

Epstein Becker & Green v Sheriff

2003 NY Slip Op 30235(U)

October 10, 2003

Sup Ct, NY County

Docket Number: 0602608/02

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

HON. JOAN A. MADDEN
J.S.C.

PART 11

0602608/2002

EPSTEIN, BECKER & GREEN, P.C.
vs
SHERIFF, DARRYL I.

SEQ 1
DISMISS ACTION

INDEX NO. _____
MOTION DATE 3-13-03
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

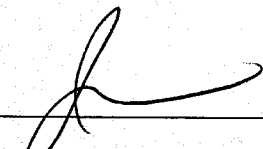
Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with
the annexed memorandum Decision & Order.

SCANNED
OCT 22 2003

MOTION/CASE IS RESPECTFULLY REFERRED TO
JUSTICE

Dated: October 10, 2003



J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 11

-----X

EPSTEIN BECKER & GREEN

Plaintiff,

Index No. 0602608/02

-against-

DARRYL I. SHERIFF,

Defendant.

-----X

MADDEN, J. :

Plaintiff law firm, Epstein Becker & Green, P.C. (EBG) commenced this action to collect legal fees from defendant client, Darryl I. Sheriff (Sheriff). EBG moves to dismiss certain of Sheriff's counterclaims for failure to state a cause of action and based upon documentary evidence, pursuant to CPLR 3211 (a) (1) and (7).

BACKGROUND

Sheriff, a resident of Ontario, Canada, was a principal, along with Thomas Armano and Larry Dries (the DKA Individuals), of Deutsche Kapital-Anlagen Ltd. (DKA), a Canadian corporation. Sheriff claims that over a two-year period, he loaned DKA approximately \$800,000 (Canadian). Sheriff maintains that DKA and the DKA Individuals agreed to repay Sheriff from DKA's business proceeds, including any monies paid to DKA from Infomatec, A.G. (Infomatec), one of DKA's former clients, as part of a settlement agreement reached in a prior dispute between DKA and Infomatec.

However, Sheriff alleges that, in November 2000, the DKA Individuals devised a plan to carve Sheriff out of the Infomatec settlement proceeds by creating a United States shell corporation (DKA-US) that would be assigned DKA's interests in, and proceeds from, the Infomatec settlement agreement. Subsequently, in January 2001, Sheriff retained EBG in New York, as well as Canadian counsel, allegedly to prevent diversion of the Infomatec settlement proceeds; and according to EBG, "to make sure that any order or judgment issued in Canada[] would be enforceable in New York, to the extent possible." Harris Aff. at ¶ 4. On February 6, 2001, according to Sheriff, the Infomatec settlement proceeds, \$307,500, were wire transferred, without Sheriff's consent, into a New York trust account held by Henry Becker, Esq. (Becker), a New York attorney and U.S. counsel for the DKA Individuals.

In February 2001, Sheriff's Canadian counsel commenced a legal action against DKA and the DKA Individuals in Ontario's Superior Court of Justice. Becker was not a party to that action. On March 5, 2001, the Canadian court ordered DKA and the DKA Individuals to pay the Infomatec settlement proceeds, upon receipt, into a specified account held by DKA. The Canadian court further ordered that any person acting on behalf of DKA or the DKA Individuals be restrained from, among other things, "in any way disposing of any assets in which [DKA] has an interest, either directly, or indirectly, wherever situate." Harris Aff.,

Ex. E at ¶ 2. The Canadian court also ordered DKA and the DKA Individuals to direct Becker to forward to the DKA account "all funds relating directly or indirectly" to the Infomatec settlement and, in connection therewith, to provide an accounting of all monies received, within 10 days. *Id.* at ¶ 5.

At the instruction of Sheriff's Canadian counsel, EBG served the Canadian order upon Becker. In response, on March 12, 2001, Becker sent a letter to EBG stating, *inter alia*: that he was in receipt of EBG's March 5, 2001 letter; that he was not a party to Sheriff's Canadian action and is, therefore, not bound by the Canadian court's order; that his firm received \$307,500 from the Infomatec settlement on February 6, 2001; that he disbursed the bulk of the Infomatec settlement proceeds prior to having learned that Sheriff was entitled to a portion of the proceeds; that upon hearing from Sheriff, consistent with Sheriff's demands, Becker forwarded \$20,000 to DKA; and that he is awaiting further instructions from his clients with respect to any further disbursements.

On April 24, 2001, EBG filed a complaint on behalf of Sheriff in the New York Supreme Court, Rockland County, against Thomas Armano (one of the DKA Individuals), Becker and DKA-US. The complaint alleged fraud, tortious interference with contractual relations and breach of fiduciary duty, all in connection with the defendants' alleged circumvention of the

Canadian court's order and misdirecting of the Infomatec settlement proceeds.

Subsequently, in June 2001, Sheriff entered into a settlement agreement (the Settlement Agreement) with the DKA Individuals, DKA, DKA-US and Becker, in connection with both the Canadian and New York actions. The terms of the Settlement Agreement provided the DKA Individuals with, in pertinent part, the balance of funds remaining on deposit with Becker and any of the accounts of DKA; Sheriff was provided with DKA's books, shares and records, and granted full rights to restructure DKA in order to permit him to wind up and restructure DKA, as necessary, to attempt to recover the indebtedness claimed by Sheriff in the New York and Canadian legal actions. Sheriff claims that he was compelled to enter into the Settlement Agreement in an attempt to obtain some Canadian tax relief after the Infomatec settlement proceeds had been mostly disbursed, and his recovery of the proceeds irretrievably lost.

EBG commenced the present action against Sheriff, in July 2002, to recover the balance of legal fees allegedly due and owing for EBG's representation of Sheriff in the foregoing matters involving the DKA Individuals, DKA-US and Becker. In connection with the commencement of this action, Sheriff alleges that the individuals hired by EBG to serve the complaint upon Sheriff forcibly entered Sheriff's business office, physically

hit and verbally threatened him, and threw EBG's complaint at his head and yelled: "You have been served." Harris Aff., Ex. B at ¶ 12.

Sheriff, in his answer to EBG's complaint, counterclaimed against EBG for, inter alia, legal malpractice, breach of contract and negligent selection of independent contractor. EBG moved to dismiss these counterclaims, which are the subject of the instant motion.

DISCUSSION

Legal Malpractice

"[A]n action for legal malpractice requires proof of three essential elements: (1) the negligence of the attorney, (2) that the negligence was the proximate cause of the loss sustained, and (3) proof of actual damages.'" *Prudential Ins. Co. v. Dewey Ballentine, Bushby, Palmer & Wood*, 170 AD2d 108, 114 (1st Dept 1991), aff'd 80 NY2d 377 (1992)(citations omitted).

Assuming the facts as pleaded to be true and according Sheriff the benefit of every possible favorable inference (*Arnav Indus., Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner, L.L.P.*, 96 NY2d 300, 303 [2001]), Sheriff has adequately stated a cause of action for defendant's professional negligence. First, Sheriff has adequately alleged that EGB was negligent in that it departed from the standard of care exercised by other lawyers by its failure to investigate the acts giving

rise to any causes of action that could be asserted against the DKA Individuals and to promptly pursue any such causes of action, and to take such action necessary to preserve Sheriff's ability to recover on any possible damage award against the DKA Individuals in favor of Sheriff. Sheriff Ans. at ¶ 16.

With respect to preserving Sheriff's ability to recover assets, it is alleged that when EGB was retained in January 2001, "there was a likelihood that the settlement proceeds would be transferred offshore, which became even more likely once the settlement proceeds were wired transferred by the DKA Individuals to the trust account in New York City in the name of Becker." Id. ¶ 7. It is further alleged that "[n]otwithstanding the foregoing, EGB failed to take any legal steps to prevent the diversion by the DKA Individuals of the \$307,500 Infomatec settlement proceeds and/or negligently failed to advise Sheriff of his rights and remedies by which to prevent the dissipation of such monies." Sheriff Ans. ¶ 8. Instead, it is alleged that during the four months of its engagement as counsel, EGB "prepared numerous drafts and redrafts of a complaint on behalf of Sheriff seeking damages against the DKA individuals based on the aforesaid fraudulent conduct." Id. ¶ 9.

In addition, Sheriff's counterclaim sufficiently alleges that EGB's negligence proximately caused Sheriff's pecuniary loss. In particular, the counterclaims alleges that as a result

of EBG's breaches of its standard of care by, inter alia, failing to take steps to prevent the diversion of assets, Sheriff "was injured and caused to lose valuable monetary rights, including ... the loss of the ability to recover any judgment that could have been obtained against the DKA individuals." Sheriff Ans. ¶ 19. Moreover, in his affidavit in opposition, in support of causation, Sheriff alleges that EBG's failed to seek relief from a New York court, via application for a restraining order or order of attachment against Becker, to prevent the diversion of the Infomatec settlement proceeds (Sheriff Aff. Opp. at ¶ 6); and failed to advise Sheriff as to the possible risks of commencing only a Canadian action without simultaneously commencing an action in New York (Sheriff Aff. Opp. at ¶ 11). In other words, Sheriff has sufficiently alleged that except for EBG's failure to restrain Becker's dissipation of the Infomatec settlement moneys, he would have been able to obtain such moneys. *Home Ins. Co. v. Liebman, Adolfe & Charne*, 257 AD2d 424 (1st Dept 1999).

And, contrary to EBG's argument, at the pleading stage, Sheriff need not demonstrate that EGB would have succeeded in preventing the diversion of assets, especially at it is unclear at this juncture whether EGB ever considered seeking injunctive relief or an attachment, and Sheriff alleges that he was not advised as to any potential difficulties of obtaining such relief. *See, Home Ins. Co. v. Liebman, Adolfe & Charne*, 257 AD2d

at 424; *Greenwich v. Markhoff*, 234 AD2d 112 (1st Dept 1996). In any event, it cannot be said that an application restraining Becker from releasing the settlement funds would have necessarily been unsuccessful.

For example, allegations in the counterclaim that there was a likelihood that the settlement proceeds would be transferred offshore, after the DKA Individuals sent the funds to Becker's trust account in New York City, may have provided a sufficient ground for obtaining an attachment based on an intent to defraud Sheriff. See, 6201(3); *See, Mineola Ford Sales, Ltd. v Rapp*, 242 A.D.2d 371 (2d Dept 1997). In fact, the complaint drafted by EGB in the action brought by Sheriff against Armano, Becker and DKA-US alleges that the settlement proceeds were assigned to DKA-US with the intent to defraud Sheriff. And, while the court recognizes that a plaintiff must provide evidence of an intent to defraud to support such application, Sheriff is not required at the pleading stage to submit such evidence to support his complaint. Alternatively, an attachment might have been sought as against DKA Individuals as nondomiciliaries of New York and against DKA as a foreign corporation not qualified to do business in the state. See, 6201(1)

Next, Sheriff's damages resulting from the alleged malpractice are not speculative or unascertainable but are based on the \$307,500 received from the Infomatec settlement. *Home*

Ins. Co. v. Liebman, Adolfe & Charme, 257 AD2d at 424.

Moreover, the documentary evidence submitted on the motion does not render the allegations in the complaint incredible or demonstrate that no cause of action for legal malpractice exists. First, contrary to EBG's position, the restraining order issued by the Canadian Court at Sheriff's request would not appear to have prevented Sheriff from obtaining supplementary relief from a New York Court. The Canadian order prevents that transfer or disposal of any assets directly or indirectly relating to the Infomatec settlement, except insofar as it directs that such assets be transferred to a designated DKA bank account in Canada. Notably, however, the order does not prevent Sheriff from seeking consistent relief from a court in another jurisdiction. Thus, for example, a New York court could have restrained Becker from transferring any assets except to the DKA bank account designated in the Canadian order.

Next, Sheriff's settlement with the DKA Individuals, DKA, DKA-US and Becker, in connection with both the Canadian and New York actions, does not prevent Sheriff from pursuing a claim for legal malpractice against EBG, particular as Sheriff alleges that he entered into the settlement due to the lack of any significant moneys remaining from the Infomatic settlement. See *Bernstein v. Oppenheim & Co.*, 160 AD2d 428, 430 (1st Dept 1990) ("A claim for legal malpractice is viable, despite settlement of the underlying

action, if it is alleged that settlement of the action is effectively compelled by the mistakes of counsel.") ; *Home Ins. Co. v. Liebman, Adolfe & Charne*, 257 AD2d at 424 (holding that a settlement allegedly due to an attorney's breach of his duty of care "does not constitute an intervening cause barring a claim for legal malpractice").

Finally, Becker's letter dated March 12, 2001, in which Becker states that he disposed of the majority of the Infomatic proceeds and was not bound by the Canadian order does not provide a basis for dismissing the legal malpractice claim. Instead, the letter arguably indicates that a restraining order in New York was needed to protect Sheriff's purported right to the settlement proceeds.

Breach of Contract

Sheriff's breach of contract counterclaim alleges that EBG agreed to represent Sheriff in connection with the US aspects of the action commenced by Sheriff's Canadian attorneys, the Fogler Rubinoff law firm. EBG's retainer agreement, submitted as an exhibit to its motion to dismiss, supports this claim:

You have requested [EBG] to represent you in connection with your claims against [DKA] and the U.S. aspects of an action commenced or to be commenced by the Fogler Rubinoff firm, on your behalf, against [DKA]. The purpose of this letter is to confirm that representation and the terms of our engagement.

Harris Aff., Ex. A.

In addition, EBG acknowledged, in its affidavit submitted in support of its motion to dismiss, that it was retained in order to ensure that any order or judgment issued in Canada would be enforceable in New York. Harris Aff. Opp. at ¶ 4. Thus, "[s]ince [Sheriff] alleges a contractual relationship out of which all of [EBG's] obligations arose, and [EBG's] failure to exercise due care in the performance of the contract, the cause of action for breach of contract is sufficiently stated." *Ruffolo v Garbarini & Scher, P.C.*, 239 AD2d 8, 10 (1st Dept 1998) (internal citations omitted).

In essence, however, Sheriff's breach of contract allegations rely exclusively upon Sheriff's position that EBG breached its duty of care in failing to attach or restrain the disbursement of the Infomatec settlement proceeds, and not the promise of a particular result which EBG failed to achieve. "While it is true that a breach of contract claim need not be based on an express promise to a client, a breach of contract claim premised on the attorney's failure to exercise due care or to abide by general professional standards is nothing but a redundant pleading of the malpractice claim." *Levine v Lacher & Lovell-Taylor*, 256 AD2d 147, 151 (1st Dept 1998) (internal quotation marks and citations omitted); *see also, IMO Industries Inc. v. Anderson Kill & Olick, P.C.*, 267 AD2d 10 (1st Dept 1999).

As such, EBG's motion to dismiss Sheriff's breach of contract

counterclaim is granted.

Negligent Selection of Independent Contractor

Finally, Sheriff claims that he was assaulted by the process servers hired by EBG. EBG moves to dismiss Sheriff's claim for negligent selection of an independent contractor, the process servers. The general rule under New York law is that "a party who retains an independent contractor * * * is not liable for the independent contractor's negligent acts." *Kleeman v Rheingold*, 81 NY2d 270, 273 (1993). The Court of Appeals has articulated exceptions in cases where an employer has negligently selected, supervised or instructed the contractor; where work is especially or inherently dangerous; and where the employer is under a specific nondelegable duty. *Id.* at 274.

In the instant action, Sheriff alleges that EBG knew, or should have known, that the process servers it hired to serve its complaint upon Sheriff were not qualified, and that EBG negligently failed to investigate the process servers' qualifications. Sheriff's claim is without merit.

Since an employer has the right to rely on the supposed qualifications and good character of the contractor, and is not bound to anticipate misconduct on the contractor's part, the employer is not liable on the ground of his having employed an incompetent or otherwise unsuitable contractor unless it also appears that the employer either knew, or in the exercise of reasonable care might have ascertained, that the contractor was not properly qualified to undertake the work.

Maristany v Patient Support Servs., Inc., 264 AD2d 302, 303 (1st Dept 1999) (citation omitted); *compare Vanderhule v Berinstein*, 285 App Div 290 (3d Dept 1954) (court found that employer knew, or should have known, of employee's vicious propensities). Here, Sheriff has not alleged that EBG had any reason to question the process servers' qualifications. Nor has Sheriff alleged that any background investigation of the process servers, conducted by EBG, would have revealed facts to bring into question the qualifications, competence or suitability of the process servers. Therefore, EBG's motion to dismiss Sheriff's negligent selection of an independent contractor counterclaim is granted.

CONCLUSION

Accordingly, it is

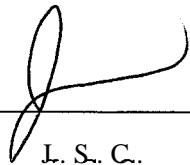
ORDERED that EBG's motion is granted to the extent that the second and sixth counterclaims are severed and dismissed; and it is further

ORDERED that EBG is directed to serve a reply to the counterclaims within 10 days after service of a copy of this order with notice of entry; and it is further

ORDERED that the parties shall appear for a preliminary conference on in Part 11, room 351, 60 Centre Street, New York on November 13, 2003 at 9:30 am.

A copy of this order is being mailed to counsel for the parties by my chambers.

Dated: October 10, 2003



J. S. C.