Ideal Steel Supply Corp. v Beil
2007 NY Slip Op 32030(U)
July 3, 2007
Supreme Court, Queens County
Docket Number: 0020519/2006
Judge: Peter Joseph Kelly
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M E M O R A N D U M

SUPREME COURT – STATE OF NEW YORK
COUNTY OF QUEENS – IAS PART 16

IDEAL STEEL SUPPLY CORP.,	BY: KELLY, J
Plaintiff,	DATED: JULY 3, 2007
– against –	INDEX NUMBER: 20519/06
MARSHALL H. BEIL, ET AL,	MOTION DATE: MARCH 20, 2007
Defendant.	

Defendants have moved for an order dismissing the complaint against them pursuant to CPLR §3211(a)(1) and (7).

On or about December 11, 2001, plaintiff Ideal Steel Supply Corp. retained defendant the law firm of Ross and Hardies, LLP (R&H), in contemplation of legal action against National Steel Supply, Inc., a competitor. Both Ideal and National operate stores in Queens and the Bronx, and Ideal asserts that wrongful action by its competitor cost it approximately $10,000,000. Ideal signed a retainer agreement with defendant R&H, the predecessor of defendant McGuire Woods LLP (MW) which stated, inter alia, that defendant Marshall Beil (Beil) would provide representation at the rate of $400.00 per hour. Ideal allegedly paid the defendants approximately $1,000,000 in legal fees.

In or about June 2002, R&H began an action on behalf of the plaintiff in the United States District Court for the Southern District of New York against National and its owners, Joseph Anza and Vincent Anza, which asserted claims for breach of a previous settlement agreement and violations of the Racketeer Influenced and Corrupt Organizations Act (RICO)

(18 USC §§ 1961 et seq.); (See, Ideal Steel Supply Corp. v Anza, 254 F Supp 2d 464). Ideal alleged that National did not charge the combined 8.25% New York State and New York City sales taxes to customers who paid cash, thereby gaining an unfair competitive advantage and, through mail and wire fraud, engaging in racketeering activity. Ideal sought to recover for, inter alia, injury to its business caused by the competitor's alleged practice of unlawfully selling products free of the 8.25% sales tax and submitting fraudulent sales tax returns in violation of mail fraud or wire fraud statutes, both forms of "racketeering activity" under RICO.

Specifically, ideal alleged that National, by mail and wire fraud, had violated 18 USC § 1962(c), which prohibits conducting or participating in the conduct of an enterprise's affairs through a " pattern" of "racketeering activity." Ideal also alleged that National had violated 18 USC § 1962(a), which prohibits a person "to use or invest" income derived from a pattern of racketeering activity in an enterprise engaged in or affecting interstate or foreign commerce by using funds accruing from the fraudulent tax scheme to open a store in the Bronx thereby diminishing Ideal's business and market share.

The federal district court granted National's motion to dismiss the RICO cause of action for failure to adequately plead "transaction causation," finding that "[a]lthough Ideal alleges that the New York State Department of Taxation and Finance relied on Defendants' alleged misrepresentations (AC ¶ 30), Ideal has not alleged-indeed, can not allege-that Plaintiff relied on the sales tax returns Defendants mailed or wired to the New York State Department of Taxation and Finance. As a result, Ideal's RICO claims fail" (Ideal Steel Supply Corp. v Anza, supra, 468).

The district court also dismissed the state law breach of contract claim without prejudice, declining to exercise supplemental jurisdiction over it.

On appeal, the United States Court of Appeals for the Second Circuit reversed the order dismissing the complaint and held, inter alia, that (1) Ideal had standing to assert a civil RICO claim against National based upon the alleged predicate acts of mail and wire fraud, (2) Ideal had standing to assert an illegal investment claim under RICO against National and (3) the purported problems of proof relating to causation were not a proper basis for dismissal for failure to state claim under RICO (See, Ideal Steel Supply Corp. v Anza, 373 F3d 251). The Court upheld the RICO claim based on predicate acts of mail and wire fraud "even where the scheme depended on fraudulent communications directed to and relied on by a third party rather than the plaintiff" and returned the case to the district court, where the parties engaged in discovery (Anza v Ideal Steel Supply Corp., 373 F3d 251, 263).

On November 28, 2005, the United States Supreme Court granted a petition for certiorari (Anza v Ideal Steel Supply Corp., ___ US ___, 126 S Ct 713). On June 5, 2006, the Supreme Court, reversing in part and vacating in part, held that National's alleged acts of defrauding the New York State tax authority, using the proceeds from the fraud to lower prices designed to attract more customers, and submitting fraudulent state tax returns to conceal the illegal conduct were not the proximate cause of Ideal's lost sales. The Court wrote "The cause of Ideal's asserted harms,. . .," is a set of actions (offering lower prices) entirely distinct from the alleged RICO violation (defrauding the State) (Anza v Ideal Steel Supply Corp., 126 S Ct 1991, 1997).

It was further held that the element of proximate cause was required for National to bring a civil RICO claim for injury to its business or property based upon alleged acts of mail fraud and wire fraud. The Supreme Court reasoned that New York State, not Ideal, was the direct victim of National's alleged fraud, that National could have lowered its prices for any number of reasons, and that Ideal's lost sales could have resulted from factors other than National's alleged acts of fraud.

The Supreme Court also declined to consider Ideal's illegal investment claim asserted under RICO since the Court of Appeals had not addressed proximate causation involved in that claim, and the Supreme Court remanded that claim to the Second Circuit Court of Appeals to determine whether National's alleged illegal investment proximately caused Ideal's lost sales (Anza v Ideal Steel Supply Corp., ___ US ___, 126 S Ct 1991). Mr. Justice Thomas, concurring in part and dissenting part, wrote: "The language of the civil RICO provision, which broadly permits recovery by '[a]ny person injured in his business or property by reason of a violation' of the Act's substantive restrictions, § 1964(c) (2000 ed), plainly covers the lawsuit brought by respondent" (Dissenting opinion, Anza v Ideal Steel Supply Corp., ___ US ___, 126 S Ct 1991, 2000).

While Anza was pending before the Supreme Court, the relationship between Ideal and the defendants herein soured partly due to, according to the defendants, legal bills which Ideal wanted reduced. The defendants allegedly threatened to file an attorney's lien if plaintiff Ideal failed to pay legal fees. The plaintiff also alleges that defendant Beil did not heed its request to hire an attorney with expertise in RICO litigation to argue the case before the Supreme Court and that the plaintiff itself was

forced to retain such an expert. Ideal ended its relationship with the defendants before the Supreme Court rendered its decision. The Anza case remains pending before the Second Circuit Court of Appeals, where a successor attorney represents Ideal.

Plaintiff began this action for, inter alia, legal malpractice on September 19, 2006, alleging that the defendants (1) "[u]nilaterally chose to pursue unique and novel claims in their litigation of the matter, when an expedited recovery could have been obtained pursuant to other causes of action. . .", (2) "[f]ailed and refused to pursue other bona fide claims, by ignoring relevant case law and facts", (3) failed to prevent costs and expenses from rising above a reasonable level, (4) made decisions that resulted in unnecessarily high fees, costs, and expenses, (5) increased hourly fees without the prior consent of the client, (6) engaged in dilatory and wasteful litigation conduct, (7) mismanaged the work of experts and litigation support consultants, (8) charged the plaintiff for resources not actually needed, and (9) violated the attorney client relationship, by, for example, revealing strategy to the adversary. The plaintiff's attorney asserts that "[e]ssentially, the mismanagement of the federal litigation and pursuit of inappropriate claims under the civil RICO Act were part of a scheme by the defendants to bill exorbitant legal fees and costs and exclusively pursue those claims that defendant Beil found intellectually novel".

CPLR §3211 provides in relevant part: A party may move for judgment dismissing one or more causes of action asserted against him on the ground that: 1. a defense is founded on documentary evidence. . ." In order to prevail on a CPLR §3211(a)(1) motion, the documentary evidence submitted

"must be such that it resolves all the factual issues as a matter of law and conclusively and definitively disposes of the plaintiff's claim. . ." (Fernandez v Cigna Property and Casualty Insurance Company, 188 AD2d 700, 702; Vanderminden v Vanderminden, 226 AD2d 1037; Bronxville Knolls, Inc. v Webster Town Center Partnership, 221 AD2d 248).

In the case at bar, the sparse documentary evidence submitted is not dispositive of any causes of action.

Accordingly, those branches of the defendants' motion which are for an order dismissing the complaint against them pursuant to CPLR §3211(a)(1) are denied.

In determining a motion brought pursuant to CPLR §3211(a)(7), the court "must afford the complaint a liberal construction, accept as true the allegations contained therein, accord the plaintiff the benefit of every favorable inference and determine only whether the facts alleged fit within any cognizable legal theory. . ." (1455 Washington Ave. Assocs. v Rose & Kiernan, 260 AD2d 770, 770-771; Esposito-Hilder v SFX Broadcasting Inc., 236 AD2d 186). "The sole criterion is whether 'from [the complaint's] four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law'. . ." (Mayer v Sanders, 264 AD2d 827, 828, quoting Guggenheimer v Ginzburg, 43 NY2d 268, 275; see, Aranki v Goldman & Associates, LLP, 34 AD3d 510; Operative Cake Corp. v Nassour , 21 AD3d 1020). "The court must accept the facts alleged in the pleading and the submissions in opposition to the motion as true, and accord the plaintiff the benefit of every possible favorable inference. . ." (Operative Cake Corp. v Nassour, supra, 1021; see, Aranki v Goldman & Associates, LLP , supra).

Turning to the first cause of action, a client may assert an action for breach of contract against an attorney where the latter has breached an agreement or a promise to specifically accomplish something (See, Magnacoustics, Inc. v Ostrolenk, Faber, Gerb & Soffen, 303 AD2d 561; Pacesetter Communications Corp. v Solin & Breindel, 150 AD2d 232; Saveca v Reilly, 111 AD2d 493). In the case at bar, the first cause of action is sufficient to withstand a CPLR §3211(a)(7) dismissal motion to the extent that the plaintiff alleges (1) an increase in agreed hourly fees without its consent, (2) failure to hire a RICO special counsel as agreed, and (3) failure to make promised adjustments in invoices sent to the plaintiff. Those parts of the first cause of action which rests on these three allegations are not merely duplicative of the cause of action for legal malpractice, since the factual allegations based on the breaches of promise differ and distinct damages are sought (Compare, Town of Wallkill v Rosenstein , ___ AD2d ___, ___ NYS2d ___, 2007 WL 1501714).

However, the remainder of the first cause of action is duplicative of the cause of action for legal malpractice, as the defendants correctly argue, and the remainder should be dismissed pursuant to CPLR §3211(a)(7) (See, Town of Wallkill v Rosenstein, supra; Shaya B. Pacific, LLC v Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, 38 AD3d 34; Magnacoustics, Inc. v Ostrolenk, Faber, Gerb & Soffen, supra).

Accordingly, that branch of the defendants' motion which is for an order pursuant to CPLR §3211(a)(7) dismissing the first cause of action is granted except for that part of the cause of action which rests on allegations concerning (1) an increase in agreed hourly fees without the plaintiff's consent, (2) failure to hire a RICO special counsel as agreed,

and (3) failure to make promised adjustments in invoices sent to the plaintiff.

Turning to the second cause of action, which is for the tort of misrepresentation based on primarily the defendants' statement that all viable claims were being pursued against National, the defendants correctly argue that the second cause of action is dismissable because it is duplicative of the claims for legal malpractice and breach of contract (See, Town of North Hempstead v Winston & Strawn, LLP, 28 AD3d 746; Schwartz v Olshan Grundman Frome & Rosenzweig, 302 AD2d 193).

Accordingly, that branch of the defendants' motion which is for an order pursuant to CPLR §3211(a)(7) dismissing the second cause of action is granted.

Turning to the third cause of action for legal malpractice, two distinct prongs are discernable. The first pertains to the selection of only a RICO cause of action for prosecution and the second pertains to mismanagement of the RICO cause of action itself. Regarding the selection of only a RICO cause of action for prosecution, plaintiff Ideal did not adequately plead that the defendants failed to exercise the degree of skill and care commonly possessed by a member of the legal community (See, Hwang v Bierman, 206 AD2d 360). "An attorney has broad discretion concerning. . .the theories to plead. . ." (4 Mallen & Smith, Legal Malpractice [2007 Ed], § 30.8; see, Patterson v Powell, 31 Misc 250 [AT], affd 56 App Div 624), and he is not subject to a "rule of infallibility, but is responsible to his client only for those mistakes as a pleader which indicate a lack on his part of the attainments and diligence commonly possessed and exercised by legal practitioners". (Rapuzzi v Stetson,

160 App Div 150, 157). Although there may be several alternatives, the selection of one of many reasonable defenses or causes of action does not constitute malpractice (See, Hwang v Bierman, supra).

In view of the history of the Anza litigation, particularly the decision rendered by the Second Circuit Court of Appeals, plaintiff Ideal cannot adequately establish that the selection of a RICO cause of action for prosecution against National was unreasonable. The "selection of one among several reasonable courses of action does not constitute malpractice". (Rosner v Paley, 65 NY2d 736, 738; see, Dimond v Kazmierczuk & McGrath, 15 AD3d 526; Holschauer v Fisher, 5 AD3d 553). The court also notes that plaintiff Ideal's complaint and opposition papers only conclusively allege that other causes of action were available; conclusory and speculative allegations do not support a cause of action for legal malpractice (See, Holschauer v Fisher, supra; Pellegrino v File, 291 AD2d 60).

Additionally, even if the selection of a RICO claim involved an error in judgment, such an error does not amount to legal malpractice (See, Rosner v Paley, supra; Hand v Silberman, 15 AD3d 167; Alter & Alter v Cannella, 284 AD2d 138). The Anza litigation presented novel issues from its inception that ultimately had to be decided by the United States Supreme Court. Attorneys "cannot be held liable for exercising their professional judgment on a question that was not elementary or conclusively settled by authority. . ." (Town of North Hempstead v Winston & Strawn, LLP, 28 AD3d 746, 748; see, Parksville Mobile Modular, Inc. v Fabricant, 73 AD2d 595; Byrnes v Palmer, 18 App Div 1, affd 160 NY 699). In sum, the recommendation by the defendants that plaintiff Ideal pursue certain

litigation against National did not, under all of the circumstances, rise to the level of malpractice (See, Boulanger, Hicks, Stein & Churchill, P.C. v Jacobs, 235 AD2d 353).

Regarding that part of the third cause of action which rests on allegations pertaining to increased litigation costs arising from other malpractice, "[i]n an action for legal malpractice, a plaintiff must demonstrate that the attorney 'failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession' and that the attorney's breach of this duty proximately caused plaintiff to sustain actual and ascertainable damages" (Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer, 8 NY3d 438, 442, quoting McCoy v Feinman, 99 NY2d 295, 301-302 [some internal quotation marks and citations omitted]). A plaintiff in a legal malpractice case establishes proximate cause by demonstrating that "but for" his attorney's negligence, he would either have prevailed in an underlying matter or would not have sustained any "ascertainable damages" (Leder v Spiegel, 31 AD3d 266, 268; see, Home Ins. Co. v Liebman, Adolf & Charme, 257 AD2d 424). The plaintiff can prove either branch of the disjunctive (See, Home Ins. Co. v Liebman, Adolf & Charme, supra), and he can recover for malpractice even though he is successful in the underlying action (See, VDR Realty Corp. v Mintz, 167 AD2d 986; Alva v Hurley, Fox, Selig, Caprari & Kelleher, 156 Misc 2d 550; Skinner v Stone, Raskin & Israel, 724 F2d 264). Increased expenses incurred by the client because of the attorney's negligence in handling an action or other matter can be charged to the attorney (See, DePinto v Rosenthal & Curry, 237 AD2d 482; VDR Realty Corp. v Mintz, 167 AD2d 986; Saveca v Reilly, 111 AD2d 493).

In the case at bar, the plaintiff's allegations regarding increased expenses resulting from the defendants' alleged mismanagement of the RICO claim are sufficient to survive a mere CPLR 3211(a)(7) motion. Whether the plaintiff's case can withstand a motion for summary judgment is a matter not taken into consideration here (See, Shaya B. Pacific, LLC v Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, supra).

Accordingly, that branch of the defendants' motion which is for an order pursuant to CPLR §3211(a)(7) dismissing the third cause of action asserted against them is granted as to that part of the third cause of action which rests on allegations pertaining to the selection of only a RICO cause of action for prosecution and denied as to that part of the third cause of action which rests on allegations pertaining to increased litigation costs arising from other alleged malpractice.

Turning to the demand for treble damages, the complaint does not adequately allege negligent conduct which is "willful or wanton" or "grossly negligent and reckless" (See, Giblin v Murphy, 73 NY2d 769). The complaint also does not adequately allege that treble damages are recoverable under Judiciary Law § 487 for "deceit or collusion" (See, Bernstein v Oppenheim & Co., P.C., 160 AD2d 428).

Accordingly, that branch of the defendants' motion which is for an order pursuant to CPLR §3211(a)(7) dismissing the demand for triple damages is granted.

Short form order signed simultaneously herewith.

Peter J. Kelly, J.S.C.