

Putter v Feldman

2003 NY Slip Op 30111(U)

July 9, 2003

Supreme Court, New York County

Docket Number: 0110420/2002

Judge: Emily Jane Goodman

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

DECEMENT. **EMILY JANE GOODMAN**

PART 17

0110420/2002

PUTTER, LLOYD
vs
FELDMAN, RICHARD

INDEX NO. 110420-02

MOTION DATE _____

MOTION SEQ. NO. _____

SEQ 1
DISMISS ACTION

MOTION CAL. NO. **SCANNED**

JUL 17 2003

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 *to dismiss is decided in accordance with the attached memorandum decision*

MOTION/CASE IS RESPECTFUL Y REFERRED TO JUSTICE

Dated: 7/8/03



J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

EMILY JANE GOODMAN

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : I.A.S. PART 17
-----X

LLOYD PUTTER,

Plaintiff,

Index #110420/02

-against-

Motion Seq.#001

RICHARD B. FELDMAN And FELDMAN &
MARKMAN, LLP,

Defendants.

-----X

EMILY JANE GOODMAN, J.:

Defendants Richard B. Feldman and Feldman & Markman, LLP (the Firm) move, pursuant to CPLR 3211 (a) (1) and (7), to dismiss the complaint. Feldman is a partner of the Firm.

The complaint alleges the following. At all times relevant to this action, plaintiff and his brother, Marvin Putter (Marvin) were directors and shareholders of Metropolitan Love, Inc. (Metropolitan) and True Love, Inc. (True Love). Metropolitan and True Love were New York corporations that operated health and beauty aids retail stores in Manhattan, as members of the "Love Stores" confederation of stores. Feldman represented a number of the "Love Stores" corporations, and he represented both plaintiff and Marvin, in connection with their interests in various "Love Stores." In or about March 1993, plaintiff and Marvin had a falling out with respect to plaintiff's rights as a shareholder in Love Manhattan, Inc. (Love Manhattan), another of the "Love Stores," and with respect to certain other matters involving plaintiff's interest in various of the "Love Stores" corporations.

certain other matters involving plaintiff's interest in various of the "Love Stores" corporations. Feldman tried to mediate the dispute between the brothers, but certain issues remained unresolved.

The complaint further alleges that on or about May 20, 1999, Marvin caused approximately ten of the corporations that were operating various "Love Stores" (collectively, the Selling Corporations), including Metropolitan and True Love, to sell and transfer all, or substantially all, of their assets to Duane Reade, Inc. (Duane Reade), a competitor of the "Love Stores." The sales of all, or substantially all, of the assets of Metropolitan and of True Love failed to comply with the requirements of Business Corporation Law § 909 (a) in that the boards of directors of those companies did not authorize the sales, no notices of meeting were given to the shareholders of record of those companies, and the shareholders of those companies did not meet to approve the sales. Plaintiff received no distribution of the sales proceeds from either Metropolitan or True Love, and those companies were sold at less than fair value, thereby inflating the prices that Duane Reade paid for the assets of the other Selling Corporations in which Marvin, but not plaintiff, was a shareholder. Defendants represented Duane Reade in its purchase of the assets of Metropolitan and True Love without requiring documentation of the normal and expected notices of meetings, resolutions or minutes, and thereby caused Duane Reade to ignore the due diligence procedures that are

normally applicable to the purchase of all, or substantially all, of the assets of a corporation. Defendants did not disclose to plaintiff either the proposed transactions between the Selling Corporations and Duane Reade, or the fact that defendants were representing Duane Reade in those transactions. Plaintiff did not learn that the assets of Metropolitan and of True Love had been sold to Duane Reade until after those sales had closed, in or about May 1999. These factual allegations must be taken as true for purposes of this motion. Leon v Martinez, 84 NY2d 83, 87-88 (1994); Hoag v Chancellor, Inc., 246 AD2d 224, 228 (1st Dept 1998).¹

The complaint alleges three causes of action, respectively, fraudulent concealment, breach of fiduciary duty, and aiding and abetting Marvin to breach his fiduciary duties to plaintiff. Plaintiff seeks punitive, as well as compensatory, damages in connection with the second and third causes of action.

Defendants argue that the first cause of action must be dismissed because plaintiff has not pled the alleged fraud with particularity (CPLR 3016 [b]), and because Feldman had no duty to disclose to plaintiff either the ongoing negotiations between the Selling Corporations and Duane Reade, or that he was representing

¹ The documents upon which defendants rely, in seeking to dismiss the complaint pursuant to CPLR 3211 (a) (1), raise a dispute as to certain of the allegations in the complaint but utterly refutes none of them. They most certainly do not establish a defense as a matter of law. See Goshen v Mutual Life Ins. Co. of New York, 98 NY2d 314, 326 (2002).

Duane Reade. Defendants argue that the second and the third causes of action must be dismissed because, at the time of the sale to Duane Reade, there was no privity between plaintiff and Feldman. Finally, defendants argue that plaintiff is not entitled to punitive damages.

As defendants acknowledge, it is settled that, when there is a duty to speak, a failure to speak may constitute fraudulent concealment. See e.g. Guardian Life Ins. Co. of America v Handel, 190 AD2d 57 (1st Dept 1993). Plaintiff has alleged that Feldman failed to tell him that he, Feldman, was negotiating on behalf of a prospective purchaser of stores, and Feldman knew that plaintiff had an interest. This allegation satisfies the specificity requirement of CPLR 3016 (b). Where the gravamen of a complaint is that the defendant failed to speak, the plaintiff can hardly be required to "particularize the substance of any alleged conversations." Defendants' Mem. of Law, at 7. See also Houbigant, Inc v Deloitte & Touche L.L.P., 303 AD2d 92 (1st Dept 2003) (lower court erred in dismissing fraud claim due to insufficiencies in the pleadings because the surrounding circumstances of the fraud are sometimes within the particular knowledge of the party against whom fraud is asserted).

However, the Court agrees with defendants that under the circumstances alleged in the complaint, Feldman had no duty to speak. See Wall Street Transcript Corp. v Ziff Communications Co., 225 AD2d 322 (1st Dept 1996) (affirming dismissal of fraud claim based on non-disclosure because there was no duty to

speak); Jolly King Rest., Inc. v Hershey Chan Realty, Inc., 214 AD2d 422 (1st Dept 1995) (absent a duty to speak, non-disclosure does not ordinarily constitute fraud). A lawyer has no general continuing obligation to pass on information to a former client, such as Putter, relating to the former client's representation. See Restatement (Third) of the Law Governing Lawyers § 33, comment **h**. Outside of an attorney-client relationship, a lawyer's duty to speak is limited. DR 7-102 provides that, where a client has perpetrated a fraud in the course of representation upon a person, and the client refuses or cannot rectify the fraud, the attorney is required to reveal the fraud to the affected person, unless the information is protected as a confidence or secret. The complaint makes no allegation that Duane Reade, defendants' client, perpetrated a fraud. The fact that the complaint alleges that defendants caused Duane Reade to ignore the normal due diligence procedures applicable to the transaction is insufficient. Complaint, at 5. However, the plaintiff's request for leave to replead is granted.

With respect to the second cause of action, an attorney, whose representation of a client has ended, continues to have a fiduciary duty to that former client to the extent that the attorney may not represent an interest adverse to that of the former client in any matter substantially related to the subject matter of the prior representation. Krouner v Koplovitz, 175 AD2d 531 (3d Dept 1991). Two matters are considered substantially related when, in the new matter, the attorney would

employ confidential information that he or she had acquired in the course of the prior representation. See Kuberzig v Advanced Dermatology, P.C., 260 AD2d 548 (2d Dept 1999) (unlikely that defendant acquired confidential information relevant to subsequent action).

Here, however, plaintiff's sole factual allegations, concerning Feldman's prior representation of him, are that Feldman represented him in connection with his interest "in various 'Love Stores'" and that, in the course of that representation, Feldman learned of certain disputes between plaintiff and Marvin concerning plaintiff's interests in a number of the "Love Stores." Complaint, at 2. These allegations do not state, nor fairly give rise to, an inference that the matters as to which Feldman represented plaintiff are substantially related to the matter in which he later represented Duane Reade. The complaint alleges, only in a conclusory manner, that Feldman owed plaintiff a fiduciary duty. Accordingly, the second cause of action will be dismissed. However, plaintiff's request for leave to replead **is** granted.

With respect to the third cause of action, the complaint adequately alleges a claim for aiding and abetting another's (Marvin's) commission of fraud, because it alleges that defendants knew that the transaction was consummated without all required notices and approvals, that defendants participated in the illegal transaction for their own benefit, and that plaintiff sustained injury because the sale was for less than fair value.

See Rizel v Bodner, 225 AD2d 410 (1st Dept 1996). Defendants argue that the third cause of action must be dismissed because of a lack of privity between plaintiff and Feldman, citing Parrot v Coopers & Lybrand, L.L.P. (263 AD2d 316 [1st Dept], affd 95 NY2d 479 [2000]). However, in Parrot, the Court dismissed the aiding and abetting cause of action, not because of the lack of privity, but because that cause of action rested solely upon conclusory allegations. In an action against a member of a profession, the issue of privity, or the lack thereof, is relevant only to a claim of negligence. It has no bearing on claims of intentional tort. The complaint alleges that defendants "willful[ly] and intentional[ly]" aided and abetted Marvin's breach of his fiduciary duties to plaintiff. Complaint, at 6.

With respect to punitive damages, the conduct alleged in the third cause of action, like that alleged in the second cause of action, does not nearly rise to such a level of moral culpability as to warrant punitive damages. See Giblin v Murphy, 73 NY2d 769 (1988).

Accordingly, it is hereby

ORDERED that defendants' motion to dismiss is granted to the extent that the first and second causes of action are dismissed with leave to replead; and defendants' motion is granted to the extent that the claims for punitive damages in the second and third cause of action are dismissed with prejudice; and it is further

ORDERED that plaintiff may, if he is so advised, serve an

amended complaint within 30 days from the date hereof; and it is further

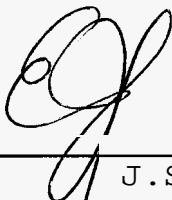
ORDERED that the remainder of this action shall continue; and it is further

ORDERED that defendants shall serve their answer to the complaint, **or**, if plaintiff serves an amended complaint, to that complaint, 30 days after the last date upon which plaintiff may serve an amended complaint.

This constitutes the Decision and Order of the Court.

Dated: July 9, 2003

ENTER:



J.S.C.

EMILY JANE GOODMAN