Schein v Blattmachr
2007 NY Slip Op 33447(U)
October 17, 2007
Supreme Court, Nassau County
Docket Number: 9093-03/
Judge: Ira B. Warshawsky
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. IRA B. WARSHAWSKY,
Justice.

TRIAL/IAS PART 12

MARVIN H. SCHEIN and THE MARVIN H. SCHEIN DESCENDANTS' TRUST,

Plaintiffs,

INDEX NO.: 019093/2003
MOTION DATE: 07/25/2007
MOTION SEQUENCE: 009 & 010

-against-

JONATHAN G. BLATTMACHR, ESQ. and MILBANK, TWEED, HADLEY & McCLOY LLP,

Defendants.

The following papers read on this motion:

Notice of Motion	1
Affirmation of Emily A. Stubbs in Support of Plaintiffs' Motion for a New Trial Pursuant to CPLR 4404(a) & Exhibits Annexed	2
Plaintiffs' Memorandum of Law in Support of Their Motion for a New Trial Pursuant to CPLR 4404(a)	3
Notice of Cross Motion	4
Affirmation of Mara Leventhal in Opposition & Exhibits Annexed	5
Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for a New Trial Pursuant to CPLR 4404(a) and in Support of Defendants' Cross Motion Pursuant to CPLR 2215 & 4406	6
Defendants' Reply Memorandum of Law in Further Support of Defendants' Cross Motion Pursuant to CPLR 2215 & 4406	7
Affirmation of Emily A. Stubbs in Further Support of Plaintiffs' Motion for a New Trial Pursuant to CPLR 4404(a) and in Opposition to Defendants' Cross Motion Pursuant to CPLR 2215 & 4406 & Exhibits Annexed	8
Plaintiffs' Memorandum of Law in Further Support of Their Motion for a New Trial Pursuant to CPLR 4404(a) and in Opposition to Defendants' Cross Motion Pursuant to CPLR 2215 & 4406	9

The plaintiffs, pursuant to CPLR 4404(a) have moved to set aside the verdict as to questions two and four of the interrogatories that were presented to the jury, and for the court to enter judgment in favor of plaintiffs on those particular questions as to whether damages were caused by the defendants' breach of its fiduciary duty to plaintiff. In the alternative, plaintiffs request that if the verdicts are not set aside and replaced with a verdict favorable to the plaintiffs, that the court set aside those verdicts and set this matter down for a new trial on damages only.

Plaintiffs argue that the jury's answers to questions numbered 2 & 4 were against the weight of the evidence and that their proof of causation was improperly restricted by erroneous evidentiary rulings made by the Court. In opposition, defendants claim (1) that plaintiffs did not satisfy their burden of proving causation; (2) the Court's evidentiary rulings were correct; (3) no new trial is warranted because there was no breach of fiduciary duty as a matter of law; and (4) that as a matter of law the undisputed evidence proved that the standard of reasonableness was satisfied. Defendants have crossed moved to vacate the jury's answers to Interrogatories 1 and 3 pursuant to CPLR 2215 and 4406. Both plaintiffs' motion and defendants' cross-motion are denied.

In May 2000, plaintiff Marvin Schein and defendant Jonathan Blattmachr met at a fundraiser. At that time, Blattmachr told Schein about a tax saving strategy called the Spectrum split dollar strategy. The strategy began with the purchase of large insurance policies by a wealthy, older individual and the subsequent creation of a trust. The trust would then be transferred for the benefit of his heirs in an amount much greater than the cost of insurance purchases, with resultant dramatic savings of tax. Schein agreed to be represented by Blattmachr jointly with Spectrum, the insurance agency, for purposes of the Spectrum split dollar strategy.

Beginning in February 2001, Schein purchased $350,500,000 of insurance on himself and his father in law, Edward Bennet, which cost Schein over $10 million. However, due to the possibility of an estate tax repeal, as promised by the newly elected President Bush, Schein negotiated a cancellation provision, the "honeymoon agreement," which allowed him until December 27, 2001 to cancel the insurance for any reason and get back most of his money.

An integral component of the strategy was the use of tax table IRS PS 58. However, on January 9, 2001, the IRS issued Notice 2001-10 which announced that the PS 58 table rates could no longer be used for split dollar strategies in subsequent years (after December 31,

2001).[1] Blattmachr believed that the IRS would permit a grandfather clause for those, such as Schein, who entered the strategy prior to January 2001 rate table change.

During a pretrial deposition Blattmachr testified that in January 2001 he concluded that the IRS was hostile to the split dollar strategy, but never informed Schein of that conclusion. This statement became the heart of plaintiffs' case. Schein contends and his trial testimony reflects that if Blattmachr had advised him that he, Blattmachr, sensed hostility from the IRS in 2001 toward the split dollar strategy, Schein would not have participated.

At the trial of this matter, the jury concluded that while the defendants did breach their fiduciary duty to plaintiffs, the breaches were not a substantial factor in causing injury to the plaintiffs.

"[A] motion under CPLR 4404 (subd. [a]) should not be granted unless the verdict is palpably wrong and there is no basis upon which the jury could reach it upon any fair interpretation of the evidence." *Tripoli v. Tripoli,* 83 A.D.2d 764 (4th Dep't 1981), *aff'd* 56 N.Y.2d 684 (1982). The verdict in this case does not rise to the level of that exacting standard. While it may in theory appear that the verdict is inconsistent, it, in fact, is not. The court concludes that the jury could and did reach its verdict on a fair interpretation of the evidence. Furthermore, proximate cause is essential to prove damages in a breach of a fiduciary duty claim, breach of fiduciary duty alone will not suffice. *Northbay Constr. Co. v. Bauco Consrt. Corp.*, 38 A.D.3d 737, 738 (2d Dep't 2007).

In an attempt to prove causation, Schein testified to the Court and before the jury regarding the events in question. However, as is their prerogative, the jury chose not to hold in accordance with the plaintiff's testimony. "It is the proper function of the jury to assess the credibility of witnesses, to resolve conflicting testimony and to determine all factual questions." *Frances G. v. Vincent G.*, 145 A.D.2d 599, 600 (2d Dep't 1988) citing to *Felt v. Olson*, 51 NY2d 977 (1980); *Lopez v City of N.Y.*, 121 A.D.2d 369, 370 (2d Dep't 1986); *Hill v Bresnick*, 112 A.D.2d 919 (2d Dep't 1985)). Contradictory evidence is not necessary for the jury to discredit the plaintiff. *Lucks v. Lakeside Mfg., Inc.*, 37 A.D.3d 666, 668 (2d Dep't 2007). Nevertheless, Blattmachr was not Schein's only tax shelter advisor. Schein, in addition to Blattmachr,

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[1] The financial impact of the rate change was that Schein would only save 50 million dollars in taxes rather than 70 million which was acceptable to Schein.

additionally relied upon a team of advisors who had previously represented him and whose approval he sought in regards to the split dollar strategy. It must not be forgotten that the question to the jury was whether the defendants' breach of fiduciary duty was a "substantial factor" in causing Schein damage not "a factor."

Furthermore, the Court's evidentiary rulings, neither cumulatively nor individually warrants a new trial. The *New York Times* article was properly excluded inasmuch as its prejudicial effect substantially outweighed its probative value. *People v.* Scarola, 71 N.Y.2d 769, 777 (1988). Plaintiffs' is a revisionist view of the evidence. The *New York Times* article was offered to prove liability not to support any part of a damages claim. It was never argued nor even mentioned in that regard. In fact, the jury could even have concluded that Schein suffered no damages. He paid for an insurance policy and he received that for which he paid. He voluntarily cancelled the policy. Moreover, plaintiffs admit that acknowledgment of the hostility mentioned in the article was made in the defendant's November 21, 2002 opinion letter, which was admitted into evidence. Therefore, it was not necessary that the entire article be admitted. Even more notably, the article was published on August 16, 2002, well past the expiration period of the "honeymoon agreement" and at a time when Notice 2001-10 had been revoked.

The expert testimony of Hal Lieberman was also correctly excluded. The expert testimony regarding joint representation would have been relevant regarding a conflict of interest for defendant Blattmachr, which is a legal issue. "It is not for witnesses to instruct the jury as to applicable principles of law, but for the judge." *Marx & Co. v. Diners' Club, Inc.,* 550 F.2d 505, 509-510 (2d Cir. 1977). The jury found a breach without Mr. Lieberman's testimony, leaving this issue irrelevant. Again, it was never argued that it had any relationship to causation; plaintiffs never presented this causation argument at trial, but instead an argument regarding Blattmachr's motive. Lieberman's testimony was also properly precluded on the issue of motive inasmuch as all of the facts regarding joint representation were already in evidence, and the jury did not require further explanation.

On the other hand, the testimony of Georgiana Slade was properly admitted. First, the testimony was given in regards to breach of duty on which the plaintiffs ultimately prevailed. Slade's limited testimony was offered under the "prior consistent statement" hearsay exception

in order to disclaim plaintiff's argument that Blattmachr's explanation of his deposition testimony was false. *See People v. McDaniel,* 81 N.Y.2d 10, 18-19 (1993) and *People v. Dominique*, 36 A.D.3d 624, 625-26 (2d Dep't 2007)). In argument, the article in discussion and defendant Blattmachr's statements were made prior to any motive to falsify.

Defendants' cross-motion is denied as well. Inasmuch as the jury verdict was in favor of the plaintiffs, the defendants cannot move to vacate the answers to interrogatories 1 and 3. *Brizse v. Lisman*, 231 N.Y. 205, 208 (1921). Furthermore, the verdict is easily supported by a fair interpretation of the evidence.

In summary, plaintiffs' motion and defendants' cross motion are both denied. The jury has spoken and inasmuch as there is no reason to overturn the verdict, it will stand. Upon a fair interpretation of the evidence, it is clear to the Court how the jury could hold as they did. Moreover, the Court's evidentiary rulings, neither cumulatively nor individually warrant a new trial.

It is SO ORDERED.

Dated: October 17, 2007

J.S.C.

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