

Toste Farm Corp. v Fowler

2006 NY Slip Op 30614(U)

January 26, 2006

Sup Ct, NY County

Docket Number: 600448-05

Judge: Rosalyn H. Richter

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

PRESENT: HON. ROSALYN RICHTER
Justice

PART 24

Toste Farm

INDEX NO. 600448/05

- v -

MOTION DATE _____

Fawkes

MOTION SEQ. NO. 01

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 _____

FILED

FEB 01 2006

Cross-Motion: Yes No

NEW YORK COUNTY CLERK'S OFFICE

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION

*PC scheduled for 3/15/06 10:00 am

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

Dated: 1/27/06

Rosalyn Richter
HON. ROSALYN RICHTER *J.S.C.*

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 24

-----X
TOSTE FARM CORPORATION and CARL ACEBES,
Individually and on behalf of IRA FBO Carl Acebes,
UBS (formerly PaineWebber, Inc.) account no.
JG12642-69) as its beneficial owner,

Plaintiffs,

-against-

BATTLE FOWLER, *et al.*,

Defendants.

DECISION AND ORDER
Index No. 600448-05
Motion Seq. No. 1

FILED

FEB 01 2006

NEW YORK
COUNTY CLERK'S OFFICE

-----X
Richter, J.:

In this action, plaintiffs allege that defendant Battle Fowler committed legal malpractice by failing to protect plaintiffs' interests in a partnership formed to purchase and own real property in Rhode Island. In particular, plaintiffs maintain that Battle Fowler neglected to ensure that the written partnership agreement, executed in November 1991, contained the necessary language to protect plaintiffs' substantial capital contribution in the event plaintiffs withdrew from the partnership. The complaint also alleges that Battle Fowler committed malpractice during a July 1992 auction during which plaintiffs lost their capital contribution.

In addition, plaintiffs contend that Battle Fowler breached a promise, made subsequent to the auction, to make plaintiffs whole as a result of Battle Fowler's allegedly negligent representation. According to the complaint, Battle Fowler induced plaintiffs not to assert a claim against the firm by promising to cover plaintiffs' damages. Battle Fowler purportedly proposed that plaintiffs file an action against their former partners and that Battle Fowler would consult with, assist and pay the legal fees of the Rhode Island counsel bringing the suit. The complaint further states that Battle

¹ The complaint names as defendants Battle Fowler and forty six of its partners or former partners.

Fowler promised that after the Rhode Island lawsuit was over, it would reimburse plaintiffs for any remaining damages not recovered.

In this motion, Battle Fowler seeks dismissal of the complaint pursuant to C.P.L.R. §3211[a][5] on statute of limitations grounds. Plaintiffs counter that Battle Fowler should be equitably estopped from asserting a statute of limitations defense. Plaintiffs also argue that the claims are nevertheless timely because the parties entered into a Tolling Agreement and Covenant Not To Sue (“the Tolling Agreement”). Battle Fowler concedes that the Tolling Agreement would render this action timely, but contends that that agreement is invalid and unenforceable.

It is well-settled that equitable estoppel may be invoked to defeat a statute of limitations defense where the plaintiff was lulled into inaction by the defendant in order to allow the statute of limitations to lapse, or where the defendant engaged in other conduct that caused the plaintiff to forebear from filing a timely action. *See, e.g., Kenny v. RBC Royal Bank*, 22 A.D.3d 385 (1st Dept. 2005); *East Midtown Plaza Housing Co. v. City of New York*, 218 A.D.2d 628 (1st Dept. 1995); *Robinson v. New York*, 24 A.D.2d 260 (1st Dept. 1965). Moreover, “the estoppel to plead the Statute of Limitations may arise without the existence of fraud or an intent to deceive and the courts will apply the doctrine of equitable estoppel to prevent an inequitable use of such defense.” *Rodriguez v. Morales*, 200 A.D.2d 406 (1st Dept. 1994). Whether or not an estoppel should be found is a question of fact that is generally not appropriate for summary disposition and should await the trial of the action. *See Matter of Spewack*, 203 A.D.2d 133(1st Dept. 1994).

Battle Fowler’s motion to dismiss on statute of limitations grounds is denied because plaintiffs’ complaint and supporting affidavits raise issues of fact as to the applicability of equitable

[* 4]

estoppel.² First, Battle Fowler purportedly extracted a promise from plaintiffs not to sue for malpractice while Battle Fowler made plaintiffs whole. At the time of this agreement, Battle Fowler allegedly failed to advise plaintiffs to obtain the advice of independent counsel. Next, plaintiffs were arguably lulled into a false sense of security by Battle Fowler's proposal of, involvement in and payment for the Rhode Island lawsuit, which lasted for many years in both federal and state court. Plaintiffs further contend that Battle Fowler told them not to tell Rhode Island counsel about the agreement not to sue. Plaintiffs also allege that Battle Fowler improperly prolonged the Rhode Island litigation by insisting that it be filed in federal court, where it was ultimately dismissed and re-filed in state court. In addition, Battle Fowler allegedly reneged on its promise to pay for the Rhode Island lawsuit, thus placing plaintiffs in the untenable position of choosing to sue Battle Fowler, which would undercut their position in the litigation, or continuing with the litigation and waiting to sue.

Plaintiffs chose the latter and then executed the Tolling Agreement which required, at Battle Fowler's alleged insistence, that plaintiffs forebear from a malpractice suit during the pendency of the Rhode Island case. The agreement explicitly provides that the parties "will not challenge or contest the authority of the parties to waive, agree to suspend the running of, or not to assert the defense of any applicable statute of limitations or laches period relating to the timing of any legal action contemplated or referred to herein". *See* Tolling Agreement, ¶ 4[b]. Several years after the Tolling Agreement was signed, plaintiffs and their former partners settled the Rhode Island lawsuit. When plaintiff then sought to bring its malpractice claim, Battle Fowler insisted that the Tolling

² In light of this conclusion, the Court need not determine, at this pre-answer stage, whether the Tolling Agreement is enforceable.

Agreement and plaintiffs' promise not to sue was still running because a third party action between Battle Fowler and plaintiffs' former partners was still pending. Relying on that representation, plaintiffs waited once again to bring their malpractice claims. Now, in this lawsuit, Battle Fowler changes course and argues that the Tolling Agreement is unenforceable, despite having promised not to challenge that agreement. Finally, the fact that Battle Fowler had a fiduciary obligation to plaintiffs and had represented plaintiff Carl Acebes for nearly twenty years makes plaintiffs' case for estoppel even more compelling.

In its response to this motion, Battle Fowler argues that equitable estoppel should not apply, yet it fails to provide any affidavits from the attorneys who actually handled plaintiffs' matter. Such information undoubtedly would shed light on the attorneys' motives for advising plaintiffs not to sue the firm or for entering into a Tolling Agreement which they now claim is invalid. Plaintiffs are certainly entitled to explore those issues during the discovery process. In light of plaintiffs' allegations, and the fact that discovery has not commenced, the Court concludes that Battle Fowler has failed to show that the action is time-barred as a matter of law. *See Vigliotti v. North Shore University Hospital*, ___ A.D.2d ___, 2005 NY Slip Op 10116 (2d Dept. 2005) ("the plaintiffs have adequately pleaded facts which, if proven, would establish the existence of an equitable estoppel"); *Dematteo v. Ratzan*, 300 A.D.2d 344 (2d Dept. 2002) (the plaintiff made sufficient allegations to, at the very least, raise triable issues of fact as to whether equitable estoppel is applicable); *Nick v. Greenfield*, 299 A.D.2d 172 (1st Dept. 2002) (plaintiffs set forth sufficient factual allegations of defendants' acts of deception to raise a triable issue of fact as to whether equitable estoppel should

apply); *Niagara Mohawk Power Corp. v. Freed*, 265 A.D.2d 938 (4th Dept. 1999)(same).³

Finally, there is no merit to Battle Fowler's contention that General Obligations Law § 17-103, which sets certain limits on tolling agreements, precludes plaintiffs from asserting equitable estoppel. That statute explicitly provides that it does not affect the court's power to find that a defendant can be equitably estopped from asserting a statute of limitations defense. *See* General Obligations Law § 17-103[4][b]. By this decision, the Court does not hold that Battle Fowler is equitably estopped from claiming the action is time-barred; it merely finds that there are issues of fact underlying the estoppel claim that must be further explored in discovery. Thus, the Court's decision is without prejudice to Battle Fowler's right to assert the statute of limitations as an affirmative defense in its answer and move for summary judgment at a later time.

The Court dismisses plaintiffs' second cause of action for breach of contract as duplicative of the malpractice claim. *See, e.g., Ferdinand v. Crecca & Blair*, 5 A.D.3d 538 (2d Dept. 2004)(breach of contract claim premised on an attorney's failure to exercise due care or abide by general professional standards dismissed as duplicative); *Sage Realty Corp. v. Proskauer Rose, LLP*, 251 A.D.2d 35 (1st Dept. 1998)(same). There is no merit to plaintiffs' claim that the cause of action should be upheld because Battle Fowler breached a promise to achieve a specific result. *See, e.g., Senise v. Mackasek*, 227 A.D.2d 184 (1st Dept. 1996). Plaintiffs do not point to any factual allegations in the complaint where Battle Fowler specifically promised to obtain a particular result. *See Schonfeld v. Rutherford Thompson*, 243 A.D.2d 343 (1st Dept. 1997)(mere failure to achieve

³ The Court notes that there are also factual disputes as to Battle Fowler's alleged continuous representation of plaintiffs. *See, e.g., Gravel v. Cicola*, 297 A.D.2d 620 (2d Dept. 2002)(issue of fact raised as to whether statute of limitations was tolled by the doctrine of continuous representation where the defendant was performing services in an attempt to rectify the alleged malpractice).

results desired by plaintiff cannot give rise to breach of contract claim in absence of specific promise to achieve that result). Indeed, the complaint explicitly identifies the claim as a "Breach of Contract To Provide Competent Legal Services", which is the essence of a legal malpractice claim. See Complaint, p. 16.

Finally, the Court denies Battle Fowler's motion to dismiss the breach of fiduciary duty claim. That cause of action is based not on the alleged malpractice but on the independent act of failing to advise plaintiffs to seek disinterested legal counsel before entering into the oral contract not to sue Battle Fowler and an alleged course of conduct in which Battle Fowler consistently placed its own interests above that of its fiduciary. Accordingly, it is

ORDERED that Battle Fowler's motion to dismiss the complaint is granted as to the second cause of action only and is otherwise denied; and it is further

ORDERED that Battle Fowler is directed to answer the complaint within thirty days of the date of this decision; and it is further

ORDERED that the parties are directed to appear for a preliminary conference in Part 24 on March 15, 2006 at 10:00 a.m.

This constitutes the decision and order of the Court.

January 27, 2006

Justice Rosalyn Richter

FILED
FEB 01 2006
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