AAEB5 Fund 17, LLC v Duval & Stachenfeld, LLP
2024 NY Slip Op 31708(U)
May 16, 2024
Supreme Court, New York County
Docket Number: Index No. 154345/2023
Judge: Nancy M. Bannon
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. NANCY M. BANNON** **PART** **61M**

Justice

---X

AAEB5 FUND 17, LLC, ZSC NYACK HOTEL FUND, LLC, NYACK HOTEL FUND, LLC, and MIDLAND OAK CAPITAL, LLC d/b/a ADVANTAGE AMERICA EB-5 GROUP,

Plaintiffs,

- v –

DUVAL & STACHENFELD, LLP, ADLER & STACHENFELD, LLP, KIRK BRETT, and JOHN DOES 1-10,

Defendants.

---X

INDEX NO. 154345/2023

MOTION DATE 04/03/2024

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 55, 56

were read on this motion to/for DISMISSAL .

I. INTRODUCTION

In this action alleging, *inter alia*, legal malpractice, the plaintiffs, unsecured creditors of a non-party debtor and former clients of the defendant attorneys, seek damages arising from the defendants' alleged failure to timely file the plaintiffs' proof of claims in the debtor's bankruptcy proceeding. The defendants now move, pre-answer, to dismiss the complaint pursuant to CPLR 3211(a)(1), (a)(5) and (a)(7). The plaintiffs oppose. The motion is granted in part.

II. BACKGROUND

The plaintiffs are related business entities that served as lenders to two real estate projects in New York: a hotel for which ZSC Nyack Hotel Fund, LLC and Nyack Hotel Fund, LLC (collectively, the "Nyack parties") served as lenders, and a condominium for which AAEB5 Fund 17 LLC ("Fund 17") served as lender. The plaintiffs received personal guarantees from nonparty Donald F. Wellington as consideration.

In June 2018, the operating companies for these two real estate projects were forced into involuntary bankruptcy before the United States Bankruptcy Court in the Southern District of New York. See In re EMC Hotels and Resorts LLC, Case No. 18-22932-rdd; In re EMC Bronxville Metropolitan LLC, Case No. 18-22963-rdd. Fund 17 received $77,146.11 from these two bankruptcy proceedings, while the Nyack parties received no distributions. The plaintiffs retained defendant Kirk Brett, Esq. of defendant Duval & Stachenfeld, LLP to represent them in these bankruptcy proceedings. Defendant Adler & Stachenfeld LLP is the successor entity to Duval & Stachenfeld LLP and Brett was a member of both entities.

In August 2018, November 2018, and January 2019, the plaintiffs filed separate actions against Wellington in Supreme Court, New York County, to enforce their payment guaranties.[1] In September 2019, Wellington consented by so-ordered stipulation to entry of judgment in favor of Fund 17 in the principal amount of $5,000,000 plus $2,548,549.19 in interest and costs, and entry of judgment in favor of the Nyack parties for $10,000,000 plus $7,017,637.62 in interest and costs. Neither judgment was satisfied. The plaintiffs once again retained the defendants to represent them in these actions.

Thereafter, on January 24, 2020, Wellington filed for Chapter 11 Bankruptcy before the United States Bankruptcy Court in the Middle District of North Carolina, Greensboro Division (the "Bankruptcy Proceeding"). See In re: Donald F. Wellington, Case No. 20-10080. The Bankruptcy Court entered a Notice of the Bankruptcy Proceeding on January 27, 2020, and mailed notices to interested parties, not attorneys, on January 29, 2020. Wellington listed the plaintiffs as creditors on his Form 104 and Schedule F and filed a Claims Notice on February 19, 2020. In that notice, the Bankruptcy Court set a deadline of May 20, 2020, for interested parties to file proof of claim. On May 25, 2020, defendant Kirk Brett filed two claims on behalf of the plaintiffs in the sums of $7,548,549.19 and $17,017,637.62. These claims were five days late. Wellington objected to the plaintiffs' claims, citing their untimeliness.

[1] Fund 17 filed two actions to enforce its payment guarantee against Wellington; AAEB5 Fund 17 LLC v Donald F. Wellington et al (Index No. 653932/2018) and AAEB5 Fund 17 LLC v Donald F. Wellington et al (Index No. 653932/2018). ZSC Nyack filed its claim against Wellington under ZSC Nyack Hotel Fund LLC et al v Donald F. Wellington (Index No. 655848/2018). Nyack Hotel filed its claim against Wellington under Nyack Hotel Fund LLC v Donald F. Wellington (Index No. 452193/2018). The court consolidated the Nyack parties' actions under Index No. 655848/2018.

On July 27, 2020, Wellington moved for approval of a mediated settlement agreement, under which Wellington would pay an impaired class of general unsecured creditors from the sale of a single asset, to which the Bankruptcy Court approved. The plaintiffs, by their new counsel, Waldrep Wall Babcock & Bailey PLLC, filed a Motion to Allow the Late Filed Claims on July 30, 2020. The Bankruptcy Court held a hearing and denied the plaintiffs' motion by a summary order dated December 15, 2020. The plaintiffs appealed to the United States District Court for the Middle District of North Carolina ("District Court"). On September 13, 2021, the District Court affirmed the decision of the Bankruptcy Court (the "Appeal Decision").

In its memorandum decision, the District Court recounted that the Bankruptcy Court holding was that "considering all the circumstances surrounding the late-filed claims by appellants, appellants had not demonstrated their late-filed claims were due to excusable neglect." The District Court noted that the Bankruptcy Court had accepted the plaintiffs' belief that their attorney was still representing them in the bankruptcy proceedings. In concurring with the Bankruptcy Court, he District Court explained that in determining whether neglect is excusable, the court is to consider "(1) the danger of prejudice to the debtor"; (2) the length of the delay and its potential impact on judicial proceedings; (3) the reason for the delay, including whether it was within the reasonable control of the movant; and (4) whether the movant acted in good faith." The court also noted that the determination of whether excusable neglect exists is an "equitable decision, taking account of all relevant circumstances surrounding the party's omission." [citations omitted]. The District Court then considered and discussed each factor at length. In regard to the third factor, "reason for the delay", the court explained that even if the plaintiffs believed that their attorney would handle the filings, the only excuse proffered by them, they are not relieved from liability for any act or omission by the attorney, under the cited federal law. In other words, a client can be penalized for an omission of their attorney. Since that record showed that the plaintiffs' principal was aware of the bankruptcy proceeding the day it was commenced and was also made aware of the filing deadlines, the District Court found that the delay "was within the reasonable control" of the plaintiffs.

On May 11, 2023, the plaintiffs commenced the instant action against the defendants alleging three causes of action - legal malpractice, breach of contract, and breach of fiduciary duty. In essence, the plaintiffs claim that the defendants were negligent and failed to exercise the applicable standard of care in the exercise of their professional duties by failing to ensure the plaintiffs' claims were timely filed in the Bankruptcy Proceeding. The plaintiffs seek damages

in the amount sought in the untimely filed claims, disgorgement of the attorney's fees paid to the defendants, plus punitive damages.

The defendants now move, pre-answer, to dismiss the complaint pursuant to CPLR 3211(a)(5), collateral estoppel, CPLR 3211(a)(1), a defense founded in documentary evidence, and CPLR 3211(a)(7), failure to state a cause of action. In support of the motion, the defendants submit, *inter alia*, the notices, filings and court orders in the bankruptcy proceeding, including the February 19, 2020, "Notice to Creditors" sent to the plaintiff by the Bankruptcy Court which states the deadline for filing proof of claim as "5/20/20."

In opposition, the plaintiffs submit, *inter alia*, a February 12, 2018, engagement letter between the parties, signed by Victor Shum as President of plaintiff Advantage America EB5 Group, an affidavit of the plaintiffs' Managing Director, Julia Park, various emails and text messages between Park and defendant attorney Kirk Brett from January 2020 to July 2020, and a disengagement letter sent by defendant Duval & Stachenfeld LLP on July 21, 2020, to Shum.

III. DISCUSSION

A. CPLR 3211(a)(5)

The doctrine of collateral estoppel, or issue preclusion, "precludes a party from relitigating an issue which has previously been decided against him in a proceeding in which he had a fair opportunity to fully litigate the point." Kaufman v Eli Lilly & Co., 65 NY2d 449 (1985). Collateral estoppel requires two distinct elements: "that an issue in the present proceeding be identical to that necessarily decided in a prior proceeding, and that in the prior proceeding the party against whom preclusion is sought was accorded a full and fair opportunity to contest the issue." Allied Chem. v Niagara Mohawk Power Corp., 72 NY2d 271 (1988); see In re Hofmann, 287 AD2d 119 (1st Dept. 2001).

The gravamen of all three causes of action here is that the defendants were at fault for the plaintiffs' failure to timely file proofs of claim in the Bankruptcy Proceeding. Contrary to the defendants' contention, neither the Bankruptcy Proceeding nor the Appeal Decision bars this action. The Bankruptcy Proceeding concerned whether the plaintiff met the excusable neglect standard under Pioneer Inv. Svcs. Co. v Brunswick Assocs. Ltd. P'ship, 507 U.S. 380 (1993), in filing an untimely proof of claim, so as to allow the claims to proceed. As described in Appeals Decision, that standard was akin to the New York standard for entering a default judgment

(CPLR 3215) or vacating a default judgment (CPLR 5015). It did not concern legal malpractice or the standards for establishing a claim of legal malpractice under New York law. To be sure, collateral estoppel does not require the assertion of identical causes of action in both the prior and present proceedings, only an identity of factual or legal issue. See Bauhouse Group I, Inc. v Kalikow, 190 AD3d 401 (1st Dept. 2021). However, the courts in the Bankruptcy Proceeding did not determine that it was not the defendants' fault that the plaintiffs filed untimely proofs of claim. The Appeal Decision stated that the court was not convinced the defendants were to be blamed fully for the untimely filing, but noted that, under the Pioneer standard, even if the defendants were to blame, the plaintiffs would still be held accountable for the acts and omissions of their attorneys. Thus, the plaintiffs' failure to satisfy the Pioneer standard in the Bankruptcy Proceeding does not collaterally estop them from asserting a legal malpractice claim against the defendants. Nor did the Bankruptcy Court or District Court determine the merits of the plaintiffs' untimely proofs of claim, so as to warrant a conclusion that the plaintiffs would not have prevailed even if their untimely claims were allowed. See Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer, 8 NY3d 438, 442 (2007); Ulico Cas. Co. v Wilson, Elser, Moskowitz, Edelman & Dicker, 56 AD3d 1 (1st Dept. 2008).

Therefore, the branch of the defendants' motion seeking to dismiss the plaintiffs' complaint on the grounds of collateral estoppel under CPLR 3211(a)(5) is denied.

B. CPLR 3211(a)(1) and (a)(7)

When assessing the adequacy of a pleading in the context of a motion to dismiss under CPLR 3211(a)(7), the court's role is "to determine whether [the] pleadings state a cause of action." 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144, 151-52 (2002). To determine whether a claim adequately states a cause of action, the court must "liberally construe" it, accept the facts alleged in it as true, accord it "the benefit of every possible favorable inference" (id. at 152: see Romanello v Intesa Sanpaolo, S.p.A., 22 NY3d 881 [2013]; Simkin v Blank, 19 NY3d 46 [2012]), and determine only whether the facts as alleged fit within any cognizable legal theory. See Hurrell-Harring v State of New York, 15 NY3d 8 (2010); Leon v Martinez, 84 NY2d 83 (1994). Under CPLR 3211(a)(1), dismissal is warranted when the documentary evidence submitted "resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim." Fortis Financial Services, LLC v Fimat Futures USA, 290 AD2d 383, 383 (1st Dept. 2002); see Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc., 120 AD3d 431, 433 (1st Dept. 2014).

In an action to recover damages for legal malpractice, a plaintiff must demonstrate 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 plaintiff to sustain actual and ascertainable damages. McCoy v Feinman, 99 NY2d 295, 301-302 (2002). To establish causation, a plaintiff must show that it would have prevailed in the underlying action or would not have incurred any damages, but for the lawyer's negligence. See Ambase Corp. v Davis Polk & Wardwell, 8 NY3d 428 (2007); Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer, supra at 442; Davis v Klein, 88 NY2d 1008, 1009-1010 (1996).

The defendants' primary argument in regard to the malpractice cause of action is that there was no attorney-client relationship between the parties with respect to the Bankruptcy Proceeding. For this, the defendants rely on the February 19, 2020, notice sent by the bankruptcy court to the plaintiffs as claimants, but not to the defendants as their attorneys and argue that it constitutes documentary evidence demonstrating that the defendants did not represent the plaintiffs in the Bankruptcy Proceeding and had no notice of the May 20, 2020, deadline for filing proof of claim. This reliance is misplaced. To be sure, an attorney-client relationship is not determined by which address or party a court sends a notice to. Notably, the court that sent the notice accepted the plaintiff's representation that the defendants were representing them. In any event, the complaint alleges and the plaintiffs' submissions further show that the defendants did represent them in the Bankruptcy Proceeding, until well after the claims filing deadline had passed. Indeed, defendant Kirk Brent prepared and sent two proofs of claim days after the May 20, 2020, deadline passed, as the attorney for the plaintiffs.

Pursuant to the February 12, 2018, engagement letter between the parties, the defendants agreed to provide legal services for any of the plaintiffs' disputes against Wellington in connection with the two projects for which the plaintiffs served as lenders, as well as other related matters. The plaintiffs also submit various communications regarding the Bankruptcy Proceeding between Park and Brett dated from January 2020 to July 2020, which includes the period before and after the May 20, 2020, proof of claim deadline. Indeed, in her affidavit, Park avers that Brett was monitoring the Bankruptcy Proceedings and that, during a phone call on May 25, 2020, Brett told her that the proof of claim deadline had expired. The plaintiffs also include an email from Brett to Park, dated the same day, May 25, 2020, in which Brett attached the two draft proofs of claim for the plaintiffs to file, even though they were by that point

untimely. Additionally, the disengagement letter submitted by the plaintiffs reflects that the defendants formally terminated their attorney-client relationship with the plaintiffs on July 15, 2020, which is also well after the May 20, 2020, proof of claim deadline.

Contrary to the defendants' further contention, and liberally construing the allegations of the complaint in favor of the plaintiffs (see 511 W. 232nd Owners Corp. v Jennifer Realty Co., supra at 152), the court finds that the complaint adequately alleges that the defendants' omissions in failing to timely file the proof of claims was a proximate cause of the plaintiffs' damages arising from the denial of the claims, which were at least viable. That is, the plaintiffs sufficiently allege that they would have prevailed in the Bankruptcy Proceeding but for the lawyer's negligence in failing to timely file their claims. See Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer, supra Therefore, while the plaintiffs may not ultimately prevail on the legal malpractice claim, it is not subject to dismissal on this motion.

However, the plaintiffs' second and third causes of action, for breach of contract and breach of fiduciary duty, respectively, must be dismissed as duplicative of the legal malpractice claim. See Knox v Aronson, Mayefsky & Sloan, LLP, 168 AD3d 70 (1st Dept. 2018); Bernard v. Proskauer Rose, LLP, 87 AD3d 412 (1st Dept. 2011); InKine Pharm. Co. v Coleman, 305 AD2d 151 (1st Dept. 2003). As previously stated, the gravamen of all three causes of action here is that the defendants were at fault for the plaintiffs' failure to timely file proofs of claim in the Bankruptcy Proceeding, and all three causes of action seek recovery of the same damages, the total amount of the untimely claims.

Finally, there is no basis for the plaintiffs' additional demand for the disgorgement of attorney's fees. That equitable remedy is available only to "prevent[] a wrongdoer from retaining ill-gotten gains" (People v Ernst & Young, 114 AD3d at 569 [1st Dept. 2014]) and is inapplicable where a plaintiff merely demands "the return of attorney's fees." See Access Point Med., LLC v Mandell, 106 AD3d 40, 44 (1st Dept. 2013). The plaintiffs' demand for punitive damages is also improper. Such damages may be awarded only "where the wrong complained of is morally culpable, or is actuated by evil and reprehensible motives, not only to punish the defendant but to deter him, and others who might otherwise be so prompted, from indulging in similar conduct in the future." Walker v Sheldon, 10 NY2d 401, 404 (1961); see Marinaccio v Town of Clarence, 20 NY3d 506 (2013). The plaintiffs make no allegation that the defendants' conduct was immoral, evil, or reprehensible, or even intentional, but only that it was negligent.

IV. CONCLUSION

Accordingly, and upon the forgoing papers, it is

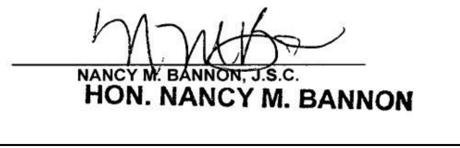
ORDERED that the defendants' motion to dismiss the complaint is granted to the extent that the plaintiffs' second and third causes of action are dismissed, and the motion is otherwise denied, and it is further

ORDERED that the defendants shall serve and file an answer to the remaining cause of action within 30 days of the date of this order, and it is further

ORDERED that the parties shall appear for a preliminary conference on August 1, 2024, at 10:00 a.m., and it is further

ORDERED that the Clerk shall mark the file accordingly.

This constitutes the Decision and Order of the court.



HON. NANCY M. BANNON

5/16/2024
DATE

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