Mr. D'Amato and Mr.  
5 Lynch? What is clear, though, in that agreement, there is  
6 just no way around it, is that only Mr. D'Amato and Mr.  
7 Lynch can dissolve the firm, that's it. There is no  
8 other -- there is no ambiguity there. It says it right in  
9 Paragraph 2, I think.

10 MR. RUSSOTTI: I'm aware of that, Your Honor.  
11 But two things, number one --

12 THE COURT: Paragraph 1, I'm sorry, Paragraph 1.

13 MR. RUSSOTTI: I'm aware of that. But there is  
14 two things, one factual and one is a legal matter that I  
15 want to address.

16 The factual matter is that Mr. Barrison is also  
17 seeking an accounting for profits and losses for the time  
18 that he was there. That agreement also contemplates the  
19 right to withdraw. That anybody can withdraw. Mr.  
20 Barrison can withdraw and get that accounting for the  
21 profits. So it's not just dissolution.

22 THE COURT: Provided that he's deemed a general  
23 partner.

24 MR. RUSSOTTI: Correct, ultimately.

25 THE COURT: Right. If he's not --

## Proceedings

1 MR. RUSSOTTI: But today we're not here to  
2 decide that. Today we're only here to decide did he make  
3 a sufficient pleading.

4 THE COURT: I'm glad you touched on that point  
5 because that's exactly what I want to ask you next on that  
6 question. I don't mean to cut you off because this has  
7 been -- I looked at this case and I looked and looked  
8 really hard and it only dawned on me after I read it for  
9 the second time, I'm looking at the complaint here and it  
10 asserts one cause of action for dissolution and  
11 accounting. I looked at each allegation set forth in this  
12 complaint and particularly Paragraph 4. Four, all of  
13 Paragraph 4 that lists or sets forth all of the  
14 allegations supporting his claim for dissolution and  
15 accounting. Those allegations, correct me if I'm wrong,  
16 rely only on the financials, K-1s, taxes, tax returns,  
17 social security tax, Medicare tax, unincorporated business  
18 tax, that's what it says. That's what is alleged here.

19 There is nothing in this complaint, in the four  
20 corners of this complaint setting forth any indicia of  
21 partnership. In other words, nothing in there alleging  
22 that he had any control over D'Amato and Lynch's business.  
23 Nothing in the complaint alleging that that plaintiff has  
24 no ownership interest in the partnership. Nothing in the  
25 four corners of the complaint that says that he shares in

## Proceedings

1 the profits and losses of the partnership, okay? There is  
2 nothing in the four corners of the complaint that  
3 alleges -- this is all allegations now. This is what Mr.  
4 Williams pointed out.

5 Any allegations of capital contributions, it  
6 doesn't have to be money because we know that capital  
7 contribution does not necessarily have to be cash, it  
8 could be other contributions. So that if you're just  
9 relying on the financial information alone in the four  
10 corners of the complaint, unless you're going to tell me  
11 that I misread this or I didn't read something in here, I  
12 don't see any allegations in here of any of the factors  
13 that I look for in terms of determining whether or not Mr.  
14 Barrison is a partner or was a general partner of D'Amato  
15 and Lynch. This is where we're at. This is why I  
16 questioned Mr. Williams. We're at the pleading stage, not  
17 summary judgment, which I totally agree with you when you  
18 raised in your argument this is not summary judgment, this  
19 is pleading. I don't have the pleadings here for that.  
20 That's what I wanted to ask you.

21 MR. RUSSOTTI: Okay. My response is pleadings  
22 are supposed to be construed liberally.

23 THE COURT: Yes.

24 MR. RUSSOTTI: We do not have to, I mean, the  
25 case law as to what the indicia of partnership that you

## Proceedings

1 prove at trial, for instance, what would be charged to the  
2 jury does not -- all of those elements don't have to be  
3 pled. What has to be pled is that he was a partner.  
4 That's the claim. Those indicia are going to be evidence  
5 that is going to be given to the jury or given to Your  
6 Honor at the appropriate time.

7 THE COURT: But that's exactly why when you  
8 plead something like that it gives the defendant, the  
9 adversary, the opportunity to examine those allegations  
10 and make a decision whether or not, okay, the allegations,  
11 they go back, they check it, they check these allegations  
12 and they said, "You know what? He's right." Or go back  
13 and say, you know, be able to then fight a battle in a  
14 sense, be able to address the allegations rather than  
15 fighting a ghost fighter here. Because they are now  
16 pointing out to me in their papers, look, right in the .2,  
17 roman numeral II, "We didn't do anything." There is no  
18 allegations here at all in the four corners of the  
19 complaint for anything of --

20 MR. RUSSOTTI: What I'm saying is those  
21 allegations are not necessary in a complaint; that's what  
22 I'm saying. All that is necessary in a complaint is that  
23 he plead that he was a partner, which he has done. And  
24 he's pled certain indicia of partnership. I don't think  
25 that there is any requirement that he plead as a matter of

## Proceedings

1 pleading, all of the indicia of partnership that are going  
2 to be given to a jury or to Your Honor on a charge as to  
3 what has to be ultimately proved. You don't have to  
4 prove, for instance, on a PJI whatever the PJI charge  
5 might be to sustain a cause of action, you don't have to  
6 prove all of those things.

7 THE COURT: You're absolutely right.

8 MR. RUSSOTTI: For instance, in a negligence  
9 case all you have to say is the defendant was negligent.  
10 And if I could just -- the place to then layout the  
11 evidence that you're going to say about the negligence is  
12 in a Bill of Particulars which comes later on.

13 THE COURT: The problem with that argument is  
14 that the documentary evidence that I have is the  
15 partnership agreement. There is a document here in the  
16 report that points out who the general partners are. It's  
17 Mr. Lynch and Mr. D'Amato, period. So the question is  
18 that the allegation of him saying that I'm a partner,  
19 okay, that's fine. That's an allegation that I have to  
20 take as true on a 3211. But when there is a document that  
21 says otherwise, you know what? That allegation is not  
22 going to be strong enough for him to stand on any more.

23 MR. RUSSOTTI: I would like to address that  
24 legally.

25 THE COURT: Okay.

## Proceedings

1 MR. RUSSOTTI: The Fontanetta case discusses the  
2 types of documents that are sufficient to be considered  
3 documentary evidence to warrant dismissal at this stage.

4 THE COURT: Right.

5 MR. RUSSOTTI: The cases they cite, they cite  
6 four cases, Kasimato (Phonetic), Bronxville Knolls, 150  
7 Broadway Associates and Crepin. I have those cases for  
8 Your Honor and for the defense counsel. I would like to  
9 hand up to Your Honor.

10 THE COURT: Please.

11 MR. RUSSOTTI: These cases are the only cases  
12 that have been found where documentary evidence has been  
13 sufficient to dismiss a case. The unique thing about all  
14 of these cases, Your Honor, is that the documentary  
15 evidence were signed by the parties who were involved in  
16 the litigation. In the first case, 150 Broadway  
17 Associates was a lease. The question was whether or not  
18 when the litigation was brought, whether or not the lease  
19 was signed in their individual capacity or their corporate  
20 capacity. The lease was viewed and the parties to the  
21 litigation both signed the lease. The Appellate Division  
22 held that the lease provisions controlled and the  
23 allegations in the complaint, which were contradicted by  
24 the lease provisions, did not survive the documentary  
25 evidence of the lease because the litigants signed the



## Proceedings

1 lease.

2 In Crepin versus Fogarty, it was a deed. The  
3 question was whether or not there was an easement. The  
4 deed established the easement. The parties to the  
5 litigation were on the deed, they were parties to the  
6 deed. So the deed was considered sufficient documentary  
7 evidence to warrant granting the motion.

8 In Knolls, the Knolls case, it was a mortgage  
9 and a note. One of the parties attempted to assert a  
10 claim against one of the other parties to the note  
11 personally. But the note and the mortgage said that the  
12 only recourse was against the property which was the  
13 subject of the mortgage and the note. The litigants were  
14 parties to the mortgage and the note. So the Court said  
15 the mortgage and the note is documentary evidence. You're  
16 bound by that documentary evidence that you signed.

17 Finally Kasimato (Phonetic) dealt with a trust  
18 agreement, where the two parties were co-trustees of the  
19 trust. The plaintiff operated the trust, consented to  
20 have property put into the trust and then sought to change  
21 the terms of the trust by having the co-trustee dismissed.  
22 The Appellate Division 2nd Department said, "No, you  
23 consented to the trust. You were named in the trust and  
24 you're bound by that trust."

25 There is no case that I found where documentary

## Proceedings

1 evidence has been sufficient to dismiss a complaint where  
2 the party to the litigation did not sign it or did not  
3 consent to it. Quite frankly, Your Honor, if you were to  
4 hold that this contract, which was secret between D'Amato  
5 and Lynch and which Barrison never consented to, never  
6 signed and never knew about until this litigation, was  
7 sufficient documentary evidence to dismiss his claim, you  
8 would be taking a step that no other court has taken that  
9 I find no support for.

10 So, that is the issue as a matter of law.  
11 Whether or not a document not signed by a party can be  
12 utilized against him to dismiss his claim. I suggest  
13 there is absolutely no authority for that proposition,  
14 Your Honor, and to do so, respectfully, would be error.

15 Even if you were to consider the documentary  
16 evidence as sufficient to bring up the issue, it does not  
17 completely resolve the issues in the case because it's  
18 contradicted by other evidence before the Court.

19 THE COURT: I'm listening.

20 MR. RUSSOTTI: It's contradicted by other  
21 evidence before the Court that is signed by the defendant  
22 Lynch.

23 First of all, the K-1s specifically state, and  
24 Your Honor was aware of this before, that for 20 years he  
25 was identified as a general partner. This is in direct

## Proceedings

1 contradiction to the agreement. There is a box on the  
2 K-1s for limited partner.

3 THE COURT: Never checked.

4 MR. RUSSOTTI: Never checked, okay. With  
5 respect to the claim of capital contributions, capital  
6 contributions were made every year. They submitted an  
7 affidavit from an accountant explaining how they accounted  
8 for his profits. His profits, they determined what his  
9 shared profits were every year. In one year they didn't  
10 pay them out until the next year. They withheld those  
11 profits for him until the next year. Where did they  
12 withhold them? They withheld them in their bank. Those  
13 profits that were not paid out throughout the year were  
14 contributions by him to the firm, to the management and to  
15 the running of the firm. Those were moneys that he was  
16 entitled to that were kept by the firm and used by the  
17 firm for their operating account. That is a capital  
18 contribution.

19 With respect to his ownership of the firm, this  
20 and having a share of the profits. The New Jersey tax  
21 returns specifically say that he had a distributive share  
22 of partnership income every year and it changed every  
23 year.

24 THE COURT: I don't have a problem with that. I  
25 understand in terms of us -- but those are all finance and

## Proceedings

1 all financial documents that Mr. Williams pointed out and  
2 made a note to point out, that that's what you're relying  
3 on in terms of that. And it is what it is at this point.

4 MR. RUSSOTTI: I don't mean to interrupt. But  
5 what I'm saying is, that it contradicts what they're  
6 saying is the documentary evidence, that he was only a  
7 limited partner. This specifically says, we don't have to  
8 bring all the evidence to bear, only enough to show you  
9 that that documentary evidence is not reliable to  
10 conclusively establish the case to dismiss it at this  
11 point have.

12 THE COURT: Your point is with respect to your  
13 verified complaint, you don't have to make those  
14 allegations. And one of the points is when I brought up  
15 the point about the partnership agreement, you're saying,  
16 look, it's signed by two individuals, not by my guy,  
17 therefore, it can't be used. But what's interesting about  
18 that is the difference between a 3211 and 3212 is, also  
19 you need to support it. With 3212 you need to support it  
20 with evidentiary proof in admissible form.

21 MR. RUSSOTTI: 3212?

22 THE COURT: Correct. I don't believe, and I  
23 haven't seen any cases that have the same requirement for  
24 on a 3211, that there has to be evidentiary proof in  
25 admissible form. Because in that sense what's the

## Proceedings

1 difference between 3211 and 3212?

2 MR. RUSSOTTI: But the cases that talk about the  
3 sufficiency of the documentary evidence and the cases I've  
4 handed up to Your Honor, is that they have all been signed  
5 by the party against whom, which is not the case here?

6 THE COURT: You're right.

7 MR. RUSSOTTI: Number two, these affidavits, the  
8 cases clearly say that affidavits are not documentary  
9 evidence.

10 THE COURT: You're right about that. I'm not  
11 looking at the affidavits, I'm looking at the agreement.  
12 The cases, although they dealt with the individual signing  
13 the document, these cases do not say that you can't use a  
14 document that wasn't signed by one of the --

15 MR. RUSSOTTI: There is no case that does.  
16 That's my point. There is no case. Every case, if you're  
17 going to use documentary evidence to say this conclusively  
18 proves that your allegation in the complaint has been  
19 conclusively resolved against you, you better have signed  
20 that.

21 THE COURT: It's not so much that, I'm not at a  
22 point where I'm making any finding of fact in terms of  
23 what's going on.

24 MR. RUSSOTTI: Correct.

25 THE COURT: I'm looking at the sufficiency of

## Proceedings

1 the pleadings only.

2 MR. RUSSOTTI: Right.

3 THE COURT: Your position is, you don't have to  
4 make those allegations because first and foremost  
5 Paragraph 3 says at best, "In 1990 plaintiff became a  
6 partner with the D & L law firm," that's it.

7 MR. RUSSOTTI: That's it.

8 THE COURT: Then that's all you have, that's  
9 your position?

10 MR. RUSSOTTI: As I say, I draw an analogy to  
11 other types of litigation, specifically negligence, where  
12 all you have to say is the defendant automobile struck me  
13 and he was negligent in the operation of the automobile,  
14 period. Later on you have to give particulars as to that,  
15 and we haven't gotten to that stage yet. After the answer  
16 and in the demand in the Bill of Particulars we  
17 particularize the claims in the complaint. But to dismiss  
18 the complaint now at this stage would be --

19 THE COURT: The thing is that if that were to  
20 happen, and I'll give you a decision shortly, if that were  
21 to happen there is nothing to prevent you from serving  
22 another complaint.

23 MR. RUSSOTTI: I understand. But why go through  
24 all this process? Why go through that process and then  
25 when they know and, in fact, they have made the claim and

## Proceedings

1 they brought to the Court's attention what these factors  
2 that ultimately will go to the jury, we've had discussion  
3 about them, about what they are, it's all in the papers.  
4 Mr. Barrison has submitted an affidavit as to his  
5 management participation in the firm. So, as a practical  
6 matter, it's all here and it's all before the Court. To  
7 say that you have to particularize that in the complaint I  
8 think that, you know, this is a question of form and not  
9 substance at this stage. I think that you're elevating  
10 substance over form, which is the only thing that must be  
11 looked at at this point in the proceedings.

12 THE COURT: Thank you, Mr. Russotti.

13 MR. WILLIAMS: Your Honor, if I may, briefly may  
14 I be heard?

15 THE COURT: Right.

16 MR. WILLIAMS: First of all, what we're dealing  
17 with here are mere conclusions and they are totally  
18 contradicted by the documentary evidence. We have already  
19 said that. I've heard nothing, nothing to the contrary.  
20 The complaint that we have doesn't even plead an  
21 agreement. In fact, it talks about there isn't an  
22 agreement. About this issue of whether or not Mr.  
23 Barrison was required to be a signatory. We have cited  
24 the Epstein case which is a 1st Department case, that  
25 basically held that the terms of the firm's operating

## Proceedings

1 agreement was evidence of the fact that he never became an  
2 equity member.

3 So, this whole issue, we have thrown up a whole  
4 group of red herrings here. We've thrown up issues about  
5 the tax. We've thrown up, without really even explaining  
6 why it's zero and it talks about capital contribution or  
7 interest in the firm. But keep in mind that we shouldn't  
8 even get to that level because the standards are such that  
9 you don't apply the requirements under the tax law to  
10 determine whether a partnership exists.

11 There, as I stated, there is no evidence of a  
12 partnership in the agreement. The documentary evidence,  
13 I've heard nothing here that says that that documentary  
14 evidence wouldn't be controlling in this case and that  
15 when it's applied, it requires dismissal.

16 THE COURT: Okay, thank you. This is my  
17 decision and order with respect to this motion. This is a  
18 difficult action. The Court is always, when attorneys and  
19 partnerships have disagreements and decide to litigate  
20 them, it's always an unhappy situation in terms of coming  
21 to the courthouse where lawyers always practice their  
22 trade. But in this case here, this is my finding and  
23 decision here.

24 With respect to the allegation of in Paragraph  
25 3, "In 1990 plaintiff became partner of defendant D & L



## Proceedings

1 law firm," I'm finding that Mr. Williams made that point  
2 there is no allegation in the four corners of the  
3 complaint of the partnership agreement. So that the  
4 allegation that he became a partner in 1990 is based not  
5 then on an agreement, but must be based on some other  
6 principle or some other legal basis. Having said that,  
7 that legal basis then requires allegations to an indicia  
8 of partnership, because now you have to set forth or the  
9 plaintiff has to set forth exactly how he became a partner  
10 and what's the basis for that partnership allegation,  
11 given that there is no allegation in here of an agreement.

12 So, here the allegations that he did set forth  
13 in Paragraph 4 all have to do with financials, K-1s, tax  
14 returns, capital -- not capital contribution but  
15 unincorporated business tax and the like. There are no  
16 allegations whatsoever as to whether or not he exercised  
17 control over D & L's business. Whether or not the  
18 partnership agreement has him having a part of ownership  
19 in the firm. There is no allegation whatsoever that there  
20 is, that he agreed, the plaintiff agreed to share profits  
21 and losses. There is also no allegations that he made  
22 capital contributions at all. There is no allegation in  
23 terms of other type of indicia that would give forth or  
24 support the basis of him saying that he's a partner of D &  
25 L.

-J.L.M.-

## Proceedings

1 Under those circumstances and based on the fact  
2 that this is a 3211 motion to dismiss, and putting that  
3 aside for a second and looking at the partnership  
4 agreement itself, and I know the argument that plaintiff's  
5 counsel raises is that the partnership agreement shouldn't  
6 be looked at because it's signed by only two individuals  
7 and not the plaintiff in this case. I've already looked  
8 at it in the sense that this is not a 3212 motion where  
9 the motion has to be supported by evidentiary proof and  
10 admissible form. It's a 3211 motion. The courts have  
11 looked at documentary evidence, without putting any  
12 imprimatur of whether or not it's evidentially admissible.

13 So, according to that I looked at the  
14 partnership agreement and I see that there is no situation  
15 where the plaintiff in this case is able to dissolve the  
16 firm. Only two people can dissolve the firm and that is  
17 Mr. Lynch and Mr. D'Amato. That is clear. There is no  
18 way around that. There is no ambiguity around that.

19 Having said that, I find based on a 3211 motion,  
20 failure to state a cause of an action and plaintiff's  
21 failure to make what I find or what I believe are critical  
22 allegations in this complaint and not having made them,  
23 I'm going to grant the defendant's motion to dismiss this  
24 complaint. Of course the dismissal is granted without  
25 prejudice. You have that decision and order for the

-J.L.M.-

## Proceedings

1 record, counsel.

2 Counselor, you're the moving party, please order  
3 the transcript and I'll so order it. Please order the  
4 transcript. You're the moving party. I'll so order it  
5 and you have it for the record.

6 MR. WILLIAMS: Yes.

7 THE COURT: Have a good day.

8 \* \* \*

9 CERTIFIED TO BE A TRUE AND ACCURATE TRANSCRIPT.

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JACK L. MORELLI, CM, CSR

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-J.L.M.-