

Esteva v Nash

2007 NY Slip Op 30584(U)

March 26, 2007

Supreme Court, New York County

Docket Number: 0104192/2005

Judge: Marylin G. Diamond

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: HON. MARYLIN G. DIAMOND PART 48

Justice

PAUL A. ESTEVA and SHORELINE
PROPERTIES GROUP, INC.,

Plaintiffs,

INDEX NO. 104192/05

-against-

KEVIN NASH, ESQ. and FINKEL GOLDSTEIN
BERZOW ROSENBLUM & NASH LLP,

Defendants.

MOTION SEQ. NO. 004

And Third-Party Action.

FILED
APR 09 2007
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that: Motion sequence numbers 004 and 005 are consolidated herein for decision. Plaintiff Paul Esteva is the president and sole shareholder of plaintiff Shoreline Properties Group Inc. During his marriage to Nancy Esteva, he and his wife owned all of the shares in at least two corporations, 349 Operating Corporation and ATC Operating Corporation. In addition, Nancy owned all of the shares in at least three corporations, CPM Services, Inc., 245 Operating Corp. and DLS Management, Inc. In May, 2001, Paul and Nancy Esteva's marriage was dissolved by judicial decree in Connecticut state court. The decree provided, *inter alia*, that the shares in all five of the companies noted above was marital property, that all of Nancy's rights in these shares would be transferred to her husband who would then hold, manage or sell them for the benefit of both parties and that any net income derived from these assets shall be paid 75% to him and 25% to her. In a subsequent order of clarification, the Connecticut court specified that Paul held the assets transferred to him pursuant to the decree in a fiduciary capacity.

In or about June, 2001, Nancy filed a personal bankruptcy petition in the United States Bankruptcy and brought chapter 11 petitions on behalf of 245 and DLS. Subsequent to these filings, Paul and Shoreline became interested in purchasing the assets of 245 and DLS and retained the defendant Kevin Nash and his law firm, defendant Finkel Goldstein Berzow Rosenbloom & Nash LLC, to represent them in this regard. Towards this end, the plaintiffs sought and received financing from a lender named Fundex Capital Corporation in return for which plaintiffs executed various "Hypothecation Agreements" pledging the shares of the five corporations as collateral. It appears from the papers before the court that, pursuant to these agreements, Paul Esteva paid over to Fundex certain payments which he had received on notes held by 349 and ATC.

In November, 2002, Nancy commenced a lawsuit against Paul, Fundex and the attorney who had allegedly negotiated the terms of the loan, Michelle Ferguson, claiming that the Hypothecation Agreements and subsequent disposition of the 349 and ATC note payments violated the automatic stay in Bankruptcy Court and represented a breach of Paul's fiduciary duty under the divorce decree. The plaintiffs then brought this action against Nash and his law firm asserting claims of legal malpractice and breach of contract based on their alleged negotiation and approval of loan terms with Fundex which violated Paul's fiduciary duty to Nancy. In turn, defendants commenced a third-party action for common law indemnification and/or contribution against Fundex, Ferguson and another attorney, Wayne M. Greenwald, who had allegedly represented them in the loan transaction.

In motion sequence number 004, Fundex has moved to dismiss the third-party complaint as against it for failure to state a cause of action. In motion sequence number 005, Greenwald has moved to dismiss the third-party complaint as against him based upon documentary evidence and defendants have cross-moved to amend their third-party complaint.

Discussion

A. Fundex's Motion to Dismiss - Although the defendants' third-party claim against Fundex is denominated as one for indemnification, it is clear that they are, in fact, seeking indemnification and/or contribution. As to indemnification, the third-party complaint fails to state a cause of action since the plaintiffs' underlying claim against them does not allege that they are vicariously responsible for any wrongdoing committed by Fundex but, instead, claims that it was the defendants themselves who were negligent. *See Jakobleff v. Cerrato, Sweeny & Cohn*, 97 AD2d 786, 786-87 (2nd Dept. 1983).

As to contribution, the defendants assert that Fundex aided and abetted Paul Esteva in breaching his fiduciary duty to his former wife. A claim for aiding and abetting a breach of fiduciary duty requires (1) a breach by a fiduciary of obligations to another, (2) that the defendant knowingly induced or participated in the breach, and (3) damages. Here, defendants have not pled any facts which even suggest that Fundex had actual knowledge that Paul, by entering into the Hypothecation Agreements, was breaching his fiduciary duty to Nancy. Moreover, it is well settled that a person knowingly participates in a breach of fiduciary duty only when he provides substantial assistance to the breaching party. *See Kaufman v. Cohen*, 307 AD2d 113, 126 (1st Dept. 2003); *King v. George Schoenberg & Co.*, 233 AD2d 242, 243 (1st Dept. 1996). Substantial assistance occurs when a defendant affirmatively assists, helps conceal or fails to act when required to do so. *See Kaufman v. Cohen*, 307 AD2d at 126. The third-party complaint fails to indicate how Fundex substantially assisted Paul in breaching his fiduciary duty. Under the circumstances, the third-party claims against Fundex fail to state a cause of action and must be dismissed.

B. Greenwald's Motion to Dismiss - Defendants allege that Wayne M. Greenwald negligently represented Paul Esteva in the lease transactions and Hypothecation Agreements. They assert claims of common law indemnification and/or contribution for damages resulting from Greenwald's alleged negligence.

As a threshold matter, the defendants' claim against Greenwald for indemnification must be dismissed for the same reason this claim has already been dismissed as against Fundex. As to contribution, Greenwald contends that he never represented plaintiffs in any of the lease transactions at issue. In support of this contention, Greenwald has submitted his own affidavit, as well as an affidavit from Paul Esteva, which claim that he did not represent either Esteva or Shoreline in the transactions at issue. Greenwald asserts that he represented Paul Esteva solely in connection with Nancy Esteva's bankruptcy petitions and, in that proceeding, focused only on protecting Paul's rights to property awarded to him in the Connecticut divorce decree. Greenwald has also submitted various documents from the bankruptcy proceedings which, he claims, demonstrate that it was the defendants who were solely responsible for representing Paul Esteva in connection with the purchase of the leases and the execution of the Hypothecation Agreements since Greenwald's name is not present on any of these papers. Greenwald also argues that, in any event, the third-party complaint fails to plead any facts which would suggest that he acted negligently in his representation of plaintiffs.

Greenwald's motion must be denied. Nash has submitted an affidavit in which he states that Greenwald did, in fact, provide representation and advice to Paul Esteva in connection with the purchase of the leases and that Greenwald's negligence in failing to advise Esteva that he was breaching his fiduciary duty to his ex-wife was a proximate cause of plaintiffs' damages. Nash's affidavit also alleges that Greenwald represented Paul Esteva with respect to Nancy Esteva's bankruptcy petitions. The contrary affidavits submitted by Paul Esteva and Greenwald merely create issues of fact which cannot be resolved

on a motion to dismiss.

C. Defendants' Cross-Motion for Leave to Amend - The proposed amended third-party complaint asserts the same three causes of action as the original third-party complaint and is substantially identical to that earlier pleading. The defendants' cross-motion for leave to amend should therefore be granted with the exception of their amended claims against Fundex, which do not correct the deficiencies in the original third-party complaint that required the dismissal herein of the defendants' claims against this company.

Accordingly, in motion sequence number 004, Fundex's motion to dismiss is granted and the third-party complaint is hereby dismissed as against this party. In motion sequence number 005, Greenwald's motion to dismiss is hereby denied. The defendants' cross-motion to amend their third-party complaint is granted to the extent that leave to amend the first and second causes of action in the third-party complaint is hereby granted. The cross-motion is otherwise denied. The amended first and second causes of action of the third-party complaint, in the proposed form annexed to the cross-motion papers, shall be deemed served upon service of a copy of this order with notice of entry thereof upon the third-party defendants, who shall thereafter serve an answer to the amended third-party complaint within 20 days.

The parties shall appear before the court in Room 412, 60 Centre Street, New York, New York on April 17, 2007 at 10:30 a.m for a status conference.

ENTER ORDER

Dated: 3-26-07

MGD

MARYLIN G. DIAMOND, J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

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