

Incorporated Vil. of Freeport v Albrecht, Viggiano, Zurich & Co., PC
2020 NY Slip Op 35788(U)
November 10, 2020
Supreme Court, Nassau County
Docket Number: Index No. 607889/2015
Judge: Stephen A. Bucaria
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

INCORPORATED VILLAGE OF FREEPORT,

Plaintiffs,

-against-

ALBRECHT, VIGGIANO, ZURICH &
COMPANY, PC, ROBERT MCGRATH and
PATRICK BRYAN,

Defendants.

TRIAL/IAS, PART 1
NASSAU COUNTY
INDEX No. 607889/2015MOTION DATE: 8/13/20
Motion Sequence 010

The following papers read on this motion:

Notice of Motion.....X
 Affirmation in Support..... X
 Memorandum of Law in Opposition.....X
 Affirmation in Opposition.....X
 Memorandum of Law in Support.....X
 Reply Memorandum of Law.....X

This motion by the defendants for an order pursuant to CPLR 2221 (d) (Sequence no. 10) granting reargument of this court's order dated April 24, 2020, and upon reargument, an order granting defendant's motion for summary judgment dismissing the plaintiff's second cause of action in its entirety and denying the plaintiff's cross-motion for summary judgment is determined as provided herein.

In this action to recover damages allegedly caused by defendants' accounting malpractice, the plaintiff alleges, inter alia, that the defendants were negligent in their preparation of their audited financial statement for the calendar year ending 2013 by understating the accounts payable by approximately

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\$971,000, which resulted in an unfavorable rating by Moodys and caused them to borrow at an increased interest rate. In its Amended complaint, the plaintiff also sought to recover for breach of contract based upon the defendants' alleged negligence in performing non-audit services as well as their failure to obtain pre-approval of them and the defendants' failure to provide itemized bills for non-audit services which was required by their Engagement Letters. As a direct result of that claim, the defendants brought a third-party action against Village official Howard Colon seeking indemnification and/or contribution based upon, inter alia, his alleged approval of those services. Soon thereafter, the plaintiff moved for leave to amend its Amended Complaint. That application was granted by order of this court dated October 11, 2018. (*Incorporated Village of Freeport v Albrecht et al.*, SFO dated October 11, 2018, index No. 607889/2015). That amendment essentially resulted in the reinstatement of its original complaint. In that order, this court held that the second amended complaint was deemed served in the form annexed as plaintiff's Ex. B.

In denying the defendants' motion for summary judgment, this court found that they had "failed to submit *any* expert affidavit or qualified testimony or proof or even the affidavit of a party, to establish that they did not fail to 'use that degree of skill and knowledge normally possessed and used by public accountants in good standing in similar practice and under like circumstances, by significantly deviating and departing from the acceptable standard of care and practice in rendering services and certifying information which was knowingly incorrect and unreliable,' as alleged in plaintiff's second amended verified complaint (emphasis added)." The court noted that the defendants had for the most part improperly sought to shift the burden to the plaintiff by alleging that it had not suffered any damages that were proximately caused by their alleged malpractice.

In contrast, in granting the plaintiff's cross-motion for summary judgment imposing liability on the defendants as to its first cause of action sounding in accounting malpractice, this court noted that the plaintiff had submitted a "thorough 38-page report and analysis" by an expert who had set forth his qualifications and all of the evidence considered by him. He set forth in detail his analysis of the evidence and explained how he ultimately found that the defendants had failed to comply with the standards applicable here, i.e., the generally accepted auditing standards and the generally accepted governmental auditing practices. This court also noted that the "[p]laintiff alleges breach of contract based upon allegations that the defendants billed [them] improperly and not consistent with the

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terms of the Engagement Letters....” This court held that “it is undisputed that the defendants failed to comply with the terms of the Engagement Letters *when billing for additional services outside their auditing services* (emphasis added).” Based solely on that conclusion, this court also granted the plaintiff’s motion for summary judgment as to liability on its second cause of action sounding in breach of contract.

This court found that the “expert” report relied on by the defendants for the first time in opposition to the plaintiff’s motion was inadmissible because it had been “prepar[ed]” by a number of people who remained unnamed and who did not sign the report. In fact, the defendants’ expert even attested that his report “was prepared by [him] and by a staff member working under [his] supervision...(emphasis added).”

The court further noted that in any event, the defendants’ “expert” report only focused on whether or not the plaintiff had sustained damages as a result of any alleged accounting malpractice by them; In fact, the defendants’ expert attested that he had been retained to “evaluate the allegations in the Complaint and if appropriate, to provide an expert opinion on [his] findings” and “to determine what, if any, damages were suffered by [the plaintiff] as a result of any actionable conduct by [the defendants....” This court found that the defendants failed to set forth any basis for concluding that they had not acted negligently, nor had they refuted the plaintiff’s expert’s report.

“A motion for reargument must be ‘based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion’ ” (*MAAD Constr., Inc. v Cavallino Risk Mgt., Inc.*, 178 AD3d 816, 819 [2d Dept 2019], quoting CPLR 2221[d][2]; see also, *Williams v Abiomed, Inc.*, 173 AD3d 1115, 1117 [2d Dept 2019] [citations omitted]). “[T]he remedy ‘is not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided, or to present arguments different from those originally presented’ ” (*Rossi v Scheinbach*, 46 Misc 3d 1226(A) [Sup Ct Nassau County 2015], quoting *McGill v Goldman*, 261 AD2d 593, 594 [2d Dept.1999] [citations omitted]; see also, *In re Baugher*, 44 Misc 3d 1211(A) [Sur Ct Nassau County 2014] [“A motion to reargue is not to be used...as a means by which an unsuccessful party may present new or different arguments from those originally asserted.... A motion to reargue is not to be used as a means ... by which an

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unsuccessful party is permitted to argue again the same issues previously decided [citations omitted]).

In seeking reargument, the defendants fault this court for refusing to consider their "expert" report. While the plaintiff maintains that this issue was not addressed by the defendants on the underlying motion and cannot be advanced for the first time in support of their request for reargument, the defendants correctly point out that the admissibility of their expert's report was only raised by the plaintiff *in its Reply to their opposition to the plaintiff's motion for summary judgment*; Accordingly, the defendants did not have an opportunity to address that issue previously and it will be considered now. This court noted that the defendants' expert's report was inadmissible based on the fact that it failed to identify all of the individuals involved in *preparing* it and their signatures (emphasis added). First and foremost, it could not have been considered by this court in deciding the defendants' motion for summary judgment since it was not submitted in support thereof. In fact, lacking an expert's affidavit, the defendant's application for summary judgment with respect to its first cause of action sounding in accounting malpractice had to be denied as a matter of law and the burden never shifted to the plaintiff. Similarly, contrary to the defendants' argument, the plaintiff had no reason for objecting to the defendants' expert's report *in opposition to the defendants' motion for summary judgment* as it had not yet been submitted to the court; It was only submitted in opposition to the plaintiff's motion for summary judgment. That it had been exchanged in discovery was irrelevant. In any event, more importantly, this court ultimately found on the merits that the defendants' expert's affidavit failed to establish an issue of fact with respect to the plaintiff's entitlement to summary judgment on its cause of action for accounting malpractice as again, it failed to identify accounting errors.

The defendants also presently fault this court for considering the plaintiff's expert's affidavit which they allege suffered from the same shortcomings as their expert's report did. This argument is being advanced for the first time and can be rejected on that basis alone. In any event, in contrast to the defendants' expert's affidavit, the plaintiff's expert's affidavit stated that while others had assisted him in his work, "[t]he opinions expressed in this report are my opinions" and, again, he methodically detailed how the defendants deviated from the applicable accounting standards.

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The defendants also allege that this court misapprehended and/or overlooked facts and/or law by granting the plaintiff's summary judgment on their second cause of action sounding in breach of contract. They maintain that the plaintiff waived its second cause of action based upon the voluntary payment doctrine. They also argue that the plaintiff is estopped from recovering on this claim based on this court's prior order which granted it leave to interpose its second amended complaint. Contrary to the plaintiff's position, these arguments were advanced by the defendants in their Memorandum of Law in support of their motion and in opposition to the plaintiff's motion (NYSEF DOC. NO. 315, p. 14-16)

The defendants have not demonstrated that this court misapprehended the facts and/or misapplied the law in refusing to hold that the plaintiff waived its claims alleging a breach of their agreements regarding billing practices based upon its payment of those bills without objection. The voluntary payment doctrine bars recovery of payments made with full knowledge of the facts and in the absence of fraud or mistake (*Dillon v U-A Columbia Cablevision of Westchester, Inc.*, 100 NY2d 525 [2003]), which clearly was not the case here.

However, insofar as the plaintiff seeks to recover for breach of contract based upon receiving and paying for services which should have been pre-approved and billed distinctly and separately pursuant to the parties' Engagement Letters, the defendants have demonstrated that this court misapprehended the facts and accordingly misapplied the law. Again, the plaintiff only advanced those claims in its Amended Complaint. As a result of those new claims, the defendants instituted a third-party action against the Village official who allegedly induced and authorized them to perform additional non-audit services without pre-approval, seeking indemnification and or contribution. As a result of that third-party action, the plaintiff moved for leave to serve a second amended complaint which this court found "essentially reinstate[d] the original complaint" (*Incorporated Village of Freeport v Albrecht*, et al. SFO dated October 11, 2018 (index No. 607889/2015)). In that order, this court held that the second amended complaint was deemed served in the form annexed as plaintiff's Ex. B. A careful examination of that second amended complaint reveals that the plaintiff clearly withdrew its claim alleging the defendants' breach of the parties' Engagement Letters by failing to have non-audit services pre-approved and failing to bill for them in a distinct and separate form (see Ex. B to this court's October 11, 2018 order former a/k/a the second amended complaint ¶¶ 27, 28, 29, 64, 65, 69, 70 (deleting "unlawful billing and retention practices"), 83, 84, 85, 109, 110, 111, 120). In fact, in that same

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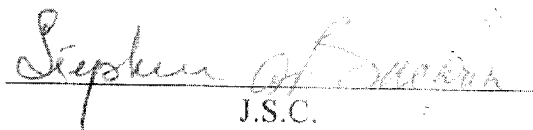
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order, this court specifically held that “[i]n view of the restoration of the original complaint, and plaintiff’s withdrawal of its theory that defendant was unlawfully paid for non-audit services, the third-party complaint is dismissed as moot.” As the defendants note, had those claims not been withdrawn by the plaintiff, its third-party complaint would still be extant.

The defendants also allege that this court erred in holding the independent defendants liable. Aside from a footnote in their Memorandum of Law in opposition to the plaintiff’s motion for summary judgment in which they noted that the plaintiff never made payment to two named individual defendants, the defendants failed to advance that argument previously let alone seek dismissal against them on the grounds now advanced; Reargument based upon theories not previously advanced is not permitted.

Accordingly, reargument is **granted**, and upon reargument, so much of this court’s April 24, 2020 order that granted the plaintiff’s summary judgment on their second cause of action seeking to recover for breach of contract “based upon ...the defendants’ fail[ure] to comply with the terms of the Engagement Letters when billing the Village for additional services” is vacated and the plaintiff’s motion for summary judgment holding the defendants liable for breach of contract under the its second cause of action is **denied**, without prejudice to renewal since the second cause of action also seeks to recover for the allegedly negligent performance of those services which claim was not withdrawn via the plaintiff’s second amended complaint.

Dated: November 10, 2020


J.S.C.

ENTERED

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NASSAU COUNTY
COUNTY CLERK'S OFFICE