UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

In re:

ROBERT J. BRADLEY, SR., **BK. NO. 91-13893K**

Debtor.

ROBERT J. BRADLEY, SR.,

Plaintiff,

vs. **AP. NO. 93-2136**

MOOT & SPRAGUE, et al.,

Defendants.

BACKGROUND

In this adversary proceeding, Robert J. Bradley, Sr. (the "Debtor") who has a Chapter 11 case pending in this Court seeks damages for alleged malpractice against Moot & Sprague, a now dissolved law firm, and a number of former partners of the firm. Defendants, the Estate of Robert D. Fernbach ("Fernbach"), Albert K. Hill ("Hill") and James F. Forton ("Forton"), have moved in the early stages of this adversary proceeding for summary judgment to dismiss the complaint against them, alleging that they were not general partners in Moot & Sprague from May, 1990 to October, 1990 when the acts constituting the alleged malpractice took place.[1]

Although the Debtor does not dispute that Fernbach, Hill and Forton were not general partners in fact of Moot & Sprague during this time,[2] he first asserts that each is nevertheless liable

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[1] Even though the alleged malpractice involved notices sent by Moot & Sprague to a third party in July, 1990, neither the moving defendants nor the Debtor have provided copies of the notices which would show if or how the moving defendants were listed on the Moot & Sprague letterhead at that time.

[2] Attached to the moving defendants' motion are copies of Retirement Agreements between Moot & Sprague and Fernbach and Hill effective January 1, 1989 whereby Fernbach and

as a partner by estoppel, within the meaning and intent of Section 27 of the New York State Partnership Law, because each continued to hold himself out as a general partner in Moot & Sprague after his withdrawal. The Debtor's assertion that the moving defendants were holding themselves out as general partners, and therefore should be found to be partners by estoppel, is based solely on the facts that the 1990 listing in Martindale-Hubbell for Moot & Sprague showed them as general partners and not as "counsel" or "special counsel," designations which were used for other individuals associated with Moot & Sprague in that listing, and the 1991 New York Lawyer Diary and Manual, Bar Directory of the State of New York listed them in such a way that the Debtor contends indicates that they were partners in Moot & Sprague.

Debtor also asserts that the moving defendants are liable to him because they did not give a required notice of dissolution and withdrawal to creditors. In his interestingly crafted Affidavit in Opposition the Debtor states that "[a]t no point during the course of my retention of Moot & Sprague was I advised, either orally or in writing, that any of the Moving Defendants were no longer with the firm, or that they had left the firm and/or retired as members of the firm."

DISCUSSION

"In a motion for summary judgment, the burden is on the moving party to establish that there are no genuine issues of material fact in dispute and that it is entitled to judgment as a matter of law." *Burke v. Bevona*, 931 F.2d 998, 1001 (2nd Cir. 1991); Fed. R. Civ. P. 56(c). In viewing the evidence in the light most favorable to the non-moving party, the court must consider whether there are any genuine issues of material fact. *Lippi v. City Bank*, 955 F.2d 599, 604 (9th Cir. 1992). Summary

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Hill were to be designated as "Of Counsel" as of January 1, 1990 and a September 1, 1989 Memorandum of Understanding between Moot & Sprague and Forton whereby effective January 1, 1990 Forton was to become an independent contractor and Special Counsel.

judgment is proper if "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). If the moving party meets its initial burden of demonstrating the absence of any genuine issues of material fact, then, according to Federal Rule of Civil Procedure 56(e), the non-moving party must set forth specific facts showing that there is a genuine issue for trial. *T.W. Elec. Service, Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987).

Section 27(1) of the New York State Partnership Law provides:

> When a person, by words spoken or written or by conduct, represents himself, or consents to another representing him to any one, as a partner in an existing partnership or with one or more persons not actual partners, he is liable to any such person to whom such representation has been made, who has, on the faith of such representation, given credit to the actual or apparent partnership, and if he has made such representation or consented to its being made in a public manner he is liable to such person, whether the representation has or has not been made or communicated to such person so giving credit by or with the knowledge of the apparent partner making the representation or consenting to its being made.
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> (a) When a partnership liability results, he is liable as though he were an actual member of the partnership.
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> (b) When no partnership liability results, he is liable jointly with the other persons, if any, so consenting to the contract or representation as to incur liability, otherwise separately.

N.Y. Partnership Law §27 (Consol. 1977).

Counsel for the moving defendants asserts in her Memorandum of Law that to be found to be liable as a partner by estoppel, it is necessary for the party asserting liability to have acted in reliance on the representations and holding out of a person as a partner even if the representation and holding out is made in a public manner. The Court agrees that reliance is a requirement for any

finding of a partnership by estoppel, so that even a public representation will not create an estoppel as to one who does not become aware of the public representation.[3]

The only relevant fact interposed by the Debtor to support his position that the moving defendants were holding themselves out as general partners, and therefore should be held liable as partners by estoppel, is the 1990 listing in Martindale-Hubbell.[4] Nevertheless, there is no allegation whatsoever by the Debtor that he was aware of the Martindale-Hubbell listing at any time before or between May, 1990 and October, 1990 when the actions constituting the alleged malpractice took place. Therefore, Debtor has failed to interpose specific facts which raise a genuine issue of fact as to reliance, and absent reliance, a finding of partnership by estoppel is not warranted.

In addition to asserting that the moving defendants are liable to him on a partnership by estoppel theory, the Debtor contends that they are liable to him because they failed to give due notice of their withdrawal from the partnership as general partners. A memorandum of law submitted on behalf of the Debtor cites *Sugarman of Partnership*, §183 (4th ed. 1966) and *Elmira Iron & Steel Rolling Mill, Inc. v. Harris*, 124 N.Y. 280, 286 (1891) for the proposition that a retiring partner is liable for obligations incurred by the firm after withdrawal unless he has given the required notice of dissolution and withdrawal to creditors.

As correctly pointed out in the memorandum of law filed on behalf of the moving defendants, however, the *Sugarman of Partnership* excerpt and the *Elmira Iron & Steel* case (decided before the

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[3] *See* 1 Bromberg & Ribstein on Partnership §2.12 (1988); *Thompson v. First National Bank of Toledo*, 111 U.S. 529, 537 (1884).

[4] The Debtor does not assert, for example, that during 1990 the moving defendants appeared on the firm letterhead or that they maintained offices at the firm or had any contact with the Debtor professionally or otherwise as representatives of the firm.

1919 effective date of Section 66 of the New York State Partnership Law,[5] modeled after Section 35 of the Uniform Partnership Act) deal with the obligation of a withdrawing or retiring partner to give notice to creditors and parties who had dealings with the partnership prior to the withdrawal of the partner to be held liable for a post-withdrawal indebtedness. Again, there is nothing before the Court that indicates that the Debtor was a creditor or even a client of Moot & Sprague prior to January, 1990. Even when viewing all of the evidence in a light most favorable to the Debtor,[6] no

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[5] Section 66 of the New York State Partnership Law provides in part:

(1) After dissolution a partner can bind the partnership except as provided by subdivision three

(a) By any act appropriate for winding up partnership affairs or completing transactions unfinished at dissolution;

(b) By any transaction which would bind the partnership if dissolution had not taken place, provided the other party to the transaction

(I) Had extended credit to the partnership prior to dissolution and had no knowledge or notice of the dissolution; or

(II) Though he had not so extended credit, had nevertheless known of the partnership prior to the dissolution, and, having no knowledge or notice of dissolution, the fact of dissolution had not been advertised in a newspaper of general circulation in the place (or in each place if more than one) at which the partnership business was regularly carried on.

(2) The liability of a partner under subdivision one, paragraph (b), shall be satisfied out of partnership assets alone when such partner had been prior to dissolution

(a) Unknown as a partner to the person with whom the contract is made; and

(b) So far unknown and inactive in partnership affairs that the business reputation of the partnership could not be said to have been in any degree due to his connection with it.

[6] In judging evidence at the summary judgment stage, the court is required to view all inferences in the light most favorable to the non-moving party. *Musick v. Burke*, 913 F.2d 1390, 1394 (9th Cir. 1990).

reasonable inference can be drawn from the careful statement set forth in the Debtor's Affidavit in Opposition that the Debtor was a pre-withdrawal creditor or client. Therefore, neither under the common law nor Section 66(1)(b)(I) of the Partnership Law would the Debtor have been entitled to a specific notice of the withdrawal by the moving defendants as general partners.

Furthermore, to the extent that the Debtor is asserting that the moving defendants could be found to be liable because they failed to comply with Section 66(1)(b)(II) of the New York Partnership Law, the Debtor has again failed to interpose specific facts that raise genuine triable issues of fact as to the required elements of that statute. The Debtor has not established, nor even raised as a question of fact, that he knew of the partnership prior to the withdrawal of the moving defendants, that he had no knowledge of the withdrawal of the moving defendants, that he had no notice of the withdrawal of the moving defendants prior to May, 1990, or that the withdrawal had not been advertised as required by Section 66. Again, the Debtor's careful statement does not allow a reasonable inference that there are material issues of fact as to the required elements of knowledge of the partnership, lack of knowledge of withdrawal of the moving partners, notice of the withdrawal of the moving partners (other than directly being advised as such during the course of his representation) or advertisement.

Furthermore, this Court agrees with the moving defendants that, unlike creditors who supply goods and services, a withdrawn or retired partner cannot be held liable for the tortious acts (malpractice) of the continuing partnership in the absence of evidence that the former partner either authorized or had knowledge of the fact that he was represented to the injured party as a continuing member of the partnership. *Gorton vs. Fellner*, 88 A.D.2d 742, 743 (3d Dept. 1982). In this case there is absolutely no evidence before the Court that the moving defendants were represented, with their authorization or knowledge, to the Debtor to be continuing members of the partnership and that the Debtor relied on any such representation.

CONCLUSION

Based on all of the evidence before the Court,[7] and considering that evidence in a light most favorable to the Debtor, the motion for summary judgment dismissing the complaint against the Estate of Robert D. Fernbach, Albert K. Hill and James F. Forton is granted.

IT IS SO ORDERED.

_____/s/_____
HON. JOHN C. NINFO, II
U.S. BANKRUPTCY COURT JUDGE

Dated: September 27, 1993

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[7] The parties failed to take advantage of the opportunity to present oral argument to the Court.