Anwar et al v. Fairfield Greenwich Limited et al Doc. 1471

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ANWAR, *et al*. Plaintiffs, v. FAIRFIELD GREENWICH LTD., *et al*., Defendants.	MASTER FILE NO. 09-CV-00118 (VM)

PwC DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION *IN LIMINE* NO. 6 TO EXCLUDE ISSUE OF PLAINTIFFS' COMPARATIVE FAULT

FILED UNDER SEAL PURSUANT TO CONFIDENTIALITY ORDER

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Defendants PricewaterhouseCoopers Accountants N.V. and PricewaterhouseCoopers LLP (collectively, the "PwC Defendants") respectfully submit this memorandum of law in opposition to Plaintiffs' Motion *in Limine* No. 6 to exclude evidence about Plaintiffs' comparative fault.

PRELIMINARY STATEMENT

Plaintiffs' attempt to prevent the jury from considering evidence of the Plaintiffs' negligence, and from apportioning fault accordingly, is premised on a misunderstanding of the so-called "audit interference rule." Even assuming the continued viability of that rule in a comparative fault regime, the rule only applies where the claim is asserted against an auditor *by the actual audit client itself*. The rule does not apply where, as here, the action is brought by plaintiffs other than the audit client. Accordingly, the PwC Defendants are entitled to present evidence of Plaintiffs' comparative negligence.

ARGUMENT

Plaintiffs base their motion entirely on a misreading of the "audit interference rule" articulated in *National Surety Corp. v. Lybrand*, 256 A.D. 226 (1st Dep't 1939). *Id.* at 236. As an initial matter, the continued relevance of this doctrine is in doubt. *National Surety* was decided at a time when New York followed a contributory negligence regime, and its reasoning was inextricably linked to the unfairness of a *total bar* against recovery by the accountant's client. *Id.* at 235 ("We are, therefore, not prepared to admit that accountants *are immune* from the consequences of their negligence . . . .") (emphasis added). Subsequent to New York's enactment of a comparative negligence regime, however, the New York Court of Appeals has not addressed whether the audit interference rule remains good law, and at least one court in this District has questioned its "continued vitality," stating that, under "a comparative fault regime,

there does not appear to be any sound policy reason to apply *National Surety*." *Bank Brussels Lambert v. Chase Manhattan Bank, N.A.*, No. 93 CIV. 5298 (LMM), 1996 WL 728356, at *1 (S.D.N.Y. Dec. 18, 1996).

Even if the audit interference rule is still viable, the rule has no application here because Plaintiffs were not the PwC Defendants' clients. As the *National Surety* Court explained, the purpose of the audit interference rule was to avoid a total bar to a client's recovery against an auditor, where the client was negligent, and where the auditor was engaged to detect the client's error. *See Nat'l Sur.*, 256 A.D. at 236. This logic necessarily limits the application of the audit interference rule to suits brought by the client whose errors the accountant was engaged to detect – not non-privy third parties such as Plaintiffs, as to whom there is no potential unfairness in considering their negligence.

Indeed, in quoting a passage from *National Surety*, Plaintiffs left out the key sentence in which the court stated "Accordingly, we see no reason to hold that the accountant is not liable *to his employer* in such cases." *Id.* (emphasis added). Consistent with this reasoning, the PwC Defendants are not aware of any case applying the audit interference rule to a non-privy party (and Plaintiffs have cited no such case). The only decision that addressed this issue has ruled that "*National Surety* must be read to be limited to the assertion of the contributory negligence defense against *the accountants' own employer*." *Bank Brussels*, 1996 WL 728356, at *1 (emphasis added).

By contrast, each decision cited by Plaintiffs discussed the application of the rule where the suit is brought by the defendant professional's employer. *See Whitney Grp., LLC v. Hunt-Scanlon Corp.*, 106 A.D3d 671, 673 (1st Dep't 2013) (suit by plaintiff client against plaintiff's former lawyer); *Collins v. Esserman & Pelter*, 256 A.D.2d 754, 757 (3rd Dep't 1998) (suit by

plaintiff trustee of defunct client against client's former accounting firm); *In re CBI Holding Co., Inc.*, 419 B.R. 553, 574 (S.D.N.Y. 2009) (same); *see also Ackerman v. Price Waterhouse*, 252 A.D.2d 179, 195, 199 (1st Dep't 1998) (noting divergence in approaches to comparative negligence, but neither considering nor applying the audit interference rule; case "involve[d] the direct professional relationship between accountant and client").

Accordingly, the audit interference rule does not apply here and evidence concerning Plaintiffs' negligence is relevant and admissible. Indeed, pursuant to N.Y. C.P.L.R. § 1411, the jury must be permitted to consider evidence of Plaintiffs' culpable conduct and to reduce any damages accordingly.

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion *in Limine* No. 6 should be denied.

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Respectfully submitted,

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