

Lobel Chem. Corp. v Petitto
2016 NY Slip Op 30273(U)
February 16, 2016
Supreme Court, New York County
Docket Number: 653226/14
Judge: Kelly A. O'Neill Levy
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 19

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LOBEL CHEMICAL CORPORATION,

Plaintiff,

Index No.: 653226/14

-against-

DECISION & ORDER

MOT. SEQ. 003

FRANK A. PETITTO, CPA and ROSEN SEYMOUR
SHAPSS MARTIN & COMPANY, LLC,

Defendants.

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KELLY O'NEILL LEVY, J.:

In this action alleging accounting malpractice, defendants Frank A. Petitto (Petitto) and Rosen Seymour Shapss Martin & Company, LLC (RSSMC) (collectively defendants), move, pursuant to CPLR 3211 (a) (7), to dismiss the complaint for failure to state a cause of action. Alternatively, they move to dismiss: 1) the fraud cause of action, pursuant to CPLR 3016 (b), for failure to plead fraud with particularity; and 2) portions of the first cause of action, pursuant to CPLR 3211 (a) (5), as time-barred.

THE PLEADINGS

The first amended complaint (complaint) alleges that, in 1991, pursuant to an oral agreement, plaintiff, Lobel Chemical Corporation (Lobel or the Company) retained RSSMC to: 1) supervise Lobel's bookkeeper; 2) oversee the bookkeeping and accounting issues concerning its business and finances; and 3) prepare Lobel's tax returns and represent the Company at tax audits. Petitto, a certified public accountant employed by RSSMC, provided accounting services

for Lobel from the inception of the parties' relationship (Anesh aff, exhibit A, ¶ 7).

In 2004, Lobel's longtime bookkeeper retired and Petitto recommended that the Company hire nonparty Meredith Conyers (Conyers), Lobel's assistant bookkeeper, to fill the vacant position. Petitto also recommended that the Company install specialized accounting software (Peachtree) to assist Conyers in the preparation of reports for general accounting and tax preparation purposes (*id.*, ¶¶ 13-15).

According to plaintiff, it was Petitto's responsibility to train Conyers in the use of Peachtree and to review the income and expense statements, bank statements, and bank reconciliations that Conyers provided (*id.*, ¶ 16). However, the complaint alleges that Petitto allowed Conyers to create a non-Peachtree methodology for listing uncleared checks and performing cash reconciliations, despite the fact that Peachtree had a built-in cash reconciliation report (*id.*, ¶ 17).

Lobel contends that Petitto failed to address obvious discrepancies between Conyers's monthly reconciliations and monthly bank statements and he failed to detect that Conyers's monthly bank reconciliations did not balance (*id.*, ¶¶ 18, 19). Because Conyers realized that Petitto was not reviewing her monthly reports, in November and December 2005, she forged the Company's signature on three checks made payable to herself. After the checks cleared, they were either omitted or deleted from Peachtree (*id.*, ¶ 21). These omissions were not detected and, thereafter, between 2006 and 2013 Conyers forged checks, payable to herself, for more than \$500,000.

The complaint alleges that, even though Petitto visited the Company's offices on a monthly basis, he failed to question: 1) checks that were missing from the statements; 2) carry-

forward balances that did not match the ending balance from the prior month; 3) checks listed on the bank statement that did not appear in the Peachtree check register; and 4) he failed to reconcile the Peachtree balance with the bank balance (*id.*, ¶¶ 24, 26).

In 2011, Steven Lobel, the Company president, began questioning discrepancies between his own estimates of the Company's gross profits and documents that Petitto was reviewing to determine operating expenses. Petitto explained that the discrepancies could be easily explained by simple adjustments between payables and receivables for a few items (Steven Lobel aff, ¶ 14).

However, in 2012, when the Company reported a large, unexpected loss, Steven Lobel asked his sister, Rhona Lobel, the Company's vice president, to look into the finances. Rhona Lobel began to monitor the Company's cash flow more closely and in January 2014, she discovered Conyers's embezzlement (*id.*, ¶ 16, 17).

In May 2014, Conyers was indicted on two counts of grand larceny and 43 counts of forgery. She pled guilty in April 2015.

Lobel commenced this action in 2014 alleging accounting malpractice (first cause of action), fraud (second cause of action), unjust enrichment (third cause of action), breach of contract (fourth cause of action) and gross negligence (fifth cause of action).¹ Lobel seeks to recoup the embezzled funds and the accounting fees paid to RSSMC. In addition, the Company seeks exemplary damages.

CONTENTIONS

In support of the motion to dismiss the complaint, defendants argue that the fraud and

¹ A cause of action for breach of fiduciary duty that appeared in the original complaint was omitted from the amended complaint.

breach of contract causes of action are duplicative of the accounting malpractice cause of action and must be dismissed because they arise out of Petitto's alleged failure to supervise Conyers.

Alternatively, defendants contend that the fraud cause of action must be dismissed because it fails to plead fraud with the specificity required in CPLR 3016 (b).

Moreover, it is defendants' position that the unjust enrichment cause of action fails to plead all the necessary elements of that claim and that the cause of action for gross negligence and exemplary damages must be dismissed because plaintiff has failed to plead facts to support the inference of intentional wrongdoing or reckless disregard for the rights of others.

In addition, defendants argue that CPLR 214 (6) provides that an action for accounting malpractice must be commenced within three years from the date the malpractice occurs. Here, the action was commenced on October 22, 2014 and, therefore, according to defendants, all of plaintiff's claims sounding in accounting malpractice that accrued before October 22, 2011, are time-barred.

In opposition to the motion to dismiss the complaint, plaintiff contends that: 1) pursuant to the continuous representation doctrine, none of plaintiff's accounting malpractice claims are time-barred because defendants' continuous representation of Lobel creates an exception to the three-year statute of limitations; 2) the cause of action for fraud is not duplicative of the accounting malpractice claim because it is based on facts that are only tangentially related to the malpractice and it is pled with sufficient particularity because it lists all the invoices that were paid and describes how Petitto intentionally misled plaintiff.

Moreover, plaintiff argues that the unjust enrichment cause of action is pled alternatively and the breach of contract cause of action states a claim for consequential damages for expenses

that plaintiff incurred as a result of Pettito's alleged malpractice.

Finally, it is plaintiff's position that it is entitled to exemplary damages based on Pettito's willful and intentional disregard of the fundamental standards of accounting and professional conduct.

DISCUSSION

CPLR 3211 (a) (7) permits the court to dismiss a complaint that fails to state a cause of action. The complaint must be liberally construed and the plaintiff given the benefit of every favorable inference (*see Leon v Martinez*, 84 NY2d 83, 87 [1994]). The court must also accept as true all of the facts alleged in the complaint and any factual submissions made in opposition to the motion (*see 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]). If the court "determine[s] that the plaintiff[is] entitled to relief on any reasonable view of the facts stated, [its] inquiry is complete" and the complaint must be declared legally sufficient (*Campaign for Fiscal Equity v State of New York*, 86 NY2d 307, 318 [1995]).

While factual allegations in the complaint are deemed true, bare legal conclusions and facts flatly contradicted on the record are not entitled to the presumption of truth (*Summit Solomon & Feldesman v Lacher*, 212 AD2d 487, 487 [1st Dept 1995]).

CPLR 3211 (a) (5) permits a defendant to seek and obtain dismissal of one or more causes of action on the ground that the cause of action is barred by the statute of limitations (*see e.g. Evan S. v Joseph R.*, 70 AD3d 668, 668 [2d Dept 2010]).

A. Statute of Limitations

The relevant statute of limitations is CPLR 214 (6), which provides that an action for non-medical professional malpractice must be commenced within three years of the date of

accrual. “A claim accrues when the malpractice is committed, not when the client discovers it” (*Williamson v PricewaterhouseCoopers LLP*, 9 NY3d 1, 7-8 [2007]). However, the continuous representation doctrine tolls the statute of limitations in circumstances where the continuous representation is “in connection with the specific matter directly in dispute, and not merely the continuation of a general professional relationship” (*Ackerman v Price Waterhouse*, 252 AD2d 179, 205 [1st Dept 1998]). “The continuous representation . . . doctrine[] recognize[s] that a person seeking professional assistance has a right to repose confidence in the professional’s ability and good faith, and realistically cannot be expected to question and assess the techniques employed or the manner in which the services are rendered” (*Williamson*, 9 NY3d at 9 [internal citation and quotation marks omitted]). “[P]laintiffs [have] the burden of demonstrating that the continuous representation doctrine applie[s], or at least there [is] an issue of fact with respect thereto” (*CLP Leasing Co., LP v Nessen*, 12 AD3d 226, 227 [1st Dept 2004]).

Here, defendants contend that plaintiff used RSSMC’s services for annual tax preparation and auditing services, which constitute separate and discrete services for each year, and thus the application of the continuous representation doctrine is precluded (*see Booth v Kriegel*, 36 AD3d 312, 315 [1st Dept 2006] [where a professional advises a client in a series of discrete and severable transactions, the performance of services in each successive transaction does not toll the running of the statute of limitations]). According to defendants, all of Lobel’s claims that accrued prior to October 2011 are time-barred .

However, in this case, Lobel has alleged evidentiary facts sufficient to establish that the accounting malpractice cause of action falls within the continuous representation exception to the statute of limitations.

Since the facts alleged in the complaint are accepted as true on a motion to dismiss and are viewed in a light most favorable to plaintiff, Lobel's pleading is sufficient to establish that the parties mutually contemplated that RSSMC's work would continue on a monthly basis and that Petitto's work was not limited to annual tax preparation and audit review. The complaint alleges that from 2004 through 2013, Petitto advised Lobel regarding hiring a bookkeeper and installing the Peachtree software, and that the parties contemplated that Petitto would supervise the bookkeeper, perform monthly reconciliations and internal audits, and advise Steven Lobel on ongoing financial concerns and decisions facing the business enterprise (Anesh aff, exhibit A, ¶¶ 7, 16, 26, 27). Here, there was no written agreement that outlined the services to be provided. Rather, the parties appear to have contemplated an ongoing relationship that was based on trust and good faith.

Accordingly, based on the pleadings and affidavits submitted on the motion to dismiss, the continuous representation doctrine applies and plaintiff's accounting malpractice claims for the years 2004 through October 11, 2011 are not time-barred.

B. Fraud

The elements of a cause of action for fraud are: "material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages" (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]).

Here, the pleading specifies that Petitto misrepresented that the differences between the income reported on an accrual basis on the tax returns and the expected annual profits were merely due to timing differences resulting from recognition of receivables and payables and that discrepancies could be adjusted on a going forward basis (Anesh aff, exhibit A, ¶ 32). However,

although plaintiff alleges that the statement was false, plaintiff does not allege that Petitto knew it was false (*see Robertson v Wells*, 95 AD3d 862, 864 [2d Dept 2012]). Indeed, it appears from the malpractice claim that, because Petitto had not done the proper review and reconciliations, he did not know that his explanation was incorrect.

Accordingly, because an element of scienter is missing, that is defendants' knowledge of the statement's falsity, the fraud claim must be dismissed.

C. Unjust Enrichment

“The essential inquiry in any action for unjust enrichment . . . is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered. A plaintiff must show that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered”

(*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011] [internal quotation marks and citations omitted]).

“An unjust enrichment claim is rooted in the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another” (*Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511, 516 [2012] [internal quotation marks and citation omitted]). In *Georgia Malone*, the court elaborated on the pleading requirements and explained that, although a plaintiff is not required to allege privity between the parties, “it had to assert a connection . . . that was not too attenuated” (*id.* At 517).

In this case, the complaint alleges: (1) a direct relationship between the parties which caused reliance, (2) that defendants were enriched at the Company's expense by collecting fees for services that were not rendered because defendants did not perform the basic work they were

hired to perform, and (3) that it is against equity and good conscience to allow defendants to retain the payments for services that were not rendered. These allegations sufficiently state a claim for unjust enrichment where no contract governing the parties' actions exists (*see Wiener v Lazard Freres & Co.*, 241 AD2d 114, 121 [1st Dept 1998] [the plaintiff's allegation that defendant did not earn the \$300,000 fee it had been paid is sufficient to state a claim for unjust enrichment]).

D. Breach of Contract

In order to state a claim for breach of contract, plaintiff must plead: 1) existence of a valid contract; 2) plaintiff's performance of the contract; 3) defendant's material breach of the contract; and 4) damages (*Noise in the Attic Prods., Inc. v London Records*, 10 AD3d 303 [1st 2004]). Here, it is undisputed that the parties never entered into a written agreement, an engagement letter or any other agreement that defined the services that defendants would provide. Accordingly, because no valid contract existed between the parties, the breach of contract claim is dismissed (*see Simplex Grinnell v Ultimate Realty, LLC*, 38 AD3d 600, 600 [2d Dept 2007]).

Moreover, the breach of contract action is duplicative of the accounting malpractice claim because the alleged breach and the alleged damages arise from defendants' accounting malpractice. The complaint alleges that, because defendants failed to supervise Conyers and failed to reconcile the Peachtree statements with the bank statements, plaintiff had to hire an outside firm to perform the 2013 reconciliation. Accordingly, plaintiff's expense in hiring the outside firm flow directly from defendant's alleged malpractice (*see e.g. Luciano v Levine*, 232 AD2d 378, 379 [2d Dept 1996]).

E. Gross Negligence and Punitive Damages

“Gross negligence differs in kind, not only in degree, from claims of ordinary negligence. To constitute gross negligence, a party’s conduct must smack[] of intentional wrongdoing or evince[] a reckless indifference to the rights of others.” (*Ryan v IM Kapco, Inc.*, 88 AD3d 682, 683 [2d Dept 2011] [internal quotation marks and citations omitted]).

Here, the allegations in the complaint fail to rise to the level of gross negligence. In the gross negligence cause of action, plaintiff reasserts the allegations in the accounting malpractice cause of action, and pleads, in a conclusory manner, that the accountant’s failure to render the basic services for which he was paid “is egregious conduct of the type for which exemplary damages are appropriate.” These allegations do not satisfy the pleading requirement for a claim of gross negligence which requires “factual allegations of conduct evincing a reckless disregard for the rights of others or smacking of intentional wrongdoing” (*Mancuso v Rubin*, 52 AD3d 580, 583 [2d Dept 2008]; *see also Colnaghi, U.S.A. v Jewelers Protection Servs.*, 81 NY2d 821, 823-824 [1993]).

The demand for punitive damages is also dismissed. In *Rocanova v Equitable Life Assur. Socy. of U.S.* (83 NY2d 603, 613 [1994]), the Court of Appeals stated, “a private party seeking to recover punitive damages must not only demonstrate egregious tortious conduct by which he or she was aggrieved, but also that such conduct was part of a pattern of similar conduct directed at the public generally” (*id.*). Generally, punitive damages are awarded where a defendant’s conduct involves a high degree of moral culpability or its conduct demonstrates “such wanton dishonesty as to imply criminal indifference to civil obligations” (*J.G.S., Inc. Lifetime Cutlery Corp.*, 87 AD2d 810, 810 [2d Dept 1982]).

This lawsuit arises from a private business relationship. Allegations of breach of a private agreement, even a breach committed willfully without justification, are insufficient to warrant punitive damages (*id.*).

Accordingly, it is ORDERED that defendants Frank A. Petitto and Rosen Seymour Shapss Matin & Company, LLC's motion to dismiss the complaint is granted to the extent that the second, fourth and fifth causes of action and the request for punitive damages are dismissed and the motion is otherwise denied; and it is further

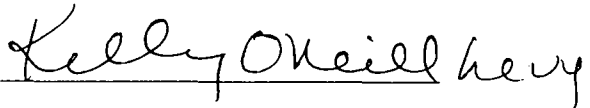
ORDERED that defendants are directed to serve an answer to the complaint within 20 days after service of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a status conference in Part 19 (111 Centre Street, Room 1164B) on March 16, 2016, at 9:30 AM.

This constitutes the decision and order of the court.

Dated: February 16, 2016

ENTER:



J.S.C.