

Guidance Endodontics v Olshan, Grundman, Frome, Rosenweig & Wolosky LLP
2016 NY Slip Op 32191(U)
October 25, 2016
Supreme Court, New York County
Docket Number: 163139/15
Judge: Charles E. Ramos
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

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GUIDANCE ENDODONTICS,

Plaintiff,

Index No. 163139/15

- against -

OLSHAN, GRUNDMAN, FROME, ROSENWEIG &
WOLOSKY LLP,

Defendant.
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Hon. C. E. Ramos, J.S.C.:

Defendant Olshan Frome Wolosky LLP f/k/a and s/h/a Olshan, Grundman, Frome, Rosenweig & Wolosky LLP (Olshan) moves, pursuant to CPLR 3211 (a) (1), (5) and (7) to dismiss the complaint.

Background

This is an action for legal malpractice arising out of the representation of plaintiff Guidance Endodontics, LLC (Guidance) by defendant Olshan and non-party New Mexico law firm Modrall, Sperling, Roehl, Harris & Sisk, P.A. (Modrall) in a litigation brought on behalf of Guidance and its principal Charles Goodis against Dentsply International, Inc. (Dentsply) for breach of a manufacturing and supply agreement and violations of New Mexico and federal law (Dentsply action). Modrall and Olshan tried the case for three weeks before a New Mexico jury, which awarded Guidance over \$44 million in compensatory and punitive damages. The judge presiding over the Dentsply action slashed the award to a total of \$8,160,002. Thereafter, following the filing of a notice of appeal and cross-appeal, Guidance settled the Dentsply

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action for \$11.5 million, and paid Olshan's and Modrall's fee.

In 2012, Guidance commenced a legal malpractice action against Olshan in this Court (First New York action). Following oral argument on Olshan's motion to dismiss, Guidance discontinued the First New York action without prejudice in order to permit completion of a New Mexico legal malpractice action that Guidance and its principal commenced against Modrall and Olshan in New Mexico (NM malpractice action). The NM malpractice action was dismissed as against Olshan based upon a forum selection clause in the parties' retainer agreement. In January 2013, the court in the NM malpractice action granted Modrall's motion for partial summary judgment dismissing Guidance's legal malpractice claim for compensatory damages arising from the loss of the opportunity to have been awarded greater punitive damages in the Dentsply action. Subsequently, in October 2013, the New Mexico court granted Modrall summary judgment dismissing the remainder of the action, based upon Guidance's voluntary decision to settle with Dentsply in the underlying (Dentsply) action rather than pursue other viable options, including seeking a higher recovery in a retrial. The court entered an order and final judgment dismissing the NM malpractice action. Guidance appealed the entry of judgment against it. While the appeal was pending, Guidance and Modrall reached a confidential settlement of the NM Malpractice Action. Guidance withdrew the appeal and

discontinued the action with prejudice.

In this action (Second New York action), Guidance alleges that Olshan committed legal malpractice by negligently handling evidentiary proof of future market share lost profit damages. Guidance maintains that there were un-designated or un-utilized fact witnesses that could have supported or supplemented the proofs of damages presented in the Dentsply action. Olshan also allegedly failed to make initial disclosure of the nature of damages, failed to supplement answers to interrogatories, failed to update the calculation of damages, and even failed to notify its adversaries that Guidance would be seeking an additional \$74 million in damages.

Discussion

Olshan moves to dismiss the complaint primarily on the basis of collateral estoppel, arguing that the summary judgment decisions dismissing Guidance's malpractice claims in the NM malpractice action bar Guidance's complaint in the Second New York action, in which Guidance attempts to assert largely identical claims as in the prior, dismissed action. In the alternative, Olshan argues that Guidance's malpractice claim is based entirely on speculation, namely, that the New Mexico court in the Dentsply action would have allowed Guidance's expert to testify as to \$74 million in lost future market-share damages, and based on that testimony, that the jury would have awarded an

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additional \$74 million in damages which the court would have sustained, but for Olshan's alleged negligence. As to the breach of fiduciary duty claim arising out of allegations that Olshan charged excessive legal fees, Olshan argues that this claim is barred by the applicable statute of limitations and voluntary payments doctrine.

In opposition, Guidance maintains that the prior litigation against Modrall does not collaterally estop this action because there is no identity of issue.

At the outset, where, as here, the law of more than one jurisdiction is potentially applicable, the court must determine if the laws of the different jurisdictions conflict (*Matter of Allstate Ins. Co. [Stolarz]*, 81 NY2d 219, 223 [1993]). Neither party has argued that there is an actual conflict between New York and New Mexico law with respect to a legal malpractice claim or collateral estoppel, and the Court can discern none (*compare Rudolf v Shayne, Sranisci, Corker & Sauer*, 8 NY3d 438 [2007]; *with Hyden v law Firm of McCormick, Forbes, Caraway & Tabor*, 115 NM 159 [1998]; *Silva v State*, 106 NM 472, 476 [1987]).

Under New York law, collateral estoppel is based upon the notion that a party, or one in privity with a party, should not be permitted to re-litigate an issue that was previously decided against it (*Singleton Mgt., Inc. v Compere*, (243 AD2d 213 [1st Dept 1998])). In order to invoke the doctrine, there must be

identity of issue which has necessarily been decided in the prior action and is decisive of the present action, and there must have been a full and fair opportunity to contest the decision now said to be a controlling one (*In re Felix*, 134 AD3d 57 [1st Dept 2015]). "[P]reclusive effect may be given to issues that were actually litigated, squarely addressed and specifically decided (*Ross v Medical Liability Mutual Insurance*, 75 NY2d 825 [1990]).

According to Olshan, the summary judgment decisions in the NM malpractice action dismissing Guidance's malpractice claims against its lead counsel Modrall are fatal to its malpractice claim in this action under the doctrine of collateral estoppel.

Guidance asserts that collateral estoppel cannot apply because the summary judgment decisions in the Modrall action cannot be considered a final judgment on the merits because the actual final judgment was a joint voluntary dismissal of the case on settlement, which leaves the suit as if it had never been brought. Olshan agrees with Guidance that there is no conflict between New York and New Mexico law on this issue.

This Court determines that Guidance is collaterally estopped from asserting a legal malpractice claim in this action. The identical issues upon which the New Mexico court initially entered partial and then complete summary judgment are present in this action. Here, Guidance alleges that Olshan (and Modrall) committed malpractice by negligently preparing and presenting

evidentiary proof of future market share lost profit damages, and expert testimony on the issue of loss of business in the Denstply action. These precise issues were squarely addressed in the NM malpractice action against Modrall. After the parties litigated vigorously, the court in the NM malpractice action ruled against Guidance and dismissed the claim for legal malpractice by granting summary judgment in favor of Modrall (see Exhibits C-F, H, annexed to the Bisceglie Aff.).

Furthermore, there is no authority to support Guidance's assertion that its settlement and joint discontinuance of the Modrall action with prejudice renders the prior, unfavorable summary judgment decisions as if they had never existed, and all of the caselaw which Guidance cites to is inapposite.

Notwithstanding the clear application of the doctrine of collateral estoppel, the claim for legal malpractice fails, as here, where it is based on rank speculation (see e.g. *Boone v Bender*, 74 AD3d 1111 [2d Dept], *lv denied* 16 NY3d 710 [2010]; *Pellegrino v File*, 291 AD2d 60 [1st Dept 2002]; *Feldman v Jasne*, 294 AD2d 307 [1st Dept 2002]; see also *Summerville v Lipsig*, 270 AD2d 213 [1st Dept 1999]).

Finally, Guidance's claim for breach of fiduciary duty fails on multiple grounds. First, the claim is untimely because it is asserted more than three years prior to payment of the fee in September 2011 (see CPLR 214 [4]). The claim is also redundant

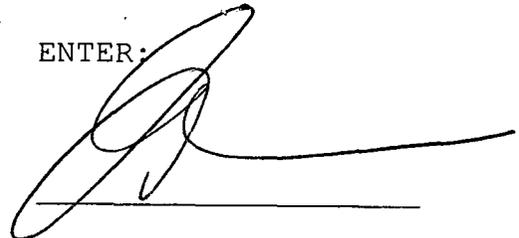
of the non-viable malpractice claim (*Sun Graphics Corp. v Levy, Davis & Maher, LLP*, 94 AD3d 669 [1st Dept 2012]). Both the legal malpractice and breach of fiduciary duty claims arise from the same factual basis and caused the identical alleged damage.

Finally, the claim is barred by the common law doctrine of voluntary payments, which bars recovery of payments voluntarily made with full knowledge of the facts, and in the absence of fraud or mistake of material fact, which Guidance does not allege (*Dillon v U-A Cablevision of Westchester*, 100 NY2d 525 [2003]).

Accordingly, it is

ORDERED that defendant's motion for an order dismissing the complaint is granted in its entirety, and the Clerk is directed to enter judgment accordingly.

Dated: October 25, 2016

ENTER: 

J.S.C.