Lahey v Santinelli
2019 NY Slip Op 32757(U)
September 18, 2019
Supreme Court, Suffolk County
Docket Number: 19428-2014
Judge: Elizabeth H. Emerson
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[* 1]

SHORT FORM ORDER

INDEX
NO.: 19428-14

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 44 SUFFOLK COUNTY

PRESENT: Hon. Elizabeth Hazlitt Emerson

GAYLE LAHEY AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF DAVID MICHAEL LAHEY,

Plaintiff,

-against-

ROBERT SANTINELLI and MERRILL LYNCH PIERCE FENNER & SMITH, INCORPORATED, AND MERRIL LYNCH LIFE AGENCY, INC.,

Defendants.

MOTION DATE: 3-14-19; 4-25-19
SUBMITTED: 5-30-19
MOTION NO.: 003-MOT D
004-XMOT D

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Upon the following papers numbered 1-52 read on this motion for summary judgment and cross-motion to amend and for summary judgment ; Notice of Motion and supporting papers 1-20 ; Notice of Cross Motion and supporting papers 21-39 ; Answering Affidavits and supporting papers 40-50 ; Replying Affidavits and supporting papers 51-52 ; it is,

ORDERED that the motion by the defendant Robert Santinelli for summary judgment dismissing the complaint insofar as it is asserted against him is granted to the extent of dismissing the first, second, third, fourth, fifth and seventh causes of action in their entirety and the sixth cause of action to the extent indicated; and it is further

ORDERED that the motion is otherwise denied; and it is further

ORDERED that the branch of the cross motion by the plaintiff which is to amend the complaint to add an eighth cause of action is granted; and it is further

ORDERED that the defendant Robert Santinelli is directed to serve and file an answer to the second amended complaint within 20 days after service upon him of a copy of this order with notice of entry; and it is further

ORDERED that the branch of the cross motion by the plaintiff which is for

summary judgment on the second amended complaint insofar as it is asserted against the defendant Robert Santinelli is denied.

The defendant Robert Santinelli was employed by Merrill Lynch as a financial advisor. In 2008, David Lahey was one of his clients. Lahey had suffered a mild traumatic brain injury for which he received a structured settlement. Santinelli arranged to have a substantial portion of the settlement deposited into a Merrill Lynch account. He also purchased annuities for Lahey and his family. After Santinelli left Merrill Lynch, he acted as Lahey's business and financial consultant. Pursuant to a written agreement dated February 2, 2009, Lahey agreed to pay Santinelli $1,000 a month for his services, retroactive to June 1, 2008, and to increase his fee by $250 a month each year on the anniversary of the commencement of their arrangement. After Lahey died, the plaintiff was appointed the personal representative of his estate on August 22, 2012. She commenced this action on October 2, 2014.[1] By an order of this court dated October 26, 2015, the action was dismissed insofar as it was asserted against the defendant Merrill Lynch Life Agency, Inc., and stayed insofar as it was asserted against the defendant Merrill Lynch Pierce, Fenner & Smith Incorporated pending completion of arbitration of the plaintiff's claims against that entity. Discovery is now complete, and Santinelli moves for summary judgment dismissing the complaint insofar as it is asserted against him. The plaintiff cross moves to amend the complaint to add another cause of action against Santinelli and for summary judgment on the second amended complaint insofar as it is asserted against Santinelli.

The first cause of action for breach of fiduciary duty alleges that, on or about January 1, 2008, Santinelli advised Lahey to make a short-term, unsecured personal loan in the amount of $4,000 to Santinelli's sister, Lorraine Castelli, and that Castelli subsequently defaulted on the loan. This cause of action is barred by the three-year statute of limitations applicable to breach-of-fiduciary duty claims that seek money damages (*see*, **Kaufman v Cohen**, 307 AD2d 113, 118). Moreover, even if the court were to apply the longer six-year statute of limitations applicable to breach-of-fiduciary-duty claims based on allegations of actual fraud (**Id**. at 119), it would still be time-barred. The claim accrued on January 1, 2008, more than six years before this action was commenced on October 2, 2014. Accordingly, the first cause of action is dismissed.

The second cause of action for breach of fiduciary duty alleges that, in or about October and November 2008, Santinelli advised Lahey to make an unsecured personal loan in the amount of $65,500 to Joseph Giuggio, with whom he had a close personal relationship, and that Giuggio subsequently defaulted on the loan. This cause of action is also barred by the three-year statute of limitations applicable to breach-of-fiduciary-duty claims that seek money damages (**Id**. at 118). Moreover, contrary to the plaintiff's contentions, the record does not support application of the six-year fraud statute of limitations. Courts will not apply the fraud statute of limitations if the

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[1]Santinelli contends that the complaint, which is dated September 18, 2014, was filed on January 13, 2015. However, the County Clerk's records indicate that the summons and complaint were filed on October 2, 2014, and that the amended summons and complaint were filed on January 13, 2015. Accordingly, the court finds that the action was commenced on October 2, 2014.

fraud allegation is only incidental to the claim asserted (**Id**. at 119). When an allegation of fraud is not essential to the cause of action pleaded except as an answer to an anticipated defense of the statute of limitations, courts look for the reality and the essence of the action and not to its mere name (**Id**.).

To plead a viable cause of action for fraud, the plaintiff must allege that the defendant made a misrepresentation or omission of a material existing fact, which was false and known to be false by the defendant when it was made, for the purpose of inducing the plaintiff's reliance thereon; that the plaintiff justifiably relied on such misrepresentation or omission; and that the plaintiff was injured thereby (*see*, **Lama Holding Co. v Smith Barney**, 88 NY2d 413, 421). In addition, CPLR 3016 (b) requires that the circumstances of the fraud be stated in detail, including specific dates and items (**Orchid Const. Corp. v Gottbetter**, 89 AD3d 708, 710).

The plaintiff contends that emails from Lahey reveal that he believed Santinelli was acting as a financial advisor with regard to the Giuggio loan, that Lahey believed Santinelli had conducted due diligence on his behalf prior to the funds being loaned, and that Lahey relied on Santinelli's assurances that he had conducted due diligence.

In the January 6, 2011, email from Lahey to Santinelli upon which the plaintiff relies, Lahey states, in pertinent part, as follows:

> "hey robert, don't know whats [sic] up with these calls, you say call you back, get together and then never hear from you. it's the longest way to get simple answers on giggio, lawline, giggio mothers house and lorraine none [sic] payments along with the rest on nonpayers. how long is this game with all these people you got me involved with will last, its old, for FA to not be able to get this mess done, **when you told me their [sic] all good for it,** is a slap in my face, and on top of it dealing with my illness. . . (emphasis added)."

In the subsequent July 3, 2011, email from Lahey to Santinelli upon which the plaintiff relies, Lahey states, in pertinent part, as follows:

> "hey robert, . . . what the heck is up with giggio, hes [sic] had so many passes . . . , been putting off asking you due to the way your [sic] feeling but i really have no other avenue to go, last time we spoke i thought we were putting demand letter and file suit from Florida so he will need fl attorney. . . ."

The court finds that these emails fail to meet the pleading requirements of CPLR 3016 (b). Although the first email indicates that Santinelli told Lahey that "their [sic] all good for it," there is no indication when the alleged representation was made or that Santinelli knew it was false when it was made. Santinelli testified that, although he introduced Giuggio to Lahey, he had nothing to do with negotiating the loan. He did not do any due diligence in connection with the loan because he knew that Giuggio had an excellent payment record on two prior loans that had

been fully repaid. Santelli testified that he had no reason to believe that Giuggio would not repay Lahey's loan to him. In fact, Giuggio made several payments on the loan before he defaulted. That Giuggio defaulted on the loan, without more, is insufficient to establish that Santinelli defrauded Lahey. Finally, the plaintiff settled her claim against Giuggio for $50,000 in Bankruptcy Court.

In view of the foregoing the court finds that the plaintiff's fraud allegation is unsupported by the record and that it was raised merely to answer the defense of the statute of limitations. Accordingly, the three-year statute of limitations applies, and the second cause of action is dismissed as time-barred.

The third cause of action for breach of fiduciary duty alleges that on or about October 1, 2008, Santinelli advised Lahey to make an unsecured loan in the amount of $67,500 to Lawline, a company owned by Santinelli, and that Lawline subsequently defaulted on the loan. This cause of action is barred by the three-year statute of limitations applicable to breach-of-fiduciary duty claims that seek money damages (*see*, **Kaufman v Cohen**, *supra* at 118). Moreover, even if the court were to apply the longer six-year statute of limitations applicable to breach-of-fiduciary-duty claims based on allegations of actual fraud (**Id**. at 119), it would still be time-barred. The claim accrued on October 1, 2008, more than six years before this action was commenced on October 2, 2014. In any event, Santinelli and Lahey did not have a fiduciary relationship with respect to Lawline. The law is clear that the relationship between a lender and a borrower is not fiduciary in nature even when, as here, the plaintiff lends money to his or her financial advisor (*see*, **Soley v Wasserman**, 823 F Supp 2d 221, 233 [SDNY; and cases cited therein]). Accordingly, the third cause of action is dismissed.

The fourth cause of action for breach of fiduciary duty alleges that Santinelli advised Lahey to make a personal loan to Joseph Giuggio's mother, who was a close friend of Santinelli, and that she subsequently defaulted on the loan. The plaintiff fails to specify when the loan was made or the amount of the loan. Santinelli contends that this loan was made around the same time as the loan to Giuggio, October and November 2008, which the plaintiff does not dispute. Accordingly, this cause of action is barred by the three-year statute of limitations applicable to breach-of-fiduciary-duty claims that seek money damages (**Id**. at 118).

The plaintiff makes the same arguments in support of applying the six-year fraud statute of limitations to this loan as he made in support of applying it to the Giuggio loan. Those arguments fail for the same reason: The plaintiff has failed to make out a viable claim of fraud against Santinelli. The January 6, 2011, email upon which the plaintiff relies contains no indication as to when the alleged representation was made or that Santinelli knew it was false when it was made. Moreover, the July 3, 2011, email contains no reference to the loan to Giuggio's mother. That Giuggio's mother defaulted on the loan, without more, is insufficient to establish Santinelli defrauded Lahey. Accordingly, the three-year statute of limitations applies, and the fourth cause of action is dismissed as time-barred.

The fifth cause of action alleges that Santinelli breached his fiduciary duty to Lahey by receiving origination fees in connection with the loans. The plaintiff seeks disgorgement of such fees and punitive damages. The record reflects that Santinelli received one origination fee in

connection with the Giuggio loan. Santinelli testified that he received $2,500 from Giuggio after the loan was made, which he subsequently returned to Giuggio. There is, therefore, nothing for him to disgorge. Moreover, punitive damages are not intended to remedy private wrongs, but to vindicate public rights (**Muhlfiend v Bak**, 174 Misc 2d 396, 398, *citing* **Raconova v Equitable Life Assur. Socy. of U.S.**, 83 NY2d 603). A private party seeking to recover punitive damages must not only demonstrate egregious tortious conduct by which he or she was aggreived, but also demonstrate that such conduct was part of a pattern of similar conduct directed at the public generally (**Raconova v Equitable Life Assur. Socy. of U.S.**, *supra* at 613). The plaintiff has made no such showing. Accordingly, the fifth cause of action is dismissed.

The seventh cause of action for breach of fiduciary duty, fraudulent inducement, and punitive damages alleges that Santinelli arranged the loans knowing that the obligors lacked the financial ability to repay them and that he hid that fact from Lahey. As previously discussed, the plaintiff cannot extend the statute of limitations on time-barred claims for breach of fiduciary duty simply by alleging fraud, and the plaintiff has failed to demonstrate a viable claim of fraud. Moreover, the plaintiff has failed to demonstrate that Santinelli's conduct was part of a pattern of similar conduct directed at the public generally (**Raconova v Equitable Life Assur. Socy. of U.S.**, *supra* at 613). Accordingly, the seventh cause of action is dismissed.

The sixth cause of action for breach of contract alleges that Santinelli acted in bad faith and with gross negligence in violation of the parties' written consulting agreement. The plaintiff's contentions to the contrary notwithstanding, the gross-negligence standard applies to Santinelli's hiring, firing, and management of caregivers, such as doctors, health-care personnel, and cleaning staff, on Lahey's behalf. It does not apply to Santinelli's activities as a financial consultant. With regard to those activities, the parties' written consulting agreement provides that Santinelli "shall only be responsible for acts, which are done in bad faith."

New York law provides a six-year statute of limitations for actions sounding in contract (*see*, **CPLR** 213 [2]). Thus, any breach-of-contract claims relating to the Castelli and Lawline loans are time-barred because they are also barred by the six-year statute of limitations applicable to breach-of-fiduciary-duty claims based on fraud. Any breach-of-contract claims relating to the loans to Giuggio and his mother are not time-barred, however, because they accrued in October and November 2008, and this action was commenced on October 2, 2014, which is less than six years later. Moreover, although the plaintiff has failed to make out a viable claim of fraud against Santinelli with respect to those loans, court finds that there are triable issues of fact as to whether he acted in good faith. Accordingly, the sixth cause of action is dismissed only insofar as the Castelli and Lawline loans are concerned.

The plaintiff seeks to add an eighth cause of action against Santinelli for breach of the Lawline loan. Under the CPLR's liberal pleadings practice, a party may amend its pleadings at any time, even after trial, provided that the late amendment does not prejudice the other party (CPLR 3025 [b]; **Whalen v Kawasaki Motors Corp.**, U.S.A., 92 NY2d 288, 293). Prejudice may be found when a party has incurred some change of position or hindrance in the preparation of its case that could have been avoided had the original pleading contained the proposed amendment (**Id.**). Santinelli has failed to demonstrate that he would be prejudiced by the proposed amendment.

He merely raises issues of fact, which are better left to be decided at trial (*see*, **Daniels v Empire-Orr, Inc.**, 151 AD2d 370, 372). Accordingly, the leave to amend the complaint is granted.

DATED: **September 18, 2019**

J. S.C.