

Recent Matters of Interest

Business Corp. Law §1505(a) Applies to Lawyer in P.C.

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The law firm of Jeffrey S. Dweck is organized as a P.C. Jeffrey S. Dweck is a shareholder in the P.C. The law firm agreed to act as escrow agent of funds deposited by an individual investor in anticipation of a transaction which looked either to the investment of the funds in an Internet company, or the return of the funds with interest. The escrow fund totaled \$250,000. Jeffrey Dweck was not a party to the escrow agreement in his individual capacity.

The escrow agreement provided that the funds should be released "simultaneously with the completion of the transaction", upon receipt by the escrow agent of "joint written instructions" from the investor and one of the companies in the transaction. If the transaction did not close within sixty days, the money would continue to be held in escrow by the law firm or disposed of as directed in writing by the investor. The escrow agreement contained the customary terms absolving the law firm of liability so long as it acted in good faith and was not guilty of willful misconduct or gross negligence.

The transaction contemplated by the escrow agreement closed and the escrow funds were released to the intended party. The investor participated in the transaction by signing some forms.

A first action by the investor in the federal courts against the parties to the transaction, including both the law firm and Dweck individually, was dismissed by the court on grounds which did not dispose of the investor's claims against the law firm or Dweck.

The investor brought a second action in New York County Supreme Court against the law firm and Dweck individually, alleging that the escrow funds had been released without his written instructions as required by the escrow agreement and that the lawyers had breached their fiduciary duty to him by releasing the funds. The matter came before Justice Herman Cahn on defendants' motion to dismiss the complaint. *Barbi v. Dweck*, NYLJ, January 8, 2004, p. 18.

Defendant law firm argued that the investor had brought the action to recoup his bad investment; that the agreement as applied did not require written instructions from the investor; that the investor had waived strict compliance with the agreement and had ratified the escrow agent's actions by executing forms to facilitate the transaction; and that it had acted in good faith and without willful misconduct or gross negligence.

Attorney Dweck argued that he was not individually liable to the investor because he was not a party to the escrow agreement; he had not acted as escrow agent; no one in the law firm had rendered any professional services to the investor as required under Business Corporation Law §1505(a); he did not have an attorney/client relationship with the investor; a lawyer-escrow-agent does not render "professional services"; and BCL §1505(a) is therefore inapplicable.

Judge Cahn denied the motions to dismiss. As to the firm, he found that the facts were in dispute and could not be determined on pre-answer motion. As to Dweck as an individual, he held that the investor had stated a valid cause of action under BCL §1505(a). "The purpose of BCL §1505(a) is to afford some of the same protection to the public for acts of professional malfeasance by a shareholder, etc., of a professional corporation as were had before professionals were afforded the right to incorporate. The court cannot determine on a pre-answer motion whether the services rendered by Dweck fall within the meaning of "professional" services as the term is used in the statute.