Connolly v Napoli, Kaiser & Bern, LLP
2012 NY Slip Op 30108(U)
January 13, 2012
Sup Ct, NY County
Docket Number: 105224/05
Judge: Joan A. Madden
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[* 1]
SCANNED ON 1/19/2012

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

PRESENT: Hon Joan A. Madden PART 11

Index Number : 105224/2005
CONNOLLY, GERARD A.
VS.
NAPOLI KAISER BERN
SEQUENCE NUMBER : 017
SUMMARY JUDGMENT

INDEX NO. ____
MOTION DATE 9-15-11
MOTION SEQ. NO. ____
MOTION CAL. NO. ____

this motion to/for ____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum Decision & Order.

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

FILED
JAN 19 2012
NEW YORK COUNTY CLERK'S OFFICE

Dated: January 13, 2012

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11
---------------------------------------X
GERARD A. CONNOLLY,

Plaintiff,

-against-

Index No. 105224/05

NAPOLI, KAISER & BERN, LLP, PAUL J. NAPOLI, MARC J. BERN, GERALD KAISER, NAPOLI BERN, LLC, and NAPOLI, KAISER, BERN & ASSOCIATES, LLP,

Defendants.
---------------------------------------X

FILED

JAN 19 2012

NEW YORK
COUNTY CLERK'S OFFICE

JOAN A. MADDEN, J.:

In this action, plaintiff Gerard A. Connolly seeks to challenge the termination of his employment as a trial attorney at the law firm of defendant Napoli, Kaiser & Bern, LLP (NKB). Plaintiff was an at-will employee at NKB, and its successor Napoli Bern LLC (NB), from July 2000 until his termination in April 2002. Defendants allege that plaintiff was terminated because of his poor job performance, culminating in his botched settlement of a personal injury case entitled *Vasquez, et al. v Barbieri* (Index No. 13010/97 [Sup Ct, Bronx County]) (the *Vasquez* Action). Conversely, plaintiff alleges that he was terminated because he refused to falsely attest to the genuineness of the signature of Rosa Vasquez, the plaintiff's wife in the *Vasquez* Action, on settlement documents which had been forged.

Defendants NKB, NB, and Napoli, Kaiser, Bern & Associates, LLP (NKBA) now move for summary judgment dismissing plaintiff's first cause of action, and dismissing the second amended complaint as against NB and NKBA. Defendants also move to amend the caption to reflect that all claims against Paul J. Napoli, Marc J. Bern and Gerald Kaiser have been dismissed.

For the reasons set forth below, the motion for summary judgment is denied, but the motion to amend the caption is granted.

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BACKGROUND

Plaintiff has been a practicing attorney for 30 years (Connolly Aff., ¶ 3). His career has consisted mainly of trial work on both the defense and plaintiff sides of personal injury cases (*id.*). In July 2000, plaintiff joined NKB, a personal injury law firm, as the firm's lead trial attorney (*id.*, ¶ 4). Plaintiff was hired, pursuant to an employment agreement, as an "employee at will." On April 11, 2002, NKB partner Marc Bern informed plaintiff that his employment was being terminated (*id.*, ¶ 9). In the two months prior to his dismissal, plaintiff had obtained two favorable verdicts. In February 2002, he obtained a $75,000 verdict in the *Ferrara* case for a client with 17 felony convictions who had been assaulted at Riker's Island (*id.*, ¶ 7). On March 15, 2002, plaintiff achieved a $203,000 verdict in the *Fischback* case involving an individual who had stepped into an open basement trap door (*id.*, ¶ 8). In the winter and spring of 2001-2002, plaintiff also obtained several settlements for NKB's clients totaling nearly $300,000 (*see* Aff. of Andrew M. Moskowitz, Exh 39). Gerald Kaiser, a partner at NKB, testified that plaintiff "did most aspects of his job well" (Kaiser Dep., at 6 [Moskowitz Aff., Exh 1]).

In May 1998, NKB substituted in as counsel for plaintiff Anthony Vasquez in the *Vasquez* Action. The Substitution of Attorney listed Mr. Vasquez as the sole plaintiff, and was executed by him alone (*see* Substitution of Attorney [Moskowitz Aff., Exh 10]). NKB's records listed Mr. Vasquez as the client, and had his contact information only (*see* 4/10/02 NKB Event Report [Moskowitz Aff., Exh 38]), and only Mr. Vasquez signed a retainer agreement with the firm (*see* Moskowitz Aff., Exh 11). According to Kaiser, the firm represented Anthony Vasquez only, and did not represent Ms. Vasquez (Kaiser Dep., at 31 [Moskowitz Aff., Exh 1).

Plaintiff served as trial counsel in the *Vasquez* Action from the beginning of March until mid-April 2001. Plaintiff alleges that, when he began his review of the *Vasquez* Action file in preparation for trial, he understood that NKB's clients were Mr. and Ms. Vasquez, but that Ms. Vasquez's claim was strictly derivative (Connolly Dep., at 344 [Moskowitz Aff.,

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Exh 5]). However, plaintiff ultimately concluded that a "derivative claim didn't really exist," as Mr. and Ms. Vasquez were no longer living together (Connolly Dep., at 537, 539, 542 [Moskowitz Aff., Exh 5] [noting that Mr. and Ms. Vasquez "had split up" shortly after his accident, and were "estranged"]). Indeed, due to the clear absence of a such a claim, the defendants' attorney did not even depose Ms. Vasquez (Kaiser Aff., ¶ 6 [Moskowitz Aff., Exh 21]).

When settlement discussions began, plaintiff informed Kaiser that since Mr. Vasquez was separated and estranged from Ms. Vasquez, Mr. Vasquez believed "he would have trouble getting [Ms. Vasquez] to sign documents" (Connolly Dep., at 552). In response, Kaiser assured plaintiff that "[w]e will take care of it" (*id.* at 553).

In mid-April 2001, the *Vasquez* Action settled for $850,000 (*see* Moskowitz Aff., Exh 32). During his deposition, partner Paul J. Napoli acknowledged that the $850,000 settlement was a good result (Napoli Dep., at 204). Plaintiff mailed Mr. Vasquez a copy of the release and a power of attorney for him to sign. The settlement proceeds were to be paid by Empire Insurance Group (Second Amended Complaint, ¶ 29). Prior to issuing the settlement check, Empire Insurance Group required that NKB provide a release executed by both Mr. and Ms. Vasquez (*id.*, ¶ 31).

However, it is undisputed that Mr. Vasquez never had Ms. Vasquez sign the settlement documents. Mr. Vasquez testified that, when he met with Kaiser in his office in late April 2001, he informed Kaiser that he would have difficulty obtaining Ms. Vasquez's signature on the release (Vasquez Dep., at 16 [Moskowitz Aff., Exh 6]). According to Mr. Vasquez, Kaiser told him that "you have to a sign before a check is released. So I said, you know, she's nowhere near here, you know. I don't know if she knows about it ... So he told me, go in the hallway and sign it" (*id.* at 17). Mr. Vasquez further testified that plaintiff was not present for this conversation (*id.* at 28). Mr. Vasquez testified that he took the settlement documents "to the back of the bathroom and signed them and handed [them] off to [Kaiser]" (*id.* at 27).

Likewise, plaintiff testified that, after the case settled, but before he had received any executed settlement documents, he overheard Kaiser have a phone conversation with Mr. Vasquez in which Kaiser said "I don't care if you have to take them down to the car and have her sign them, she has to sign them. I recall when the releases actually showed up on my desk [thinking] she must have gone down to the car and signed it" (Connolly Dep., at 407-408).

Kaiser admits that he witnessed Mr. Vasquez sign Ms. Vasquez's signature on the back of the settlement check (Kaiser Dep., at 88). Although Kaiser did not ask him, Kaiser testified that he surmised that Mr. Vasquez had the authority to sign Ms. Vasquez's name (*id.* at 165). However, Mr. Vasquez testified that he never informed Kaiser that he was authorized to sign Ms. Vasquez's name (Vasquez Dep., at 25). Mr. Vasquez also testified that he did not inform Kaiser that Ms. Vasquez was aware of the settlement (*id.* at 25-26).

The Release and Power of Attorney containing Ms. Vasquez's forged signature (*see* Moskowitz Aff., Exh 16) was notarized by Miriam Guevara, Kaiser's secretary. Ms. Guevara testified that Kaiser's practice was to leave documents on her chair with a Post-it note stating "please notarize" (Guevara Dep., at17-18 [Moskowitz Aff., Exh 16]). Nevertheless, Kaiser denies that he orchestrated the forgery of the Release and Power of Attorney (Kaiser Dep., at 76-77). He does acknowledge that, in August 2001, he learned that Ms. Vasquez's signature on these documents was not genuine (*id.* at 113-114). According to Kaiser, he "asked [Mr. Vasquez] point-blank did he forge her name on the closing papers and he said yes" (Kaiser Dep., at 172).

Several months later, on July 16, 2001, NKB received a letter from Joseph A. Altman, Esq., on behalf of Ms. Vasquez, alleging that the *Vasquez* Action had been settled without her knowledge (Second Amended Complaint, ¶ 38). The letter further alleged that Ms. Vasquez had never signed any of the closing documents with respect to the settlement of the *Vasquez* action (*id*). Plaintiff responded, advising Altman that the "[r]eleases executed by both Mr. and Mrs. Vasquez were provided to [NKB] and forwarded to the defendants' insurance

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company," and that NKB believed that Ms. Vasquez had waived her right to assert a claim to the proceeds (*id.*, ¶ 39). Kaiser wrote a subsequent letter to Altman in September, alleging that NKB had never represented Ms. Vasquez (*id.*, ¶ 41).

In the winter of 2002, Ms. Vasquez moved by order to show cause to vacate the settlement of the *Vasquez* Action on the grounds that she had not consented to it, and was unaware of it (*see* Moskowitz Aff., Exh 40). Plaintiff contends that, after reviewing Ms. Vasquez's application, Kaiser provided an affirmation for him to sign (Connolly Dep., at 463-464). As described by plaintiff, "[t]he original affirmation, in substance, stated that Rosa Vasquez had signed the closing papers" (Connolly Dep., at 478). Plaintiff testified that, although Kaiser asked him to sign this document, he refused to do so, because he did not have personal knowledge concerning the signatures on the releases (*id.* at 470, 473).

Because he had no first-hand knowledge of her actions and, in fact, had never communicated with Ms. Vasquez, plaintiff contends that he edited the affirmation on NKB's computer system by removing the language which stated that the "releases [] had been signed by Rosa Vasquez, which I had no personal knowledge about" (*id.* at 465). Plaintiff interpreted the reference to Ms. Vasquez "[as] an invitation to perjure myself on behalf of the firm ... [b]ecause I believe the people who prepared the [affirmation] knew it was not true" (*id.* at 499). Plaintiff told Kaiser that the genuineness of Ms. Vasquez's signature "would have to be addressed by the persons involved and that would be [Kaiser]" (*id.* at 474). Plaintiff signed the affirmation after making these changes (*id.* at 467). Plaintiff contends that Kaiser accepted the edited affirmation (Connolly Dep., at 474-475). In any event, in opposition to Ms. Vasquez's application to vacate the settlement, NKB did not use the Affirmation, but rather, utilized an affirmation signed by Kaiser (Second Amended Complaint, ¶¶ 46-47).

On April 11, 2002, Napoli and Kaiser appeared in court with respect to the order to show cause (Napoli Dep., at 228). During the conference, a settlement was reached in which Ms. Vasquez's claim was settled for the amount of $50,000, with $12,000 payable to Ms.

Vasquez by Mr. Vasquez, and $38,000 payable by NKB.

Plaintiff executed the revised affirmation on March 19, 2002 (*see* Moskowitz Aff., Exh 36). On April 11, 2002, plaintiff was informed that his employment was being terminated (Connolly Aff., ¶ 9). Napoli alone made the decision to terminate plaintiff on April 11, 2002 (Napoli Dep., at 190 [Moskowitz Aff., Exh 3]). This was the same date that Ms. Vasquez's order to show cause was returnable (*see* 4/2/02 Order to Show Cause [Moskowitz Aff., Exh 35]). Napoli stated that the decision to terminate plaintiff "was made when I was sitting in the courtroom [on the Vasquez matter]" (Napoli Dep., at 190; *see also* Kaiser Dep., at 7-8).

Defendants contend that this decision arose because, during plaintiff's tenure at NKB, his job performance was deficient in several respects. Napoli testified that, prior to the decision to terminate plaintiff, he discussed terminating plaintiff with other partners at the firm, concerning plaintiff's cases that had been marked off the trial calender (Napoli Dep., at 192-196). Defendants also contend that plaintiff's performance as a trial lawyer was abysmal, given that five of the cases he had tried resulted in defense verdicts. Defendants further contend that there were also occasions when plaintiff would appear in court on a matter and not notify NKB's calendar clerk of the new dates, with the result that court dates were missed.

Napoli testified that, as a result of plaintiff's sloppiness with court dates and poor performance as a trial lawyer, he decided to terminate plaintiff's employment in September 2001 (Napoli Dep., at 196). Napoli further testified that the Vasquez order to show cause and the payment of $38,000 in attorney's fees due to plaintiff's mishandling of the *Vasquez* Action was the culmination of his poor performance, and precipitated his termination (Napoli Dep., at 199).

DISCUSSION

"'[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact [citation omitted]'" (*Ayotte v Gervasio*, 81

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NY2d 1062, 1062 [1993]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d at 853; *see also Lesocovich v 180 Madison Ave. Corp.*, 81 NY2d 982 [1993]).

The party opposing summary judgment has the burden of presenting evidentiary facts sufficient to raise triable issues of fact (*Rinaldi v Holt, Rinehart & Winston, Inc.*, 42 NY2d 369, *cert denied* 434 US 969 [1977]; *Indig v Finkelstein*, 23 NY2d 728 [1968]). The court is required to examine the evidence in a light most favorable to the party opposing the motion (*Martin v Briggs*, 235 AD2d 192 [1st Dept 1997]). Summary judgment may be granted only when it is clear that no triable issues of fact exist (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]), and "should not be granted where there is any doubt as to the existence of a triable issue" of fact (*American Home Assur. Co. v Amerford Intl. Corp.*, 200 AD2d 472, 473 [1st Dept 1994]).

As set forth below, defendants' motion for summary judgment dismissing the second amended complaint is denied.

Plaintiff's first cause of action for breach of an implied-in-law obligation is based upon the case of *Wieder v Skala* (80 NY2d 628 [1992]), which created a narrow exception to the at-will doctrine where an employer law firm requires an attorney employed by it to act unethically and in violation of professional rules in order to avoid termination. Plaintiff alleges that his discharge was wrongful and intended as retaliation for his refusal to sign an affirmation falsely stating that Ms. Vasquez had duly executed the release in connection with the *Vasquez* Action, and that she had agreed to waive her claims (Second Amended Complaint, ¶ 55). Plaintiff further alleges that defendants breached an implied-in-law obligation owed to him when he was terminated for refusing to engage in misconduct in violation of 22 NYCRR § 1200.3 (DR 1-102). (*id.*, ¶ 56). DR 1-102 prohibits an attorney from, inter alia, engaging in "illegal conduct that adversely reflects on a lawyer's honesty, trustworthiness or fitness as a lawyer" or "conduct

involving dishonesty, fraud, deceit, or misrepresentation."

Under New York law, "absent an agreement establishing a fixed duration, an employment relationship is presumed to be a hiring at will, terminable at any time by either party" (*Sabetay v Sterling Drug*, 69 NY2d 329, 333 [1987]). Where employment is at will, an employee may be terminated at any time, for any reason, or for no reason at all (*see Lobosco v New York Tel. Co./NYNEX*, 96 NY2d 312 [2001]).

Plaintiff was an at-will employee of NKB. Thus, the NKB could have terminated plaintiff's employment at any time, for any reasons, or for no reason at all. Accordingly, the only basis for plaintiff's claim is whether or not he was terminated under the *Weider v Skala* exception.

In *Wieder v Skala* (80 NY2d 628, *supra*), the Court of Appeals recognized a cause of action for breach of an implied contract where an associate in a law firm, hired as an at-will employee, was terminated for his insistence that the firm comply with DR 1-103 (a), which imposes an obligation on an attorney to report another attorney's misconduct, as defined in DR 1-102, to the Appellate Division of the Supreme Court. In reaching this conclusion, the court explained that:

> Defendants, a firm of lawyers, hired plaintiff to practice law and this objective was the only basis for the employment relationship. Intrinsic to this relationship, of course, was the unstated but essential compact that in conducting the firm's legal practice both plaintiff and the firm would do so in compliance with the prevailing rules of conduct and ethical standards of the profession. Insisting that as an associate in their employ plaintiff must act unethically and in violation of one of the primary professional rules amounted to nothing less than a frustration of the only legitimate purpose of the employment relationship.

Id. at 637-638.

Before answering the complaint, defendants moved to dismiss on the ground that plaintiff in *Wieder* was allegedly terminated for seeking compliance with the reporting requirements of DR 1-103 whereas plaintiff here alleges that he was terminated for refusing to commit misconduct as defined under DR 1-102. Justice Rolando Acosta rejected defendants'

argument, writing that "according to defendants, an implied-in-law obligation exists where an associate insists that his partners report misconduct as defined in DR 1-102 to the Appellate Division Disciplinary Committee pursuant to DR 1-103, but would not be protected for refusing to engage in DR 1-102 misconduct in the first instance. The court clearly could not have intended such a result." (*Connolly v Napoli, Kaiser & Bern, LLP*, 12 Misc 3d 530, 536 [Sup Ct, NY County 2006]).

Defendants now move for summary judgment dismissing the cause of action on the ground that no one at NKB specifically stated to plaintiff that he would be fired if he did not sign the allegedly false affirmation. However, where an employer's conduct was allegedly predicated on an impermissible motive, such an improper motive may be proved either by direct or circumstantial evidence (*Price Waterhouse v Hopkins*, 490 US 228 [1989]). Similarly, in cases interpreting *Weider*, courts have not required plaintiff to demonstrate that the employer specifically made such a threat.

For example, in *Lichtman v Estrin* (282 AD2d 326 [1st Dept 2001]), plaintiff, an attorney, had been employed by Melvyn J. Estrin & Associates, P.C. as an associate when, in 1995, defendant Melvyn J. Estrin was indicted in connection with an insurance fraud scheme. In April 1999, Estrin entered into an plea agreement with the District Attorney's office. Anticipating suspension or disbarment by the Appellate Division for his role in the scheme, Estrin told plaintiff that, even if he were suspended or disbarred, he could continue his involvement in his law practice. Plaintiff advised Estrin that the Disciplinary Rules of the Code of Professional Responsibility would prohibit him from any involvement in the practice of law if he were suspended or disbarred. Plaintiff offered this advice in spring of 1999, and he was subsequently terminated on June 30, 1999. In holding that plaintiff had stated a *Weider* claim, the Court noted that he had voiced his concerns about potential unethical conduct, and was subsequently discharged.

Likewise, here, plaintiff objected to signing an affirmation which stated that Ms.

Vasquez had signed the closing papers (Connolly Dep., at 478). Plaintiff interpreted the reference to Ms. Vasquez "[a]s an invitation to perjure myself on behalf of the firm ... [b]ecause I believe the people who prepared [the affirmation] knew it was not true" (*id.* at 499). Although Kaiser asked plaintiff to sign this document, he refused to do so (*id.* at 474). Plaintiff told Kaiser that the genuineness of Ms. Vasquez's signature "would have to be addressed by the persons involved and that would be [Kaiser]" (*id.* at 474). Only after making these changes did plaintiff sign the affirmation (*id.* at 467). Plaintiff executed the revised affirmation on March 19, 2002. On April 11, 2002, the day Ms. Vasquez's order to show cause was heard and NKB paid $38,000 to Ms. Vasquez in settlement of her claim, plaintiff was informed that his employment would be terminated.

When viewing this evidence in the light most favorable to plaintiff (*Martin v Briggs*, 235 AD2d at 196), a reasonable fact finder could conclude that plaintiff was terminated for his refusal to sign this false affirmation in violation of DR 1-102, rather than, as defendants allege, his poor performance as a trial attorney, and his alleged mishandling of the *Vasquez* Action. This conclusion is further supported by evidence that in the months prior to his dismissal, plaintiff had obtained two favorable verdicts, and realized several settlements for NKB's clients totaling nearly $300,000. Moreover, by Napoli's own admission, the $850,000 settlement in *Vasquez* was a good result (Napoli Dep., at 204), and earned NKB a fee of almost $250,000 (*see* Closing Statement [Moskowitz Aff., Exh 24]).

In addition, the timing of his termination suggests that plaintiff was fired not due to his alleged mishandling of the *Vasquez* Action, but as a result of his refusal in March 2002, to falsely attest that Ms. Vasquez's signatures were genuine. Ms. Vasquez filed her application to set aside the settlement at the end of February 2002. Kaiser testified that Napoli knew, prior to appearing in court on April 11, 2002, that Vasquez has forged Ms. Vasquez's signature on the release (Kaiser Dep., at 208-209). If, in fact, NKB intended to fire plaintiff due to his mishandling of the case in connection with the signing of the release, it likely would have done

soon after Ms. Vasquez's application was filed in February 2002. However, plaintiff was not terminated until the April 11, 2002 return date which was also after plaintiff's refused to sign the false affirmation.

Moreover, a reasonable fact finder could conclude that plaintiff was fired for his refusal to sign the false affirmation based on Mr. Vasquez's testimony that Kaiser engineered a forgery; the presence of Kaiser's secretary's notary stamp on the forged documents; Kaiser's admission that he witnessed Mr. Vasquez sign Ms. Vasquez's signature on the back of the settlement check; and the fact that plaintiff was fired on the same day that Ms. Vasquez's application was returnable.

Next, contrary to defendants' position, plaintiff's failure to produce the draft affirmation that Kaiser allegedly asked him to sign does not warrant a grant of summary judgment in defendants' favor, particularly as the document was originally drafted on defendants' computer system, to which plaintiff no longer has access.

Furthermore, defendants' reliance upon *Geary v Hunton & Williams* (257 AD2d 482 [1st Dept 1999]), is misplaced. In *Geary*, the attorney was terminated before he complained about the ethical propriety of a partner's billing practices. In contrast, in this case, the record indicates that plaintiff was terminated after he refused to engage in unethical conduct by refusing to sign what he believed to be a false affirmation.

Defendants also move for summary judgment dismissing all claims against NKBA and NB. Defendants argue that plaintiff's claims against NKBA and NB must be dismissed in their entirety as plaintiff alleges that he was employed by NKB. The basis of plaintiff's claim against NB is the allegation that NB is the "product of an actual or 'de facto' merger and/or is the successor of the rights and liabilities of NKB" (Second Amended Complaint, ¶ 3). Likewise, with respect to NKBA, plaintiff alleges that it "is or was the alter ego of NKB" (*id.*, ¶ 4).

The motion is denied. Plaintiff presents evidence that, although the entity that paid plaintiff his salary was NKB (*see* 2000 and 2001 W-2s [Moskowitz Aff., Exh 28]),

plaintiff's employment agreement was with NKBA (*see* Moskowitz Aff., Exh 27). In fact, defendants have stated that NKBA was plaintiff's employer (*see* Response to Notice to Admit No. 1 [Moskowitz Aff., Exh 26] ["Connolly's dates of employment as an associate attorney were July 17, 2000 to April 11, 2002 with Napoli, Kaiser Bern & Associates LLP"]). Although defendants contend that there is no evidence that NKBA is or was the alter ego of NKB, it is not necessary to pierce the corporate veil or prove that NKB and NKBA were alter ego corporations. As plaintiff's employment agreement was with NKBA, and as defendants have admitted the NKBA was plaintiff's employer, plaintiff has an independent basis for liability against NKBA. In any event, this court has already determined that NKB and NKBA were "alter ego corporations" (*see* July 24, 2009 Decision and Order at 12 [Moskowitz Aff., Exh 43]).

With respect to NB, defendants argue that NKB is still in existence and that thus, NB is not the product of a de facto merger with NKB. The de facto merger doctrine is "applied when the acquiring corporation has not purchased another corporation merely for the purpose of holding it as a subsidiary, but rather has effectively merged with the acquired corporation" (*Fitzgerald v Fahnestock & Co.*, 286 AD2d 573, 574 [1st Dept 2001]). However, legal dissolution is not necessary to find a de facto merger, "[s]o long as the acquired corporation is shorn of its assets and has become, in essence, a shell" (*id.* at 575).

Courts consider several factors when determining whether there has been a de facto merger, such as: continuity of ownership; cessation of ordinary business and dissolution of the acquired corporation as soon as possible; assumption by the successor of the liabilities ordinarily necessary for the uninterrupted continuation of the business of the acquired corporation; and continuity of management, personnel, physical location, assets and general business operation (*id.*).

Defendants have offered no evidence that NB is a distinct corporate entity from NKB. In contrast, plaintiffs present evidence that, at the end of February 2003, Kaiser departed NB (Kaiser Dep., at 138). In June 2004, NB was formed (*see* Aff. of Christopher Hitchcock, Exh

[* 14]

U]). In addition to sharing two of the same partners, NKB and NB shared the same office address at 115 Broadway, 12th Floor (Napoli Dep., at 254). Although Napoli claimed that the two firms had different employees, he could not identify any of them (*id.* at 253). By his own admission, he did not file substitutions of counsel in all pending matters (*id.* at 254).

Thus, there is a sufficient basis to find that NB is the successor of the rights and liabilities of NKB and, therefore, defendants' motion to dismiss the second amended complaint as against NB is denied.

Defendants also move to amend the caption to remove the names of the individual defendants Paul J. Napoli, Marc J. Bern and Gerald Kaiser. This motion is granted based on this court's decision and order dated July 16, 2009, which dismissed all claims against these defendants. Since the second amended complaint has been dismissed as against these defendants, it is appropriate to amend to caption to reflect that these parties are no longer in the case (*see Mandel v Adler*, 267 AD2d 150 [1st Dept 1999]).

The court has considered the remaining arguments, and finds them to be without merit.

CONCLUSION

Accordingly, it is

ORDERED that defendants' motion is granted only to the extent it seeks to amend the caption in this action and is otherwise denied; and it is further

ORDERED that the caption shall be amended as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK:
---------------------------------------X
GERARD A. CONNOLLY,

Plaintiff,

-against- Index No. 105224/05

NAPOLI, KAISER & BERN, LLP, NAPOLI BERN, LLC, and NAPOLI, KAISER, BERN & ASSOCIATES,

[* 15]

LLP,

Defendants.

--X;

and it is further

ORDERED that defendants shall serve a copy of this order with notice of entry on the Clerk of the Court and the Clerk of the Trial Support Office who are directed to mark their records to reflect the amendment; and it is further

ORDERED that the parties shall appear for a pre-trial conference on January 26, 2012 at 9:30 am in Part 11, room 351, 60 Centre Street, New York, NY 10007.

Dated: January 18 2012

FILED

JAN 19 2012

NEW YORK COUNTY CLERK'S OFFICE

ENTER:

J.S.C.