Amtrust N. Am., Inc. v Pavloff
2020 NY Slip Op 31005(U)
April 23, 2020
Supreme Court, New York County
Docket Number: Index No. 156855/2019
Judge: Andrew Borrok
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK **PART** IAS MOTION 53EFM

Justice

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AMTRUST NORTH AMERICA, INC.,

Plaintiff,

- v -

SHERRI PAVLOFF, FARBER BROCKS ZANE, LLP

Defendant.

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INDEX NO. 156855/2019

MOTION DATE N/A

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 45, 46, 47, 48, 49, 50, 51, 52

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, Sherri N. Pavloff and Farber Brocks & Zane LLP's (**FBZ**; Ms. Pavloff, together with FBZ, hereinafter, collectively the **Defendants**) motion to dismiss the complaint with prejudice pursuant to CPLR 3211(a)(1) and (a)(7) is denied.

THE RELEVANT FACTS AND CIRCUMSTANCES

This is a legal malpractice action stemming from a 2013 lawsuit captioned *Pruss v Infiniti of Manhattan, Inc.,* Index No. 161240/2013 (the **Underlying Action**). The Underlying Action concerned an automobile accident (the **Accident**) in Crown Heights, Brooklyn, commenced in this court, in which a pedestrian named Eita (Itty) Pruss was severely injured when an automobile owned by Infiniti of Manhattan, Inc. (**Infiniti**) and insured by a "tower" of primary and excess insurers including CastlePoint National Insurance Company (**CastlePoint**) and the Tower Insurance Company of New York (**TowerNY**) "jumped" the sidewalk on which Ms. Pruss was standing and crushed her.

In 2014, AmTrust North America, Inc. (**AmTrust**) purchased CastlePoint and TowerNY as part of a larger insurer purchase (the **TGI Acquisition**). After the TGI Acquisition, AmTrust took over the claims in the Underlying Action as the third-party claims administrator (**TPA**). AmTrust assigned the "Pruss Case" to its Major Case Unit under the supervision of one of its line examiners, Brian Kuhn, who subsequently assigned the defense of the case of AmTrust's insureds in the action to FBZ and one of the FBZ partners, Ms. Pavloff.

The Underlying Action court first held a mediation of the Underlying Action and that of another pedestrian victim of the same accident on November 10, 2015. The other victim, who had suffered an amputated leg, settled her claim and was paid with the $1 million primary limit provided by CastlePoint and the first excess layer of insurance provided by another insurer, Zurich Insurance Company, leaving the next excess layer of $5 million, provided by TowerNY, and the remaining layer of excess Infiniti insurance to provide coverage in the Underlying Action.

Mr. Kuhn had authorized the payment of TowerNY's full $5 million limit at this November 10, 2015 mediation, and an offer of $6 million was made by the next excess insurer, the Great American Insurance Company (**Great American**), which offered $1 million of its $5 million layer on top of TowerNY's $5 million limit. Ms. Pruss rejected the offer.

On November 16, 2015, Mr. Kuhn formerly tendered TowerNY's full $5 million limit to Great American, the next level excess insurer (with its own $5 million limit), and to Liberty Mutual Insurance Company (**Liberty**), the next excess insurer with a $10 million limit excess of all the underlying insurance. By making this tender, the Complaint alleges that Mr. Kuhn formally offered Great American, as the next excess layer, control of the defense of the Underlying Action along with control over TowerNY's $5 million policy limit. Great American purported to

decline the tender by e-mail dated November 23, 2015, but simultaneously appointed its own defense counsel as lead trial counsel, took control of settlement negotiations and continued to negotiate with the plaintiff's $5 million in coverage.

As noted above, in December 2015, Mr. Kuhn engaged Ms. Pavloff and FBZ as coverage counsel to protect CastlePoint and AmTrust's interest in the Underlying Action. Consistent with industry custom, Ms. Pavloff and FBZ were appointed from a list of approved service providers under a general written contract pursuant to which FBZ agreed to provide legal services at an hourly rate, including for providing insurance coverage counseling. For the avoidance of doubt, there does not appear to have been a written retainer agreement between AmTrust and FBZ delineating the scope of specific services or, significantly as it relates to the instant motion, limiting the scope of representation. In any event, the Complaint further alleges that Ms. Pavloff advised Mr. Kuhn that Great American's rejection of the tender while negotiating with Ms. Pruss was improper. Thereafter, Ms. Pavloff appeared at settlement conferences on AmTrust's behalf.

On July 28, 2016, the Superior Court of California placed CastlePoint in Conservation pursuant to a Conservation Order of even date (the **Conservation Order**) (Compl., Ex. I). Shortly prior to this time, various AmTrust insurers, including TowerNY, transferred all of their insurance liabilities, together with their reserves, to CastlePoint, the entity that was then placed in Conservation. As part of a complex nationwide conservation and liquidation plan, AmTrust agreed to continue as TPA administering CastlePoint's claims for two years under the direct control and supervisions of the Insurance Commissioner of the State of California (the **Commissioner**). The Conservation Order expressly (i) appointed the Insurance Commissioner of the State of California as Conservator, vesting all rights, title, and interest to all assets of CastlePoint in the Commissioner, (ii) gave the Commissioner the discretionary authority to delay, approve, or deny, in whole or in part, liabilities of CastlePoint whether arising before or

after the Order, and, most significantly, (iii) prohibited anyone from conducting any CastlePoint Business without a prior order of the California court.

On August 10, 2016, the court (Silver, J.) held another Settlement Conference (the **Settlement Conference**) in the Underlying Action. Ms. Pavloff appeared in court on behalf of AmTrust. Prior to the Settlement Conference, Ms. Pavloff – who was in possession of the Conservation Order – called Mr. Kuhn to confirm settlement authority for the Settlement Conference. According to the Complaint, however, Ms. Pavloff only "skimmed" her copy of the Conservation Order, did not consult with the California Court, the Commissioner or with a more experienced attorney concerning the impact of the Conservation Order on any potential settlement. Significantly, Ms. Pavloff also allegedly did not inquire whether Mr. Kuhn had a copy of the Conservation Order or address the Order with him in any way including, without limitation, discussing with him whether the Conservation Order impacted his authority to offer the policy limits to settle the Underlying Action. Rather, all Ms. Pavloff allegedly asked – ***without any mention of the Conservation Order*** – was if Mr. Kuhn believed he still had authority to offer the policy limits at the Settlement Conference.

In court, at the Settlement Conference, Ms. Pavloff advised Justice George J. Silver, who was conducting the settlement conference, along with lead defense counsel, that funds were still available to be paid in full notwithstanding the Conservation proceeding. Relying on Ms. Pavloff's representation to the court, the court then advised counsel for Ms. Pruss that such funds were available. The parties to the Underlying Action then settled the claim in court on August 10, 2016 for $9 million, $5 million of which was to be paid by CastlePoint. Neither the Conservation Court nor the Commissioner had approved the settlement offer or been asked to do so prior to the Settlement Conference. In fact, the Commissioner had determined as of July 28, 2016 that no amounts above a respective state's Guaranty Fund's cap (which in New York is $1

million) would or could be paid as part of any settlement. Thus, ultimately, Ms. Pruss was able to receive only $1 million of the $5 million that Ms. Pavloff had represented was available.

Almost a full year after the settlement, on August 9, 2017, Justice Silver conducted an on-the-record factual hearing (the **Hearing**) with all counsel who were present at the August 10, 2016 Settlement Conference (*8/9/2017 Tr.*, NYSCEF Doc. No. 19). At that Hearing, Ms. Pavloff again appeared on behalf of CastlePoint and made the following statement to the court:

> On July 28, 206, CastlePoint was placed into conservation. I and my law firm did not learn about the conservation until August 8, 2016. ***Neither I, nor my law firm, were ever provided with the Conservation Order that was issued on July 29th of 2016.*** However, before I appeared on August 10th of 2016, I can't recall if it was Monday, Tuesday or Wednesday, August 8, August 9 or August 10, I had a conversation with AmTrust, who was the third-party administrator managing CastlePoint's policies, and confirmed that I still had the authority to appear in this Court and represent that that $5 million that had previously been offered was still available to be offered and paid in cash to [Ms.] Pruss.
>
> Between the time of the Conservation Order and when I appeared in Court and made that representation[,] I didn't receive any instructions or communications from AmTrust, CastlePoint or the conservator relating to how the conservation might impact the settlement or any settlement authority, and no one ever communicated to me that the $5 million was not available in cash for purposes of the settlement. Therefore, I appeared, I made that representation to Your Honor and to all counsel and I stand by that representation.

(NYSCEF Doc. No. 19 at 40:13-41:11 [emphasis added]).

At a subsequent deposition in a proceeding captioned *Insurance Commissioner of the State of California v CastlePoint National Insurance Co.*, however, Ms. Pavloff testified that, in fact, she had seen the Conservation Order prior to the Settlement Conference: "I saw it. Nobody provided it to me but I saw it" (NYSCEF Doc. No. 15 at 17:11-12; 17:4). She testified further as follows:

> Q. When you made the representation that the 5 million would be paid in cash on August 10th at the settlement conference, you had not read that order?

A. I had not read it in detail.

Q. So you may have read it in some other fashion?

A. I may have. ***I believe that I briefly reviewed it.***

* * *

Q. Ms. Pavloff, when you gave the statement to Judge Silver on that day, you said that you were never provided with the order and yet you confirmed that the money was available in cash. Did that mean that you had not read it at all prior to making the representation to be paid in cash, or are you testifying now you may have looked at it in some sense?

* * *

A. I looked at it when I was told that the conservation order had been issued. When I spoke to my client to find out if it impacted what was going to go on, if the case settled on August 10th, my client said no. And so I didn't review it in detail because that wasn't the scope of my representation.

(*id*. at 17:13-22; 18:5-13; 18:15-22 [emphasis added]).

After Ms. Pruss was unable to collect $4 million of her $9 million settlement, she commenced proceedings against AmTrust and Mr. Kuhn for the remainder. Great American commenced a federal declaratory judgment action to sort out the various insurer obligations. And, AmTrust has now commenced this action alleging a single cause of action for legal malpractice against Ms. Pavloff and FBZ based on their alleged deviation from the standard of care of competent and qualified counsel in their representation of AmTrust.

DISCUSSION

In moving to dismiss for failure to state a claim, the defendants argue that (i) AmTrust fails to state a claim for legal malpractice because it does plead a cognizable legal duty, and because (ii) it does not adequately plead causation, and that, in any event, (iii) AmTrust does not state a claim for vicarious liability against FBZ. Simply put, the arguments are without merit.

To plead a legal malpractice claim, a plaintiff must allege: (1) that the attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession, (2) that the attorney's breach of that duty proximately caused plaintiff to (3) sustain actual and ascertainable damages (*Nomura Asset Capital Corp. v Cadwalader, Wickersham & Taft LLP*, 26 NY 3d 40, 49-50 [2015]). A claim for legal malpractice can be viable "despite settlement of the underlying action, if it is alleged that the settlement was effectively compelled by [the] mistakes of counsel" (*Bernstein v Oppenheim & Co.,* 160 AD2d 428, 430 [1st Dept 1990] [holding settlement of underlying action did not compel dismissal]). At the pleading stage, a legal malpractice plaintiff does not need to show "likelihood of success" but "is required only to plead facts from which it could reasonably be inferred that the defendant's negligence caused" his loss (*Garnett v Fox, Horan & Camerini, LLP*, 82 AD3d 435 [1st Dept 2011]). As concerns damages, it is sufficient to sustain a claim for a plaintiff to allege facts from which actual damages may be reasonably inferred, a showing of actual damages is not required at the motion to dismiss stage of proceedings (*id.*).

Here, contrary to the Defendants' argument, the Complaint adequately pleads a duty owed by the Defendants to AmTrust as a client. And, for the avoidance of any doubt, Ms. Pavloff has acknowledged under oath at her deposition that AmTrust was, in fact, her client, along with CastlePoint (NYSCEF Doc. No. 15 at 5:8-16). To the extent that Ms. Pavloff may have taken the position at her deposition that advising AmTrust (or Mr. Kuhn) about the Conservation Order and/or inquiring as to whether Mr. Kuhn was aware of the Conservation Order and whether the Conservation Order impacted his authority to settle the case was outside of the scope of her representation (i.e., even after she represented to the court that funds were available in the course of the settlement of the Underlying Action), this is, at best, a factual issue for discovery and the trier of fact as Ms. Pavloff and FBZ have not produced a retainer agreement and have

acknowledged that they never made a retainer agreement for their services to AmTrust in the Underlying Action.

Turning to proximate cause, although the required standard of proximate cause has been imprecisely and variously stated, the alleged malpractice needs to be at least a substantial factor if not the "but for" factor in a plaintiff's damages (*180 E. 88th St. Apt. Corp. v Law Office of Robert Jay Gumenick, P.C.*, 2010 NY Slip Op 33848 [Sup Ct NY Cnty 2010] [discussing varying formulations of proximate cause for legal malpractice actions] [*affd* 84 AD3d 582 [1st Dept 2011]). Here, the Complaint alleges that, "[h]ad [Ms. Pavloff] read the Conservation Order in any meaningful way … , or call[ed] the California Conservation Court or the California Conservation and Liquidation Office, or even just discuss the Order with her client, she would have known to advise AmTrust not to proceed with the settlement conference … where she represented that the insurer would contribute its $5 million limit to the settlement," which representation then "directly caused AmTrust to be sued (Compl., ¶¶ 71-75). This, together with other allegations in the Complaint, is sufficient to allege that the Defendants' conduct was a substantial factor in AmTrust's damages for purposes of pleading a legal malpractice claim. Inasmuch as the Defendants cite *Kluczka v Lecci* (63 AD3d 796 [2d Dept 2009]) and *Reibman v Senie* (302 AD2d 290 [1st Dept 2003]) for the proposition that the Complaint does not allege proximate cause, those are both summary judgment decisions which do not address allegations at the pleading stage of the proceedings. Simply put, an "attorney's conduct or inaction is the proximate cause of a plaintiff's damages if but for the attorney's negligence the plaintiff…would not have sustained actual and ascertainable damages" (*Gallet, Dryer & Berkley, LLP v Basile*, 141 AD3d 405 [1st Dept 2016]). Here, the Complaint pleads that Ms. Pavloff's failure to meaningfully read and discuss the Conservation Order caused AmTrust to proceed with a settlement it would not have otherwise undertaken and that it has sustained at least a million dollars in damages as a result. This is sufficient at this juncture.

Inasmuch as the Defendants next argue that FBZ cannot be held responsible in this action because there are no specific allegations of active malpractice on its part in the Complaint, this argument also fails. FBZ is named in the Complaint because it employed Ms. Pavloff and is, thus, vicariously liable for any legal malpractice Ms. Pavloff may have committed while in its employ. Under the well-established "doctrine of *respondeat superior*, an employer will be liable for the negligence of an employee committed while the employee is acting in the scope of [her] employment" (*Lundberg v State*, 25 NY2d 467, 470 [1969]).

Finally, to the extent that the Defendants argue that Mr. Kuhn as the client authorized Ms. Pavloff as AmTrust's attorney to represent to counsel for Ms. Pruss and Great American and to the court that the $5 million was available for settlement in the Underlying Action, this argument simply misses the point. While it is true that "an attorney should not be held liable for ignorance of facts which the client neglected to tell him or her," an attorney also "has a responsibility to investigate and prepare every phase of a client's case" (*Green v Conciatori*, 26 AD3d 410, 411 [2d Dept 2006]). There is absolutely no dispute here that Ms. Pavloff knew of the Conservation Order before appearing at the August 10th Settlement Conference, where she represented that the $5 million was still available for settlement and where she signed off on the settlement on AmTrust's behalf. Despite her, at best, evasive representation to the court at the subsequent August 9, 2017 hearing that neither she nor her firm were "ever presented with the Conservation Order" before the Settlement Conference, she admits that she saw the Conservation Order and "briefly reviewed it" before the fact (NYSCEF Doc. No. 15 at 17:22). This is simply not an instance of her client keeping this secret from her, nor does it matter if Mr. Kuhn advised her that the money was still available because he believed that to be the case as she alleges (*see* NYSCEF Doc. No. 49). It was ***her job*** to provide legal advice to Mr. Kuhn and AmTrust as the client, not the other way around.

Accordingly, it is

ORDERED that the motion to dismiss is denied and the defendants are directed to serve an answer within 30 days of this decision and order; and it is further

ORDERED that a status conference is scheduled in Part 53 for June 17, 2020 at 11:30 am.

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4/23/2020
DATE

ANDREW BORROK, J.S.C.

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