Channel Fabrics, Inc. v Skwiersky, Alpert & Bressler LLP
2022 NY Slip Op 33991(U)
November 18, 2022
Supreme Court, New York County
Docket Number: Index No. 655432/2021
Judge: Joel M. Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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CHANNEL FABRICS, INC.,

Plaintiff,

- v -

SKWIERSKY, ALPERT & BRESSLER LLP, NEIL BRESSLER, CPA

Defendants.

INDEX NO. 655432/2021

MOTION DATE 07/15/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 32, 33, 34, 35, 36, 37

were read on this motion to DISMISS.

This case concerns the scope of an accounting firm's professional, fiduciary, and contractual duties when preparing and conducting a "review" (not an audit) of a client's financial statements. Defendants Skwiersky, Alpert & Bressler LLP and Neil Bressler, CPA (collectively "SAB" or "Defendants") move to dismiss the Complaint asserted against them by Plaintiff Channel Fabrics, Inc. ("Channel"), pursuant to CPLR §§3211(a)(1), (5) and (7). Channel alleges that SAB, who were retained as accountants to conduct a review and prepare Channel's financial statements, are liable for failing to identify an overstatement of accounts receivable in Channel's financial statements, which Channel alleges led to the failure of its business.

Defendants' motion is granted.

Professional Malpractice

Channel's Complaint fails to plead a viable claim for professional malpractice. Such a claim "requires proof that there was departure from accepted standards of practice and that [the]

departure was [a] proximate cause of [the] injury" (*D.D. Hamilton Textiles, Inc. v Est. of Mate*, 269 AD2d 214, 703 [1st Dept 2000]).

Here, Plaintiff pleads allegations sounding in audit services, yet it is undisputed that scope of Defendants' engagement was far more limited. The Engagement Letters (NYSCEF 10–12) governing SAB's work and responsibilities provided, among other things, that SAB would "prepare the financial statements" and "perform a review engagement with respect to those financial statements." They make clear that "[a] review engagement is substantially less in scope than an audit engagement, the objective of which is the expression of an opinion regarding the financial statements as a whole. A review engagement does not contemplate obtaining an understanding if the Company's internal control; assessing fraud risk; testing accounting records by obtaining sufficient appropriate audit evidence through inspection, observation, confirmation, or other examination of source documents" (*id*. p. 1). They further provide that SAB "cannot be relied upon to identify or disclose any financial statement misstatements, including those caused by fraud or error, or to identify or disclose any wrongdoing within the Company" (*id*. p. 2). The Engagement Letters go on to state that SAB "will assist in the preparation of your financial statement . . . but the responsibility for the financial statements remains with you" (*id*, p. 4). Further, the Engagement Letters expressly stated that SAB would not express an opinion regarding the financial statements (*id*. p. 1). Plaintiff also executed Representation Letters, in which Channel's CEO, Steven Wolfe, took "responsibility for the preparation and fair presentation of the financial statements" and affirmatively stated that the financial statements did not include any uncorrected misstatements and that no events had occurred subsequent to the date of the company's financial statements that would require adjustment (NYSCEF 13–15).

Consistent with the language of the Engagement Letters, courts have recognized that a review engagement is more limited in scope than an audit in that it "consists principally of inquiries of the client's management and analysis of financial information supplied by the client . . . [and offers only] limited assurance that the accountant is not aware of any material modifications that should be made to the client's financial statements in order for them to conform with GAAP" (*William Iselin & Co. v Landau*, 71 NY2d 420, 424-25 [1988]). In this regard, "an accountant and client may contractually agree that the accountant is not to perform certain services, thereby absolving the accountant of liability for not performing them" (*Cumis Ins. Socy. Inc. v Tooke*, 293 AD2d 794, 798 [3d Dept 2002]). Nevertheless, an accountant "has a duty to exercise due care" (*Landau*, 71 NY2d at 425). "To that end, the applicable standards provide that: 'if the accountant becomes aware that information coming to his attention is incorrect, incomplete or otherwise unsatisfactory, he should perform the additional procedures he deems necessary to achieve a limited assurance that there are no material modifications that should be made to the financial statements in order for the statements to be in conformity with generally accepted accounting principles'" (*Collins v Esserman & Pelter*, 256 AD2d 754, 756 [3d Dept 1998]).

Channel seeks to hold SAB liable for failing to identify and correct alleged overstatements of Channel's accounts receivable in Channel's 2018, 2019, and 2020 financial statements. The documentary evidence makes clear, however, that Channel provided SAB with an unqualified representation that Channel had "properly recorded or disclosed in the financial statements" for "[r]elated-party transactions and related accounts receivable or payable" (NYSCEF 13–15 ¶ 5). Nevertheless, Channel argues that the errors purportedly embedded in its own data – expressly confirmed by the CEO – could have been discovered if SAB had compared

the accounts receivable with comparable information from prior periods or considered plausible relationships between the accounts receivable and the sales figures. In short, Channel argues that SAB should have undertaken affirmative steps to verify the accuracy of the information it received from Channel, which goes beyond the scope of the expressly limited review engagement to which SAB agreed.

Further, Channel's allegations of proximate cause are attenuated and speculative (*Herbert H. Post & Co. v Sidney Bitterman, Inc.*, 219 AD2d 214, 224 [1996]). Even if SAB had compared the accounts receivable, Channel can only theorize that SAB "would have further determined the material reductions in accounts payable recorded by Channel by off-setting payable amounts due to Chinese vendors for monies collected by them directly from Channel customers," leading SAB to determine that "the corresponding reduction in Channel's accounts receivable was not recorded by Channel, resulting in the accounts receivable being grossly overstated" (Compl. ¶ 40). This is precisely the type of speculation and conjecture that is insufficient to state a claim.

Finally, Channel fails to plead ascertainable damages (*Ferguson v Hauser*, 156 AD3d 425 [1st Dept 2017]). Channel claims that had SAB identified the errors made by Channel in its financial statements, "Channel would then have taken appropriate corrective measures and the resulting damages that Channel has been forced to incur would have been avoided" (Compl. ¶ 55). Not only are the alleged corrective measures speculative, but the measures were available to Channel regardless of the existence of the supposed deficit. Such speculation cannot support a viable claim, especially as Channel concedes the pandemic independently caused a significant drop in Channel's sales (*id.* ¶ 42).

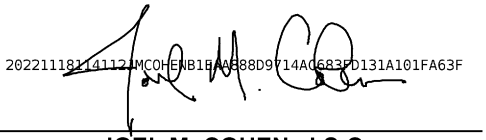
Breach of Contract/Breach of Fiduciary Duty

Channel's claims for breach of contract and breach of fiduciary duty rely on the same factual allegations as the claim for professional malpractice and thus are duplicative (*Serio v PricewaterhouseCoopers, LLP*, 9 AD3d 330, 330 [1st Dept 2004]). They also seek the same damages (*Schwartz v Leaf, Salzman, Manganelli, Pfiel, & Tendler, LLP*, 123 AD3d 901, 902 [2d Dept 2014] [upholding dismissal where a party "sought to recover damages for negligence, fraud, breach of fiduciary duty, and unjust enrichment, since they were duplicative of the professional malpractice cause of action, as they arose from the same facts and do not allege distinct damages"]).

Accordingly, it is

ORDERED that Defendant's motion to dismiss is **granted** and the complaint is dismissed, with costs and disbursements to Defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of Defendants.

This constitutes the Decision and Order of the Court.



11/18/2022
DATE

JOEL M. COHEN, 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