**Stagg, Terenzi, Confusione & Wabnik, LLP v Clark Dodge Holding, LLC**

2018 NY Slip Op 34604(U)

July 16, 2018

Supreme Court, Nassau County

Docket Number: Index No. 602904/2015

Judge: Arthur M. Diamond

SUPREME COURT - STATE OF NEW YORK

Present:

HON. ARTHUR M. DIAMOND
Justice Supreme Court

---x

STAGG, TERENZI, CONFUSIONE & WABNIK, LLP,

Plaintiff,

-against-

CLARK DODGE HOLDING, LLC, CLARK DODGE & CO., INC., CLARK DODGE ASSET MANAGEMENT LLC, CLARK DODGE FINANCE, LLC, JOSEPH V. DIMAURO, and MICHAEL CLARK,

Defendants.

---x

TRIAL PART: 7

NASSAU COUNTY

INDEX NO: 602904/2015

# DECISION & ORDER AFTER TRIAL

Plaintiff law firm Stagg, Terenzi, Confusione & Wabnik (hereinafter "STCW") commenced this action against Defendants Clark Dodge Holdings, LLC, Clark Dodge & Co. Inc., Clark Dodge Asset Management LLC, Clark Dodge Finance, LLC, Joseph DiMauro, and Michael Clark on May 11, 2015, asserting claims arising out of a retainer agreement for legal service for breach of contract, account stated, detrimental reliance, violations of various sections of the debtor and creditor law, and to pierce the corporate veil against Defendant DiMauro. Defendants denied each of these claims.

A non-jury trial was held on November 20, 2017, through November 22, 2017; January 9 and 10, 2018; and April 16 and 17, 2018. Several witnesses testified, including Mr. Stagg on behalf of Plaintiff and Mr. DiMauro on behalf of Defendants. Careful consideration was given to both the manner of substance of their testimonies.

## Background

In 1996, Joseph DiMauro purchased the business and name of "Clark Dodge & Co." (hereinafter "CDC"). He described the business as a securities broker-dealer on a very limited basis and an investment advisor with the ability to do 'banking deals'. Trial Transcript page 105, April 16, 2018. Mr. DiMauro held a series 2, 3, 7, 24, 55, and 63 licenses at the time of its creation. CDC also had an asset management business, known as Clark Dodge Asset Management (hereinafter "CDAM"), which was also purchased by Mr. DiMauro. As he described the businesses, CDC made money by its brokers charging clients fees per transactions. It was prohibited from engaging in banking deals. That business was under the auspices of FINRA. CDC was also a registered investment advisor. On the other hand, CDAM charged clients an annual management/advisory fee and it reported to the SEC.

By 2012, CDC had offices on Long Island and in Westchester, ten brokers, and five support personnel with revenue of two to three million. It historically showed a loss. CDAM had over one hundred million in assets; yet, there was no testimony as to its profitability. From 2012 through August 2013, DiMauro was the sole owner of CDC. Since he was the only one who held the appropriate licenses, he was the only one who could put capital into the firm under FINRA regulations.

In or around November 2012, Mr. Michael Clark bought into CDC and became Mr. DiMauro's partner. Mr. Clark was known to Mr. DiMauro as someone who had a significant and wide-ranging banking resume, with decades of experience. Mr. Clark represented that he could take CDC and turn it into a thriving business, which DiMauro felt he himself was unable to do. Trial Transcript, page 107-108, April 16, 2018. The new entity was to be known as Clark Dodge Holdings, Inc. (hereinafter "CDH") and CDC was brought under its umbrella. Mr. DiMauro testified that Mr. Clark took over the total operations of CDH and CDC, including hiring a chief financial officer, outside counsel, and negotiating a new agreement with Mike Sanders, then a thirty percent (30%) owner of CDAM, with Mr. DiMauro owning the remaining seventy percent (70%), that involved moving CDAM into CDH. Unfortunately, Mr. Clark and Mr. Sanders were unable to come to an agreement; thus, CDAM was never integrated into CDH.

Mr. Clark also hired several investment bankers who were to bring clients into CDH and engage the firm in the investment banking business. Almost one million dollars ($1,000,000.00) were spent on salaries for these people. While several deals were initiated, none closed, with the exception of a relatively small one known as Solavei.

Later in 2012, when there was not enough money to pay salaries, Mr. Clark was forced to put funds into CDH to pay employees. However, since only Mr. DiMauro was permitted to put money into CDC, money often had to be transferred from Mr. Clark's account to CDH, then from CDH into Mr. DiMauro's personal account, and finally from there into CDC. The testimony established that during this time, Mr. Clark contributed one million, one hundred nine thousand dollars ($1,109,000.00) and Mr. DiMauro contributed one hundred fifty-eight thousand, six hundred thirty-three ($158,633.00), with additional moneys being contributed subsequently.

In December of 2013, the relationship between Mr. Clark and Mr. DiMauro had deteriorated to the point that Mr. Clark left the firm. He subsequently sued Mr. DiMauro in several venues and litigation is still pending as of this date. Soon after, CDC ran out of capital and could no longer meet FINRA requirements. By March 2015, CDC stopped doing business altogether. With CDC out of business, CDH had no further reason for existing. At this time the plaintiff was owed $197,739.04 plus interest pursuant to the agreement and that unpaid bill is the basis for this lawsuit.

With regard to the relationship between STCW and DiMauro, Mr. DiMauro testified at the trial that he met Tom Stagg from Plaintiff's office through a mutual friend in their neighborhood in Westchester County and that Mr. Stagg had represented Mr. DiMauro in a lawsuit against a homebuilder. After CDH was formed and the investment bankers were hired, several potential deals began to be discussed. It was at this time that it was decided that counsel was needed to help navigate these transactions and Mr. DiMauro then introduced Mr. Stagg to Mr. Clark; furthermore, it was Mr. Clark's decision to hire Plaintiff's law firm.

**Interrogatories and Discussion**

Based upon the pleadings and the evidence presented, the Court has determined that the following interrogatories would be decided herein.

1. *Did Defendant CDH and related entities enter into a valid contractual relationship with Plaintiff?*
2. *Did Plaintiff perform pursuant to the agreement?*
3. *Did Defendant breach the agreement?*
4. *Is Defendant CDAM, the only remaining viable entity, liable for the outstanding bill from Plaintiff of one hundred ninety-seven thousand, seven hundred thirty-nine dollars and four cents ($197,739.04), plus interest, for a total of three hundred seven*

*thousand, three hundred twenty-five dollars and sixty-six cents ($307,325.66)?*

*5. Did Defendant DiMauro violate the Debtor and Creditor Law?*

The Retainer Agreement

Plaintiff states that they have proved that they entered into an attorney-client fee contract (retainer) with CDAM when Mr. DiMauro, an officer and managing agent of CDAM, signed the retainer agreement, that the retainer agreement is clear and unambiguous, and that it should be enforced as against CDAM according to its terms. Further, Plaintiff states that it provided clear proof establishing its performance pursuant to the agreement and, therefore, has also established its claim for account stated and detrimental reliance, including damages for its outstanding fees. Plaintiff argues that the businesses named in the retainer and their affiliated companies were essentially one and the same, and as such, CDAM should be held responsible for the legal fees incurred on behalf of CDC.

Defendants' main contention on this point is that Plaintiff has consistently misrepresented the structures of the corporate defendants herein. Specifically, they dispute Plaintiff's claim that CDAM was a wholly owned subsidiary or affiliate of CDH and denies that CDAM bears joint and several, guarantor-type of liability for the debts incurred by the other affiliated companies.

The contract in question is titled "Attorney-Client Fee Contract", of which the first paragraph reads as follows:

> "The agreement is made between Stagg, Terenzi, Confusione & Wabnik, LLP, 401 Franklin Avenue, Suite 300, Garden City, New York, 111530, referred to in this agreement as 'The Firm' and Clark Dodge Holding, LLC, which for purposes of this agreement shall include any affiliated companies such as Clark Dodge Asset Management LLC and Clark Finance, LLC, with an address at 2 Gannett Drive, Suite 410, White Plains, New York, 10604, and referred to in this agreement as 'Client', in order to set out the terms and conditions under which the Firm will represent Client."

According to the testimony of Mr. DiMauro, upon his receipt of the agreement, he immediately contacted Mr. Stagg and told him that CDAM should not be included in the agreement since none of the work was going to be done for CDAM, as that business did not engage in banking deals, its charter would not allow it, and it was a separate company. In response, Mr. Stagg replied "not to worry, that it was only of maintaining attorney-client privilege that CDAM was included in the agreement. Mr. DiMauro testified that "I said I need that in writing, and he sent me an email shortly thereafter." Trial Transcript page 6, April 17, 2018. The email that he received stated that it included the various entities to ensure that the attorney-client privilege will apply to each entity: CDH, CDAM, and Clark Dodge Finance, LLC (hereinafter "CDF"). Mr. DiMauro testified that, had he been made aware that CDAM could have been responsible for legal fees under this arrangement, he would not have signed the retainer agreement.

Mr. Stagg testified that his email and phone call concerning the inclusion of CDAM and the issue of privilege were never meant to limit the Plaintiff/CDAM relationship in any way and that the retainer clearly refers to CDAM as a client. He also stated that Plaintiff required an agreement with each client, that Mr. DiMauro signed the agreement on behalf of the three companies, and CDAM is specifically listed in the signature block. In addition, Plaintiff claims that Mr. DiMauro and CDAM waived the right to assert that CDAM is not obligated under the retainer because it asked Plaintiff to do substantial work on CDAM's behalf, which services directly benefited CDAM.

Based upon the foregoing, the Court finds that Defendant DiMauro did in fact enter into the retainer on behalf of the three companies. The so-called "privilege email" does not affect the finding on this point one way or the other. Thus, the Court answers the first interrogatory in the affirmative. Likewise, the Court answers the second and third interrogatories in the affirmative as well; that is, Plaintiff performed work on behalf of Defendant CDH and it has not paid for these services.

Joint and Several Liability

Turning next to the fourth interrogatory, the issue now becomes whether or not each entity served as a guarantor of the legal bills for each other. Clark Dodge Holdings, Clark Dodge & Co., and Clark Dodge Finance have all been shut down, yet, Plaintiff maintains that based upon the language of the retainer agreement, CDAM is jointly and severally liable for the outstanding legal bills incurred on behalf of any or all of the affiliated companies. In their post-trial memorandum, Plaintiff primarily relies on the case of Epstein Becker & Green, P.C. v. Amersino Marketing Group, LLC (111 AD3d 428, 974 NYS2d 393 [1st Dept., 2013]) in support of its position on this issue.

In that case, the issue was whether the plaintiff law firm's retainer agreement covered their representation of the defendant in two separate underlying actions. The Appellate Division, First Department, found that while defendants initially sought plaintiff to represent them in the first action, it was undisputed that they requested plaintiff's services with respect to the other action shortly thereafter; therefore, the retainer covered representation in the second action. In the case before this Court, the retainer agreement covered CDAM and any work done on its behalf; however, unlike Epstein, the work done for CDH did not involve overlapping work for CDAM. Furthermore, and more significantly, the defendant in Epstein signed the retainer individually and was therefore liable for the resulting fees, whereas here, Mr. DiMauro did not sign in an individual capacity.

Plaintiff next relies on the case of Phillips Nizer Benjamin Krim & Ballon v. Chu (240 AD2d 231, 659 NYS2d 4 [1st Dept., 1997]), which granted plaintiff's relief for legal fees on summary judgment against defendants, holding them jointly and severally liable for plaintiff's outstanding legal bill. In affirming the granting of summary judgment, the Appellate Division, First Department, found that although the retainer agreement excluded defendants Eastbank and Chu from joint and several liability and required payment only for their proportionate share of the legal fees, since both of the underlying actions were based upon the same facts and all discovery and research covered the issues in both actions, all defendants were jointly and severally liable for all of the fees.

Here, the facts before this Court are clearly distinguishable, as there was no attempt to apportion fees between the entities. Even assuming, *arguendo*, that an attempt was made to apportion the fees between the Defendants, the outcome would not change because the billings were almost completely for work done for CDH as opposed to CDAM. Plaintiff has not made a showing that the work performed for CDH overlapped with legal work performed for CDAM, save for a single inquiry concerning the propriety of earning fees if one company referred clients to the other. That email, dated May 17, 2013, the subject of which was "Asset Management Referrals", now in evidence as Plaintiff's Exhibit 3, reads as follows:

"Joe and Basil,

> Clark Dodge & Company, Inc. (the "Company") is a registered broker-dealer that is considering compensating Clark Dodge Asset Management, LLC ("Asset Management") for referring investors to the company. Our research

> indicates that this is permissible if Asset Management discloses to its clients the compensation received from the Company, obtains the clients' written consent, and provides the other written disclosures discussed below."

The email goes on for a printed page and a quarter, explaining the firm's opinion. The testimony surrounding this email explained that Mr. Clark was attempting to have CDAM's clients steered to deals that CDH was working on at a time when Mr. Clark was desirous of having CDAM moved into CDH, a plan that he ultimately gave up on. There are no other emails that explicitly deal with CDAM. A search of the firm's billing records does not indicate any billing done on that date.

When two or more tortfeasors act concurrently or in concert to produce a single injury, they may be held jointly and severally liable. Ravo v. Rogatnick, 70 NY2d 305, 520 NYS2d 533 (1987). Joint and several liability, primarily a tort law concept, imposes on each wrongdoer responsibility for the entire damages awarded, even though a particular wrongdoer's conduct may have caused only a portion of the loss. Matter of Seagrott Floral Co. (Riccardi), 78 NY2d 439, 576 NYS2d 831 (1991). The rationale for such liability is that the wrongdoers are considered part of a joint enterprise and a mutual agency such that the act of one is the act of all and liability for all that is done is visited upon each. Id at 448, 836.

For this Court to hold a defendant liable for the debts of a related business entity, it must find that the related entity explicitly agreed to serve as a guarantor of the other entity's liability. This Court finds no evidence of any such agreement here; moreover, there is no question that each of these three entities had an independent legal existence. They engaged in separate businesses such that each reported to a different federal enforcement agency and one could not, by law, engage in the same business of the other. They had separate bank accounts, despite having one bookkeeper. The billings of Plaintiff almost exclusively detailed work done on behalf of CDH.[1] CDAM was not a party to any of the work performed by Plaintiff, all of which was attributed to CDH's investment banking endeavors, none of which apparently came to

---

[1] Plaintiff's Exhibit 6, now in evidence, is a spread sheet of the outstanding bills Plaintiff had as of the start of this trial. Every one of these projects involved work done by Plaintiff on behalf of CDH. Without the accrued interest, they were in sum as follows: SOL Project, $22,282.78; John Carris Merger, $40,446.26; Opus Hedge Fund, $1,040.00; NPS Project, $4,670.00; Atossa Bridge Loan, $2,880.00; Hilliar's Engagement, $23,010.00; Solavei Bridge, $58,250.00; Hydra/Hercules, $14,220.00; Life Engagement, $8,080.00; US Trust Escrow, $2,580.00; Solavei/Opus, $7,910.00; Atossa PIPE, $5,540.00. The total of these bills, plus miscellaneous assignments is $197,739.04.

fruition. The one thing CDH and CDAM had in common was Defendant DiMauro. However, this fact alone is insufficient to find an agency or guarantor relationship exists between CDH and CDAM. Agency law determines whether liability should be extended to reach assets beyond those belonging to the individual corporation. Port Chester Electrical Construction Corp. v. Atlas, 40 NY2d 652, 389 NYS2d 327 (1976).

For the reasons stated above, this Court finds CDAM is not liable for the outstanding bill of Plaintiff and answers the fourth interrogatory in the negative. Coinciding with this, the fifth interrogatory is deemed moot.

## Conclusion

Defendant CDH clearly breached the retainer agreement by not paying for services rendered to it by Plaintiff. However, CDAM was not a party to that work, nor did DiMauro cause CDH to become insolvent so as not to pay Plaintiff for the work performed. Accordingly, the decision of this Court after trial is in favor of Plaintiff against Clark Dodge Holding, LLC, for the complaint amount of one hundred ninety-seven thousand, seven hundred thirty-nine dollars and four cents ($197,739.04), plus interest at the contract rate of twelve percent (12%) from September 1, 2013, through the date of this decision and order. All other claims against all other Defendants are hereby dismissed forthwith.

Plaintiff shall file and serve the within order with notice of entry upon Defendants within thirty (30) days from the date of this order.

This hereby constitutes the decision and order of this Court.

ENTER

DATED: July 16, 2018

HON. ARTHUR M. DIAMOND
J.S.C.

ENTERED
JUL 16 2018
NASSAU COUNTY
COUNTY CLERK'S OFFICE