Engelke v Brown, Rudnick, Berlack, Israels, L.L.P.

2007 NY Slip Op 34377(U)

February 14, 2007

Supreme Court, New York County

Docket Number: 114511/05

Judge: Jane S. Solomon

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SCANNED ON 2/21/2007

[*1]

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

PRESENT: JANE S. SOLOMON _____ / PART 55

Index Number : 114511/2005
ENGELKE, DAVID H.
VS
BROWN RUDNICK BERLACK ISRAELS
Sequence Number : 002
REARGUMENT/RECONSIDERATION

INDEX NO. _____
MOTION DATE 10/18/06
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 ...	1-3
Answering Affidavits — Exhibits	4-5
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum decision and order.

FILED
FEB 21 2007
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 2/14/07

JANE S. SOLOMON J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

2SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 55

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DAVID H. ENGELKE,

Plaintiff,

Index No.: 114511/05
DECISION and ORDER

-against-

BROWN, RUDNICK, BERLACK, ISRAELS, L.L.P.,

Defendant.

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HON. JANE S. SOLOMON, J.S.C.:

Plaintiff moves, pursuant to CPLR 2221, for leave to reargue a portion of the decision by this court that granted defendant's earlier motion to dismiss (motion sequence number 002). Plaintiff's motion is granted, however the court adheres to its original decision for the reasons set forth below.

FILED
FEB 21 2007
COUNTY CLERK'S OFFICE
NEW YORK

BACKGROUND

The Parties

In this action, plaintiff David H. Engelke (Engelke), a resident and domiciliary of the State of Florida, seeks to bring legal malpractice claims against the defendant law firm of Brown, Rudnick, Berlack, Israels, L.L.P. (Brown, Rudnick), a Massachusetts limited liability company that also conducts business in New York County. See Notice of Motion, Exhibit 1, ¶¶ 1-2. The court's previous decision (the August 2, 2006 decision) set forth the facts of this action at length, and it is only necessary to briefly revisit those facts now. Id.; Exhibit 8.

Engelke's Claims

The events that gave rise to Engelke's malpractice claims concerned two companies in which Engelke used to be a shareholder - a Florida corporation called Digital Editing Services,

Inc. (DES), and a New Hampshire corporation called the Montage Group, Limited (Montage). Id. at 1. In early 2000, a third company, Pinnacle Systems, Inc. (Pinnacle), made separate offers to purchase the equity in DES and Montage from Engelke and the other shareholders. Id. at 2. Pinnacle then acquired DES on March 29, 2000 in a merger agreement (the DES merger agreement), and acquired Montage on April 6, 2000 in a stock purchase agreement (the Montage stock purchase agreement). Id. Engelke states that Brown, Rudnick represented him (and Montage's other shareholders) in connection with the Montage stock purchase agreement, but admits that another firm (Pillsbury, Winthrop, L.L.P.) represented him in connection with the DES merger agreement. Id.

Under the terms of the foregoing contracts, Engelke received a quantity of Pinnacle's common stock in return for his interests in DES and Montage, as well as contingent rights to receive more such stock depending upon DES's and Montage's respective financial performances in the year that immediately followed their acquisition by Pinnacle.[1] Id. Both of the contracts also contained provisions that obligated the "Shareholders" (i.e., Engelke and the others) and the "Purchaser" (i.e., Pinnacle) to mutually indemnify each other against any losses that might arise as a result of either party breaching any of the contractual warranties or guaranties that it had made to the other.[2] Id. The contracts' indemnification clauses each

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[1] The DES merger agreement also made Engelke a vice president of Pinnacle in charge of operating DES as a division of Pinnacle. See Notice of Motion, Exhibit 8, at 2.

[2] Among the warranties and guaranties that Engelke made on behalf of DES and Montage were certain representations as to those companies' exposure to possible future litigation. The DES merger agreement and Montage stock purchase agreement also each defined the term "losses" to include "damages, claims, ... liabilities, ... costs and expenses, including reasonable attorneys' fees." Id.

provided that:

> [i]n the event that the indemnifying party does not assume the defense of such claim or fails to defend the claim in good faith, the indemnified party shall have the right in its sole discretion to defend and settle any such claim; provided, however, that except with the consent of the indemnifying party, no settlement of any such claim with third-party claimants shall be determinative of the amount of any claim for indemnification pursuant to ... [this agreement].

Id. at 3.

On August 29, 2000, a Florida corporation called Athle-Tech Computer Systems, Inc. (Athle-Tech) commenced a breach of contract action against DES and Montage in Florida Superior Court, Pinellas County (the Athle-Tech I action).[3] Id. at 4. On February 23, 2001, Pinnacle served all of the shareholders of DES and Montage (including Engelke) with a notice stating that Pinnacle was demanding indemnification from them. Id. At that time, Pinnacle also exercised its options to buy out Engelke's remaining interests in DES and Montage. Id. As a result of the latter, Engelke shortly thereafter commenced two arbitration proceedings against Pinnacle.[4] Id. Brown, Rudnick represented Pinnacle in both of those arbitrations. Id.

On May 25, 2002, Pinnacle and DES's and Montage's shareholders (Engelke among them) executed an agreement to coordinate their collective, ongoing defense of the Athle-Tech I action (the Common Interest Agreement). Id. at 5. Engelke admits that Brown, Rudnick did not represent him during the negotiation of the Common Interest Agreement. Id. Engelke also

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[3] The allegedly breached contract was signed by Engelke for Montage, and had obligated Montage to develop certain computer programs for Athle-Tech. Athle-Tech claimed that Montage had failed to do so. See Notice of Motion, Exhibit 8, at 4.

[4] The first arbitration proceeding concerned Pinnacle's decision not to issue Engelke any more shares of its common stock as a result of DES's financial performance in the preceding year. The second arbitration proceeding concerned Pinnacle's decision to terminate Engelke the vice president in charge of DES. Id. at 4.

admits that on August 23, 2002, Brown, Rudnick sent him a letter requesting that he consent to its representing him along with the other defendants in the Athle-Tech I action, but that he refused. Id. Engelke states that he did so because Brown, Rudnick was already representing Pinnacle against him in the two arbitration proceedings that he had commenced earlier. Id.

In late 2003, the jury in the Athle-Tech I action delivered a verdict against the defendants which Pinnacle immediately appealed. Id. at 6. In December of 2003, the arbitrator in one of Engelke's arbitration proceedings found in favor of Engelke. Id. Thereafter, in February of 2004, Engelke and Pinnacle settled both of the arbitration proceedings. Id. On April 1, 2004, while the appeal of its first action was still pending, Athle-Tech commenced a second action against Engelke, Pinnacle, DES and Montage (the Athle-Tech II action). Id. In December of 2004, Pinnacle - represented by Brown, Rudnick and acting on behalf of itself, DES and Montage - executed two settlement agreements with Athle-Tech to resolve both the Athle-Tech I and Athle-Tech II actions (the Athle-Tech settlement agreements). Id. The Athle-Tech settlement agreements provided that Pinnacle, DES and Montage would be given a general release that would not cover former DES and Montage shareholders (i.e., Engelke). Id. at 7. Thus, Engelke remained a party to both the Athle-Tech I and Athle-Tech II actions.

Prior Proceedings

Although all of the contracts discussed above - the DES merger agreement, the Montage stock purchase agreement, the Common Interest Agreement and the Athle-Tech settlement agreements - contained Florida choice of law provisions, Engelke nonetheless chose to commence this legal malpractice action in New York. His October 17, 2005 summons and complaint alleged that Brown, Rudnick had committed legal malpractice during its defense of the

Athle-Tech I action and during the negotiations that gave rise to the Athle-Tech settlement agreements. Id.; Exhibit 1. On December 16, 2005, without filing an answer, Brown, Rudnick moved to dismiss this action. Id.; Exhibit 2.

The August 2, 2006 Decision

On August 2, 2006, this court issued a decision that granted Brown, Rudnick's motion (the August 2, 2006 Decision). Id.; Exhibit 8. In the relevant portion of the August 2, 2006 Decision, the court first observed that:

> Florida courts have uniformly limited attorneys' liability for negligence in the performance of their professional duties to clients with whom they share privity of contract. "In a legal context, the term 'privity' is a word of art derived from the common law of contracts and used to describe the relationship of persons who are parties to a contract." The only instances in Florida where the rule of privity has been relaxed are where the plaintiff is an intended third party beneficiary of the employment contract. Brennan v Ruffner, 640 So2d 143, 145 (Fla App 4th Dist 1994) (citations omitted).

Id. at 9. Thereafter, the court held that:

> It is true that [Florida]'s law affords Engelke a narrow exception if he was an "intended third party beneficiary of the employment contract" between Brown, Rudnick and the other defendants that it represented in the Athle-Tech I and II actions. Brennan v Ruffner, 640 So2d at 145. However, that exception may not be invoked unless "it can be demonstrated that the intent of the client in engaging the services of the lawyer was to benefit a third party." Id. at 146. Further, where the proponent of the exception admits that there was an inherent conflict of interest between his or her rights as an individual shareholder and the corporation, this admission expressly undercuts a third party beneficiary claim. Id. Here, because Pinnacle retained Brown, Rudnick, and Engelke admitted that he refused to be represented by Brown, Rudnick since he and Pinnacle had conflicting interests in the Athle-Tech I and II actions, it is clear that Engelke may not avail himself of the "intended third-party beneficiary" exception to Florida's privity requirement. ... Under Florida law, Engelke's legal malpractice claim against Brown, Rudnick would plainly fail.

Id. at 11.

Engelke now moves, pursuant to CPLR 2221, to reargue this portion of the August 2, 2006 Decision.

DISCUSSION

A motion for leave to reargue pursuant to CPLR 2221 may be granted only upon a showing "'that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision'." See William P. Pahl Equipment Corp. v Kassis, 182 AD2d 22, 27 (1st Dept 1992), quoting Schneider v Solowey, 141 AD2d 813 (2d Dept 1988). After reviewing the controlling Florida case law, the court finds that its original decision was correct.

As the court observed in the August 2, 2006 Decision, Florida law relaxes the strict requirement that a plaintiff in a legal malpractice action must prove privity of contract between himself/herself and the defendant law firm only where the plaintiff can show that he/she was an intended third-party beneficiary of a legal services contract between the defendant law firm and a third party. See Brennan v Ruffner, 640 So2d 143, 145 (Fla App 4th Dist 1994). Here, Engelke argues that "the court misapprehended that [he] was in fact a third party beneficiary of Brown, Rudnick's legal services" in the negotiation of the Montage stock purchase agreement, because all of Montage's shareholders "were necessarily third party beneficiaries ... when Brown, Rudnick represented Montage in the sale of Montage's equity to Pinnacle." See Plaintiff's Memorandum of Law, at 5. Engelke then argues that Brown, Rudnick committed legal malpractice by failing to either seek his consent or to withdraw its representation of Pinnacle when Pinnacle's interests became averse to his during the negotiation of the Athle-Tech settlement agreements. Id. at 6-7. However, it is clear that Engelke was not a third-party

beneficiary of Brown, Rudnick's legal employment contract with Pinnacle.

In Brennan v Ruffner (640 So2d 143, supra), the Florida Court of Appeals specifically held that:

> [W]here an attorney represents a closely held corporation, the attorney is not in privity with and therefore owes no separate duty of diligence and care to an individual shareholder absent special circumstances or an agreement to also represent the shareholder individually. While there is no specific ethical prohibition in Florida against dual representation of the corporation and the shareholder if the attorney is convinced that a conflict does not exist, an attorney representing a corporation does not become the attorney for the individual stockholders merely because the attorney's actions on behalf of the corporation may also benefit the stockholders. The duty of an attorney for the corporation is first and foremost to the corporation, even though legal advice rendered to the corporation may affect the shareholders [emphasis added].

Id. at 145-146. In Silver Dunes Condominium of Destin, Inc. v Beggs and Lane (763 So2d 1274 [Fla App 1st Dist 2000]), the Florida Court of Appeals cited the Brennan decision in holding that "[e]vidence of a conflict of interest between the rights of the claimed third-party beneficiary and the rights of the attorney's actual client undercuts any claim that the legal services were undertaken for the express benefit of the claimed third-party beneficiary." Engelke's argument fails on two fronts under Florida law. Firstly, his claim that he and Montage's other stockholders were "necessarily third party beneficiaries ... when Brown, Rudnick represented Montage in the sale of Montage's equity to Pinnacle" runs completely counter to the Florida Court of Appeals' holding in Brennan that "an attorney representing a corporation does not become the attorney for the individual stockholders merely because the attorney's actions on behalf of the corporation may also benefit the stockholders." At best, Florida law would deem Engelke to be an incidental beneficiary of Brown, Rudnick's representation of Pinnacle in the Montage stock purchase agreement. Secondly, Engelke's admission that he refused to consent to Brown, Rudnick's

representing him in the Athle-Tech litigation because Brown, Rudnick was already representing Pinnacle in the two earlier arbitration proceedings that he had commenced, clearly constitutes "evidence of a conflict of interest between the rights of the claimed third-party beneficiary and the rights of the attorney's actual client" that undercuts Engelke's claim that he was an intended third-party beneficiary of Brown, Rudnick's ongoing representation of Pinnacle. Engelke's argument ignores the fact that the Athle-Tech litigation had caused the interests of Montage's new owner (i.e., Pinnacle) and its former shareholders (i.e., himself) to diverge. Indeed, his argument appears all the more disingenuous because the Montage stock purchase agreement itself recognized and provided for the possibility of a divergence of interests in the portion of the agreement that permitted the respective parties the right to seek indemnification from each other. In any event, it is clear that the court did not misapprehend the workings of Florida law in the August 2, 2006 Decision. Accordingly, the court finds that it should adhere to the legal conclusions set forth in that decision.

In its opposition papers, Brown, Rudnick argued that Engelke's motion is improper because Engelke did not raise a third-party beneficiary argument in opposition to Brown, Rudnick's original motion to dismiss. See Defendant's Memorandum of Law, at 5-6. Engelke responded that his current argument is properly directed to a point of law that the court misapprehended. See Plaintiff's Reply Memorandum, at 2. The court agrees that Engelke's reargument motion is proper in form. It is true that a reargument motion is not intended to provide a party "'an opportunity to advance arguments different from those tendered on the original application'." See Rubinstein v Goldman, 225 AD2d 328, 328 (1st Dept 1996), quoting Foley v Roche, 68 AD2d 558, 568 (1st Dept 1979). However, after reviewing the file, it is

evident that Engelke's original opposition presumed that Brown, Rudnick had incorrectly interpreted Florida law, and argued for the application of a different standard. See Notice of Motion, Exhibit 6, at 9-10. Because the court's August 2, 2006 Decision essentially agreed with Brown, Rudnick's interpretation of Florida law, Engelke was correct to seek leave to reargue the relevant portion of that decision pursuant to CPLR 2221. Accordingly, the court grants Engelke's request for leave to reargue a portion of the August 2, 2006 Decision. However, for the reasons discussed above, the court also adheres to the findings of fact and conclusions of law set forth in that decision.

DECISION

ACCORDINGLY, for the foregoing reasons, it is hereby

ORDERED that the motion of plaintiff David H. Engelke, pursuant to CPLR 2221 (motion sequence number 002), for leave to reargue a portion of the decision that disposed of motion sequence number 001 is granted; however the court adheres to the findings of fact and the conclusions of law that were set forth in that decision .

Dated: New York, New York
February 14, 2007

FILED
FEB 21 2007
COUNTY CLERK'S OFFICE
NEW YORK

ENTER:

Hon. Jane S. Solomon, J.S.C.

JANE S. SOLOMON