SHORT FORM ORDER

INDEX NUMBER: 27295-2010

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

Present: HON. EMILY PINES
J. S. C.

Original Motion Date: 11-03-2011
Motion Submit Date: 02-15-2011
Motion Sequence No.: 002 MD

[ ] FINAL
[x] NON FINAL

SOUTH SHORE NEUROLOGIC ASSOCIATES, P.C.,

Plaintiff,

-against-

RUSKIN MOSCOU FALTISCHEK, P.C.,

Defendant.

Attorney for Plaintiff
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CORRECTED DECISION

Defendant, Ruskin Moscou Faltischek, P.C. ("Ruskin Moscou or law firm") moves, by Notice of Motion (motion sequence # 002) for an Order dismissing the complaint of, Plaintiff South Shore Neurologic Associates, P.C. ("SSNA" or "South Shore") against the law firm, pursuant to CPLR §§ 3211 (a) (1), (5) and (7), and with respect to the cause of action asserted against it for fraud, pursuant to CPLR § 3016.

According to the 24 page Complaint, this action arises out of the alleged legal representation of SSNA by Ruskin Moscou from 1989 through 2009, in connection with certain contracts, which have now given rise to four separate lawsuits concerning purportedly illegal fee splitting arrangements between SSNA and certain entities performing management and collection services. According to the

Complaint, Ruskin Moscou represented SSNA in two contract negotiations, one on September 1, 1994 and the other in 2007, advising SSNA that the 1994 Agreement, its amendments over the years, and a 2007 billing and collection agreement were lawful, while at the same time representing other entities to these agreements, namely Brookhaven Magnetic Imaging, Inc, ("BMRI"), Lee Management, Inc, ("Lee"), and Mobile Health Management. These entities are interrelated in that BMRI is owned by SSNA (2/3) and non-physician Bert Brodsky (1/3), Lee Management, Inc. is owned by Bert Brodsky and was owned by Brodsky and non-physician Gerald Shaprio at certain relevant times in the past, and Mobile Health is owned by non-physician Brodsky's wife and was previously owned at certain relevant time periods by her and Gerald Shapiro.

In addition to what Defendant claims to be an obvious conflict of interest, SSNA asserts that Ruskin Moscou advised SSNA that such agreements were proper and lawful after participating in a 1994 deposition of Gerald Shapiro concerning the rights of a departing physician, in which Shapiro admitted that SSNA was improperly receiving one-third of the medical income generated by South Shore's MRI operations via their billing company, Lee Management. Despite such knowledge, according to SSNA, the law firm allowed SSNA to enter into several of these illegal arrangements and participated in covering up their unlawful nature through their termination in 2009.

In its motion to dismiss the complaint, Ruskin Moscou, while denying the allegations in the complaint, states that they cannot stand even if they are accepted on their face, as they are barred by the statute of limitations; refuted completely by documentary evidence and fail to state a claim. With regard to the claim that the law firm breached its fiduciary duty to SSNA, Defendant asserts that such claim is barred by the three-year statute of limitations for such actions, which arose, if at all, in 1994, when the subject contracts were entered into. Claiming that the allegations of breach of such duty do not rise to the level of fraud, Ruskin Moscou avers that they accrue upon the alleged breach, as opposed to ultimate disclosure. The firm

states further that SSNA cannot rely on the continuous representation doctrine to toll the statute because there exists no evidence that Ruskin Moscou represented the medical practice with regard to such agreements. Rather, the law firm points to documentary evidence in the form of letters signed by Dr. Chernik, SSNA's CEO, acknowledging that the law firm was not representing SSNA with regard to the 1994 turnkey lease agreement between BMRI and SSNA; the 1994 Billing and Collection agreement between SSNA and Lee Management and the 2007 amendment of the turnkey lease agreement. To the extent that SSNA asserts violations of the former Disciplinary Rules regarding attorney's conduct, Ruskin Moscou further asserts that such do not give rise to a breach of fiduciary duty as a matter of law, without more in the way of factual allegations. Since, the firm states, these alleged breaches of the conflict rules all arise out of Plaintiff's barred claims for breach of fiduciary duty, they cannot, in and of themselves, state a cause of action.

Ruskin Moscou asserts, in addition, that the alleged fraud claim is also barred in this instance, by a six year statute of limitations, which expired in 2000. Even applying the "two year from reasonable discovery" rule, the firm asserts that such fraud could clearly have been discovered long before 2009, when this action arose, by professionals such as those involved with SSNA. Finally, Ruskin Moscou opines that any improper conduct attributed to SSNA's CEO, Dr. Chernik, alleged to have participated in this unlawful scheme, must be attributed to the Plaintiff itself, since the neurology firm benefitted therefrom through years of profitable operation. As there is no basis for any of the claims for fraud or for breach of fiduciary duty, the law firm seeks to dismiss the cause of action for disgorgement of legal fees as arising totally therefrom as well as the request for punitive damages.

SSNA opposes the motion based on its assertion that the law firm represented all of the entities involved in these pending lawsuits and conspired with some of them, Brodsky, Lee Management and Mobile Health, to allow the non-physician participants, to engage in illegal fee splitting with the physicians of SSNA, without

their knowledge and consent. Essentially, Plaintiff avers, pointing to internal memoranda of the law firm, questioning such agreements and questioning the firm's obvious conflict, that Ruskin Moscou chose to favor the non-physicians in these agreements by masking their favored clients' true fees. Part of the basis for SSNA's claims derive from deposition testimony of former partner of Lee Management, Gerald Shapiro, who stated that Lee Management actually received one third of the profits of the MRI operations despite a pre-1994 agreement setting forth a fee of 23% of collections. According to SSNA, Ruskin Moscou, armed with this knowledge, then participated in the representation of SSNA, BMRI and Mobile Health (an entity owned by Shapiro and Brodsky's wife) which allowed the same people to split fees with the physicians by subterfuge, calling part of BMRI's fee a collection and Mobile Health's fee a service fee. According to SSNA, the law firm then conspired with SSNA's CEO, Chernik, without the knowledge or consent of the majority of SSNA's shareholders, to sign such agreements on behalf of SSNA and had Chernik sign letters three days before these 1994 agreements were signed recognizing and consenting to the fact that the law firm was representing the other entities.

SSNA asserts that the law firm continuously represented SSNA during this period and advised them that each of these agreements were lawful. Various portions of such agreements were amended over the years in 1996, 2001, 2004 2006 and in 2007, with the fees in each increasing. According to SSNA, this sham continued in 2007, with proposals to expand the fee splitting scheme, accompanied by letters stating that SSNA would be represented by other counsel all while the law firm knew there was no other counsel and that SSNA was relying on Ruskin Moscou's continuous representation that such agreements were proper and lawful. In an internal law firm memo attached to SSNA's papers, there is a statement that the turnkey lease agreement looks like a sham, and that the term is unconscionable. SSNA also annexes to its papers in opposition to the motion, a copy of a first quarter BMRI financial statement, which explicitly sets forth that Brodsky was receiving one third of the entity's income.

According to SSNA, the law firm's inappropriate conduct continued in 2008 when the majority of shareholders of SSNA commenced the main action before this Court, asserting claims to rescind the allegedly illegal contracts. In that action, the law firm assertedly purported to appear as counsel for SSNA and supplant SSNA's counsel of record in claims against its other former clients, Mobile Health, Lee Management and Bert Brodsky. SSNA alleges that the firm's 2008 and 2009 actions in representing SSNA in actions against its other former clients with respect to the very agreements it created and confirmed as lawful in 1994 and throughout amendments thereof, was unethical and riven with irremediable conflicts, such that any legal fee paid by SSNA therefor should be repaid to SSNA.

SSNA states the law firm represented it with respect to the contracts that formed the basis of the illegal scheme and that billing records demonstrate an invoice to SSNA of $31,227.59 at the very period in 1994 that these contracts were executed. The invoice is accompanied by a letter to Gerald Shapiro to the effect that it is only being sent to him, indicating, according to SSNA, that the fee may have been sent to Shapiro and Brodsky in order to mask the fact that Ruskin Moscou was really representing SSNA.

Under CPLR § 3211(a)(1) dismissal of a pleading is warranted only in those matters where the documentary evidence submitted establishes an absolute defense to the matters asserted as a matter of law. **Leon v Martinez**, 84 NY 2d 83, 614 NYS 2d 972, 638 NE 2d 511 (1994). Where the motion to dismiss is made pursuant to CPLR § 3211(a)(7), the court must view the complaint as set forth and determine whether, accepting as true all the factual averments and inferences which may be drawn therefrom, Plaintiff can succeed upon any reasonable view of the facts stated. **Fast Track Funding Corp v Perrone**, 19 AD3d 362, 796 NYS 2d 164 (2d Dep't 2005).

In order to establish a claim for breach of fiduciary duty, a Plaintiff is required to demonstrate 1) the existence of a fiduciary relationship; 2) misconduct by the

Defendant; and 3) damages directly caused by such conduct. **Kurtzman v Bergstol**, 40 AD3d 588, 835 NYS2d 644 (2d Dep't 2007). Whether a fiduciary relationship exists between parties is necessarily fact specific. **AG Capital Funding Partners, LP v State Street Bank and Trust Co**, 11 NY3d 146, 866 NYS2d 578, 896 NE2d 91 (2008). An attorney stands in a fiduciary relationship to his or her client, **Graubard Mollen Dannett & Horowitz v Moscovitz**, 86 NY2d 112, 629 NYS2d 1009, 653 NE2d 1179 (1995), and is thus charged with a high degree of undivided loyalty to his or her client. **Kelly v Greason**, 23 NY 2d 368, 296 NYS2d 937, 244 NE2d 456 (1968). However, a violation of a disciplinary rule, without more, is insufficient to state an action for breach of fiduciary duty. **Schwartz v Olshan Grundman Frome & Rozensweig**, 302 AD2d 193, 753 NYS2d 482 (1st Dep't 2003).

The statute of limitations for breach of fiduciary duty is dependent on the substantive remedy sought by the plaintiff. Thus, a six year statute applies, where equitable relief is sought; and a three year statute applies where the "injury to property" is the gravamen of the action. CPLR §§213(1), 214. The claim accrues, for statue of limitations purposes, when the fiduciary has repudiated his or her obligation. **Westchester Religious Institute v Kamerman**, 262 AD2d 131, 691 NYS2d 502 (1st Dep't 1999). The doctrine of "continuous representation" tolls the running of this statute where the claim is brought against an attorney fiduciary but only so long as the defendant continued to represent the Plaintiff in connection with the transaction that is the subject of the action as opposed to general representation. **Transport Workers Union of America Local 100 AFL-CIO v Schwartz**, 32 AD3d 710, 821 NYS2d 53 (1st Dep't 2006).

Under the Code of Professional Responsibility (now the Rules of Professional Conduct, 22 NYCRR 1200 et. seq.) a lawyer may not concurrently represent clients with adverse interests nor take on a new client whose interests are adverse to an existing client. Where an attorney represents multiple clients and a situation arises posing potential conflicts among them, the attorney may not undertake the representation of any of the clients unless continued involvement is with the full

consent of all parties upon complete disclosure. **Kelly v Greason, supra.** Whether an attorney-client relationship exists depends on the actions of the parties, as there are no set of rigid rules as to what is required to form an attorney-client relationship. **See, McLenithan v McLenithan**, 273 AD2d 757, 710 NYS2d 674 (3d Dep't 2000).

In an action for fraud, a plaintiff must demonstrate that the defendant misrepresented or omitted a material fact which was false and known to be false and made for the purpose of the other party to rely upon it, justifiable reliance by such party on the misrepresentation or material omission, and injury resulting therefrom. **Ross v Louise Wise Services**, 8 NY3d 478, 836 NYS2d 509, 868 NE2d 189 (2007); **see, Graubard Mollen Dannett& Horowitz v Moscovitz**, 86 NY2d 112, 629 NYS2d 1009, 653 NE2d 1179 (1995). In this vein, an attorney may be liable to non-clients for wrongful acts if guilty of fraud or collusion or of a malicious or tortious act. **Koncelik v Abady**, 179 AD2d 942, 578 NYS2d 717, **Callahan v Callahan**, 127 AD2d 298, 514 NYS2d 819 (3d Dep't 1987). The statute of limitations for fraud is six years from the accrual of the claim or within two years from the actual or imputed discovery of the fraud. CPLR 213 (8), 203 (f); **see, Trepuk v Frank**, 44 NY2d 723, 405 NYS2d 452, 376 NE2d 924 (1978). As with the claim for breach of fiduciary duty, the continuous representation doctrine tolls the running of the statute of limitations against a professional defendant, but only so long as the defendant continues to represent the plaintiff in connection with the transaction and not merely the continuation of the general professional relationship. **Transport Workers Union of America Local 100 AFL-CIO v Schwartz, supra**. Punitive damages are not recoverable in the ordinary fraud case, but may be recovered where the fraudulent act is gross, involves high moral culpability and is aimed at the general public. **Walker v Sheldon**, 10 NY2d 401, 223 NYS2d 488, 179 NE2d 497 (1961).

Finally, one who owes a duty of fidelity or loyalty to another and is faithless in performance of such duty is generally disentitled to recover compensation for his services. **Feiger v Iral Jewlry Ltd**, 41 NY2d 928, 394 NYS2d 626, 363 NE2d 350

(1977).

This case presents a complex series of questions. The complaint, as addressed more fully in Plaintiff's opposition to the motion to dismiss, sets forth a scenario, which, if found to be true, does state causes of action for breach of fiduciary duty and for fraud. While there exist serious questions as to the truth of the allegations, these are not appropriately addressed in a pre-answer motion. If, indeed, the Defendant law firm represented SSNA in connection with the negotiation of the 1994 agreements, with knowledge that they constituted a cover up for an illegal fee splitting arrangement with other clients, whose interests were adverse to those of SSNA, and if, as Plaintiff avers, Defendant conspired with those entities and with the CEO of SSNA to keep this information from the majority shareholders of that entity, and if the law firm had SSNA's then CEO sign off on non-representation forms on the eve of execution of these agreements with no real opportunity for SSNA to obtain counsel, and if Ruskin Moscou continued to advise members of SSNA that the 1994 agreements as well as their amendments over the years through 2007 were proper and lawful, when their own internal memoranda suggest the opposite, and if the law firm insisted on representing SSNA when it sued those entities to terminate such agreements against SSNA's own interests, the Plaintiff has stated such causes of action. Ruskin Moscou's allegations that the client is equitably estopped from making such arguments due to the profitability of such arrangements, is simply not a defense if they were unlawful and improper and deprived the shareholders of SSNA of appropriate fees.

While Ruskin Moscou has presented documents signed by the CEO stating they did not represent the entity, SSNA has set forth both documentary and circumstantial evidence to the contrary. At this stage of the proceeding, the Court is not in a position to determine whether the representation was or was not in existence; nor whether such representation, if it existed with regard to these service agreements, continued through 2007 and 2008. Moreover, if what SSNA has set forth, is deemed, as it must be, correct, then such party would be entitled to the

tolling of both the three year breach of fiduciary duty statute of limitations and to the two year from discovery rule for the concealed information on the fraud claim.

In addition, if the allegations of SSNA prove to be correct, the Defendant may be required to return any fees paid for services that were provided in a manner in violation of its duty to its client.

The Court does agree with Defendant that Plaintiff has stated no basis for punitive damages, as its claim is based on the dealings between the parties hereto and is not a wrong aimed at the public. **See, Walker v Sheldon, supra**.

Based on the above, Ruskin Moscou's motion to dismiss SSNA's complaint against the law firm is denied, with the exception of the request for punitive damages which is dismissed.

This constitutes the ***DECISION*** and ***ORDER*** of the Court.

Dated: May 9, 2011
Riverhead, New York

Emily Pines
EMILY PINES
J. S. C.

[ ] FINAL
[x] NON FINAL