

Kaminski v Sirera

2016 NY Slip Op 32995(U)

May 25, 2016

Supreme Court, Orange County

Docket Number: 0103/2016

Judge: Catherine M. Bartlett

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 ORIGINAL

SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. CATHERINE M. BARTLETT, A.J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

-----x

JILL KAMINSKI,

Plaintiff,

-against-

CHRISTINA SIRERA; ALLYSON AVILA, ESQ.;
WILSON, ELSER, MOSKOWITZ, EDELMAN &
DICKER, LLP; CHAR & HERZBERG, LLP, and
ED CHAR, ESQ.;

Defendants.

To commence the statutory time
period for appeals as of right
(CPLR 5513 [a]), you are
advised to serve a copy of this
order, with notice of entry,
upon all parties.

Index No. 0103/2016

Motion Date: May 10, 2016

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The following papers numbered 1 to 6 were read on the motion of defendants Allyson Avila, Esq. ("Avila") and Wilson, Elser, Moskowitz, Edelman & Dicker, LLP ("Wilson Elser") to dismiss the claims asserted against them in Plaintiff's amended complaint:

Notice of Motion - Affirmation / Exhibits - Memorandum	1-3
Affirmation in Opposition / Exhibits	4
Reply Affirmation - Reply Memorandum	5-6

Upon the foregoing papers, it is ORDERED that the motion is disposed of as follows:

Introduction

This action arises out of a dispute between plaintiff Jill Kaminski and defendant Christina Sirera over the operation of the Melange Med Spa, LLC (the "Spa"), a New York limited liability

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company engaged in the business of providing customers with various medical and non-medical beauty remedies. Plaintiff's amended complaint asserts that:

Plaintiff, who holds 50% of the outstanding stock of the LLC, brings this derivative action on behalf of the LLC to redress and prevent further breaches of fiduciary duty by Defendant Sirera, a Managing Member of the LLC; Defendant Elser, the attorney for the LLC; Defendant Avila, Esq., the individual attorney for the LLC (§10)

The complaint asserts various causes of action against defendant Sirera, including claims for waste of Spa assets and breach of fiduciary duty. The complaint also asserts causes of action against defendants Wilson Elser and Avila for (1) breach of fiduciary duty, (2) aiding and abetting defendant Sirera's breach of fiduciary duty, (3) legal malpractice, (4) breach of contract, and (5) attorney's fees and the costs of prosecution.

Prior Decision And Order Dated March 28, 2016

By prior Decision and Order dated March 28, 2016, this court found that Plaintiff is a "non-member purchaser" of LLC membership units owned by a prior "member" of the Spa, but is not herself a "member" of the Spa.

The essential facts are recited therein as follows:

Melange Med Spa, LLC was founded in 2007 by defendant Sirera and non-party Margaret Scully. By Purchase & Sales Agreement of Membership Units entered into on July 27, 2009, Ms. Sirera agreed to purchase Ms. Scully's Membership Units in the Spa. Pursuant to a Purchase Price Promissory Note made by defendant Sirera, (a) the purchase price was to be paid by Buyer to Seller in 98 equal monthly installments of \$505.00, (b) the Buyer's rights under the Purchase & Sales Agreement were assignable without limitation to plaintiff Jill Kaminski, and (c) the Buyer's duties, obligations and responsibilities under the Purchase & Sales Agreement were delegable without limitation to Ms. Kaminski. Ms. Kaminski alleges that "in or about 2009 or early 2010, [she] and Ms. Sirera agreed that [she] would acquire Scully's shares and would pay for said shares through deferred compensation payments not requiring [her] to pay any monies up front."

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The court concluded:

While Plaintiff may thereby have acquired Ms. Scully's Membership Units, she did not thereby become a Member of the Spa or become entitled to exercise the rights of a Member.

Citing the terms of the Spa's Operating Agreement, and Sections 602(b), 603(a), 604(a) and 407(a) of the Limited Liability Company Law, the court reasoned:

The legal effect of the cited provisions of the Spa's Operating Agreement and the Limited Liability Company Law is that Plaintiff could become a Member of the Spa only upon the consent of defendant Sirera evidenced in writing. Plaintiff has not established, or even asserted, that formal action was taken under the Operating Agreement or under the provisions of the Limited Liability Company Law to admit her as a new Member of the Spa; and defendant Sirera expressly denies that Plaintiff was admitted to Membership in the Spa.

Plaintiff provides no legal authority for her claim that she may be deemed a Member of the Spa absent compliance with the requirements of the Operating Agreement and the Limited Liability Company Law. Moreover, her claim that she was in fact informally admitted to Membership – i.e., that her legal status with the Spa was precisely the same as Defendant's – is contradicted by the Spa's tax returns: the K-1 forms designate Defendant as "General partner or LLC member-manager", and Plaintiff only as "Limited partner or other LLC member."

Plaintiff has therefore failed to establish that she is entitled to exercise the rights of a Member of the Spa. As a "non-member purchaser" of Ms. Scully's Membership Units, Plaintiff is entitled only "to share in such profits and losses, to receive such distributions, and to receive such allocation of income, gain, loss, deduction, credit or similar items to which the selling member would be entitled, to the extent of the interest assigned."

(Decision and Order dated March 28, 2016, pp. 2-6)

The Motion To Dismiss

Defendants Wilson Elser and Avila move to dismiss the claims asserted against them on three alleged grounds: (1) Since Plaintiff is not a "member" of the LLC, she lacks standing to bring a derivative action on the Spa's behalf; (2) Plaintiff fails to state a cause of action for legal malpractice against the Defendant attorneys for the Spa because the damages alleged are her

personal damages, not those of the Spa; and (3) the remaining causes of action are redundant and therefore subject to dismissal.

1. Plaintiff's Standing To Bring Her Derivative Action

In *Tzolis v. Wolff*, 10 NY3d 100 (2008), the plaintiffs, owners of 25% of the membership interests in Pennington Property Co. LLC, brought a derivative action in the right and on behalf of the LLC. The Court of Appeals held that as LLC members the plaintiffs had a common law right to sue derivatively on behalf of the LLC. *Id.*, 10 NY3d at 103-106, 109. Defendants here contend that since per this court's March 28, 2016 Decision and Order Plaintiff is not a "member" of the Spa but only a non-member owner of membership units, she falls outside the scope of *Tzolis v. Wolff* and lacks standing to bring a derivative action on the Spa's behalf.

However, the *Tzolis* Court's ruling was predicated on the analogy between, on the one hand, LLC members, and on the other, (i) corporate shareholders and (ii) limited partners – both of whom are accorded standing to bring derivative actions. *Id.*, 10 NY3d at 103-105. Plaintiff's status as a non-member owner of LLC membership units is substantially analogous to that of a corporate shareholder or a limited partner.

The *Tzolis* Court wrote:

The derivative suit has been part of the general corporate law of this state at least since 1832. It was not created by statute, but by case law. Chancellor Walworth recognized the remedy in *Robinson v. Smith*, 3 Paige CH. 222 (1832), because he thought it essential for shareholders to have recourse when those in control of a corporation betrayed their duty. Chancellor Walworth applied to a joint stock corporation – then a fairly new kind of entity – a familiar principle of the law of trusts: that a beneficiary (or "cestui que trust") could bring suit on behalf of a trust when a faithless trustee refused to do so. Ruling that shareholders could sue on behalf of a corporation under similar circumstances, the Chancellor explained:

“The directors are the trustees or managing partners, and the stockholders are the cestui que trusts, and have a joint interest in all the property and effects of the corporation....And no injury the stockholders may sustain by a fraudulent breach of trust, can, upon the general principles of equity, be suffered to pass without a remedy. In the language of Lord Hardwicke, in a similar case [*Charitable Corp. v. Sutton*, 2 Atk. 400, 406 (Ch. 17420)], ‘I will never determine that a court of equity cannot lay hold of every such breach of trust. I will never determine that frauds of this kind are out of the reach of courts of law or equity; for an intolerable grievance would follow from such a determination.’” (3 Paige Ch. at 232).

Eventually, the rule that derivative suits could be brought on behalf of ordinary business corporations was codified by statute (*see* Business Corporation Law §626[a]). But until relatively recently, no similar statutory provision was made for another kind of entity, the limited partnership; again, the absence of a statute did not prevent courts from recognizing the remedy. In *Klebanow v. New York Produce Exch.*, 344 F.2d 294 (2d Cir. 1965, Friendly, J.), the Second Circuit Court of Appeals held that limited partners could sue on a partnership’s behalf. For the Second Circuit, the absence of a statutory provision was not decisive because the court found no “clear mandate *against* limited partners’ capacity to bring an action like this” (*id.* at 298 [emphasis added]). We agreed with the holding of *Klebanow* in *Riviera Congress Assoc. v. Yassky*, 18 NY2d 540, 547...(1966, Fuld, J.), relying, as had Chancellor Walworth long before, on an analogy with the law of trusts:

“There can be no question that a managing or general partner of a limited partnership is bound in a fiduciary relationship with the limited partners ... and the latter are, therefore, *cestui que trustent* ... It is fundamental to the law of trusts that the *cestuis* have the right, ‘upon the general principles of equity’ (*Robinson v. Smith*, 3 Paige Ch. 222, 232) and ‘independently of [statutory] provisions’ (*Brinckerhoff v. Bostwick*, 88 NY 52, 59), to sue for the benefit of the trust on a cause of action which belongs to the trust if ‘the trustees refuse to perform their duty in that respect’. (*Western R.R. Co. v. Nolan*, 48 NY 513, 518)”

Tzolis, supra, 10 NY3d at 103-105.

Here, defendant Sirera, as Managing Member of the Spa, unquestionably owed a fiduciary duty to Plaintiff, as a non-member owner of LLC membership units. Under the principles set forth in *Tzolis v. Wolff*, Plaintiff has a common law right to sue on behalf of the Spa to redress the alleged betrayal by defendant Sirera of her duties to Plaintiff and to the Spa.

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By extension, Plaintiff also has standing to bring a derivative action against defendants Wilson Elser and Avila, in their capacity as attorneys for the Spa, to remedy the alleged breach of their fiduciary duty to the LLC. *See, Stack v. Midwood Chayim Aruchim Dialysis Associates, Inc.*, 54 AD3d 935 (2d Dept. 2008).

Therefore, Defendants' motion for dismissal on the ground of Plaintiff's supposed lack of standing to sue derivatively on behalf of the Melange Med Spa, LLC is denied.

2. The Legal Insufficiency Of The Claims For Legal Malpractice

The Twelfth and Thirteenth Causes of Action in the Amended Complaint purport to set forth claims for legal malpractice against Defendants Wilson Elser and Avila as attorneys for the Spa. However, the damage allegedly resulting from this malpractice is legal fees and expenses incurred, not by the Spa, but by Plaintiff herself.

"Damages in a legal malpractice case are designed 'to make the injured client whole' (*Campagnola v. Mulholland, Minion & Roe*, 76 NY2d 38, 42... [1990])." *Rudolph v. Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438, 443 (2007) (emphasis added). While the *Rudolph* Court recognized that malpractice damages may include "litigation expenses incurred in an attempt to avoid, minimize, or reduce the damage caused by the attorney's wrongful conduct," the damages/expenses must be those of the attorney's *client*. *Id.* Plaintiff expressly pleads that Defendants Wilson Elser and Avila were attorneys for the Spa, not for Plaintiff herself. (Complaint ¶¶ 182, 189) Inasmuch as the Thirteenth and Fourteenth Causes of Action plead only damages incurred by Plaintiff herself, and not by the Spa (*Id.*, ¶¶ 185, 192), they fail to state a valid cause of action for legal malpractice and are therefore subject to dismissal. *See, e.g., Engelke v. Brown Rudnick Berlack Israels LLP*, 111 AD3d 444 (1st Dept. 2013).

3. The Alleged Redundancy Of The Remaining Claims

Duplicative pleading of causes of action “premised on the same facts and seeking the identical relief” is improper. *See, Ulico Casualty Company v. Wilson, Elser, Moskowitz, Edelman & Dicker*, 56 AD3d 1, 9 (1st Dept. 2008); *Weil, Gotshal & Manges, LLP v. Fahon Boutique of Short Hills, Inc.*, 10 AD3d 267, 271 (1st Dept. 2004); *Daniels v. Lebit*, 299 AD2d 310 (2d Dept. 2002); *Mecca v. Shang*, 258 AD2d 569 (2d Dept. 1999).

The Fourteenth and Fifteenth Causes of Action, for breach of contract, allege a breach of the retainer agreement between the Spa and the Defendant attorneys. (Complaint ¶¶195-196, 203-205) These claims arise from the same facts as the claims for legal malpractice, and seek the same damages: Plaintiff’s own attorney’s fees and expenses, not the Spa’s. (*Id.*, ¶¶ 199, 208) Since Plaintiff was not a party to the retainer agreement, she may not recover her personal legal fees and expenses as damages for the alleged breach of that agreement. In other words, the claims for breach of contract are defective for the same reason the legal malpractice claims are defective, and are likewise subject to dismissal.

However, the four claims premised on breach of fiduciary duty – Nos. 5, 6, 7, and 8 – are distinct claims premised on different theories of recovery, seeking legally cognizable damages, and neither duplicative nor redundant:

- The Fifth Cause of Action asserts a derivative claim against defendant Wilson Elser for breach of its fiduciary duty to the Spa, and seeks legally cognizable damages for “the misuse and waste of the LLC’s assets and lost LLC profits.”
- The Sixth Cause of Action asserts a derivative claim against defendant Avila for breach of her fiduciary duty to the Spa (including, above and beyond the matters alleged as to Wilson Elser, her alleged improper receipt of free services from the Spa), and seeks legally cognizable damages for “the misuse and waste of the LLC’s assets and lost LLC profits.”

- The Seventh Cause of Action asserts a derivative claim against defendant Wilson Elser for aiding and abetting defendant Sirera's alleged breach of fiduciary duty, which is a legally cognizable action distinct from Wilson Elser's alleged breach of its own fiduciary duty to the Spa. *See, Ulico Casualty Company v. Wilson, Elser, Moskowitz, Edelman & Dicker, supra*, 56 AD3d at 10-12.
- The Eighth Cause of Action asserts a derivative claim against defendant Avila for aiding and abetting defendant Sirera's alleged breach of fiduciary duty, which is a legally cognizable action distinct from Avila's alleged breach of her own fiduciary duty to the Spa. *See, id.*

The Seventeenth Cause of Action pleads, in essence, that as a result of all the wrongdoing alleged in the complaint, Plaintiff was forced to expend her personal resources to prosecute this derivative action, and is entitled to recover her litigation expenses. The question whether a successful plaintiff in a common law derivative action is entitled to recover litigation fees and expenses is not presently before this court. (*Cf.*, Business Corporation Law §626(e), providing for an award of reasonable expenses, including reasonable attorney's fees, to successful plaintiffs in corporate shareholders' derivative actions). Regardless, the Seventeenth Cause of Action pleads a separate and distinct claim which is not subject to dismissal as duplicative or redundant.

It is therefore

ORDERED, that the motion of defendants Allyson Avila, Esq. and Wilson, Elser, Moskowitz, Edelman & Dicker, LLP to dismiss the Plaintiff's Amended Complaint is granted in part and denied in part, and it is further

ORDERED, that the Twelfth, Thirteenth, Fourteenth and Fifteenth Causes of Action set forth in Plaintiff's Amended Complaint are hereby dismissed, and it is further

ORDERED, that the motion to dismiss is in all other respects denied.

The foregoing constitutes the decision and order of this Court.

Dated: May 25, 2016 ENTER
Goshen, New York



HON. CATHERINE M. BARTLETT, A.J.S.C.

**HON. C. M. BARTLETT
JUDGE NY STATE COURT OF CLAIMS
ACTING SUPREME COURT JUSTICE**