Aramarine Brokerage, Inc. v Hall, Estill, Hardwick, Gable, Golden & Nelson, P.C.
2012 NY Slip Op 33325(U)
January 11, 2012
Supreme Court, New York County
Docket Number: 650631/11
Judge: Barbara R. Kapnick
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: BARBARA R. KAPNICK Justice PART 39

Index Number : 650631/2011
ARAMARINE BROKERAGE, INC
vs
HALL, ESTILL, HARDWICK,
Sequence Number : 003
DISMISS

INDEX NO. 650631/11
MOTION DATE
MOTION SEQ. NO. 003
MOTION CAL. NO.
otion to/for

	PAPERS NUMBERED
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

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

Dated: 1/11/12

BARBARA R. KAPNICK J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 39

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ARAMARINE BROKERAGE, INC.,

Plaintiff,

- against -

HALL, ESTILL, HARDWICK, GABLE, GOLDEN & NELSON, P.C. and EPSTEIN BECKER & GREEN, P.C.,

Defendants.

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DECISION/ORDER
Index No. 650631/11
Motion Seq. No. 003

BARBARA R. KAPNICK, J.:

In this legal malpractice action, defendant Epstein Becker & Green, P.C. ("EB&G") moves, pursuant to CPLR 3211 (a) (7), to dismiss the Complaint (i.e., plaintiff's Third Cause of Action) as against it.

BACKGROUND

Aramarine Brokerage, Inc. ("Aramarine") was an insurance brokerage firm which, from 1995 through 2000, had an ongoing business relationship with various insurance companies (the "CGU defendants"), whereby Aramarine procured group property and casualty insurance coverage for the CGU defendants for the policy holder-members in Aramarine's various purchasing group programs (Complaint, ¶¶ 1, 17). Aramarine and the CGU defendants entered into a number of written agreements, principal of which was a Broker's Agreement

dated March 15, 1996 (*id.*, ¶ 18), which was governed by Pennsylvania law (*id.*, ¶ 31 [a]).

In early 2001, Aramarine and seven purchasing group entities created by Joseph Elmasri ("Elmasri"), the founder, sole shareholder and only officer of Aramarine, and controlled by Aramarine, employed and retained the law firm of Hall, Estill, Hardwick, Gable, Golden & Nelson, P.C. (the "Hall Firm") to prosecute a lawsuit entitled Aramarine Brokerage, Inc. et al v CGU Insurance Company, et al (the "CGU Action") in the United States District Court for the Southern District of New York (*id.*, ¶ 6):

As alleged in the CGU Action, in or around July and August of 2000, the CGU defendants wrongfully terminated their business relationship with Aramarine and the purchasing groups in contravention of various express written contracts and oral and written modifications to the Broker's Agreement, and further tortiously interfered with various third-party contracts, costing Aramarine many millions of dollars in lost commissions and other damages (*id.*, ¶ 19).

The Hall Firm, which was not plaintiff's original counsel, prepared and filed an Amended Complaint dated August 20, 2001 alleging, *inter alia*, breach of contract, tortious interference and

punitive damages, seeking compensatory damages exceeding $210 million and punitive damages in the amount of $200 million (*id.*, ¶ 23). In response to the Amended Complaint, the CGU defendants filed counterclaims alleging, *inter alia*, that Aramarine was required to return commissions to them that Aramarine had earned in connection with a two-year purchasing group policy for the period of July 1, 2000 to July 1, 2002 (*id.*, ¶ 25). Aramarine placed this purchasing group policy for the Associated Restaurant Management Program (the "ARM Program") (*id.*, ¶ 26). Pursuant to an oral modification to the Broker's Agreement, the CGU defendants agreed, *inter alia*, that the ARM Program Policy extension for the period July 1, 2000 to July 1, 2002 was "non-cancellable" and Aramarine's commissions on said extension were guaranteed and non-refundable (the "Freyberger Modification") (*id.*, ¶ 27). Aramarine did not assert any affirmative defenses to those counterclaims (*id.*, ¶ 28).

Thereafter, the CGU defendants moved for summary judgment on their counterclaims and, in opposition to the motion, Aramarine took the position that pursuant to the Freyberger Modification, the commissions on the two year policy were guaranteed and non-refundable. In its reply papers, the CGU defendants raised for the first time the argument that the Freyberger Modification, if there was such a modification, was not supported by consideration (*id.*, ¶ 33). Aramarine did not seek to submit a sur-reply or otherwise

attempt to supplement the record to present evidence that there was consideration to support the Freyberger Modification[1] (*id.*, ¶ 34).

In March 2004, Judge Richard Conway Casey of the Southern District of New York issued an opinion holding that: (1) New York law applied to the alleged oral Freyberger Modification and that, pursuant to the New York Statute of Frauds (N.Y. Gen. Oblig. Law § 5-710 [a] [1]), the alleged oral modification was void because it was not capable of being performed within one year. Alternatively, Judge Casey found that the alleged Freyberger Modification was unenforceable because it was not supported by consideration (*Amer. Hotel Intern. Group Inc. v CGU Ins. Co.*, 2004 WL 626187 at *7 and fn. 7 [SDNY 2004]) . Accordingly, the Judge granted the CGU defendants judgment on liability on their counterclaim for the return of commissions.

Thereafter, the Hall Firm filed two allegedly untimely motions for reconsideration, which were denied (id., ¶¶ 39, 41). In those reconsideration motions the Hall Firm failed to argue that Aramarine

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[1] Aramarine alleges in the Complaint "that the Freyberger Modification was supported by consideration as evidenced by Aramarine's procurement of a $12 million prepaid deposit premium, a 2% increase in insurance rates on the ARM Program extension, Aramarine's agreed upon reduction in its commission rate and the CGU Defendants' receipt of two-years' worth of ARM Program premiums many months prior to the expiration of the ARM Program extension;" (*id.*, ¶ 31 [c]).

was unfairly surprised and prejudiced because the District Court considered the "no consideration" argument raised by the CGU defendants for the first time in its reply papers. Nor did it assert that the alleged modification was, in fact, supported by consideration (*id.*, ¶¶ 43, 44). After a subsequent hearing on damages, the CGU defendants were awarded $1,316,520.11 on their counterclaims for the return of commissions .

In June 2007, the Hall Firm withdrew as Aramarine's counsel and Aramarine retained EB&G to represent Aramarine's interests, including appealing all final orders issued (*id.*, ¶ ¶ 52, 53).

In July 2007 EB&G filed an appeal of the above-mentioned judgment to the Second Circuit Court of Appeals which reversed the District Court's judgment on the ground that Pennsylvania, not New York law applied to the alleged oral modification of the Broker's Agreement and, therefore, the alleged oral agreements were not barred by New York's Statute of Frauds. That Court specifically stated that it expressed no view on whether Aramarine actually obtained an oral modification to the Broker's Agreement and, if so, what the terms of that agreement were (*Aramarine Brokerage, Inc. v OneBeacon Ins. Co.*, 307 Fed Appx 562, 564-565 [2d Cir 2009]).

On remand, the District Court (McMahon, Colleen J.) noted that, on appeal, Aramarine could have cited Judge Casey's decision to rely on the belatedly raised "no consideration" argument as error because that issue had nothing to do with the statute of frauds and that "it is entirely possible that the Court of Appeals would have responded favorably to the abuse of discretion argument. Of course, it is equally likely that the Court of Appeals would have viewed with disfavor Aramarine's failure to raise the issue before the district court . . . ." (*Amer. Hotel Intern Group, Inc. v OneBeacon Ins. Co.*, 611 F Supp 2d 373, 376 [SDNY 2009]). Accordingly, the Court held that Aramarine had waived its right to argue that Judge Casey erred by considering the belatedly-raised "no consideration" argument in the first place:

> In this case, no one has pointed to any intervening change in controlling law; as far as I am aware, Pennsylvania still bars proof of an oral modification of a contract that is not supported by consideration. Nor has anyone pointed to the availability of new evidence; as noted above . . . Aramarine has always had available to it the "evidence" that there was "consideration" for the oral agreement.
>
> Instead, Aramarine argues that I should retry the counterclaim because Judge Casey erred when he concluded that the oral agreement was not supported by consideration. As far as I can tell from the papers I have reviewed, this is the FIRST TIME that Aramarine has actually made that argument in cogent and comprehensible terms.
>
> * * *

> Nothing in the Second Circuit's mandate suggests that [Judge Casey's] decision was wrong, so this ruling is law of the case. And there is neither a cogent nor a compelling reason to overrule the law of the case.
>
> Of course, when a district court decides to apply the law of the case doctrine to an issue that the appellate court did not address, the appellate court has the ability to review and conclusively determine the issue it left unanswered in the first instance. Perhaps the next time it gets this case, the Second Circuit will address the issue left unaddressed on the previous appeal. If it concludes that I should have exercised my discretion to overturn Judge Casey's alternative "no consideration" ruling, then I will just have to steel myself for another remand.

611 F. Supp at 379-380 (citations omitted).

On appeal, the Second Circuit addressed Aramarine's argument that the District Court erred by considering the insurer's "no consideration" argument because it was raised for the first time on reply. In this second appeal, the Court found Aramarine's assignment of error untimely because:

> Under [the law of the case] doctrine, a decision made at a previous stage of litigation, which could have been challenged in the ensuing appeal but was not, becomes the law of the case; the parties are deemed to have waived the right to challenge that decision, for '[i]t would be absurd that a party who has chosen not to argue a point on a first appeal should stand better as regards the law of the case than one who had argued and lost'. As Aramarine admits, the opening brief of its first appeal "treated the [no consideration] basis [for the

> district court's decision] as a nullity." Accordingly, Aramarine is no longer in a position to challenge the district court's decision to consider the "no consideration" argument that informed its holding. For the same reasons, Aramarine's argument that Judge McMahon should not have treated Judge Casey's ruling on consideration as the law of the case is incorrect.

(*American Hotel Intern. Group, Inc. v OneBeacon Ins. Co.*, 374 Fed. Appx. 71, 74 [2d Cir 2010][citations omitted]).

Thereafter, Aramarine commenced this legal malpractice case against the Hall Firm and EB&G. In its sole cause of action against EB&G, the third cause of action, plaintiff alleges that EB&G's representation of Aramarine fell below "the ordinary and reasonable skill, diligence and knowledge commonly possessed by members of the legal profession" and it breached the standard of care on an ongoing and continuous basis by "[f]ailing to raise and object to the CGU Defendants' 'no consideration' contention in [the first] appeal of Judge Casey's decision granting the CGU Defendants' motion for summary judgment" (Complaint, ¶¶ 82, 83).

CONTENTIONS

In support of the motion to dismiss the Complaint, EB&G argues that Aramarine's claims against it are impermissibly speculative because Aramarine is merely guessing that it would have succeeded on the argument to the Second Circuit that the District Court abused

its discretion by considering the "no consideration" argument that was first interposed in the CGU defendant's reply papers. It is EB&G's position that (a) given the Hall Firm's preceding acts of purported negligence, EB&G had virtually no chance of overturning the District Court's "no consideration" holding on appeal, and (b) Elmasri's self-serving testimony about negotiating the Freyberger Modification with an unavailable now-deceased witness would have been rejected by the Appellate Court as incredible.

In opposition to the motion, Aramarine contends that it has adequately pled a cause of action sounding in legal malpractice against EB&G and, at this early stage of the litigation, the Court's inquiry is merely whether the pleading states a cause of action. Aramarine further argues that the motion is premature because the extent, if any, of EB&G's liability, must be developed through discovery.

DISCUSSION

To succeed on a motion to dismiss a complaint pursuant to CPLR 3211 (a) (7), "the standard is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action (*see Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]) ... and the court must '"accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable

inference, and determine only whether the facts as alleged fit within any cognizable legal theory"' (*Sokol v Leader*, 74 AD3d 1180, 1180-1181 [2d Dept 2010]; *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]).

To state a cause of action alleging legal malpractice, a plaintiff must plead that the defendant attorney "failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession" (*McCoy v Feinman*, 99 NY2d 295, 301-302 [2002] quoting *Darby & Darby v VSI Intl.*, 95 NY2d 308, 313 [2000]) and that "the attorney's breach of this professional duty caused the plaintiff's actual damages" (*McCoy v Feinman, supra* at 301-302, *citing Prudential Ins. Co. Of Am. v Dewey, Ballantine, Bushby, Palmer & Wood*, 170 AD2d 108, 114 [1st Dept 1991] *affd* 80 NY2d 377 [1992]). To satisfy the element of proximate causation, a plaintiff must preliminarily plead and ultimately prove that "but for" the attorney's malpractice, the client would have achieved a different result in the underlying matter (*Yong Wong Park v Wolff & Samson, P.C.*, 56 Ad3d 351, 352 [1st Dept 2008]; *Hand v Silberman*, 15 AD3d 167 [1st Dept 2005]).

Here, the Complaint states a cognizable cause of action against EB&G for legal malpractice by alleging that EB&G breached the standard of care by, inter alia, failing to raise and object to the CGU defendants' "no consideration" contention when it appealed Judge Casey's decision (the first appeal) and that "but for" EB&G's negligence, Aramarine would have prevailed in defending against the CGU defendants' counterclaims (Complaint, ¶¶ 83, 84).

EB&G is correct that the "but for" causation requirement in legal malpractice actions requires the plaintiff to prove "a case within a case" because the Court must undertake a hypothetical re-examination of the events at issue absent the alleged malpractice (*Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267, 272 [1st Dept 2004]). In this case, such analysis would require the Court to consider the hypothetical outcome if the Second Circuit had considered the argument that Judge Casey abused his discretion by considering the belatedly submitted "no consideration" contention. When faced with this question, on remand, Judge McMahon opined that it was entirely possible that the Second Circuit would have responded favorably to the argument that Judge Casey abused his discretion, and it was equally likely that the Court would have looked with disfavor on the Hall Firm's failure to raise the issue before the District Court.

Although it is true that "'[m]ere speculation about a loss resulting from an attorney's alleged omission is insufficient to sustain a prima facie case of legal malpractice' (citation omitted)" (*Plymouth Org. Inc. v Silverman, Collura & Chernis, P.C.*, 21 AD3d 464, 465 [2d Dept 2005]), it is equally true that at this pre-answer, pre-discovery stage, "plaintiff does not have to show a 'likelihood of success'" (*Garnett v Fox, Horan & Camerini, LLP* 82 AD3d 435, 436 [1st Dept 2011]). Indeed, at this juncture, Aramarine need only plead "allegations from which damages attributable to [defendant's conduct] might be reasonably inferred" (*InKine Pharm Co. v Coleman*, 305 AD2d 151, 152 [1st Dept 2003] quoting *Tenzer, Greenblatt, Fallon & Kaplan v Ellenberg*, 199 AD2d 45, 45 [1st Dept 1993]). Here, it can be reasonably inferred that Aramarine's damages resulted from EB&G's failure to address the "no consideration" argument on the first appeal which caused Judge Casey's "no consideration" finding to become law of the case on remand.

Indeed, even though it is generally true that a Circuit Court will not address issues that were not raised or passed upon before the Federal District Court (*see, Singleton v Wulff*, 428 US 106, 120 [1976]), an appellate court does have broad discretion to consider such issues, in particular, to avoid manifest injustice or where the issue is purely legal and there is no need for additional fact

finding (*Readco, Inc. v Marine Midland Bank*, 81 F3d 295, 302 [2d Cir 1996]). In the case at bar, "it is entirely possible" that the Second Circuit might have responded favorably to an argument that the District Court Judge abused his discretion which would have allowed Aramarine to present evidence that the Freyberger Modification existed and that adequate consideration was given for it. EB&G's reliance on *John P. Tilden, Ltd. v Profeta and Eisenstein*, 236 AD2d 292, 292-293 [1st Dept 1997]) for the proposition that it is "too speculative" to assume that a reversal and retrial would have resulted in a different outcome is readily distinguishable, because *Tilden* was decided on summary judgment after the parties had had a full opportunity for discovery. Here, the parties should be permitted to conduct discovery and then move for summary judgment, if deemed appropriate, upon its completion.

Accordingly, based on the papers submitted and the oral argument held on the record on August 12, 2011, defendant Epstein Becker & Green's motion to dismiss the Complaint as against it is denied.

EB&G has thirty days from the date of notice of the e-filing of this decision to serve its Answer.

Counsel shall appear for a conference in IA Part 39, 60 Centre Street - Room 208 on February 8, 2012 at 10:30 a.m.

This constitutes the decision and order of this Court.

Dated: January 11, 2012

BARBARA R. KAPNICK
J.S.C.

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