SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: **HON. BARRY R. OSTRAGER.** **PART** **IAS MOTION 61EFM**

Justice

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Felix Glaubach,

Plaintiff,

- v -

Graubard Miller, Daniel Chill, Nathan Cohen, Edward Pomeranz

Defendants.

INDEX NO. 161605/2019
MOTION NO. 002

DECISION & ORDER ON MOTION

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OSTRAGER, J.

On February 17, 202, the Court heard oral argument via Microsoft Teams on defendants' pre-answer motion to dismiss. The Court reserved decision on the motion to give the parties an opportunity to consensually resolve this action. The parties informed the Court by letter dated February 24, 2021 that a consensual resolution has not been reached (NYSCEF Doc. No. 71). Accordingly, the Court must decide the motion. For the reasons that follow, defendants' motion to dismiss the Complaint is granted.

Background

Plaintiff Felix Glaubach is the former president of Personal Touch Corp. ("Personal Touch") – a home healthcare company. Glaubach is presently a special board member and 27.5% shareholder of Personal Touch.

In 2013, Glaubach uncovered fraud at Personal Touch relating to a scheme of mischaracterizing certain payments as reimbursements. After failed efforts to get Personal

Touch to address the fraud internally, in 2014 Glaubach hired the law firm Graubard Miller to file a lawsuit aimed at the fraud.

The Complaint in this action alleges that Glaubach intended for Graubard Miller to make claims pursuant to Business Corporate Law (herein "BCL") §720, as well as derivatively against Personal Touch officers. BCL § 720 permits an officer or director to file suit against wrongdoers without pre-suit demand on the board or the need to show demand futility.

Graubard Miller filed suit on plaintiff's behalf in March 2015. The underlying action was litigated in Supreme Court, Queens County under the caption: *Felix Glaubach, derivatively on behalf of Personal Touch Holding Corp., v. David Slifkin, Trudy Balk, Robert Marx, John L. Misicone, John D. Calabro, Lawrence J. Waldman, Robert E. Goff, Jack Bilincia, Anthony Castiglione, Nancy Roa and Josephene Dimaggio,* Index No. 702987/2015. The defendants in the underlying action were officers and directors of Personal Touch. Years of expensive, extensive litigation followed. There were over 30 depositions, 29 fully brief motions, numerous appeals, and cross-appeals in the underlying action.

The caption in the underlying action stated only "Felix Glaubach, derivatively on behalf of Personal Touch Holding Corp." and failed to state in the caption that Glaubach also had a direct claim as an officer under BCL § 720. The text of the Complaint in the underlying action, however, cited BCL § 720, and stated that Felix Glaubach was an officer of Personal Touch. *See* NYSCEF Doc. No. 45 Amended Complaint in the Underlying Action, dated January 13, 2016. These facts form the basis of Glaubach's claim in the present action, discussed further below.

In 2015, the trial court in the underlying action denied a motion to dismiss the Amended Complaint. *See* NYSCEF Doc. No. 44. In 2016, the trial court in the underlying action denied a motion to reargue the motion to dismiss. *See* NYSCEF Doc. No. 46. The trial court decisions

upheld both Glaubach's direct claims under BCL § 720 and his derivative claims on behalf of Personal Touch. Defendants in the underlying action appealed the denial of the motion to dismiss.

In September 2016, Jones Day appeared as co-counsel to Graubard Miller, and, in 2018, the Wilder Firm substituted for Graubard Miller and then became "lead counsel" by the end of 2018.

On July 22, 2018, the trial court entered summary judgment, on liability only, in favor of Glaubach and against defendant Slifkin in the underlying action.

On April 18, 2019, the Appellate Division, Second Department rendered its decision on the appeal defendants had previously filed on the denial on the motion to dismiss. The Appellate Division reversed the trial court's decision and dismissed the causes of action against defendants Slifkin and Balk.

On appeal, the Second Department held that the Amended Complaint failed to allege a demand on the Board or demand futility and further held that because the Amended Complaint indicated that Plaintiff [Glaubach] had sued in his capacity as a shareholder, the demand requirement applied to his BCL §720 causes of action and dismissed them. The remaining causes of action were also dismissed.

The crux of the present lawsuit is that plaintiff Glaubach alleges Graubard Miller committed malpractice by (1) failing to advise Glaubach to make a demand on the Board of Personal Touch and (2) by failing to state in the caption of the underlying action that Plaintiff's claims were both derivative and direct. Plaintiff's contention is based on the Appellate Division's decision in the underlying action.

Standard on Motion to Dismiss

On a CPLR 3211(a)(7) motion to dismiss, the court must afford the pleadings a liberal construction, accept the allegations of the complaint as true and provide the plaintiff with "the benefit of every possible favorable inference." *Leon v. Martinez*, 84 N.Y.2d 83 (1994); *Goshen v. Mutual Life Ins. Co of NY*, 98 N.Y.2d 314 (2002). A motion pursuant to CPLR 3211(a)(1) to dismiss a complaint on the ground that a defense is founded on documentary evidence "may be appropriately granted only where the documentary evidence utterly refutes [the] plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Id*.

Elements of Legal Malpractice Claims

In the present action, plaintiff brings a single cause of action for legal malpractice against Graubard Miller and the individual defendants who are or were attorneys at Graubard Miller.

To sustain a cause of action alleging 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 the plaintiff actual and ascertainable damages. *Rudolf v. Shayne, Dachs, Stanisci, Corker & Sauer*, 8 N.Y.3d 438 (2007); *Bauza v. Livingston*, 40 A.D.3d 791 (2d Dept, 2007); *Magnacoustics, Inc. v. Ostrolenk, Faber, Gerb & Soffen*, 303 A.D.2d 561 (2d Dept, 2003).

Recovery for professional malpractice against an attorney requires that a client prove three elements: "(1) the negligence of the attorney; (2) that the negligence was the proximate cause of the loss sustained; and (3) proof of actual damages". *Mendoza v. Schlossman*, 87 A.D.2d 606, 607 (2d Dept, 1982). Plaintiff must establish that counsel "failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal

profession" and to meet the exacting standard that "'but for' the attorney's negligence" the outcome of the matter would have been substantially different. *AmBase Corp. v. Davis Polk & Wardwell*, 8 N.Y.3d 428, 434 (2007); *N. A. Kerson Co. v. Shayne, Dachs, Weiss, Kolbrenner, Levy & Levine*, 45 N.Y.2d 730 (1978).

Discussion

Plaintiff alleges defendants committed malpractice by (1) failing to advise Glaubach to make a demand on the Board of Personal Touch and (2) by failing to state in the caption of the underlying action that Glaubach's claims were both derivative and direct. Plaintiff alleges that these failures were the proximate cause of plaintiff's ultimate loss in the underlying action. Plaintiff alleges that but-for these purported failures by defendants, plaintiff would have prevailed in the underlying action. Plaintiff alleges he was damaged "in the amount of his share (27.5%) of the $600,000 that had to be expended on the forensic accounting firm Friedman LLP; attorney fees expended in the case, including, $925,875.19 paid to Graubard Miller for a strong case which was fatally ruined from the start based on the Defendants' pleading errors; $5,045,684 paid to Jones Day for litigation of a strong case which was undermined due to the pleading errors by Graubard Miller; and $367,384 to the Wilder Law firm." *See* Complaint at ¶ 53.

Defendants move to dismiss the Complaint on several grounds, chief of which is a defense based on documentary evidence. The documentary evidence at issue is the Amended Complaint and decisions in the underlying action. Plaintiff contends that the pleading and decisions in the underlying action do not qualify as "documentary evidence" under CPLR 3211 (a)(1). This argument is without merit. All of the documents submitted to be considered with defendants' motion to dismiss are either pleadings, decisions, or other court documents in the

underlying action – many of which are referenced in but not attached to the Complaint. Where, as here, there is no dispute as to the authenticity of the documents, there is no prohibition on considering pleadings or prior court orders as documentary evidence if relevant.

Here, the Court finds that the pleading in the underlying action – specifically the Amended Complaint dated January 13, 2016 (NYSCEF Doc. No. 45) is documentary evidence sufficient to utterly refute plaintiff's claim for legal malpractice.

The heart of plaintiff's claim is that the underlying action was dismissed for failure to evidence that plaintiff was suing both in his derivative and direct capacity under BCL § 720. Plaintiff argues that it was fatal to the case that the caption should have stated "Flex Graubard *directly and derivatively* on behalf of Personal Touch Corp.". This argument fails as a matter of law.

As defendants argue, it has long been the law that a caption will not take priority over the pleading's factual allegations. A century ago, the Appellate Division made clear that "[t]he body of the complaint must be considered, not the omissions of the caption." *Kornblum v. Commercial Advertiser Ass'n*, 183 A.D. 615, 619 (2d Dep't 1918); *see also Knox v. Metro. El. Ry. Co.*, 12 N.Y.S. 848, 849 (1st Dep't Gen. Term 1890) ("[T]he averments in the complaint are sufficient to affix to the plaintiffs their proper representative character, and, when that appears in the body of the complaint, an erroneous description in the caption is immaterial"), aff'd without opinion, 28 N.E. 485 (1891); *Hillside Colony Inc. v. Barbolt*, 86 Misc.2d 20, 24–25 (Sup. Ct. Saratoga Co. 1976). *Accord Rapoport v. Schneider*, 29 N.Y.2d 396, 403 (1972) ("the primary purpose of pleadings" is "notice"); *Van Gaasbeck v. Webatuck Cent. Sch. Dist. No. 1*, 21 N.Y.2d 239, 246 (1967) ("Surely, we have advanced far beyond that hypertechnical period when form was all-

important and a pleader had to attach the correct label to his complaint, at the risk of having it dismissed").

Indeed, the trial court in the underlying action clearly understood from the body of the Amended Complaint that Glaubach was bringing both derivative and direct claims under BCL §720 and sustained those claims on a motion to dismiss and again on a motion to reargue, and ultimately rendered summary judgement in plaintiff's favor.[1] That the Appellate Division later reversed this decision does not mean that defendants were negligent or failed to meet the relevant professional standard of care. The body of the Amended Complaint references BCL §720 twelve times, and twice states that Glaubach is a Special Director of Personal Touch. As such, the Amended Complaint utterly refutes plaintiff's claim of legal malpractice.

Standing

Even if there were no such documentary evidence refuting plaintiff's claim, the Complaint would still need to be dismissed because plaintiff lacks standing to bring a legal malpractice claim against defendants. The present action is brought by Glaubach as an individual, but the right of recovery, if any, belongs to Personal Touch.

Pursuant to BCL §720, an individual, in their capacity as officer or director, is permitted to sue the corporate management for malfeasance without having to make a pre-suit demand on the corporate board as required for shareholder derivative claims under BCL §626. N.Y. Bus. Corp. Law §720. Although a BCL §720 claim does not need to be brought in the name of the corporation, the cause of action and right of recovery belongs solely to the corporation and not

[1] Moreover, two law firms subsequently represented Glaubach and Personal Touch and made no motion to amended the Caption until after the Appellate Division, Second Department rendered its decision, and even then sought additional relief beyond Amending the Caption.

the individual officer or director bringing the lawsuit. *Conant v. Schnall*, 33 A.D.2d 326, 328–30 (3d Dep't 1970).

In opposition, plaintiff raises issues of privity. Plaintiff argues that because plaintiff retained Graubard Miller and Graubard Miller appeared in the case as plaintiff's attorney, that retention creates privity between plaintiff and defendants and confers standing. This argument misses the point. Plaintiff's Complaint in the present against alleges a failure to properly assert claims pursuant to BCL §720. Although claims brought under BCL §720 are brought by a particular officer, here – Glaubach, the cause of action and right of recovery has always belonged to Personal Touch. Therefore, Glaubach as an individual has no cause of action for legal malpractice against defendants.

Accordingly, it is hereby

ORDERED that the Complaint is dismissed.

Dated: February 26, 2021

BARRY R. OSTRAGER, J.S.C.

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