XE Partners, LLC v Skadden Arps Slate Meagher & Flom LLP
2014 NY Slip Op 30668(U)
March 6, 2014
Sup Ct, New York County
Docket Number: 152994/2013
Judge: Eileen Bransten
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART THREE

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XE PARTNERS, LLC as MANAGING MEMBER OF XE CAPITAL MANAGEMENT, LLC,

Plaintiff,

-against-

SKADDEN ARPS SLATE MEAGHER & FLOM LLP, ALLISON L. LAND, ESQ., et al.,

Defendant.

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Index No. 152994/2013
Motion Date: 12/9/2013
Motion Seq. No.: 001

BRANSTEN, J.

Plaintiff XE Partners, LLC ("XE Partners") brings the instant action, asserting malpractice against its former legal counsel, Defendants Skadden Arps Slate Meagher & Flom LLP ("Skadden") and Allison L. Land. Defendants seek dismissal of the action, pursuant to CPLR 3211(a)(5),[1] as well as the imposition of sanctions against XE Partners. Plaintiff opposes. For the reasons that follow, Defendants' motion to dismiss is granted, while Defendants' motion for sanctions is denied.

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[1] When Defendants' motion was filed, Plaintiff's Complaint asserted not only a legal malpractice claim but also a claim for breach of fiduciary duty. After the filing of Defendants' motion to dismiss, Plaintiff withdrew its breach of fiduciary duty claim, leaving only the legal malpractice claim at issue on this motion. *See* Affirmation of Angela Y. Baker in Opposition to Motion to Dismiss ¶ 51 (discussing Plaintiff's withdrawal of its breach of fiduciary duty cause of action); Tr. of 11/1/13 Oral Arg. at 2:13-17. Defendants seek dismissal of the malpractice count pursuant to CPLR 3211(a)(5). *See* Notice of Motion.

I. Background[2]

Plaintiff XE Partners is the business of asset management and serves as the managing member of XE Capital Management, LLC ("XE Capital Management"). (Compl. ¶ 2.) Defendant Skadden is a law firm, of which Defendant Land is a partner. *Id.* ¶ 3.

This action stems from legal advice rendered by Defendants[3] to XE Partners in 2008. Partners sought counsel from Defendants regarding the withdrawal of certain members ("Members") from XE Capital Management. *Id.* ¶ 9. After reviewing certain documentation, including business valuation engagement agreements and a 2008 LLC Agreement, Defendants "directed [XE Partners] as to how to proceed with the withdrawal, including preparing necessary documentation, and instructed [XE Partners] on the interpretation of the agreements." *Id.*

The withdrawn Members then commenced an arbitration proceeding against Plaintiff, claiming entitlement to disbursements made after their withdrawal notices. *Id.* ¶ 11. The Members also contended that they were entitled to a greater buyout figure and argued that the business valuation, from which the buyout figure was derived, was not

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[2] Unless otherwise noted, the facts discussed in this section are drawn from Plaintiff's Verified Complaint ("Complaint").

[3] The Complaint refers to Defendants collectively and does not make particular allegations as to Skadden and Land.

performed in accordance with the LLC Agreement. *Id.* Plaintiffs contend that the work performed by Defendants was "at the heart of the aforementioned Members' action against [P]laintiff." *Id.* ¶ 12.

In 2010, the arbitration panel ruled in the Members' favor, determining, *inter alia*, that Plaintiff failed to follow a key provision of the LLC Agreement and used an inappropriate business valuation. *Id.* ¶ 17. Plaintiff attributes the conduct cited by the arbitration panel to Defendants' failure to exercise reasonable care and skill in their representation of XE Partners. *Id.* ¶ 21.

Accordingly, Plaintiff filed the instant action on March 29, 2013. Plaintiff's sole remaining claim alleges that Defendants committed legal malpractice.

II. Defendants' Motion to Dismiss

Defendants now seek dismissal of Plaintiff's legal malpractice claim under CPLR 3211(a)(5). Pursuant to CPLR § 214(6), the statute of limitations for such a claim is three years. Since the Complaint alleges that Defendants rendered the legal advice at issue in 2008, Defendants contend that the Plaintiff's March 2013 complaint is time-barred.

Plaintiff counters that its malpractice claim accrued, at the earliest, when the arbitration panel rendered its award in November 2010. Before that time, Plaintiff contends that it suffered no actionable injury and thus had no claim for malpractice.

Therefore, according to Plaintiff, its March 2013 complaint fell within the three-year statute of limitations.

Under New York law, "[i]t is well settled that a legal malpractice claim accrues when all the facts necessary to file the cause have occurred and the injured party can obtain relief in court." *Creditanstalt Inv. Bank AG v. Chadbourne & Parke LLP*, 14 A.D.3d 414, 415 (1st Dep't 2005). "What is important is when the malpractice was committed, not when the client discovered it." *McCoy v. Feinman*, 99 N.Y.2d 295, 301 (2002).

As explained by the Court of Appeals in the accounting malpractice context: "the claim accrues upon the client's receipt of the accountant's work product since this is the point that a client reasonably relies on the accountant's skill and advice and, as a consequence of such reliance, can become liable for tax deficiencies." *Ackerman v. Price Waterhouse*, 84 N.Y.2d 53, 541 (1994). Receipt of the accountant's advice "is the time when all the facts necessary to the cause of action have occurred and an injured party can obtain relief." *Id.*

The reasoning of *Ackerman* has been extended to attorney malpractice claims. For example, in *Proskauer Rose Goetz & Mendelsohn LLP v. Munao*, 270 A.D.2d 150 (1st Dep't 2000), the First Department cited *Ackerman* in holding that a client's legal malpractice counterclaims accrued when the client received defendant's purportedly

negligent work product. *See id.* at 151 ("The counterclaims accrued in April 1991, when plaintiff allegedly gave defendants negligent advice that they could shelter income through a certain joint venture."). The First Department likewise held in *Nuzum v. Field*, 106 A.D.3d 541, 541 (1st Dep't 2013), deeming legal malpractice claims brought in connection with the drafting of promissory notes time-barred where brought more than three years after the allegedly defective documents were prepared. *See also Mark v. Dechert, LLP*, 58 A.D.3d 553, 554 (1st Dep't 2009) ("Plaintiffs' legal malpractice claim is barred by the statute of limitations (CPLR 214[6]), which began to run in January 2000, when the merger of the corporate plaintiffs was completed and defendant law firm filed the merger documents.").

Viewed in this framework, Plaintiff's legal malpractice cause of action is clearly barred by the statute of limitations. Plaintiff's claim accrued when Defendants' allegedly negligent work product was received by Defendants. To paraphrase *Ackerman*, this was the time when all the facts necessary to the cause of action occurred and when Plaintiff was able to obtain relief. Since the advice was given in 2008, Plaintiff's 2013 filing was untimely.

In opposition, Plaintiff contends that it did not suffer an "actionable injury" until the adverse arbitral finding, and as such, had no claim until that point. However, the First Department rejected a similar argument in *Lincoln Place, LLC v. RVP Consulting, Inc.*,

70 A.D.3d 594 (1st Dep't 2010), dismissing a claim asserting legal malpractice in the drafting of a lease assignment as time-barred where the claim was brought five years after lease assignment was executed. While the plaintiff-client argued that its claim did not accrue until it was found liable for outstanding rent due to the faulty assignment, the First Department held otherwise, stating that the collateral adjudication "was not a prerequisite to the existence of an actionable injury." *Id.* at 594. Likewise here, the resolution of the arbitration was not a prerequisite to a pleading of "actionable injury" by XE Partners. Accordingly, Plaintiff's claim did not accrue after the arbitration ruling in 2010; instead, consistent with *Ackerman*, such claim accrued when the legal advice was received.

Plaintiff cites to a Second Department case, *Frederick v. Meighan*, 75 A.D.3d 528 (2d Dep't 2010) for the contrary proposition. Even accepting Plaintiff's reading of *Frederick* as correct for the sake of argument, this reading is in conflict with *Ackerman* and its First Department progeny and therefore is not controlling.

Thus, for the foregoing reasons, Defendants' motion to dismiss is granted on statute of limitations grounds.

III. Defendants' Motion for Sanctions

Defendants next request that the Court sanction Plaintiff for "frivolous conduct," on the grounds that Plaintiff's legal malpractice claim lacked merit. In support,

Defendants note that they advised Plaintiff's counsel in an April 26, 2013 letter that the malpractice claim was clearly time-barred and should be withdrawn. Since Plaintiff did not withdraw the claim, Defendants assert that they are entitled to sanctions under Rule 130-1.

A party's conduct merits sanctions under 22 NYCRR § 130-1.1 if "(1) it is completely without merit in law ...; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another ...; or (3) it asserts material factual statements that are false." As the First Department has counseled, the Court "must be careful to avoid the imposition of sanctions in cases where the appellant asserts colorable, albeit unpersuasive, arguments in good faith and without an intent to harass or injure." *Yenom Corp. v. 155 Wooster St. Inc.*, 33 A.D.3d 67, 70 (1st Dep't 2006). While the Court disagrees with Plaintiff's argument as to the validity of count one, the claim itself – and Plaintiff's arguments in support – are not so lacking in legal basis as to be deemed "frivolous." Moreover, Defendants have presented no argument that Plaintiff lacked good faith or brought the claim with malicious intent. Accordingly, Defendants' request for sanctions is denied.

(*Order follows on next page.*)

IV. Conclusion

Accordingly, it is

ORDERED that Defendants Skadden Arps Slate Meagher & Flom LLP and Allison L. Land's motion to dismiss is granted; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of Defendants dismissing this action, together with costs and disbursements to Defendants, as taxed by the Clerk upon presentation of a bill of costs; and it is further

ORDERED that Defendants' motion for sanctions is denied.

Dated: New York, New York
March 6, 2014

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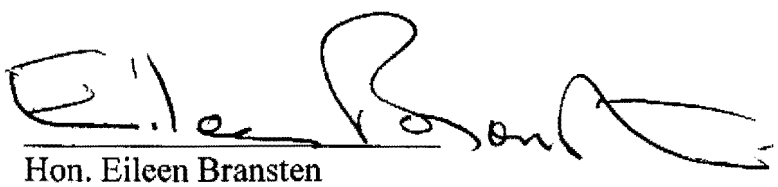

Hon. Eileen Bransten