

H.P.S. Mgt. Co. v St. Paul Surplus Lines Ins. Co.
2011 NY Slip Op 32900(U)
October 26, 2011
Sup Ct, Nassau County
Docket Number: 019847-10
Judge: Timothy S. Driscoll
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**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL

Justice Supreme Court

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**H.P.S. MANAGEMENT COMPANY, Inc., and
HENRY GRUBEL,**

Plaintiffs,

-against-

**TRIAL/IAS PART: 20
NASSAU COUNTY**

**Index No: 019847-10
Motion Seq. No. 8
Submission Date: 9/13/11**

**ST. PAUL SURPLUS LINES INSURANCE
COMPANY; SEABURY & SMITH, Inc., MARSH &
McLENNAN COMPANIES, Inc.; MARSH AFFINITY
GROUP SERVICES; WILTON REASSURANCE LIFE
COMPANY OF NEW YORK; THE TRAVELERS
COMPANIES, Inc.; BABCHIK & YOUNG, LLP;
JACK BABCHIK, individually, and as a principal of
BABCHIK & YOUNG LLP,**

Defendants.

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The following papers having been read on this motion:

**Notice of Motion, Affirmation in Support and Exhibits.....x
Second Volume of Exhibits.....x
Exhibit W (Second Amended Complaint).....x
Memorandum of Law in Support.....x
Affidavit in Opposition and Exhibits.....x
Memorandum of Law in Opposition.....x
Reply Affirmation in Further Support.....x**

This matter is before the Court for decision on the motion filed by Defendants Babchik & Young, LLP and Jack Babchik, individually, and as a principal of Babchik & Young, LLP (“B&Y”) on July 22, 2011 and submitted on September 13, 2011. For the reasons set forth below, the Court denies the motion.

A. Relief Sought

The B&Y Defendants move for an Order, pursuant to CPLR §§ 3211(a)(1), (2) and (7) dismissing the Second Amended Complaint against B&Y, including the Seventh Cause of Action.

B. The Parties' History

This action was the subject of a prior decision of the Court dated May 12, 2011 ("Prior Decision") (Ex. V to Weldon Aff. in Supp.)¹ The Court outlined the nature of the action in detail in the Prior Decision, and incorporates the Prior Decision herein by reference.

In the Prior Decision, the Court, *inter alia*, granted the motion by the B&Y Defendants to the extent that the Court dismissed the fourth and fifth causes of action in the Amended Complaint against these Defendants, and granted leave to replead the fifth cause of action to the extent that Plaintiffs can allege that the damages were directly caused by these Defendants. The Court further directed that, if Plaintiffs elected to replead, they were to file and serve their second amended complaint within twenty (20) days.

Plaintiffs subsequently filed the Second Amended Complaint (Ex. W to Weldon Aff. in Supp.). In the seventh cause of action, asserted against the B&Y Defendants, Plaintiff alleges that the B&Y Defendants breached their fiduciary duty by, *inter alia*, 1) making misrepresentations of facts regarding their conflicts of interest in representing Plaintiffs; 2) making false representations concerning the Errors and Omissions Insurance Policy ("E&O Policy"), Reservation of Rights Letter and dealings with the New York State Insurance Department ("NYSID"); 3) failing to advise Plaintiffs that they had the right to hire their own counsel at the cost and expense of Defendants Travelers and/or St. Paul; 4) falsely advising the NYSID that Plaintiffs had obtained new counsel; and 5) unilaterally abandoning their defense of Plaintiffs without proper notice or permission of Plaintiffs or the court.

Plaintiffs further allege that, as a "direct and proximate result" of these breaches (Second Am. Compl. at ¶ 170), Plaintiffs, *inter alia*, 1) were denied proper legal representation; 2) were unaware that they were entitled to retain counsel at the expense of Travelers; 3) were unaware of the existing conflict of interest, and of B&Y's knowledge of that conflict of interest; 4) spent

¹ The notice of motion refers to an Affirmation in Support of Robert J. Grande. Although the names of Mr. Grande and Mr. Weldon both appear under the signature line of the Affirmation in Support, Mr. Weldon is its affiant.

over \$10,000 for substitute counsel; and 5) were threatened by the NYSID with loss of their insurance licenses if they failed to obtain substitute counsel immediately. Plaintiffs also allege that they have incurred additional legal expenses, and their sales of annuities “have essentially stopped” (*id.*).

Plaintiffs allege further that:

But for their breaches of the fiduciary duties by the B&Y Lawyers, Plaintiffs, upon information and belief, would have had the “complaint” in the [NYSID] dismissed; in addition to the foregoing, Plaintiffs were directly damaged and injured as follows: Plaintiffs would have had the availability of \$1 million in legal fees under the subject E&O Policy; Plaintiffs would not have been compelled to reveal the names, addresses, account values, and social security numbers of the customers, which release of information, if it becomes public, may damage Plaintiffs['] customers who then may bring action against Plaintiffs for the injuries they sustained by the disclosure; Plaintiffs incurred over \$10,000 in legal fees; Plaintiffs would not have had to discontinue their defense of the NYSID proceeding; Plaintiffs would have had the use of the \$10,000 in legal fees that were paid to the B&Y Lawyers.

Second Am. Compl. at ¶ 171.

In his Affidavit in Opposition, Plaintiff Henry M. Grubel (“Grubel”) affirms that it was not until July 20, 2011 that Plaintiffs learned that their new counsel had received a letter from NYSID reflecting the fact that the matters with NYSID had been “closed” (Grubel Aff. in Opp. at ¶ 51). Grubel avers that the matters were closed without any admission or finding of guilt and, therefore, under the express terms of the E&O policy Plaintiffs are entitled to reimbursement of their legal fees, as well as costs and expenses. He affirms, further, that it was not until July 25, 2011 that Plaintiffs were able to demand from Travelers the sum of \$24,052.50 which represented their out of pocket payments for legal fees plus outstanding unpaid legal fees incurred in their defense of the NYSID matter. He avers, further, that the demand for those fees is now outstanding and unpaid.

C. The Parties’ Positions

The B&Y Defendants submit that 1) Plaintiffs have failed to set forth a claim for breach of fiduciary duty in sufficient detail, pursuant to CPLR § 3016(b) and the Prior Decision; 2) the damages claims contained in the Second Amended Complaint are similar to those rejected by the Court in the Prior Decision, and remain inadequate; and 3) the claim against the B&Y Defendants is not ripe for adjudication, and will not be ripe until Plaintiffs submit their claim for payment on the fees incurred by substitute counsel and Travelers responds to that submission.

Plaintiffs oppose the motion, submitting that the Second Amended Complaint properly alleges the elements of a cause of action for breach of fiduciary duty by the B&Y Defendants, and the documentation provided by the B&Y Defendants does not refute those allegations.

RULING OF THE COURT

A. Standards of Dismissal

A motion interposed pursuant to CPLR § 3211 (a)(7), which seeks to dismiss a complaint for failure to state a cause of action, must be denied if the factual allegations contained in the complaint constitute a cause of action cognizable at law. *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268 (1977); *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144 (2002). When entertaining such an application, the Court must liberally construe the pleading. In so doing, the Court must accept the facts alleged as true and accord to the plaintiff every favorable inference which may be drawn therefrom. *Leon v. Martinez*, 84 N.Y.2d 83 (1994). On such a motion, however, the Court will not presume as true bare legal conclusions and factual claims which are flatly contradicted by the evidence. *Palazzolo v. Herrick, Feinstein*, 298 A.D.2d 372 (2d Dept. 2002).

A complaint may be dismissed based upon documentary evidence pursuant to CPLR § 3211(a)(1) only if the factual allegations contained therein are definitively contradicted by the evidence submitted or a defense is conclusively established thereby. *Yew Prospect, LLC v. Szulman*, 305 A.D.2d 588 (2d Dept. 2003); *Sta-Bright Services, Inc. v. Sutton*, 17 A.D.3d 570 (2d Dept. 2005).

Pursuant to CPLR § 3211(a)(2), a party may move for dismissal on the grounds that the court does not have jurisdiction of the subject matter of the cause of action. The question of subject matter jurisdiction is a question of judicial power: whether the court has the power, conferred by the Constitution or statute, to entertain the case before it. *Matter of Fry v. Village of Tarrytown*, 89 N.Y.2d 714, 718 (1997), citing *Hunt v. Hunt*, 72 N.Y. 217, 230 (1878). In the New York State court system, Supreme Court is a court of original, unlimited and unqualified jurisdiction. *Id.*, quoting *Kagen v. Kagen*, 21 N.Y.2d 532, 537 (1968), and citing N.Y. Const., Art. VI, § 7. Ripeness is a matter pertaining to subject matter jurisdiction which may be raised at any time. *Matter of Agoglia v. Benepe*, 84 A.D.3d 1072, 1076 (2d Dept. 2011).

B. Application of these Principles to the Instant Action

B&Y is correct in observing that many of the allegations regarding B&Y's breaches of fiduciary duty in the Amended Complaint and Second Amended Complaint are identical, but the Court concludes that those similarities are to be expected. The Court previously granted Plaintiffs leave to replead to the extent that Plaintiffs can allege that the damages were directly caused by these Defendants. The Court concludes that the Second Amended Complaint complies with that direction, and is now sufficient, and accordingly denies the motion.

As pleaded in paragraph 170 of the Second Amended Complaint, the Plaintiffs allege nine consequences that occurred "as a direct and proximate result of" the breaches of fiduciary duties by the B&Y Defendants. In paragraph 171, Plaintiffs allege that "but for" the breaches of fiduciary duty by the B&Y Defendants, Plaintiffs would have had the NYSID complaint dismissed, and also allege other specific damages incurred. In light of Grubel's affirmation that Plaintiffs learned in 2011 that the two NYSID matters were closed, the Court interprets paragraph 171 of the Second Amended Complaint as alleging that, but for the breaches of fiduciary duty by the B&Y Defendants, the NYSID matters would have been closed at an earlier time.

The Court set forth the elements of a claim for breach of fiduciary duty in its Prior Decision. In granting leave to replead, the Court focused on the absence of allegations that Plaintiffs' damages were directly caused by the conduct of the B&Y Defendants. Viewing the Second Amended Complaint in the light most favorable to Plaintiffs, the Court concludes that Plaintiffs have now satisfied that missing element, and have adequately alleged a cause of action for breaches of fiduciary duty.

The Court also denies the motion to dismiss for lack of subject matter jurisdiction. Plaintiffs have alleged the existence of an actual dispute between themselves and the B&Y Defendants. To the extent that St. Paul and Travelers reimburse Plaintiffs' legal fees, Plaintiffs' damages will be reduced accordingly. Finally, the documentary evidence presented does not conclusively dispose of plaintiffs' claim.

In light of the foregoing, the Court denies the motion.

All matters not decided herein are hereby denied.

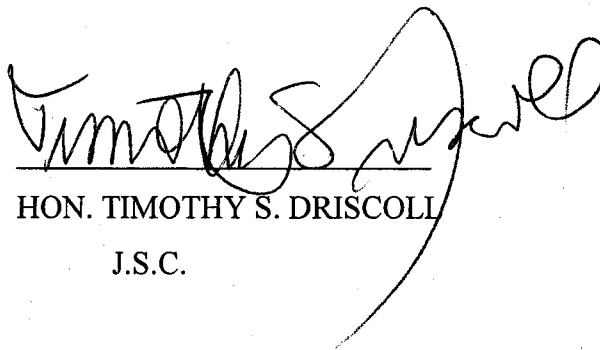
This constitutes the decision and order of the Court.

The Court reminds counsel of their required appearance before the Court for a Preliminary Conference on November 16, 2011 at 9:30 a.m.

ENTER

DATED: Mineola, NY

October 26, 2011



HON. TIMOTHY S. DRISCOLL
J.S.C.

ENTERED

OCT 28 2011

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**