

TPR Inv. Assoc., Inc. v Fischer

2010 NY Slip Op 33370(U)

December 9, 2010

Supreme Court, New York County

Docket Number: 603509/07

Judge: Charles E. Ramos

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

Index Number : 603509/2007

C.E. Ramos

PART ~~52~~ 53

TPR INVESTMENT ASSOCS., INC.

ice

vs.

FISHER, WILLIAM L.

INDEX NO. _____

SEQUENCE NUMBER : 008

MOTION DATE _____

SUMMARY JUDGMENT

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 decided in accordance with
accompanying memorandum decision and order.

FILED

DEC 08 2010

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 11/30/2010

[Signature]

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

-----x
TPR INVESTMENT ASSOCIATES, INC., D&K
LIMITED PARTNERSHIP, AG PROPERTIES COMPANY,
and DALIA GENGER,

Plaintiffs,

Index No. 603509/07

-against-

WILLIAM S. FISCHER, RAINES & FISCHER LLP, ARIE
GENGER, EDWARD KLIMERMAN, SONNENSCHN NATH &
ROSENTHAL LLP, TRUSTEESHIPS LTD. and GILAD
SHARON,

Defendants.

FILED
DEC 08 2010
COUNTY CLERK'S OFFICE
NEW YORK

-----x
Charles Edward Ramos, J.S.C.:

Defendants Edward Klimerman and Sonnenschein Nath &
Rosenthal LLP move for summary judgment dismissing the thirteenth
through seventeenth causes of action (CPLR 3212).

Background¹

This action for fraud and malpractice arises out of the
bitter divorce between plaintiff Dalia Genger (Mrs. Genger) and
her former husband, defendant Arie Genger (Mr. Genger).

Plaintiff TPR Investment Associates, Inc. (TPR) is a holding
company, comprised of plaintiff D&K Limited Partnership (D&K).
Mr. Genger was formerly the president, chairman, and controlling
shareholder of TPR. D&K, in turn, was ninety-six percent owned
by the Gengers' children, Sagi and Orly, while Mrs. Genger owned
the remaining four percent and was its general partner.

¹ The facts set forth herein are taken from the pleadings
and the Sonnenschein Defendants' Rule-19A Statement. It is noted
that plaintiffs failed to comply with Part 53 Practice Rules
which expressly require the submission of a Rule 19-A Statement
of Undisputed Facts on summary judgment motions.

TPR's main asset was a controlling stake in non-party Trans-Resources, Inc. (TRI) a holding company of domestic and foreign subsidiaries that manufacture fertilizer and chemicals. From 1995 to 2005, TPR held fifty-three percent of TRI's shares. Former defendant William Dowd was the president of TRI and an officer of TPR, while Mr. Genger also purportedly controlled TRI.

Defendant Klimerman, a partner at Sonnenschein Nath & Rosenthal LLP (Sonnenschein) (together, the Sonnenschein Defendants) represented Mr. Genger during the divorce proceedings.

Procedural History

The Gengers' divorce proceedings were assigned to the Honorable Visitacion-Lewis, between 2003 and 2004. In October 2004, the Gengers agreed to a stipulation of settlement (Settlement), which was incorporated into a judgment of divorce in January 2005, pursuant to which the Gengers agreed to a fifty-fifty split of their net marital property.

The Settlement contains an audit and arbitration provision in order to address disputes involving the distribution of marital property. Specifically, it entitles Mrs. Genger to conduct up to five audits of Mr. Genger's assets, and obligates Mr. Genger to pay her fifty percent of the value of any undisclosed property that the auditors discover, and treble damages if the omission was wilful (Exhibit 1, annexed to the Smith Aff., Settlement, Article XII [1]). The Settlement also states that any disputes, including disputes relating to audits,

were to be resolved by arbitration (Exhibit 1, annexed to the Smith Aff., Settlement, Article XIII [1]).

As a result of the Settlement, all of the Gengers' TPR stock holdings and voting interest in TRI, a portion of which was marital property, was transferred to Mr. Genger. Mr. Genger's shares of TPR were transferred to Mrs. Genger, and Mr. Genger resigned his positions in that company.

Following the divorce, Mrs. Genger availed herself of the audit provisions of the Settlement, leading to renewed litigation between the Gengers involving a continuing dispute over distribution of their marital property. In April 2007, Judge Visitacion-Lewis referred the issue to arbitration. While the arbitration was pending before Judge Milonas, plaintiffs commenced this action against the Sonnenschein Defendants and a business associate of Mr. Genger's for fraud, malpractice and other wrongdoing in connection with the distribution of the Gengers' marital property.

In addition, plaintiffs made parallel allegations against Mr. Genger's accountant William L. Fischer and his firm Raines and Fischer LLP, in a second action. The two actions were consolidated before this Court.

On May 6, 2008, Judge Milonas issued a final award in the arbitration, awarding Mrs. Genger \$3.85 million under the Settlement stemming from her claims that Mr. Genger misrepresented the value of TPR stock in his net worth statement (Net Worth Statement). The Net Worth Statement is a schedule

valuing Mr. Genger's assets and liabilities as of December 31, 2003, that he was required to submit in the course of the divorce proceedings and was annexed to the Settlement (Exhibit K, annexed to the Smith Aff., Award at 11).

Subsequently, each of the defendants in this action moved to dismiss applicable portions of the complaint on the ground of collateral estoppel, arguing that Mrs. Genger and the Genger-family entities, plaintiffs D&K and TPR (together, the Family Entities), were attempting to re-litigate the Gengers' matrimonial dispute.

On February 9, 2009, this Court dismissed all of the plaintiffs' claims that related to the Bogalusa litigation and the alleged fraudulent diversion of profits and corporate opportunity owned by TPR and invested in plaintiff AG Properties, Co. (AG Properties), a real estate venture firm.² These claims were addressed by Judge Milonas during the course of arbitration proceedings.

The Remaining Claims

² In the complaint, plaintiffs had alleged that Mr. Genger, assisted by the Sonnenschein Defendants and Fischer, misrepresented in the divorce proceedings that TPR and TRI stock had little to no value as the result of being subject to massive potential liabilities in a series of lawsuits filed against TPR and various subsidiaries after a chemical spill involving one of TPR's products in Bogalusa, Louisiana.

In addition, plaintiffs alleged that Mr. Genger and the Sonnenschein Defendants sought to falsely re-characterize some of TPR's equity contributions to AG Properties as a loan in order to misappropriate a corporate opportunity and divert profits away from TPR for the benefit of defendants.

According to the complaint, Mr. Genger owned a Florida corporation, A.L. Investments Inc. (AL) since 1994, and thus, his interest therein purportedly constituted marital property at the time of the divorce proceedings.

In early 1994, AL advanced monies to non-party Shikmim Agricultural Farm Ltd. (Shikmim Farm), an Israeli entity owned by Ariel Sharon, the former Israeli prime minister, and his family, including defendant Gilad Sharon. The \$600,000 advanced was evidenced by a promissory note (Shikmim Note). At various times, the maturity of the Shikmim Note was extended.

On information and belief, the Sonnenschein Defendants purportedly knew of the existence of AL and the debt owed to it by Shikmim Farm. However, neither AL nor the Shikmim Note was recorded as an asset of Mr. Genger's on the Net Worth Statement, which the Sonnenschein Defendants prepared and submitted to the court during divorce proceedings. According to Mrs. Genger, the Sonnenschein Defendants intentionally omitted the Shikmim Note from Mr. Genger's Net Worth Statement in order to deceive her as to the extent of Mr. Genger's assets. On this basis, she asserts a claim for fraud and violation of Judiciary Law § 487.

In addition, plaintiffs allege that in 1988, TPR entered into an agreement to buy back some of its own stock then owned by a third party. In connection with that agreement, TPR executed a note (Mendel Note) for \$7 million that was due in March 2002.

In July 2001, TPR transferred approximately \$7 million into the interest-bearing escrow account maintained by Klimerman's

then-law firm, non-party RubinBaum LLP (RubinBaum), a predecessor to Sonnenschein. The purpose of the transfer was to pay amounts due under the Mendel Note.

Due to a late payment on the Mendel Note, litigation ensued and was eventually settled in 2002 for \$6.075 million, leaving approximately \$1 million in the RubinBaum escrow account.

In or around January 2003, Mr. Genger purportedly directed Klimerman to cause the escrow balance, referred to in the complaint as the "missing million" (Missing Million), to be transferred to TRI, rather than TPR, which was the purported owner of the funds. Those funds were not recorded on Mr. Genger's Net Worth Statement as an asset of TPR (at the time, D&K owned forty-nine percent of TPR's stock and Mr. Genger owned the remaining fifty-one percent, that Mrs. Genger claimed a marital interest in).

The Family Entities assert claims for fraud and malpractice against the Sonnenschein Defendants in connection with the omission of the Missing Million from Mr. Genger's Net Worth Statement, and for failure to disclose the conflicts of interest in representing the Family Entities while representing Mr. Genger and TRI in the divorce proceedings. In addition, Mrs. Genger asserts a claim for violation of Judiciary Law § 487.

Mrs. Genger did not submit to arbitration the claims involving the omission of the Missing Million and the Shikim Note from the Net Worth Statement.

Discussion

The Sonnenschein Defendants move for summary judgment dismissing the thirteenth through seventeenth causes of action for fraud, violation of Judiciary Law § 487, and legal malpractice on the grounds that they involve allegations of wrongdoing relating to the valuation of the Gengers' marital property during the divorce proceedings.

The Sonnenschein Defendants assert that the Settlement, which governs distribution of the Gengers' marital property, vitiates Mrs. Genger's contention that she justifiably relied upon the Net Worth Statement. Further, they argue that she had actual knowledge of the Missing Million prior to her execution of the Settlement, which undermines any contention that she was deceived by the omission from the Net Worth Statement.

In addition, the Sonnenschein Defendants seek dismissal of the claims asserted by the Family Entities for failure to allege that they acted in reliance on any representation of defendants. Finally, they assert that the claim for legal malpractice is barred by the applicable statute of limitations.

In opposition, plaintiffs assert that the existence of Mrs. Genger's audit and arbitration rights against Mr. Genger does not affect the Family Entities' standing to sue the Sonnenschein Defendants.

I. Fraud

To establish a claim for common law fraud, a plaintiff must demonstrate that defendants knowingly misrepresented a material fact upon which the plaintiff justifiably relied and caused

damage (*Ross v Louise Wise Services, Inc.*, 8 NY3d 478, 488 [2007]).

The Sonnenschein Defendants correctly assert that the terms of the Settlement belie any contention that Mrs. Genger justifiably relied upon Mr. Genger's Net Worth Statement, or was damaged from any omissions.

First, the Settlement states that the equitable distribution contemplated thereby is intended to "effect approximately a 50-50 distribution of their marital assets and represent and set forth a fair, reasonable and suitable distribution" of property (Exhibit 1, annexed to the Smith Aff., Article VIII [1])

Moreover, the terms of the Settlement expressly state that Mrs. Genger retains the right to audit Mr. Genger's assets and liabilities as of the date of commencement of the parties' matrimonial action "in order to test the correctness and completeness of the items included on such Schedules (...) and the values assigned to each such item based on all information available at the time of the audit" (Exhibit 1, annexed to the Smith Aff., Article XII [1]).

In addition, the Settlement provides that "If the audits ... find that the Husband [Mr. Genger] owned any property ... which is not listed on Schedule II (1)," Mr. Genger will pay to Mrs. Genger half of the value of that property (Exhibit 1, annexed to the Smith Aff., Article XII [2]). If the value of that property omitted from Schedule II has a cumulative value greater than \$250,000, the omission "will be presumed wilful on the Husband's

part," and Mr. Genger is obligated to pay to Mrs. Genger one-half of three times of that value, in addition to audit expenses (Exhibit 1, annexed to the Smith Aff., Article XII [2]).

This contractual language undermines any contention that Mrs. Genger was fraudulently induced to enter into the Settlement by the omission of any assets from Gr. Genger's Net Worth Statement, or that she reasonably relied upon the Net Worth Statement as a complete representation of all of Mr. Genger's assets. The Settlement itself unambiguously contemplates the potential existence of additional, omitted assets, and provides for an explicit audit and arbitration mechanism to address Mrs. Genger's entitlement to those assets.

Consequently, by expressly carving out a right to investigate further the representations set forth in the Net Worth Statement by insertion of a mechanism to challenge its completeness and accuracy, Mrs. Genger clearly cannot demonstrate justifiable reliance on any purported misrepresentation by the Sonnenschein Defendants that the Net Worth Statement was complete (see generally *Global Minerals and Metals Corp. v Holme*, 35 AD3d 93, 98-101 [1st Dept 2006]; see also *Centro Empresarial Cempresa S.A. v America Movil S.A.B. de C.V.*, 76 AD3d 310 [1st Dept 2010]).

If Mrs. Genger actually intended to rely upon the completeness and accuracy of the Net Worth Statement in agreeing to the Settlement, she should have insisted that her execution of the Settlement be conditioned upon this representation (*Id.*).

Moreover, even assuming the intentional omission of the Shikmim Note or the Missing Million from the Net Worth Statement, Mrs. Genger fails to raise a triable issue of fact that she sustained damages as a result of the omission.

In an action for fraud, a plaintiff may recover only the actual pecuniary loss sustained as a direct result of the wrong (*Continental Cas. Co. v PricewaterhouseCoopers, LLP*, 15 NY3d 264, 271-72 [2010]; see also *Starr Foundation v American Intl Group, Inc.*, 76 AD3d 25 [1st Dept 2010]). Under this rule, the actual loss sustained as a direct result of fraud that induces an investment is "the difference between the value of the bargain which a plaintiff was induced by fraud to make and the amount or value of the consideration exacted as the price of the bargain" (*Id.*). The damages are to compensate plaintiffs for what they lost because of the fraud, not for what they might have gained (*Id.*).

Mrs. Genger fails to explain how the Sonnenschein Defendants' omission from the Net Worth Statement of a \$600,000 debt purportedly owed to a wholly-owned company of Mr. Genger's, even if intentional, caused her any out-of-pocket damages or is even capable of calculation. The loss of an alternative bargain overlooked in favor of a fraudulent one cannot serve as the basis for fraud damages where the loss of the bargain was undeterminable and speculative (see generally *Starr Foundation*, 76 AD3d 25). In fact, Mrs. Genger does not even attempt to articulate the basis for the damages she seeks to recover other

than to conclusorily argue that she "suffered out of pocket damages."

As for the fraud claim stemming from the wrongful transfer of the contents of a certain escrow account, the Missing Million, to TRI rather than to TPR, the funds' alleged rightful owner, and the failure to identify the escrowed funds on the Net Worth Statement, it fails for identical reasons; namely, the failure to raise a triable issue as to justifiable reliance and damages.

Incidentally, Mrs. Genger herself concedes that, because TPR's stock was partly marital property, she "might still have the right to assert" a direct audit or arbitration claim against Mr. Genger for half the value of the marital property that was not listed as an asset of TPR on Mr. Genger's Net Worth Statement (Plaintiffs' Memo in Opp at 7, n 3).

In addition, Mrs. Genger fails to rebut evidence that she was aware of the transfer of the Missing Million to TRI by at least February 2003, prior to her execution of the Settlement in October 2004, when her counsel deposed Mr. Genger. At that time, Mr. Genger testified that \$7 million was transferred from TRI to TPR, to RubinBaum, and that after the balance of the debt was negotiated down to \$6,075,000, the remaining \$1 million [the Missing Million] was transferred back to TRI (Exhibit B, annexed to the Smith Aff., Mr. Genger Dep Tr 150-57).

Her failure to rebut evidence which establishes her knowledge that the Missing Million was transferred to TRI at the time she executed the Settlement is fatal to her claim that she

justifiably relied upon its omission from the Net Worth Statement to her detriment.

The Family Entities also assert a claim for fraud against the Sonnenschein Defendants for the handling of the Missing Million, which was purportedly an asset of TPR (in which D&K had a 49% beneficial ownership). However, even assuming that the Sonnenschein Defendants participated in intentionally omitting the Missing Million from the Net Worth Statement as an asset of TPR, the Family Entities do not allege, let alone submit evidence, that they took any action in reliance upon the Net Worth Statement or suffered any damages.

The claims against the Sonnenschein Defendants for violation of Judiciary Law § 487 also must be dismissed. Plaintiffs fail to submit any evidence that the Sonnenschein Defendants intentionally sought to deceive the court in the divorce proceeding to the extent of the omissions. As to the Shikmim Note, Mrs. Genger only alleges "on information and belief" that the Sonnenschein Defendants were aware of the Shikmim Note to begin with.

Accordingly, the Sonnenschein Defendants' motion for summary judgment dismissing the causes of action for fraud and violation of Judiciary Law § 487 stemming from the omissions from Mr. Genger's Net Worth Statement is granted.

The remaining claim for malpractice asserted by the Family Entities against the Sonnenschein Defendants is barred by the applicable statute of limitations, which is three years (CPLR 214

[6]).

The Family Entities allege that the Sonnenschein Defendants committed malpractice in their handling of the Missing Million, and failed to disclose or attempt to cure an inherent conflict of interest insofar as they simultaneously represented Mr. Genger and TRI in the divorce proceedings, which occurred between 2003 and 2004.

The accrual time for a claim for legal malpractice is measured from the date that the injury is claimed to have occurred even if the aggrieved party is ignorant of the wrong or injury (*McCoy v Feinman*, 99 NY2d 295, 301 [2002]).

Here, the date the injury is claimed to have occurred is 2003, when the Sonnenschein Defendants, purportedly at Mr. Genger's direction, diverted the Missing Million allegedly owned by TPR to TRI and failed to disclose this in Mr. Genger's Net Worth Statement. This action was commenced on October 22, 2007 and thus, the claim for malpractice is not timely.

In any event, even assuming the existence of an attorney-client relationship between them, which is only conclusorily alleged, the Family Entities fail to raise a triable issue that any breach of duty on the part of the Sonnenschein Defendants, caused actual damages. Thus, the claim for malpractice must be dismissed.

Accordingly, it is

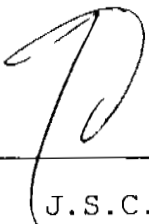
ORDERED, that the motion for summary judgment by defendants Edward Klimerman and Sonnenschein Nath & Rosenthal LLP dismissing

the thirteenth through seventeenth claims is granted in its entirety; and it is further

ORDERED that the complaint is dismissed and the Clerk is directed to enter judgment accordingly.

Dated: November 30, 2010

ENTER:



J.S.C.

CHARLES E. RAMOS

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