Wimbledon Financing Master Fund, Ltd. v Hallac
2019 NY Slip Op 33281(U)
November 4, 2019
Supreme Court, New York County
Docket Number: 652769/2018
Judge: Saliann Scarpulla

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. SALIANN SCARPULLA **PART** IAS MOTION 39EFM

Justice

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WIMBLEDON FINANCING MASTER FUND, LTD.,

Plaintiff,

- v -

ALBERT HALLAC, KATTEN MUCHIN ROSENMAN LLP

Defendant.

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INDEX NO. 652769/2018

MOTION DATE 07/24/2019

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34

were read on this motion to/for DISMISS.

Upon the foregoing documents, it is

Defendant Katten Muchin Rosenman LLP ("Katten") moves, pursuant to CPLR 3211(a)(5), to dismiss the first and second causes of action in the complaint of plaintiff Wimbledon Financing Master Fund, Ltd. ("Wimbledon").[1]

This action is one of several stemming from a massive fraud involving Wimbledon's investment advisor, Weston Capital Asset Management, LLC ("Weston"), and its related affiliates, which resulted in guilty pleas by defendant Albert Hallac ("Hallac"), Weston's founder and president, and Keith Wellner ("Wellner"), Weston's general counsel. In addition, Hallac's and Wellner's co-conspirators – David Bergstein ("Bergstein"), Gary Hirst ("Hirst") and Jason Galanis ("Galanis") – have been convicted or pleaded guilty for their roles in the schemes.

[1] Wimbledon, a Cayman Islands company, is in official liquidation and brings this suit by and through its Joint Official Liquidators and its counsel, Kaplan Rice LLP.

The complaint alleges that the fraud began in 2009 when Hallac received a bribe from Galanis to transfer Wimbledon's assets to Gerova Financial Group, Ltd. ("Gerova"). Galanis structured the bribe as an "acquisition" of Weston's parent company, Weston Capital Management, LLC ("WCM") by Fund.com, Inc. ("Fund.com"). Galanis controlled both Gerova and Fund.com, which were both public companies. Wimbledon retained Katten to represent it in connection with the Gerova deal.

Wimbledon alleges that Katten lawyers knew that Galanis, a known fraudster whom the SEC had barred from serving as an officer or director of public companies, was involved in the deals yet failed to disclose this information to Wimbledon's board.

In January 2011, Gerova was exposed as a Galanis-controlled ponzi scheme in a Forbes magazine article. On February 23, 2011, the NYSE halted trading of Gerova securities, and soon after, Gerova's stock was delisted. The complaint alleges that Katten failed to inform the Wimbledon board and investors that Hallac received a bribe from Galanis or that it knew that Galanis was involved with Gerova prior to the deal's execution.

According to the complaint, Katten facilitated additional fraudulent transactions between Hallac, Galanis and Bergstein. Katten allegedly did not disclose to Wimbledon's board or investors that Hallac was entering new deals with Galanis and Bergstein, including the Pagoda media transaction.

Katten's only communication with the Wimbledon board, in June 2011, was to advise it how to protect Wimbledon's underlying hedge funds from being transferred to

Gerova once Gerova was exposed as a fraud. The complaint also alleges that Katten failed to disclose that it had a conflict of interest in that it represented Wimbledon and Hallac and his entities.

The complaint states that Katten's failure to disclose material facts to Wimbledon enabled the Arius Libra phase of the fraudulent scheme to proceed through the drafting and execution of a series of fraudulent documents, including a backdated "unwind agreement." The agreement, which Katten was aware of but did not draft, purported to "unwind" the Wimbledon asset purchase agreement with Gerova and required Wimbledon to pay $4.8 million to Hallac, Bergstein and Galanis or to companies that they controlled. These distributions were fraudulent in that Wimbledon did not owe any of the money and the document existed solely to misappropriate funds from Wimbledon and Weston Capital Partners Master Fund II Ltd. ("Partners II").[2] The unwind agreement was not disclosed to the investors or boards of Wimbledon or Partners II.

Next, Bergstein and Hallac entered into a "contribution agreement," dated August 3, 2011, which purported to transfer control of Wimbledon's hedge fund assets to Arius Libra, a Bergstein shell company. The contribution agreement included a list of the Wimbledon hedge fund assets that were to be contributed, as well as a list of the supposed payments owed to Bergstein's entities, Galanis, Weston and others, pursuant to the secret Unwind Agreement. Hallac, Wellner and Bergstein had Partners II and Arius Libra signed a loan agreement and a pledge agreement through which Arius Libra

[2] Katten also represented Partners II.

pledged Wimbledon's assets to secure a loan from Partners II. These agreements were also not disclosed to either funds' investors or board.

In September 2011, Katten agreed to redraft the unwind agreement. Katten's redraft: 1) deleted any reference to the $4.8 million in payments made to Hallac, Gerova, Bergstein and others; 2) was backdated to the same "as of" date – July 4, 2011 – of the unwind agreement; and 3) neither referenced the original unwind agreement nor stated that it was an amendment. The complaint alleges that Katten failed to disclose this agreement to the Wimbledon board.

When Katten's revised and backdated agreement was given to the Wimbledon board in December 2011, Weston represented to the board that Katten fully vetted and approved the transaction. At that time, Wimbledon alleges that Katten lawyers knew that "Galanis was a recidivist fraudster, that Galanis had controlled Weston from the end of 2009 through 2011, that Hallac had entered into new deals with Galanis and Bergstein that were potentially worth millions, that the original unwind agreement improperly had provided for approximately $5 million in payments to Gerova insiders (including Galanis and Bergstein), that Weston itself had been beholden to Galanis when it approved the Gerova acquisition agreement (that Katten had drafted on behalf of Wimbledon), and, upon information and belief, that Hallac had caused Partners II to make an unauthorized and inappropriate loan and to wrongfully terminate (for no consideration) an agreement in order to obtain the funds for the loan." As per the complaint, Katten also knew that its personal representation of Hallac in his dealings with Galanis and Bergstein was a

conflict of interest and facilitated Hallac's breach of his fiduciary duty to the funds. Katten attorney Robert Weiss, Esq. spoke to the board in July 2012 and advised it that the Arius Libra transaction was the only viable option to protect Wimbledon's interests and preserve the value of the assets for investors.

Katten represented Wimbledon through July 2014, when Wimbledon was put into liquidation by investors. Katten also continued representing Partners II, including in connection with an action to recover on the Partners II loan[3], until its installation of a new board in 2014.

In its complaint Wimbledon asserted claims for fraud and breach of fiduciary duty against Hallac and claims for aiding and abetting fraud and aiding and abetting breach of fiduciary duty against Katten. Katten now moves to dismiss the claims against it as time-barred.

Discussion

A defendant moving to dismiss an action based on statute of limitations "bears the initial burden of demonstrating, prima facie, that the time within which to commence the cause of action has expired." *MTGLQ Investors, LP v. Wozencraft*, 172 A.D.3d 644, 644 (1st Dept. 2019). Then the burden "shifts to the plaintiff to raise a question of fact as to whether the statute of limitations is inapplicable or whether the action was commenced within the statutory period." *Id*. at 645.

[3] The action that Katten commenced was before Judge Kornreich and was resolved on default.

The Statute Of Limitations Period Applicable to Wimbledon's Claims

Katten argues that Wimbledon's causes of action are actually mislabeled attorney malpractice claims and that Wimbledon's nomenclature is an attempt to avoid the shorter statute of limitations for malpractice claims. In opposition, Wimbledon argues that New York lacks a *per se* rule that attorneys sued for malpractice cannot also be sued for intentional misconduct; and that the fraud allegations here are not "only incidental to another cause of action."

The statute of limitations for claims of legal malpractice is three years. CPLR 214(6); *see also Duane Morris LLP v. Astor Holdings Inc.*, 61 A.D.3d 418, 420 (1st Dept. 2009). A legal malpractice cause of action accrues "when the malpractice is committed, not when the client learns of it." *Palmeri v. Willkie Farr & Gallagher LLP*, 156 A.D.3d 564, 567 (1st Dept. 2017) (citation omitted); *see also DeStaso v. Condon Resnick, LLP*, 90 A.D.3d 809, 812 (2d Dept. 2011).

Notably, the New York legislature amended CPLR 214 (6) in 1996 to "make clear that 'where the underlying complaint is one which essentially claims that there was failure to utilize reasonable care or where acts of omission or negligence are alleged or claimed, the statute of limitations shall be three years if the case comes within the purview of CPLR Section 214 (6), regardless of whether the theory is based in tort or in a breach of contract.'" *In re R.M. Kliment & Frances Halsband, Architects (McKinsey & Co., Inc.)*, 3 N.Y.3d 538, 541-542 (2004) (citation omitted). Further, CPLR 214 (6) "was enacted to prevent plaintiffs from circumventing the three-year statute of limitations for professional malpractice claims by characterizing a defendant's failure to meet

professional standards as something else." *Johnson v. Proskauer Rose LLP*, 129 A.D.3d 59, 68 (1st Dept. 2015). To determine whether a claim is duplicative of a malpractice claim, a court must "discern[] the essence of each claim." *Id.*

Here, the essence of Wimbledon's claims is that Katten should have disclosed information that it knew and should have given different advice. These are plain allegations of malpractice despite being labeled as claims for aiding and abetting fraud and aiding and abetting breach of fiduciary duty.[4] Moreover, permitting these claims to go forward as claims for aiding and abetting fraud and aiding and abetting breach of fiduciary duty is contrary to the legislative intent of CPLR 214 (6). *See In re R.M. Kliment & Frances Halsband, Architects*, 3 N.Y.3d at 543 (stating that "allowing what is essentially a malpractice claim to be couched in [another claim's] terms" to benefit from a longer statute of limitations would be contrary to the legislature's intent).

Courts frequently deem claims for fraud and breach of fiduciary duty duplicative of legal malpractice when the former claims are based upon the same facts as the malpractice claim. *See, e.g., Commonwealth Land Title Insurance Company v. ANM Funding LLC*, No. 15-CV-03405, 2016 WL 11263666 at *4-5 (E.D.N.Y. Sept. 1, 2016) (stating that fraud is "often duplicative of legal malpractice"); *Genesis Merchant Partners, LP v. Gilbride, Tusa, Last & Spellane LLC*, 149 A.D.3d 469, 469 (1st Dept. 2017); *Freeman v. Brecher*, 155 A.D.3d 453, 453-454 (1st Dept. 2017).

[4] Wimbledon's allegation that Katten's personal representation of Hallac was a conflict of interest is also a malpractice claim.

In this case, the complaint lacks any facts other than those that support a malpractice claim *i.e.*, facts pertaining to Katten's failure to make disclosures, alleged bad legal advice and conflicts of interest. *See Meskunas v. Auerbach*, No. 17 CV 9129, 2019 WL 719514 at *4 (S.D.N.Y. Feb. 20, 2019) ("[u]nder New York law, a fraud claim "asserted in connection with charges of professional malpractice" is non-duplicative "only to the extent" it arises from "one or more affirmative, intentional misrepresentations" that caused damages "separate and distinct from those generated by the alleged malpractice.") (citation omitted); *Gourary v. Green*, 143 A.D.3d 580, 581 (1st Dept. 2016) (finding fraud claims to be duplicative of the legal malpractice claim "since they arise from the same facts as underlie that claim and involve no additional damages separate and distinct from those alleged in connection with the malpractice claim.").

Additionally, Wimbledon's allegations that Katten engaged in continuing concealment by failing to disclose information about Gerova and Arius Libra to the board amount to allegations that Katten failed to disclose its own malpractice, and do not furnish support for fraud claims. *See White of Lake George v. Bell*, 251 A.D.2d 777, 778 (3d Dept. 1998) (finding that where "a fraud claim is asserted in connection with charges of professional malpractice, it is sustainable only to the extent that it is premised upon… something more egregious than mere 'concealment or failure to disclose [one's] own malpractice.'") (citations omitted).

Katten also argues that Wimbledon's damages theory is identical to that of a malpractice action, again demonstrating that this is truly a claim for malpractice.

Wimbledon counters that even if the damages it seeks are the same as damages for an attorney malpractice claim, this is not "determinative of whether Wimbledon's aiding and abetting claims are duplicative of a malpractice claim."

Wimbledon's complaint seeks judgment against Katten for "forfeiture of fees and disgorgement of any ill-gotten gains." Wimbledon's demand for the return of attorneys' fees paid to Katten is fundamentally a claim for money damages. *See Access Point Medical, LLC v. Mandell*, 106 A.D.3d 40, 44 (1st Dept. 2013). It does not seek separate damages from those stemming from malpractice. Furthermore, Wimbledon's use of the word "disgorgement" cannot transmute the claim into one with a longer limitations period because "purely semantic distinction(s)" cannot "control the application of the statute of limitations." *Id*. Thus, even if Wimbledon's claims were not merely mislabeled attorney malpractice claims, the claims would still be dismissible as duplicative.

Considering the foregoing, Wimbledon's claims against Katten, though pled as fraud, are for attorney malpractice. Accordingly, the applicable statute of limitations period is three years.

Calculating the Statute of Limitations

The majority of the complaint's allegations pertain to Gerova and Arius Libra. The Gerova fraud was revealed in the January 2011 Forbes magazine article. The last action Katten took vis-à-vis the Gerova deal was in June 2011, when it advised the Wimbledon board how to protect Wimbledon's underlying hedge funds from being

transferred to Gerova in light of Gerova's exposure as a fraud. Therefore, the statute of limitations for the Gerova deal began to run in June 2011.

The Arius Libra transaction was enabled via fraudulent documents including a backdated "unwind agreement" of which Katten was allegedly aware but did not draft. In September 2011, Katten agreed to redraft the unwind agreement and Wimbledon alleges that it should have been titled as an amendment to the original unwind agreement. Katten addressed the Wimbledon board in July 2012 and advised it that the Arius Libra transaction was the only viable option to protect Wimbledon's interests. Hence, the last action that Katten took with respect to Arius Libra was in July 2012 and the statute of limitations began to run on that date.

Wimbledon did not file its summons with notice against Hallac and Katten until June 4, 2018. Even taking into account several agreements by Wimbledon and Katten that tolled the statute of limitations for a total of 243 days,[5] the claims based on the Gerova and Arius Libra deals are time-barred because more than 3 years and 243 days elapsed between June 2011 and July 2012 and June 4, 2018.

To escape this calculation, Wimbledon argues (without conceding) that even if the tort claims are duplicative of an attorney malpractice claim, a malpractice claim would be timely because of the continuous representation doctrine. Wimbledon asserts that the

[5] The parties' original tolling agreement commenced on November 12, 2015 and was continuously extended through May 15, 2016 by written agreements dated April 22, 2016 and May 11, 2016. Another tolling agreement was then executed tolling any applicable statutes of limitation from July 21, 2016 through September 15, 2016.

statute of limitations started to run from October 7, 2014 when Partners II terminated Katten and therefore this action is timely.

The continuous representation doctrine "tolls the Statute of Limitations only where the continuing representation pertains specifically to the matter in which the attorney committed the alleged malpractice." *Shumsky v. Eisenstein*, 96 N.Y.2d 164, 168 (2001). The doctrine, however, "is limited 'to the course of representation concerning a specific legal matter,' and is not applicable to the client's 'continuing general relationship with a lawyer… involving only routine contact for miscellaneous legal representation… unrelated to the matter upon which the allegations of malpractice are predicated.'" *Encalada v. McCarthy, Chachanover & Rosado, LLP*, 160 A.D.3d 475, 476 (1st Dept. 2018) (citation omitted).

Wimbledon has not demonstrated that the continuous representation doctrine applies, nor can it, as the last action by Katten detailed in the complaint occurred in July 2012. *See 860 Fifth Ave. Corp. v. Superstructures-Eng'rs & Architects*, 15 A.D.3d 213, 213 (1st Dept. 2005), (noting that "plaintiff [has] the burden of demonstrating that the continuous representation doctrine applied"). The fact that Katten was still retained as attorney for Wimbledon and Partners II until 2014 is insufficient to establish applicability of the continuous representation doctrine because such representation is not related to the transactions giving rise to the claims. *See Zaref v. Berk & Michaels*, 192 A.D.2d at 348 (1st Dept. 1993) (stating that a "pleading must assert more than simply an extended general relationship between the professional and client… in that the facts are required to

demonstrate continued representation in the specific matter directly under dispute") (internal citations omitted).

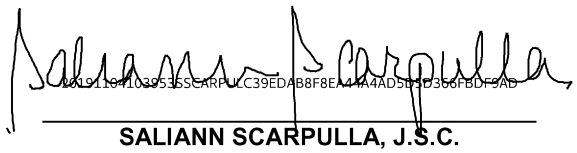
In additions, I find Wimbledon's remaining arguments unavailing.

In accordance with the foregoing

ORDERED that Katten Muchin Rosenman LLP's motion to dismiss is granted and the complaint is dismissed in its entirety, with costs and disbursements to Katten Muchin Rosenman LLP as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly in favor of Katten Muchin Rosenman LLP and against Wimbledon Financing Master Fund, Ltd..

This constitutes the decision and order of the Court.



11/4/2019
DATE

SALIANN SCARPULLA, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
	X	GRANTED		DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE