

McMahan Sec. Co. L.P. v Kleinberg, Kaplan, Wolff & Cohen, P.C.
2011 NY Slip Op 33940(U)
November 4, 2011
Sup Ct, NY County
Docket Number: 111952/2008
Judge: Shirley Werner Kornreich
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (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

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH PART 54
Justice

Index Number : 111952/2008
MCMAHAN
vs.
KLEINBERG, KAPLAN, WOLFF,
SEQUENCE NUMBER : 004
REARGUMENT/RECONSIDERATION

INDEX NO. _____
MOTION DATE 11/25/11
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED
91-93
95
97

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION AND ORDER.**

Dated: 11/25/11 JUSTICE SHIRLEY WERNER KORNREICH
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE
 SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

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

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

-----X
McMAHAN SECURITIES CO. L.P.,

Plaintiff,

Index No. 111952/2008

-against-

DECISION and ORDER

KLEINBERG, KAPLAN, WOLFF & COHEN, P.C.,
DAVID PARKER and MARTIN D. SKLAR,

Defendants.

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

This action arises out of the representation by defendant law firm Kleinberg, Kaplan, Wolff & Cohen, P.C. (KKWC) and two of its attorneys, David Parker and Martin Sklar, of plaintiff McMahan Securities Co. L.P. (McMahan) in connection with its role as a placement agent for a private offering of securities by non-parties Strategy International Insurance Group, Inc. and Strategy Real Estate Investments Ltd. (collectively, Strategy). Plaintiff brought causes of action against defendants for legal malpractice, fraud, fraudulent concealment, negligent representation and omission, breach of fiduciary duty, breach of contract, negligent failure to supervise and restitution, and sought both compensatory and punitive damages. By a decision and order dated October 8, 2010 (October 8 Order), this court granted in part and denied in part defendants' motion to dismiss the complaint. The motion was also denied insofar as it sought to dismiss plaintiff's claim for punitive damages. Defendants now move to reargue, again seeking dismissal of the amended complaint in its entirety. Plaintiff opposes.

Background

The facts as alleged in plaintiff's amended complaint were discussed at length in the

October 8 Order and will not be repeated here except as necessary for the purposes of this motion. In brief, they are as follows.

In 2004, McMahan acted as a placement agent for an offering of securities by Strategy (the Offering), raising approximately \$50,000,000 from nine hedge funds (the Investors). While acting as the placement agent, plaintiff had retained KKWC to perform due diligence on Strategy, its principals and several companies affiliated with it. KKWC performed some investigation of the principals with the help of a Canadian law firm. However, these efforts failed to reveal numerous civil and criminal charges that had been brought against several of the principals, some of which were for securities fraud and many of which were successfully pursued. Within a short period of time, the underlying venture failed, and the securities became worthless. Plaintiff alleges that had appropriate due diligence been performed by KKWC, it never would have continued in its role as placement agent for the Offering.

The failure of the Offering set in motion a chain of lawsuits. The first was brought in 2006 by the Investors against Strategy (the Pandora Litigation). Their primary counsel was the Minnesota firm of Anthony Ostlund & Baer (AOB). KKWC had frequently acted as AOB's local counsel in New York, and shortly before the Investors commenced the Pandora Litigation, AOB contacted KKWC to inquire as to whether it would agree to serve as local counsel for the Investors in that action. Given the likely conflict of interest that would arise, KKWC declined the engagement.

Several months later, AOB contacted KKWC on behalf of the Investors to request McMahan's assistance in the Pandora Litigation and threatened that, if no assistance was forthcoming, McMahan would be added as a defendant in the action. After negotiations between

the parties, McMahan agreed to produce to the Investors evidence that would support their claims against Strategy and would demonstrate that McMahan had not had any knowledge of Strategy's principals' checkered past. In return, the parties entered into an agreement tolling the Investors' claims against McMahan pending the outcome of the Pandora Litigation.

On November 30, 2006, Andrew Stone, McMahan's general counsel, directed KKWC to produce to the Investors a series of documents relating to its due diligence efforts on Strategy (the Exculpatory Documents) "as soon as possible." Amended Compl. ¶ 44. Plaintiff alleges that these documents "would have demonstrated to Investors that Plaintiff had no knowledge of the Adverse Information or any other negative information about Strategy or its principals not provided by Plaintiff to Investors prior to Investors' investment in the Offering." *Id.* ¶ 40. The memo identified two particular documents—one containing the initial request for due diligence on Strategy's principals and the other in which KKWC responded stating that they had found no "dirt" on those individuals. *Id.* ¶ 44. According to plaintiff, and this is the crux of many of its non-legal malpractice, tort causes of action, defendants never forwarded these documents to the Investors and subsequently took deliberate steps to conceal this failure from plaintiff.¹ Plaintiff alleges that this was done because KKWC did not want its long-time partner AOB to be aware of any sloppiness in its conduct of due diligence.

Upon settling its lawsuit with Strategy, the Investors terminated the tolling agreement and commenced a FINRA arbitration proceeding (the Arbitration) against McMahan claiming that it

¹ It should be noted that defendants assert that the fact that the Exculpatory Documents were not produced was revealed to plaintiff. Defendants claim that the fact that they were withheld, purportedly on the grounds of attorney-client privilege and work product protection, was reflected on a revised privilege log submitted to Stone after the other documents were produced.

had falsely represented that it had conducted adequate background checks on Strategy's principals and either knew or should have known about the Strategy principals' prior fraudulent acts. Not long thereafter, plaintiff commenced this action seeking contribution and indemnification from defendants. Plaintiff alleges in its amended complaint that, in a further attempt to maintain its relationship with AOB, KKWC forwarded to AOB a copy of the original complaint to use at the Arbitration. At the time, KKWC no longer was plaintiff's counsel. Shortly after receiving the complaint, the Investors amended their allegations in the Arbitration, allegedly based on facts in the complaint. The instant complaint states that, after receiving and reviewing the documents KKWC originally withheld, the Investors determined that McMahan had not possessed any knowledge that it should have disclosed in the offering documents and withdrew their claims in the Arbitration. The damages sought are the cost incurred in litigating with the Investors and lost business from the Investors.

As a result of this court's October 8 Order, there remain: a legal malpractice claim based on the initial performance of KKWC's due diligence investigation and its supervision of the Canadian firm's due diligence; the fraud, fraudulent concealment and negligent misrepresentation claims in regard to KKWC's failure to turn over the Exculpatory Documents and its representations to plaintiff that it had in fact done so; and the breach of fiduciary duty claim as to defendants' failure to turn over the Exculpatory Documents and related misrepresentations, as well as its alleged assistance to AOB and the Investors prior to and during the Arbitration. Defendants now move to reargue. They contend that the remaining claims are duplicative of the malpractice claim since the damages are identical and that the demand for punitive damages should be dismissed.

Discussion

CPLR § 2221(d) provides that “[a] motion for leave to reargue: ... 2. shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion.”

DeSoignies v Cornasesk House Tenants’ Corp., 21 AD3d 715 (1st Dept 2005) (internal quotations omitted). If the motion is granted, “the court may adhere to the determination on the original motion or may alter that determination.” CPLR §2221(f).

In its motion to dismiss, defendants argued that plaintiff’s causes of action for fraud, fraudulent concealment, negligent misrepresentation and breach of fiduciary duty were duplicative of its malpractice claim. Noting that plaintiff’s claims were premised on an entirely different series of actions than the malpractice claim—the alleged misrepresentations that the Exculpatory Documents had been produced as opposed to the initial due diligence searches—the court held that the claims were not duplicative. However, courts in this state have repeatedly held that even where the conduct underlying a tort claim is separate from that which constituted the alleged malpractice, the former will be dismissed as duplicative of the latter where the damages are identical. *Carl v Cohen*, 55 AD3d 478 (1st Dept 2008); *Kaiser v Van Houten*, 12 AD3d 1012 (3d 2004); *White of Lake George, Inc. v Bell*, 251 AD2d 777 (3d Dept 1998); *LaBrake v Enzien*, 167 Ad2d 709 (3d Dept 1990). It is only where there are separate or additional damages that both the malpractice and the tort claims may survive. *LaBrake, supra* citing *Simcuski v Saeli*, 44 NY2d 442 (1978).

The cases cited by plaintiff do not counsel a contrary result. In *Ulico Cas. Co. v. Wilson, Elser, Moskowitz, Edelman & Dicker*, 56 AD3d 1 (1st Dept 2008), the court does state that the

breach of fiduciary duty and legal malpractice claims are not redundant because they are based on different facts (*id.* at 8) and there is some language in the opinion which indicates that the damages asked for in the malpractice and the non-malpractice torts are the same (*id.* at 6), but in ruling the court held, “the two claims are not ‘premised on the same facts and seeking...identical relief.’” *Id.* at 9. *Mitschela v Schultz*, 36 AD3d 249 (1st Dept 2006), involved accounting malpractice, not legal malpractice.

The court, now, determines that where the facts and damages are identical, non-malpractice claims are duplicative of the malpractice claim. Here, the non-malpractice actions seek the same damages as the malpractice claim, namely the costs of defending the Arbitration and the lost business with the Investors. Consequently, the fraud, fraudulent concealment and negligent misrepresentation claims must be dismissed as duplicative, though plaintiff will be granted leave to replead the conduct as part of its malpractice cause of action. The breach of the fiduciary duty cause of action is dismissed as duplicative only in regard to any conduct occurring prior to the termination of KKWC.

In regard to defendants’ remaining arguments, the court previously considered them and neither overlooked the facts or the law. Finally, whether or not plaintiff is entitled to punitive damages will depend on the nature of the allegations in its second amended complaint—if it decides to serve one. Accordingly, it is hereby

ORDERED that defendants’ motion for leave to reargue its motion to dismiss is granted; and it is further

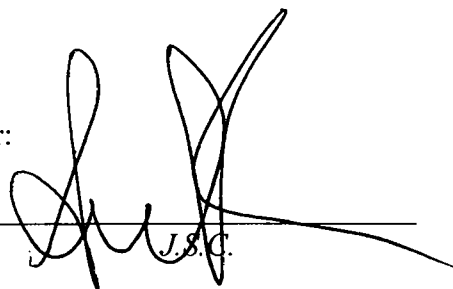
ORDERED that, upon reargument, the Court vacates its prior order, dated October 8, 2010, and grants defendants’ motion to dismiss the fraud, fraudulent concealment and negligent

misrepresentation causes of action and the breach of fiduciary duty cause of action insofar as it pertains to conduct of defendants while they represented plaintiff; and it is further

ORDERED that leave to replead is given plaintiff.

Dated: November 4, 2011

Enter:


J.S.C.