

Reynolds v Ford O'Brien, LLP

2025 NY Slip Op 31463(U)

April 22, 2025

Supreme Court, New York County

Docket Number: Index No. 157303/2023

Judge: David B. Cohen

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. DAVID B. COHEN **PART** **58**

Justice

-----X

SCOTT RICHARD REYNOLDS, SRR FORTRESS
CAPITAL, LLC,

Plaintiffs,

- v -

FORD O'BRIEN, LLP, ADAM C. FORD, MATTHEW AARON
FORD, FORD O'BRIEN LANDY LLP,

Defendants.

-----X

INDEX NO. 157303/2023

MOTION DATE 10/04/2023

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 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

were read on this motion to/for DISMISS.

In this legal malpractice action, defendants move pursuant to CPLR 3211(1) and (7) to dismiss the complaint. Plaintiffs oppose.

I. BACKGROUND

Plaintiff Reynolds (Reynolds) is the manager, president, officer, or director of the other plaintiff, SRR Fortress Capital, LLC (SRR) (NYSCEF 1, ¶ 4). Defendants, comprised of a law firm and its individual attorneys, represented plaintiffs in the underlying arbitration giving rise to the malpractice claims.

While Reynolds was working for nonparty Spartan Securities Group, Ltd. (Spartan), Reynolds, on behalf of Spartan, took short positions in a stock, with the result that Spartan incurred a \$16.6 million deficit in its proprietary trading account with nonparty Axos Clearing LLC (Axos). Spartan lacked the capital to cover the deficit. Reynolds, SSR, Spartan, Axos, and

others proceeded to litigation and then arbitration before the Financial Industry Regulatory Authority (FINRA).

On May 27, 2021, FINRA rendered an arbitration award (Award), finding that Reynolds traded with Spartan's and Axos's funds and assumed the risk of his conduct by virtue of his agreement with Spartan to absorb trading losses which exceeded his accumulated reserves (*In the Matter of the Arbitration between Spartan Sec. Group, Ltd., Claimant and Scott Richard Reynolds et al, Respondents*, FINRA No. 19-00926, 2021 WL 2287920, ¶ 1, 2021 FINRA ARB. LEXIS 681 [May 27, 2021]). The arbitration panel (the Panel) ruled in favor of Spartan on its claims of fraudulent misrepresentation, breach of fiduciary duty, and breach of oral contract against Reynolds, and awarded Spartan \$1.4 million in compensatory damages and \$4 million in punitive damages based on Reynolds's willful and intentional behavior, which led directly to Spartan's financial collapse as an ongoing business (*id.*, 2021 WL 2287920, ¶ 2, 2021 FINRA ARB. LEXIS 681).

The Panel also granted third-party respondent Axos's counterclaim against Reynolds for fraudulent misrepresentation and fraudulent failure to disclose, finding him liable for \$15.3 million in compensatory damages, plus interest, for a total of \$17.4 million (*Arbitration*, 2021 WL 2287920, ¶ 4, 2021 FINRA ARB. LEXIS 681). Axos's fourth-party claims against fourth party respondent SRR were denied in their entirety (*id.*). Also denied in their entirety were Reynolds's claims against Spartan, and Reynolds's claims for compensatory and punitive damages against Axos (*id.*, ¶ 3, 2021 FINRA ARB. LEXIS 681).

Plaintiffs allege that, after the conclusion of testimony and evidence at the arbitration but prior to issuance of the Award, defendants were contacted by counsel representing Axos's prior owner, Legent Group, LLC (Legent), in an ongoing Delaware Court of Chancery litigation

against the present owners of Axos. Legent had sold the company that became Axos to Axos's parent companies. Legent's counsel allegedly informed defendants that Axos and its parent companies had received a recovery from Legent of \$7.5 million of the same damages that Axos was seeking against Reynolds in the arbitration and that Axos intentionally concealed this fact and the existence of the Delaware litigation from Reynolds and the arbitrators (NYSCEF 1, complaint, ¶ 25). Plaintiff claims that they were entitled to set off the \$7.5 million against the money that Axos was awarded against Reynolds, and that in the Delaware case, Axos blamed its damages on Spartan and another, while in the arbitration, Axos blamed Reynolds for the same damages.

After the hearing part of the arbitration ended, defendants, on May 18, 2021, wrote to the arbitrators, "seeking urgent emergency relief because the Panel is currently deliberating as to the final decision and award in" the arbitration, and notified the Panel that defendants "have just learned this past weekend of new evidence proving that Axos" misled the Panel on material disputed issues (NYSCEF 34, letter). The letter discusses each point in detail and requests that the Panel grant the instant application to introduce the new evidence and allow further discovery and additional days of testimony (*id.*). The letter reminds the Panel that as the Chairperson "stated on the record at the conclusion of the hearing, the record in this case remains open until the time the Panel issues its final award" (*id.*).

On May 20, 2021, Axos opposed plaintiffs' request, and denied breaching discovery obligations, stating that Axos did not keep the transaction with Legent or the Delaware litigation a secret (NYSCEF 30). Axos maintained that it did not receive a recovery from Legent, but rather, when Legent sold the clearing house that later became Axos to Axos's parent companies, the purchase agreement provided that \$7.5 million of the purchase price would be held by the

Axos companies as the sole source of payment for any indemnification claims. Thus, Axos was withholding \$7.5 million from Legent.

Axos alleged that “quite obviously, if Axos Clearing is ultimately made whole by the Award in [the arbitration], it will not suffer a loss or damage from Reynolds’ conduct and, hence, will not be able to trigger the indemnity insofar as Reynolds’ d conduct is concerned” (NYSCEF 30 at 1). It further represented that neither Axos nor its parent companies have “in any way recovered the \$7.5 million” (*id.* at 2).

The final award of May 27, 2021 made no allowance for the \$7.5 million, and the Panel wrote:

On May 18, 2021, Respondent Reynolds filed an Emergency [Post-Hearing] Motion to Admit Newly Discovered Evidence and Request for Hearing Prior to the Issuance of any Final Decision and Award, to which Claimant and Third Party Respondent Axos objected. After consideration of the parties' respective written submissions, the Panel determined to deny the Motion.

(*Arbitration*, 2021 WL 2287920, *7, 2021 FINRA ARB. LEXIS 681, *16-17).

Reynolds’s subsequent motion to vacate the award was denied (*Spartan Sec. Group, Ltd. v Reynolds*, 2021 WL 6098353 [Fla 15th Cir Ct, Dec. 21, 2021]), on the ground that “the Award itself states that it considered Reynolds' May 18, 2021 motion to admit evidence relating to the Delaware lawsuit and denied that motion” (*id.*, ¶ 7). The court did not accept plaintiffs’ argument that the Panel failed to consider material evidence related to a possible setoff for Reynolds.

II. ANALYSIS

Plaintiffs allege in their complaint that if defendants had acted according to the standard of practice of a reasonable attorney, defendants would have known of the Delaware case sooner and plaintiffs would not have sustained any damages or less damages. They contend that

defendants failed to raise defenses of judicial estoppel, collateral estoppel, and fraud concerning Axos's claims in the arbitration and in other litigation, and failed to investigate what was occurring in the Delaware litigation. Had they done so, plaintiffs maintain that defendants would have discovered earlier that Axos took differing positions on causation, proximate cause and fault in the Delaware case than it took in the arbitration, including the circumstances surrounding the \$7.5 million payment. But for these failures, plaintiffs contend they would have received a setoff in the arbitration and an overall better result.

They assert three causes of action against defendants: (1) legal malpractice; (2) breach of fiduciary duty; and (3) breach of contract for fees (NYSCEF 1).

On a motion to dismiss pursuant to CPLR 3211(a)(7), "pleadings are to be afforded a liberal construction, allegations are taken as true, the plaintiff is afforded every possible inference, and a determination is made only as to whether the facts as alleged fit within any cognizable legal theory" (*CSC Holdings, LLC v Samsung Elecs. Am., Inc.*, 192 AD3d 556 [1st Dept 2021]). Nevertheless, the complaint will be dismissed "if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences drawn from them do not allow for an enforceable right of recovery" (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 142 [2017]). The test is "whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Leon v Martinez*, 84 NY2d 83, 87–88 [1994]; *IIG Capital LLC v Archipelago, L.L.C.*, 36 AD3d 401, 402 [1st Dept 2007]).

Under CPLR 3211(a)(1), for dismissal based on documentary evidence, the evidence in question must conclusively refute the allegations in the complaint (*J.P. Morgan Sec. Inc. v Vigilant Ins. Co.*, 21 NY3d 325, 334 [2013]).

A. Malpractice claim

An action for legal malpractice requires proof of three elements: (1) that the attorney was negligent; (2) that the negligence was a proximate cause of the plaintiff's losses; and (3) proof of actual damages (*Reibman v Senie*, 302 AD2d 290, 290 [1st Dept 2003]). A plaintiff establishes proximate cause by showing that, but for the attorney's negligence, the plaintiff would have succeeded on the merits of the underlying action or would not have sustained any ascertainable damages (*Nomura Asset Capital Corp. v Cadwalader, Wickersham & Taft LLP*, 26 NY3d 40, 50 [2015]). The but for requirement is also called the case within a case requirement and is applicable to CPLR 3211 motions (*Warshaw Burstein Cohen Schlesinger & Kuh, LLP v Longmire*, 106 AD3d 536, 536 [1st Dept 2013]).

To withstand a motion to dismiss, the plaintiff must submit sufficient detail about the “nature of” the underlying claim to show that it has merit (*see Fletcher v Boies, Schiller & Flexner, LLP*, 75 AD3d 469, 469 [1st Dept 2010] [internal citation and quotation marks omitted]). Failure to prove proximate cause mandates the dismissal of a legal malpractice action, regardless of the attorney's negligence (*Reibman*, 302 AD2d at 291).

The Award reflects that the Panel considered the newly-discovered evidence about Axos but decided that it did not change the outcome. There is no indication that the evidence was not considered, and plaintiffs fail to show that it would have changed the Award had it been submitted before or during the hearing.

While plaintiffs claim that defendants' failure to make a motion to vacate the award on SRR's behalf (as opposed to having done so on Reynolds's behalf, which was denied) resulted in the loss of a favorable outcome to plaintiffs, they do not explain on what legal basis defendants

could have made such a motion considering that the Panel denied any claims against SRR and awarded no damages against it.

Similarly, while plaintiffs assert that defendants failed to engage in appellate motion practice, meet deadlines, and file appeals or requests for certiorari within the applicable time limits, they do not demonstrate that they would have had a more favorable outcome had defendants done so.

Plaintiffs complain that defendants failed to investigate or perform due diligence into the prejudice, bias, or favoritism of the Panel Chairperson, alleging that defendants were on notice that partiality might be a problem, because the first Chairperson recused herself due to a conflict of interest with Axos. Plaintiffs thus contend that defendants were obligated to inquire into the impartiality of the replacement Chairperson, of which there is evidence that he was not impartial as he allegedly had connections with attorneys who previously worked at the law firm that represented Spartan in the arbitration.

However, the issue of impartiality was raised in Reynolds's motion to vacate the Award, with the Panel concluding that "(n)one of the remote, fleeting, long-ago connections alleged by Reynolds involved a party to the arbitration" or were existing relationships (*id.*, ¶ 24). For many of those alleged connections, "Reynolds provided no evidence that [the Chairperson] even knew about them" (*id.*). Consequently, the Chairperson "was not obligated to disclose any of those long-ago, remote interactions. Failure to do so" did not warrant vacatur (*id.*, ¶ 25). "Even assuming that [the Chairperson] was required to make the disclosures, his failure to do so did not constitute evident partiality" (*id.*, ¶ 26).

Thus, even if plaintiffs established that defendants should have raised the issue before or during the arbitration hearing instead of after, they do not demonstrate that the outcome would have been any different.

As defendants show that plaintiffs are unable to demonstrate that they would have obtained a better outcome in the arbitration absent defendants' malpractice, they are entitled to dismissal of the legal malpractice claim against them.

B. Breach of fiduciary duty

The second cause of action for breach of fiduciary duty is based on the same allegations and seeks the same damages as plaintiffs' malpractice claim, and is thus dismissed as duplicative (*see Innovative Risk Mgt., Inc. v Morris Duffy Alonso & Faley*, 204 AD3d 518 [1st Dept 2022]).

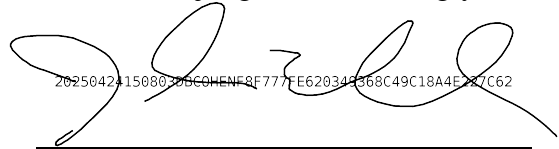
C. Breach of contract

The third cause of action is for breach of contract based on allegedly improper billing of attorney fees. Plaintiffs claim that although they had a contingency fee arrangement with defendants, they allegedly billed plaintiffs on an hourly basis. Defendants assert that they have not attempted to collect the fees and have forgiven the balance, and that they created invoices as a means of recording their work on plaintiffs' case in case it was needed.

As plaintiffs were never actually billed for the fees, nor will they be in the future, defendants demonstrate that plaintiffs have failed to state a breach of contract claim against them.

Accordingly, it is hereby

ORDERED that defendants' motion to dismiss the complaint is granted, and the complaint is dismissed in its entirety, and the clerk is directed to enter judgment accordingly.



2025042415080305COHEN8F77FE620348568C49C18A4E27C62

4/22/2025

DATE

DAVID B. COHEN, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE