

Sahagen v Drye

2001 NY Slip Op 30093(U)

July 31, 2001

Supreme Court, New York County

Docket Number: 602933-00

Judge: Walter B. Tolub

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PRESENT: WALTER B. TOLUB
Justice

PART 15

Sahagan
Nelley Dreyer, etc

INDEX NO. 602933-00
MOTION DATE 3/8/01
MOTION SEQ. NO. 02
MOTION CAL. NO. _____

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

MOTION/CASE IS RESPECTFULLY REFERRED TO
JUSTICE

Dated: 7/31/01

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WALTER B. TOLUB
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

-----x
PETER SAHAGEN,

Plaintiff,

-against-

Index No. 602933/00
Mtn Seq. No. 002

KELLEY DRYE & WARREN and JONATHAN
CANIS,

Defendants.
-----x

WALTER B. TOLUB, J.:

The defendants move to dismiss the complaint, pursuant to CPLR 3211(a)(1) and 3211(a)(7). The motion is granted in part.

In the late 1990's, the defendant law firm Kelley Drye & Warren ("KDW"), and specifically defendant partner Jonathan Canis ("Canis"), represented the plaintiff. One of the matters in which the defendants represented the plaintiff was his investment in American Metrocomm, Inc. ("AMC"), a start up local service telephone company. The plaintiff eventually asked Canis to sit on AMC's Board of Directors.

The plaintiff subsequently handed control of his AMC shares to Michael Henry ("Henry"), an executive the plaintiff recruited to run AMC. At the same time, the plaintiff entered into a contract with Henry which gave Henry voting control of the plaintiff's Class A AMC common shares. Pursuant to this agreement, Henry effectively became the owner of the AMC shares for voting purposes, but the plaintiff retained power with regard to action involving a merger or consolidation of AMC.

In early 2000, AMC discussed the possibility of a merger with ILD Telecommunications, Inc. ("ILD"). The amended complaint alleges that the defendants schemed with Henry to convince ILD, as a condition of the merger, that the plaintiff give up a large portion of his interest in AMC. According to the plaintiff, the defendants wrongfully agreed to represent Henry in this effort, and caused the plaintiff to invest more than an additional \$1,000,000 in AMC. It is further alleged that when the plaintiff obtained new counsel, the defendants refused to provide new counsel with information, and that the defendants breached their fiduciary duties. The plaintiff outlines numerous allegations regarding Henry, and contends that KDW supported, encouraged, and approved those actions, including the participation in a defamatory mail campaign against the plaintiff.

Five causes of action are alleged: (1) breach of fiduciary duty; (2) legal malpractice; (3) breach of contract; (4) aiding and abetting breach of fiduciary duty; and (5) conspiracy to breach fiduciary duties. The defendants have counterclaimed for nearly \$210,000 in unpaid legal fees and disbursements.¹

¹The parties agree that the substantive law of Washington, D.C. governs, based on the defendants' representation of the plaintiff in Washington D.C. and the choice of law provision in KDW's retainer agreement. The parties further agree that New York's procedural standards apply, as New York is the forum state.

A. Breach of Fiduciary Duty, Legal Malpractice, & Breach of Contract

In moving to dismiss the first and second causes of action, the defendants contend that the plaintiff has wholly failed to establish a proximate causal connection between the negligent conduct and the resulting injury. The defendants argue that the plaintiff's allegations of specific damages are not tied by any factual allegation to the alleged legal malpractice of breaches of fiduciary duty.

The plaintiff counters that he need not allege that he has suffered any damages, but is entitled to cancellation of any amounts owed the defendants based upon his claims for breach of fiduciary duties and legal malpractice. In any event, the plaintiff claims, the defendants violated District of Columbia legal ethical rules and represented AMC and Henry against the plaintiff's interests.

In determining whether to grant a motion to dismiss based upon failure to state a cause of action, "the pleadings must be liberally construed and the facts alleged accepted as true; the court must determine 'only whether the facts as alleged fit within any cognizable legal theory'" (Wiener v Lazard Freres & Co., 241 AD2d 114, 120 [1st Dept 1998] [quoting Leon v Martinez, 84 NY2d 83, 87-88 (1994)]). This test is so liberal that the standard is simply whether the plaintiff has a cause of action, not even whether one has been stated. Id.

The Court is satisfied that dismissal of the first and second causes of action is not warranted at this time. Under D.C. law, to state a claim for professional malpractice or breach of fiduciary duty, a plaintiff is required to allege facts which establish "a proximate causal connection between the negligent conduct and the resulting injury" or "facts from which proximate cause and injury may be inferred" (Shapiro, Lifschitz & Schram, P.C. v Hazard, 24 FSupp2d 66, 75 [DDC 1998]).

At this point of the litigation, it cannot be stated that dismissal is warranted, as there are facts from which proximate cause and injury may be inferred. It is alleged that the defendants represented AMC and Henry to the detriment of their client, the plaintiff, for the purpose of making a larger profit. It is further alleged that the defendants failed to abide by their duty of loyalty by representing AMC and Henry and not warning the plaintiff of the possible conflict. Although the plaintiff's case may not be the strongest, dismissal of these claims at this time is inappropriate (see, Hendry v Pelland, 73 F3d 397, 402 [DC Cir 1996] ["clients suing their attorney for breach of the fiduciary duty of loyalty and seeking disgorgement of legal fees as their sole remedy need prove only that their attorney breached that duty, not that the breach caused them injury"]).

As the defendants also seek to dismiss the breach of

contract cause of action (which is based on the April 16, 1999 Engagement Letter) on the same grounds as that for breach of fiduciary duty and legal malpractice (see, Defendants' Reply Memo, at 13), and as the Court rejects the motion to dismiss these claims, the motion to dismiss the third cause of action for breach of contract is likewise denied.

B. Aiding & Abetting Breach of Fiduciary Duty & Conspiracy to Breach Fiduciary Duty

The fourth and fifth causes of action allege that the defendants aided and abetted Henry in breaching his fiduciary duty and conspired with Henry to breach his fiduciary duty. These claims rely on the assumption that Henry was a fiduciary to the plaintiff. However, the plaintiff ignores the clear language of the agreement entered into by Henry and the plaintiff. Paragraph 12 of the agreement specifically provides that Henry, as the trustee, "whether or not acting upon the advice of counsel, shall not incur or be under any responsibility or liability as Holder, trustee, fiduciary or otherwise" (Walsh Aff., Exh. C, Voting Trust, at ¶ 12). The fourth and fifth causes of action are therefore dismissed.

The plaintiff requests leave to file a second amended complaint should the Court dismiss any of the causes of action. The request is denied, as the plaintiff has failed to submit a copy of the proposed amended pleading (see, Sirchi v Lee, 222 AD2d 222, 223 [1st Dept 1995]).

Accordingly, it is ordered that the motion to dismiss the complaint is granted in part and the fourth and fifth causes of action are dismissed.

Counsel are directed to appear in IA Part 15 (Room 335) for a compliance conference on September 14, 2001 at 11 AM.

This constitutes the decision and order of the Court.

Dated: 7/31/01

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HON. WALTER B. TOLUB, J.S.C.