

Excelsior Capital LLC v Read
2013 NY Slip Op 31250(U)
May 13, 2013
Supreme Court, New York County
Docket Number: 110950/11
Judge: Charles E. Ramos
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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: RAMOS Justice

PART 53

EXCELSIOR CAPITAL LLC

INDEX NO. 110950/11

MOTION DATE

- v -

READ, et al

MOTION SEQ. NO. 06, 07

MOTION CAL. 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)

Answering Affidavits - Exhibits No(s)

Replying Affidavits No(s)

Upon the foregoing papers, it is ordered that this motion is

Motion sequence 06 and 07 are consolidated for disposition and decided in accordance with the accompanying memorandum decision.

DATED: 5/13/13

[Signature]

CHARLES E. RAMOS J.S.C.

1. CHECK ONE :

[x] CASE DISPOSED

[] NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE :

MOTION IS: [x] GRANTED [] DENIED

[] GRANTED IN PART [] OTHER

3. CHECK IF APPROPRIATE :

[] SETTLE ORDER

[] SUBMIT ORDER

[] DO NOT POST

[] FIDUCIARY APPOINTMENT

[] REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

-----X
EXCELSIOR CAPITAL LLC,

Plaintiff,

-against-

Index No.
110950/11

NATHANIEL P.T. READ, ALEXANDRA WALD, COHEN &
GRESSER LLP, ROBERT WESSELY, and ARNOLD &
PORTER LLP,

Defendants.

-----X

Charles E. Ramos, J.S.C.:

Motion sequence numbers 06 and 07 are consolidated for disposition.

In motion sequence 06, defendants Robert Wessely and Arnold & Porter LLP (together, the A&P defendants) move pursuant to CPLR 3212 to dismiss the claims asserted against them.

In motion sequence 07, plaintiff Excelsior Capital LLC (Excelsior) moves for leave to reargue the prior motion to dismiss the complaint against defendants Nathaniel P.T. Read, Alexandra Wald, and Cohen & Gresser LLP, or in the alternative, to modify the order granting that motion, entered on December 12, 2012.

Background

The facts set forth herein are taken from the pleadings, and the parties' Rule 19-A statements.

Excelsior, a commercial lender, is controlled by Richard Davis. Defendant Nathaniel P.T. Read serves as counsel to

defendant Cohen & Gresser LLP (C&G). Defendant Alexandra Wald is a partner at (C&G).

This action arises in connection with a litigation between Excelsior and C. Robert Allen III (Allen), the son of one of the founders of the investment house, Allen & Co. Defendants served as counsel to Allen in that litigation.

The underlying dispute between Excelsior and Allen originated in 2003, when Excelsior agreed to loan money to Superior Broadcasting Company Inc. (Superior), a company in which Allen held a 60% interest.

Between March 2004 through July 2004, Excelsior loaned Superior \$18 million. Of that amount, \$13 million was personally guaranteed by Allen. In addition, in January 2004, Davis made a personal loan of \$400,000 to Superior.

The \$13 million in loans guaranteed by Allen were evidenced by three promissory notes: an April 2004 \$3 million note due in April 2005, a June 2004 \$5 million note due in December 2005, and a July 2004 \$5 million note due in January of 2006.

In March 2005, Allen asked Excelsior to extend the three notes he had guaranteed for two years, to April 2006, June 2006 and July 2006, respectively.

In mid-2005, Allen retained the services of Robert Wessely, Esq., a partner in the law firm of defendant Arnold Porter, LLP (A&P), to advise him concerning Allen's investment in Superior.

In early 2006, Superior defaulted on its obligations to Excelsior, including the obligations personally guaranteed by Allen. On May 26, 2006, Allen signed a letter which Excelsior claims refers to the notes issued to Superior and the guaranties (May Letter) (Exhibit 2, annexed to the Miller Aff.). In the May Letter, Allen acknowledged his continuing liability under the guaranties in return for Excelsior's agreement not to enforce its rights under the notes while renegotiating them.

In January 2007, Excelsior commenced an action against Allen in the Supreme Court of New York, New York County, which was subsequently transferred to Nassau County.

At the outset of the Excelsior/Allen litigation and until June 2008, Wessley and A&P represented Allen. In June of 2008, A&P was replaced by C&G, with Read and Wald supervising all pretrial discovery.

First Trial

In June 2009, the Excelsior/Allen litigation went to trial before a jury (First Trial). The two key issues were whether the loans to Superior had been repaid, and if the loans had not been repaid, whether the notes were amended without Allen's consent, thus excusing Allen from the guaranties. Allen's primary defense was that the notes that he guaranteed were extended or modified without his consent.

As to the issue of the modification/extension of the notes,

Excelsior relied upon Davis's testimony and the May Letter to establish Allen's consent to modify. According to Excelsior, the May Letter was a crucial document because it was the only document signed by Allen in which he acknowledged the continued existence of his guaranties after the original maturity dates of the guaranteed notes had passed.

Excelsior subpoenaed Wessley's testimony as a third-party fact witness concerning his role in negotiating the May Letter and the circumstances under which Allen signed it (A&G defendants' Rule 19-A Statement, ¶¶ 4, 11-13). By this point, Wessley had ceased representing Allen.¹

Excelsior alleges that Wessley committed perjury both during his deposition and trial testimony in the First Trial, which tainted the record before the court. Excelsior points to Wessley's testimony that he did not know if Allen was represented by counsel in May 2006 with regard to the May Letter, did not remember if he had represented Allen in the negotiations that led up to the May Letter, and that he had no specific recollection of when he saw the May Letter for the first time (Wessley Dep. Tr. 3/5/09: 180-81, 184).

Excelsior prevailed at the First Trial on the issue of

¹ Allen did not waive privilege with respect to his prior communications with Wessley, and only testified as to non-privileged facts (A&P Defendants' Rule 19-A Statement, ¶ 21; Exhibit 5, annexed to the Miller Aff., Trial Tr. 6/16/09: 1002-1003).

whether the loans had been repaid. Nonetheless, the court dismissed the guaranty claims after the close of evidence and granted a directed verdict on the ground that the notes had been modified without Allen's consent. The court reasoned that the May Letter had "no legal impact" on Allen's guaranties because "no specific note is listed."

The trial court's dismissal of the guaranty claims was reversed by the Second Department in March 2011. The Second Department stated that "the evidence presented at trial provided a rational basis upon which the jury could have found that Allen, who allegedly requested an extension of the maturity dates of the notes he had guaranteed, and who was allegedly consulted regarding the decision to extend the maturity dates, did in fact consent to the extensions (*Excelsior Capital, LLC v Allen*, 82 AD3d 696 [2d Dept 2011]). The matter was remanded for a new trial.

Second Trial

A second trial of the guaranty claims was held in September 2011 (Second Trial). Just prior to the Second Trial, additional emails relating to the May Letter were produced in connection with a separate litigation proceeding in federal court. These emails (the unproduced emails) had not been produced during the initial discovery period of the Excelsior/Allen litigation.

At this point in the litigation, the C&G defendants, by Read

and Wald, supervised all discovery on behalf of Allen.

Among the unproduced emails was a message dated May 17, 2006, in which Wessley states to Neiman:

Bob- this is fine with me. Will they sign it first, and then I can arrange for Bob's [Allen's] signature?

How are we doing on getting a complete and current list on the outstanding notes? (Exhibit 10, annexed to the Miller Aff.).

In another email, Wessley states to Neiman:

Bob- here is another copy of the signed [May] letter, which I sent to you last Friday (Exhibit 11, annexed to the Miller Aff.).

Excelsior argues that these emails demonstrate that Wessley had actually negotiated the language of the May Letter with Neiman, Superior's counsel, approved its terms, secured Allen's counter-signature on the May Letter, and twice forwarded it with Allen's signature to Neiman. According to Excelsior, the only explanation for Wessley's drastically inconsistent testimony at the First Trial is that he has committed perjury pertaining to his involvement in the May Letter.

Moreover, Excelsior maintains that the C&G defendants intentionally withheld these emails in an effort to deceive the court. As part of its July 2008 Second Request for Discovery and Inspection, in Request No. 8, Excelsior demanded all copies of documents evidencing all "communications between Allen and Devine, Davis ... [and] Neiman ... concerning business with Superior, Affiliates of Superior, Excelsior, or Davis (Exhibit

10, annexed to the Leventhal Aff.).

Although the withheld emails, communications between Neiman and Wessley, do not in themselves constitute a communication between Allen and Davis, Excelsior maintains that there is no question that the documents should have been produced as evidencing a communication between Allen and Davis concerning business with Superior and Excelsior.

Further, at Wessley's March 2009 deposition, Excelsior's attorney "called for, if there are any, any other drafts or documents related to" the May Letter. Read represented: "I believe everything we have related to this had been produced" (Wessley Dep Tr 181:12-15, Exhibit F, annexed to the Burstein Aff.).

Excelsior contends that if Judge Warshawsky had all of the evidence before him in the First Trial, namely Wessley's testimony concerning his involvement in negotiating the May Letter and obtaining Allen's signature coupled with the unproduced emails, he would not would have concluded that there was not enough evidence for a reasonable jury to find that the guaranties referenced in the May Letter were the same guaranties at issue in the litigation, and he would not have dismissed the claims against Allen.

Excelsior prevailed at the Second Trial with respect to two of the three guaranties. Excelsior introduced into evidence the

e-mails referred to above, and once again called Wessley to testify as a third-party fact witness. Wessley affirmed that the testimony he offered in the First Trial had been truthful to the best of his recollection (Exhibit 17, annexed to the Leventhal Aff., 9/2/11 Trial Tr 1274:3-1277:8).

The jury found that Allen had consented to the modification of the April and June notes, but that the July note had not been modified. The jury also found that Allen did not provide written consent to the modifications of the April and June notes, and thus, by deduction, that the May Letter did not constitute written consent to modify. Instead, the jury found that Allen had "otherwise consented" to the modifications (Special Verdict Form, Exhibit 15, annexed to the Miller Aff.). A judgment entered against Allen in the amount of \$25,233,277.53.

This Action

In September 2011, Excelsior commenced this action against defendants, followed by an amended complaint in January 2012, for violation of section 487 of the Judiciary Law, and for vicarious liability against C&G and A&P.

Defendants moved to dismiss the complaint. In an order dated November 27, 2012 and entered on December 10, 2012 (December Order), this Court granted the C&G defendants' motion to dismiss the claims against it.

The Court converted Wessley's motion to dismiss under CPLR

3211 to a motion for summary judgment, and permitted the parties to provide supplemental briefing.

Discussion

Excelsior moves to reargue this Court's November 27, 2012 decision which granted the C&G defendants' motion to dismiss the claims as against them for violation of Judiciary Law § 487, or in the alternative, to modify the December Order to comport with the July 11, 2012 hearing transcript.

The motion for leave to reargue is granted, and upon reargument, the Court adheres to its prior determination granting the C&G defendants' motion to dismiss for the reasons set forth below.

The C&G Defendants

According to Excelsior, the Court overlooked facts in the record that establish that the C&G defendants had the duty to produce the withheld documents because they are responsive to its Document Request, which demanded documents "evidencing all communications between Allen and Devine, Davis, Buzil, [and] Neiman ... concerning business with Superior, Affiliates of Superior, Excelsior, or Davis" (Exhibit 7, annexed to the Burstein Aff).

Excelsior alleges that the C&G defendants intentionally suppressed the unproduced emails in order to deceive the court which resulted in the dismissal of the guaranties claims against

Allen at the close of evidence during the First Trial.

At the outset, the Court notes that the unproduced emails were never the subject of a specific document demand by Excelsior in the underlying action. The communications at issue, the unproduced emails, are not communications between Allen and Davis, although they do generally relate to matters pertaining to Superior, Excelsior and Davis, e.g. the May Letter. In addition, the unproduced emails were accessible from other third parties who sent or received them, including Neiman, counsel for Superior.

Moreover, although Excelsior "called for, if there are any, any other drafts or documents related to" the May Letter, during Wesley's March 2009 deposition, to which Reade represented: "I believe everything we have related to this had been produced" (Wesley Dep Tr 181:12-15, Exhibit F, annexed to the Burstein Aff.), Excelsior concedes that it did not follow-up with a formal written demand.

Section 487 of the Judiciary Law permits an injured party to recover treble damages against an attorney who is guilty of any deceit or collusion with the intent to deceive any party. A violation is evidenced by a "chronic and extreme pattern of legal delinquency" (*Strumwasser v Zeiderman*, 102 AD3d 630, 630 [1st Dept 2013]), or otherwise egregious conduct (see *Kurman v Schnapp*, 73 AD3d 35 [1st Dept], lv denied 15 NY3d 804,

reconsideration denied 15 NY3d 920 [2010] [plaintiff stated a claim under Judiciary Law § 487 based on defendant's alleged attempted deceit of court by drafting a fictitious letter from the former licensing director of the Taxi and Limousine Commission (TLC) that falsely stated that plaintiff was under a lifetime ban on owning any TLC licenses]).

The misrepresentation must be material and actually cause injuries or legal expenses sustained (*Amalfitano v Rosenberg*, 12 NY3d 8, 14 [2009]; *Strumwasser*, 102 AD3d 630). The withholding of crucial information can support a section 487 claim only when there is a duty to speak (*Guardian Life Ins. Co. of Am. v Handel, Handel*, 190 AD2d 57, 61 [1st 1993]).

This Court concludes that Excelsior has failed to state a claim for violation of section 487 of the Judiciary Law as against the C&G defendants. The conduct at issue, the failure to produce emails that were not the subject of a specific document demand, which would have given rise to an affirmative duty to speak, is not sufficiently egregious to support a claim for violation of section 487 of the Judiciary Law. Nor does the failure to produce emails that were otherwise available from third parties reflect an intent to deceive on the part of the C&G defendants. Accordingly, upon reargument, the motion to dismiss is granted.

The A&P Defendants

The A&P defendants move for summary judgment on the ground that Excelsior cannot establish a claim against Wesley for violation of Judiciary Law § 487, because Wesley's testimony did not cause Excelsior any injury, which is an essential element of the claim.

In opposition, Excelsior argues that but for Wesley's testimony pertaining to the May Letter, coupled with the fact that the C&G defendants withheld the unproduced emails that ultimately disclosed Wesley's role in negotiating that letter and procuring Allen's signature, the court in the First Trial would not have found the fact that "no specific note is listed" in the May Letter determinative in dismissing Excelsior's guaranty claims.

The issue with respect to Excelsior's claim for violation of Judiciary Law section 487 is whether Wesley intended to deceive the court, and whether his false testimony caused Excelsior harm (see *Amalfitano v Rosenberg*, 12 NY3d at 14; *Strumwasser*, 102 AD3d 630). The Court concludes that Excelsior fails to raise a triable issue as to each of these elements.

As to Wesley's purported intent to deceive the court during the First Trial, it is evident that Excelsior has selectively excerpted Wesley's testimony. While Wesley did testify during the First Trial that he did not have any discussions with Neiman

in mid-2006 regarding whether a forbearance letter [the May Letter] of any kind had been signed by Allen, he immediately added:

"Certainly the e-mail exchanges that you just referred to a little while ago were indicative of the fact that I was discussing with Neiman whether [Mr. Allen] would sign any kind of letter," and that the signature on the May Letter does look like Allen's (6/16/09 Trial Tr 1113-1114, Exhibit 5, annexed to the Miller Aff.).

During the Second Trial, Wessley was specifically asked about the falsity of his prior testimony offered during the First Trial. Wessley responded:

"I was asked what I remembered at that time [the First Trial] and at that time I did not remember having had that discussion. I have subsequently seen documents that indicated that my memory was incorrect" (9/2/11 Trial Tr 1274-1277, Exhibit 17, annexed to the Leventhal Aff.).

Notwithstanding this Court's conclusion that the totality of Wessley's testimony does not give rise to an inference of fraud, the claim fails for two additional and distinct reasons. First, the mere fact that the alleged wrongdoer is an attorney is insufficient to impose liability under the statute. Rather, section 487 of the Judiciary Law is aimed at actions by an attorney in his or her role as an attorney during a pending proceeding in which plaintiff was a party (*Seldon v Spinnell*, 95 AD3d 779 [1st Dept 2012], *lv denied* 20 NY3d 857, *reargument denied* _NY3d_, 2013 NY Slip Op 69150 [2013]; *Stanski v Ezersky*, 228 AD2d 311, 313 [1st Dept 1996]). During both the First and

Second Trial, Wessley offered testimony as a third-party fact witness, and not in his role as an attorney. By the time he was subpoenaed to testify concerning his role in the May Letter, the C&G defendants had substituted as counsel for Allen in Wessley's place.

Moreover, Excelsior fails to raise a triable issue that the alleged conduct was the proximate cause of any injury. Nothing in the court's ruling during the First Trial references Wessley's testimony in any way as impacting the significance of the May Letter or questions the authenticity of the May Letter. Instead, it appears as if Justice Warshawsky assumed that the May Letter was, in fact, signed by Allen. In addressing the May Letter from the bench, Judge Warshawsky stated:

"Does [the May Letter] act as a ratification of the guaranties or an extension of the guaranties? No specific note is listed in the document, which has also been called a forbearance agreement or a waiver agreement. The Court finds that this document, no matter what we wish to call it, has no legal impact on the extension or revival of the guaranties previously signed by Mr. Allen" (6/19/09 Trial Tr 1791, Exhibit 6, annexed to the Miller Aff.).

It is beyond conjecture to presume that Judge Warshawsky in the First Trial would not have found the fact that "no specific note is listed" in the May Letter determinative in dismissing Excelsior's guaranty claims. In fact, at the close of the Second Trial, when the jury did have before it all of the evidence that Excelsior claims was so crucially lacking due to defendants'

fraud (e.g. the unproduced emails and Wessley's testimony that he was involved in the negotiation of the May Letter and obtained Allen's signature on it), notwithstanding its finding that the April and June notes had been modified, the jury specifically found that Allen did not provide written consent to modify any of the notes (Special Verdict Form, Exhibit 15, annexed to the Miller Aff.). Excelsior's failure to plausibly identify a loss proximately caused by Wessley's alleged deceit mandates dismissal of the claim against the A&P defendants.

Accordingly, it is hereby

ORDERED that defendants' Robert Wessely and Arnold Porter LPP motion (06) for summary judgment is granted in its entirety; and it is further

ORDERED that plaintiff's Excelsior Capital LLC motion (07) for leave to reargue the prior motion to dismiss by defendants Nathaniel P.T. Read, Alexandra Wald, and Cohen & Gresser LLP, is granted, and upon reargument, the motion is granted in its entirety.

The Clerk is directed to enter judgement in favor of defendants.

Dated: May 13, 2013

ENTER

J.S.C.

13 **CHARLES E. RAMOS**