

Galloway v Wittels

2014 NY Slip Op 30006(U)

January 6, 2014

Supreme Court, New York County

Docket Number: 151287/2013

Judge: Cynthia S. Kern

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: CYNTHIA S. KERN
J.S.C. Justice

PART _____

Index Number : 151287/2013
GALLOWAY, PAUL
vs
WITTELS, STEVEN L.
Sequence Number : 005
DISMISS ACTION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

is decided in accordance with the annexed decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 1/6/14

CYNTHIA S. KERN, J.S.C.
CYNTHIA S. KERN
J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE:MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

-----X
PAUL GALLOWAY,

Plaintiff,

Index No.151287/2013

-against-

DECISION/ORDER

STEVEN LANCE WITTELS, an individual, DEBRA
BROWN STEINBERG, an individual, CADWALADER,
WICKERSHAM & TAFT, LLP and SANFORD
HEISLER, LLP,

Defendants.

-----X
HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion
for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Answering Affidavits.....	<u>2</u>
Cross-Motion and Affidavits Annexed.....	<u> </u>
Answering Affidavits to Cross-Motion.....	<u> </u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

Plaintiff commenced the instant action asserting claims for, *inter alia*, malpractice and breach of fiduciary duty based on defendants alleged negligence in allowing plaintiff to be publicly identified as a whistleblower. By separate notices of motion, defendants Steven Lance Wittels (“Wittels”) and Sanford Heisler, LLP (“Sanford Heisler”) (collectively referred to herein as “moving defendants”) now move for an order pursuant to CPLR §§ 3211(a)(7) and 3016(b) dismissing plaintiff’s complaint on the ground that it fails to state a cause of action and fails to plead breach of fiduciary duty with the required specificity. Additionally, said defendants seek an order dismissing plaintiff’s claim for punitive damages. These motions are hereby

consolidated for disposition purposes and, for the reasons set forth below, moving defendants' motions are granted.

The relevant facts are as follows. This action centers around the fact that plaintiff, in 2009, was publicly identified as a whistleblower in a patent lawsuit between Convolve, Inc. ("Convolve") and Seagate Technology, LLC ("Seagate"). Specifically, in 2003, plaintiff was employed as an engineer at Seagate Technology, LLC ("Seagate"). At that time, plaintiff testified as a 30 (b)(6) witness for Seagate in a pending patent lawsuit commenced by Convolve against Seagate (the "CS Lawsuit"). Six years later, after being terminated by Seagate, plaintiff was contacted by Seagate's attorney and was advised that the CS Lawsuit was likely going to trial in January 2010 and that he might be called as a trial witness on Seagate's behalf. According to plaintiff's complaint, "[p]rompted by the call from Seagate's attorney, [he] did some research on the ongoing lawsuit and learned that, in addition to the patent litigation, Convolve had sued Seagate for violation of a non-disclosure agreement (NDA)." Thereafter, "[a]fter reviewing the case, [plaintiff] came to the conclusion that Seagate had violated the NDA." (Emphasis in original). Apparently, disturbed by the realization that the work he had done at Seagate had violated the NDA, plaintiff sent an email to Convolve asking that its legal department contact him.

Plaintiff alleges that in response to this email, he was contacted by one or more attorneys from defendant Cadwalader Wickersham & Taft, LLP ("Cadwalader"), who represented Convolve in the CS Litigation. Specifically, plaintiff alleges that defendant Debra Brown Steinberg ("Steinberg") was on the initial call with him. During the call, Cadwalader's attorneys allegedly asked if plaintiff was represented by counsel and after he told them he might still be represented by Seagate's attorney, the call ended. Thereafter, plaintiff alleges that he was

contacted by Neil Singer, CEO of Convolv who recommended that plaintiff contact Wittels, an attorney formerly employed by Sanford Heisler's predecessor firm, Sanford Wittels & Heisler, LLP, at the time of the acts complained of herein, regarding plaintiff's termination of his employment from Seagate.

On September 22, 2009, after contacting Wittels, plaintiff flew to New York and met with Wittels in his office. According to plaintiff's complaint, during the meeting, Wittels advised plaintiff that he did not think that there was anything improper about plaintiff's termination from Seagate and that "[t]owards the end of the meeting, [Wittels] mentioned that Convolv's attorneys would like to speak to [plaintiff]." Thereafter, Wittels allegedly sent plaintiff a retainer agreement, which stated that Wittels would be representing plaintiff in connection with potential claims against Seagate and in connection with the CS Litigation.

On or about November 12, 2009, plaintiff participated in a conference call with Wittels, Steinberg and James Bailey ("Bailey"), another Cadwalader attorney, regarding the CS Litigation. Thereafter, on or about November 24, 2009, plaintiff met in person with Wittels, Steinberg and Bailey. During that meeting, plaintiff alleges that Wittels told him that Steinberg planned to draft a statement based on what plaintiff had told her during the meeting and that the statement would be turned into an affidavit. Moreover, Wittels briefly explained what an affidavit was and said that "we" would do everything to prevent the affidavit from being made public. Thereafter, Steinberg allegedly presented a statement to plaintiff to sign and informed plaintiff that it would later be turned into an affidavit. Plaintiff alleges that at this time he "expressed his concern about the possibility of his affidavit and name being made public because public disclosure could be damaging to his career," but Wittels and Steinberg convinced him "that he did not need to be concerned about his identity becoming public." Moreover, plaintiff

asserts that “Steinberg assured [him] that she would file his affidavit under seal.” However, according to plaintiff’s complaint, “Steinberg [also] explained that it was likely that counsel for Seagate would dispute [his] testimony and he could expect to be deposed in the future.”

Thereafter, on or about November 7, 2009, Steinberg sent plaintiff a drafted affidavit, which plaintiff signed and had notarized. Steinberg filed that affidavit under seal in the CL Litigation but also filed an accompanying memorandum of law, not under seal, which identified plaintiff as the whistleblower against Seagate. On December 28, 2009, the New York Times published an article detailing plaintiff’s whistleblower testimony and identifying him by name. Specifically, the article cited to court filings by Convolv’s attorneys, including Steinberg’s affidavit and memorandum of law. Prior to this article coming out, plaintiff, who was unemployed at the time, had verbally accepted a position as a Director of Engineering at an unknown company (the “Company”). However, according to plaintiff, after the article came out and he informed his new employer of it, the company withdrew its offer of employment.

Thereafter, Wittels brought suit on behalf of plaintiff against the Company for wrongful termination (the “Retaliation Lawsuit”), which settled in January 2012 (the “Settlement”). Plaintiff provides no details about the Retaliation Lawsuit or what the terms of the Settlement were.

Plaintiff now brings the instant action alleging that as a direct result of the defendants’ misconduct in regards to allowing him to be publicly identified as a whistleblower he has been unable to find suitable employment in his field. Specifically, in his amended complaint, plaintiff asserts two causes of action against Wittels and Sanford Heisler, as successor in interest to Wittels former employer at the time the acts complained of herein occurred, for malpractice and breach of fiduciary duty. Wittels and Sanford Heisler now move for an order dismissing the two

claims.

On a motion addressed to the sufficiency of the complaint, the facts pleaded are assumed to be true and accorded every favorable inference. *Morone v. Morone*, 50 N.Y.2d 481 (1980). “[A] complaint should not be dismissed on a pleading motion so long as, when plaintiff’s allegations are given the benefit of every possible inference, a cause of action exists.” *Rosen v. Raum*, 164 A.D.2d 809 (1st Dept 1990). However, “[i]n those circumstances where the legal conclusions and factual allegations are flatly contradicted by documentary evidence they are not presumed to be true or accorded every favorable inference.” *Morgenthow & Latham v. Bank of New York Company, Inc.*, 305 A.D.2d 74, 78 (1st Dept 2003) (quoting *Biondi v. Beekman Hill House Apt. Corp.*, 257 A.D.2d 76, 81 (1st Dept 1999), *aff’d*, N.Y.2d 659 (2000)). Additionally, “conclusory allegations—claims consisting of bare legal conclusions with no factual specificity—are insufficient to survive a motion to dismiss.” *Godfrey v. Spano*, 13 N.Y.3d 358, 373 (2009).

In order to state a claim for legal malpractice, “the plaintiff must plead factual allegations which, if proven at trial, would demonstrate that counsel had breached a duty owed to the client, that the breach was the proximate cause of the injuries, and that actual damages were sustained.” *Dweck Law Firm, LLP v. Mann*, 283 A.D.2d 292, 293 (1st Dept 2001). Specifically, “[i]n order to survive dismissal, the complaint must show that but for counsel’s alleged malpractice, the plaintiff would not have sustained some ascertainable damages.” *Russo v. Feder, Kaszovitz, Isaacson, Weber, Skala & Bass*, 301 A.D.2d 63, 67 (1st Dept 2002). Indeed, “[a] failure to establish proximate cause requires dismissal regardless of whether negligence is established.” *Id.* Moreover, “[t]he plaintiff is required to plead actual, ascertainable damages that resulted from

the attorneys' negligence. Conclusory allegations of damages or injuries predicated on speculation cannot suffice for a malpractice action, and dismissal is warranted where the allegations in the complaint are merely conclusory and speculative." *Bua v. Purcell & Ingrao, P.C.*, 99 A.D.3d 843, 847 (2nd Dept 2012) (internal citations omitted). To be sure, plaintiff "is not obliged to show . . . that he actually sustained damages, but only that damages attributable to defendants' conduct might be reasonably inferred." *Fielding v. Kupferman*, 65 A.D.3d 437, 442 (1st Dept 2009) (internal citations and quotation marks omitted). However, even at the pleading stage, those damages must not be speculative. *See Zarin v. Reid & Priest*, 184 A.D.2d 385, 388 (1st Dept 1992).

In the present case, plaintiff's claim for malpractice must be dismissed as against the moving defendants as the allegations in the amended complaint, taken as true and given the benefit of every possible inference, fail to demonstrate that but for Wittels' alleged negligence plaintiff would not have been publicly named as a whistleblower and he would have found suitable employment. Moreover, plaintiff fails to plead actual and ascertainable damages that resulted from Wittels' alleged negligence. Plaintiff bases his malpractice claim on the following allegations: (1) "Mr. Wittels failed to advise [plaintiff] that by disclosing what he knew to Convolve and signing an affidavit, it was likely that his name would be made public"; (2) "Mr. Wittels failed to advise [plaintiff] that it was likely that he would be publicly disclosed as a whistleblower by providing Convolve with an affidavit in connection with the Seagate litigation"; (3) "Mr. Wittels failed to advise [plaintiff] that Ms. Steinberg was not under a duty to protect [his] identity"; (4) "Mr. Wittels failed to take any steps to ensure that Ms. Steinberg filed both [plaintiff's] affidavit and any court documents referencing his affidavit under seal"; and (5)

“Mr. Wittels failed to take any steps to lessen the harm caused by the disclosure of [plaintiff’s] name as a whistleblower.” In short, the crux of plaintiff’s claim for malpractice against moving defendants is that he would not have gone forward with the affidavit and his name would not have been made public if Wittels would have properly advised him about the risks of signing the affidavit and taken additional steps to ensure the documents filed by Steinberg were all under seal. As an initial matter, these allegations are insufficient to state a claim for legal malpractice as plaintiff has failed to allege that had he known his name would be made public he would not have in any way participated in the CS Litigation. Without this allegation plaintiff cannot establish that but for moving defendants’ actions he would not have been publicly exposed as a whistleblower as any participation in the CS Litigation could have resulted in him being publicly identified as a whistleblower with or without him providing the affidavit. Accordingly, plaintiff’s complaint fails to show that but for moving defendants’ actions he would not have been publicly exposed as a whistleblower and would have found suitable employment.

Additionally, plaintiff fails to allege in his amended complaint actual and ascertainable damages stemming from Wittels’ alleged negligence. Plaintiff asserts in his amended complaint that he has been damaged by Wittels’ alleged negligence as he has not been able to find “suitable employment” since he was publicly identified as a whistleblower. However, plaintiff fails to offer any concrete factual allegations in support of this assertion. Instead, plaintiff offers only his own speculation that he has not received job offers based on his status as a whistleblower.

Additionally, plaintiff has failed to adequately plead a claim for breach of fiduciary duty against moving defendants in his amended complaint. To sufficiently plead a cause of action for breach of fiduciary duty, a party must allege: “(1) the existence of a fiduciary relationship, (2)

misconduct by the [other party], and (3) damages directly caused by the [other party's] misconduct." *Smallwood v. Lupoli*, 107 A.D.3d 782, 784 (2d Dept 2013). Additionally, the same "but for" standard of causation, applicable to a legal malpractice claim, also applies to the claim for breach of fiduciary duty. See *Weil, Gotshal & Manges, LLP v. Fashion Boutique of Short Hills, Inc.*, 10 A.D.3d 267, 270 (1st Dept 2004). Specifically, in *Weil Gotshal & Manges*, the First Department held: "We have never differentiated between the standard of causation requested for a claim of legal malpractice and one for breach of fiduciary duty in the context of attorney liability. The claims are coextensive. Under New York law, to establish the elements of proximate cause and actual damages, where the injury is the value of the claim lost, the client must meet the 'case within a case' requirement, demonstrating that 'but for' the attorney's conduct the client would have prevailed in the underlying action or would not have sustained any ascertainable damages." *Id.* at 271-72.

Here, plaintiff fails to allege facts in his amended complaint demonstrating the "but for" causation and actual damages sustained required to maintain a claim for breach of fiduciary duty. In his amended complaint, plaintiff alleges that Wittels breached his fiduciary duties of undivided loyalty as he had a "pre-existing and undisclosed personal relationship with Neil Singer, the C.E.O of Convolve" and accepted payment from Covovle for his legal fees incurred in representing plaintiff. Plaintiff further alleges that "[b]ecause of his divided loyalty, Mr. Wittels improperly urged [plaintiff] to settle the Retaliator litigation prematurely" and "improperly put Convolve's interest in making sure that information about [plaintiff's] relationship with Convolve not become public ahead of [plaintiff's] interest in obtaining full recovery for the damages he suffered as a result of the Retaliator's misconduct." These

