

Smith v Kaplan Belsky Ross Bartell, LLP

2011 NY Slip Op 31449(U)

May 18, 2011

Sup Ct, Nassau County

Docket Number: 9132/10

Judge: Stephen A. Bucaria

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 1
NASSAU COUNTY

THOMAS W. SMITH and
N. NORMAN MULLER,

Plaintiffs,

INDEX No. 9132/10

MOTION DATE: March 31, 2011
Motion Sequence # 002, 003, 004

-against-

KAPLAN BELSKY ROSS BARTELL, LLP,
JOEL S. KAPLAN, individually and f/d/b/a
LAW OFFICES of JOEL S. KAPLAN,
BRUCE H. BELSKY, individually, N. BARRY
ROSS, individually, LEWIS A. BARTELL,
individually and ANDREW JACOBS, individually,

Defendants.

The following papers read on this motion:

Notice of Motion.....	XX
Cross-Motion.....	X
Affirmation in Opposition.....	X
Reply Affirmation.....	XX
Memorandum of Law.....	XXX
Reply Memorandum of Law.....	X

Motion by defendant Lewis Bartell to dismiss the complaint for failure to state a cause of action is **granted**. Motion by the other defendants to dismiss the complaint for failure to

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state a cause of action is **denied**. Cross-motion by plaintiffs for partial summary judgment on their first cause of action is **denied**. Cross-motion by plaintiffs for leave to serve an amended complaint is **granted**. Motion by plaintiffs to compel discovery is **denied**.

This is an action for legal malpractice. Plaintiffs Thomas Smith and N. Norman Muller are former directors of Odyssey Pictures Corporation. As part of their separation package, Odyssey undertook to indemnify plaintiffs for claims arising from their tenure as directors. In 1996, plaintiffs were named as defendants in a putative class action. Although the class action was dismissed, Odyssey refused to pay plaintiffs' legal fees.

In August 1998, plaintiffs were named in a second class action based upon acts allegedly committed while they were directors of Odyssey. Plaintiffs requested Odyssey to indemnify them for their defense costs, but Odyssey again refused to do so.

In 2001, the class action plaintiffs offered to settle with Smith and Muller for approximately \$15,000 each. Smith and Muller rejected the settlement offer based upon their assessment that the claims were meritless and Odyssey possessed sufficient assets to satisfy its indemnity obligation. Although the second class action was ultimately dismissed, Smith and Muller incurred \$360,000 of legal fees and expenses. Plaintiffs subsequently recovered a judgment against Odyssey in California but were unable to enforce the judgment because Odyssey is insolvent.

Plaintiffs allege that they based their opinion as to Odyssey's financial condition on audited financial statements prepared by Want & Ender, CPA PC, who were Odyssey's accountants. The financial statements listed as an asset a "film library" valued at \$4.5 million. Plaintiffs assert that, based upon generally accepted auditing procedures, Want & Ender should have determined the film library was valueless.

In 2004, plaintiffs commenced an action against Want & Ender in Supreme Court, Nassau County for fraud, accounting malpractice, and negligent misrepresentation (Index No. 4160/04). Defendant Kaplan Belsky Ross Bartell, LLP is the successor to the law firm which represented plaintiffs in the action against Want & Ender. Although Want & Ender defaulted in appearing, defendants delayed for three years in seeking a default judgment. By order dated October 14, 2008, the Appellate Division reversed the order of Justice Galasso dated September 13, 2007 and dismissed the complaint as abandoned pursuant to CPLR § 3215[c] (*Muller v Want & Ender*, 55 AD3d 696 [2d Dept 2008]).

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Plaintiffs commenced this action for legal malpractice on May 11, 2010. Plaintiffs allege that they would have recovered on their meritorious claim against Want & Ender but for defendants' failure to move timely for a default judgment.

Defendants move pursuant to CPLR 3211(a)(7) to dismiss the complaint for failure to state a cause of action. Defendants argue that because plaintiffs did not have a meritorious claim for negligent misrepresentation, they cannot establish that they would have recovered but for defendants' malpractice.

On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. The court must accept the allegations of the complaint as true and provide plaintiff the benefit of every possible favorable inference (*AG Capital Funding Partners v. State Street Bank and Trust Co.*, 5 NY3d 582, 591 [2005]).

An accountant may be liable for negligent misrepresentation to a third party, with whom the accountant was not in privity, if the accountant was aware that the reports were to be used for a particular purpose, in furtherance of such purpose a known party was intended to rely upon the reports, and there was some linking conduct which evinced the accountant's understanding of that reliance (*SEC Investor Protection Corp. v BDO Seidman*, 95 NY2d 702, 711 [2001]). The accountant's conduct linking it to the plaintiff must be such as "to create a relationship between the two that sufficiently approached privity" (Id).

Plaintiffs allege that since they were no longer directors or insiders of Odyssey, their only source for obtaining reliable financial information about the company was from Odyssey's financial statements filed with the SEC and prepared by Want & Ender (Complaint at ¶ 20). Giving plaintiffs the benefit of every possible favorable inference, the court must assume that Want & Ender, as Odyssey's accountants, were aware of the agreement indemnifying former directors and that the former directors were relying on Odyssey's financial statements to assess the value of their indemnification agreement. Thus, the court must further assume that there was a relationship between plaintiff and Want & Ender approaching privity and plaintiffs had a viable cause of action against Want & Ender for negligent misrepresentation in the financial statements. But for defendants' failure to enter a default judgment against Want & Ender in a timely manner, the outcome of the underlying litigation might have been more favorable (*Leder v Spiegel*, 9 NY3d 836 [2007]). Defendant Lewis Bartell has submitted an affidavit in which he states that he did not become an associate with the defendant law firm until October 2, 2008. Since the Appellate Division dismissed the complaint in the underlying case on October 14, 2008, plaintiffs have not

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alleged, and the court cannot infer, that defendant Bartell was involved in the failure to move for a default judgment. However, plaintiffs have alleged a sufficient claim for legal malpractice against the other defendants. Defendant Lewis Bartell's motion to dismiss the complaint for failure to state a cause of action is **granted**. The other defendants' motion to dismiss the complaint for failure to state a cause of action is **denied**.

Plaintiffs cross-move for partial summary judgment on their first cause of action for legal malpractice. Plaintiffs appear to argue that defendants' failure to move for a default judgment in a timely fashion is malpractice per se. However, a motion for a default judgment should be denied where plaintiff fails to offer proof as to the merits of the claim (CPLR § 3215[f]). Thus, on plaintiffs' motion for summary judgment on its malpractice claim, it is plaintiffs' burden to establish a prima facie case against Want & Ender for negligent misrepresentation (*JMD Holding Corp. v. Congress Financial Corp.*, 4 NY3d 373, 384 [2005]). Failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers(Id).

In their affidavits in support of their motion for summary judgment, plaintiffs do not discuss their relationship with Want & Ender. In particular, plaintiffs do not set forth the circumstances which might have led Want & Ender to know that plaintiffs were relying on the financial statements in order to evaluate their indemnity agreements. Thus, the court concludes that plaintiffs have failed to establish a prima facie case against Want & Ender for negligent misrepresentation. Plaintiffs' motion for partial summary judgment with respect to their malpractice claim is **denied**.

Leave to amend a pleading shall be freely given upon such terms as may be just (CPLR 3025[b]). However, leave to amend may be denied where the proposed amendment is palpably improper or insufficient as a matter of law, or prejudice or surprise will directly result from the delay in seeking amendment (*Koenig v Action Target*, 76 AD3d 997 [2d Dept 2010]). The proposed amendment, alleging in more detail the facts supporting plaintiffs' claim that Want & Ender knew that plaintiffs were relying on the financial statements, is not patently without merit. Plaintiffs' motion for leave to serve an amended complaint is **granted**. The amended complaint is deemed served in the form annexed as exhibit 11 to plaintiffs' motion.

Plaintiffs move pursuant to CPLR § 3124 to compel defendants to produce documents relating to other complaints or disputes which the defendant law firm had with other clients. Plaintiffs allege that Kaplan Belsky assigned the prosecution of the underlying case against

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Want & Ender to defendant Andrew Jacobs. Plaintiffs argue that evidence of other complaints will tend to show that Jacobs' failed to perform his duties competently on other occasions and the law firm failed to give him adequate supervision.

In view of the relatively routine nature of an application for a default judgment, it is unclear how evidence of other derelictions on Jacobs' part is material or necessary to the prosecution of the malpractice action. Plaintiffs' motion to compel defendants to produce documents concerning complaints or disputes with other clients is denied.

So ordered.

Dated MAY 18 2011

Stephen A. Bucaria
J.S.C.

ENTERED
MAY 20 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE