Carnegie Assoc., Ltd v Lerner, Arnold & Winston, LLP
2020 NY Slip Op 32322(U)
July 17, 2020
Supreme Court, New York County
Docket Number: 156680/2012
Judge: Tanya R. Kennedy
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 63

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CARNEGIE ASSOCIATES, LTD and SHERWOOD SCHWARZ,

Plaintiffs,

Index No. 156680/2012
Motion Seq. No. 004

- against -

LERNER, ARNOLD & WINSTON, LLP, f/k/a ABRAHAM, LERNER & ARNOLD, LLP, JONATHAN D. ABRAHAM, ESQ., and CHARLES MARTIN ARNOLD, ESQ.,

Defendants.

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LERNER, ARNOLD & WINSTON, LLP, f/k/a ABRAHAM, LERNER & ARNOLD, LLP, JONATHAN D. ABRAHAM, ESQ., and CHARLES MARTIN ARNOLD, ESQ.,

Third-Party Plaintiffs,

-against-

OHRENSTEIN & BROWN, LLP,

Third-Party Defendant.

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TANYA R. KENNEDY, J.S.C.:

In this legal malpractice action, defendants move, pursuant to CPLR 3212, for partial summary judgment as against their former client Carnegie Associates, Ltd., and its sole owner, Sherwood Schwarz ("Schwarz") (together, "Carnegie or plaintiffs").[1] For the reasons set forth below, defendants' motion for partial summary judgment is granted in part and otherwise denied.

[1] Defendants also move in the alternative to stay the action, pursuant to CPLR 2201, pending resolution of the underlying action in Supreme Court, New York County, entitled *Carnegie Assocs. Ltd. v Eric J. Miller and The Miller*

The Underlying Action

Carnegie was formed in 2004 by Kevin Daly ("Daly"), Schwarz and Eric Miller ("Miller"), and provided high-end insurance products and consulting services (Complaint in underlying action, ¶¶1, 15, NYSCEF Doc. No. 192; Statement of Undisputed Facts, ¶22, NYSCEF Doc. No. 191).

Miller served as President of Carnegie from October 2004 through January 2006 when he resigned his position, sold his shares and continued to recruit and service clients as a Carnegie employee until November 2006 (Complaint in underlying action, ¶¶17, 19, NYSCEF Doc. No.191; Answer in underlying action, ¶¶17, 19; NYSCEF Doc. No. 193; Statement of Undisputed Facts, ¶26, NYSCEF Doc. No 191).

Carnegie commenced the underlying action in January 2008 and the complaint therein alleged that Carnegie terminated Miller in November 2006 after discovering he deliberately withheld for himself commissions which were due and owing to Carnegie (Complaint in underlying action, ¶¶ 24-25, NYSCEF Doc. No. 192).[2] The complaint in the underlying action alleged, among other things, that Miller recruited three Carnegie employees to join his life insurance brokerage business, Miller Consulting Group, Inc. ("Miller Consulting"), and used Carnegie's resources and employees to divert Carnegie clients to Miller Consulting (*id.*, ¶¶ 27-28).

Consulting Group, Inc., index No. 600109/2008 (the underlying action). However, defense counsel represented during oral argument on November 20, 2019 that the underlying action was no longer pending since Carnegie failed to file a motion to restore that action (Oral Argument Transcript, P. 7, L. 7-16, NYSCEF Doc. No. 253). As such, the branch of the motion to stay this action is denied as moot.

[2] Carnegie was originally represented by Winston and Strawn, LLP in the underlying action and defendants assumed Carnegie's representation therein in December 2008 (Statement of Undisputed Facts, ¶¶31-32, NYSCEF Doc. No. 191).

The complaint in the underlying action asserted causes of action for breach of the duties of loyalty and good faith, breach of the covenant of good faith and fair dealing and breach of fiduciary duty against Miller, and tortious interference with current and prospective business relations, unjust enrichment, and a constructive trust against Miller and Miller Consulting (*id*., ¶¶34-63).

Carnegie also commenced an action in Supreme Court, New York County in June 2009 entitled *Carnegie Assoc. Ltd. v Richard Klein, Ashmanee Lackeyram and Amy Kim*, index No. 108638/2009, against its three former employees who, among other things, allegedly aided and abetted Miller in diverting Carnegie clients (the "Klein action"), which was voluntarily dismissed with prejudice on February 28, 2011 (Complaint, NYSCEF Doc. No. 204; Statement of Undisputed Facts, ¶38; NYSCEF Doc. No. 191; Stipulation of Discontinuance, NYSCEF Doc. No. 206).[3]

During defendants' representation of Carnegie in the underlying action, the Honorable Richard B. Lowe, III issued a January 25, 2010 order imposing monetary sanctions against Carnegie for failing to provide discovery, and an October 25, 2010 order dismissing Carnegie's complaint, striking its reply to defendants' counterclaims, and imposing monetary sanctions for failing to proceed with court-ordered mediation (Court orders, NYSCEF Doc. Nos. 220, 225).

Carnegie's present counsel appealed both orders and on April 3, 2012, the Appellate Division, First Department modified the October 25, 2010 order to the extent of denying the motion dismissing the complaint and striking Carnegie's reply to the counterclaims and otherwise

[3] Carnegie's present counsel maintains that a decision was made to discontinue the Klein action because it was not cost-effective since the former employees were unlikely able to personally pay any judgment (Brown Opposing Affirmation, ¶34, NYSCEF Doc. No. 217.

affirmed such order, and dismissed the appeal from the January 25, 2010 order as academic (*see Carnegie Assoc. Ltd. v Miller*, 94 AD3d 404 [1st Dept 2012]).

The Honorable Richard B. Lowe, III also issued an October 23, 2012 order which granted, on default, the motion to restore the underlying action to the calendar and directed the Clerk of the Court to transfer the matter to another Commercial Division Justice since the court no longer presided over such matters (Order, NYSCEF Doc. No. 203). The parties in the underlying action subsequently entered a stipulation and confession of judgment on December 8, 2015 where Carnegie agreed to pay $80,000.00 to reflect the sanctions levied against it with respect to the legal fees Miller and Miller Consulting incurred (Stipulation and Confession of Judgment, NYSCEF Doc No. 233).

On August 24, 2017, the Supreme Court (Ramos, J.) granted Carnegie's motion to restore the underlying action on the condition that Carnegie pay the $80,000.00 sanction (Oral Argument Transcript, P. 3, L. 22 to P. 4, L. 9, NYSCEF Doc. No. 240). After Carnegie failed to pay sanctions, the Supreme Court (Ramos, J.) deemed the underlying action "abandoned" and marked it as "disposed" on November 9, 2018 (Order, NYSCEF Doc. No. 243).

The Instant Legal Malpractice Action

Carnegie commenced this legal malpractice action arising from defendants' representation of Carnegie in the underlying action (Complaint, NYSCEF Doc. No. 207). The complaint in the instant action alleges that defendants were negligent, among other things, in failing to timely comply with discovery orders, which resulted in the dismissal of the underlying action (*id.*). The complaint also alleges that Carnegie incurred two sanctions awards against it and incurred legal fees to reverse the dismissal of the underlying action as a result of defendants' negligence (*id.*).

Carnegie also seeks to recover as damages the full value of lost commissions totaling $630,137.08 in connection with twenty (20) life insurance policies Miller allegedly diverted from Carnegie, as well as the value of salaries and benefits of Carnegie employees who allegedly aided and abetted Miller in diverting clients away from Carnegie (*id*.; Statement of Damages, NYSCEF Doc. No. 196; Opposing Memorandum of Law, P. 20, NYSCEF Doc. No. 249).

Defendants' Motion for Partial Summary Judgment

Defendants maintain that Carnegie is unable to prevail on its claim for legal malpractice because Carnegie is unable to establish it sustained any damages as a result of defendants' alleged negligence since the underlying action is still pending. According to defendants, Carnegie's legal malpractice claim is not ripe until the underlying action is resolved against Carnegie and that Carnegie is only able to state a claim against the defendants if it loses the underlying action.[4]

Defendants also argue that Carnegie's alleged damages claim for renewal commissions is barred by the Statute of Frauds and must be dismissed because there was no written agreement between the parties as to how renewal commissions would be paid. Among the papers annexed to the motion are a June 18, 2009 letter from defendants to Carnegie and the deposition transcripts of Daly and Schwarz, which all indicate that no written contract existed establishing how commissions would be paid (Daly Deposition Transcript, P. 166, L, 4-15, NYSCEF Doc. No. 198; Schwarz Deposition Transcript, P.174, L. 11-15; P. 248, L. 1-3, NYSCEF Doc. No. 197; June 18, 2009 Letter, NYSCEF Doc. No. 211).

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[4] The Court notes that defense counsel noted at oral argument that the underlying action was no longer pending.

In addition, defendants maintain that Carnegie's alleged damages claim for commissions on four specific insurance policies must also be dismissed because such policies "were never taken" (Supporting Memorandum of Law, P. 12, NYSCEF Doc. No. 190). Defendants note that although Carnegie seeks damages in the amount of $630,137.08 for twenty (20) life insurance policies which Miller allegedly diverted from Carnegie, the documentary evidence and Schwarz's deposition testimony demonstrates that four of the policies, totaling $297,658.29, "were not taken" (*id*.; NYSCEF Doc. No. 212 [letters indicating that four separate policies were "not taken"]). Defendants further note that Schwarz testified at his deposition that no commissions were generated if a policy was "not taken" by the client and no commission was generated (Schwarz Deposition Transcript, P. 256, L. 22 to P. 257, L. 3, NYSCEF Doc. No. 197).

Lastly, defendants maintain, among other things, that Carnegie's alleged damages claim for the value of employees' salaries and benefits of Carnegie employees who allegedly aided and abetted Miller while he worked for Carnegie must be dismissed because Carnegie never sought these damages in the underlying action. Defendants maintain that Carnegie represented in the underlying action that "the nature of this claim is that [d]efendants surreptitiously and without the knowledge of plaintiff, diverted funds to themselves." (Supplemental Response to Interrogatories, ¶14, NYSCEF Doc. No. 195).

Defendants also note that Carnegie's claim for damages in the underlying action was limited to the commissions that Miller allegedly diverted to himself (Statement of Damages, NYSCEF Doc. No. 196). Therefore, defendants argue that inasmuch as a plaintiff in a legal malpractice action can only recover damages that could have been recovered in the context of the underlying action, Carnegie is unable to seek recovery herein for the employees' salaries and benefits since it never asserted such a claim in the underlying action.

Carnegie argues in opposition that the Statute of Frauds does not bar its claim to recover renewal commissions as damages because Miller was a Carnegie employee who was "obligated to remit all proceeds from the issuance of life insurance policies, including commissions and renewals, to Carnegie" (Opposing Memorandum of Law, P. 18, NYSCEF Doc. No. 249). Carnegie also contends that "[t]he clients at issue were Carnegie's clients, and the sales . . . of life insurance policies were Carnegie's corporate opportunities" (*id.*). According to Carnegie, "all commissions resulting from the sale of insurance to Carnegie's clients remain with Carnegie and are part of Carnegie's damages" (*id.*, P. 19).

With respect to the alleged damages for commissions on four specific insurance policies, defendants acknowledge that these policies were "not taken." However, Carnegie maintains that it is nonetheless entitled to recover as damages the commissions at issue because Miller diverted the commissions for these policies and replaced the "not taken" policies with others (*id.*). Carnegie relies upon an October 26, 2006 email Miller wrote to two employees who were named defendants in the Klein action regarding three policies where Miller referenced a replacement policy, replacement forms and Miller Consulting (E-mail, NYSCEF Doc. No. 244).

As for its claim to recover as damages the value of the salaries and benefits of Carnegie employees who allegedly aided and abetted Miller in diverting clients away from Carnegie, Carnegie argues that the complaint in the underlying action "repeatedly alleges Miller's use of Carnegie's employees for his own benefit and seeks damages for those breaches of duties" (Opposing Memorandum of Law, P. 20, NYSCEF Doc. No. 249). Further, Carnegie contends that its former employees forfeited compensation under the faithless servant doctrine since they owed a duty of fidelity to Carnegie and were faithless in performing their services (*id.*).

In reply, defendants reiterate their arguments in support of their motion for partial summary judgment.

Discussion

On a summary judgment motion, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Once the movant demonstrates its prima facie entitlement to summary judgment, the burden shifts to the opposing party to "produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*id.* at 324).

"[W]here there is any doubt as to the existence of a factual issue or where the existence of a factual issue is arguable," summary judgment must be denied (*Matter of New York City Asbestos Litig.*, 33 NY3d 20, 25 [2019] [internal quotation marks and citation omitted]; *see Genesis Merchant Partners, L.P. v Gilbride, Tusa, Last & Spellane, LLC*, 157 AD3d 479, 482 [1st Dept 2018]).

To prevail on a claim for legal malpractice, a plaintiff must establish that the attorney "failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession, and that the attorney's breach of this duty proximately caused plaintiff to sustain actual and ascertainable damages" (*Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438, 442 [2007] [internal quotation marks and citation omitted]). Carnegie is required to show that it would have prevailed on the merits of the underlying action or would have not incurred any damages, but for the defendants' negligence (*id.* at 442; *see Davis v Klein*, 88 NY 2d 1008, 1009-1010 [1996]).

Ripeness of Instant Legal Malpractice Claim

Defendants argue that the legal malpractice claim is not ripe until the underlying action is resolved. However, defense counsel represented at oral argument that the underlying action was no longer pending, rendering defendants'ripeness argument moot.

Alleged Damages for Renewal Commissions

General Obligations Law §5-701(a)(1) provides, in pertinent part, that:

> "Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking … [b]y its terms is not to be performed within one year from the making thereof."

The Appelate Division, First Deparrment has held that " a promise to pay commissions that extends indefinitely, dependent solely on the acts of a third part and beyond the control of the defendant, is within the statute and must be in writing" (*Apostolos v R.D.T. Brokerage Corp*., 159 AD2d 62, 65 [1st Dept 1990]).

The evidence herein reveals that no written contract governed how commissions were to be paid (*see* Daly Deposition Transcript, P. 166, L, 4-15, NYSCEF Doc. No. 198; Schwarz Deposition Transcript, P.174, L. 11-15; P. 248, L. 1-3, NYSCEF Doc. No. 197; June 18, 2009 Letter, NYSCEF Doc. No. 211). As such, the claims for renewal commissions are barred by the Statute of Frauds (*Apostolos v R.D.T. Brokerage Corp*., *supra* at 65).

Alleged Damages for Commissions on Four Insurance Policies "Not Taken"

The parties do not dispute that there are four insurance policies which were "not taken." However, the October 26, 2008 email from Miller to two Carnegie employees which references a "replacement policy" and Miller Consulting provides some credence to Carnegie's claim that

Miller diverted the commissions for these policies and replaced the "not taken" policies with others, which raises factual issues that defeat the grant of summary judgment.

Alleged Damages for Value of Employee Salaries and Benefits

"Damages in a legal malpractice action are designed to make the injured client whole" (*Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, *supra* at 443 [internal quotation marks and citation omitted]).

Here, defendants correctly contend that Carnegie's claim for damages in the underlying action was limited to the commissions that Miller allegedly diverted to himself. Therefore, inasmuch as a plaintiff in a legal malpractice action can only recover damages that could have been recovered in the context of the underlying action (*id.* at 443), Carnegie is now unable to seek recovery for the employees' salaries and benefits since it never asserted such a claim in the underlying action.

Accordingly, it is

ORDERED that the branch of defendants' motion for a stay is denied as moot; and it is further

ORDERED that the branch of defendants' motion for partial summary judgment is granted to the extent that Carnegie's claims for damages based on renewal commissions and the value of employee salaries and benefits is granted, and such claims are dismissed; and it is further

ORDERED that Carnegie shall, within fifteen (15) days from entry of this order serve a copy of this order with notice of entry on all parties and upon the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who is hereby directed to place this case on the trial calendar at the head of said calendar except for actions in which a preference was previously granted; and it is further

ORDERED that such service upon the Clerk of the General's Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-filing" page on the court's website at the address www.ny.courts.gov/supctmanh).

This constitutes the Decision and Order of the Court.

Dated: New York, New York
July 17, 2020

ENTER:

Hon. Dawn Kennedy
J.S.C.

DAWN R. KENNEDY
J.S.C.