

Smith v Bercovici

2007 NY Slip Op 31784(U)

June 20, 2007

Supreme Court, Suffolk County

Docket Number: 0027344/2006

Judge: Elizabeth H. Emerson

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SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 44 SUFFOLK COUNTY

PRESENT: Hon. Elizabeth Hazlitt Emerson

MOTION DATE: 1-4-07, 1-8-07
SUBMITTED: 2-14-07
MOTION NO.: 001-MG
002-MOTD

x
BARBARA SMITH, B. SMITH GROUP LICENSING
CORP., FINALLY FREE, INC., GASBY INC.,
KEDJENOU CORP., MITCH CHA MYRRH, INC. and
THREE TWENTY RESTAURANT ROW CORP.,

Plaintiffs,

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Melville, New York 11747

-against-

MARIUS BERCOVICI and GRASSI AND CO., CPAs,
P.C.,

Defendants.

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& KAMMHOLZ, P.C.
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x
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Upon the following papers numbered 1 to 15 read on this motion for Dismissal of the complaint ; Notice of Motion and supporting papers 1-3 ; Notice of Cross Motion and supporting papers 4-7; Answering Affidavits and supporting papers 8-9; Replying Affidavits and supporting papers 10-15; it is,

ORDERED that the motion by the defendant Grassi and Co., CPAs, P.C. ("Grassi P.C.") for an Order dismissing causes of action 1-7, 22-28 and 36-42 is granted in its entirety; and it is further

ORDERED that the motion by the defendant Bercovici for an order dismissing causes of action 15-21 is granted; and it is further

ORDERED that the motion by Bercovici for an order dismissing causes of action 8-14, 29-35 and 43-49 is denied.

Facts

The plaintiffs in this action consist of six entities, B. Smith Group Licensing Corp., Finally Free Inc., Gasby Inc., Kedjenou Corp., Mitch Cha Myrrh, Inc. and Three Twenty Restaurant Row Corp., all of which are entities related to each other and related to the individual plaintiff, Barbara Smith (hereinafter "plaintiffs"). The plaintiffs allege in their summons and complaint dated October 17, 2006, 49 causes of action against the defendants. Each of the seven plaintiffs assert three causes of action against defendant Grassi P.C. and four causes of action against defendant Bercovici.

Grassi P.C. is an accounting firm with offices located at 2001 Marcus Avenue, Lake Success, New York. Grassi P.C. was hired by each of the plaintiffs in 2001 to perform their respective accounting and business management functions. Plaintiffs contend that they engaged Grassi P.C. to perform certain accounting services, set forth in the complaint as "business management, including paying of bills and managing the plaintiffs' bank accounts." The record shows that this relationship continued from 2001 through January 2003. During this period, Bercovici was an employee of Grassi P.C. working in its business management division. Grassi P.C. assigned Bercovici to perform the above-referenced services for the plaintiffs.

Grassi P.C. contends that, by a letter dated January 2, 2003, it was advised by the plaintiffs that they would be picking up all of the business management and corporate records in the firm's possession on that day. The letter states, "I am releasing Grassi & Co. from any liability for holding and storing my records. I will also remove Grassi & Co. from any responsibility with North Fork bank accounts, and will remove them as authorized signers." Grassi P.C. alleges that this language served to terminate the firm's services to the plaintiffs as of that date. The plaintiffs do not argue that Grassi P.C. performed work for them after January 2, 2003, nor do they argue that this letter was not intended to terminate Grassi P.C.'s services as of that date. In February 2003, defendant Bercovici left his employment with Grassi P.C. and went to work directly for the plaintiffs as Vice President of Finance. Plaintiffs fail to raise any allegations that Bercovici was not employed directly by them from February 2003 through November 13, 2003.

As set forth above, the complaint and the amended complaint set forth 49 causes of action. Causes of action numbered 1-7 are asserted against Grassi P.C. by each of the seven named plaintiffs for negligently managing the bank accounts and business affairs of the plaintiffs. Causes of action 8-14 assert the same claims for negligence against defendant Bercovici. Causes of action 15-21 assert claims of fraud against defendant Bercovici and 22-28 assert fraud claims against Grassi P.C. Causes of action 29-35 allege breach of contract against Bercovici and claims 36-42 allege breach of contract against Grassi P.C. Finally, causes of action 43-49 allege breach of fiduciary duty against Bercovici. Plaintiffs allege that, as a result of defendants' actions, they incurred significant fees and costs and are entitled to damages. The defendants have separately moved to dismiss the allegations against them, arguing that the claims were brought outside the applicable statute of limitations, that the fraud claims are not plead with sufficient particularity, and that the complaint fails to state a cause of action upon which relief can be granted.

Discussion

It is well settled that, on a motion to dismiss pursuant to CPLR 3211(a)(7), the Court is to liberally construe the complaint, accept the alleged facts as true, give the plaintiff the benefit of every possible favorable inference, and determine only whether the alleged facts fit within any cognizable legal theory (*see, Leon v Martinez*, 84 NY2d 83; *Guggenheimer v Ginzburg*, 43 NY2d 268; *Rovello v Orofino Realty Co.*, 40 NY2d 633). Furthermore, an action is subject to dismissal if said action is barred by the applicable statute of limitations. (*see, A. Morrison Trucking v. Bonfiglio*, 13 Misc 3d 1211A).

A cause of action charging that a professional failed to perform services with due care and in accordance with the recognized and accepted practice of the profession is governed by the three-year statute of limitations applicable to negligence actions. (*see, Ackerman v. Price Waterhouse*, 84 NY2d 535) Accordingly, and without regard to whether a claim uses the words negligence or malpractice, the applicable statute of limitations is three years (CPLR 214 [6]).

The CPLR has not defined specific actions giving rise to a malpractice claim. However, courts have defined malpractice to mean a professional misfeasance toward one's client. (*see, Chase Scientific Research, Inc. v. NIA Group*, 96 NY2d 20). Furthermore, the term professional has been defined to include groups that share such characteristics as formal learning and training, licensure and regulation indicating qualification, a code of conduct and system of discipline, and a trusting and confidential relationship with clients. (*see, Chase Scientific Research, Inc. v. NIA Group*, 96 NY2d 20). A Certified Public Accountant is a professional as defined above and subject to claims for malpractice (**Education Law §7401**) [the practice of the profession of public accountancy includes holding one's self out to the public, or being an individual having or purporting to have expert knowledge in accounting or auditing].

Statute of Limitations

Grassi P.C., by its designation as a C.P.A. firm and the services it provides, is subject to claims for malpractice and the applicable three-year statute of limitations. The record indicates that Bercovici, in performing services for the plaintiffs and holding himself out as an individual purporting to have expert knowledge in accounting, is likewise subject to claims of malpractice. Both defendants have moved to dismiss the complaint on the ground that the action was brought outside of the applicable three-year period.

Grassi P.C.'s motion will be addressed first. The plaintiffs argue that the claims against Grassi P.C. are based on the actions of Bercovici while he was an employee of the firm. Grassi P.C. has provided documentary evidence that the plaintiffs notified the firm in writing that, on or about January 2, 2003, they would be picking up all books and records in its possession, relieving the firm from any responsibility for the North Fork Bank accounts and removing it as authorized signers. This evidence has not been contradicted in any manner by the plaintiffs, and no argument has been made that Grassi P.C.'s services were not terminated on or about January 2, 2003. Furthermore, it is uncontested that Bercovici left his employment with Grassi P.C. no later than February 2003 and went to work directly for the plaintiffs.

Grassi P.C. contends that the three-year statute of limitations began to run no later than February 2003 when Bercovici resigned. The plaintiffs argue that, since the periods covered in the complaint encompass the time prior to February 2003, when Bercovici was employed by Grassi P.C., and between February 2003 and November 13, 2003, when Bercovici was employed by the plaintiffs directly, the defendants were united in interest and the Court should apply the continuous representation doctrine and the relation back doctrine to toll the statute of limitations as to Grassi P.C.

To show that a party is united in interest, sufficient to apply the relation back doctrine, the plaintiff must show that (1) both claims arose out of the same conduct, transaction, or occurrence, (2) the new party is united in interest with the original defendant and by reason of that relationship can be charged with such notice, and (3) the new party knew or should have known that, but for an excusable mistake by the plaintiff in originally failing to identify all the proper parties, the action would have been brought against it. All three features must be met for the statutory relation back remedy to be operative (*see, Mondello v. New York Blood Center*, 80 NY2d 219).

The parties have provided documentary evidence that Grassi P.C. was relieved of its duties in January 2003. The evidence before the Court establishes that neither Grassi P.C. nor any of its employees performed services for any of the plaintiffs after January 2003. The plaintiffs contend that the period covered by the complaint includes the time when Bercovici worked for Grassi P.C. They argue that the employment of Bercovici by Grassi P.C. is sufficient to toll the statute of limitations against the firm. The Court finds that this argument fails. The plaintiffs cannot establish that their claims arose out of the same conduct, transaction, or occurrence once they terminated their business relationship with Grassi P.C. Plaintiffs exercised their independent judgment and made a decision to hire Bercovici directly. Plaintiffs began a new relationship with Bercovici. In addition, since Bercovici terminated his employment with Grassi P.C. in February 2003, there was no relationship between the defendants sufficient to charge the firm with notice of a possibility of a future action concerning Bercovici.

The plaintiffs argue that the complaint cannot be dismissed pursuant to CPLR 3211 because more discovery is needed to establish that the parties are united in interest. However, the record now before the Court, as well as the arguments made by Grassi P.C., clearly show that services were not provided by Grassi P.C. after January 2003. The plaintiffs have failed to establish that the defendants were united in interest during the three years prior to the complaint being filed. Therefore, they are unable to apply the relation back doctrine.

The continuous representation doctrine fails for the same reason. Where the defendant's final work product was delivered to the plaintiff more than three years prior to the commencement of an action, the continuous representation doctrine is inapplicable. (*see, Mitschele v. Schultz*, 36 AD3d 249). Any action for accounting malpractice by Grassi P.C. would have to have been commenced no later than January 2006 to be timely. The complaint in this matter was filed in October 2006, nine months later. The fact that Bercovici, a former employee of Grassi P.C., was subsequently hired by the plaintiffs to perform the same function as Grassi P.C. is

insufficient to establish continuous representation by Grassi P.C. The plaintiffs independently decided to hire Bercovici as an employee. Clearly a new relationship between the plaintiffs and Bercovici as employer/employee was established in or around February 2003. Neither the continuous representation nor the united in interest doctrine apply to Grassi P.C. in this matter. Therefore, causes of action 1-7 are dismissed.

Causes of action 36-42 are also dismissed. Pursuant to CPLR 214, a three-year statute of limitations applies to malpractice actions regardless of whether the underlying theory is based in contract or tort (*see also*, **Matter of Kliment v. McKinsey**, 3 NY3d 538 [holding that the intent of CPLR §214 was not to allow actions that were technically malpractice actions to proceed under a six-year, contract statute of limitations]). Plaintiffs' allegations numbered 36-42 claim that Grassi P.C. was hired to provide business management services, that the firm held itself out to be qualified to perform those services, and that the firm would act in the best interest of the plaintiffs in exchange for compensation. The plaintiffs contend that this constitutes a contract to which Grassi P.C. should be bound. However, the Court finds that this is a restatement of the malpractice claims, which are subject to the three-year statute of limitations. Courts have found that, if a claim was time-barred and the nature of the claim was for malpractice, it can not then be recognized as a breach of contract. (*see*, **Steiner v. Wenning**, 53 AD2d 437; *see also*, **Mitschele v. Schultz**, *supra*). Furthermore, the legislative history of CPLR 214(6) makes clear that, where an underlying complaint is one for failure to use reasonable care or negligence, the statute of limitations shall be three years regardless if the theory is based in tort or breach of contract. (*see*, **R.M. Kliment v. McKinsey & Company, Inc.** 3 NY3d 538).

Bercovici's motion to dismiss, however, cannot be granted on statute of limitations grounds. According to the complaint and the documents now before the Court, Bercovici was an employee of the plaintiffs, hired to act as Vice President of Finance to manage their businesses from February 2003 through November 13, 2003. This action was commenced in October 2006. Applying the law cited above to these facts, the Court can apply the continuous representation doctrine. The continuous representation doctrine, under certain circumstances, tolls the statute of limitations during the period of time when professional services are being rendered. (*see*, **Fred Smith Plumbing and Heating Co. v. Christesen**, 233 AD2d 207). Furthermore, where a cause of action alleges malpractice against an accountant, the claim accrues upon receipt of the accountant's work product. (*see*, **A. Morrison Trucking Inc. v. Bonfiglio**, 13 Misc 1211A). The three-year statute of limitations is applicable whether the claim sounds in breach of contract or tort. Applying this law to the allegations in the complaint and construing the allegations in the light most favorable to the plaintiff, the Court finds that causes of action 8-14 for malpractice and 29-35 for breach of contract are timely against Bercovici and that they state cognizable causes of action. Therefore, Bercovici's motion is denied insofar as it seeks to dismiss causes of action 8-14, and 29-35.

Fraud

Grassi P.C. argues that causes of action 22-28 should be dismissed for failure to plead fraud with specificity. When alleging fraud, a plaintiff must demonstrate: (1) that the defendant made material representations that were false or concealed a material fact which

defendant should have disclosed, (2) that the defendant knew the representations were false and made them with the intent to deceive the plaintiff, (3) that the plaintiff justifiably relied on the defendant's representations, and (4) that the plaintiff was injured as a result of the defendant's representations. (*see*, **Brannigan v. Board of Education of Levittown Union Free School District**, 18 AD3d 787). Moreover, the plaintiffs must state the circumstances constituting the fraud or mistake in detail. **CPLR 3016 [b]**.

The allegations set forth in the verified complaint and the amended verified complaint do not satisfy these elements. The plaintiffs allege that they were "defrauded" by Grassi P.C. and that Grassi P.C. caused them to enter into transactions that were unfair. They further allege that these transactions included transferring monies out of plaintiffs' accounts into those of other clients of the firm and that the firm concealed its relationships with other clients. The plaintiffs attempt to clarify the allegations of fraud in their amended verified complaint by stating these acts occurred numerous times in 2002 and 2003, which caused money to be transferred to accounts of other clients, including two named in the complaint. However, without specific dates, specific amounts of the transfers, specific injury resulting from these alleged transfers and alleged representations by the defendants, the fraud claims cannot stand. Since there is no dispute that the Grassi P.C. returned all documents to the plaintiffs on or about January 2, 2003, this information should be in the plaintiffs' possession. However, they fail to include any specifics in their complaint. In addition, the claims by the plaintiffs for malpractice against Grassi P.C. are interrelated with the transfers of money out of the accounts. It has been held that, in addition to establishing each element of fraud, a plaintiff has the burden of proving that the alleged fraud caused additional damages, separate and distinct from those generated by the alleged malpractice. (*see*, **Kaiser v. Van Houten** 12 AD3d 1012). The plaintiffs in this case have not only failed to allege each of the elements of fraud with specificity, but they have failed to allege any actions by Grassi P.C. that are distinguishable from those alleged in their malpractice claims. Therefore, the Court finds that the remaining causes of action numbered 22-28 against Grassi P.C., are also dismissed.

Causes of action 15-21 allege fraud against Bercovici. The allegations against Bercovici are identical to those against Grassi P.C. As stated above, the fraud allegations are not plead with particularity pursuant to CPLR 3016 [b], they do not set forth specific dates or specific amounts of the alleged unfair transactions, and they are interrelated to the malpractice and negligence claims. Since Bercovici was an employee of the plaintiffs during the period from February 2003 through November 2003, this information should be readily accessible to them. For these reasons, causes of action 15-21 as against Bercovici are dismissed.

Breach of Fiduciary Duty

It is alleged in causes of action 43-49 that Bercovici has breached a fiduciary duty to the plaintiffs. The plaintiffs claim that, as Vice President, Bercovici was placed in a position of loyalty and trust to the plaintiffs and, as such, owed them a fiduciary duty. Bercovici contends that the plaintiffs have failed to establish that a fiduciary relationship existed between himself and the plaintiffs.

An employer/employee relationship is a contract, whether expressed or implied. Fundamental to that relationship is the proposition that an employee is to be loyal to his employer, is prohibited from acting in any manner inconsistent with his agency or trust, and is at all times bound to exercise the utmost good faith and loyalty in the performance of his duties. (*see, Western Electric Company v. Francis X. Brenner*, 41 NY2d 291). Searching the record and reading the pleadings in a light most favorable to the plaintiffs, the Court finds that a fiduciary relationship may exist between these parties. However, more information regarding their relationship and the obligations of each party is needed, precluding the Court from dismissing these claims at this juncture. Accordingly, defendant Bercovici's motion is denied insofar as it seeks to dismiss causes of action 43-49.

DATED: June 20, 2007

HON. ELIZABETH HAZLITT EMERSON

J. S.C.