

**Troy v Carolyn D. Slawski, C.P.A., P.C.**

2011 NY Slip Op 30476(U)

February 28, 2011

Supreme Court, New York County

Docket Number: 105968-2009

Judge: Judith J. Gische

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

PRESENT: Hon. Judith J. Gische JSC

PART 10

Index Number : 105968/2009

TROY, EDWARD

vs

SLAWSKI, CAROLYN D., CPA, P.C.

Sequence Number : 002

PARTIAL SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH  
THE ACCOMPANYING MEMORANDUM DECISION.

**FILED**

MAR 03 2011

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: Feb 28, 2011

J. Gische  
HON. JUDITH J. GISCHE J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 10**

-----X  
Edward Troy,  
Plaintiff (s),

*-against-*

Carolyn D. Slawski, C.P.A., P.C.,  
Troy & Troy, P.C., William J. Troy, III,  
Joseph B. Troy, and James J. Troy,

Defendant (s).  
-----X

**DECISION/ORDER**

Index No.: 105968-2009  
Seq. No.: 002

**PRESENT:**

Hon. Judith J. Gische  
J.S.C.

**FILED**

**MAR 03 2011**

*Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):*

NEW YORK  
COUNTY CLERK'S OFFICE  
Numbered

**Papers**

ET n/m (3212) w/EJT affid, exhs .....	1
Troy opp w/TJT affid, exhs .....	2
ET reply w/EJT affid, exhs .....	3

*Upon the foregoing papers, the decision and order of the court is as follows:*

This is an action by Edward Troy ("plaintiff") against Troy & Troy, P.C. the law firm ("law firm") that he was a member and shareholder of, the other shareholders and members of that firm, who are his brothers ("individually named defendants"), and the accountant, Carolyn D. Slawski, C.P.A., P.C. ("Slawski") who the law firm hired to prepared its tax returns.

Presently before the court is plaintiff's motion for partial summary judgment against the Troy defendants. If that motion is denied, plaintiff seeks, in the alternative, the imposition of discovery sanctions against all the defendants, striking their answers.

Although the note of issue has not been filed, issue has been joined by all the defendants and, therefore, summary judgment relief is available (CPLR § 3212 [a]);

Myung Chun v. North American Mortgage Co., 285 A.D.2d 42 [1<sup>st</sup> Dept. 2001]).

The facts of this case, as alleged in the complaint, were set forth in the prior order denying the accountant's motion to dismiss the complaint against her (Order, Gische J., 1/5/10) ("prior order"). The reader is presumed to be familiar with that order.

**Arguments Presented**

Plaintiff is an attorney at law and the brother of the individually named defendants. All the brothers were shareholders in the Troy & Troy law firm, a sub-chapter "S" corporation. Plaintiff's share of the corporation was 25%.

In 2007, the majority shareholders (i.e. the three individually named defendants) called for the dissolution of the law firm and commenced an action in Supreme Court, Suffolk County (In the matter of Edward Troy, Esq., Index No. 14816/07). That action was resolved by a stipulation of settlement so-ordered by the Hon. Elizabeth H. Emerson ("settlement agreement"). The settlement agreement recites that plaintiff is the owner of 25% of the outstanding shares in the law firm and in 3783 Realty Corp, a corporation owning real property in Lake Ronkonkoma. In exchange for surrendering his interest in the law firm and the 3783 Realty Corp, plaintiff received the sum of \$150,000 which was to be paid out over time and secured by a mortgage.

The law firm's accountant, defendant Slawski, prepared the year 2007 corporate tax return for the law firm and issued a K-1 in plaintiff's name. Although a cash distribution of \$75,000 was reported on each of those forms, plaintiff denies he ever received the \$75,000 attributed to him and, as a result of this "distribution," he has incurred a personal tax liability of \$25,000 for that year. He contends that not only is this a breach of defendants' duty to him, it is also a breach of the settlement agreement to

pay his taxes.

Paragraph 11 of the settlement agreement provides as follows

“Upon surrender by Edward Troy of his shares of stock in the respondent and 3783 Realty Corp . . . the respondent will hold Edward Troy harmless for any liability for the payment of taxes or other debts of the respondent and 3783 Realty Corp which exist December 31, 2007.”

Plaintiff contends that the Troy defendants are obligated to hold him harmless for the personal income tax assessment against him because they allocated income to him that was never paid to him. He seeks partial summary judgment against the Troy defendants based solely on the strength of that clause. He claims “payment of taxes” means not just corporate tax liability, but also his personal income taxes.

In the alternative, plaintiff claims that none of the defendants have provided discovery and their answers should be stricken. Only Troy opposes the motion; Slawski takes no position on any of the relief sought, although there is due proof of service of the motion upon her.

The Troy defendants contend that plaintiff’s interpretation of this clause is incorrect and not what the parties intended. The Troy defendants deny that there is any basis to strike their answer because they provided “unbridled access” to all the firm’s records in connection with the dissolution action and also gave him authorizations so he can obtain any financial documents from Slawski.

**Discussion**

*Partial summary judgment*

The purpose of contract interpretation is to give effect to the intention of the parties

(AGCO Corp. v. Northrop Grumman Space & Mission Systems Corp., 61 A.D.3d 562 [1<sup>st</sup> Dept. 2009]). In adjudicating the rights of parties to a contract, the court may not fashion a new contract under the guise of contract construction (Morlee Sales Corp. v. Manufacturers Trust Co., 9 N.Y.2d 16 [1961]). Thus, where the intention of the parties is clearly and unambiguously set forth, effect must be given to the intent as indicated by the language used.

The parties' settlement agreement, that the Troy defendants would "hold Edward Troy harmless for any liability for the payment of taxes or other debts of the respondent and 3783 Realty Corp," does not support plaintiff's interpretation, that the defendants agreed to pay his personal income taxes. The settlement agreement was made within the context of a corporate dissolution proceeding and the "taxes" clearly refer to corporate, not personal, taxes.

A movant seeking summary judgment in its favor must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case " (Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 [1985]). The evidentiary proof tendered, however, must be in admissible form (Friends of Animals v. Assoc. Fur Manufacturers, 46 N.Y.2d 1065 [1979]). Plaintiff has not met his burden and, therefore, his motion for partial summary judgment is denied.

#### *Discovery*

The purpose of a Bill of Particulars is to obtain the particulars of an opponent's claims in the pleadings. Particulars are not usually required from party as to matters which it need not prove upon trial (New England Seafood of Amherst, Inc. v. Travelers

Companies, 84 A.D.2d 676 [4<sup>th</sup> Dept 1981]).

In response to plaintiff's the document demands, most of the Troy defendants' responses are "none." Moreover, although the Troy defendants have asserted a number of affirmative defenses, they have refused to particularize them. Thus, for example, in response to plaintiff's request for a particularization of their business judgment rule defense ("In what manner did the business judgment rule permit all of the defendants' actions?" and "List all defendants' actions that were permitted by the business judgment rule"), the Troy defendants have responded that they "do not bear the burden of proof on this defense and, as such, are not required to furnish particulars."

The Troy defendants also claim they produced documents in the dissolution proceeding and should not have to re-produce them again in this action, particularly since they provided plaintiff with authorizations allowing him to obtain payroll records, etc., from Slawski. They also claim plaintiff's motion is premature because depositions have not yet taken place.

None of these objections or defenses require the denial of plaintiff's motion to compel. The court will require that the Troy defendants provide complete responses to the demand for documents, regardless of whether they were previously provided in a prior action. The Troy defendants have not presented any reason why this is a hardship. The Troy defendants must also respond to plaintiff's demand for particularization of their defenses. These responses are due no later than Twenty (20) Days after service of an entered copy of this decision/order. To the extent that plaintiff seeks an order striking the Troy defendants' answer, the motion is denied without prejudice.

Although plaintiff also seeks discovery sanctions against Slawski, the motion is denied. The discovery demand and demand for a bill of particulars was only directed at the Troy defendants. No demands directed to Slawski were provided to the court.

**Conclusion**


In accordance with the foregoing, plaintiff's motion for partial summary judgment against the Troy defendants is denied. Plaintiff's motion for an order striking the Troy defendants' answer is granted only to the extent that they must provide the documents demanded and respond to the bill of particulars, otherwise the motion is denied without prejudice. Plaintiff's motion for an order striking Slawski's answer is denied.

Any relief requested but not specifically addressed is hereby denied.

This constitutes the decision and order of the court.

Dated: New York, New York  
February 28, 2011

So Ordered:

  
\_\_\_\_\_  
Hon. Judith J. Gische, JSC

**FILED**  
**MAR 03 2011**  
NEW YORK  
COUNTY CLERK'S OFFICE