Stonebridge Capital v Brown Rudnick, LLP
2012 NY Slip Op 33538(U)
January 20, 2012
Sup Ct, NY County
Docket Number: 152259/12
Judge: Eileen A. Rakower

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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STONEBRIDGE CAPITAL,

Plaintiffs,

-against-

BROWN RUDNICK, LLP,

Defendant.

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Index No. 152259/12

DECISION and ORDER

Mot. Seq. 001

HON. EILEEN A. RAKOWER:

This is an action for legal malpractice and arises out of defendant Brown Rudnick, LLP's ("Defendant" or "Brown Rudnick") representation of Plaintiff Stonebridge Capital ("Plaintiff" or "Stonebridge") in a September 26, 2007 transaction with Nomura International, P.C. ("Nomura").

Plaintiff, in the Verified Complaint, avers that in or around March 2006, Plaintiff retained Defendant "to provide legal services in connection with the advice, negotiation and drafting of transaction documents pertaining to the Transaction, and Brown Rudnick continuously represented Stonebridge through and beyond the closing of the transaction, which occurred on September 26, 2007." Plaintiff avers that Defendant "was responsible for drafting all of the Transaction Documents, including the Stonebridge Indenture and the Nomura Indenture," including the 'event-of-default' provisions in both Indentures." Plaintiff avers that Defendant was "fully aware and was duty bound to draft the Transaction Documents so that they were consistent with Stonebridge's plan that the Bonds to be purchased by the Investors were to be wrapped bonds and that an event of default based upon a downgrade would only occur if there was a downgrade of both the rating of the issuer and the rating of the financial guaranty insurance company." The Verified Complaint states that the double layer of protection was needed because an event of default would

permit Nomura to demand the sale of the Bonds, which would result in the recognition of capital gains to the Investors, and would defeat the very purpose of the transaction.

The Verified Complaint alleges, "Despite Stonebridge's express intentions that Brown Rudnick draft the 'event of default' language so that it would be tied to the ratings of both the issuer of the Bonds and of the financial guaranty insurance company, Brown Rudnick negligently drafted and/or altered the event-of-default language to provide as follows:

> Section 6.1. Events of Default.
>
> (a) Each of the following shall constitute an Event of Default with respect to the affected Class of Notes and only such Notes:
>
> *****
>
> (v) the rating with respect to any financial guaranty insurance policy related to any Underlying Bond falls to or below "B2" by Moody's or "B" by S&P . . ."

Paragraph 35.

The Verified Complaint avers that "[t]he effect of this blunder by Brown Rudnick was that it permitted an event of default upon a downgrade to 'B2'/'B' of the rating of the insurance companies that insured the Bonds, rather than a downgrade at or below that level of both the rating of the issuers of the Bonds and the rating of the insurance companies." After the closing of the Transaction, "the ratings of several of the insurance companies that insured the Bonds fell to or below 'B2'/'B,' although the ratings of none of the issuers of the Bonds fell to or below that rating." Thereafter, "In accordance with the terms of the Transaction Documents as negligently drafted by Brown Rudnick, Nomura "declared an event of default and threatened to exercise its remedies and to sell the Bonds which had been pledged back to Nomura." Plaintiff, in an attempt to "prevent Nomura from exploiting Brown Rudnick's blunder and from selling the Bonds," commenced an action to challenge Nomura's invocation of an event of default and to reform the Indenture Documents on the grounds of scrivener's errors and mutual mistake (the "Nomura Litigation").

The Verified Complaint alleges, that as a direct and proximate result of Defendant's negligence and in an attempt to minimize or reduce the damages caused by Defendant's negligence, the Bonds were sold prematurely and Plaintiff was denied loan fees and sustained other damages in connection with, among other things, its effort to mitigate the consequences of Defendant's malpractice. Plaintiff alleges that it not only incurred significant legal fees, but also"incurred and paid substantial fees to other participants in the Transaction including, but not limited to, JP Morgan, the Indenture Trustee, Moody's and S&P."

Presently before the Court is Defendant's motion for an Order dismissing Plaintiff's Verified Complaint in its entirety (I) based on the doctrine of collateral estoppel; (ii) pursuant to CPLR 3211(a)(7), for failing to state a cause of action for legal malpractice as a matter of law; and (iii) pursuant to CPLR 3211(a)(1), based upon documentary evidence. Plaintiff opposes.

CPLR §3211 provides, in relevant part:

> (a) a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
>
> (1) a defense is founded upon documentary evidence;
>
> (5) the cause of action may not be maintained because of... collateral estoppel...; or
>
> (7) the pleading fails to state a cause of action.

In determining whether dismissal is warranted for failure to state a cause of action, the court must "accept the facts alleged as true ... and determine simply whether the facts alleged fit within any cognizable legal theory." (*People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 AD2d 91[1st Dept. 2003]) (internal citations omitted) (*see* CPLR §3211[a][7]). On a motion to dismiss pursuant to CPLR §3211(a)(1) "the court may grant dismissal when documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." (*Beal Sav. Bank v. Sommer*, 8 NY3d 318, 324 [2007]) (internal citations omitted) "When evidentiary material is considered, the criterion is whether the proponent of the pleading *has* a

cause of action, not whether he has stated one." (*Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 [1977]) (emphasis added). A movant is entitled to dismissal under CPLR §3211 when his or her evidentiary submissions flatly contradict the legal conclusions and factual allegations of the complaint. (*Rivietz v. Wolohojian*, 38 A.D.3d 301 [1st Dept. 2007]) (citation omitted).

The doctrine of collateral estoppel

> 'precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party ..., whether or not the tribunals or causes of action are the same' (*Ryan v New York Tel. Co.*, 62 NY2d 494, 500; *see also, Burgos v Hopkins,* supra, 14 F3d. at 792). The doctrine applies if the issue in the second action is identical to an issue which was raised, necessarily decided and material in the first action, and the plaintiff had a full and fair opportunity to litigate the issue in the earlier action (*Ryan v New York Tel. Co., supra,* at 500-01). '[T]he burden rests upon the proponent of collateral estoppel' to demonstrate the identicality and decisiveness of the issue, while the burden rests upon the opponent to establish the absence of a full and fair opportunity to litigate the issue in [the] prior action or proceeding' (*id. at 501*). (*Parker v. Blauvelt Volunteer Fire Co.*, 93 N.Y.2d 343, 349 [1999]).

"To sustain a cause of action for legal malpractice, moreover, a party must show that an attorney failed to exercise the reasonable skill and knowledge commonly possessed by a member of the legal profession." (*Darby & Darby v. VIS Int'l*, 95 N.Y. 3d 308, 313 [2000]). In order to prevail against an attorney on a legal malpractice claim, a plaintiff must first prove that the attorney was negligent, that such negligence was the proximate cause of the loss sustained, and that actual damages resulted therefrom (*see Tydings v. Greenfield, Stein & Senior*, 2007 NY Slip Op 6734, *2 [1st Dept. 2007]). In order to establish proximate cause, the plaintiff must demonstrate that he or she would have prevailed in the underlying matter "but for" the attorney's negligence (*id.*). If the plaintiff cannot demonstrate proximate cause, the malpractice action must be dismissed (*id.*).

"The culpable conduct of a plaintiff client in a legal malpractice action may be pleaded by the defendant attorney, by way of an affirmative defense, as a mitigating factor in the attorneys' negligence." *Arnav Indus. v. Brown, Raysman, Millstein, Felder & Steiner, LLP*, 96 N.Y.2d 300, 305 (N.Y. 2001)(citations omitted). A client's execution of a binding agreement drafted by counsel does not constitute a complete defense as a matter of law to a client's claim of legal malpractice related to the counsel's drafting of the agreement. *(Id.)* (denying defendant's motion to dismiss and holding that the binding nature of the agreement drafted by plaintiffs' lawyer and executed by plaintiffs was not a defense as a matter of law to plaintiffs' legal malpractice claim that the law firm had drafted the agreement to plaintiffs' detriment).

Assuming the facts as pleaded in the Verified Complaint to be true, Plaintiff has adequately stated a cause of action for legal malpractice against Defendant. The Verified Complaint alleges that Plaintiff retained Defendant to prepare certain transaction documents consistent with Plaintiff's intentions and instructions that any event of default would be tied to the ratings of both the issuer of the Bonds and of the financial guaranty insurance company and that Defendant negligently drafted and/or altered the event-of-default language so as to permit "an event of default upon a downgrade to 'B2'/'B' of the rating of the insurance companies that insured the Bonds, rather than a downgrade at or below that level of both the rating of the issuers of the Bonds and the rating of the insurance companies."

Plaintiff alleges that as a result of Defendant's "drafting blunder," Nomura declared an event of default, the Bonds were sold prematurely, and Plaintiff was denied loan fees and sustained other damages in connection with their efforts to mitigate the consequences of the Defendant's negligence.

Defendant first moves for dismissal to the doctrine of collateral estoppel based on the Court's Decision in the Nomura Action. Defendant contends that "[t]he central issue in the instant matter is whether plaintiff was aware that the event-of-default language contained in the transaction documents provided that the triggering event would be a downgrade of the insurer of the wrapped security/bond." Defendant contends that this issue was decided in the Nomura Action, citing to the portion of the Court's Decision wherein the Court stated that "it would be egregious to accept" that "sophisticated business entities" "were not aware of changes in a document redlined to highlight such changes." The Decision, however, also states, "Finally, it is notable that Stonebridge's own attorneys systematically made the complained of changes ...

Stonebridge cannot secure reformation by merely showing that their attorney made what appears to be a unilateral mistake." Defendant's collateral estoppel lacks merit because Plaintiff's instant claim of legal malpractice was not before the Court in the Nomura action and Plaintiff's execution of the subject transaction documents does not provide a complete defense as a matter of law to Defendant.

Similarly, the documentary evidence submitted by Defendant does not conclusively establish a defense as a matter of law warranting the dismissal of Plaintiff's legal malpractice claim. Defendant submits an email from Defendant to Larry Kaplan forwarding the redlined transaction documents which reflect the changes to the subject default provision, as well as the fully executed transaction documents containing the subject provisions which were signed by Larry Kaplan. Defendant contends that these documents establish that Plaintiff knowingly executed the transaction documents containing the subject default provision, and as a result, Plaintiff's legal malpractice claim fails to state a claim. However, as stated above, a client's execution of a binding agreement drafted by counsel does not constitute a complete defense as a matter of law to a client's claim of legal malpractice related to the counsel's drafting of the agreement. *Arnav Indus. v. Brown, Raysman, Millstein, Felder & Steiner, LLP*, 96 N.Y.2d 300, 305 (N.Y. 2001). As Kaplan avers in his opposition affidavit, Plaintiff expressly directed Defendant to use certain default provisions, Defendant altered those default provisions in contravention to Plaintiff's intentions and instructions, and Defendant did not advise Plaintiff that Defendant had materially altered the default provisions in the transaction documents or ask Plaintiff to review the redlined drafts that it had e-mailed. Kaplan contends that Plaintiff did not review the final drafts of the transaction documents because it was relying upon Defendant to represent its interests and "had no reason to suspect that Brown Rudnick had materially modified the default provisions in a manner which so drastically defeated Stonebridge's intentions and instructions with respect to the transaction." As the Verified Complaint adequately states a cause of action for legal malpractice and the documents submitted by Defendant do not provide a complete defense as a matter of law to the alleged cause of action, Defendant's motion to dismiss pursuant to CPLR 3211(a)(1) and (a)(7) is denied.

Wherefore it is hereby

ORDERED that the motion to dismiss is denied; and it is further

ORDERED that Defendant shall file and serve an answer within 20 days of receipt of a copy of this Order with Notice of Entry thereof.

DATED: 12/20/12

EILEEN A. RAKOWER, J.S.C.