Paraco Gas Corp. v
Jay Z. Gerlitz & Assoc., Inc.

2021 NY Slip Op 34081(U)

September 10, 2021

Supreme Court, Westchester County

Docket Number: Index No. 51723/2020

Judge: Linda S. Jamieson

Disp ____ Dec ____ Seq. No. 3 Type _dismiss_

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

PRESENT: HON. LINDA S. JAMIESON

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PARACO GAS CORPORATION, Index No. 51723/2020

Plaintiff, DECISION AND ORDER

-against-

JAY Z. GERLITZ & ASSOCIATES, INC., and JAY Z. GERLITZ,

Defendants.

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The following papers numbered 1 to 4 were read on this motion:

Paper	Number
Notice of Motion, Affirmation and Exhibits	1
Memorandum of Law	2
Memorandum of Law in Opposition[1]	3
Reply Memorandum of Law	4

This is defendants' third motion to dismiss what is now the third amended complaint. According to the complaint, since 1997, defendants "have managed and controlled all aspects of Paraco's employee healthcare benefits. As a result of that long-term business relationship between the parties, the Plaintiff fully relied upon and trusted in the Defendants' duty to act in the best interests of Paraco." Plaintiff alleges that "Defendants entered into a business relationship with [non-parties] Riccardi,

[1]Tables of contents and authorities are required on all memoranda of law. In future, memoranda that omit these will be rejected.

EBS and PMB, to assist Defendants in the management of Paraco's employees' healthcare insurance account ("the EHIA" or "Paraco's EHIA"). . . . Relying upon the trust which reposed in the Defendants, Paraco agreed to follow the advice and recommendations of the Defendants. The Plaintiff thereafter, relying upon the trust which reposed in them, and acting on the advice and guidance proffered by the Defendants, allowed the Defendants to engage the services of Partners MGU and the Riccardi Entities to work with the Defendants in assuming responsibility for all aspects of Paraco's EHIA." Plaintiff continues, "unknown to the Plaintiff during the relevant time period, the Riccardi Entities, along with other entities owned by Riccardi, were experiencing serious legal issues involving both civil and criminal fraud. These issues involved, inter alia, allegations concerning stealing of money from clients, failing to properly pay employee benefits claims and premiums, and making false and fraudulent representations to clients and others concerning funds entrusted to them by those clients. The Plaintiff agreed to utilize the services of the Riccardi Entities as a result of the urgings, advice and insistence of the Defendants, and the Defendants knew or should have known that the Plaintiff would so rely on the Defendants' urgings, advice and insistence in that regard." As a result, the Riccardi Entities stole over $2 million from plaintiff.

In previous versions of the complaint, plaintiff alleged that one of the Riccardi Entities, non-party Employee Benefits Solutions, LLC ("EBS") was an agent of defendants. Now, in this version, plaintiff takes a different tack by arguing that defendants had a special relationship with plaintiff and thus owed it fiduciary duties. Specifically, plaintiff contends that it "effectively turned over control of Plaintiff's insurance needs and requirements to the discretion of the Defendants;" defendants convinced plaintiff to use EBS' services; and defendants knew or should have known that EBS was a bad actor. In other words, plaintiff asserts that defendants "promoted the total trust placed in them by the Plaintiff to the point where there was, in effect, a complete transfer of responsibility to the Defendants in dealing with and overseeing Plaintiff's insurance matters. That included the selection of entities such as ESB to administer Plaintiff's employment health insurance as well as the monitoring of such entities to ensure that the rights of the Plaintiff were being protected. . . Plaintiff subsequently discovered that EBS and Riccardi had embarked on a scheme to systematically rob funds from the Plaintiff." Plaintiff never alleges how defendants should have known this, other than through their familiarity with the industry and their business dealings with ESB both generally and with respect to plaintiff's business.

The complaint contains four causes of action: professional negligence;[2] breach of fiduciary duty; negligent misrepresentation; and aiding and abetting fraud. The Court addresses each cause of action.

Beginning with the claim for breach of fiduciary duty, plaintiff argues that the essence of this claim is that "not only was the relationship between the Defendants and the Plaintiff beyond the ordinary broker-client relationship, but the degree of trust specifically fostered by the Defendants elevated the Defendants to act as fiduciaries of the Plaintiff and that they then breached those duties." The problem with plaintiff's argument is that defendants had no fiduciary duty to plaintiff.

The Court of Appeals has explained that insurance brokers, such as defendants, "have a common-law duty to obtain requested coverage for their clients within a reasonable time or inform the client of the inability to do so; however, they have no continuing duty to advise, guide or direct a client to obtain additional coverage. Hence, in the ordinary broker-client setting, the client may prevail in a negligence action only where it can establish that it made a particular request to the broker and the requested coverage was not procured." There is an

[2]In its opposition papers, plaintiff argues that this is not actually a cause of action for professional negligence, despite it being labeled as such, but is really just a claim for negligence "in the sense of negligence committed in the course of Defendants practicing their [sic]" profession.

exception, however, for when there is a "special relationship" between the broker and client. If there is a special relationship, "the broker may be liable, even in the absence of a specific request, **for failing to advise or direct the client to obtain additional coverage.**" (Emphasis added). The Court "identified three exceptional situations that may give rise to a special relationship, thereby creating an additional duty of advisement," only one of which is arguably relevant here: "(3) there is a course of dealing over an extended period of time which would have put objectively reasonable insurance agents on notice that their advice was being sought and specially relied on." *Voss v. Netherlands Ins. Co.*, 22 N.Y.3d 728, 734–35 (2014). *See also JT Queens Carwash, Inc. v. JDW & Assocs., Inc.*, 144 A.D.3d 750, 753, 45 N.Y.S.3d 100, 105 (2d Dept. 2016) ("where a special relationship develops between the broker and client, the broker may be liable, even in the absence of a specific request, for failing to advise or direct the client to obtain additional coverage.").

Plaintiff ignores the fact that in each of these cases, the "special relationship" only gives rise to a duty to advise the client about additional coverage. *See, e.g., Waters Edge @ Jude Thaddeus Landing, Inc. v. B & G Grp., Inc.*, 129 A.D.3d 706, 707, 10 N.Y.S.3d 563, 565 (2d Dept. 2015); *Cromer v. Rosenzweig Ins. Agency Inc.*, 156 A.D.3d 1192, 1194, 8 N.Y.S.3d 169, 172 (3d Dept.

2017) ("although an insurance broker's common-law duty to his or her clients does not include a continuing duty to advise the clients on appropriate coverage or to recommend additional coverage that the clients did not request, an insurance broker may nevertheless be found liable for failing to provide appropriate advice regarding insurance coverage where it is determined that a special relationship has been established with his or her client."); it does not apply to issues unrelated to coverage, such as those alleged by plaintiff. *Loevner v. Sullivan & Strauss Agency, Inc.*, 35 A.D.3d 392, 394-95, 825 N.Y.S.2d 145, 147 (2d Dept. 2006) ("the record provides no basis to conclude that the plaintiff and Sullivan had a special relationship that would give rise to the potential for a continuing duty on Sullivan's part to advise the plaintiff to obtain additional coverage."). *See also STB Invs. Corp. v. Sterling & Sterling, Inc.*, 178 A.D.3d 413, 111 N.Y.S.3d 170 (1st Dept. 2019).

The Court thus finds that even if the parties did have a special relationship - a finding which it need not make – it would not give rise to a fiduciary duty in the context of this relationship, which is unrelated to coverage. *Cf. Broecker v. Conklin Prop., LLC*, 189 A.D.3d 751, 138 N.Y.S.3d 177, 181 (2d Dept. 2020) (allowing breach of fiduciary duty claim because plaintiff "raised specific questions about the insurance coverage

and the exclusions . . . and . . . relied on the appellants' expertise [on the] . . . question of coverage."). Moreover, any damages that plaintiff suffered are because of misconduct by EBS, not defendants. The second cause of action is thus dismissed.

The same result applies to the first cause of action, for professional negligence. Defendants argue that "professional" is defined strictly, and applies to doctors, lawyers, dentists and other similar highly-trained and educated people, not insurance brokers. Even if it applied to insurance brokers – again, a finding which this Court need not make – (or if it were a claim for ordinary negligence) it only applies in the context of a special relationship imposing additional responsibilities relating to coverage. Plaintiff alleges that "Ordinarily, an insurance broker is only responsible to an insured **to properly obtain insurance in accordance with what was requested by the insured.** However, when there is a special relationship existing between the broker and the client-insured, a heightened degree of duty owed from the broker to the client." (Emphasis added). Plaintiff's own words demonstrate that the "heightened degree of duty" relates solely to coverage. The claim for negligence, professional or otherwise, is also dismissed.

Turning next to the claim for negligent misrepresentation, plaintiff acknowledges that such a claim "requires the plaintiff to demonstrate (1) the existence of a special or privity-like

relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information." Assuming, *arguendo*, that there was such a relationship, plaintiff further alleges that "the Complaint sets forth allegations that 'Defendants [...] repeatedly communicated to the Plaintiff that the Ricardi Entities were competent, professional and were performing well regarding Plaintiff's interests' (¶ 52) and 'Defendants [...] repeatedly communicated to the Plaintiff that the Ricardi Entities were acting in a competent and honest manner regarding the EHIA.'" The allegations in the complaint are far too vague to have the requisite specificity about the alleged false representations that defendants made to plaintiff. *Lipton v. Unumprovident Corp.*, 10 A.D.3d 703, 707, 783 N.Y.S.2d 601, 604 (2d Dept. 2004). Instead, all plaintiff alleges is general, sweeping statements. This is inadequate. *Ferro Fabricators, Inc. v. 1807-1811 Park Ave. Dev. Corp.*, 127 A.D.3d 479, 479-80, 11 N.Y.S.3d 548, 549 (1st Dept. 2015) (dismissing claim "for failure to plead with requisite particularity pursuant to CPLR 3016(b). Here, the third-party complaint only contains general allegations as to the alleged misrepresentations and virtually no information as to when and by whom these representations were made."). *See also Sheth v. New York Life Ins. Co.*, 273 A.D.2d 72, 74, 709 N.Y.S.2d 74, 75 (1st Dept. 2000)

("purported misrepresentations relied upon by plaintiffs may not form the basis of a claim for fraudulent and/or negligent misrepresentation since they are conclusory and/or constitute mere puffery, opinions of value or future expectations. . . ."); *Goldfarb v. Schwartz*, 26 A.D.3d 462, 463, 811 N.Y.S.2d 414, 416 (2d Dept. 2006) ("bare assertion" inadequate for claim of negligent misrepresentation). The third cause of action is also dismissed.

The final cause of action is for aiding and abetting fraud. As plaintiff states, this claims requires it to "allege the existence of the underlying fraud, actual knowledge, and substantial assistance," and it "must be pleaded with the specificity sufficient to satisfy CPLR 3016(b)." As the Second Department has explained, "Aiding and abetting fraud is not made out simply by allegations which would be sufficient to state a claim against the principal participants in the fraud combined with conclusory allegations that the aider and abettor had actual knowledge of such fraud." *Goel v. Ramachandran*, 111 A.D.3d 783, 792, 975 N.Y.S.2d 428, 438 (2d Dept. 2013). A review of the fourth amended complaint shows that that is exactly what plaintiff has done. "The facts alleged in the complaint are insufficient to permit a reasonable inference as to the [] defendants' knowledge of this fraud and their substantial

assistance in the achievement of the fraud." *Id.* at 793, 975 N.Y.S.2d at 439.

Plaintiff certainly alleges adequately the wrongdoing by EBS. With respect to defendants, however, it only states that "they knew or should have known of said misrepresentations made by the Riccardi Entities by virtue of Defendants' involvement with the Riccardi Entities in the context of managing the EHIA and that the Plaintiff would rely on such statements from the Riccardi Entities." None of the emails that plaintiff attaches to the complaint, however, indicates that defendants knew or should have known that EBS was a bad actor. All they demonstrate was that plaintiff and defendants had the same information at the same time. Accordingly, the Court dismisses the fourth cause of action.

The complaint is dismissed in its entirety.

The foregoing constitutes the decision and order of the Court.

Dated: White Plains, New York
September 10, 2021

HON. LINDA S. JAMIESON
Justice of the Supreme Court

To: The DeIorio Law Group , PLLC
Attorneys for Plaintiff
800 Westchester Avenue, Suite S-608
Rye Brook, New York 10573

Lewis Brisbois et al.
Attorneys for Defendants
77 Water Street, 21st Floor
New York, New York 10005