

Hill Rosenberg & Thurston LLC v Gerber

2020 NY Slip Op 33724(U)

November 5, 2020

Supreme Court, Kings County

Docket Number: 516400/19

Judge: Leon Ruchelsman

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8
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HILL ROSENBERG & THURSTON LLC,
Plaintiff, Decision and order

- against - Index No. 516400/19

ETHAN GERBER, GERBER & GERBER PLLC, and
ABRAMS, FENSTERMAN, FENSTERMAN, EISMAN,
FORMATO, FERRARA, WOLF & CARONE LLP,
Defendants, November 5, 2020
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PRESENT: HON. LEON RUCHELSMAN

The defendants have moved pursuant to CPLR §2221 seeking to reargue portions of a decision dated July 24, 2020 which dismissed the complaint as to Gerber and Gerber PLLC and Ethan Gerber, dismissed the cause of action for unjust enrichment and dismissed all claims prior to July 25, 2013. The defendants oppose the motion. Papers were submitted by the parties and after reviewing all the arguments this court now makes the following determination.

As recorded in the prior order the plaintiff, a law firm, has filed this lawsuit against the defendants alleging they performed legal services for the defendants between January 2011 and January 2019 and they have not been paid for such services. The prior decision noted that in 2016 Ethan Gerber became a partner at defendant law firm Abrams Fensterman and according to the Amended Verified Complaint, Gerber and Gerber merged with Abrams Fensterman and Abrams Fensterman became the successor of Gerber and Gerber. Consequently, the plaintiff likewise sued Abrams

Fensterman.

The prior decision dismissed the action against Gerber and Gerber on the grounds Gerber and Gerber was never served since the individual served on its behalf had no authority to accept service. The plaintiff now seeks to reargue that determination to the extent the court should allow service upon Gerber and Gerber pursuant to CPLR §306-b to assert claims against them prior to the merger with Abrams Fensterman.

A motion to reargue must be based upon the fact the court overlooked or misapprehended fact or law or for some other reason mistakenly arrived at in its earlier decision (Deutsche Bank National Trust Co., v. Russo, 170 AD3d 952, 96 NYS2d 617 [2d Dept., 2019]).

It is well settled that pursuant to CPLR §306-b an extension of time may be granted where the plaintiff establishes reasons either "upon good cause shown or in the interest of justice" (Leader v. Maroney, Ponzini & Spencer, 97 NY2d 95, 736 NYS2d 291 [2001]). A plaintiff that fails to attempt service at all, as a matter of law, cannot establish 'good cause' to effectuate late service (Valentin v. Zaltsman, 39 AD3d 852, 835 NYS2d 298 [2d Dept., 2007]).

The plaintiff argues the court should grant permission to serve Gerber and Gerber pursuant to CPLR §306-b because the merger between Gerber and Gerber occurred in 2016 and there is no

knowledge about the liabilities between Gerber and Gerber and Abrams Fensterman for events that occurred before that date. Thus, Gerber and Gerber is not necessarily the same party as Abrams Fensterman. The plaintiff argues that "we do not know what the legal arrangement was between GERBER & GERBER, PLLC and ABRAMS, FENSTERMAN at the time of the merger. We are not privy to any contracts or other agreements entered into between the two firms. We have no knowledge or information as to the assets and liabilities assumed by each firm both before and after the merger. We have no knowledge or information as to the existence of any hold harmless clause, or any other similar clause/agreement, that might be relied upon by ABRAMS, FENSTERMAN to relieve it of liability for any claims or suits relating to the legal services rendered by Plaintiff to GERBER & GERBER, PLLC. either before or after the merger" (see, Affirmation in Support of Motion to Reargue, §11). However, in opposition to the motion to dismiss the plaintiff asserted the contrary. In those arguments the plaintiff asserted that "in and around 2016, ABRAMS FENSTERMAN merged with, and became the successor firm to, GERBER & GERBER, PLLC on matters being handled in the past, as well as those to be handled in the future, by GERBER & GERBER, PLLC. (see, Affirmation in Opposition to Motion to Dismiss, §18). Indeed, Paragraph 27 of the Supplemental Summons and Complaint states that "in and around 2016, defendant, ABRAMS FENSTERMAN

merged with, and became the successor firm to, defendant, GERBER & GERBER, PLLC on matters being handled in the past, as well as those to be handled in the future, by defendant, GERBER & GERBER, PLLC" (see, Supplemental Amended Complaint, §27). The next Paragraph states that "upon information and belief, at the time defendants, ETHAN GERBER and GERBER & GERBER, PLLC merged with defendants, ABRAMS FENSTERMAN, there was a written agreement whereby the assets and liabilities of defendant, GERBER & GERBER, PLLC were assumed by defendant, ABRAMS FENSTERMAN (see, Supplemental Amended Complaint, §28). Thus, there is no basis to the plaintiff's arguments presented in this motion to reargue that "it simply cannot be said that ABRAMS, FENSTERMAN and GERBER & GERBER, PLLC are essentially the same party" (see, Affirmation in Support of Motion to Reargue, §12) when the plaintiff has asserted as much in its complaint and prior arguments. Therefore, this portion of the motion to reargue is denied.

Turning to the next argument, namely seeking reargument regarding the court's dismissal of claims against Ethan Gerber individually, the plaintiff asserts the court failed to afford the complaint a liberal construction. In support of plaintiff's request that Ethan Gerber should be personally responsible for acts he performed on behalf of a corporation the plaintiff presents six distinct facts presented in the Supplemental

Complaint. They include that Ethan Gerber controlled his own medallions, hired the plaintiff to perform legal work, sent weekly calendars to plaintiff containing the assignments for that week, that invoices were mailed to Ethan Gerber, that Ethan Gerber acknowledged debts to the plaintiff and that Ethan Gerber refused to pay the invoices. However, none of those acts demonstrate, in any way, that Ethan Gerber "exercised complete dominion and control over the corporation and 'abused the privilege of doing business in the corporate form to perpetuate a wrong or injustice'" (Allstate ATM Corp., v. E.S.A. Holding Corp., 98 AD3d 541, 949 NYS2d 483 [2d Dept., 2012]). As recorded in the prior order the factors that are examined to determine whether such abuse has been presented is whether there has been a failure to adhere to corporate formalities, inadequate capitalization, commingling of assets and the personal use of corporate funds (id). Thus, in Oliveri Construction Corp., v. WNW Weaver Street LLC, 144 AD3d 765, 41 NYS3d 59 [2d Dept., 2016] the court concluded that piercing the corporate veil was proper where the evidence supported the facts the corporation was inadequately capitalized and that assets were commingled and that the individual in question kept assets out of the corporation to avoid paying its debts. In this case there are no such allegations at all. The allegations consist of Ethan Gerber

acting on behalf of Gerber and Gerber to pursue the objectives of Gerber and Gerber. Therefore, the plaintiff has failed to allege any conduct that could pierce the corporate veil and consequently, the motion to reargue that decision is denied.

Turning to the motion to reargue the dismissal of the unjust enrichment cause of action, there is no dispute that contracts exist between plaintiff and a Gerber entity. The defendant's reference in earlier motions that the plaintiff never entered into a contract with defendants merely sought to emphasize that plaintiff never entered into a contract with Abrams Fensterman and that therefore the plaintiff was suing the wrong defendants. The court already has concluded that contracts exist and subject to the statute of limitations such claims based upon contracts are viable. Consequently, there can be no cause of action for unjust enrichment and the motion seeking to reargue that determination is denied.

Lastly, the plaintiff argues the court misapprehended the law regarding the continuous representation doctrine. The doctrine does not really apply outside a malpractice context. As the court explained in West Village Associates Limited Partnership v. Balber Pickard Battistoni Maldonado & Ver Dan Tuin P.C., 49 AD3d 270, 854 NYS2d 340 [1st Dept., 2008] all malpractice actions accrue when the malpractice is committed.

However, "under the 'continuous representation' doctrine, however, a client cannot reasonably be expected to assess the quality of professional service while in progress" (id).

The doctrine is "generally limited to the course of representation concerning a specific legal matter," and thus is "not applicable to a client's ... continuing general relationship with a lawyer ... involving only routine contact for miscellaneous legal representation ... unrelated to the matter upon which the allegations of malpractice are predicated" (id). Further, "the pleading must assert more than simply an extended general relationship between the professional and client, and the facts are required to demonstrate continued representation in the specific matter directly under dispute" (id). Therefore, even if the doctrine extends to breaches of contract, the underlying breach must be connected to a malpractice claim. This is apparent since in order for the doctrine to apply the latter services must relate to the original services performed (Sendar Development Co., LLC v. CMA Design Studio P.C., 68 AD3d 500, 890 NYS2d 534 [1st Dept., 2009]). Luk Lamellen U. Kupplungbau GmbH v. Lerner, 166 AD2d 505, 560 NYS2d 787 [2d Dept., 1990] is in accord. Although that decision seemed to apply the continuous representation doctrine in breach of contract cases, clearly the breach of contract must relate to "the performance of the same or

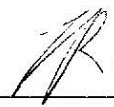
related services and is not merely the continuity of a general professional relationship” (id). There is no support for the doctrine in this case where each appearance by the plaintiff was unrelated to the appearances beforehand. Therefore, the continuous representation doctrine is inapplicable and therefore the motion to reargue that determination is denied.

Thus, the motion seeking to reargue the prior determination is denied in all respects.

So ordered.

ENTER:

DATED: November 5, 2020
Brooklyn N.Y.



Hon. Leon Ruchelsman
JSC