

Reid v Ernst & Young Global Ltd., Eygs LLP

2007 NY Slip Op 30944(U)

April 20, 2007

Supreme Court, New York County

Docket Number: 0604028/2005

Judge: Karla Moskowitz

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 3

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NIGEL REID,

Plaintiff,

Index No. 604028/2005

-against-

ERNST & YOUNG GLOBAL LIMITED, EYGS LLP,
ERNST & YOUNG U.S. LLP and ERNST & YOUNG
LLP,

DECISION and ORDER

Defendants.

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KARLA MOSKOWITZ, J:

The court consolidates motion sequence numbers 003 and 004 for disposition.

In the amended complaint (“complaint”), plaintiff Nigel Reid (“Reid”) alleges that the defendants aided and abetted a breach of a fiduciary duty. Defendants Ernst & Young Global Limited and EYGS LLP (collectively “Global defendants”) move, pursuant to CPLR 3211(a)(7) and CPLR 3016(b), to dismiss the complaint (motion sequence 003). Ernst & Young U.S. LLP and Ernst & Young LLP (collectively “US defendants”) move on the same grounds, and they also move pursuant to CPLR 3211(a)(1) and CPLR 3013 to dismiss the complaint as against them (motion sequence 004).

The court’s November 15, 2006 decision and order recite the facts of this case in detail, so the court will not repeat the facts here. In that decision, the court dismissed the complaint in its entirety but granted plaintiff leave to replead a cause of action for aiding and abetting breach of a fiduciary duty. The court stated that, although Reid had not pled a separate cause of action for participation in breach of fiduciary duty against defendants, he took the position that an aiding and abetting claim would lie. Because all of the defendants discussed the sufficiency of the claim in their motion papers, the court addressed Reid’s assertion that a claim for

breach of fiduciary duty is viable. (Osnato Aff. Ex. B, p. 13).¹

In the November 15, 2006 decision, the court held that, to state a claim for aiding and abetting a breach of fiduciary duty under Hong Kong law, a plaintiff must allege that “defendant provided substantial assistance to the primary violator and that ordinary people would regard his conduct as dishonest.” (Osnato Aff. Ex. B, p. 13 [citation omitted]). Based on this two-prong test, the court found that:

Reid alleges that EY-HKC owed him a fiduciary duty by virtue of their partnership relationship. EY-HKC’s alleged attempt to place the blame squarely on Reid for the Violations amounted to a breach of that duty. Further, defendants allegedly participated in that breach by substantially assisting the campaign to place the blame on him and actively concealing that he was not responsible for the Violations, despite knowing that he was innocent in addition to concealing the identity of the true perpetrators. In contrast to the defendants’ assertion, these allegations sufficiently allege dishonesty on the part of the defendants in their alleged participation in the breach of fiduciary duty, in accord with Hong Kong law.

Therefore, Reid’s demonstration of a good ground for the assertion of this claim justifies the granting of leave to plead . . .to afford him the opportunity to adequately plead the claim.

(Osnato Aff., Ex. B, p. 14).

THE AMENDED COMPLAINT

The sole cause of action in the amended complaint is a claim for aiding and abetting the breach of fiduciary duty. Reid alleges EY-HKC owed him a fiduciary duty by virtue of its partnership relationship with him and that EY-HKC breached that duty by falsely blaming Reid

¹ Under a conflicts of law analysis, the court found that Hong Kong Law applied to the claim. (Osnato Aff., Ex. B, pp. 13-14).

for the Violations and by actively concealing that others were responsible for the Violations. The complaint further alleges that US and Global knowingly participated in the breach by (1) substantially and dishonestly assisting in the campaign to blame Reid for the Violations; (2) actively concealing that others, not Reid, were the true perpetrators; and (3) attempting to blame Reid for the violations before the SEC and at the Rome Meeting. (Osnato Aff, Ex. A, paras. 91-95). Reid claims that, because of defendants' actions at the Rome meeting, he was forced to defend himself and attack Mr. Wu, thereby causing an irreparable rupture in the partnership relationship that led to his resignation. (Osnato Aff., Ex. A, paras. 81-83, 87-88).

Based on these allegations, Reid demands compensatory and punitive damages.

DISCUSSION

Defendants' arguments that Reid has failed to adequately plead a cause of action for aiding and abetting a breach of fiduciary duty are without merit. These allegations in the amended complaint are virtually identical to the allegations in the original complaint that the court found adequate to satisfy both elements of the two-pronged pleading requirement: "substantial assistance" and "dishonesty."

Reid's allegations of substantial assistance include his statement that EY-Global and EY-US reported to the Securities and Exchange Commission that, as part of the remedial measures to prevent future violations, "the EY-Far East Professional Practices Director (i.e., Mr. Reid) would be replaced by a more senior person" (Osnato Aff, Ex. A, para. 70). Moreover, as to the Rome meeting, Reid identifies the EY-Global and EY-US personnel who attended the meeting and then describes how EY-Global and EY-US allegedly attempted to coerce him into accepting the blame for the Violations, even though they knew that the accusations were false. Reid claims

EY-Global and EY-US personnel blamed him in order to placate the director of EY-HKC, Mr. Wu, and to buy time, so they could determine how best to deal with Wu and EY-HKC. (Osnato Aff, Ex. A, paras. 74, 81, 84-85). Moreover, as the court found in the November 15, 2006 decision, plaintiff's allegations of defendants' participation in the scheme sufficiently allege dishonesty. (Osnato Aff, Ex. B., p. 14).

On a motion to dismiss a complaint for legal insufficiency, the court accepts the facts alleged as true and determines simply whether the facts alleged fit within any cognizable legal theory. (*Arnav Indus. Inc. Retirement Trust v Brown, Rayman, Millstein, Felder & Steiner, L.L.P.*, 96 N.Y.2d 300 [2001]; *Morone v Morone*, 50 N.Y.2d 481[1981]). The court liberally construes the pleading, accepts the facts alleged and accords the allegations every possible favorable inference. (*Goshen v Mutual Life Insurance Co. of New York*, 98 N.Y.2d 314 [2002]). Whether plaintiff can ultimately establish its allegations is not part of determining a motion to dismiss. (*ECB I. Inc. v Goldman, Sachs & Co.*, 5 N.Y.3d 11[2005]).

Here, the complaint alleges the elements necessary to state a claim for aiding and abetting the breach of a fiduciary duty under Hong Kong Law—substantial assistance and dishonesty—and satisfies the particularity requirement of CPLR 3016(b) by identifying the transactions and occurrences constituting the wrong. (*Foley v D'Agostino*, 21 A.D.2d 60,64 [1st Dept 1964]). CPLR 3016(b) does not require that a pleading distinguish between defendants when it alleges a scheme involving all defendants. (*Board of Managers of 411 East 53rd Street Condominium v Dylan Carpet, Inc.*, 182 A.D.2d 551 [1st Dept 1992]).

PUNITIVE DAMAGES

At the outset, the parties assumed that New York law controlled the question of punitive

damages. However, in their reply brief, the Global defendants argued for the first time that Hong Kong law should decide the question of whether punitive damages were available. At oral argument, Reid addressed Global's choice of law arguments (3/1/07 Transcript, pp. 20-29) and argued that New York law applied to the question of punitive damages. Accordingly, based on Reid's agreement on the record (3/1/07 Trans., p. 20-21), the court will consider whether Hong Kong or New York law applies to the request for punitive damages in this case.

As a preliminary matter, the court must determine whether a conflict exists between the laws of New York and Hong Kong regarding punitive damages.

In a tort action, the New York courts will award punitive damages in cases "where the defendant's wrongdoing has been intentional and deliberate, and has the character of outrage frequently associated with a crime." (*Prozeralik v Capital City Communications*, 82 N.Y.2d 466 [1993]). There must be circumstances of aggravation or outrage, such as spite, malice or a fraudulent or evil motive on the part of the defendant, or such a conscious and deliberate disregard for the interests of others that the conduct is willful or wanton. (*Prosser and Keeton, Torts*, Section 2 at 9-10 [5th Ed. 1984]; see also *Ross v Louise Wise Svcs., Inc.*, 28 A.D.3d 272 [1st Dept 2006])

Under Hong Kong Law, a plaintiff must establish that defendant acted in complete cynical disregard for the plaintiff's rights with an express calculation that the profits defendant could accrue outweigh any damages that defendant could later owe. (Sng Second Supp. Aff., para. 5 citing *Broome v Castle & Co., Ltd* [1972] AC 1027). In *Kuddus v Chief Constable of Leicestershire* ([2002] 2 AC 122), the court held that conduct supporting an award of punitive damages must be so outrageous with so blatant a disregard for plaintiff's rights that nothing less

than punitive damages would achieve justice.

Here, because the laws of Hong Kong and New York regarding punitive damages conflict, the court must conduct an interest analysis to determine the jurisdiction with the strongest interest in the resolution of the issue of punitive damages. (*See, James v Powell*, 19 N.Y.2d 249 [1967]).

Reid is a Hong Kong resident, and, at the time of the incident, he was a partner in EY-HKC, a Hong Kong entity. Reid alleges injury from defendants' aiding and abetting the breach of fiduciary duty with EY-HKC. Defendants are a UK corporation, a UK partnership and two Delaware limited partnerships all of whom are headquartered in Manhattan. Reid's alleged injury occurred in Hong Kong and Rome. Thus, because it appears that Hong Kong had the most significant contacts, Hong Kong Law applies.

The pleadings allege that defendants disregarded plaintiff's rights to advance their own economic motives. Reid complains defendants' desire to placate Mr. Wu and avoid the potential economic harm that would occur if EY-HKC disaffiliated from the defendants motivated defendants. (Complaint, para. 65). The court cannot decide at the pleading stage whether defendants' conduct was so outrageous and blatant to rise to the level necessary to support an award of punitive damages. Reid's allegations that defendants knew he was innocent, that they knew who was responsible and that they engaged in a scheme to discredit him for their own economic advantage and with complete disregard to the damage he would suffer is sufficient to state a claim for punitive damages under Hong Kong Law. (*See Broome v Cassell & Co, Ltd* [1972] AC1027 ["What is necessary is that the tortuous act must be done with guilty knowledge for the motive that the chances of economic advantage outweigh the chances of economic or

perhaps physical penalty.”])

Accordingly, it is


ORDERED that defendants’ motions to dismiss the complaint are denied.

The parties are directed to appear for a preliminary conference in Part 3, 60 Centre Street, Room 248 on Tuesday, May 8, 2007 at 11:00 a.m.

This decision constitutes the decision and order of the court.

Dated: April 20, 2007

ENTER:



J.S.C.

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