

Issues That Remain When A Partner Withdraws

BY LAZAR EMANUEL

Although many of the facts in the recent case of *Conolly v. Thuillez* (NYLJ 1/14/05, p. 20) are sui generis, most of the issues decided by Judge Louis C. Benza (Supreme Court, 3rd Dept.) will be of interest to all law firms.

Without entering into a written agreement, in June 1995, Plaintiff Conolly and others formed the law firm of Thuillez, Ford, Gold and Conolly, LLP. The firm was organized as a Registered Limited Liability Partnership pursuant to Article 8-B, §121-1500(a) of the Partnership Law. On May 15, 1997, Conolly was appointed as executive director of the State Insurance Fund (SIF). In June 1997, the law firm was selected to represent the State in its litigation against the tobacco industry.

One month later, the firm filed a Certificate of Amendment of Limited Liability Partnership Registration which changed the name of the firm to Thuillez, Ford, Gold & Johnson, LLP. The litigation against the tobacco industry culminated in a substantial fee.

In April 2001, Conolly contacted his former partner, Dale Thuillez, and asked for a share of the fee. The firm refused Conolly's request and Conolly sued.

Upon stipulation of the parties, Judge Benza limited the issues to these three: (1) was Conolly still a partner in the firm? (2) If Conolly was no longer a partner, what was the effective date of his resignation? and (3) Had Conolly agreed to accept \$150,000 in full satisfaction of his interest in the firm?

Defendant law firm moved for summary judgment, arguing that Conolly was not entitled to an accounting because he had resigned from the firm on May 15, 1997 and had accepted \$150,000 as full payment for his interest. The firm also argued that Conolly was not entitled to any of the fees resulting from the tobacco litigation. Conolly argued that he was still a member of the firm; that the firm had received the contract to represent the State in the tobacco litigation as a result of his efforts; that the issue of his share in the tobacco fees was beyond the scope of the issues defined by the court; and that there were triable issues of fact.

Judge Benza considered and resolved the motion and plaintiff's cross-motion as follows:

Organization and dissolution of the law firm: The initial partnership was formed under Article 8-B of the Partnership Law. Under Partnership Law §121-1500(a)(9)(d), if the new partnership was a successor to the initial partnership, are filings due to dissolution or withdrawal of a partner was not required. A partnership is a successor partnership "if a majority of the total interests in the current profits of such successor partnership...are held by partners of the predecessor partnership...immediately prior to the dissolution of such predecessor partnership." Since the new partnership satisfied that definition, no additional filings were required when Conolly withdrew.

Circumstances Surrounding Dissolution

Fixing the date of Conolly's withdrawal from the firm: Under Partnership Law §60, dissolution is a change in the relationship of the partners which results when a partner ceases to be associated in carrying out, as distinguished from winding up, a partnership. Under Partnership Law §62(1)(b), dissolution can be caused "by the express will of any partner when no definite term or particular undertaking is specified." The express will of a withdrawing partner can be demonstrated by the partner's manifestation of an "unequivocal intention to dissolve the partnership." (citing *Alessi v. Brozzetti*, 228 AD2d 917 (1996).

Had Conolly manifested an intent to withdraw from the partnership and cause its dissolution? Judge Benza found that he had. Each of the remaining partners submitted an affidavit stating that Conolly had advised him that he was leaving the firm to take a full-time position with SIF on May 15, 1997.

In his Annual Statements of Financial Disclosure filed with the New York State Ethics Commission during the years he was employed by SIF, Conolly stated under oath that he had resigned from the law firm on May 15, 1997. In further support of its motion for summary judgment, the law firm produced other documents confirming the date of Conolly's withdrawal as May 15, 1997.

"Of Counsel" letter: Judge Benza found of particular significance a letter which Conolly had written on July 8, 1997, after he took on his employment with SIF. The letter, in which Conolly stated that he was winding up his affairs at the firm, was written on the firm's new letterhead and was signed by Conolly as "of counsel." Judge Benza said:

The term "of counsel" is a phrase of art used in the legal profession meaning, as relevant here, 'a lawyer who is affiliated with a law firm, though not as a member, partner or associate (Black's Law Dictionary, Seventh Edition).' This acknowledgment by plaintiff of his role in the firm is a manifestation at the time of the execution of the letter that he was no longer a partner.

Judge Benza granted the defendants' motion for summary judgment on the issue of the date of Conolly's resignation from the firm, fixing that date as May 15, 1997.

Effect of Dissolution

Plaintiff's status after resignation: When Conolly resigned from the law firm, he caused a dissolution of the existing firm. Thereafter, the firm as it was constituted on the date of his resignation continued only for purposes of winding up the affairs of the partnership. Partnership Law §§60-61; 62(i)(b); *Harshman v. Pantaleoni*, 294 AD2d 687 (2002). His status was that of a partner participating in the winding-up activities of the partnership.

Partnership Accounting: Upon dissolution of a partnership, a partner is entitled to an accounting of his interest in the partnership. Partnership Law §74. Under established case law, the accounting includes the value of contingency fees in outstanding matters. *Liddle Robinson & Shoemaker v. Shoemaker*, 309 AD2d 688 (2003); *Shaudell v. Katz*, 217 AD2d 472 (1995). However, as Partnership Law §74 specifically provides, the partners may agree to the contrary.

Plaintiff Conolly contended that the partners had never reached agreement as to the value of the partners' interests in the partnership. The law firm argued that Conolly had agreed to accept \$150,000 in full satisfaction of his interest. Conolly responded that if such agreement did exist, it violated the Statute of Frauds (General Obligation Law 5-701(a)(1)).

Application of Statute of Frauds: Judge Benza concluded that if there was an agreement between the parties, the agreement did not violate the Statute of Frauds.

The Statute invalidates any agreement which is not signed by the party to be charged, if the agreement cannot be performed within one year. Neither party claimed that a signed agreement existed between Conolly and the firm; therefore, the only issue was whether or not the oral agreement alleged by the defendants could be performed within one year.

Judge Benza cited the recent Court of Appeals decision in *Sheehy v. Clifford Chance Rogers & Wells LLP*, ___NY3d___ (2004), dealing with oral modification of a law partnership agreement concerning a partner's retirement benefits. The Court held that to take an oral agreement out of the Statute of Frauds. "both parties must be able to complete their performance of the contract within one year."

In assessing the factors which determine whether performance can be completed in one year, the controlling factor is whether the agreement can be terminated as of right by either party upon a contingency which may or may not occur within a year. *North Shore Bottling v. Schmidt & Sons*, 22 NY2d 171.

Here, the agreement claimed by defendant law firm was that the firm could pay Conolly \$150,000 over three years "or sooner, if the cash situation changed." "The fact that defendants reserved the right to pay plaintiff constituted a preference which could be performed within one year, and, thus, takes the case out of the purview of the statute."

Accordingly, Judge Benza rejected Conolly's argument that the agreement, if any, would violate the Statute of Frauds.

Was there an oral agreement between Conolly and the lawfirm? Judge Benza did not find the facts submitted by either side persuasive on this primary issue. Several partners in the law firm submitted affidavits verifying the existence of a noral agreement to pay Conolly \$150,000 over three years or sooner, but Conolly insisted that no agreement existed. The court denied the law firm's motion for summary judgment on this issue.

Accounting for Contingent Fees: If a contract fixing Conolly's interest did not exist, as argued by Conolly, then Conolly was entitled to include in his accounting the value of his interest in any contingent fees to be earned by the law firm from any work in progress. Partnership Law §73; *Liddle et al. v. Shoemaker*, supra. Judge Benza was satisfied that there was a triable issue whether the firm's litigation against the tobacco industry was a "work in progress" on the date of Conolly's withdrawal. He noted that the firm had responded before Conolly's withdrawal to a request by the State to take over the litigation; that all of the correspondence from the State relating to the litigation was addressed to the former firm, which included Conolly in its name; that Conolly claimed to have interceded in the tobacco proceedings twice on behalf

of the firm, once in preparation of the firm's fee application; and that, in an ethics disclosure, Plaintiff had reported that he was entitled to funds due on works in progress.

In his decision, Judge Benza found only that Conolly had resigned from the former law firm on May 15, 1997, that the firm was dissolved on that date, and that Conolly had continued as a partner only for the purpose of winding up the partnership. All other relief was denied pending trial.