Rag & Bone Holdings LLC v Hand Baldachin & Assoc. LLP
2020 NY Slip Op 31149(U)
May 2, 2020
Supreme Court, New York County
Docket Number: Index No. 156994/2019
Judge: Andrea Masley

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ANDREA MASLEY** **PART** **IAS MOTION 48EFM**

Justice

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RAG & BONE HOLDINGS LLC,

Plaintiff,

- v -

HAND BALDACHIN & ASSOCIATES LLP, et al.
Defendants.

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INDEX NO. 156994/2019

MOTION DATE _____

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16, 17, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47

were read on this motion to/for DISMISSAL.

Masley, J.:

In motion sequence number 001, defendants Hand Baldachin & Associates LLP and Douglas Hand move, pursuant to CPLR 3211 (a)(5), or in the alternative, pursuant to CPLR 3211 (a)(3), and (a)(7), to dismiss the complaint of plaintiff Rag & Bone Holdings LLC (Holdings).

Background

The following facts are alleged in the complaint unless noted otherwise, and for purposes of this motion, accepted as true.

In 2008, Holdings and nonparty TJ PRP LLC (TJ PRP) created nonparty Rag & Bone Footwear, LLC (Footwear) to sell footwear under the Rag and Bone brand (NYSCEF Doc. No. [NYSCEF] 21 at ¶10). Holdings owned 75% of Footwear, and TJ PRP owned 25% (*id.*). TJ PRP is owned by nonparty Tull Price (*id.*). Price provided consulting services to Footwear pursuant to a consulting agreement (*id.*). Holdings'

wholly-owned subsidiary, nonparty Rag & Bone Industries, Inc. (RBI), provided management services to Footwear (*id.* at ¶11).

In 2011, Holdings and TJ PRP decided to amend Footwear's operating agreement and formalize a management agreement (MA) between Footwear and RBI (*id.* at ¶12). Holdings engaged defendants, who had performed legal services for Holdings since 2006, to draft these agreements (*id.* at ¶ 13). Defendants negotiated and prepared the MA, which was executed by Footwear and RBI (*id.* at 14). The MA became effective on January 1, 2012 (*id.*).

The MA formalized the management fee Footwear paid to RBI (*id.* at ¶15). Although not a party to the 2012 Agreement, Holdings alleges that the formula for the management fee's calculation provided for in the MA did not accurately reflect the parties' intentions (*id.* at ¶¶18, 19). In September 2012, RBI learned of this error and immediately sought legal advice from defendants (*id.* at ¶¶ 22, 23). Defendants allegedly ignored the request (*id.*).

Over the next five years, RBI proceeded to calculate its fee in the manner in which it says the parties intended, rather than in the manner provided by the MA (*id.* at ¶24). In late 2015, during discussions about the exercise of a Put Option[1], disagreements arose between TJ PRP and Holdings regarding the value of Footwear (*id.* at ¶27). Holdings alleges that, in 2015 and 2016, defendants represented Holdings in regard to those disagreements, as well as disagreements as to the

[1] Under the Operating Agreement, TJ PRP received a Put Option, which it could exercise at the end of 2016 to require Holdings to acquire TJ PRP's interest in Footwear (NYSCEF 11, Complaint at ¶26).

calculations of TJ PRP's distributions under the operating agreement, which included the calculation of RBI's management fee (*id.* at ¶¶ 25, 28).

In November of 2016, an independent accounting firm informed TJ PRP that RBI had been overpaying itself for several years; as result, TJ PRP made a demand for its share of Footwear's overpayment (*id.* at ¶¶ 2, 30-31). Specifically, TJ PRP demanded "demanded immediate payment of its 25% ownership share of the purported overpayment, or $3,826,465 for those years" (*id.* at 31). Holdings alleges that defendants represented Holdings with regard to this management fee dispute until January of 2017 (*id.* at ¶ 33).

In May 2017, TJ PRP commenced an action against Holdings and RBI, among others, "alleging breach of fiduciary duty and other claims based, inter alia, on the failure to pay management fees in accordance with the [MA]" (*TJ PRP LLC v Rag & Bone Holdings LLC, et al.*, Index No. 652569/2017 [Masley, J.]) (TJ PRP Action) (*id.* at ¶36). In January 2018, TJ PRP filed an amended complaint, alleging breach of the operating agreement against Holdings, breach of implied covenant of good faith and fair dealings against Holdings, breach of fiduciary duty against Holdings, fraud against Holdings and RBI, aiding and abetting breach of fiduciary duty and fraud against Holdings and RBI's principals (NYSCEF 12, TJ PRP Action Amended Complaint)

In February 2018, defendants in the TJ PRP Action moved to dismiss the claims for breach of implied covenant, fraud, and aiding and abetting breach of fiduciary duty and fraud (NYSCEF 13, Notice of Motion). On August 6, 2018, this court granted the motion to dismiss the amended complaint, which resulted in the dismissal of the entire

action against RBI and the individuals (NYSCEF 14, 8/6/18 Decision & Order). The TJ PRP Action continued against Holdings for breach of the operating agreement and breach of fiduciary duty (*id.*). In 2019, Holdings and TJ PRP reached a settlement, and the action was discontinued on February 28, 2019 (NYSCEF 11, Complaint at ¶42). As part of the settlement, Holdings paid money to TJ PRP (*id.*).

In July 2019, Holdings commenced this action against defendants for legal malpractice and for contribution and/or indemnification. Defendants now move to dismiss the complaint on the grounds that Holding's legal malpractice claim is barred by the applicable three year statute of limitations, Holdings lacks standing, and the complaint fails to state a claim.

Discussion

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. [The court] accept[s] the facts as alleged in the complaint as true, [and] accord[s) plaintiff the benefit of every possible favorable inference" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994] [citation omitted]).

First Cause of Action - Legal Malpractice

Statute of Limitations

Defendants contend that the legal malpractice claim must be dismissed because the alleged legal malpractice occurred in 2012, and this action was not commenced until 2019, far beyond the three year statute of limitations. Holdings asserts that its claim is timely because defendants continuously represented Holdings in connection with the matters at issue until at least January 2017.

CPLR 3211(a)(5) provides that "the cause of action may not be maintained because of ... statute of limitations ... ." An action for legal malpractice, "regardless of whether the underlying theory is based in contract or tort," must be commenced within three years (CPLR 214[6]).

> "A legal malpractice claim accrues when all the facts necessary to the cause of action have occurred and an injured party can obtain relief in court. In most cases, this accrual time is measured from the day an actionable injury occurs, even if the aggrieved party is then ignorant of the wrong or injury. What is important is when the malpractice was committed, not when the client discovered it"

(*McCoy v Feinman*, 99 NY2d 295, 301 [2002] [internal quotation marks and citations omitted]). However, the continuous representation doctrine "recognizes 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" (*Shumsky v Eisenstein*, 96 NY2d 164, 167 [2001]). "In the context of a legal malpractice action, 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" (*id.* at 168).

"[P]laintiff ha[s] the burden of demonstrating that the continuous representation doctrine applied, or at least that there [is] an issue of fact with respect thereto" (*860 Fifth Ave. Corp. v Superstructures-Engineers & Architects*, 15 AD3d 213, 213 [1st Dept 2005] [citation omitted]). "The pleading must assert more than simply an extended general relationship between the professional and client, and the facts are required to demonstrate continued representation in the specific matter directly under dispute"

(*West Village Assoc. Ltd. Partnership v Balber Pickard Battistoni Maldonado & Ver Dan Tuin, PC*, 49 AD3d 270, 270 [1st Dept 2008]).

As alleged in the complaint, defendants routinely advised Holdings relating to the MA and the calculation of TJ PRP's distributions pursuant to the operating agreement, which depended on the calculation of the management fee under the MA (NYSCEF 11, Complaint at ¶¶25, 33). These allegations are also supported by documentary evidence, including an email sent by defendant Hand to TJ PRP in November 2016 and defendants' invoices (NYSCEF 38, Email; NYSCEF 40, Invoices).

While the court acknowledges that the allegations in the complaint involve references to the MA and its application, but do not involve specific action taken by defendants regarding the agreement, the references to the MA in the exhibits submitted by Holdings demonstrate a continued representation in connection with the MA. At this stage, the allegations, as supported by documentary evidence, are sufficient to deny the motion to dismiss on statute of limitations grounds. At the very least, the documentary evidence raises an issue of fact as to continuous representation.

Standing

Defendants contend that the complaint must be dismissed because Holdings is not a party to the MA. Defendants contend that as a nonparty, Holdings lacks standing to sue for damages based on defendants' alleged malpractice in drafting the MA. Holdings asserts that the legal work that defendants performed in connection with the MA was performed on behalf of Holdings, as evidenced by defendants' own invoices.

The MA was entered into between Footwear, of which Holdings was then a majority owner, and RBI, a wholly-owned subsidiary of Holdings. The operating

agreement was entered into between Holdings and TJ PRP. It is alleged that Holdings was the entity that retained defendants in connection with the MA, as well as the operating agreement, both the subjects of the TJ PRP Action.

Specifically, in the TJ PRP Action, TJ PRP alleged a cause of action for breach of the operating agreement on several grounds, including Holdings' failure to pay out the correct annual distributions. Holdings asserts that TJ PRP claimed, in the underlying action, that its annual distributions were reduced because of the incorrect calculation of the management fees under the MA, ultimately causing a breach of the operating agreement; this assertion is supported by documentary evidence (*see* NYSCEF 21, TJ PRP Interrogatory Reponses at 7 [TJ PRP seeks damages for overpayment of management fees under the MA]). Holdings also alleges that the calculation formula provided for in the MA affected the valuation process under the Operating Agreement (NYSCEF 11, Complaint at ¶38), which was also at issue in the TJ PRP Action.

Holdings alleges "specific facts upon which the existence of an attorney-client relationship or privity between the parties could be inferred" (*Conti v Polizzotto*, 243 AD2d 672, 673 [2d Dept 1997]). Holdings has sufficiently alleged that the existence of an attorney-client relationship with defendants. This relationship is also supported by documentary evidence (NYSCEF 38, Email; NYSCEF 40, Invoices). It is irrelevant that Holdings was not a party to the MA. What is relevant is the alleged attorney-client relationship between Holdings and defendants, and Holdings has sufficiently established that relationship.

Proximate Cause

> "In an action to recover damages for legal malpractice, 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. To establish causation, 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"

(*Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438,442 [2007]). Dismissal of a legal malpractice action pursuant to CPLR 3211(a) (7) is required where a plaintiff fails to plead "specific factual allegations demonstrating that, 'but for' the defendant's alleged negligence, there would have been a more favorable outcome in the underlying action" (*Tortura v Sullivan Papain Block McGrath & Cannavo, P.C.*, 21 AD3d 1082, 1083 [2d Dept. 2005] [citations omitted]). "A claim for legal malpractice is viable, despite settlement of the underlying action, if it is alleged that settlement of the action was effectively compelled by the mistakes of counsel" (id. [internal quotation marks and citations omitted]).

Here, Holdings has failed to sufficiently allege that defendants' alleged negligent drafting of the MA and operating agreement was the proximate cause of its damages. In contrast, Holdings alleges in its complaint that Holdings was made aware of the alleged error in the calculation formula but failed to do anything to correct it besides sending one email to defendants which went unanswered (NYSCEF 11, Complaint at ¶¶ 22, 23). Further, Holdings admits that, despite knowing of the calculation formula agreed to in the MA, for five years, it continued to calculate the management fees contrary to the plain language of the MA (*id.* at ¶24). This continued defiance of the MA calculation was the proximate cause of Holdings' damages. Further, although Holdings alleges that defendants continued to provide legal services in respect to TJ PRP's

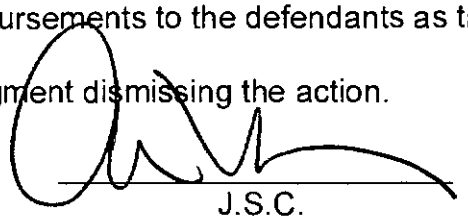
distributions, the complaint is bereft of an allegation that defendants continued to advise Holdings to breach the MA by calculating the fees in the manner Holdings believed that the parties intended. The court cannot hold an attorney liable for the egregious conduct of its client.

Indemnification/Contribution

As Holdings' claim for malpractice is dismissed, so is its claim for indemnification/contribution. Even if Holdings' claim for legal malpractice was sustained, "[a]n allegation that a party failed in the proper performance of services related primarily to its profession is a claim of professional malpractice" (*Travelers Indem. Co. v Zeff Design*, 60 AD3d 453, 455 [1st Dept 2009] [citation omitted]). Here, Holdings' claim is one for legal malpractice and not common law indemnification or contribution.

Accordingly, it is

ORDERED that the defendants' motion to dismiss is granted and the complaint is dismissed in its entirety with costs and disbursements to the defendants as taxed by the Clerk and the Clerk is directed to enter judgment dismissing the action.



J.S.C.

5/2/2020
DATE

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