Incorporated Vil. of Freeport v Albrecht, Viggiano, Zurich & Co., PC
2018 NY Slip Op 34605(U)
July 2, 2018
Supreme Court, Nassau County
Docket Number: Index No. 607889/2015
Judge: Stephen A. Bucaria
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA
Justice

TRIAL/IAS, PART 1
NASSAU COUNTY

INCORPORATED VILLAGE OF FREEPORT,

Plaintiff,

-against-

ALBRECHT, VIGGIANO, ZURICH & COMPANY, PC, ROBERT MCGRATH AND PATRICK BRYAN,

Defendants.

INDEX No. 607889/2015

MOTION DATE: 6/11/18
Motion Sequence # 003

The following papers read on this motion:

Notice of Motion..X
Affirmation in Support................................X
Memorandum of Law in Opposition............X
Memorandum of Law in Support.................X
Reply Affirmation......................................X

Motion by third-party defendant Howard Colton to dismiss the third-party complaint for failure to state a cause of action is **granted** in part and **denied** in part.

This is an action for accounting malpractice. Defendant Albrecht, Viggiano, Zurich & Company, PC is an accounting firm which provided auditing and other financial services to plaintiff Village of Freeport for approximately ten years. Defendant Robert McGrath was the partner in charge of the Village audit, and defendant Patrick Bryan was the audit manager.

On February 8, 2011, defendants sent the Village an engagement letter, setting forth the services which were to be performed for the fiscal year ending February 28, 2011 (Doc 78). These services included assisting with preparation of the "basic financial statements," which would be audited, as well as "required supplementary information," including "management's discussion and analysis," which would not be audited. At the end of the 2011 engagement letter, it states, "This letter correctly sets forth the understanding of The Incorporated Village of Freeport" and is signed by the Village Mayor. The letter is also stamped, "Approved as to form," and is signed by the Village Attorney.

On March 23, 2012, defendants sent a similar engagement letter for the fiscal year ended February 29, 2012 (Doc 79). The March 23, 2012 letter similarly states that it "correctly sets forth the understanding" of the Village but is signed not by the mayor, but by the Village Attorney.

On February 26, 2013, defendants sent a similar engagement letter for the fiscal year ended February 28, 2013 (Doc 80). The February 26, 2013 letter states that it "correctly sets forth the understanding" of the Village and is signed only by the Village Attorney.

Since 2011, the Village has paid defendants $826,661 in accounting fees, including $307,000 for audit services and $519,661 for non-audit services.

The Village alleges that, for the year ending February 28, 2013, Albrecht, Viggiano prepared audited financial statements that understated accounts payable by approximately $971,000. The Village further alleges that, as a result of the understated accounts payable and other incorrect journal adjusting entries, it received an unfavorable rating by Moody's, which increased the interest rate at which it was required to borrow. Defendants' engagement was terminated in 2013 after the Village discovered the alleged errors in its financial statements.

This action was commenced on December 7, 2015. In the first cause of action in the amended complaint, plaintiff asserts claims for accounting malpractice. In the second cause of action, plaintiff asserts a claim for breach of the contract to provide non-audit services. Plaintiff alleges that it paid defendants $153,736 for non-audit services for the fiscal year ending February 28, 2013; $182,966 for non-audit services for fiscal year ending February 28, 2012; and $182,958 for non-audit services for fiscal year ending February 28, 2011. Plaintiff seeks disgorgement of the fees for non-audit services on the ground that they were not authorized by the Board of Trustees, as well as consequential damages. Plaintiff also asserts claims for fraud, conspiracy, negligent misrepresentation, unjust enrichment, and breach of fiduciary duty.

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On April 25, 2018, defendant Albrecht, Viggiano filed a third-party complaint against third-party defendant Howard Colton, the Village Attorney, as well as a number of unidentified village officials or employees. Defendant asserts third-party claims for indemnity and contribution. Defendant relies upon Village Law § 4-412(12), which provides that "An officer or person who assumes to create a liability or appropriate money or property of the village without authority of law, or assents thereto, is personally liable for such debt, or to the village for such money or property." Thus, defendant argues that if it is required to disgorge any fees for non-audit services, Colton is personally liable for the fees because he assumed to create liability of the village without authority.

By notice of motion dated May 17, 2018, third-party defendant Howard Colton moves to dismiss the third-party complaint for lack of standing and failure to state a cause of action. Colton argues that he cannot be personally liable for Albrecht, Viggiano's "failure to adhere to the requirements of Village Law § 4-412," so as to obtain an enforceable contract for non-audit services. Thus, Colton argues that he has no duty to indemnify defendants pursuant to any contract or under any theory of unjust enrichment.

On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. The court must accept the allegations of the complaint as true and provide plaintiff the benefit of every possible favorable inference. Further, any deficiencies in the complaint may be amplified by supplemental pleadings and other evidence. Whether plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss but must await a summary judgment motion (**AG Capital Funding Partners v. State Street Bank and Trust Co.**, 5 NY3d 582, 591 [2005]).

A municipal contract which does not comply with statutory requirements or local law is invalid and unenforceable (**Nassau v Grand Baldwin Assoc**, 128 AD3d 1004 [2d Dept 2015]). Where a statute or local law provides that a contract may be made only by specified officers or boards and in specified manner, a contract which fails to comply with these restrictions creates no obligation or liability on the municipality (**Infrastructure Mgmt v Nassau**, 2 AD3d 784, 786 [2d Dept 2003]).

Village Law § 4-400(1)(i) provides that it shall be the responsibility of the mayor to execute all contracts in the name of the village. However, the Village Law contains no express statutory provision requiring village boards to approve contracts in their entirety before their execution by the mayor (**Guazzoni v Tuxedo Park**, 2018 N.Y. LEXIS 2262 [Sup Ct Orange Co June 12, 2018]). Moreover, except for the provision that the mayor execute the contract, the village law does not specify the manner in which village contracts must be made (Id).

Because the February 8, 2011 engagement agreement was signed by the village mayor, it was presumably authorized. Nevertheless, for purposes of this motion to dismiss, the court must give third-party plaintiff the benefit of the possible favorable inference that the February 2011 engagement agreement was unauthorized.

Although the signature of the Village Attorney on the February 8, 2011 engagement letter is illegible, the court must give third-party plaintiff the benefit of the possible favorable inference that it was signed by Howard Colton. However, because the February 8 engagement letter was approved only "as to form," third party defendant Colton did not "assume to create a liability" of the village by signing the engagement letter. Accordingly, third-party defendant Colton's motion to dismiss is **granted** to the extent that the third-party complaint is based upon the February 8, 2011 engagement letter.

Neither the March 23, 2012, nor the February 26, 2013, engagement letters were signed by the village mayor. Thus, neither of those documents could give rise to an enforceable contract to perform non-audit services.

The signature of the Village Attorney on the March 23, 2012 and February 10, 2013 engagement letters are similarly illegible. Nevertheless, the court must give third-party plaintiff the benefit of the possible favorable inference that the letters were signed by Howard Colton.

The court concludes that the language "correctly sets forth the understanding of the Village of Freeport" assumes or purports to create a liability of the village based upon the engagement letters. If the village board of trustees did not ratify Colton's action of accepting the engagement letters, (See **Lansing v Triphammer Dev Co.**, 193 AD2d 919 [3d Dept 1993]), Colton could be liable for the unauthorized amount of the non-audit fees for 2012 and 2013.

Because Village Law § 4-412(1) provides that the unauthorized official is personally liable for "such debt," it is clear that the obligor of the debt, or the contracting party, has standing to sue the village official (See, 8 Op. State Compt. 165 [1952]). Third-party defendant's motion to dismiss the third-party complaint for lack of standing is denied.

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Third-party defendant Colton argues that municipal officials may be personally liable, only if there is fraud, collusion, bad faith, or acts motivated by personal gain (**Murtha v Island Park**, 202 AD2d 650 [2d Dept 1994]). However, **Murtha** involved personal liability pursuant to General Municipal Law § 51, prosecution of officers for illegal acts, rather than Village Law § 4-412(12).

Accordingly, third-party defendant Colton's motion to dismiss is denied as to the March 2012 and February 2013 engagement letters.

Any argument not addressed herein is deemed to be without merit.

So ordered.

Date: JUL 0 2 2018

Stephen A. Bucaria
J.S.C.

ENTERED
JUL 0 9 2018
NASSAU COUNTY
COUNTY CLERK'S OFFICE