Centre Lane Partners, LLC v Skadden, Arps, Slate, Meagher & Flom Llp
2016 NY Slip Op 32136(U)
October 21, 2016
Supreme Court, New York County
Docket Number: 651721/16
Judge: Barry Ostrager
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 61

CENTRE LANE PARTNERS, LLC; 10TH LANE FINANCE CO., LLC; ZM PRIVATE EQUITY FUND I, LP; and ZM PRIVATE EQUITY FUND II, LP,

Plaintiffs,

-against-

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP; SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLC; JAY M. GOFFMAN; and JOHN DOES 1-10,

Defendants.

Index No. 651721/16

DECISION AND ORDER

Motion Seq. No. 001

OSTRAGER, J:

Before the Court is a motion by the Skadden, Arps defendants and one of its New York-based partners, Jay M. Goffman, to dismiss the Amended Complaint pursuant to CPLR §3211(a), subd. (1), (3), (5) and (7). For the reasons stated below, the motion is granted pursuant to subdivision (a)(5) on the ground that the action is barred by the statute of limitations. As such, no need exists for the Court to address the other grounds alleged.

The underlying facts are as follows. For many years, the Skadden law firm represented Delford Smith, an Oregon-based entrepreneur, and various entities controlled by him, including Evergreen International Aviation, Inc. ("Evergreen"). Mr. Smith's philanthropic interests included various Oregon-based institutions, including The Evergreen Aviation and Space Museum and The Michael King Smith Foundation, a not-for-profit that managed the Museum.

In December 2013, Evergreen and certain subsidiaries (the "Debtors") filed for bankruptcy in Delaware. This action was brought derivatively on behalf of the Debtors by creditors of Evergreen who claim that Skadden committed legal malpractice and breached its fiduciary duty in connection with two transactions referred to as the "Airplane Transfer" and the "Helicopters Transaction." The Debtors claim that Skadden's work had the effect of diverting money from Evergreen that could have been used to reduce Evergreen's debts to plaintiffs.

The moving defendants assert that under New York's borrowing statute, CPLR §202, Oregon's statute of limitations for legal malpractice and breach of fiduciary duty applies to this case. The Oregon statute of limitations, Or. Rev. Stat. Ann. §12.110(1), bars such claims filed more than two years after the breach. Since the two transactions were completed in April and May of 2013, respectively, and this action was commenced by the filing of the Summons and Complaint on March 31, 2016, defendants assert that the action must be dismissed as time-barred. Plaintiffs argue in opposition that the claims are timely under both the New York and Oregon statutes of limitations.

New York's borrowing statute, CPLR §202, provides that:

> An action based upon a cause of action accruing without the state cannot be commenced after the expiration of the time limited by the laws of either the state or the place without the state where the cause of action accrued, except that where the cause of action accrued in favor of a resident of the state the time limited by the laws of the state shall apply.

Earlier this month the Appellate Division, First Department, made clear, as the Court of Appeals previously did in *Norex Petroleum Ltd. v Blavatnik*, 23 NY3d (2014),

that "the law of New York requires that when a nonresident sues on a cause of action accruing outside of New York, the cause of action must be timely under the limitations period of both New York and the jurisdiction where the cause of action accrued." *2138747 Ontario, Inc. v Samsung C&T Corp., et al.*, 2016 WL 5888697 (1st Dep't October 11, 2016), *citing Global Fin. Corp. v Triarc Corp.*, 93 NY2d 525, 585 (1999). Thus, where, as here, the claim accrued outside of New York and the plaintiffs here are indisputably non-residents, CPLR §202 provides for "borrowing" the statute of limitations of the jurisdiction where the claim arose (Oregon) if the Oregon statute of limitations is shorter than New York's.

It is undisputed that every claim in this case accrued in Oregon, that every transaction at issue was consummated in Oregon, and that the only relationship this case has to New York is that the defendant law firm is headquartered in New York and the defendant partner is based here. Consequently, Oregon's two-year statute of limitations applies to the plaintiffs' claims, rather than the longer three-year statute of limitations applicable in New York.

In this regard, in *Ontario*, *supra*, the First Department made clear that: "The borrowing statute is considered a statute of limitations provision and not a choice-of-law provision." Consequently, it is irrelevant whether an Oregon court would or should apply New York substantive law to the attorney malpractice and breach of duty claims. All that is relevant is whether plaintiff's claims are barred by the two-year Oregon statute of limitations. *See Rescildo v. R.H. Macy's*, 187 A.D.2d 112 (1st Dep't 1993), *overruled on other grounds by Ins. Co. of North America v ABB Power Generation, Inc.*, 91 NY2d

180, 187-88 (1997). As the claim accrued at the latest on December 31, 2013, when the Delaware Bankruptcy began and Skadden's representation ended, the March 31, 2016 commencement of this suit more than two years later was untimely.

In *Norex*, the Court of Appeals held that when the statute of limitations from another state is "borrowed" it is borrowed with all extensions and tolls to the statute of limitations applicable in the foreign jurisdiction. In this case, plaintiffs have failed to establish any potential extensions or tolls of the Oregon statute of limitations. It is undisputed that the transactions challenged in the complaint took place in the spring of 2013, more than two years before this action was filed in March of 2016. As indicated earlier, this case is brought derivatively on behalf of debtors by creditors of Evergreen; the plaintiffs are private equity funds that both held a substantial portion of the secured debt of Evergreen and were the controlling majority shareholders in the counter-party to one of the transactions at issue. Consequently, when the disputed transactions closed, both the debtor and the derivative plaintiffs knew or reasonably should have known the terms of the transactions at issue and how those terms affected the debtor's balance sheet *and* that the defendants represented various entities controlled by Delford Smith, including Evergreen. Thus, there is no issue of fact that would toll the Oregon statute of limitations by reason of the discovery of the defendants' alleged malpractice and alleged breach of fiduciary duty.

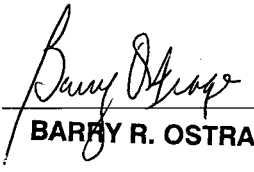
Nor would application of the two-year Oregon statute of limitations produce an "absurd" result that would warrant departure from the well-settled and routine application of CPLR §202. As noted above, earlier this month the First Department in

Ontario, supra, citing, inter alia, Norex, 23 NY3d at 678, emphasized that New York's borrowing statute is designed to "prevent forum shopping by nonresident plaintiffs who come to New York, seeking to take advantage of a more favorable statute of limitations than that which is available to them elsewhere." The derivative plaintiffs are attempting to do precisely what CPLR §202 precludes them from doing. Moreover, the attempted end run around CPLR §202 is particularly egregious here as both the debtor and the derivative plaintiffs have been parties for years to a Delaware bankruptcy proceeding in which actions presumably could have been taken to preserve these claims.

Accordingly, it is hereby

ORDERED that defendants' motion to dismiss this action is granted pursuant to CPLR §3211(a)(5), and the Clerk is directed to enter judgment in favor of defendants dismissing this action as barred by the statute of limitations.

Dated: October 21, 2016



BARRY R. OSTRAGER J.S.C.
JSC