

Roberts v Corwin

2013 NY Slip Op 33549(U)

November 19, 2013

Sup Ct, New York County

Docket Number: 115370/2009

Judge: Marcy S. Friedman

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MARCY S. FRIEDMAN PART 60
Justice

ALLEN B. CORWIN Roberts INDEX NO. 115370/2009

Plaintiff,

-against-

MOTION DATE _____

LESLIE D. CORWIN and GREENBERG TRAUIG, LLP, MOTION SEQ. NO. 003

Defendants.

The following papers, numbered 1 to _____ were read on defendants' motion for summary judgment.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	No (s). _____
Answering Affidavits — Exhibits _____	No (s). _____
Replying Affidavits _____	No (s). _____

Cross-Motion: Yes No

Defendants' motion for summary judgment is decided in accordance with the accompanying decision/order, dated November 19, 2013.

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

FILED

FILED

NOV 21 2013

NOV 1 2013

COUNTY CLERK'S OFFICE
NEW YORK

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 11-19-13

Marcy S. Friedman, J.S.C.
MARCY S. FRIEDMAN, J.S.C.

- Check one: CASE DISPOSED NON-FINAL DISPOSITION
- Check as appropriate:.....Motion is: GRANTED DENIED GRANTED IN PART OTHER
- 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 60

FILED

NOV 21 2013

PRESENT: HON. MARCY FRIEDMAN, J.S.C.

COUNTY CLERK'S OFFICE
NEW YORK

ALLEN B. ROBERTS,
Plaintiff,

Index No.: 115370/2009

- against -

DECISION/ORDER

LESLIE D. CORWIN and GREENBERG
TRAURIG, LLP,
Defendants.

Motion Seq. 003

_____ x

In this legal malpractice action, plaintiff Allen B. Roberts sues defendants Leslie D. Corwin and Greenberg Traurig, LLP (collectively Greenberg Traurig), his attorneys in an underlying arbitration proceeding against his former firm, Roberts & Finger, LLP (Roberts & Finger). Defendants move for summary judgment dismissing the complaint.

The relevant material facts are undisputed. The panel in the underlying arbitration issued an adverse Interim Award on May 11, 2006, finding that Mr. Roberts failed to establish that he has suffered any damage from the dissolution of Roberts & Finger. (Interim Award, ¶ 10.) The panel’s determination was based in pertinent part on Mr. Roberts’ failure to present expert testimony as to the value of the law firm and its assets. (*Id.*, ¶¶ 8, 9, 10.) Mr. Roberts retained Epstein Becker to serve as co-counsel to Greenberg Traurig in the arbitration in May 2006, after the panel’s issuance of the Interim Award. (May 21, 2012 Decision at 19.) The panel issued an adverse Final Award on July 13, 2006, incorporating the Interim Award. (Final Award.) Mr. Roberts’ petition to vacate the unfavorable Final Award was denied by order of this Court

(Moskowitz, J.), dated April 3, 2007. (Ds.' Ex. 52.) Mr. Roberts ultimately reached a settlement with Roberts & Finger in August 2007. (Ds.' Ex. 57.)

Shortly after the issuance of the adverse Interim Award, and while Epstein Becker, through Mr. Cozier, was co-counseling with Greenberg Traurig to obtain relief from the award, Mr. Roberts consulted with John Sachs, also an attorney at Epstein Becker, regarding a possible malpractice action against Greenberg Traurig. Although the parties dispute the date as of which Epstein Becker was retained for the malpractice action, it is undisputed that Mr. Roberts consulted with Mr. Sachs as early as May 2006, and that a formal demand was not served until October 2007. This demand, made by letter dated October 18, 2007, asserted that the arbitrators precluded expert testimony on the valuation of Mr. Roberts' partnership interest based on Greenberg Traurig's failure to disclose that it would call an expert, and that such failure constituted malpractice. (Ds.' Ex. 59.) This malpractice action was filed on October 30, 2009, and was also based on Greenberg Traurig's failure to disclose the expert witness.

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action "sufficiently to warrant the court as a matter of law in directing judgment." (CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980].) "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985].) Once such proof has been offered to defeat summary judgment "the opposing party must 'show facts sufficient to require a trial of any issue of fact' (CPLR 3212, subd. [b].)" (Zuckerman, 49 NY2d at 562.)

It is further settled that in order to prevail on a claim for malpractice, "the plaintiff must

show that the attorney was negligent and that ‘but for’ the attorney’s negligence the plaintiff would have prevailed in the underlying case.” (Pacesetter Communications Corp. v Solin & Breindel, P.C., 150 AD2d 232, 233 [1st Dept 1989], lv dismissed 74 NY2d 892.)

In moving for summary judgment, Greenberg Traurig contends that Mr. Roberts cannot prove that he would have prevailed in the underlying arbitration “but for” Greenberg Traurig’s negligence in not designating an expert on the valuation of his partnership interest. (Ds.’ Memo. In Support at 19.) In support of this contention, Greenberg Traurig contends that this alleged negligence would not have affected the outcome of the arbitration because Mr. Roberts lost on liability. (Id. at 23.)

While Greenberg Traurig correctly argues that proof of liability is a predicate to the consideration of damages (id.), it misperceives the holding of the arbitration panel. In the Interim Award which, as noted above, was adopted by the Final Award, the panel held that “regardless of the Causes of Action pleaded, Claimant [Roberts] has failed to establish a prima facie case that he has suffered any damage as a result of the manner in which the dissolution of [Roberts] & Finger LLP was carried out.” (Interim Award, ¶ 10.) More particularly, in concluding that Mr. Roberts did not prove that Roberts & Finger’s appraisal of the tangible assets of the firm was inaccurate, the panel found that Mr. Roberts failed to present any testimony, “expert or otherwise,” as to the fair market value of these assets. (Id., ¶ 8.) In further concluding that Mr. Roberts did not “meet his burden” of quantifying intangible assets, the panel found that Mr. Roberts presented “no testimony, expert or otherwise, from which it could be determined that either ‘going concern value’ or ‘goodwill’ could be quantified at an amount greater than the amount Roberts & Finger, LLP received in the course of the liquidation.” (Id., ¶ 9.)

Mr. Roberts' Demand for Arbitration asserted causes of action for breach of contract, breach of fiduciary duty and waste, misappropriation, unjust enrichment, and monies had and received, as well as an ERISA claim. (See Ds.' Exs. 24 [Demand], 34 [Listing of Damages].) Mr. Roberts raised certain claims in the arbitration that turned strictly on liability – e.g., his claim of the firm's alleged violation of the partnership agreement based on its failure to appoint him to the Dissolution Committee which was formed to carry out the dissolution, and failure to give proper notice of the meeting at which the partners might take steps to implement a decision to dissolve. (See Interim Award, ¶ 7 [B], [C].) However, it is undisputed that Mr. Roberts' central claim in the arbitration was that his partnership interest had been undervalued. Whether this claim was asserted under the rubric of breach of contract or unjust enrichment or any of the other pleaded causes of action, the claim was inextricably intertwined with liability. Put another way, the panel's holding that Mr. Roberts failed to prove liability on these causes of action was based on his failure to prove damages – i.e., the amount by which his partnership interest was undervalued. Triable issues of fact thus remain as to whether the failure to designate an expert witness on valuation was a but for cause of Mr. Roberts' loss.

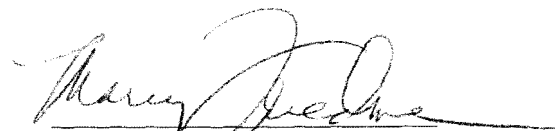
The court has considered defendants' remaining contentions and finds them to be without merit.

It is accordingly hereby ORDERED that defendants' motion for summary judgment is denied; and it is further

ORDERED that a pre-trial conference will be held in Part 60, Room 248, 60 Centre Street, New York, New York on January 30, 2014 at 2:30 p.m.

This constitutes the decision and order of the court.

Dated: New York, New York
November 19, 2013



MARCY FRIEDMAN, J.S.C.