

Argyle Funds SPC Inc. v BDO USA LLP

2019 NY Slip Op 34009(U)

June 13, 2019

Supreme Court, Nassau County

Docket Number: 605952/2017

Judge: Stephen A. Bucaria

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

-----SHORT FORM ORDER SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

ARGYLE FUNDS SPC INC.
(In Liquidation),

TRIAL/IAS, PART 1
NASSAU COUNTY

Plaintiff,

INDEX No. 605952/2017

MOTION DATE: 5/17/19
Motion Sequence 001, 002, 003

-against-

BDO USA LLP, BDO CAYMAN LTD., BDO
TRINITY LTD. d/b/a BDO TRINIDAD & TOBAGO,
SCHWARTZ & CO. LLP,

Defendants.

The following papers read on this motion:

- Notice of Motion.....XXX
- Affirmation in Support.....XXXXX
- Memorandum of Law in Support.....XX
- Reply Memorandum of Law.....XXX
- Memorandum of Law in Opposition.....XX

Upon the foregoing papers, the motion by defendant BDO USA LTD (hereinafter "BDO USA") seeking an order pursuant to CPLR §3211(a)(7), dismissing the plaintiff's complaint for failing to state a cause of action; the motion by defendant BDO Trinidad and Tobago LTD (hereinafter "BDO Trinity") seeking an order pursuant to CPLR §3211(a)(1) and (a)(7), dismissing plaintiff's complaint for, *inter alia*, failing to state a cause of action, is determined as follows.

ARGYLE FUNDS v BDO USA LLP**Index No.: 605952/2017**

The within action stems from the defendants' alleged failure during an auditing process to notify plaintiff, Argyle Funds SPC INC., of fraudulent schemes perpetuated by two of plaintiff's primary credit advisors, resulting in a loss of \$86 million and collapse of its mutual fund.

Plaintiff, a mutual fund organized under the laws of the Cayman Islands, engaged the services of two credit advisors to build a portfolio of investments with plaintiff's funds. These included New York-based RMC Capital Corp (hereinafter "RMC") and its special purpose vehicle ECB Funding LLC (together with RMC "Barrick"), both which were controlled by Donald Barrick, and Ontario, Canada-based New Solutions Financial (III) Corp. (hereinafter "NSF") (together with Barrick as "Credit Advisors").

Defendants belong to U.K. based BDO International Ltd., a global network of public accounting, tax, and advisory firms that conduct auditing services. Plaintiff entered into engagement letters with BDO Cayman LTD. (hereafter as "BDO Cayman") to conduct annual audits on plaintiff's investments for the financial years ending December 31, 2010, 2011, 2012, and 2013 (hereinafter "the Audits"). Despite not being parties to the engagement letters, plaintiff alleges that BDO Trinity, with the assistance of BDO USA, conducted the audits. Specifically, plaintiff asserts that Riaz Ali (hereinafter "Ali"), a BDO Trinity employee, and Sue-Anne Pierre (hereinafter "Pierre") (together with Ali, "BDO Trinity Representatives"), a BDO Trinity employee, and temporary employee of BDO USA, were plaintiff's principal points of contact regarding the auditing process.

During the relevant years, both credit advisors engaged in a confirmed fraudulent scheme using plaintiff's funds. NSF used plaintiff's funds to extend high-risk loans to already bankrupt companies before filing for creditor protection on April 11, 2012, and subsequently being prosecuted by the Ontario Securities Commission. Barrick falsified financial reporting, misled plaintiff about the true value of the underlying investments, and engaged in obstructive conduct during the auditing process.

Plaintiff contends that the audit reports were void of any "red flags" concerning plaintiff's investments with the credit advisors and reliance on the "clean" opinions issued by the defendants resulted in a collapse of the mutual fund. Plaintiff further contends that defendants intentionally concealed the fraudulent conduct in the auditing process to avoid a loss of business and continue collecting fees.

Plaintiff commenced this action on June 21, 2017, naming BDO Cayman, BDO USA, BDO Trinity, and Schwartz and Co. LLP (hereinafter "Schwartz") as defendants.

ARGYLE FUNDS v BDO USA LLP**Index No.: 605952/2017**

On August 8, 2017, BDO Cayman initiated legal proceedings in the Grand Court of the Cayman Islands (hereinafter "Grand Court") seeking to enjoin plaintiff from commencing this action (hereinafter "Cayman Proceedings"). On March 23, 2018, the Grand Court enjoined plaintiff from proceeding with this action. On October 8, 2018, The Cayman Islands Court of Appeals reversed the Grand Court and allowed this action to proceed against all parties except BDO Cayman. This Court notes that plaintiff voluntarily discontinued this action as against BDO Cayman without prejudice on March 23, 2018 and as against Schwartz with prejudice on November 15, 2018.

Plaintiff's "Second Amended Complaint," dated January 2, 2019, asserts two causes of action against defendants alleging 1) professional negligence and gross negligence and 2) fraudulent concealment.

Defendants now move to dismiss plaintiff's complaint contending that plaintiff's malpractice claim is voided by a lack of contractual privity. In support, both defendants provide the engagement letters for all of the audited years and BDO Trinity submits the audit reports for the financial years of 2011 and 2012 indicating that BDO Cayman contracted with plaintiff and supplied the audit reports. Specifically, BDO USA provides a Secondment Assignment Agreement displaying Pierre's temporary secondment to BDO USA from January 5, 2015 to April 15, 2015; a subpoena *duces tecum* dated September 14, 2016, served upon BDO USA ordering production of all relevant documents concerning a previous action between plaintiff and Barrick; and a letter dated September 28, 2016, from BDO USA to plaintiff's counsel in the aforementioned action indicating that BDO USA lacked any documentation relevant to the subpoena requests.

Defendants further contend that plaintiff has failed to properly allege a fraudulent concealment claim and that the negligence claims based on the 2010, 2011, and 2012 audit reports are barred by the statute of limitations.

In opposition, plaintiff argues that dismissal is premature and that further discovery is needed to prosecute plaintiff's action since the defendants have control over key documents. Plaintiff further argues it has contractual privity with the defendants. Concerning BDO Trinity, plaintiff provides the affidavit of Andrew Richard Victor Morrison ("Morrison"), one of plaintiff's joint official liquidators appointed by the Grand Court; the affidavit of Ali from the Cayman Proceedings; email correspondences between plaintiff and BDO Trinity Representatives; email correspondences between Morrison and BDO Trinity Representatives; and letters between Morrison and both BDO Cayman and

ARGYLE FUNDS v BDO USA LLP

Index No.: 605952/2017

BDO Trinity concerning documentation requests about the audits. Plaintiff also argues that it has properly alleged a fraudulent concealment claim and that the negligence claims arising from the 2013 audit and the fraudulent concealment claims arising out of the all the audits are actionable.

In considering the motion to dismiss for failure to state a cause of action pursuant to CPLR §3211(a)(7), the pleading must be liberally construed, the factual allegations must be deemed true, and the pleading party must be accorded the benefit of every possible favorable inference (*Dinger v. Cefola*, 133 A.D.3d 816, 20 N.Y.S.3d 416 [2nd Dept. 2015]; *Webb-Webb v. Community Action for Human Services, Inc.*, 23 N.Y.3d 448, 15 N.E.3d 1172, 992 N.Y.S.2d 163 [2014]; *Leon v. Martinez*, 84 N.Y.2d 83, 638 N.E.2d 511, 614 N.Y.S.2d 972 [1994]; *Fuller v. Collins*, 114 A.D.3d 827, 982 N.Y.S.2d 484 [2014]; *Kopelowitz & Co., Inc. v. Mann*, 83 A.D.3d 793, 921 N.Y.S.2d 108 [2011]). The “sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law...” (*Guggenheim v. Ginzberg*, 43 N.Y.2d 268, 275, 401 N.Y.S.2d 182 [1977]). “Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss.” (*EBC I, Inc. v. Goldman, Sachs & Co.*, 5 N.Y.3d 11, 19, 832 N.E.2d 26, 799 N.Y.S.2d 170 [2005]). “When a party moves to dismiss a complaint pursuant to CPLR 3211(a)(7), the standard is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action...” and “the court must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.” (*Sokol v. Leder*, 74 A.D.3d 1180, 1181, 904 N.Y.S.2d 153 [2nd Dept. 2010]). “A complaint is subject to dismissal pursuant to CPLR 3211(a)(7) when the pleading is comprised of little more than bare legal conclusions and factual claims which are either inherently incredible or flatly contradicted by documentary evidence.” (*Lovisa Const. Co., Inc. v. Metro. Transp. Auth.*, 198 A.D.2d 333, 333 [2nd Dept. 1993]).

A three-year statute of limitations governs accounting malpractice claims, which “accrues upon the client’s receipt of the accountant’s work.” (*CPLR §214(6)*; *CRC Litigation*, 132 A.D.3d 938, 939 [2nd Dept. 2015]). **Based upon the foregoing, plaintiff’s malpractice claims against BDO Trinity based on the 2010, 2011, and 2012 audits are dismissed as time barred while the malpractice claim arising out of the 2013 audit remains actionable.**

ARGYLE FUNDS v BDO USA LLP

Index No.: 605952/2017

“The statute of limitations is an affirmative defense which is waived by a party unless it is raised either in a responsive pleading, or by motion prior to the submission of a responsive pleading.” (See CPLR §3211(e); 352 *Legion Funding Assoc. v. 348 Riverdale, LLC*, 164 A.D.3d 551, 552 [2nd Dept. 2018]). BDO USA has waived their right to assert the statute of limitations defense by failing to raise it in its motion. **Accordingly, the malpractice claims arising out of all of the audits remain actionable against BDO USA.**

A requisite to an accounting malpractice claim is “either actual privity of contract between the parties or a relationship so close as to approach that of privity.” *Bernstein v. Arthur Andersen & Co.*, 210 A.D.2d 193, 194 [2nd Dept. 1994]). “Before accountants may be held liable in negligence to noncontractual parties who rely to their detriment on inaccurate financial reports, certain prerequisites must be satisfied: (1) the accountants must have been aware that the financial reports were to be used for a particular purpose or purposes; (2) in the furtherance of which a known party or parties was intended to rely; and (3) there must have been some conduct on the part of the accountants linking them to that party or parties, which evinces the accountants’ understanding of that party or parties’ reliance.” (*Credit Alliance Corp. v. Arthur Andersen & Co.*, 65 N.Y.2d 536, 551 [1985]).

The court is unable to ascertain whether the evidence provided establishes “a nexus sufficiently approaching privity.” *Id.* at 554. However, it appears that plaintiff has made a sufficient showing that facts essential to opposing the motion may be uncovered during further discovery. (See CPLR 3211(d); *Halmar Corp. v Hudson Founds.*, 122 A.D.2d 505, 506 [2nd Dept. 1995]).

Accordingly, the motion to dismiss plaintiff’s remaining accounting malpractice claim against BDO Trinity arising out of the 2013 audit, and against BDO USA concerning all of the audits, is **denied** without prejudice to renew upon completion of discovery.

Based upon this Court’s review of plaintiff’s complaint, plaintiff has failed to state a cause of action for fraudulent concealment. Since plaintiff’s claim of fraudulent concealment arises from the same facts as the malpractice claims and does not allege distinct damages, said cause of action is **dismissed** as duplicative of the malpractice claims (*Symbol Tech., Inc. v Deloitte & Touche, LLP*, 69 A.D.3d 191, 199 [2nd Dept. 2009]); *Smith v. Kaplan Belsky Ross Bartell, LLP*, 126 A.D.3d 877, 879 [2nd Dept. 2015]).

ARGYLE FUNDS v BDO USA LLP

Index No.: 605952/2017

In addition, the motion by BDO T&T seeking an order pursuant to 22 NYCRR §520.11(a)(1), admitting Peter D. Sullivan (hereinafter "Sullivan") and Barry F. MacEntee (hereinafter as "MacEntee"), both members in good standing of the bar of the State of Illinois, *pro hac vice*, as counsel for defendants in order to appear, argue, and try the above-mentioned caption, is **granted**.

The courts of this State have long given recognition to a party's entitlement to be represented in ongoing litigation by counsel of its choosing. (*J.G. Wentworth v. Serio*, 33 A.D.3d 761, 823 N.Y.S.2d 439 [2nd Dept. 2006]; *Giannotti v. Mercedes Benz USA*, 20 A.D.3d 389, 798 N.Y.S.2d 141 [2nd Dept. 2005]).

The affidavits of Sullivan and MacEntee and the affirmation of Kyle M. Medley, an attorney admitted to the State Bar of New York, submitted in support of the motion, are in compliance with the strict provisions of 22 NYCRR §520.11(e)(1) & (2).

In accordance with the foregoing decision, the defendants BDO USA and BDO Trinity are directed to answer plaintiff's Second Amended Complaint within thirty (30) days of the date of this Order.

It is further Ordered that plaintiff shall serve a copy of this Order upon the Clerk of Nassau County within ten (10) days of the date of this Order and the Nassau County Clerk is directed to amend the caption herein to reflect the discontinuance of this action as against BDO Cayman and Schwartz as reflected below:

ARGYLE FUNDS SPC INC.
(In Liquidation),

TRIAL/IAS, PART 1
NASSAU COUNTY

Plaintiff,

INDEX No. 605952/2017

-against-

BDO USA LLP, TRINITY LTD.
d/b/a BDO TRINIDAD & TOBAGO,

Defendants.

ARGYLE FUNDS v BDO USA LLP

Index No.: 605952/2017

The parties are reminded to appear before the undersigned on July 8, 2019 at 9:30A.M. for a status conference in this matter.

This constitutes the decision and Order of this Court. Any request for relief not expressly granted herein is denied.

So ordered.

Dated: JUN 13 2019

Stephen A. Suarez
J.S.C.

ENTERED
JUN 14 2019
NASSAU COUNTY
COUNTY CLERK'S OFFICE