

G3 Capital Partners, L.P. v McCallum

2014 NY Slip Op 30176(U)

January 17, 2014

Supreme Court, New York County

Docket Number: 653276/2012

Judge: Anil C. Singh

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANIL C. SINGH
SUPREME COURT JUSTICE
Justice

PART 61

Index Number : 653276/2012
G3 CAPTIAL PARTNERS, L.P.
vs
MCCALLUM, WILLIAM T
Sequence Number : 001
DISMISS ACTION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to 20, 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 Decided in accordance with the annexed Decision and Order

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

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

Dated: 1/17/14

HON. ANIL C. SINGH, J.S.C.
SUPREME COURT JUSTICE

- 1. CHECK ONE: CASE DISPOSED
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. 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 61

-----X
G3 CAPITAL PARTNERS, L.P., CUMMINGS
GOLDMAN CAPITAL PARTNERS, L.L.C. and ERIC
WARREN GOLDMAN, in his capacity as Trustee of the
Webb Family,

Plaintiff,

-against-

WILLIAM T. MCCALLUM, WILLIAM T. MCCALLUM,
CPA, P.C., ANDY PAN and CHRISTINE WANG,

Defendants.

-----X

DECISION AND
ORDER
Index No. 653276/2012

HON. ANIL C. SINGH, J.:

Defendants move for an order pursuant to CPLR §§ 3211(a)(1) and (7) dismissing the complaint with prejudice and, pursuant to CPLR § 3211(c) awarding summary judgment to Defendants. Plaintiff opposes the motion.

Legal Standards

In ruling upon a motion to dismiss, the court must “determine whether plaintiffs’ pleadings state a cause of action. The motion must be denied if from the pleadings’ four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law. In furtherance of this task, we liberally construe the complaint, and accept as true the facts alleged in the complaint and any submissions in opposition to the dismissal motion. We also accord plaintiffs the benefit of every possible favorable inference.” (*511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 N.Y. 2d 144 [2002], internal quotations and citations omitted.)

Summary judgment will be granted if it is clear that no triable issues of fact exist (*Alvarez*

v Prospect Hosp., 68 NY2d 320, 324 [1986]). The burden is on the moving party to make a prima facie showing of entitlement to summary judgment as a matter of law (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067 [1979]). If a prima facie showing has been made, the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of a triable issue of fact (*Alvarez v Prospect Hosp.*, 68 NY2d at 324; *Zuckerman v City of New York*, 49 NY2d at 562). Mere conclusions, unsubstantiated allegations or expressions of hope are insufficient to defeat a summary judgment motion (*Zuckerman v City of New York*, 49 NY2d at 562).

Background

This is an action for accounting malpractice, breach of contract, unjust enrichment, negligence, conversion, and the unauthorized release of tax returns and tax information.

Plaintiff G3 Capital Partners, L.P. (“G3”) alleges that from 2006 to 2010 it hired William T. McCallum, and William T. McCallum, CPA, P.C. (collectively the “McCallum defendants”) to conduct financial audits, prepare financial statements, and prepare tax returns pursuant to written retainer agreements. G3 claims that the audits were improperly performed because they failed to fully account for the McCallum Defendants’ own fees and, therefore, G3’s expenses were approximately eighty percent (80%) higher than reported. The McCallum Defendants refused to revise the financial statements. G3 claims that, due to the McCallum Defendants’ actions, G3’s 2009 profits and 2010 losses were overstated, which adversely affected G3’s reputation and ability to attract investors and raise funds. G3 further maintains that the McCallum Defendants “improperly allocated the investors’ individual allocations for income tax return purposes and exposed the investors to additional tax liabilities.” The McCallum

Defendants allegedly refused to provide G3 with copies of accounting and other financial papers in their files, thereby resulting in G3 expending additional sums on legal and accounting fees to determine how the alleged errors impacted G3 and its investors and to correct the mistakes.

Plaintiff Cummings Goldman Capital Partners, L.L.C. (“Cummings”) claims that, in 2010, the McCallum Defendants filed Cummings’ 2009 federal and New York State tax returns. In 2012, the McCallum Defendants brought a suit in New York City Civil Court seeking fees for accounting and tax services. Cummings sought to dismiss the action based on forum non-conveniens, as it was a Delaware corporation authorized to transact business in Rhode Island. The McCallum Defendants argued that New York was the appropriate forum because Cummings earned income here and filed a New York State tax return. In support of their claim, the McCallum Defendants allegedly disclosed a copy of Cummings’ 2009 tax return containing investors’ Social Security numbers, home addresses and personal financial information. When Cummings’ counsel complained of the disclosures, the McCallum defendants allegedly redacted the returns by removing the Social Security numbers and investor home addresses, but not the personal financial information, and filed the document as an exhibit with the Court. McCallum maintains that the tax returns were never disclosed to anyone other than counsel for the parties in the Civil Court action and to the Court, on a CD, for *in camera* review. The Civil Court decision specifically states that the CD containing the tax returns was never reviewed. The McCallum Defendants contend that no one other than counsel for the parties to this action ever reviewed the tax returns.

In or about 2004, Eric Goldman (“Trustee”) was appointed trustee of the Webb Family Trust (“Family Trust” or “Trust”). The McCallum Defendants were “retained to provide

accounting and financial services to the Family Trust.” Plaintiffs allege that Christine Wang (“Wang”) is a bookkeeper employed by the McCallum Defendants. They allege that Wang communicated with the Trustee and provided services for the Family Trust. They further contend that the McCallum Defendants failed to properly train, direct and/or supervise Wang. Plaintiffs allege that the McCallum Defendants and Wang coordinated the transfer of funds into the Family Trust, which triggered the need for legal notices, known as Crummey withdrawal letters (“Crummey letters”), to be issued to the Trust’s beneficiaries. Plaintiffs claim that Wang used William T. McCallum, CPA, P.C. letterhead to issue notices regarding the Crummey letters and for other correspondence with the Trustee. It is alleged that the provisions of the Family Trust were not followed when issuing the Crummey letters, that the Crummey letters were not timely prepared and that Wang asked the Trustee to backdate them, and that Crummey letters were improperly prepared for a beneficiary who did not have withdrawal rights and not prepared for some beneficiaries who did have withdrawal rights. Plaintiffs alleges that, as a result, the Trustee had to hire outside counsel and another accountant to correct the errors.

First Cause of Action

The complaint alleges malpractice against the McCallum defendants and Andy Pan (“Pan”), a CPA employee of William T. McCallum, CPA, P.C., with regards to accounting services provided to G3.

G3 alleges that it contracted with William T. McCallum and William T. McCallum, C.P.A., P.C. to perform accounting services and that Pan performed many of the accounting services complained of. The complaint alleges that the McCallum defendants and Pan failed to exercise due professional care, departed from the requisite professional standards and, as a result,

G3 suffered damages. Accordingly, Plaintiffs have set forth facts sufficient to set forth a cause of action for malpractice against the McCallum defendants and Pan. Summary judgment or dismissal of this cause of action is therefore not warranted.

Second Cause of Action

The second cause of action is for breach of contract between the McCallum defendants and G3, alleging that the McCallum defendants breached the contract by failing to exercise due professional care in performing accounting services to G3.

Plaintiffs have alleged that a contract exists, a breach of that contract, and damages. Accordingly, dismissal and summary judgment are not warranted on the second cause of action.

Third Cause of Action

The third cause of action, between G3 and the McCallum defendants, is for unjust enrichment due to payment for the accounting services complained of in the first two causes of action.

“An unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim.” *Corsello v Verizon N.Y., Inc.*, 18 N.Y.3d 777, 790 (2012). However, “where there is a bona fide dispute as to the existence of a contract or where the contract does not cover the dispute in issue, plaintiff may proceed upon a theory of quantum meruit and will not be required to elect his or her remedies.” *Joseph Sternberg, Inc. v. Walber 36th St. Assocs.*, 187 A.D.2d 225, 228 (1st Dep't 1993).

Here, there is no contention that a contract does not exist or that it does not cover the dispute in issue. The third cause of action essentially replicates the second cause of action in that it alleges that it paid the McCallum defendants and that the services it paid for were not properly

performed. The second cause of action states that G3 paid for the services it contracted for and that the McCallum defendants breached the contracts by not exercising due professional care in performing the services.

Therefore, because the claim for unjust enrichment duplicates the contract claim, Plaintiff, G3, has failed to state a cause of action for unjust enrichment, and the third cause of action should be dismissed.

Fourth Cause of Action

The fourth cause of action, between G3 and the McCallum defendants for conversion, alleges that, despite demand having been made, the McCallum defendants are in possession of work papers, records and documents which are the property of G3.

A cause of action for conversion cannot be maintained where “it merely restates the cause of action for breach of contract and alleges no independent facts sufficient to give rise to tort liability.” *See Yeterian v. Heather Mills N. V., Inc.*, 183 A.D.2d 493 (1st Dept. 1992)

In the present case, new facts are alleged to support the cause of action for conversion. Namely, plaintiff alleges that the McCallum defendants are in possession of work papers, records and documents that are the property of G3, that G3 has a possessory right to these documents, that demand has been made for their return, that the McCallum defendants have intentionally exercised control over this property, and that G3 has been damaged by the McCallum defendants actions in not returning the documents.

Therefore, dismissal of the fourth cause of action is not warranted.

Fifth Cause of Action

The fifth cause of action, against the McCallum defendants and Christine Wang, is for

malpractice when interpreting the provisions of the Family trust and issuing incorrect Crummey letters, failing to notify the Trust's beneficiaries of their right to withdrawals, improperly notifying a beneficiary of a right to withdrawal and incorrectly calculating the amount of the potential withdrawals.

Wang was an employee of McCallum CPA, P.C. There is no allegation that she is a CPA herself. The complaint alleges that Wang performed services for the Family Trust, that she failed to exercise due professional care and that the Family Trust was harmed by her negligence. The complaint alleges that Wang was trained, directed and supervised by the McCallum defendants and that the McCallum defendants failed to properly train, direct and supervise the work that Wang performed for the Family Trust.

“Each shareholder, employee or agent of a professional service corporation and a design professional service corporation shall be personally and fully liable and accountable for any negligent or wrongful act or misconduct committed by him or by any person under his direct supervision and control while rendering professional services on behalf of such corporation.”
NY CLS Bus Corp § 1505.

Pursuant to BCL NY CLS Business Corporation § 1505, each employee can be held liable for her negligence in rendering professional services. NY CLS Educ § 7401 defines the practice of public accountancy as:

1. offering to perform or performing attest and/or compilation services, as defined in section seventy-four hundred one-a of this article;
2. incident to the services described in subdivision one of this section, offering to perform or performing professional services for clients, in any or all matters relating to accounting concepts and to the recording, presentation, or certification of financial information or data; or
3. offering to perform or performing, for other persons one or more types of the

following services including but not limited to accounting, management advisory, financial advisory, and tax exclusive of services within subdivisions one and two of this section, involving the use of professional skills or competencies of the licensed accountant as described in the rules of the board of regents, including professional services rendered to one's employer not required to register under section seventy-four hundred eight of this article, in any and all matters related to accounting concepts and to the recording of financial data or information or the preparation or presentation of financial statements.

The complaint does not allege that the services performed by Wang were attest or compilation services or incident to attest/compilation services as defined in the statute.

Therefore, plaintiffs have failed to state a claim against Wang.

Sixth Cause of Action

The sixth cause of action is for breach of contract, against the McCallum defendants by Eric Warren Goldman ("Trustee") as trustee, alleging that the McCallum defendants failed to provide the Family Trust with the services it was paid for.

Plaintiffs have alleged that a contract exists, a breach of that contract, and damages. Accordingly, dismissal and summary judgment are not warranted on the sixth cause of action.

Seventh Cause of Action

The seventh cause of action is for unjust enrichment for the actions alleged in the fifth and sixth causes of action.

The seventh cause of action asserts no facts not asserted in the sixth cause of action. It is merely a duplicate of the breach of contract claim with a different title.

Therefore, because the claim for unjust enrichment duplicates the contract claim, Plaintiffs have failed to state a cause of action for unjust enrichment, and the seventh cause of action should be dismissed.

Eighth Cause of Action

The eighth cause of action is for malpractice against the McCallum Defendants by Cummings Goldman Capital Partners, L.L.C. for improperly disclosing Cummings' tax returns. The disclosures were made in the course of litigation to support the McCallum Defendants' contention that New York was an appropriate forum for their suit against Cummings. Defendants contend that the tax returns were only provided to Cummings' attorneys and to the Court, and that as stated in the Court's decision, the tax returns were provided on a CD for *in camera* review but were never looked at by the Court. This is not disputed by plaintiffs.

26 U.S.C. § 7216 prohibits the disclosure of information provided for or in connection with the preparation of income tax with an exception if the disclosure is made pursuant to any other provision of the title.

26 C.F.R. § 301.7216-2(g)(3) provides that a tax preparer may disclose tax return information "To any officer of a court for use in connection with proceedings involving the tax return preparer (including proceedings involving the tax return preparer in its capacity as a practitioner), or the return preparer's client, before the court or before any grand jury that may be convened by the court."

New York Board of Regents Rule 29.10(14)(c) provides that "[u]nprofessional conduct shall also include revealing of personally identifiable facts, data or information obtained in a professional capacity without the prior consent of the client, except such information may be disclosed as necessary to other licensees of the profession conducting professional standards or ethics reviews, or as otherwise authorized or required by law."

An "attorney is both an officer of the court and an advocate." *See* 22 NYCRR § 604.1.

The alleged disclosures in this case were made to Cummings' attorney and to the Court in connection with litigation between the parties concerning the accounting services provided by the McCallum Defendants to Cummings. Both the attorneys the tax returns were disclosed to and the Judge were officers of the Court. Therefore, disclosure of the tax returns was authorized by law, and plaintiff has failed to state a cause of action.

Ninth Cause of Action

The ninth cause of action, against the McCallum defendants by Cummings, is for negligence in disclosing the tax returns. As discussed above, the defendants were permitted by law to disclose the tax returns, and plaintiff fails to state a cause of action.

Tenth Cause of Action

The tenth cause of action, against the McCallum defendants by Cummings, is for unauthorized disclosure of the tax returns.

As explained above, the disclosure of the tax returns was authorized by law. Therefore, the tenth cause of action is dismissed.

Conclusion

Upon the affirmations of Samantha V. Lansky and the exhibits thereto, the plaintiffs' memorandum of law, defendants' memorandum of law, and all other papers heretofore had herein, it is hereby

ORDERED that the motion to dismiss is granted in part, and the third, fifth, seventh, eighth, ninth, and tenth causes of action of the complaint are dismissed; and it is further

ORDERED that the motion of CHRISTINE WANG to dismiss the complaint herein is granted, and the complaint is dismissed in its entirety as against said defendant, and the Clerk of

the Court is directed to enter judgment accordingly in favor of defendant, Christine Wang; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that defendants are directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in room 320, 80 Centre Street, on APRIL 2ND, 2014, at 9:30 AM; and it is further

ORDERED that counsel for the moving parties shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), who are directed to mark the court's records to reflect the change in the caption herein.

The foregoing constitutes the decision and order of the court.

Date:

1/17/14

New York, New York

Dec 2

Anil C. Singh

**HON. ANIL C. SINGH
SUPREME COURT JUSTICE**