

Rosado v McAloon & Friedman
2008 NY Slip Op 31523(U)
May 29, 2008
Supreme Court, New York County
Docket Number: 0601856/2007
Judge: Michael D. Stallman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. MICHAEL D. STALLMAN
Justice

PART 7

WILFREDO ROSADO, individually and
derivatively as a shareholder on behalf of
Castillo, Rosado, Inc., Edmundo Castillo LLC,
and Edmundo Castillo International S.r.L.,

INDEX NO. 601856/2007

Plaintiff,

- v -

MOTION DATE 2/11/08

MOTION SEQ. NO. 002

McALOON & FRIEDMAN, P.C., and STANLEY D.
FRIEDMAN, individually,

MOTION CAL. NO. 77

Defendants.

The following papers, numbered 1 to 3 were read on this motion to dismiss

	PAPERS NUMBERED
Notice of Motion— Affidavits — Exhibits A-B	1-2
Answering Affidavits — Exhibits A-K	3
Reply Memo of Law	

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.

MOTION/CASE IS RESPECTFULLY REFERRED TO
JUSTICE
DATED:

J.S.C.

Dated: 5/29/08
New York, New York

FILED
JUN 04 2008
COUNTY CLERK'S OFFICE
NEW YORK

[Signature]
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: IAS PART 7**

-----X
WILFREDO ROSADO, individually and derivatively as a
shareholder of Castillo Rosado, Inc., Edmundo Castillo, Inc. and
Edmund Castillo International S.r.L.,

Index No. 601856/07

Plaintiff,

- against -

McALOON & FRIEDMAN, P.C. and STANLEY D.
FRIEDMAN, Individually,

Defendants.

Decision and Order
FILED
JUN 11 2008
COUNTY CLERK'S OFFICE
NEW YORK

-----X
HON. MICHAEL D. STALLMAN, J.:

Plaintiff contends that the law firm that his corporation hired as its counsel should not have rendered legal services to individuals in the corporation who plaintiff alleges acted against the corporation's interests, and against the interest of related corporate entities. Defendants move to dismiss the verified complaint.

BACKGROUND

Plaintiff Wilfredo Rosado and non-party Edmundo Castillo formed Castillo Rosado, Inc. (CRI), a New York corporation, which allegedly designed, manufactured, and sold women's shoes under the Edmundo Castillo trademark. CRI authorized Edmundo Castillo LLC (EC LLC), a New York limited liability company, and Edmundo Castillo International S.r.L. (ECI S.r.L), an Italian limited liability company, to use the Castillo trademark in the United States and in countries outside the United States, respectively. According to Rosado, he owns 50% of CRI; CRI is the sole member of EC LLC; Rosado and Castillo equally own ECI S.r.L. CRI allegedly hired non-party Denise Cassano and B&D Financial Strategies, Inc. (B&D) as its financial/business consultant.

Rosado claims that Castillo conspired with Cassano to divert CRI's assets. In particular, Castillo allegedly signed an agreement with Cassano assigning CRI's receivables to Cassano, in consideration of \$800,000 that Cassano had purportedly lent to CRI. Castillo allegedly formed a competing company, Edmundo Castillo, Inc. (ECI), negotiated a new lease for ECI at CRI's former offices, and used CRI's security deposit for ECI's lease. On September 30, 2004, Rosado commenced an action against Castillo, Cassano, ECI, B&D Financial Strategies, Inc. and another party in Supreme Court, New York County, which is currently pending before Justice Ramos. Rosado v Edmund Castillo, Inc. et al., Index No. 603214/2004.

On June 4, 2007, Rosado commenced this action against defendants McAloon & Friedman, P.C. and Stanley D. Friedman (collectively, M&F P.C.), the attorneys who allegedly advised and rendered legal services for Castillo and Cassano. Rosado contends that M&F P.C.'s representation of Castillo and Cassano created conflicts of interest with M&F P.C.'s alleged representation of CRI. Prior to M&F P.C.'s representation of Castillo and Cassano, CRI had allegedly hired M&F P.C. to draft a shareholder agreement for CRI. M&F P.C. was allegedly involved in the registration of the Edmundo Castillo trademark, and drafted the agreements whereby the trademark was granted to CRI.

Rosado maintains that Castillo's and Cassano's actions constituted breaches of fiduciary duty, which M&F P.C. aided and abetted by rendering legal services and advice to Castillo and Cassano. The verified complaint alleges nine causes of action against M&F P.C., sounding in breach of fiduciary duty, aiding and abetting breach of Castillo's and Cassano's fiduciary duties, tortious interference with the CRI shareholder agreement, conspiracy, conflict of interest, and legal malpractice. The causes of action are brought as shareholder derivative claims, on behalf of CRI, EC LLC, and ECI S.r.L., and as direct claims.

DISCUSSION

On a motion to dismiss pursuant to CPLR 3211(a) (7), the court must afford the pleadings a liberal construction, accept the allegations of the complaint as true and provide plaintiff the benefit of every possible favorable inference. AG Capital Funding Partners, L.P. v State Street Bank and Trust Co., 5 NY3d 582, 591 (2005). “In assessing a motion under CPLR 3211(a)(7), however, a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint.” Leon v Martinez, 84 NY2d 83, 88 (1994).

The verified complaint alleges that CRI hired M&F P.C. to be the lawyer for CRI. Verified Complaint ¶ 8. The verified complaint does not allege that an attorney-client relationship existed either between M&F P.C. and Rosado, in his individual capacity, or between M&F P.C. and EC LLC and ECIS.r.L. The allegations of M&F P.C.’s breach of fiduciary duty, conflict of interest, and legal malpractice therefore do not state a cause of action insofar as Rosado is asserting claims both individually and derivatively on behalf of EC LLC and ECI S.r.L.

Plaintiff’s reliance on Green v Fishbein Oliveiri Rozenholc & Badillo (119 AD2d 345 [1st Dept 1986]) is misplaced. Green acknowledges that “an attorney generally cannot be held liable to third parties for actions taken in furtherance of his role as counsel unless it is shown that he ‘did something either tortious in character or beyond the scope of his honorable employment.’” Id. at 351. In order to be viable, the theory of legal malpractice requires the existence of an attorney-client relationship. See e.g. National Westminster Bank USA v Weksel, 124 AD2d 144, 146 (1st Dept 1987) (“an attorney may not be held liable for negligence in the provision of professional services adversely affecting one with whom the attorney is not in contractual privity”). Green does not hold otherwise. An attorney generally owes no owe fiduciary duty to those who are not clients. Linden

v Moskowitz 294 AD2d 114, 115 (1st Dept 2002)(breach of fiduciary claim properly dismissed because the complaint fails to allege the existence of an attorney-client relationship with defendants).¹

To the extent that plaintiff asserts these causes of action on behalf CRI, they are dismissed as well. The gravamen of the verified complaint is that M&F P.C. should not have performed legal work for Castillo and Cassano, who purportedly had interests adverse to CRI's interests. At most, plaintiff is alleging a violation of either DR 5-105 (A) or DR 5-108 (A). "[E]ven if a violation of the Code of Professional Responsibility had occurred, that, in itself, would not create a private right of action." Arkin Kaplan LLP v Jones, 42 AD3d 362, 366 (1st Dept 2007). "A conflict of interest, even if a violation of the Code of Professional Responsibility, does not by itself support a legal malpractice cause of action." Schafrann v N.V. Famka, Inc., 14 AD3d 363, 364 (1st Dept 2005). Given all the above, the first, sixth, seventh, eighth, and ninth causes of action are dismissed.

The second cause of action alleges that M&F P.C. aided and abetted Castillo to breach fiduciary duties that Castillo owed to CRI, EC LLC, and EC S.r.L. Rosado maintains that M&F P.C. had actual knowledge of Castillo's fiduciary relationship with Rosado because it drafted the CRI shareholder agreement between Rosado and Castillo, which was part of the creation of CRI as a close corporation. Rosado argues that Castillo breached his alleged fiduciary duty by executing an agreement assigning CRI's receivables to Cassano and acknowledging that CRI owed \$800,000 to Cassano. Rosado Opp. Aff. ¶ 25. Under the CRI shareholder agreement, CRI's assets and property

¹ An attorney may be liable to third-party beneficiaries of a trust for breach of fiduciary duty, where the attorney served as counsel to the trustee, and the attorney has placed his or her self-interest above that of the trustee. See e.g., Heaven v McGowan, 40 AD3d 583, 585 (2d Dept 2007). The trustee and the attorney owe a duty to the trust beneficiaries. Matter of People (Bond & Mtge. Guar. Co.), 303 NY 423, 431 (1952). This is not the case here.

could not be pledged, loaned or encumbered without the express written consent of both Castillo and Rosado. Verified Complaint ¶ 20. M&F P.C. allegedly drafted the assignment agreement, which Rosado claims constitutes substantial assistance of Castillo's alleged breach of fiduciary duty. Rosado contends that, were it not for M&F P.C. drafting that assignment agreement, Cassano would not have had a claim of right to CRI's receivables. Rosado Opp. Aff. ¶ 34. Rosado also claims that M&F P.C. assisted Castillo to form a competing corporation, ECI, and to misappropriate CRI's security deposit for ECI's use. Rosado submits billing records from M&F P.C. indicating conversations with Castillo about the formation of a new corporation and about a security deposit. See Rosado Opp. Aff., Ex C.

The allegations and plaintiff's opposition papers are insufficient to state M&F P.C.'s actual knowledge of Castillo's alleged wrongdoing, so as to hold M&F P.C. liable as an aider and abettor of Castillo's breach of fiduciary duty. International Strategies Group, Ltd. v ABN AMRO Bank N.V., 49 AD3d 474-475 (1st Dept 2008); National Westminster Bank USA, 124 AD2d at 149. The assignment agreement that M&F P.C. allegedly prepared contained signature lines for both Castillo and Rosado. Rosado Opp. Aff., Ex G. Had Rosado executed the assignment agreement, both shareholders would have approved of the assignment agreement as well, and thus plaintiff could not claim that Castillo breached the CRI shareholder agreement. Nothing in the verified complaint or plaintiff's opposition papers suggest that M&F P.C. knew, as Rosado suggests, that Castillo and Cassano were keeping Rosado from signing the assignment agreement. M&F P.C.'s drafting of the assignment agreement, even if true, therefore does not constitute aiding and abetting Castillo to breach his fiduciary duties. Cf. Agostini v Sobol, 304 AD2d 395, 396 (1st Dept 2003)(drafting stock purchase agreement subject to plaintiff's right of first refusal fatally undermines notion that attorney

was participating in a scheme to defraud plaintiff).

The remaining allegations of M&F P.C.'s substantial assistance to Castillo are conclusory. Absent allegations that M&F P.C. "had actual knowledge of the primary wrong or that these parties rendered substantial, as opposed to inadvertent, assistance to the underlying breach of fiduciary duty, the verified complaint does not advance a valid claim for aiding and abetting breach of fiduciary duty on their part." Bullmore v Ernst & Young Cayman Is., 45 AD3d 461, 464 (1st Dept 2007). Therefore, the second cause of action is dismissed.

The third cause of action alleges that M&F P.C. aided and abetted Cassano and B&D to breach a fiduciary duty they owed to CRI. Like the allegations against Castillo, the elements of intent and knowledge of wrongdoing are lacking. It cannot be reasonably inferred from the allegations that M&F P.C. were aware that Cassano and B&D even had a fiduciary relationship with CRI, much less that Cassano and B&D were engaged in wrongdoing. The verified complaint alleges that CRI hired M&F P.C. in 2001 to perform legal services, which culminated in a shareholder agreement dated October 2001 and registration of the Edmundo Castillo trademark. Verified Complaint ¶¶ 9-10. Meanwhile, CRI allegedly hired Cassano and B&D in 2002. It cannot be reasonably inferred from the allegations that M&F P.C. were aware of Cassano's dealings with CRI so as to have actual knowledge that Cassano had a fiduciary relationship with CRI. Moreover, an acknowledgment of debt in writing is not itself a tortious act. An acknowledgment of debt in writing would be necessary to make enforceable an otherwise time-barred promise to repay debt. General Obligations Law § 17-101. Therefore, the third cause of action is dismissed, because "[t]he only circumstance of the wrong allegedly committed by the law firm that can be gleaned from the instant

complaint is that the firm represented” Cassano and B&D. National Westminster Bank USA, 124 AD2d at 149.

As to fourth cause of action, Rosado alleges that M&F P.C. tortiously interfered with the CRI shareholder agreement between plaintiff and Castillo by allegedly drafting the assignment agreement. As discussed above, Rosado claims that Castillo breached the CRI shareholder agreement because Castillo pledged, loaned and encumbered CRI’s assets and property without the express written consent of both Castillo and Rosado.

As discussed above, “an attorney generally cannot be held liable to third parties for actions taken in furtherance of his role as counsel unless it is shown that he ‘did something either tortious in character or beyond the scope of his honorable employment.’” Green, 119 AD2d at 351. M&F P.C.’s alleged drafting of the assignment agreement is, in itself, not tortious. M&F P.C. provided a signature line for both Castillo and Rosado. The assignment agreement would not be considered a breach of the CRI shareholder agreement had Rosado also signed the assignment agreement. Neither is it reasonable to infer that M&F P.C. induced Castillo to sign the assignment agreement without obtaining Rosado’s signature. M&F P.C. is not a party to the assignment agreement, and M&F P.C. does not receive any money under the assignment agreement. Rosado. Opp. Aff., Ex G. Accordingly, the fourth cause of action is dismissed.

Lastly, “a mere conspiracy to commit a [tort] is never of itself a cause of action.” Alexander & Alexander v Fritzen, 68 NY2d 968, 969 (1986)(citations omitted). Therefore, the fifth cause of action is dismissed.

CONCLUSION and ORDER

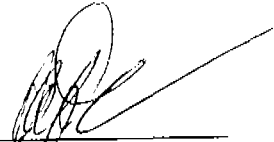
Accordingly, it is hereby

ORDERED that defendants' motion to dismiss the complaint is granted and the complaint is dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: *May 29, 2008*
New York, New York

ENTER:



J.S.C.

FILED
JUN 04 2008
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NEW YORK