

Infinity Capital Mgmt. Ltd. v Sidley Austin LLP

2011 NY Slip Op 33923(U)

November 15, 2011

Sup Ct, NY County

Docket Number: 650835/11

Judge: Shirley Werner Kornreich

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

Index Number : 650835/2011
INFINITY CAPITAL MANAGEMENT
vs
SIDLEY & AUSTIN, LLP
Sequence Number : 002
DISMISS ACTION

PART 54

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s) 21, 5, 16, 17
Answering Affidavits — Exhibits _____ No(s) 25
Replying Affidavits _____ No(s) 27

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed decision and order.

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

Dated: 11/15/11

JUSTICE SHIRLEY WERNER KORNREIC [Signature] J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

----- X
INFINITY CAPITAL MANAGEMENT LIMITED,

Plaintiff,

- against -

Index No. 650835 /11
Decision & Order

SIDLEY AUSTIN LLP,

Defendant.

----- X
SHIRLEY WERNER KORNREICH, J.:

Defendant Sidley Austin, LLP (Sidley) moves, pursuant to CPLR 3211 (a) (1), (5), and (7), for dismissal of the second amended complaint (SAC). Originally, Sidley moved for dismissal of the amended complaint. Subsequent to so-moving, Sidley consented to the filing by plaintiff Infinity Capital Management Limited (Infinity) of the SAC. The following facts, taken from the SAC, are assumed true for the purposes of this motion.

At the relevant time period, Infinity was in the business of providing “assets management services,” and was regulated by the United Kingdom (U.K.) Financial Services Authority (SAC ¶ 1). By agreement dated July 14, 2006 (Engagement Letter), Sidley, a New York law firm, agreed to provide legal services to Infinity in the U.S., which, by agreement dated October 17, 2006, was extended to also include the U.K. (*id.* ¶ 4).

Sidley was Infinity’s sole legal advisor on all business matters between it and Citigroup Financial Products Inc. (Citigroup) in New York and London, and advised Infinity on issues including “tax questions, restructuring the fund, offering procedures, marketing the fund in the United States, SEC registration and reporting, potential investors, redemptions, information for the Credit Support Administration Agreement, raising capital, the margin call on March 3, 2008, contract reviews and negotiations, correspondence with investors, general business and legal

advice and eventually, the liquidation and closing of the hedge fund in early 2009” (*id.* ¶ 6).

While representing Infinity, Sidley reviewed several fund and trading documents on Infinity’s behalf, including the above-mentioned July 31, 2007, Credit Support Administration Agreement (CSAA) between Infinity and CGML, CGMI, CBNA, and Citigroup (*id.* ¶12). A feature of the CSAA increased Infinity’s operational and trading risks by significantly curtailing the time period available for Infinity as a U.K.-based entity to meet any margin calls. It also enabled Citigroup to “unreasonably” increase collateral requirements with much greater discretion than before (*id.* ¶15). Section 5 (b) of the CSAA stated that margin calls made by 10:00 A.M. New York time, 3:00 P.M. London time, were to be satisfied by 5:00 P.M. New York time that same day, or in effect 10:00 P.M. London time. It would have been contractually impossible for Infinity to have performed this condition (*id.* ¶ 16). Unbeknownst to Infinity at the time, Citigroup was a pre-existing and major client of Sidley (*id.* ¶ 8).

On March 3, 2008, Citigroup notified Infinity of a large margin call of \$1.2 million at 2:49 P.M. London time, and, pursuant to the CSAA, Citigroup advised Infinity that if the margin call was not made before 5:00 P.M. New York time, Infinity’s trading position would be liquidated and Infinity’s fund would be in default (*id.* ¶ 19). Based on advice from Sidley, Infinity paid the margin call, so that Citigroup would not be able to liquidate the fund (*id.* ¶ 20).

Although Citigroup acknowledged receipt of the cash on March 4, 2008, it, nevertheless, deemed Infinity in breach of the CSAA, contending that Infinity had failed to meet the margin call within the time allotted and that it, therefore, would have to liquidate its fund. Citigroup gave Infinity 30 days to liquidate all Citigroup stock, but only 48 hours to liquidate all other assets (*id.* ¶ 22). Infinity asked James Munsell of Sidley, the attorney primarily in charge of the

matter for Sidley, to intervene with Citigroup on its behalf by requesting 30 days to liquidate the non-Citigroup assets. According to Infinity, Munsell refused, stating that Sidley would not act adverse to the commercial interests of New York banks and would not even ask Citigroup for additional time (*id.* ¶¶ 23-24). As a result, Infinity was forced to liquidate at a great loss (*id.* ¶ 25). This action ensued, albeit approximately three years after the complained of acts.

The SAC contains four causes of action. The first cause of action is for legal malpractice. Allegedly, Sidley failed to meet the requisite standard of care by (1) representing both parties to the CSAA without disclosing any potential conflict of interest, (2) failing to disclose that Citigroup was a pre-existing client of Sidley, (3) failing to advocate on Infinity's behalf when Citigroup called for liquidation of the fund on March 4, 2008, (4) conducting negotiations on Infinity's behalf with Citigroup directly although Citigroup was a pre-existing and important client, and (5) advising Infinity to execute agreements that were not in Infinity's best interests such as the CSAA agreement executed on July 31, 2007 (*id.* ¶ 40).

The remaining three causes of action are predicated upon the same allegations as the first cause of action, and they seek recovery on theories of breach of contract, breach of the implied covenant of good faith and fair dealing, and fraudulent concealment and negligent omission of fact. At oral argument, the court dismissed these causes of action as duplicative of the legal malpractice cause of action.

Sidley argues that the malpractice claim also should be dismissed because it is time-barred in that the action was commenced more than three years after the cause of action accrued. Infinity responds by asserting that the action is timely under the continuing representation doctrine which tolls the running of the statute.

For the reasons discussed below, the motion is granted, and the complaint is dismissed.

Discussion

Legal malpractice is subject to a three-year statute of limitations (CPLR 214 [6]; *Lincoln Place, LLC v RVP Consulting, Inc.*, 70 AD3d 594, 594 [1st Dept], *lv denied* 15 NY3d 710 [2010]). As a preliminary matter, Infinity is not prejudiced by the dismissal of the breach of contract and fraud causes of action, which have longer periods in which to commence an action, because even if they were not dismissed as duplicative, the action would, nevertheless, be governed by the three-year statute of limitations for legal malpractice (CPLR 214 [6]; *Matter of R.M. Kliment & Frances Halsband, Architects (McKinsey & Co., Inc.)*, 3 NY3d 538, 541-42 [2004]; *Kinberg v Garr*, 60 AD3d 597, 597 [1st Dept 2009]).

Infinity complains of two acts as the basis for its legal malpractice cause of action. First, it cites the drafting of the CSAA, dated July 31, 2007, which contained unfavorable provisions that permitted Citibank to force a liquidation at great loss to Infinity. The cause of action based on this alleged wrong accrued when the agreement was entered into, and not when Infinity may have first discovered the alleged malpractice (i.e. March 3-4, 2008) (*Tsafatinos v Lee David Auerbach, P.C.*, 80 AD3d 749, 750 [2d Dept 2011] [the “limitations period begins to run from the time of the alleged malpractice, not from the time of discovery”]).

The second alleged wrongful act is based on Sidley’s refusal to intervene on Infinity’s behalf on March 4, 2008, when it was faced with liquidation. This ground for malpractice, however, fails to state a cause of action. CPLR 3211 (a) (7). Infinity has not alleged that if Sidley had contacted Citigroup, that contact would have led to a different result (*Pyne v Block & Assoc.*, 305 AD2d 213 [1st Dept 2003] [allegations in complaint do not permit inference that “but for”

alleged malpractice, plaintiff would not have sustained damages]). Consequently, the “but for” requirement of a legal malpractice action has not been met (*see McCoy v Feinman*, 99 NY2d 295, 301-2 [2002][plaintiff must show attorney’s breach of professional duty caused his damages]).

The alleged malpractice based on the Agreement, however, does remain. Because this action was commenced on March 29, 2011, which is more than three years from the cause of action accrual dates, July 31, 2007, Sidley met its burden of establishing that the time in which to sue has expired (*Gravel v Cicola*, 297 AD2d 620, 620-21 [2d Dept 2002]). The burden, thus, shifted to Infinity to show that its “cause of action falls within an exception to the statute of limitations, or to raise an issue of fact as to whether such an exception applies” (*id.* at 621). Infinity has not met its burden.

Infinity argues that the continued representation of it by Sidley tolled the statute until 2009, thereby making the action timely. To be sure, evidence in the record supports the assertion that Sidley continued to represent Infinity through at least sometime in 2009. This evidence includes Sidley invoices dated April 14, 2008 and March 25, 2009. The Engagement Letter provides: “either you or we will have the right, exercised by notice to the other, to terminate this engagement at any time for any reason by written notice, subject on our part to applicable rules of professional responsibility.” It also provides: “Unless previously terminated, our representation of you with respect to the Matter will terminate upon our sending you our final statement for services rendered in connection with the Matter.” Assuming that the March 25, 2009 invoice was a “final invoice,” the representation ended, at the earliest, on that date and no sooner. Nonetheless, the analysis does not end here.

The “continuous representation doctrine tolls the Statute of Limitations only where the continuing representation pertains specifically to the matter in which the attorney committed the alleged malpractice” (*Shumsky v Eisenstein*, 96 NY2d 164, 168 [2001] [citations omitted]; accord *McCoy*, *supra*, 99 NY2d 306; see also *Zaref v Berk & Michaels, P.C.*, 192 AD2d 346, 348 [1st Dept 1993][continuous representation must be in connection with P]articular transaction which is subject of action)). Infinity has not shown that any continuing work by Sidley on the fund throughout March 2008, and for an unspecified period of time thereafter, comes within the “dilemma that gave rise to the continuing treatment/representation doctrine” (*Shumsky*, *id.* at 169 [internal quotation marks and citation omitted]).

According to Infinity, Sidley represented it on a wide variety of matters including advising it on issues including “tax questions, restructuring the fund, offering procedures, marketing the fund in the United States, SEC registration and reporting, potential investors, redemptions, information for the Credit Support Administration Agreement, raising capital, the margin call on March 3, 2008, contract reviews and negotiations, correspondence with investors, general business and legal advice and eventually, the liquidation and closing of the hedge fund in early 2009” (SAC ¶ 6). The subsequent general representation of Infinity regarding matters unrelated to the liquidation and refusal to intervene “does not warrant the application of the doctrine” (*Dignelli v Berman*, 293 AD2d 565, 566 [2d Dept 2002]; see also *Parlato v Equitable Life Assur. Socy. of U.S.*, 299 AD2d 108, 115 [1st Dept 2002] [“advice related to a series of discrete and severable transactions” does not toll the statute], *lv denied* 99 NY2d 508 [2003]).

According to David Brown, Infinity’s fund manager, on “March 31, 2008, I spoke with Jim Munsell of Sidley Austin about this margin call and resulting liquidation, and we

corresponded by email about this matter, as evidenced from the Invoice dated April 14, 2008” (Affidavit of David Brown, sworn to July 19, 2011, ¶ 25). Brown also states that “[f]uture representation in this matter was mutually understood and evidenced by Sidley Austin’s retention of the \$13,724.97 retainer balance” and that defendant “continued to represent Infinity in this matter throughout 2008 and eventually provided legal assistance in the closing of the hedge fund in early 2009, which was a direct result of Sidley Austin’s refusal to act on March 4, 2008” (*id.* ¶¶ 26-27). Brown’s statements fail to distinguish between the complained of service provided by defendants and the various other legal work performed and are conclusory in that he does not describe the subject matter of the communications. As was found to be the situation in *Zaref, supra*, 192 AD2d 348, the “‘papers are almost devoid of factual statements’ to support application of the continuous representation doctrine.”

Neither Brown, nor anyone else on behalf of Infinity, provides any statement as to what Infinity expected Sidley to do to address the problem (forced liquidation) caused by its alleged malpractice. The continuous representation doctrine tolls the statute of limitations only where there is a mutual understanding of the need for further representation on the specific subject matter underlying the malpractice claim (*McCoy, supra*, 99 NY2d 306).

Furthermore, the circumstances here are incompatible with the rationale underlying the continuous representation doctrine. The “continuous representation doctrine tolls the statute of limitations . . . where there is a mutual understanding of the need for further representation on the specific subject matter underlying the malpractice claim” (*Zorn v Gilbert*, 8 NY3d 933, 934 [2007] [internal quotation marks and citation omitted]). “One of the predicates for the application of the doctrine is continuing trust and confidence in the relationship between the

parties” (*Luk Lamellen U. Kupplungbau GmbH v Lerner*, 166 AD2d 505, 507 [2d Dept 1990]).

The SAC itself establishes that the trust and confidence of the relationship of the parties ended on March 4, 2008, when “Munsell refused to act on Infinity’s behalf and advised Infinity that Sidley Austin would not act adverse to the commercial interest of New York banks . . .” (SAC ¶ 24).

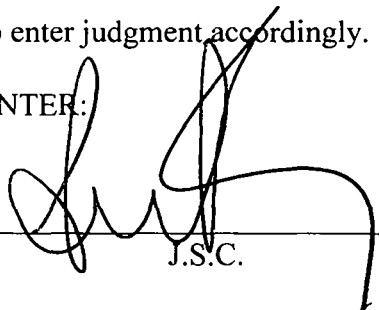
Accordingly, it is

ORDERED that the motion to dismiss is granted and the second amended complaint is dismissed with costs and disbursements to defendant Sidley Austin LLP as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: November 15, 2011

ENTER:



J.S.C.