

Welland v Hebble

2007 NY Slip Op 32922(U)

September 4, 2007

Supreme Court, New York County

Docket Number: 0106766/2005

Judge: Emily Jane Goodman

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

EMILY JANE GOODMAN

PART 17

Index Number : 106766/2005

WELLAND, ROY G.

vs

HEBBLE, ROBERT M.

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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 _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

is denied per

AD

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

FILED
SEP 18 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 9/4/07

[Signature]
J.S.C.
EMILY JANE GOODMAN
 NON-FINAL DISPOSITION

Check one: FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

-----x
ROY G. WELLAND,

Plaintiff,

Index No. 106766/05

-against-

ROBERT M. HEBBLE and
MUCHNICK, GOLIEB & GOLIEB, P.C.,

Defendants.

FILED
SEP 18 2007
NEW YORK
COUNTY CLERK'S OFFICE

Emily Jane Goodman, J.S.C.:

In this legal malpractice action, defendant Muchnick, Golieb & Golieb, PC (MGG) moves, pursuant to CPLR § 3212 and CPLR 3211, for an order dismissing the Amended Complaint and all cross-claims asserted by defendant Robert Hebble.¹ For the reasons stated below, the motion is granted in part and denied in part.

Plaintiff Roy Welland is a New York resident. MGG is a law firm with offices at 200 Park Avenue South in New York City. Hebble is a New York attorney and former partner of MGG. Hebble left MGG as of January 1, 2004.

According to the Amended Complaint, in 2003, MGG, with Hebble as the partner in charge, represented Welland in connection with

¹Hebble withdrew all his cross-claims against MGG pursuant to a Stipulation Discontinuing Cross-Claims, dated October 12, 2006.

two loans to non-party Capital Acquisitions Management Corporation (CAMCO). The first loan, for \$2,500,000, was made on March 7, 2003, and the second loan, also for \$2,500,000, was made on August 6, 2003.

Welland states that he intended for both loans to be fully secured by a pledge of CAMCO's assets. He states that this intent is evidenced by a Pledge Agreement between Welland and CAMCO dated January 31, 2003 (the Pledge Agreement) and an Amended and Restated Pledge and Security Agreement dated August 6, 2003 (Amended Security Agreement). However, Welland alleges that Hebble failed to perfect his security interests with respect to either loan by failing, among other things, to file the appropriate UCC documents.

After Hebble left MGG, he started his own law firm and continued to represent Welland. On August 1, 2004, Welland loaned CAMCO an additional \$1,000,000. Welland states that he understood that the loan would be secured pursuant to the Pledge Agreement and the Amended Security Agreement. However, the necessary steps to secure this loan were also allegedly not taken.

Welland alleges that CAMCO failed to repay any of the amounts due, except for \$246,648.50. Thus, after giving credit for the payments made, and accounting for accrued interest on the loans, and collection expenses, Welland was allegedly owed in excess of

\$6.3 million by CAMCO, which went into receivership in December of 2004.

Welland commenced this action in May of 2006. The first cause of action in the Complaint was against Hebble for legal malpractice, alleging that he failed to take the steps necessary to secure Welland's loans to CAMCO. In July of 2006, Hebble agreed to pay \$1 million to Welland in settlement of the claim against Hebble. The settlement agreement states that

Welland agrees to and does hereby indemnify Hebble and hold him harmless (the "Indemnity") against all manner of claims, liabilities, damages, losses, costs and expenses which Hebble may suffer by reason of, or arising out of, the cross claim asserted against Hebble by his co-defendant [MGG] based upon any liability for any payments MGG may be ordered to make to Welland...in the above captioned action, or the Claims which arise directly or indirectly, out of the subject matter of this lawsuit. The Indemnity shall be limited to any sums paid by Hebble in excess of the Settlement Amount above referenced, it being understood and agreed that the Indemnity is not intended to diminish the amount paid hereunder. Welland agrees to promptly pay Hebble the Indemnity herein provided, if any, upon receipt of proof of payment of any Claims by Hebble to Co-defendant [MGG]...

MGG now states that Welland settled his claims with CAMCO sometime in the summer of 2006 for \$2.3 million. However, Welland states that this proposed settlement was opposed by other creditors

and was not approved by the United States District Court which is handling the CAMCO receivership.

MGG now moves for an order granting summary judgment dismissing the Amended Complaint. Alternatively, it seeks an order dismissing the Amended Complaint pursuant to CPLR 3211(a)(7), for failure to state a cause of action.

A party moving for summary judgment is required to make a prima facie showing that it is entitled to judgment as a matter of law, by providing sufficient evidence to eliminate any material issues of fact from the case. Winegrad v NYU Medical Center, 64 NY2d 851 [1985]; Grob v Kings Realty Associates, LLC, 4 AD3d 394 [2d Dept 2004]. The opposing party must then demonstrate the existence of a factual issue requiring a trial of the action. Zuckerman v City of New York, 49 NY2d 557, 560 [1980]. On a motion pursuant to CPLR 3211(a)(7), the court must accept the complaint's factual allegations as true and accord the plaintiff the benefit of every possible favorable inference determining only whether the facts as alleged fit within any cognizable legal theory. Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc, 10 AD3d 267 [1st Dept 2004].

The second cause of action in the Amended Complaint alleges that MGG is liable for Hebble's alleged malpractice while he was a

member of the MGG firm.² MGG argues that this claim should be dismissed because Welland has not adequately alleged or demonstrated that any alleged negligence on MGG's part was the proximate cause of his damages. Specifically, MGG argues that Hebble had ample opportunity to protect Welland's security interests after Hebble left the firm and before CAMCO went into receivership. Thus, MGG argues that Hebble is solely responsible for any failure to perfect Welland's interests in the loans.

Initially, it is clear that MGG is not responsible for any alleged failure on Hebble's part to secure Welland's interests with respect to the August of 2004 loan. That transaction indisputably occurred after Hebble was no longer with MGG. Therefore, any claim against MGG with regard to that transaction is dismissed.

Concerning the first two loans, MGG asserts that "Hebble, as successor counsel, had the 'last clear chance' to protect his client's interests." (Defendant's Memorandum of Law at 14). In other words, MGG argues that, even assuming that Hebble and MGG were initially negligent in failing to perfect Welland's interests, that negligence could have been corrected by Hebble after he left MGG, thus negating any liability on the part of the firm. It is

² As noted above, Hebble settled the malpractice claim against him.

well settled that where "successor counsel had sufficient time to adequately protect plaintiff's rights" a legal malpractice claim against a predecessor firm, hired for the same services, fails as a result of lack of proximate cause. Golden v Cascione, Chechanover & Purcigliotti, 286 AD2d 281 [1st Dept 2001]; see also Pyne v Block & Assoc., 305 AD2d 213 [1st Dept 2003]; Albin v Pearson, 289 AD2d 272 [2d Dept 2001]; Kozmol v Law Firm of Allen L Rothenberg, 241 AD2d 484 [2d Dept 1997].

However, MGG has failed to prove that successor counsel had sufficient time to protect Welland's rights. It is undisputed that following the March 2003 loan and prior to Hebble's departure from MGG, three additional CAMCO creditors perfected their interests in loans to CAMCO.³ Thus, factual questions exist, among others, as to whether Hebble had an opportunity to adequately protect Welland's security interests after he left the firm or whether it was too late, e.g., in terms of priority, based on the other creditors who had previously perfected security interests in connection with

³ The entities are Fourscore Resource Capital LLC on July 9, 2003, Sheridan Asset Management, LLC on August 21, 2003 and General Electric Capital Corp. on September 9, 2003.

debts owed by CAMCO.

MGG asserts that "shortly after CAMCO entered into receivership in December 2004, approximately \$7.1 million was collected by the Receiver in January 2005 following the sale of CAMCO's portfolio of consumer accounts." (Defendant's Memorandum of Law at 15). "As such, had Hebble perfected the plaintiffs interests after he left [MGG] (which theoretically he could have from January 1, 2004 to December 2, 2004), there would have been enough to cover the plaintiffs \$5 million loan advanced to CAMCO in March and August 2003." (Defendant's Memorandum of Law at 15, emphasis in original). However, MGG has not put forth any facts or evidence to demonstrate that, in fact, there would have been sufficient funds to cover CAMCO's debt to Welland, particularly in light of the other creditors with earlier perfected security interests and who would possibly have been paid before Welland. Accordingly, the motion to dismiss is denied with respect to the second cause of action.

Welland's third cause of action alleges that: 1) during the relevant period, MGG also represented CAMCO, as well as another lender to CAMCO, non-party Sheridan Opportunity Fund, L.P.

(Sheridan); 2) CAMCO's interests as borrower and Sheridan's interests as a creditor of CAMCO were directly adverse to Welland's; 3) MGG failed to institute proper systems and procedures concerning its simultaneous representation of clients with conflicting interests; 4) Welland never gave informed consent to such simultaneous representation of conflicting interests; and 5) MGG failed to disclose the relevant risks of such simultaneous representation. The Amended Complaint states that "[b]ut for MGG's negligence and malpractice in failing to institute appropriate systems and procedures, Welland would not have suffered any injury."

This cause of action, for negligence/legal malpractice, is dismissed as duplicative of the second cause of action. Even assuming that MGG represented parties with interests adverse to Welland, he has not specifically alleged or demonstrated the manner in which such representations caused him to sustain damages in connection with the loans, other than by the negligent failure to perfect his security interests, which was already alleged in the second cause of action for negligence/legal malpractice.

The Fourth Cause of Action sets forth in a conclusory manner

that MGG was negligent in failing to supervise and monitor Hebble's representation of Welland. However, the Amended Complaint contains no facts to support this assertion. Moreover, plaintiff fails to demonstrate that MGG has a duty to supervise another member/shareholder of MGG. Therefore, Welland has not adequately stated a claim for negligent supervision and this cause of action is dismissed.⁴

The Fifth Cause of Action alleges that MGG breached its fiduciary duty to Welland by accepting legal fees from him while at the same time receiving legal fees from parties with interests adverse to his own interests. Welland seeks damages in the form of the legal fees he paid to MGG. Initially, MGG asserts that this claim should be dismissed as redundant of the third cause of action. However, this cause of action, not only is not based on negligence/legal malpractice (as is the third cause of action), but also seeks damages in the form of the legal fees paid by Welland, rather than damages from the failure to secure his interest in the loans. See Excelsior 57th Corp. v Lerner, 160 AD2d 407 [1st Dept

⁴ Notably, plaintiff's opposition papers do not address the motion to dismiss regarding this cause of action, presumably because of its lack of merit.

1990] [a plaintiff asserting a breach of fiduciary claim, unlike a malpractice claim, need not allege a direct economic loss; a fiduciary may be required to disgorge ill gotten gains, despite the absence of a direct economic loss to plaintiff].

MGG also asserts that this cause of action should be dismissed because Welland has not adequately alleged the details of the alleged conflicting representations by MGG. However, the Amended Complaint adequately alleges that: during the relevant period, MGG also represented the borrower, CAMCO, and Sheridan, another lender to CAMCO; CAMCO's interests as borrower and Sheridan's interests as a creditor of CAMCO were directly adverse to Welland's; and MGG failed to disclose the relevant risks of such simultaneous representation. Therefore, the motion to dismiss this cause of action is denied.⁵

Accordingly, it is


⁵MGG also asserts that the terms of the settlement agreement between Welland and Hebble bar recovery against MGG. MGG maintains that Welland's agreement to indemnify Hebble for damages which might be suffered by Hebble as a result of MGG's cross-claims for contribution and indemnification "makes the continuation of claims absurd." MGG has failed to demonstrate why the settlement agreement between Welland and Hebble inures to the benefit of MGG, and any argument based on absurdity is not a proper ground for granting the requested relief.

ORDERED that defendant's motion is granted to the extent that the third and fourth causes of action in the Amended Complaint are dismissed and the motion is otherwise denied.

This Constitutes the Decision and Order of the Court.

DATED: September 4, 2007

ENTER:



J.S.C.
EMILY JANE GOODMAN

FILED
SEP 18 2007
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