Gainor v. Sidley, Austin, Brow Doc. 175

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 06-21748-CIV-MARTINEZ-BANDSTRA

MARK J. GAINOR and ELYSE GAINOR,

Plaintiffs,

v.

SIDLEY AUSTIN, LLP, a Delaware limited liability Partnership, f/k/a BROWN & WOOD, R.J. RUBLE, an individual, ARTHUR ANDERSEN, LLP, an Illinois limited liability partnership, MICHAEL S. MARX, an individual, P. ANTHONY NISSLEY, an individual, MERRILL LYNCH & CO., INC., a Delaware corporation, and MARK C. KLOPFENSTEIN, an individual,

Defendants.

DEFENDANT SIDLEY AUSTIN LLP'S REPLY IN SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY JUDGMENT ON DAMAGES

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TABLE OF CONTENTS

		Page
I.	INTRODUCTION	1
II.	ARGUMENT	2
	A. Plaintiffs' Attempts To State A Direct Claim Fail As A Matter of Law	2
	B. The "Economic Reality" Is That Plaintiffs Cannot Show Any Injury From The Payment of The Fees At Issue, Much Less A Direct Injury	4
	C. Plaintiffs' Effort To State A Direct Claim Apart From The Corporations' Payment of Fees Also Fails	7
	D. Plaintiffs Have Not Established The Elements Of Equitable Estoppel	9
III.	CONCLUSION	10

I. INTRODUCTION

Plaintiffs agree with the essential facts set forth in Brown & Wood's Separate Statement of Undisputed Facts: Plaintiffs did not pay any of the $2.1 million in fees to Arthur Andersen, Brown & Wood, Merrill Lynch or Loeb & Loeb that they now seek to recover as damages in this case; Bryan Medical, Inc. and Lucor, Inc. paid those fees, and Plaintiffs were not stockholders of those corporations at the time of payment.

Under well-established principles of law, Plaintiffs cannot state a direct claim for fees paid by Bryan Medical and Lucor when Plaintiffs were not stockholders. *See, e.g., Chemplex Florida v. Norelli,* 790 So. 2d 547, 549 (Fla. 2001) ("a direct action . . . is defined as a suit *by a stockholder* to enforce a right existing in the stockholder" (emphasis added)). Moreover, even if Plaintiffs had been stockholders, they still could not state a direct claim for the fees because they would not have suffered a separate and distinct injury from that suffered by the corporations that paid the fees. *See Falic v. Legg Mason Wood Walker, Inc.*, 347 F. Supp. 2d 1260, 1269 (S.D. Fla. 2004) (professional fees paid by a corporation could not be recovered by individual plaintiffs).

Furthermore, Plaintiffs do not dispute that MJG Partners -- not Plaintiffs -- sold the shares of Bryan Medical and Lucor, thus sustaining any alleged loss from that sale. Plaintiffs cannot sue to recover damages suffered by MJG, assuming those damages are even recoverable.

Confronted by unfavorable law and facts, Plaintiffs resort to claims that Brown & Wood designed the tax transaction at issue and orchestrated Gainor's participation in it. Nevertheless, the only *evidence* (as opposed to ad hominem attacks) Plaintiffs proffer shows that Gainor's long-time trusted accountant Andersen suggested that Gainor use his existing corporations as part of the tax strategy. Despite Plaintiffs' liberal use of the term "Defendants," Plaintiffs submit nothing to indicate that *Brown & Wood* designed the strategy, orchestrated it, or told Plaintiffs to use any particular corporate entity to effectuate it. Accordingly, this Court should grant partial summary judgment, striking Plaintiffs' prayer for the fees paid by Bryan Medical and Lucor and

any losses resulting from MJG Partners' sale of these corporations.

II. ARGUMENT

A. Plaintiffs' Attempts To State A Direct Claim Fail As A Matter of Law

Plaintiffs concede that in general only the corporation itself can sue to recover fees that the corporation paid. *Falic*, 347 F. Supp. 2d at 1269; (Opp. at 8.) They argue, however, that three exceptions apply to save their claim for fees from the general rule. (*Id.*) Two of these so-called exceptions merely describe the two prongs (separate duty owed to, and separate injury suffered by, the shareholder) of a shareholder "direct claim", which courts define "as a suit *by a stockholder* to enforce a right of action existing in the stockholder." *Chemplex*, 790 So. 2d at 549 (emphasis added). Here, although Plaintiffs claim the right to recover fees that Bryan Medical and Lucor erroneously paid, Plaintiffs *did not own Bryan Medical and Lucor when those corporations paid the fees at issue in this case*, nor do they own the corporations now. (Sep. Statement, Fact Nos. 15-27.) Put differently, Plaintiffs were stockholders neither when the alleged harm of which they complain occurred, nor when they filed this action. Therefore, by definition, they could not have suffered injury -- either direct, derivative, or otherwise -- when the corporations paid the fees. Indeed, no case we have found or cited by Plaintiffs remotely suggests that Plaintiffs can state a direct claim under these circumstances.

Because Plaintiffs simply ignore this fundamental defect in their argument, their efforts to meet the requirements of a direct claim make little sense. Plaintiffs first urge that because Brown & Wood allegedly owed a duty to Plaintiffs, "Gainor was directly injured by Sidley's faulty advice in an amount exceeding $2.1 million simply for the fees paid to Defendants." (Opp. at 14.) Plaintiffs necessarily beg the question: *how* were Plaintiffs injured from the alleged breach of duty? Certainly, they could not have been harmed when corporations in which they owned no interest paid fees. Without an injury tied to the payment of the fees, Plaintiffs cannot recover from anyone for those payments, regardless of what duties Plaintiffs might or might not have been owed.

Next Plaintiffs argue that that they suffered injuries "'separate and distinct from that sustained by other stockholders'" (Opp. at 15), but once again they never explain how those injuries were caused by Bryan Medical's and Lucor's payment of the fees. Indeed, any explanation would defy logic because Plaintiffs owned no shares of either company, so they could not have suffered injury from the corporations paying the fees, even if the fees should not have been paid. Moreover, we observe that even if Plaintiffs *had* owned the companies, they would have suffered exactly the same injury from payment of the fees as any other shareholders -- diminution in the value of their shares. *Chemplex Florida,* 790 So. 2d at 549 (where injury is primarily against the stockholders generally "then the cause of action is in the corporation").

The rest of Plaintiffs' "direct injury" arguments are either *nonsequiturs* or distortions of the record. Plaintiffs continually refer to Bryan Medical's and Lucor's S-Corporation status (Opp. at 14), without explaining its significance (it has none), and without acknowledging that neither corporation was in fact an S-Corporation when it paid the fees at issue. (*See* Sanchez Decl. ¶ 6, Exhibit E (A+P 0577) (Bryan lost S Corporation status on August 3, 1999 and Lucor lost S Corporation status on December 23, 1999).

Plaintiffs also argue that the fees "were paid [by the corporations] with funds to which Gainor was otherwise entitled as the sole owner of the corporations." (Opp. at 14.) This is indisputably wrong. Gainor did not even own the corporations before they were sold; MJG Partners did. (Sep. Statement, Fact No. 15.) MJG Partners then sold the corporations to Mark C. Klopfenstein before the corporations paid the fees at issue. (Fact Nos. 17, 18, 20, 22-27.) Therefore Gainor could not possibly have been "entitled" to the money used to pay the fees.

Plaintiffs also insist that they "personally [paid] the IRS $17 million in taxes and interest after the advice Gainor paid for proved false . . . ." (Opp. at 14). If the law considered back taxes as injury (which it does not), Plaintiffs might state a direct claim for such injury, but that hardly explains why fees paid by two corporations Plaintiffs did not own constitute *any* sort of injury -- much less direct injury -- to Plaintiffs.

Finally, Plaintiffs suggest that "Gainor received less on the sale of the S Corporations to

TransStar based on Defendants' actions and advice." (Opp. at 14.) Yet again, Plaintiffs never explain what this has to do with any injury to them flowing from the fees Bryan Medical and Lucor paid after Klopfenstein bought the corporations from MJG Partners, not Gainor. Because Plaintiffs did not own any interest in Bryan Medical or Lucor when the corporations paid the fees at issue in this case, Plaintiffs do not have standing to recover those fees, and this Court should grant partial summary judgment.

B. The "Economic Reality" Is That Plaintiffs Cannot Show *Any* Injury From The Payment of The Fees At Issue, Much Less A Direct Injury

Plaintiffs say that "[t]he law deals in economic reality. And the economic reality is that Gainor paid Defendants' fees." (Opp. at 2.) Actually, the economic -- and legal -- reality is that a corporation's payment of fees to a third-party does not cause injury to a nonshareholder. Again, whether that nonshareholder might be able to state a claim for some other type of injury is not at issue; one cannot lose what one does not have -- Gainor owned no interest in either corporation and lost nothing when the corporations paid the fees.

Plaintiffs also depict an "economic reality" in which Brown & Wood designed the tax strategy at issue and controlled Gainor's implementation of it. (Opp. at 16.) Plaintiffs offer not a shred of evidence to support this "reality." Nothing in the record even hints that Brown & Wood designed the strategy, or that Brown & Wood misled Gainor, or communicated with him in any way about the strategy, other than to deliver a tax opinion letter. The only evidence Plaintiffs submit shows that Arthur Andersen, Gainor's "long-time and trusted accounting firm," attempted to interest Gainor in a tax shelter and advised him on how to structure the transaction. (Gainor Aff. ¶¶ 4, 5, 6, 8.) *Andersen* was the one who told Gainor not to "liquidat[e] Bryan Medical. Inc. or Gainor Medical USA, Inc. [nka Lucor] at this time [because i]f you decide to go ahead with any of the planning we discussed relating to the sale of Gainor Medical Management, LLC, it may be necessary to use these entities as part of the planning." *Id.* ¶ 6, Ex. A.

We are also tempted to observe that in "economic reality," Gainor knew perfectly well that he was using corporate entities to engage in the transaction. Can anyone doubt that Gainor

would have used the corporate form to protect himself from liability during the transaction had that become desirable? Indeed, Exhibit A to Gainor's declaration shows that Gainor has employed many corporate entities to structure his business affairs and that Gainor used Lucor (f/k/a Gainor Medical) to shield himself from personal liability from a lawsuit. (Gainor Decl. ¶ 6, Ex. A.) No reason in law or equity exists why Gainor should now be allowed to ignore the basic separation between shareholder and corporation because he feels it convenient to do so.

More to the point, there is no "economic reality" exception to the black-letter rule that only the corporation can sue to recover fees it paid. Of the four cases Plaintiffs cite in support of their "economic reality" notion (Opp. at 9-13), two involve standard direct claim analyses, one concerns irrelevant principles of bankruptcy law, and one, an unpublished, uncitable California case, contains no legal analysis at all.

For some reason, Plaintiffs chiefly rely on *Shalam v. KPMG LLP*, 2006 WL 2589917 (N.Y. Sup. Ct. Sept. 8, 2006), which only clarifies that Plaintiffs would not have suffered direct injury even if they had owned shares of Bryan Medical and Lucor when the corporations paid the fees at issue. In *Shalam*, the plaintiff established a wholly-owned S corporation, Congo Ventures, as the investment vehicle for his participation in a tax shelter. *Shalam*, 2006 WL 2589917, at * 2. Congo Ventures then entered into various contracts with parties, but the plaintiff himself paid over $3 million in fees for the transaction. *Id.* at * 2-3. The trial court noted that "although shareholders, even a sole shareholder, or one in a closely held corporation, have no standing to sue for injuries to the corporation itself, they may assert claims based upon breach of a duty owed directly to them, independent of any duty owed to the corporation." *Id.* at *4 (citations omitted).

The trial court then held that the plaintiff could not sue in contract because the plaintiff was not a party to the contracts; however, the court allowed him to sue in tort for the fees *he* paid for the transaction. As the appellate court explained in affirming that decision, the plaintiff in *Shalam* had standing to sue because "*Plaintiff, not Congo Ventures*, paid $3.85 million in fees to defendants and suffered the loss of tax savings opportunities." *Shalam*, 41 A.D.3d 200, 200

(N.Y.A.D. 1 Dept. 2007) (emphasis added).

Here, Plaintiffs manifestly did *not* pay the fees at issue, the corporations paid the fees. (Sep. Statement, Fact Nos. 22-27, 31.) As the court in *Shalam* would be the first to observe, the corporation therefore suffered the injury of paying the fees and only the corporation can recover them. Plaintiffs suggest in the margin that the distinction between *Shalam,* where the plaintiffs paid the fees in question, and the case at bar, where all admit that Plaintiffs never paid the fees in question "is not material." (Opp. at 10 n.4.) Suffice it to say that it would be difficult to imagine a more material distinction in a case where Plaintiffs insist that the Court should simply ignore a basic principle of corporate law -- that only the corporation can sue for fees it paid. *Shalam* supports the general rule, not Plaintiffs' proposed exception.

Plaintiffs also cite *Far West Federal Bank, S.B. v. Office of Thrift Supervision-Director*, 119 F.3d 1358 (9th Cir. 1997) (Opp. at 11-12), in which the court conducted a standard "direct injury" analysis and concluded that the plaintiff investors suffered individual financial injury allowing a direct claim because the plaintiffs paid the funds at issue themselves. *Id.* at 1364. As already discussed, Plaintiffs in the case at bar never explain (and could never explain) how they suffered any injury flowing from the payment of fees by corporations they did not own; consequently, cases like *Federal Bank* are irrelevant.

Hirsch v. Arthur Andersen & Co., 72 F.3d 1085 (2d Cir. 1995) (Opp. at 12), addressed a matter of bankruptcy law concerning whether a bankruptcy trustee has standing to sue on behalf of the debtor when creditors allege the debtor is complicit in the wrongdoing underlying the lawsuit. The court's answer was no. *Hirsch* has absolutely nothing to do with this case.

Finally, Plaintiffs cite to an unpublished California case, *O'Keefe v. Han*, 2004 WL 327004 (Cal. App. 2004). *Han* warrants attention because it is the only case Plaintiffs could find in which a court permitted an individual shareholder to sue for professional fees incurred by his closely-held corporation.[1] *But see Falic*, 347 F. Supp. 2d at 1269 ("Attorney's fees that are paid

[1] *Han* has no precedential effect anywhere, and may not be cited to any California state court. *See* Cal. Rule Court 8.1115 (unpublished opinions may not be cited).

by a corporation rather than a shareholder personally cannot be considered a realized loss of the shareholder, even in the case of a sole shareholder or a closely held corporation.").

Plaintiffs note that *Han* "arose in another context" (Opp. at 12), which is putting it mildly. In *Han*, a lawyer filed a malicious prosecution action seeking as damages attorney fees paid by his S corporation. The S corporation had assigned the claims to the attorney, but the appellant contended that the trial court erred in allowing the assignment and the introduction of the fees paid by attorney's S corporation. *Id.* at *3. Because appellant framed the issue as one of admissibility of evidence, the California Court of Appeal declined to review the issue de novo as a question of law, but rather regarded it as within the trial court's discretion, which would not be reversed "unless the reviewing court believes the error resulted in a miscarriage of justice." *Id.*

Based on the assignment, and the S-corporation status of the lawyer's company, the California Court of Appeal held that the trial court did not abuse its discretion in permitting evidence of legal fees paid by the corporation. The appellate panel did not conduct any legal analysis -- or even mention the applicable corporate law doctrines -- since it proceeded under an abuse of discretion standard. Whatever else one may say about *Han*, it is of very little use to Plaintiffs.

C. Plaintiffs' Effort To State A Direct Claim Apart From The Corporations' Payment of Fees Also Fails

As a fall-back, Plaintiffs suggest two sources of direct injury other than the payment of fees for which they might conceivably state a claim. Neither has merit.

First, Plaintiffs argue that even though Bryan Medical and Lucor paid the fees, Plaintiffs funded the corporations. As evidence, Plaintiffs submit only Gainor's hazy assertion in his affidavit that "I placed at least $4.5 million of my own money into the bank account of one of the entities ...."[2] (Gainor Aff. ¶ 12.)

[2] Plaintiffs have not submitted any evidence showing that Gainor's money was ultimately used to pay the fees at issue. All they have said is that Gainor contributed $4.5 million to some unnamed corporate entity. (Gainor Aff. ¶ 12.) Plaintiffs submit no evidence showing that this $4.5 million was used to pay any of the fees at issue or that the $4.5 million even went to one of the entities that paid the fees. Without connecting the dots between the $4.5 million contribution and Bryan Medical and Lucor's payment of

Assuming Gainor means he contributed to Bryan Medical or Lucor, once an individual contributes money to a corporation, the money no longer belongs to the individual. *Palafrugell Holdings, Inc. v. Cassel*, 825 So.2d 937, 940 (Fla. 3rd DCA 2001); *Warter v. Boston Securities, S.A.*, 2004 WL 691787, * 9-10 (S.D. Fla. 2004). If that money is later misappropriated from or wrongly paid out by the corporation, any right of recovery to that money belongs to the corporation, not the individual. *Id.*; *see Starke v. Joda, LLC,* 2005 WL 1983835 at *4 (E.D. Mo. 2005) (applying Florida law) (holding that even though individual plaintiff "invested money in the corporation and the corporation used his money to purchase the helicopter," plaintiff could not sue for conversion of the helicopter).

In *Palafrugell Holdings*, Hernandez convinced five investors to form a corporation and contribute $350,000 to it. After the investors deposited their money into the corporation's escrow account, Hernandez caused the escrow company to transfer the funds to his name. *Id.* at 938. Thereafter, the corporation sued to recover the funds. The defendants argued that the corporation lacked standing to bring suit as the investors actually suffered the injury because they contributed the money. *Id.* at 939. The Court of Appeals disagreed. It held that "[t]he money no longer belonged to the investors individually after they deposited it into the escrow account and received stock certificates. Although the investors were *indirectly* injured, loss of the money was a direct and primary injury to Palafrugell." *Id.* at 940 (emphasis added).

In *Warter*, the defendants solicited the individual plaintiffs to invest their money with the defendants' bank. *Warter*, 2004 WL 691787, at *2. Plaintiffs thereafter opened a bank account with Defendants in the name of plaintiffs' wholly-owned corporation and contributed at least $600,000 into that account. *Id.* Defendants then allegedly misappropriated the $600,000 and plaintiffs sued in their individual capacity to recover this money. On the Defendants' motion to dismiss, the court held that plaintiffs could not sue to recover any of the money deposited into the corporation's bank account because "the alleged financial injury was to [the corporation], not

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fees, Plaintiffs have not even provided the factual predicate necessary to support their erroneous legal argument.

Plaintiffs." *Id.* at *9.

The facts as alleged by Plaintiffs essentially mirror *Palafrugell* and *Warter*. Once Gainor made his $4.5 million contribution to the (unnamed) entity, the money was no longer his. He therefore cannot sue to recover that money once the corporation spends it, even if he made the contributions at the direction of Defendants. *See also Starke,* 2005 WL 1983835, at *4.

Second, Plaintiffs argue that "[Gainor] received less on the sale of his interest in the S corporations due to the transaction fees and Defendants' actions" (Opp. at 16) and that Gainor, as an individual, can recover damages for having to sell his stock at a depressed price.

As already noted, no one disputes that MJG Partners, not Gainor, sold the shares of Bryan Medical and Lucor and sustained any alleged loss from that sale. Accordingly, only MJG Partners has any claim for damages resulting from the sale of the shares. *Goldome Sav. Bank v. Wulsin,* 530 So.2d 291, 293 (Fla. 1988).

Moreover, under Eleventh Circuit law, "a stockholder cannot recover for a personal loss by asserting and proving that the defendants' wrongdoing has caused him to sell his corporate stock at a depressed value." *Citibank, N.A. v. Data Lease Fin. Corp.*, 828 F.2d 686, 693 n.9 (11th Cir. 1987) (quoting *Mendenhall v. Fleming Co., Inc.*, 504 F.2d 879, 881 (5th Cir. 1974)). That is exactly what Gainor attempts to do here. (*See* Opp. at 16.) As the Eleventh Circuit explained, "the very act of selling at a lower price [] has established that the direct damage was to corporate worth. The loss in [the shareholder's] stock's sale price is a real economic harm to [the shareholder], but is both indirect to and duplicative of the corporation's right of action." Whether Gainor or MJG Partners sold the shares of the corporations at a reduced value, the right to recover any damages would still belong to the corporations. *See Citibank,* 828 F.2d at 693 n.9; *Mendenhall,* 504 F.2d at 881.

D. Plaintiffs Have Not Established The Elements Of Equitable Estoppel.

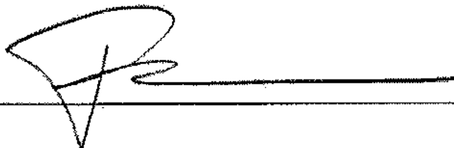
"Equitable estoppel must be applied with great caution, and the party raising estoppel must prove its elements by clear and convincing evidence." *Goodwin v. Blu Murray Ins.*

Agency, Inc. 939 So.2d 1098, 1103 (Fla. 5th DCA 2006). The elements of equitable estoppel are: "(1) a misrepresentation of a material fact by the party being estopped, which is contrary to a later asserted representation or position by that party, (2) reliance on that representation by the party claiming estoppel, and (3) a detrimental change in the position of the party claiming estoppel caused by that party's reliance on the misrepresentation." *Spoerr v. Manhattan Nat'l Life Ins. Co.*, 2007 WL 128815, at *5 (S.D. Fl. Jan. 12, 2007) (J. Martinez) (citing cases). Plaintiffs satisfy none of these elements.

First, they fail to present evidence that Brown & Wood made any misrepresentation regarding Plaintiffs' ability to sue in their individual capacities or any representation contrary to a position Brown & Wood now espouses in challenging Plaintiffs' damages claims. Nor do Plaintiffs submit evidence that Gainor did not know use of corporate entities would place any right of recovery for fees paid by those corporations in the corporation. Absent a prior representation from Brown & Wood that contradicts Brown & Wood's current position, Plaintiffs fail to demonstrate equitable estoppel as a matter of law.

III. CONCLUSION

For the foregoing reasons, Brown & Wood respectfully requests that this Court grant partial summary judgment and strike Plaintiffs' claims for attorneys fee paid to Brown & Wood, accounting fees paid to Andersen, loan facility fees paid to Merrill, and damages Plaintiffs describe as the difference between the purchase price of Bryan Medical and Lucor and the value of the securities conveyed.

DATED: September 7, 2007 By: 

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy was sent via the Southern District of Florida's CM/ECF System and/or electronic mail to all counsel of record on the attached Service List this ___ day of September, 2007.

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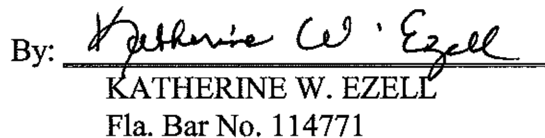
By: 
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