SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED **PART** IAS MOTION 2

Justice

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UTILISAVE, LLC,

Plaintiff,

- v -

FOX HORAN & CAMERINI, LLP and OLEG RIVKIN,

Defendants.

INDEX NO. 652318/2014

MOTION DATE 09/12/2018

MOTION SEQ. NO. 002

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88

were read on this motion to/for SUMMARY JUDGMENT.

Upon the foregoing documents, it is ordered that the motion is decided as follows.

Defendants Fox Horan & Camerini LLP (Fox) and Oleg Rivkin (Rivkin) (together, defendants) move, pursuant to CPLR 3212, for summary judgment dismissing the complaint. Plaintiff Utilisave, LLC (Utilisave) opposes the application. For the reasons set forth below, defendants' motion is denied.

FACTUAL AND PROCEDURAL BACKGROUND

Utilisave is a limited liability company organized in Delaware with its principal place of business in this state (affirmation of James G. McCarney [McCarney affirmation], exhibit P [complaint] ¶ 6). Nonparty Michael H. Steifman (Steifman) founded Utilisave's predecessor in 1991 and served as a Utilisave employee (*id.*, ¶¶ 9, 14). Nonparty MHS Venture Management

Corp. (MHS), an entity wholly owned by Steifman, was one of Utilisave's two managing members (*id.*, ¶ 13). Mikhael Khenin (Khenin), the second managing member, was Utilisave's CEO (*id.*)

In 2007, Steifman and MHS brought an action against Khenin and Utilisave, *Steifman v Khenin*, Supreme Court, Westchester County Index Number 8271/2007 (the Prior Action), for wrongfully withholding distributions and salary payments and for removal of Khenin as CEO (complaint ¶¶ 15-16). Fox, a law firm based in New York, and Rivkin, a former partner at Fox, represented Utilisave from January 2008 through July 2011, when a judgment was entered against Utilisave after a bench trial (*id.*, ¶¶ 7-8, 19 and 32).

Plaintiff alleges that, during the pendency of the Prior Action, Khenin's term as CEO expired in 2009, as set forth in his employment agreement. Nonetheless, under defendants' counsel, Khenin renewed his employment agreement without MHS's knowledge, irrespective of the terms in Utilisave's operating agreement that required the consent of both managing members (*id.*, ¶ 57). Khenin then paid himself unauthorized distributions and excessive compensation, misappropriated Utilisave's confidential information, and undertook other actions that caused Utilisave harm (complaint, ¶¶ 26-32, 45). Ultimately, the judgment in the Prior Action included a declaration that Khenin's renewed employment agreement was void (*id.*, ¶¶ 57-58).

Since the commencement of the Prior Action, Utilisave, Steifman, MHS, and/or Khenin have been engaged in nine other lawsuits in New York and Delaware. In or about 2012, Steifman purchased Utilisave from the liquidating trustee who had been appointed in one of the Delaware actions (*id.*, ¶ 44). MHS is now Utilisave's sole member (*id.*).

Utilisave commenced this action against Fox and Rivkin for legal malpractice, breach of contract, aiding and abetting breach of fiduciary duty, and unjust enrichment. The complaint alleges that Fox and Rivkin acted against Utilisave's interests when they negligently provided it

with advice, encouraged Khenin to take improper actions as CEO, and ignored a clear conflict of interest when they appeared to personally represent Khenin in the Prior Action. It is alleged that the majority of Khenin's harmful actions as CEO took place after defendants had advised him that he could remain as CEO (*id.*, ¶¶ 30 and 47).

CONTENTIONS OF THE PARTIES

Defendants move for dismissal on the ground that the present action is barred by the doctrine of collateral estoppel. They submit that Steifman and MHS had moved by order to show cause to disqualify Butler, Fitzgerald, Fiveson & McCarthy P.C. and Tibbets, Keating & Butler, LLC from representing Utilisave in the Prior Action (McCarney affirmation, exhibit R at 1). The order to show cause indicated that Edward F. Beane of Keane & Beane, P.C. served as Khenin's counsel of record (*id.* at 2 and 18). In a decision and order dated November 1, 2007 (the Disqualification Order), the trial court denied MHS's and Steifman's motion to disqualify and denied their request for an order "requiring Khenin to consult with and obtain consent from Steifman in connection with the choice and retention of counsel for Utilisave to defend this action" (McCarney affirmation, exhibit E at 3). Defendants did not represent Utilisave until January 2008, when they filed a notice of appearance with the court (McCarney affirmation, exhibit F at 1). Defendants posit that the language of the Disqualification Order precludes this action.

Utilisave, in opposition, argues it is not collaterally estopped from maintaining the present action because defendants cannot demonstrate that the identical issues were decided against it in the Prior Action. Furthermore, Utilisave contends that defendants' motion for summary judgment is premature as discovery is incomplete.

Defendants, in reply, submit that they cannot be held liable for any actions taken outside the scope of their engagement, which was limited to representing Utilisave in the Prior Action. Defendants assert that they were not involved in any of the other actions commenced by or against Utilisave, MHS, Steifman or Khenin. Defendants also submit an affidavit from Rivkin, who avers that he did not counsel Khenin to renew his employment agreement or increase his compensation and that he learned of these facts after Khenin had taken those actions (Rivkin aff, ¶ 4).

LEGAL CONCLUSIONS

It is well settled that the movant on a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The motion must be supported by evidence in admissible form (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), and by the pleadings and other proof such as affidavits, depositions and written admissions (*see* CPLR 3212). The "facts must be viewed in the light most favorable to the non-moving party" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted]). Once the movant meets its burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact (*id.*, citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The "[f]ailure to make [a] prima facie showing [of entitlement to summary judgment] requires a denial of the motion, *regardless of the sufficiency of the opposing papers*" (*Vega*, 18 NY3d at 503 [internal quotation marks and citation omitted, emphasis in original]).

"The doctrine of collateral estoppel . . . precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that

party or those in privity, whether or not the tribunals or causes of action are the same" (*Ryan v New York Tel. Co.*, 62 NY2d 494, 500 [1984] [internal citations omitted]). Thus, the two elements necessary to invoke collateral estoppel are "an identity of issue which has necessarily been decided in the prior action and is decisive of the present action" and "a full and fair opportunity to contest the decision now said to be controlling" (*Buechel v Bain*, 97 NY2d 295, 303-304 [2001], *cert denied* 535 US 1096 [2002] [internal citation omitted]). "[T]he burden rests upon the proponent of collateral estoppel to demonstrate the identicality and decisiveness of the issue, while the burden rests upon the opponent to establish the absence of a full and fair opportunity to litigate the issue in the prior action or proceeding" (*Ryan*, 62 NY2d at 501).

The court finds that the Disqualification Order has no preclusive effect on the present action. First, with respect to the element of identicality of issues, the Disqualification Order did not determine any issue that would have precluded a legal malpractice claim against defendants (*see Wachtell, Lipton, Rosen & Katz v CVR Energy, Inc.*, 143 AD3d 648, 648-649 [1st Dept 2016]). To state a cause of action for legal malpractice, a plaintiff must plead "the negligence of the attorney; that the negligence was the proximate cause of the loss sustained; and actual damages" (*Leder v Spiegel*, 31 AD3d 266, 267 [1st Dept 2006], *affd* 9 NY3d 836 [2007], *cert denied*, 552 US 1257 [2008] [citations omitted]). The two issues necessarily decided in the Disqualification Order related to whether the court should (1) disqualify Butler, Fitzgerald, Fiveson & McCarthy P.C. and Tibbets, Keating & Butler, LLC from representing Utilisave because of purported conflicts of interest and (2) order Khenin to consult with and obtain Steifman's consent on the selection and retention of counsel for Utilisave. Whether defendants were negligent in providing Utilisave with advice was not at issue in the Prior Action. Likewise, the Prior Action did not determine whether defendants breached their contract to Utilisave, whether defendants aided and

abetted Khenin's breach of his fiduciary duty to Utilisave, and whether defendants were unjustly enriched because they were paid for the legal services rendered.

Furthermore, defendants were not in privity with Utilisave, Steifman, MHS or Khenin in the Prior Action. Privity is an "amorphous concept not easy of application" (*D'Arata v New York Cen. Mut. Fire Ins. Co.*, 76 NY2d 659, 664 [1990] [citation omitted]). A nonparty to a prior litigation may be deemed in privity with a party in a prior litigation if "his [or her] own rights or obligations in the subsequent proceeding are conditioned in one or another on, or derivative of, the rights of the party to the prior litigation" (*id.* [citations omitted]). Plainly, Utilisave's claims are not derivative of or conditioned upon the rights of any party in the Prior Action. More importantly, the language in the Disqualification Order does not absolve defendants of any allegedly negligent actions they may have taken. Indeed, the complaint alleges that Utilisave was harmed by defendants' representation of it in the Prior Action, not that Khenin's selection of defendants as Utilisave's counsel was improper.

The court also notes that the submission of Rivkin's affidavit in reply, in which he denies advising Khenin to unilaterally extend his employment agreement, is improper as Utilisave was not afforded an opportunity to reply to Rivkin's averment (*see Keneally v 400 Fifth Realty LLC*, 110 AD3d 624, 624 [1st Dept 2013] [declining to consider an affidavit, submitted in reply, that contained new grounds for summary judgment]). Thus, defendants failed to meet their prima facie burden on summary judgment.

Therefore, in accordance with the foregoing, it is hereby:

ORDERED, that defendants' motion for summary judgment dismissing the complaint is denied; and it is further

ORDERED that counsel are directed to appear for a status conference in Part 2, Room 280, 80 Centre Street, on April 30, 2019 at 2:15 p.m.; and it is further

ORDERED that this constitutes the decision and order of the court.

12/18/2018
DATE

KATHRYN E. FREED, J.S.C.

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