

Larosa v Arbusman

2007 NY Slip Op 33461(U)

October 17, 2007

Supreme Court, New York County

Docket Number: 0600742/2007

Judge: Richard B. Lowe

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

PRESENT:

HON. RICHARD D. LOWE, Justice

PART 56

Index Number : 600742/2007
LAROSA, ALFRED
vs.
ARBUSMAN, AVIGAIL
SEQUENCE NUMBER : # 002
DISMISS COMPLAINT

INDEX NO. 600742-07
MOTION DATE 8/17/07
MOTION SEQ. NO. #002
MOTION CAL. NO.

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

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

MOTION IS DENIED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

FILED
OCT 24 2007
NEW YORK COUNTY CLERK'S OFFICE

Dated: 10/17/07

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

-----X
ALFRED LAROSA, LYNN GROSSMAN and STEPHEN J.
SAFT, ESQ., as co-executors of the estate of THOMAS
ELMEZZI, individually, and on behalf of Vito, Ltd.,

Plaintiffs,
-against-

Index No. 600742/07

AVIGAIL ARBUSMAN, DAN ARBUSMAN, TALI
ARBUSMAN, HERZFELD & RUBIN, P.C., and
JEWELS BY VIGI, LTD.,

Defendants,

-and-

VITO, LTD.,

Nominal Defendant.

-----X
Hon. Richard B. Lowe, III:

Motion Sequences 002 and 003 are consolidated for disposition.

Defendants Tali Arbusman (“Tali”) and Herzfield and Rubin (H&R) separately move pursuant to CPLR §§ 3211(a)(7) and 3016(b) for an order dismissing the following claims against them: Fraud Forgery (First Cause of Action); Fraud in the Inducement (Second Cause of Action); Breach of Fiduciary Duty (Fourth Cause of Action); Fraudulent Concealment (Fifth Cause of Action); Constructive Fraud (Sixth Cause of Action); Negligent Representation (Seventh Cause of Action); Material Misrepresentation (Eighth Cause of Action); and Attorney Malpractice (Ninth Cause of Action).¹

¹ The court notes the reply brief submitted by Tali in motion sequence 003 violates Rule 17 of the Rules of the Commercial Division of the Supreme Court as it is beyond the 15 page limit required for reply briefs. Therefore, the excessive pages will not be considered by the court.

Background

This action is brought by the co-executors of the estate of Thomas Elmezzi (Elmezzi). As alleged in the Complaint, Elmezzi died on October 3, 2005. Prior to his death, he established the Thomas and Jean Elmezzi Private Foundation (the "Foundation") for the purpose of supporting educational initiatives, underprivileged children, and medical research. Prior to his death, Elmezzi made investments for the purpose of increasing the value of the assets he was leaving to the Foundation. Upon his death, he left 90% of those assets to the Foundation.

The complaint alleges that on or about March 14, 2005, defendant Avigail Arbusman ("Avigail") and her husband, defendant Dan Arbusman ("Dan") induced Elmezzi to invest in and to form Vito, Ltd. ("Vito"), a New York corporation, purportedly for the purpose of buying and selling high-end specialty or novelty jewelry pieces. On or about March 14, 2005, Avigail and Elmezzi executed a Memorandum of Understanding ("MOU"), under which Avigail was to be responsible for Vito's day to day operations. Elmezzi and Avigail were each to be 50% shareholders of Vito. The MOU did not provide for the sale or disposition of shares on the death of the shareholder. H&R, of which Tali was an associate, filed the Certificate of Incorporation for Vito. On March 15, 2005, Elmezzi made an initial investment of \$750,000 in Vito. He thereafter wrote additional checks evidencing additional investments totaling between \$500,000 and \$1,850,000.

At the time of Elmezzi's investments, Avigail and Dan were also the proprietors of a Long Island high-end jewelry store, "Jewels by Viggi." The complaint alleges that the Vito business plan called for Avigail and Dan to operate the business of Vito out of the same Long Island locations as Jewels by Viggi. Elmezzi was to have no active role in Vito's operation and

would instead act as a director and silent investor/shareholder.

Plaintiff Stephen J. Saft, Esq. ("Saft"), through his law firm, Kleban & Sanor, P.C., had previously always represented Elmezzi with respect to his estate planning , businesses, and investments. He had been representing Elmezzi with respect to his investment in Vito and was aware of the terms of the MOU. Tali is alleged to have known that Saft was representing Elmezzi because of prior contact between the two.

Elmezzi died October 3, 2005, leaving most of his assets to the Foundation. Prior to his death, Elmezzi received no return on his investment in Vito. After Elmezzi's death, Saft sought to recover Elmezzi's one-half share of Vito for the Estate. Avigail refused to turn over Elmezzi's shares claiming that, under the terms of a purported Shareholder Agreement, Elmezzi had "gifted" or forfeited his entire investment to Avigail. Unaware that there had been a Shareholder's Agreement executed by Elmezzi, Saft requested a copy the agreement. After some delay, Dan produced a copy of the purported Shareholders Agreement. The Arbusmans refused to produce the original signed document.

The plaintiffs' believe Elmezzi's signature was either forged to the Shareholder Agreement or alternatively, his signature was fraudulently procured. They plead a course of conduct whereby the defendants attempted to conceal from Saft that Elmezzi may have executed a Shareholder's Agreement without Saft's knowledge. Until Elmezzi's death, neither Tali, Avigail, Dan, or Elmezzi ever told Saft that a Shareholder Agreement had been executed. To the contrary, immediately prior to Elmezzi's death Tali and the Arbusmans had been negotiating with Saft through email and telephone regarding the terms of a draft Shareholders Agreement. Saft believed the terms still needed to be agreed upon and finalized. Allegedly, by participating

in these negotiations the Arbusmans and Tali were misleading Saft into believing a Shareholder Agreement had not yet been executed and concealing the fact that Elmezzi signed a Shareholder Agreement on May 26, 2006 containing terms favorable to the Arbusmans.

The complaint pleads that on May 26, 2006, at 10:05 p.m., Tali sent Saft a proposed Shareholders Agreement and asked for his comments. It was in draft form and unsigned. Allegedly two provisions in the draft stood out to Saft as unacceptable. First, paragraph 10 stated that upon the death of either shareholder, his or her shares would “pass free and clear to the Surviving Shareholder who shall remain the sole shareholder of the Corporation,” without having to provide any consideration to the deceased shareholders (Complaint, Exhibit 3, ¶ 10). Thus, under the May 26, 2005 draft, the shareholder who died first would forfeit his (or her) entire share in Vito to the other shareholder. Elmezzi was 90 years old and in failing health, while Avigail was approximately 50 years old at the time. As alleged in the Complaint, this provision was contrary to Elmezzi’s general plan to make investments which would maximize the value of assets he was leaving to the Foundation.

Second, Saft found paragraph 21 of the May 26, 2005 draft, entitled, “Conflicting Interests”, objectionable. It stated that “Elmezzi, Dan and Avigail consented to be jointly represented by H&R in the matter of negotiating and drafting this agreement.”(Complaint, Exhibit 3, ¶ 21) Arguably, paragraph 21 confirms that H&R entered into an attorney-client relationship with Elmezzi.

Saft immediately contacted Tali and told her he had objections with the draft agreement and the attorneys should meet with the clients to resolve them. Saft also had periodic conversations with Elmezzi to discuss Vito and the need for the Shareholders Agreement to be

completed. Elmezzi agreed with Saft that an agreement needed to be signed, belying any claim that one had already been executed. On August 20, 2005, Saft again contacted Tali in order to schedule a meeting to discuss a proposed re-draft of the Stockholders Agreement. He indicated that the main issue for discussion is the buy-out value and that he would send a revised draft. On the same day, Tali responded that she would confirm a meeting once she received a revised draft of the Shareholders Agreement. Again, Tali did not disclose that an agreement had already been executed.

On August 29, 2005, Saft sent a substantially revised proposed Shareholder Agreement to Tali, with a cover email stating that it was a re-draft of the proposed Stockholder's Agreement. The redraft eliminated the paragraph regarding conflicting representations and the forfeiture provision. The next day, Tali emailed Saft thanking him for his revision and advised him she would contact him again after reviewing it. On September 1, 2005, Saft advised Tali that Elmezzi was in agreement with the revised Shareholders Agreement and suggested they meet to resolve any differences.

On September, 20, 2005, Elmezzi, Saft and other executors of the Estate met at the Foundation's offices to discuss Elmezzi's investments, including Vito. They discussed the need to resolve open issues in the proposed Shareholder Agreement so it could be finalized. Elmezzi instructed Saft to contact the Arbusmans to arrange to do so. During the meeting, Elmezzi never stated that he had already executed a Shareholders' Agreement for Vito, but rather to the contrary, indicated it still needed to be done.

Shortly thereafter, Elmezzi became ill and passed away on October 3, 2005, leaving most of his assets to the Foundation. A search of his estate failed to uncover any document concerning

Vito other than the MOU.

Plaintiff contends there is no valid or enforceable Shareholder's Agreement. Instead, plaintiffs contend that the Estate continues to own 50% of the shares in Vito. They seek to invalidate the Agreement as a forgery or as procured by fraud, recover the Estate's half interest in Vito for the benefit of the Foundation and/or to recover for the fraud allegedly perpetrated upon Elmezzi.

Defendants Tali and H&R now seek to dismiss the causes of action for fraud, malpractice, breach of fiduciary duty, and punitive damages asserted against them.

Discussion

On a motion to dismiss the complaint pursuant to CPLR § 3211(a)(7) a court must determine whether the complaint states a cause of action. The Court must liberally construe the complaint and accept all facts as alleged as true when determining whether they fit into any cognizable legal theory. (*Morone v Morone*, 50 NY2d 481 [1980]; see also *Guggenheimer v Ginzburg*, 43 NY2d 268,275.) The complaint must be construed liberally and the court must accept as true not only the complaint's material allegations, but also whatever can reasonably be inferred therefrom in favor of the pleader. (*PT Bank Central v ABM AMRO*, 301 AD2d 373 [1st Dept 2003].)

Fraud Claims

Defendants seek to dismiss the complaint alleging the plaintiffs have not sufficiently plead fraud. The elements constituting fraud claims, fraudulent concealment, and negligent misrepresentation are similar. To plead fraud the plaintiff must demonstrate that: (1) the defendant made a material false representation, (2) the defendant intended to defraud the plaintiff

thereby, (3) the plaintiff reasonably relied upon the representation, and (4) the plaintiff suffered damage as a result of reliance. (*Swersky v Dreyer and Traub*, 219 AD2d 321, 326 [1st Dept 1996].) Fraudulent Concealment requires a showing of a concealment of material fact not readily available to the plaintiff, scienter, reliance, and injury. (*Kaufman v Cohen*, 307 AD2d 113 [1st Dept 2003].) To plead negligent misrepresentation, the plaintiff must plead the representation of material fact, falsity, scienter, justifiable reliance, and injury. (*Grammar v Turits*, 271 AD2d 644 [2d Dept 2000].) With respect to fraudulent concealment and negligent misrepresentation, the plaintiff must also demonstrate the existence of a special relationship of trust or confidence between the parties giving rise to a duty to provide correct information. (*Id.*)

The plaintiffs have satisfactorily plead the fraud claims. It is specifically alleged that Tali misrepresented to Elmezzi the nature of the document he signed, what the nature of her representation was, and the nature of his investment in Vito. Furthermore, in detail, the plaintiffs allege steps which were taken to hide from Saft, Elmezzi's attorney, the fact that Elmezzi allegedly had executed the purported Shareholder's Agreement before defendants sent the draft to Saft for review. This pleading is sufficient to put the defendants on notice of the claims alleged and provides disclosure of "the circumstances constituting the wrong." (*DaPuzzo v Reznick Fedder Silerman*, 14 AD3d 302 [1st Dept 2005].)

Further, plaintiffs allege the defendants either forged Elmezzi's signature, or fraudulently misrepresented to or concealed the terms of the agreement from Elmezzi. The plaintiff also alleges such misrepresentations were made to Elmezzi's detriment because he signed an agreement, the terms of which caused Elmezzi to lose his entire investment in Vito, to the benefit of Tali's mother, Avigail.

Defendants also argue dismissal is warranted because the plaintiffs do not allege any *specific* representations to Elmezzi which he reasonably relied upon to his detriment, nor do they allege defendants ever communicated one on one with Elmezzi. However, where the facts constituting the fraud are peculiarly within the knowledge of the party against whom the claim is being asserted, a court will find that the misconduct complained of is properly plead. This is because it would be impossible for the plaintiff to state the circumstances in more detail where, if the allegations are true, only the defendants would have knowledge of the details. (*Bernstein v Kelso & Co* 231 AD2d 314 [1st Dept 1997]) In this matter, Elmezzi is unable to testify and the defendants alone are aware of what they said or did not say to Elmezzi with respect to the agreement. Therefore, because on a motion to dismiss, this court must give the allegations the most favorable intendment, and where the details constituting the fraud and negligent misrepresentation are in the exclusive knowledge of the defendants, the claims may stand. (*Id.*)

Furthermore, with respect to the fraudulent concealment and negligent misrepresentation claims, there may have been a special relationship between H&R, Tali and Elmezzi whereby Elmezzi was represented by the firm in negotiating the Shareholders Agreement. Attorneys, like other professionals, may be held liable for economic injury arising from negligent misrepresentations. (*Tajan v Pavia & Harcourt*, 257 AD2d 299 [1st Dept 1999].)

The defendants also argue that the plaintiffs cannot plead the alterative theories of liability of forgery and/or fraud. However, a plaintiff may plead alternate theories of liability. It is only at the time of trial or summary judgment stage that he/she must elect one of those remedies. (*Unisys v Hercules, Inc.*, 224 AD2d 365, 367 [1st Dept 1996].)

Malpractice Claims

In order to properly plead a claim for legal malpractice, a plaintiff must allege (1) the negligence of the attorney (*Darby & Darby, P.C. v VSI Intern. Inc.*, 268 AD2d 270 [1st Dept] *aff'd* 95 NY2d 308 [2000]); (2) that the negligence was the proximate cause of loss; and (3) proof of actual damages as a direct result of the attorney's actions. (See, *Franklin v Ward*, 199 AD2d 220 [1st Dept 1993])(In a legal malpractice action, a plaintiff must show that an attorney "failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession") (*Bernstein v Oppenheim & Co., P.C.*, 160 AD2d 428 [1st Dept 1990])("[a]n attorney is liable in a malpractice action if it can be proved that his conduct fell below the ordinary and reasonable skill and knowledge commonly possessed by a member of the profession", and that conduct caused injury).

A malpractice claim is properly stated if it fairly apprises the attorney of the malpractice intended to be proved and the material elements of the cause of action. Total specificity in pleading is not required in order to sustain the cause of action. (*Richardson v King*, 36 AD2d 781 [3d Dept, 1971].)

Disciplinary and ethical violations do not, in and of themselves, give rise to a malpractice cause of action. (*Shapiro v McNeil*, 92 NY2d 91 [1988])("an ethical violation will not, in and of itself, create a duty that gives rise to a cause of action that would not otherwise exist at law".) "A conflict of interest, even if a violation of the Code of Professional Responsibility, does not by itself support a cause of action [for malpractice]. (*Darby & Darby, supra*, at 313.)

To the extent that the complaint pleads the malpractice claim based on the fact Tali represented both Elmezzi and the Arbusmans simultaneously, this is not sufficient to sustain a

cause of action for malpractice. Rather, the facts would properly be referred to a disciplinary committee for review. The plaintiffs however do not bring their cause of action solely on the factual grounds constituting the purported conflict of interest.

Where an attorney labors under a conflict of interest which compromises his/her level of advocacy on behalf of a client, this is sufficient to plead a cause of action for malpractice. (See, e.g. *Weil Gotshal & Manges, LLP v Fashion Boutique of Short Hills*, 10 AD3d 267 [1st Dept 2004]) Plaintiffs malpractice claim is based on a theory of liability whereby Tali, while representing Elmezzi and the Arbusmans in drafting the Shareholders Agreement, was under a conflict of interest that was at such an extent that she did not adequately represent Elmezzi's interests in negotiating and drafting the Shareholder Agreement. Therefore, this conflict may have led counsel Tali to draft an agreement which led to a loss of Elmezzi's entire investment in Vito, to the benefit of her parents, the Arbusmans. This is sufficient to plead a malpractice claim.

The court also notes that in moving to dismiss the fraud claims, Tali on the one hand, offers the Shareholder Agreement in support of her argument that where a client is on notice of a conflict of interest, but chooses to proceed with the representation, then courts are reluctant to entertain claims for malpractice. (See, *Sumo Container Station, Inc. v Evans, Orr, Pacelli, Norton & Laffan, P.C.*, 278 AD2d 169 [1 st Dept 2000].) Therefore, according to Tali, she did undertake representation of Elmezzi, he waived conflict issues, and the conflict is not an actionable issue. Then, on the other hand, Tali stands behind the plaintiffs inability to articulate specific statements made by her to Elmezzi during her representation because they cannot plead she ever spoke or communicated with him about the Shareholder Agreement — facts solely

within her knowledge. Assuming a fact finder were to determine she was retained by Elmezzi, yet never communicated with him, this would also be grounds for a malpractice claim whereby counsel undertook to draft an agreement and have it signed by the client without first discussing the agreement's terms, specifically those which gave a right of survivorship of Elmezzi's shares to the remaining shareholders, and which waived his objection to the conflict of interest. It is those terms which caused Elmezzi to lose his investment in Vito.

Therefore, because the plaintiffs have sufficiently plead the conflict of interest between Elmezzi and Tali led her to engage in conduct which fell below the ordinary and reasonable skill of a member of the profession, thereby causing Elmezzi to lose his investment, the cause of action for malpractice may stand.

Lastly, the claims for fraud and malpractice are not duplicative of one another. This is not an example of a failure by the attorney to disclose ones own malpractice which precludes a fraud claim in addition to a malpractice claim. (*See e.g. White of Lake George Inc v Bell*, 251 AD2d 777 [3d Dept 1998].) Nor is a supposed "error of professional judgment" alleged. (*La Brake v Enzein*, 167 AD2d 709 [3d Dept 1990].) Rather, the complaint can fairly be read to allege Tali undertook representation of Elmezzi, secreted the representation from Saft, his attorney handling the Vito transaction, with the intent of misleading and fraudulently causing Elmezzi to enter into a transaction favorable to the Arbusmans. This can be gathered through a reading of the complaint which details supposed negotiations between Tali and Saft regarding a draft agreement, the negotiations of which occurred *after* Elmezzi signed the draft agreement while being represented by Tali.

Breach of Fiduciary Duty

Allegations of a breach of fiduciary duty that are duplicative of a malpractice claim must be dismissed. (*Proskauer Rose, LLP v ASIA Electronics Holding Co., Inc.*, 2 AD3d 196 [1st Dept 2003].) Where the breach of fiduciary duty cause of action is based on the same facts and seeks the identical relief of the attorney malpractice action, it is redundant and must be dismissed. (*Estate of Nevelson v Carro, Spanbock Kaster & Cuffo*, 290 AD2d 399, 400 [1st Dept 2002].)

Plaintiffs fourth cause of action alleges Tali breached a fiduciary duty by representing both Elmezzi and the Arbusmans when negotiating and drafting the Shareholder Agreement and thereby compromising her representation of Elmezzi. The alleged damages are Elmezzi's loss of his investment in Vito. These claims are duplicative of those alleged in the cause of action for attorney malpractice and therefore must be dismissed.

Punitive Damages

Punitive damages are allowable in a tort case where the plaintiff shows that there was "egregious, malicious and intentional" conduct by the defendants. (*H.B. International, Ltd. V Kahan Jewelry Corp.*, 266 AD2d 77 [1st Dept 1999].) To sustain a claim for punitive damages in tort either intentional or deliberate wrongdoing, aggravating or outrageous circumstances, a fraudulent or evil motive, or a conscious act that willfully and wantonly disregards the rights of another" must be shown. (*Gamiel v Curtis & Reese-Curtics, P.C.*, 16 AD3d 140 [1st Dept 2005].)

The plaintiffs sufficiently plead details warranting punitive damages. Here, they plead a scenario whereby steps were taken by Tali and the Arbusmans to defraud Elmezzi of his

investment to their benefit. The complaint articulates in detail steps taken by Tali to prevent Saft, who she knew represented Elmezzi with respect to his investments, from finding out about her representation of Elmezzi during the negotiation of the Shareholder Agreement. It further pleads the agreement was kept from the plaintiffs until after Elmezzi's death. Therefore, the details of its negotiation and execution could not be discussed with Elmezzi. The complaint also alternatively alleges the Shareholder Agreement was forged by Tali and/or the Arbusmans.

These allegations are sufficient to plead the defendants engaged in a pattern of intentional wrongdoing and in an outrageous manner in an effort to strip Elmezzi of his investment in Vito. Therefore, the claim for punitive damages may remain.

Claims against H&R

H&R has brought a separate motion to dismiss the claims against it arguing it is not vicariously liable for Tali's conduct because it was committed for personal motives unrelated to the furtherance of H&R's business.

Generally, an employer may be vicariously liable for its employees' tortious acts on a theory of respondeat superior if they were committed in furtherance of the employer's business and within the scope of employment. (*Bowman v State*, 10 AD3d 315 [1st Dept 2004].) Thus, an employer is liable for the acts of its employee when the employee "is doing something in furtherance of the duties he owes to his employer and where the employer is, or could be exercising some control, directly or indirectly, over the employee's activities." (*Lundberg v State of New York*, 25 NY2d 467 [1969].)

The plaintiff has plead that H&R was involved to a certain extent with the transactions at issue. For example, it is H&R which filed Vito's Certificate of Incorporation. Furthermore, the

contract at issue which may have been fraudulently procured specifically identifies H&R as acting on behalf of Elmezzi and Arbusman. As this court has already acknowledged, where knowledge of the circumstances surrounding the allegations are solely within the defendants' possession, a court will find the complaint is properly plead. (*See, Bernstein v Kelso & Co.*, 231 AD2d 314, *supra.*) At this early stage of the litigation, plaintiff has plead enough to bring a cause of action where it may be determined H&R and its members participated in the purported scheme to divest Elmezzi of his interest in Vito and that it was done to further the interests of H&R.

Indeed, a reading of the complaint does show involvement by H&R in the relevant transaction and therefore the action, at least at this juncture, can continue as against H&R.

Conclusion

Therefore, based on the foregoing, it is hereby

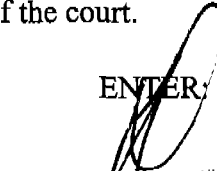
ORDERED that Motion Sequence 003 is granted in part and otherwise denied to the extent that fourth cause of action is dismissed and it is further

ORDERED Motion Sequence 002 seeking to dismiss the complaint against H&R is denied and it is further

ORDERED the defendants serve an answer to the complaint within twenty days of service of this order with notice of entry.

This shall constitute the order and decision of the court.

Dated: October 17, 2007

ENTER

 HON. RICHARD D. LOVE, III
 J.S.C.

FILED
 OCT 24 2007
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