Deane v Brodman

2020 NY Slip Op 31880(U)

June 18, 2020

Supreme Court, New York County

Docket Number: 150373/2017

Judge: Andrew Borrok

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK **PART** IAS MOTION 53EFM

Justice

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GARY DEANE,

Plaintiff,

- v -

HOWARD BRODMAN, LIGGETT VOGT & WEBB P.A., RBSM LLP

Defendant.

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INDEX NO. 150373/2017

MOTION DATE 06/10/2020

MOTION SEQ. NO. 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER .

Upon the foregoing documents and for the reasons set forth below, Howard Brodman, Ligget Vogt & Webb P.A. (**LVW**), and RBSM LLP's (**RBSM**, and together with Mr. Brodman and LVW, the **Accountants**) motion for summary judgment pursuant to CPLR § 3212 seeking dismissal of the complaint asserted against them by Gary Deane (**Mr. Deane**) is granted in part to the extent that the third cause of action for breach of fiduciary duty is dismissed and is otherwise denied.

I. THE FACTS RELEVANT TO THE MOTION

Leslie Taylor and Brad Taylor (the **Taylors**) were the founders and managing members of Big Machine Media, LLC (**BMM**), a publicity and marketing company focusing on the music and entertainment industries, and its holding company, Big Machine Media Worldwide, LLC

(**BMMW**). BMMW and BMM were formed in 2008. Non-party Maurice Dean made an initial investment of $150,000 in BMM, representing a 24.5% ownership interest. Between October 2008 and April 2010, Maurice Dean made personal loans to BMMW totaling $327,150. In June 2012, BMMW changed its name to Big Machine Agency, LLC (**BMA**, and together with BMM, hereinafter the **Company**). On September 30, 2012, Maurice Dean sold his equity interest in the Company and interest as a creditor to his son, Gary Dean. Mr. Deane made additional personal loans to the Company totaling $86,978.30 between August 2010 through September 2011, of which $2,500 has been repaid.

Pursuant to a certain Limited Liability Company Agreement (the **Operating Agreement**), dated January 1, 2009, by and among Brad Taylor, Leslie Taylor, Carl Liu, and Maurice Dean, any guaranteed payments or distributions to members (except as otherwise expressly authorized) required unanimous member approval (NYSCEF Doc. No. 88, § 8.04 [ii], [xxiv]). Paragraph 6.02 of the Operating Agreement provides that "[t]he Company shall not make a distribution to any member (i) unless, after giving effect thereto, the assets of the Company exceeded the Company's liabilities and (ii) if such distribution would violate the Act" (*id.*, § 6.02).

In May 2011, the Company retained Howard Brodman, CPA, who was a partner at the accounting firm Sherb & Co., LLP, to prepare the Company's 2010 tax returns. Mr. Brodman prepared the Company's tax returns from 2011 through 2015. Mr. Brodman requested a copy of the Operating Agreement to assist in preparing the tax returns. The tax returns for tax years 2011 through 2015 reflect that the Taylors received guaranteed payments of at least $723,338 and distributions of at least $111,470. It is undisputed that the Taylors did not seek unanimous

member approval for the guaranteed payments or distributions. In 2012, Mr. Brodman was a partner at RBSM, and in 2013, he became a partner at LVW. In 2014, the Taylors met with Mr. Brodman and discussed the possibility of Mr. Brodman providing business, accounting, and other advice in addition to tax preparation services. Ultimately, the Company never engaged Mr. Brodman to perform such additional services.

Mr. Deane brought this lawsuit individually and derivatively on behalf of the Company against Mr. Brodman, LVW, and RBSM for professional negligence, aiding and abetting breach of fiduciary duty, and breach of fiduciary duty. Mr. Deane alleges that the Taylors misused the Company's assets for their own personal use and benefit, including by using the Company's funds to pay for their personal expenses, and that Mr. Brodman negligently performed accounting and tax preparation services, failed to represent the Company with undivided loyalty, and provided assistance to the Taylors in their tortious conduct.

II. DISCUSSION

Summary judgment shall be granted only when the movant presents evidentiary proof in admissible form that there are no triable issues of material fact and that there is either no defense to the cause of action or that the cause of action or defense has no merit (CPLR § 3212 [b]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The proponent of a summary judgment motion carries the initial burden to make a *prima facie* showing of entitlement to judgment as a matter of law (*Alvarez*, 68 NY2d at 324). Failure to make such a showing requires denial of the motion (*id.*, citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once this

showing is made, the burden shifts to the opposing party to produce evidence in admissible form sufficient to establish the existence of a triable issue of fact (*Alvarez*, 68 NY2d at 324).

A. Professional Negligence

To prevail on a claim of accounting malpractice, a plaintiff must establish that the conduct of the defendant departed from accepted standards of accounting practice, and that such deviation proximately caused injury to the plaintiff (*Herbert H. Post & Co. v Sidney Bitterman, Inc.*, 219 AD2d 214, 223 [1st Dept 1996]). Proximate causation is an essential element of the claim (*id.*). In other words, it is insufficient to merely show that an accountant "somehow deviated from accepted standards of practice" (*D.D. Hamilton Textiles, Inc. v Estate of Mate*, 269 AD2d 214, 215 [1st Dept 2000]). A plaintiff must show that the harm complained of was occasioned by the conduct that fell below the standard of practice (*id.*).

The Accountants argue that they are entitled to summary judgment and dismissal of the accounting malpractice cause of action because they were retained solely to provide tax preparation services and the tax returns were prepared. The Accountants' expert, Ryan Cislo, states in his expert report that the Accountants were not responsible for the corporate governance practices of the Company and that they provided tax preparation services "within the acceptable standards set forth in the Code, the SSTS, and Circular 230" (Cislo Report at 10, NYSCEF Doc. No. 101). Mr. Cislo states that the Accountants "generally complied with professional standards for tax preparation engagements" (*id.*), and that "[t]he Taylors are responsible for any alleged damages incurred by the Plaintiffs" (*id.* at 13). Mr. Cislo, concludes that the Accountants were not engaged to police the Company's internal controls and "[i]t is not a standard practice or tax

engagements to inquire as to whether these activities had received unanimous or majority member approval. Such inquiries are more common to an audit engagement, which [the Accountants were] never engaged to perform" (*id.* at 10). Mr. Cislo further concludes that "[u]ltimately, an organization's board and management have responsibility for implementing effective internal controls and best corporate governance practices" (*id.* at 11).

In his opposition papers, and relying on the expert report of Ryan Hoffman, Mr. Deane argues that summary judgment must be denied because Mr. Brodman violated not one but three separate regulations and professional standards of accounting practice. To wit, Mr. Hoffman, among other things, opines that although the engagement was for tax preparation services and not for auditing or other advisory services, "Mr. Brodman failed to adhere to the professional standards and regulations governing the provision of tax preparation services by a certified public accountant" by failing to (1) "address the risk of a conflict of interest due to his representation of clients whose interests may have been adverse to each other," (2) "establish a clear communication with his clients regarding the terms of his engagement," and (3) "exercise an appropriate level of due care in establishing relevant background facts related to his preparation of tax returns for the Company" (Hoffman Report, ¶ 18, NYSCEF Doc. No. 116). Mr. Hoffman concludes:

> [Mr. Brodman] did not inquire as to whether distributions and guaranteed payments were made to the Taylors with or without the approval of the other LLC members, nor did he determine whether distributions were made in compliance with the limitations on distributions specified in the [Operating] Agreement. He was also aware that Ms. Taylor paid many of the Taylors' personal expenses through the Company's accounts. Mr. Brodman's knowledge of these violations of the Agreement and failure to address them with the Taylors with continuing to provide tax preparation services to them and the Company constitutes a failure to adhere to the ethical requirements of Circular 230, the SSTS, and the Code of Conduct.

(*id.*, ¶ 69).

In other words, this was not a matter of failing to do a proper sampling as in the case of an audit. This, according to Mr. Hoffman, was a failure to do basic checking customary in doing the very work that Mr. Brodman indicates he was engaged to perform.

Inasmuch as, among other things, it is undisputed that Mr. Brodman had a copy of the Operating Agreement, which expressly prohibited the payment of guaranteed payments or distributions without the unanimous consent of the members or when the Company's liabilities exceeded its assets, and that Mr. Brodman not only knew of the payments to the Taylors but directed their recharacterization as distributions and failed to check the back-up or even inquire as to whether the Taylors obtained unanimous member approval while he knew or should have known that the company's liabilities exceeded its assets throughout his engagement, summary judgment must be denied.

B. Breach of Fiduciary Duty

To prevail on a cause of action for breach of fiduciary duty, a plaintiff must prove "the existence of a fiduciary relationship, misconduct by the other party, and damages directly caused by that parties' misconduct" (*Pokoik v Pokoik*, 115 AD3d 428, 429 [1st Dept 2014]). In general, an accountant does not owe a fiduciary duty to a client (*Bitter v Renzo*, 101 AD3d 465, 465 [1st Dept 2012]). The First Department has held that even where an accountant agrees to perform accounting and consulting services for a client, i.e., services beyond mere tax preparation, this still does not give rise to a fiduciary duty (*id.*).

The Accountants argue that the evidence establishes that they were not in fiduciaries and that there was no misconduct by the Accountants that would constitute a breach of any purported fiduciary duty in any event.

In his opposition papers, Mr. Deane argues that that Mr. Brodman owed a fiduciary duty to the Company as he played an advisory role above and beyond mere tax preparation. He argues that even Mr. Brodman referred to himself as a "trusted advisor" to the Company. In support of his position, Mr. Deane adduces emails regarding the Company but unrelated to tax preparation on which Mr. Brodman was carbon copied. The argument, however, fails.

The uncontroverted evidence establishes that Mr. Brodman was retained to perform tax preparation services and nothing more. Accordingly, the Accountants did not owe a fiduciary duty to Mr. Deane or the Company. There is no evidentiary basis to support a finding that Mr. Brodman's conduct or relationship with the Company warrant a deviation from the general rule. The emails submitted by Mr. Deane do not raise an issue of material fact as to whether Mr. Brodman's role with the Company gave rise to a fiduciary duty because it is undisputed that any vaguely-articulated plans for Mr. Brodman to play a larger role within the Company never came to fruition and his contractual relationship with the Company was limited to preparing its taxes (Heppt. Aff, ¶ 7; NYSCEF Doc. No. 101 at 6). Accordingly, the motion for summary judgment is granted as it relates to the breach of fiduciary duty cause of action.

C. Aiding and Abetting Breach of Fiduciary Duty

To prevail on a claim of aiding and abetting a breach of fiduciary duty, a plaintiff must establish: "a breach of fiduciary duty, that defendant knowingly induced or participated in the breach, and damages resulting from the breach" (*Global Minerals and Metals Corp. v Holme*, 35 AD3d 93, 101 [1st Dept 2006]). As the First Department has explained, "[a] person knowingly participates in a breach of fiduciary duty only when he or she provides 'substantial assistance' to the primary violator" (*id.*). Further, "[a]ctual knowledge, as opposed to merely constructive knowledge, is required and a plaintiff may not merely rely on conclusory and sparse allegations that the aider or abettor knew or should have known about the primary breach of fiduciary duty" (*id.* at 101-102). Significantly, "the mere inaction of an alleged aider and abettor constitutes substantial assistance only if the defendant owes a fiduciary duty directly to the plaintiff" (*Kaufman v Cohen*, 307 AD2d 113, 126 [1st Dept 2003]).

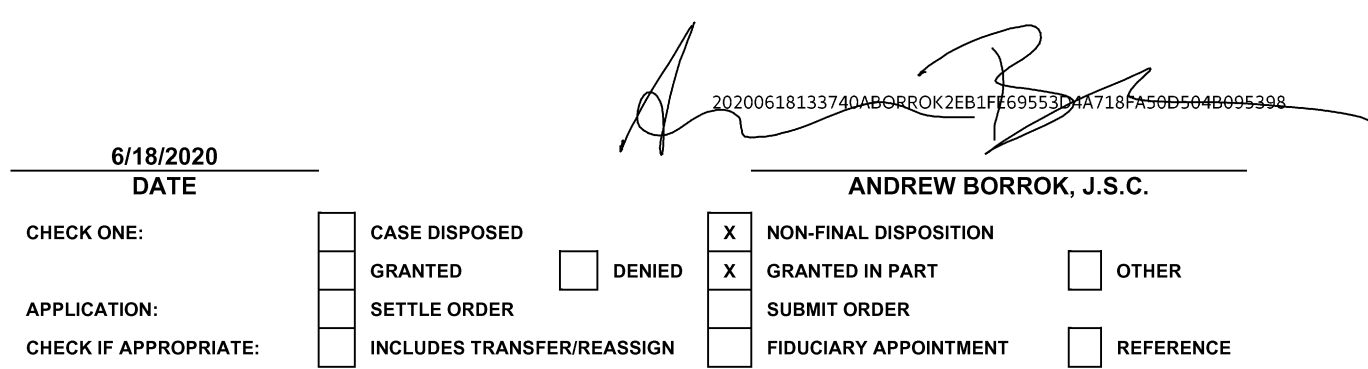
The Accountants argue that the aiding and abetting breach of fiduciary duty claim must be dismissed because the uncontroverted evidence establishes that they did not knowingly induce or participate in the Taylors' allegedly tortious conduct. The argument however is unavailing.

Although the Accountants' expert, Mr. Cislo, concludes that Mr. Brodman did not conceal the payments made by the Taylors and that he properly reported them after the payments had already been made (Cislo Report at 13), Mr. Deane's expert, Mr. Hoffman, concludes that Mr. Brodman had a close personal relationship with the Taylors, was fully aware of the Taylors' receipt of

improper payments and misuse of Company funds, and in fact advised them on how to classify the payments as guaranteed payments and distributions (Hoffman Report, ¶¶ 46, 56). Indeed, on one such occasion, Mr. Brodman personally added entries to the Company's accounting system to reflect the same. Thus, it cannot be said as a matter of law that the Accountants did nothing to knowingly assist the Taylors in breaching their fiduciary duties.

Accordingly, it is

ORDERED that Howard Brodman, Liggett Vogt & Webb P.A., and RBSM LLP's motion for summary judgment is granted solely to the extent that the third cause of action for breach of fiduciary duty is dismissed and is otherwise denied.



6/18/2020		ANDREW BORROK, J.S.C.
DATE		

CHECK ONE:	☐ CASE DISPOSED		☒ NON-FINAL DISPOSITION		
	☐ GRANTED	☐ DENIED	☒ GRANTED IN PART		☐ OTHER
APPLICATION:	☐ SETTLE ORDER		☐ SUBMIT ORDER		
CHECK IF APPROPRIATE:	☐ INCLUDES TRANSFER/REASSIGN		☐ FIDUCIARY APPOINTMENT		☐ REFERENCE