SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 39

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BISON CAPITAL CORPORATION,

Plaintiff,

- against-

Index No. 153793/15
Decision/Order

HUNTON & WILLIAMS LLP,

Defendant.

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HON. SALIANN SCARPULLA, J.:

Defendant Hunton & Williams LLP ("Hunton & Williams") moves, pursuant to CPLR 3211 (a) (1) and (7), for an order dismissing the complaint of plaintiff Bison Capital Corporation ("Bison").

Hunton & Williams, a law firm, represented Bison in a litigation in which Bison brought suit against ATP Oil and Gas Corporation ("ATP") for fees allegedly earned by Bison in procuring financing for ATP from Credit Suisse (the "Bison/ATP action"). The Bison/ATP action was commenced in the United States District Court for the Southern District of New York. After a four day bench trial, United States District Judge Stanley H. Stein issued Findings of Fact & Conclusions of Law ("FFCL") on or about March 8, 2011.

In pertinent part, Judge Stein found that (1) the contract between ATP and Bison ("Agreement") provided for Bison to be paid a fee based on "the value of the new funds

made available to ATP in a Capital Transaction," rather than "one percent of the entire face amount of each Capital Transaction," as advocated by Bison; and (2) "Paragraph 7 of the Agreement only entitles Bison to fees if ATP 'consummates or enters into an agreement or arrangement providing for a Capital Transaction' prior to April 1, 2005." FFCL at 10-11, 13 (quoting Agreement). In making the latter finding, Judge Stein discredited "[Bison's President's] in-court testimony that March 31, 2005 marks a cut-off for triggering Bison's right to perpetual fees," finding that it was at odds with the Bison's President's earlier interpretation of the Agreement, as expressed in an October 15, 2004 letter. *Id.* at 2, 12. The court found that "[Bison's President's] stated position in his October 15, 2004 letter reflects his understanding that in order to receive a fee for 'financial arrangements' (i.e., a Capital Transaction), these arrangements must be made 'within the applicable time frame' (i.e., prior to April 1, 2005)." *Id.*

Ultimately, Judge Stein awarded Bison $1.65 million, along with interest, and, on June 7, 2012, the Second Circuit affirmed the judgment. Following the affirmance, Bison allegedly terminated Hunton & Williams' representation of Bison for cause, and retained separate counsel to pursue enforcement of the judgment. Bison alleges that through new counsel Bison requested an amended judgment and fees and costs. Bison further alleges that on August 15, 2012, the District Court issued an amended judgment, and, two days later, on August 17, 2012, ATP filed for bankruptcy.

In this action Bison claims that Hunton & Williams' performance in preparation of and during the Bison/ATP trial was deficient, in that Hunton & Williams failed to call an expert witness, failed to introduce into evidence ATP's SEC reports, and failed to rebut attacks on the credibility of Bison's President. Bison further claims that Hunton & Williams should have, but did not, seek to enforce the judgment prior to ATP filing for bankruptcy protection. Also, Bison alleges that Hunton & Williams agreed that a specific attorney would do significant work on the Bison/ATP action, but he did not. Based upon these allegations, Bison asserts causes of action against Hunton & Williams for legal malpractice (first cause of action); breach of contract (second cause of action); breach of fiduciary duty (third cause of action); negligence and gross negligence (fourth cause of action); and negligent misrepresentation and fraud (fifth cause of action).

In its motion to dismiss, Hunton & Williams argues that Bison fails to state a legal malpractice claim because litigation strategy may not form the basis of a malpractice claim, and because the underlying judgment could not be enforced during appeal of the judgment to the Second Circuit. Hunton & Williams also argues that Bison cannot show proximate cause, and that Bison's remaining claims are duplicative of the legal malpractice claim.

In opposition to the motion, Bison argues that Hunton & Williams's actions in the underlying lawsuit were not the product of reasonable legal strategy and Bison may therefore base its legal malpractice claim on those actions. It additionally argues that it

has adequately pleaded proximate cause, and that Hunton & Williams breached certain Rules of Professional Conduct, and, as a result, that Hunton & Williams should disgorge fees Bison paid to it. Finally, Bison argues that its breach of contract and negligent misrepresentation causes of action are not duplicative of the legal malpractice claim.

Discussion

On a CPLR 3211 motion to dismiss, "the pleading is to be afforded a liberal construction. We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v Martinez*, 84 NY2d 83, 87-88 (1994) (internal citation omitted). Further, "[u]nder CPLR 3211 (a) (1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." *Id.* at 88.

In a legal malpractice claim seeking damages, "a plaintiff must demonstrate that the attorney 'failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession' and that the attorney's breach of this duty proximately caused plaintiff to sustain actual and ascertainable damages." *Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438, 442 (2007) (citation omitted). Additionally, to show the causation element, "a plaintiff must show that he or she would have prevailed in the underlying action or would not have incurred any damages, but for the lawyer's negligence." *Id.*; *Frankel v Vernon & Ginsburg, LLP*, 118 AD3d 479, 480

(1st Dept 2014). Whether a complaint makes out a claim for legal malpractice is a question of law, capable of determination on a motion to dismiss. *Rosner v Paley*, 65 NY2d 736, 738 (1985).

Bison's allegations in support of the malpractice claim – that Hunton & Williams failed to call an expert witness, to introduce into evidence ATP's SEC reports, and to rebut attacks on the credibility of Bison's President – are plainly disagreements with Hunton & Williams professional decisions related to trial strategy and are not actionable as a matter of law. *See id.*; *Siracusa v Sager*, 105 AD3d 937, 938-39 (2d Dept 2013); *Brookwood Co., Inc. v Alston & Bird LLP*, (Sup Ct, New York County, Sept. 17, 2015, Bransten, J., Index No. 653723/2014, at *9-11).[1]

Further, Bison's allegations fail to "meet the 'case within a case' requirement, that is, the allegations fail sufficiently to allege that 'but for' [Hunton & Williams'] conduct [Bison] would have prevailed in the underlying matter or would not have sustained any

[1] Thus, for example, Bison alleges that Hunton & Williams negligently failed to convince Judge Stein that "Bison's interpretation of the ATP Contract was correct." Complaint, ¶ 16. In his live testimony at trial, Bison's President testified as to his understanding of the ATP contract. In the FFCL, Judge Stein specifically discredited that testimony, finding that Bison's President's in-court testimony "contradicts his own prior interpretation of the agreement." FFCL at 12. Judge Stein then chose to credit a prelitigation letter in which Bison's President interpreted the ATP Agreement in a manner inconsistent with his trial testimony. *Id.* at 12-13. Despite Bison's allegations, issues like determining how to deal with inconsistent evidence are quintessential trial strategy decisions that may not form the basis of a malpractice claim.

ascertainable damages." *Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267, 272 (1st Dept 2004); *Rudolf*, 8 NY3d at 442.

Similarly, Hunton & Williams' decision to wait to enforce the judgment against ATP during its appeal to the Second Circuit was a "reasonable course[] of action [which] does not constitute malpractice." *Rosner*, 65 NY2d at 738. While "'[t]here is nothing inconsistent in a party's accepting the benefit of a judgment ... and appealing in an attempt to increase the award,'" *id* at 865 (citation omitted), when an appellate body has "authority . . . as broad as that of the Trial Judge" and can accordingly decrease a judgment, a party may not simultaneously accept the trial court's judgment and appeal that award. *Id* at 866; *see Williams v Hearburg*, 245 AD2d 794, 794-95 (3d Dept 1997). Here, the Second Circuit, engaging in *de novo* review, could have found that ATP was entitled to a reduced judgment. *See Roffey*, 217 AD2d at 866; *Williams*, 245 AD2d at 794-95; *cf. Cornell v T.V. Dev. Corp.*, 17 NY2d 69, 73 (1966).

In addition, Bison has not alleged sufficient facts to show that Hunton & William's alleged negligence in not immediately seeking to enforce the judgment proximately caused its injuries. *See Phillips-Smith Specialty Retail Group II v Parker Chapin Flattau & Klimpl*, 265 AD2d 208, 210 1st Dept 1999) (citation omitted) ("Contentions underlying a claim for legal malpractice which are 'couched in terms of gross speculations on future events and point to the speculative nature of plaintiffs' claim are insufficient as a matter of law to establish that defendants' negligence, if any, was the proximate cause of

plaintiffs' injuries."). While Bison conclusorily alleges that "[i]n March 2011, and through at least May 2012, ATP had more than enough resources to pay a District Court judgment against ATP of $112 million," it also alleges that "[o]n August 17, 2012, while Bison was seeking to execute the August 15, 2012 judgment against an ATP bank account located in New York County, ATP filed a voluntary petition for Chapter 11 bankruptcy in the U.S. Bankruptcy Court in Houston, Texas" (complaint ¶¶ 144, 161). Bison's claims that it would have been able to collect on its judgment up until three months before ATP filed for bankruptcy protection "but for [Hunton & Williams'] negligence" in failing to immediately execute on the judgment, and assumption that ATP would not have filed for bankruptcy protection earlier if Bison had attempted to collect on the judgment earlier, is mere speculation, devoid of any evidentiary factual basis. *Rudolf*, 8 NY3d at 442.[2]

Bison's breach of fiduciary duty, negligence and gross negligence, and negligent misrepresentation and fraud claims, all based upon Hunton & Williams' failure to abide by general professional standards, must be dismissed, as they are all redundant of the legal malpractice claim. The alleged breaches "arose out of the same facts as the legal

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[2] In *Lindenman v Kreitzer,* the First Department held that "the ultimate collectibility of any judgment that could have been obtained in the underlying action is not an element necessary to establish the plaintiff's claim." *Lindenman v Kreitzer,* 7 AD3d 30, 31 (1st Dept 2004). *Lindenman* is inapposite here, because in this action Bison alleges that the negligence itself was Hunton & Williams' failure to enforce the judgment that it obtained on Bison's behalf at an earlier time. As such, Bison must properly plead facts sufficient to allege causation. *See Rudolf*, 8 NY3d at 442.

malpractice claim and did not involve any damages that were separate and distinct from those generated by the alleged malpractice." *Cosmetics Plus Group, Ltd. v Traub*, 105 AD3d 134, 143 (1st Dept 2013); *Mecca v Shang*, 258 AD2d 569, 570 (2d Dept 1999); *see Raghavendra v Brill*, 128 AD3d 414, 414 (1st Dept 2015).

As to the breach of contract claim, Bison's contention, as articulated in its opposition memorandum of law, that "[Hunton & Williams] breached [a] specific promise[] that . . . the litigation would come to a 'successful conclusion' and lead to an enforceable final judgment," is insufficient to state an independent breach of contract claim because "[Bison] [has] not allege[d] that [Hunton & Williams] breached a promise to achieve a specific result." *Sage Realty Corp. v Proskauer Rose LLP*, 251 AD2d 35, 39 (1st Dept 1998).[3]

Bison, nevertheless, has properly pled a breach of contract cause of action based solely on its allegations that in the retainer agreement Hunton & Williams specifically agreed that Marty Steinberg would conduct certain depositions and participate at trial but he did not do so.[4] Hunton & Williams claims that Bison waived this contractual

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[3] In fact, Hunton & Williams did successfully obtain a $1.65 million judgment (plus prejudgment interest and attorneys fees) for Bison in the Bison/ATP action. That judgment in Bison's favor, however, was not as successful a conclusion as that desired by Bison.

[4] In the retainer agreement Hunton & Williams agrees that "[at] your request, Mr. Steinberg will conduct all significant depositions in the case and will participate in the trial, should the case actually proceed to trial."

requirement over the ensuing years, but I decline to make such a finding on this pre-answer motion to dismiss.

Bison also alleges that Hunton & Williams is required to disgorge the legal fees it received from Bison because Hunton & Williams breached the Rules of Professional Conduct. While Hunton & Williams does not expressly respond to this assertion, Bison has not pleaded facts sufficiently to support its disgorgement request; Bison has not alleged in sufficient detail how Hunton & Williams allegedly breached the Rules of Professional Conduct. *See, e.g.*, complaint ¶ 155 ("H&W also breached the New York Rules of Professional Conduct regarding competence, diligence and misconduct, including Rules 1.1, 1.3, and 8.4, throughout H&W's legal representation of Bison during the ATP litigation.").

Finally, in opposition to Hunton & Williams's motion, Bison states that "[i]n the event that this Court believes Bison has not adequately alleged any of the causes of action asserted in its First Amended Complaint, Bison formally requests leave to amend." I deny this request, as Bison has not shown that additional facts would remedy the defects in its complaint. Additionally, no formal motion was made, nor was a proposed amended complaint provided. CPLR 3025 (b).

In accordance with the foregoing, it is

ORDERED that the motion of Hunton & Williams LLP to dismiss the first, third, fourth, and fifth causes of action of the First Amended Complaint is granted and those causes of action are dismissed; and it is further

ORDERED that the motion of Hunton & Williams LLP to dismiss the second cause of action is denied only insofar as the First Amended Complaint alleges that Hunton & WILLIAMS breached the retainer agreement by not having Marty Steinberg conduct certain depositions and participate at trial, and the motion to dismiss the second cause of action in all other respects is granted; and it is further

ORDERED that Hunton & Williams is directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 208, 60 Centre Street, on September 28, 2016, at 2:15 PM.

Dated: July 28, 2016

ENTER:

J.S.C.

HON. SALIANN SCARPULLA