Clare Rose, Inc. v Elliot Wise & Co., Inc.

2011 NY Slip Op 31832(U)

June 9, 2011

Sup Ct, Suffolk County

Docket Number: 15854/2010

Judge: Melvyn Tanenbaum

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SHORT FORM ORDER

INDEX NO. 15854-2010

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART XIII SUFFOLK COUNTY

Date: 06-09-2011

PRESENT:
HON. MELVYN TANENBAUM
Justice

MOTION # 001, #002, & #003 **Mot D**
R/D:03/04/2011
S/D:03/23/2011

CLARE ROSE, INC.,

Plaintiff,

-against-

ELLIOT WISE & CO., INC. PAUL BRENNAN and BOSTON BENEFIT CONSULTING, INC.,

Defendants.

PLTF'S/PET'S ATTY:
ETTELMAN & HOCHHEISER, P.C.
100 Quentin Roosevelt Boulevard, 401
Garden City, NY 11530

DEFT'S/RESP'S ATTY:
LAWRENCE WORDEN & RAINIS, PC
225 Broad Hollow Road, Suite 105E
Melville, NY 11747

MCMANUS, COLLURA & RICHTER, PC
48 Wall Street
New York, NY 10005

Upon the following papers numbered 1 to 24 read on this motion for an order pursuant to CPLR Sec 3211 (a), (1), (5), (7) & 3211 (c) Notice of Motion/Order to Show Cause and supporting papers 1-8, 9-13 ; Notice of Cross Motion and supporting papers 14-17 Answering Affidavits and supporting papers 18-20 Replying Affidavits and supporting papers 21-22, 23-24 Other ________; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that these motions by defendants PAUL BRENNAN ("BRENNAN") and BOSTON BENEFIT CONSULTING, INC. ("BBC"), and ELLIOT WISE ("WISE") and ELLIOT WISE & CO. INC. ("WISE & CO.") each seeking an order pursuant to CPLR Section 3211(a)(1),(5),(7) & 3211(c) dismissing plaintiff's complaint and the cross motion by plaintiff CLARE ROSE, INC. seeking an order pursuant to CPLR Sec. 3025 (b) granting leave to amend the complaint and denying defendants motions are determined as follows:

Plaintiff CLARE ROSE, INC. ("CLARE ROSE") claims that between 1998 and 2006 defendants were retained to design and administer a pension plan for "CLARE ROSE" drivers/salesmen employees. The pension plan was required under the terms of a 1998 collective bargaining agreement. Defendant "BRENNAN" is a licensed "ERISA" (Employment Retirement Income Security Act) actuary and the president of defendant "BBC"; defendant "WISE" is an attorney employee in defendant/law firm "WISE & CO.".

Defendants motions each seek an order dismissing plaintiff's complaint claiming that no viable causes of action exist against them. Plaintiff's cross motion seeks an order denying defendants motions and granting "CLARE ROSE" permission to amend the complaint to include a claim for fraud against all defendants.

In support of defendants "BRENNAN" and "BBC" motion, movants submit an affidavit from defendant "BRENNAN" and two attorney affirmations and argue that plaintiff's negligence and

breach of contract claims are barred by the three year statute of limitations (CPLR Section 214(6). Defendants assert that documentary evidence in the form of a termination letter from "CLARE ROSE" dated May 2, 2006 addressed to "BRENNAN" confirms that plaintiff's complaint, which was filed on May 3, 2010, is time barred. Defendants also claim that even if the six year limitations period applied with respect to plaintiff's breach of contract claim, no viable breach of contract cause of action exists since there was no contract between defendants/law firm and "CLARE ROSE". Defendants maintain that plaintiff's cross motion seeking to amend the complaint to include an additional fraud claim must be denied since the fraud claim is also barred by the three year limitations period and since the fraud claim does not allege conduct or damages separate and distinct from the conduct and damages associated with the negligence and breach of contract causes of action.

In support of defendants "WISE" and "WISE & CO." motion, defendants submit an affidavit from ELLIOT WISE and two attorney affirmations and claim that the law firm did not provide legal services for "CLARE ROSE" and therefore no viable malpractice action is stated. Defendants assert that the law firm only provided administration services including collecting employee data, determining employee eligibility, performing preliminary benefit calculations and providing a written report solely at the request of a "CLARE ROSE" investment advisor. Defendants claim that none of its activities involved providing legal counsel or representation for "CLARE ROSE". Defendants also argue that even if the Court determines that "WISE & CO." provided legal services for "CLARE ROSE", plaintiff's claims are time barred by the three year limitations period for professional malpractice (CPLR Section 214(6)) since "WISE & CO." last provided services of any kind with respect to the pension fund account in 2001. Defendants argue that plaintiff's negligence and breach of contract causes of action are also time barred by statute (CPLR Sections 214-4 & 213(2)) and maintain that no viable breach of contract claim exists since the parties never entered into a written agreement for legal services. Defendant "WISE" argues that the individual claims against him must be dismissed since any professional planning services he provided were performed as an employee of the law firm "WISE & CO.".

In opposition to both motions and in support of its cross motion, plaintiff submits an affidavit from "CLARE ROSE's" corporate secretary and an affirmation of counsel and claims that the complaint sets forth viable negligence and breach of contract causes of action against the defendants. Plaintiff claims that it sustained injury beginning in October, 2009 when the Internal Revenue Service notified "CLARE ROSE" that the pension plan defendants designed and administered was required to be restated since it violated the government prohibition against backloading. Plaintiff claims that as a result of the "IRS" requirement "CLARE ROSE" became liable for an additional $4.5 million to its pension plan employees. Plaintiff asserts that the defendants are actuaries and are therefore not professionals subject to the three year "professional malpractice" limitations period set forth in CPLR Section 214(6). Plaintiff claims that the negligence claims are not time barred by the applicable three year limitations period since "CLARE ROSE's" injury accrued in October, 2009 when the "IRS" issued its compliance letter. Plaintiff argues in the alternative that an issue of fact

may exist concerning the date of accrual of this cause of action and additionally that defendants motions must be denied since no discovery has been conducted. Plaintiff also claims that viable breach of contract claims are asserted which are not barred by the six year limitations period since defendants last breach allegedly occurred in 2006. Plaintiff asserts that the complaint states a valid breach of contract claim based upon the conduct of the parties and that an implied contract can be inferred from the facts set forth in the pleadings. Plaintiff also argues that "CLARE ROSE' should be permitted to amend the complaint to add an additional cause of action sounding in fraud based upon the defendants' recklessness and gross negligence. Plaintiff asserts that no grounds exist to dismiss all claims against the individual defendant "WISE" since "CLARE ROSE" has submitted evidence in the form of an affidavit from its corporate secretary alleging that "WISE" performed pension service until 2006 and therefore an issue of fact exists concerning defendant's personal liability.

The issue before the Court on a motion to dismiss for failure to state a cause of action is not whether the cause of action can be proved, but whether one has been stated (STAKULS v. STATE, 42 NY 2d 272, 397 NYS 2d 740 (1977)). A pleading does not state a cause of action when it fails to allege wrongdoing by a defendant upon which relief can be granted (HEX BLDG. CORP. v. LEPECK CONSTRUCTION, 104 AD 2d 231, 482 NYS 2d 510 (2nd Dept., 1984)). The Court must accept the facts alleged as true and determine whether they fit any cognizable legal theory (CPLR Sec. 3211(a)(7); MARONE v. MARONE, 50 NY 2d 481, 429 NYS 2d 592 (1980); KLONDIKE GOLD INC. v. RICHMOND ASSOCIATES, 103 AD 2d 821, 478 NYS 2d 55 (2nd Dept., 1984)).

Plaintiff's complaint sets forth three causes of action: 1) attorney malpractice against defendant "WISE"(Count 1); 2) negligence against defendants "WISE & CO.", "BRENNAN" and "BBC" (Count 2); and 3) breach of contract against all defendants.

CPLR Section 214 (4) provides that actions to recover damages for injury to property must be commenced within three years. CPLR Section 214(6) provides that actions to recover for damages for malpractice, other than medical, dental or podiatric malpractice, regardless of whether the underlying theory is based in contract or tort must be commenced within three years. CPLR Section 213 (1) provides that an action upon a contractual obligation or liability, express or implied, must be commenced within six years. CPLR Section 213(8) provides that an action based upon fraud must also be commenced within six years computed from the time the plaintiff could with reasonable diligence have discovered the fraud.

CPLR Section 214(6) confines negligence and contract claims based upon professional malpractice to three years. The Court of Appeals in Chase Scientific Research, Inc. v. NIA Group, Inc., 96 NY2d 20, 725 NYS2d 592 (2001) described the "professional" individuals and groups intended to benefit from the by the shortened limitations period:

> The term "professional" is also commonly understood to refer to the learned professions, exemplified by law and medicine, which have particular relevance to the history of CPLR 214 (6). The two- and three-year malpractice statutes of limitation, after all, began with doctors, enlarged soon after to encompass attorneys and accountants. In 1996, when CPLR 214 (6) was before the

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> Legislature for amendment, the report of the New York State Bar Association referred specifically to those categories in speaking of professional malpractice "an architect, engineer, lawyer or accountant" (Legis Rep No. 76-B of NY State Bar Assn., Bill Jacket, L1996, ch 623, at 13-14).
>
> The qualities shared by such groups guide us in defining the term "professional." In particular, those qualities include extensive formal learning and training, licensure and regulation indicating a qualification to practice, a code of conduct imposing standards beyond those accepted in the marketplace and a system of discipline for violation of those standards (see, MATTER OF FREEMAN, 34 NY2d 1, 7-8; see also, BDO SEIDMAN v. HIRSHBERG, 93 NY2d 382, 389-390; PORT AUTH. v. EVERGREEN INTL., AVIATION, 179 Misc 2d 674). Additionally, a professional relationship is one of trust and confidence, carry with it a duty to counsel and advise clients (see,MURPHY v. KUHN, 90 NY2d 266, 270; KIMMELL v. SCHAEFER, 89 NY2d 257, 263).
>
> This definition, we believe, implements the legislature's intention to benefit a discrete group of persons affected by the concerns that motivated the shortened statute of limitations (see, Alexander 2000 Supp Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C:214 [6], 2001Cum Pocket part,. at 211). We are mindful as well that our definition ideally should establish a bright line, so that, absent legislative clarification, it can be fairly and uniformly applied. Moreover, with the rise of large numbers of skilled "semi-professions" (see, Polelle, supra, 33 USF L Rev, at 205), any broader definition would be for the future make it hard to draw meaningful distinctions and the groups covered by CPLR 214 (6) would quickly proliferate. (CHASE v. NIA at page 29).

Defendant "BRENNAN" is an actuary and does not qualify as a "professional" subject to the three year limitations period for all claims asserted against defendants "BRENNAN" and "BOSTON BENEFIT CONSULTING" (seeCASTLE OIL CORP. v. THOMPSON PENSION EMPLOYEE PLANS, INC., 299 AD2d 513, 750 NYS2d 629 (2nd Dept., 2002); NEW YORK DISTRICT COUNCIL of CARPENTERS PENSION FUND v. SAVASTA, 2005 WL 22872 (S.D., N.Y.)). Plaintiff's negligence and breach of contract causes of action against these defendants are therefore governed by limitations periods applicable to negligence claims (CPLR Section 214(4)) and breach of contract claims (CPLR Section 213(1)).

Although plaintiff asserts that the October, 2009 "IRS" compliance notice is the accrual date for purposes of commencement of the statute of limitations period for negligence claims, paragraphs 32 & 33 of"CLARE ROSE's" complaint state:

> 32. In or about the end of 2006, Clare Rose severed its relationship with Defendants and engaged a new third party administrator (the "TPA").

33. At this time, the TPA discovered that the Plan was not qualified.

Based upon these claims accrual of "CLARE ROSE's" negligence action commenced "in or about the end of 2006" since plaintiff concedes that "CLARE ROSE" discovered defendants negligence at this time. Defendants motions seeking dismissal of those claims upon expiration of the three year limitations period (CPLR Sec. 214(4)) must therefore be granted since this action was not commenced until May 3, 2010. Accordingly the negligence claims asserted against defendants are hereby dismissed.

With respect to plaintiff's breach of contract claims, the elements that must be alleged for a viable breach of contract claim are: 1) formation of a contract between plaintiff and defendant; 2) performance by plaintiff; 3) defendant's failure to perform; and 4) resulting damage (See 2 N.Y. PJI §4:1 438 (2003); FURIA v. FURIA, 116 AD2d 694, 498 NYS2d 12 (2d Dept., 1986); LEDAIN v. ONTARIO, 192 Misc 2d 247, 746 NYS2d 760 (NY Sup Ct 2002). Plaintiff's complaint sets forth sufficient allegations of an implied contract to state an arguably viable claim against the defendants at this juncture. Defendants applications to dismiss these claims must therefore be denied without prejudice to renewal upon completion of discovery.

CPLR §3025(b) provides:

> (b) Amendments and supplemental pleadings by leave. A party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just first including the granting of costs and continuances.

Leave to amend a pleading should be freely granted in the absence of a showing of prejudice or surprise resulting directly from the delay (FAHEY v. ONTARIO COUNTY, 44 NY2d 9, 34, 408 NYS2d 314 (1978); PREFARIS v. LONG, 114 AD2d 806, 495 NYS2d 176 (1st Dept., 1985)). In considering a motion for leave to amend the pleadings, the Court has discretion to consider the merits of the proposed amendment (MATTER OF COHEN, 154 AD2d 291, 546 NYS2d 368 (1st Dept., 1989)).

A review of the proposed additional fraud cause of action in the light most favorable to plaintiff reveals that "CLARE ROSE" has set forth sufficient factual claims to sustain a viable fraud claim against the defendants. Defendants motions seeking to dismiss the fraud claims on the basis of failure to state a cause of action and expiration of the six year limitations period must therefore be denied without prejudice to renewal upon completion of discovery. Accordingly it is

ORDERED that defendants motions each seeking an order pursuant to CPLR Section 3211(a)(1),(5) & (7) & 3211(c) are granted solely to the extent that the negligence causes of action asserted against each defendant are hereby dismissed. All other requests for relief asserted by the defendants are denied, and it is further

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ORDERED that plaintiff's cross motion for an order pursuant to CPLR Section 3025(b) is granted to the extent that the proposed verified amended complaint alleging causes of action sounding in breach of contract and fraud shall be deemed served nunc pro tunc to the date of service of the cross motion. Responsive pleadings shall be served within twenty days of service of a copy of this order with notice of entry.

MELVYN TANENBAUM

Dated: June 9, 2011

J.S.C.