

Access Point Med., LLC v Mandell
2011 NY Slip Op 32107(U)
July 29, 2011
Sup Ct, NY County
Docket Number: 102082/2010
Judge: Judith J. Gische
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JUDITH J. GISCHE
Justice

PART 10

Access Point Medical

~~✗CORRECTED✗~~
Decision/Order

Plaintiff (s),

INDEX NO. 102082/10

- v -

MOTION DATE _____

MOTION SEQ. NO. 002

Mandell

Defendant(s).

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

FILED


AUG 02 2011

NEW YORK
COUNTY CLERK'S OFFICE

Upon the foregoing papers, it is ordered that this motion

**motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.**

Dated: 7/29/11



HON. JUDITH J. GISCHE, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE SETTLE/SUBMIT ORDER

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

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10**

-----X
ACCESS POINT MEDICAL, LLC and
ACCESS POINT MEDICAL, INC.,

Plaintiffs,

-against-

EDWARD R. MANDELL and TROUTMAN
SANDERS LLP,

Defendants.

****CORRECTED****
Decision and Order
Index No. 102082/2010
Seq No. 002

Present:
Hon. Judith J. Gische, JSC

FILED

AUG 02 2011

-----X

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

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Papers	Numbered
Defs' Mandell, T&S n/m (3211) w/PA affirm, exhs (sep backs)	1,2
Pltfs' opp w/JTY affid, exh	3
CW affid	4
Defs' reply	5

GISCHE, J.:

In this action for breach of fiduciary duty, aiding and abetting the breach of fiduciary duty, legal malpractice and breach of contract, defendants Edward R. Mandell and Troutman Sanders LLP, move, pursuant to CPLR 3211 (a) (1) and (7), to dismiss the amended complaint on the grounds that the pleading fails to state a cause of action and the first two causes of action are time-barred.

The following allegations are taken from the complaint.

Plaintiff Access Point Medical, LLC is a limited liability company that manufactures and sells durable home medical equipment. It is organized under the laws of the State of Delaware.

Plaintiff Access Point Medical, Inc., is a wholly owned subsidiary of Access Point

Medical, LLC (together, Access) and is also engaged in the manufacture and sale of durable home medical equipment.

Troutman Sanders LLP (Troutman) is a law firm that is authorized to do business in the State of New York.

Defendant Edward Mandell is an attorney admitted to practice in the State of New York. He is a partner at Troutman in New York City.

In April of 2005, non-party Bill Kidd formed Access to manufacture and sell durable medical equipment. Troutman and Mandell represented Kidd in this endeavor. Kidd invested over five million dollars in this venture. In April of 2005, Kidd solicited Carret China Opportunity Investment Company, Inc. (Carret) to invest in Access. To pitch Carret, defendants drafted a Private Placement Memorandum (2005 PPM) detailing Access' corporate profile and marketing strategy. The 2005 PPM revealed Kidd's strategy toward securing fixed arrangements for low-cost products in China for the durable home medical equipment, thereby solidifying Access' place as a low-cost player in the industry. On June 3, 2005, Carrett purchased two million shares of Access' Series A Convertible Preferred Stock at a price of \$7.50 per share and 180,000 shares of Access' common stock at a price of \$0.33, for a total investment of \$15,060,000. Shortly thereafter, Kidd and defendants executed a Management Services Agreement (Agreement). Under the Agreement, Kidd was to receive fees from Access by providing management, financial, strategic and operational services to Access.

In January 2006, defendants prepared another Private Placement Memorandum (2006 PPM), similar to the 2005 PPM, to solicit an investment from Prospect Investment Management LLP (Prospect). On February 23, 2006, Prospect purchased four million shares of Access' Series

B Convertible Preferred Stock at a price of \$7.50 per share, for a total investment of \$30 million dollars. Contrary to the representation made in the 2006 PPM, Access failed to obtain low-cost supply contracts as promised. Instead, the prices paid to its Chinese suppliers were variable, negotiable and uncertain. As a result, Access' gross margins were negative. However, defendants failed to disclose said facts in the 2006 PPM.

On July 29, 2005, Access obtained a line of credit from Wells Fargo. Defendants negotiated and reviewed said loan materials that contained specific default provisions, which were triggered if, among other things, Access had certain losses. On April 15, 2006, Access defaulted on its loan following a seven million dollar loss for the fiscal year that ended on March 31, 2006. The default triggered a \$50,000 penalty and restrictive covenants in order to avoid risking the loss of its credit line. Defendants were aware that Kidd was not adequately addressing Access' financial condition and neglected to report said information to the Board of Directors. On October 20, 2006, Access defaulted a second time on the Wells Fargo loan, and as a result of the second default, Access interest rate increased to the prime rate plus 4%. On November 10, 2006, Wells Fargo revoked Access' credit line due to its deteriorating financial condition.

In addition to withholding information regarding Access' defaults on the Wells Fargo line of credit, defendants failed to disclose to the Board of Directors the fact that Access received warning letters from the Food and Drug Administration regarding allegedly defective products being sold by Access. Defendants allowed their representation of Kidd to adversely affect their representation of Access, thereby creating a conflict of interest arising from the simultaneous representation. It was apparent that Kidd's interests were adverse to those of Access, in that

Kidd used Access as a vehicle to raise investment capital by making false statements regarding Access' solvency. Defendants failed to disclose this conflict of interest, nor did it explain the material and reasonably foreseeable ways in which the conflict of interest could adversely affect Access. Access was never advised to obtain separate counsel, nor did it give its informed consent to defendants to represent Access and defendants. Defendants terminated their representation with Access in February 2007.

As a result, Access commenced this action asserting claims for: (1) breach of fiduciary duty, (2) aiding and abetting breach of fiduciary duty, (3) legal malpractice, and (4) breach of contract. Plaintiff is seeking damages, a judgment disgorging all legal fees related to defendants' representation of Access, and costs and disbursements in this action.

Defendants argue that they are entitled to dismissal because: (1) Access was not qualified to do business in New York, and, as a foreign corporation, lacks standing to bring suit in this jurisdiction; (2) Access' claims for breach of fiduciary duty and aiding and abetting breach of fiduciary duty are time-barred under CPLR 214 (4), the applicable three-year statute of limitations; (3) Access' breach of contract claim is duplicative of its breach of fiduciary duty cause of action; and (5) Access failed to plead that it was injured following defendants' alleged breach of fiduciary duty.

Access argues that defendants are not entitled to dismissal because: (1) it was not doing business in New York, and thus, its failure to obtain the requisite authorization to do so is not a statutory barrier to this lawsuit; (2) Access' claims for breach of fiduciary duty are not time-barred; (3) the amended complaint sufficiently pleads a conflict of interest; (4) the breach of contract cause of action is not duplicative of the breach of fiduciary duty claim; (5) the amended

complaint adequately pleads damages; and (6) if the court were inclined to grant dismissal, Access should be granted leave to amend the complaint, pursuant to CPLR 3025 (b).

“When assessing the adequacy of a complaint in light of a CPLR 3211 (a) (7) motion to dismiss, 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” (*People v Coventry First LLC*, 13 NY3d 108, 115 [2009] [internal quotation marks and citation omitted]). A court’s “sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail” (*id.* [internal quotation marks and citation omitted]).

I. Breach of Fiduciary Duty

Concerning its first cause of action, Access has stated a valid cause of action for breach of fiduciary duty. However, defendants have established that said action is time-barred under CPLR 214 (4).

“In order to establish a breach of fiduciary duty, a plaintiff must prove the existence of a fiduciary relationship, misconduct by the defendant, and damages that were directly caused by the defendant’s misconduct” (*Guarino v North Country Mtge. Banking Corp.*, 79 AD3d 805, 807 [2d Dept 2010] [internal quotations and citation omitted]). “A fiduciary relationship exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation” (*People v Coventry First LLC*, 13 NY3d at 115 [internal citation and quotation marks omitted]). Furthermore, a fiduciary duty exists “only when a person reposes a high level of confidence and reliance in another, who thereby

exercises control and dominance over him” (*id.*).

The attorney-client relationship is one of “unique fiduciary reliances and that the relationship imposes on the attorney ‘[t]he duty to deal fairly, honestly and with undivided loyalty . . . avoiding conflicts of interest . . . and honoring the clients’ interests over the lawyer’s’” (*Ulico Cas. Co. v Wilson, Elser, Moskowitz, Edelman & Dicker* 56 AD3d 1, 9 [1st Dept 2008] [internal citation omitted]).

According to the complaint, defendants failed to disclose the fact that they represented Kidd in various legal matters that were adverse to the interests of Access. The complaint states that defendants were hired to secure financing for Access’ capital needs and they endeavored to enter into negotiations to sell Access’ stock to outside investors. To secure said financing, defendants drafted the 2005 and 2006 PPMs to solicit funds for Access’ capital needs, but defendants misled both Access and potential investors by failing to disclose that Kidd had not secured fixed prices for the durable medical equipment from its Chinese purveyors. The complaint alleges that the resultant harm was that Access’ primary business strategy, to position itself as a low-cost provider in the durable home medical equipment industry, was untenable. The complaint alleges that this led defendants to focus more on recouping Kidd’s personal five million dollar investment, than on maintaining Access’ fiscal health and profitability. The allegations further state that defendants breached their fiduciary duty by making knowing misrepresentations, concealing pertinent financial information, neglecting their duty to safeguard Access’ assets, and by failing to provide Access with undivided loyalty. Thus, Access has sufficiently plead a cause of action for breach of fiduciary duty.

Although Access has sufficiently pleaded a claim for breach of fiduciary duty, the claim

is time-barred pursuant to CPLR § 214 (4).

CPLR § 214 (4) provides:

Actions to be commenced within three years: for non-payment of money collected in an execution; for penalty created by statute; to recover chattel; for injury to property; for personal injury; for malpractice other than medical, dental, or podiatric malpractice; to annul a marriage on the ground of fraud

The following actions must be commenced within three years:

4. An action to recover money damages for an injury to property except as provided in section 214-c.

The Court of Appeals has addressed this issue and it has opined that:

“New York law does not provide a single statute of limitations for breach of fiduciary duty claims. Rather, the choice of the applicable limitations period depends on the substantive remedy that the plaintiff seeks. Where the remedy sought is purely monetary in nature, courts construe the suit as alleging ‘injury to property’ within the meaning of CPLR 214 (4), which has a three-year limitation period. Where, however, the relief sought is equitable in nature, the six-year limitations period of CPLR 213 (1) applies”

(IDT Corp. v Morgan Stanley Dean Witter & Co., 12 NY3d 132, 139 [2009] [internal citation omitted]).

Here, Access primarily seeks money damages in excess of \$200,000 dollars, and the equitable relief it seeks in the form of disgorgement of profits, is incidental to that relief (*id.*).

Therefore, the three-year statute of limitations is applicable to this cause of action.

Turning now turn to the question of when Access’ breach of fiduciary claim accrued, “[a] tort claim accrues as soon as ‘the claim becomes enforceable, i.e., when all elements of the tort can be truthfully alleged in a complaint’” (*id.* at 140 [internal citation omitted]). Similarly, in

other torts in which damage is an essential element, the claim “is not enforceable until damages are sustained. To determine timeliness, we consider whether plaintiff’s complaint must, as a matter of law, be read to allege damages suffered so early as to render the claim time-barred” (*id.* [internal citation omitted]).

Here, the only reasonable inference to be drawn from Access’ allegations is that it first suffered loss, as a result of defendants’ misrepresentations and breach of fiduciary duty, following the execution of the 2005 PPM. The exact day of the injury is April 2005. Access alleges that it was injured again in January 2006 following the execution of the 2006 PPM. The current action was commenced on February 17, 2010, well past the three-year limitation period, thereby barring Access’ breach of fiduciary duty claim (*Carlingford Ctr. Point Assoc. v MR Realty Assoc., L.P.*, 4 AD3d 179, 179-80 [1st Dept 2004]).

However, Access argues that its claims for breach of fiduciary duty are not time-barred under the “continuous representation doctrine,” because defendants represented the corporation on similar matters until March of 2007.

“Under the continuous representation doctrine, the statute of limitations is tolled while representation on the same matter in which the malpractice is alleged is ongoing. The doctrine is rooted in recognition that a client cannot be expected to jeopardize a pending case or relationship with an attorney during the period that the attorney continues to handle the case”

(*Waggoner v Caruso*, 68 AD3d 1, 4 [1st Dept 2009], *affd* 14 NY3d 874 [2010] [internal citation omitted]).

Although Access alleges that defendants representation ended in 2007, the invoices they submitted to support said assertion reveal that defendants’ representation of Access concluded on February 14, 2007. Access did receive invoices in March of 2007, but those

invoices were for unpaid balances of work performed prior to February 15, 2007. As stated above, Access commenced this action on February 17, 2010, three years and three days beyond the date that defendants last represented or performed work on their behalf (Exhibit H to Affirmation of Philippe Adler, dated August 23, 2010) (Adler Aff.). Thus, Access' first cause of action for breach of fiduciary duty is time-barred.

II. Aiding and Abetting

Access has sufficiently plead its second cause of action for aiding and abetting breach of fiduciary duty. However, since the complaint "allege[s] damages suffered so early as to render the [breach of fiduciary] claim time-barred," Access' second cause of action for aiding and abetting breach of fiduciary duty must fail (*IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d at 140).

"A claim for aiding and abetting a breach of fiduciary duty requires: (1) a breach by a fiduciary of obligations to another, (2) that the defendant knowingly induced or participated in the breach, and (3) that plaintiff suffered damage as a result of the breach" (*Kaufman v Cohen*, 307 AD2d 113, 125 [1st Dept 2003]). "A person knowingly participates in a breach of fiduciary duty only when he or she provides 'substantial assistance' to the primary violator. Substantial assistance occurs when a defendant affirmatively assists, helps conceal or fails to act when required to do so, thereby enabling the breach to occur" (*id.* at 126). Here, Access has successfully pleaded a cause of action for aiding and abetting breach of fiduciary duty.

As discussed above, defendants, as attorneys, owed Access' Board of Directors a fiduciary duty (*Ulico Cas. Co. v Wilson, Elser, Moskowitz, Edelman & Dicker*, 56 AD3d at 9). Moreover, the allegations assert that defendants "knowingly induced or participated in the

breach” when they failed to disclose information regarding: (1) Kidd’s inability to secure low-cost products from its Chinese suppliers, (2) the Food and Drug Administration’s letter citing that Access’ durable medical equipment was defective, and (3) Access’ inability to meet its loan payments and subsequently defaulted on its Wells Fargo loan. The complaint further alleges that Access suffered damages as a result of defendants’ breach, in that it was forced to pay an increased interest rate, along with excessive fees for failing to meet the terms of its loan agreement. Moreover, soon thereafter, it lost its line of credit with Wells Fargo.

Despite Access’ successful pleading of its second cause of action, because its primary claim for breach of fiduciary duty was properly dismissed, the claim for aiding and abetting a breach of fiduciary duty cannot stand (*see OFSI Fund II, LLC v Canadian Imperial Bank of Commerce*, --- AD3d—, 2011 WL 904135, *2-*3, 2011 NY Slip Op 1926, *6 [1st Dept 2011]; *Fiala v Metropolitan Life Ins. Co.*, 6 AD3d 320, 323 [1st Dept 2004]). As discussed above, the complaint alleges “damages suffered so early as to render the breach of fiduciary claim as time-barred,” (*IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d at 140) and, thus, Access’ second cause of action for aiding and abetting breach of fiduciary duty must fail.

III. Legal Malpractice

Access has not successfully plead its third cause of action, which is for negligence, although the allegations sound in legal malpractice.

“In order to sustain a claim for legal malpractice, a plaintiff must establish both that the defendant attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession which results in actual damages to a plaintiff, and that the plaintiff would have succeeded on the merits of the underlying action ‘but

for' the attorney's negligence" (*AmBase Corp. v Davis Polk & Wardwell*, 8 NY3d 428, 434 [2007] [internal citation omitted]). "A claim for attorney malpractice arises out of the contractual relationship between the parties[, whether, as here, it is] documented by a retainer agreement or not" (*Yuko Ito v Suzuki*, 57 AD3d 205, 207 [1st Dept 2008]). "A plaintiff is not obligated to show, on a motion to dismiss, that it actually sustained damages. It need only plead allegations from which damages attributable to the defendant's malpractice might be reasonably inferred" (*Rock City Sound, Inc. v Bashian & Farber, LLP*, 74 AD3d 1168, 1171 [2d Dept 2010]).

The crux of this legal malpractice claim is that defendants failed to exercise the degree of care, skill, and diligence commonly possessed by a member of the legal community when it failed to disclose that its representation of Kidd created a conflict of interest with Access, that defendants made several misrepresentations to Access' Board of Directors which negatively impacted the company, that defendants made statements in reckless disregard of their truth or accuracy, and that defendants allowed the interests of another client to supercede those of Access.

Access' claim for legal malpractice fails on two counts. Access failed to argue or demonstrate that it would have suffered the damage "but for" defendants' negligence (*AmBase Corp. v Davis Polk & Wardwell*, 8 NY3d at 434). Secondly, an attorney malpractice action must be commenced within three years from accrual (*see* CPLR 214 [6]). "A legal malpractice claim accrues 'when all the facts necessary to the cause of action have occurred and an injured party can obtain relief in court'" (*McCoy v Feinman*, 99 NY2d 295, 301 [2002] [internal citation omitted]). To state it more simply, accrual occurs when the malpractice is committed (*Waggoner*

v Caruso, 68 AD3d at 6). As discussed above, Access' malpractice claims against defendants accrued in 2005 and 2006, nearly five years before the commencement of this action, and thus, it is time-barred (*id.*).

Access reliance on the continuous representation doctrine is unavailing. The limitation period for a legal malpractice claim pursuant to CPLR 214 (6), may be tolled if "the attorney continues to represent the client on the same matter in which the malpractice is alleged to have occurred, but there must be clear indicia of an ongoing, continuous, developing, and dependent relationship between the client and the attorney for the continuous representation doctrine to apply (*TVGA Eng'g, Surveying, P.C. v Gallick*, 45 AD3d 1252, 1256-7 [4d Dept 2007]). As, discussed above, the evidence in the record does not demonstrate that fact. Consequently, the continuous representation doctrine fails to toll the statutory limitation period.

IV. Breach of Contract

Access' has not sufficiently plead a cause of action for breach of contract.

"[A] party alleging a breach of contract must 'demonstrate the existence of a . . . contract reflecting the terms and conditions of their . . . purported agreement'" (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173 [2011]). The complaint alleges that Access and defendants entered into an attorney-client relationship pursuant to a contract agreement and that defendants violated their contractual obligations by failing to act with the requisite level of skill and competence in their representation of Access, by acting in a manner that was detrimental to the business and property rights of the company. At paragraphs 99-104 of the complaint, Access' cause of action for breach of contract refers to the unethical conduct described in paragraphs 82-86, which are similar to the allegations stated in its first cause of action for breach of fiduciary duty. Since

Access' cause of action for breach of contract is merely duplicative of its claim for breach of fiduciary duty, it cannot stand (*William Kaufman Org., Ltd. v Graham & James L.L.P.*, 269 AD2d 171, 173 [1st Dept 2000]).

However, a contract claim is not always duplicative of a tort claim (*see OFSI Fund II, LLC v Canadian Imperial Bank of Commerce*, _ AD3d_, 2011 WL 904135, 2011 NY Slip Op at *6). "While it is true that a breach of contract claim need not be based on an express promise to the client, a breach of contract claim premised on the attorney's failure to exercise due care or to abide by general professional standards, is nothing but a redundant pleading of the malpractice claim" (*Sage Realty Corp. v Proskauer Rose L.L.P.*, 251 AD2d 35, 38-39 [1st Dept 1998] [internal citation omitted]). Here, paragraphs 99-104 of the fourth cause of action refer to the unethical conduct described in paragraphs 93-95, which constitute the same allegations in Access' third cause of action for legal malpractice. Since Access did not allege that defendants breached a promise to achieve a specific result, their breach of contract claim is insufficient to survive dismissal (*id.* at 39).

Defendants also seek dismissal on the alternate ground that Access failed to obtain a business certificate in the State of New York as required under Business Corporation law § 1312 (a) and Limited Liability Company Law § 808 (a).

"Section 1312 (a), which denies an unauthorized foreign corporation 'doing business' in this state capacity to sue here, employs a heightened 'doing business' standard, fashioned specifically to avoid unconstitutional interference with commerce under the Commerce Clause (*AirTran N.Y., LLC v Midwest Air Group, Inc.*, 46 AD3d 208, 214 [1st Dept 2007] [internal citation omitted]). Since this statute constitutes a statutory barrier to the foreign corporation's

right to bring suit, “the party seeking to impose the barrier, in order to rebut the presumption that the corporation does business in its state of incorporation rather than New York, has the burden of proving that the foreign corporation’s activity” here is “systematic and regular” (*id.*).

Defendants would normally be entitled to a conditional dismissal pursuant to Limited Liability Law § 808 (a). Although the aforementioned statute precludes Access from bringing suit for its failure to obtain a certificate of authority, such action is not a fatal jurisdictional defect (*Basile v Mulholland*, 73 AD3d 597 [1st Dept 2010]). Access would be entitled to a reasonable opportunity to cure its noncompliance with the statute prior to an award of dismissal (*Matter of Mobilevision Med. Imaging Servs., LLC v Sinai Diagnostic & Interventional Radiology, P.C.*, 66 AD3d 685, 686 [2d Dept 2009]), but this point is moot due to the grounds for dismissal in the foregoing analysis.

Finally, the court must deny Access’ request for leave to file a second amended complaint.

“Leave to amend a pleading is freely given (CPLR 3025 [b]), absent prejudice or surprise resulting directly from the delay. The determination of whether to allow such an amendment is reserved for the court’s discretion, and exercise of that discretion will not be overturned without a showing that the facts offered for the amendment do not support the new claim(s)”

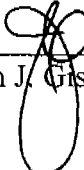
(*Eighth Ave. Garage Corp. v H.K.L. Realty Corp.*, 60 AD3d 404, 405 [1st Dept 2009] [internal citation omitted]). “Where a court concludes that an application to amend a pleading clearly lacks merit, leave is properly denied” (*id.*). Here, Access failed to offer facts to support any new claims for a second amendment to the complaint.

Accordingly, it is

ORDERED that the motion by defendants Edward Mandell and Troutman Sander LLP to dismiss the amended complaint herein is granted and the amended complaint is dismissed in its entirety, with costs and disbursements as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendants.

Dated: New York, New York
July 29, 2011

So Ordered:



Hon. Judith J. Gische, JSC

FILED

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