Lizjan, Inc. v Sahn Ward Coschignano & Baker, PLLC
2012 NY Slip Op 33809(U)
August 7, 2012
Supreme Court, Nassau County
Docket Number: 17777/11
Judge: Karen V. Murphy
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Short Form Order

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 11 NASSAU COUNTY

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

---x

LIZJAN, INC.,

Plaintiff(s),

-against-

SAHN WARD COSCHIGNANO & BAKER, PLLC,

Defendant(s).

---x

Index No. 17777/11

Motion Submitted: 6/26/12
Motion Sequence: 001

The following papers read on this motion:

Notice of Motion/Order to Show Cause.....X
Answering Papers.....X
Reply.....X
Briefs: Plaintiff's/Petitioner's.....
Defendant's/Respondent's.....

Defendant Sahn, Ward Coschignano & Baker, P.C. moves pursuant to CPLR § 3211[a][7] for an order dismissing the complaint.

In April of 2011, the plaintiff Lizjan, Inc [Lizjan] retained the defendant-law firm, Sahn, Ward Coschignano & Baker, P.C. [Sahn or the firm], to represent it in connection with "multiple litigations" arising out of a landlord tenant dispute and other, related matters. Elizabeth Ullman and Joseph Frascogna are, respectively, president and vice-president of Lizjan.

In accord with its retainer, Sahn later commenced lawsuits on behalf of Lizjan in the Supreme Court, Suffolk County. The Suffolk County matters were ultimately settled shortly

thereafter in June of 2011. As part of the written settlement, the sum of $115,000.00 was wired to Sahn's escrow account to be held for Lizjan's benefit.

According to Lizjan, after the settlement money was deposited into the Sahn escrow account, Frascogna contacted Sahn by e-mail and requested that the firm release the settlement. Specifically, Frascogna asked that Sahn transfer the funds into a bank account which was not owned by Lizjan [e-mail print out, dated June 14, 2011]). Apparently, Frascogna may at first have given Sahn his own name in connection with the account. The Sahn firm then attempted to comply with the wire request, but the transfer failed because either "the name on [the] account" did not match the account name given by Frascogna, or the account number was incorrect [e-mail print out, dated June 14, 2011]).

When a Sahn lawyer e-mailed Frascogna and apprised him of the transfer error, Frascogna replied, "sorry for the inconvenience the account name is . . . [Let it Be, Inc.] my name is on the debit card [e-mail print out, dated June 14, 2011]. Thereafter, Sahn then was able to successfully transfer the settlement funds to "Let it Be, Inc."

According to Sahn, prior to the commencement of the underlying lawsuit, Sahn's partner Jon Ward met with both Ullman and Frascogna to discuss the potential Suffolk County lawsuit. At the meeting, Ullman and Frascogna allegedly told Ward that they were Lizjan's sole shareholders, officers and directors.

Subsequently, a "new client" form and a retainer agreement were executed by Ullman and Frascogna. The "New Client" form contains Frascogna's e-mail, while his home address is listed as Lizjan's "billing address." The retainer agreement contains three signatures, which include: (1) Ullman's signature "individually"; and (2) Frascogna's signature, also individually (with no corporate titles added to either). Ullman, however, alone executed the retainer again on behalf of Lizjan, in her capacity as "president" [Retainer Agreement at 5]). Frascogna then allegedly served as Sahn's primary contact with respect to the litigation, and it was he who verified Lizjan's complaint as a Lizjan "officer" and later executed certain additional litigation documents, including affidavits in which he described himself as, *inter alia*, an officer and director of Lizjan.

According to Ullman, however, she was the one who signed key documents on behalf of Lizjan, except where personal knowledge was required, as in the case of litigation pleadings and affidavits [internal Exhs., "A", "B," Lizjan Lease, Rider, "Purchase and Sale Agreement"]). Ullman further contends that Sahn never consulted her with regard to Frascogna's escrow transfer requests, even though Frascogna was directing the firm to wire Lizjan's settlement funds to a corporate entity other than Lizjan, *i.e.*, "Let it Be, Inc."

A review of the settlement agreement reveals that Ullman signed it twice while Frascogna signed the agreement once (Settlement, at 9, 10). Ullman's first signature, as "president," appears under the pre-printed, heading,"Lizjan, Inc." Ullman then signed the settlement again in her individual capacity. Frascogna's notarized signature is also appended to the settlement, but his separate signature as "vice-president" appears under his own, pre-printed name, with no reference to "Lizjan" (Settlement, at 9, 10). Notably, the settlement provides in part that all notices sent thereunder relating to Lizjan were to be forwarded to Ullman as Lizjan's agent (Settlement, ¶ 4[c], at 7-8).

After the disputed, "Let it Be, Inc." wire transfer was completed, Lizjan was allegedly unable to recover any of the settlement proceeds from Frascogna, and this action ensued.

More specifically, by summons and verified complaint dated December 2011, Lizjan commenced the within legal malpractice action, alleging, *inter alia*, that Sahn breached its fiduciary duty to the plaintiff and/or committed malpractice by failing to properly safeguard the settlement proceeds, *i.e.*, by negligently wiring the funds to "Let It Be, Inc."

Sahn now moves pre-answer, to dismiss the complaint pursuant to CPLR § 32211[a][7], arguing in substance that as a matter of law, Frascogna was vested with apparent and/or actual authority to act for Lizjan, thereby precluding any recovery based on the allegedly improper wire transfer.

Crediting the complaint's non-conclusory allegations as true, and affording them the benefit of every possible favorable inference ***ABN AMRO Bank, N.V. v MBIA Inc.***, 17 NY3d 208, 227 [2011]; ***Leon v Martinez***, 84 NY2d 83, 87-88 [1994], the Court agrees that the complaint adequately states a claim grounded upon legal malpractice (*see generally*, ***Leder v Spiegel***, 9 NY3d 836, 837 [2007]; ***Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer***, 8 NY3d 438 [2007] *see also*, ***Collision Plan Unlimited, Inc. v Bankers Trust Co.***, 63 NY2d 827, 830 [1984]; ***Board of Managers of Bay Club v Borah, Goldstein, Schwartz, Altschuler & Nahins, P.C.*** , ___AD3d___, 2012 WL 2819360 [2d Dept 2012]).

For the purposes of its motion, Sahn does not necessarily dispute that wiring escrowed settlement funds to a non-client, absent proper authority could constitute breach of its duty of care and/or professional negligence (*e.g.*, ***Shasha v Gillard***, 68 AD3d 972, 973 [2d Dept 2009]; ***Great Am. Ins. Co. v Canandaigua Natl. Bank & Trust Co.***, 23 AD3d 1025; ***Iannizzi v Seckin***, 5 AD3d 555, 556 [2d Dept 2004]). Indeed, Sahn, as a escrow agent, was "absolutely" duty-bound as a fiduciary "'not to deliver the escrow to anyone except upon strict compliance with the conditions imposed'" (***George A. Fuller Co. v Alexander & Reed,***

Esqs., 760 F.Supp. 381, 387-388 [SDNY 1991], *quoting from*, 55 N.Y. Jur.2d, Escrows, § 21 *accord*, ***Baquerizo v Monasterio***, 90 AD3d 587, 588 [2d Dept 2011]; ***Iannizzi v Seckin, supra***; ***Takayama v Schaefer***, 240 AD2d 21, 24 [2d Dept 1998], *see generally* ***Albert Jacobs, LLP v Parker***, 94 AD3d 919, 920 [2d Dept 2012]; ***Cash v Titan Fin. Servs., Inc., supra***, 58 AD3d 785, 789 [2d Dept 2009]; ***Egnotovich v Katten Muchin Zavis & Roseman LLP***, 55 AD3d 462, 463, *cf.*, ***Matter of Ginzburg***, 89 AD3d 938, 941; ***Frawley v Dawson***, 32 Misc3d 1207(A), at ~~5-6~~ [Sup Co, Nass Co 2011]).

Rather, Sahn contends that Frascogna was vested with actual and/or apparent authority to direct the transfer on which it then justifiably relied as a matter of law.

Although Sahn acted in response to Frascogna's request, there is absent evidence showing that Lizjan conferred upon Frascogna, express or actual authority to disburse corporate settlement funds owned by Lizjan to third party payees. Nor in the current, pre-answer context of the action, does the record establish as a matter of law that Frascogna was clothed with apparent authority to permissibly request the disputed transfer (***Cash v Titan Fin. Servs., Inc., supra***).

"Essential to the creation of apparent authority are words or conduct of the principal, communicated to a third party, that give rise to the appearance and belief that the agent possesses authority to enter into a transaction" (***Hallock v State of New York***, 64 NY2d 224, 231 [1984]; ***Ford v Unity Hospital***, 32 NY2d 464, 472 [1973], *see* ***Marshall v Marshall***, 73 AD3d 870, 871; ***ER Holdings, LLC v 122 W.P.R. Corp.***, 65 AD3d 1275, 1277 [2d Dept 2009]). Since "[a]n agent's power to bind his principal is coextensive with the principal's grant of authority" . . . "[o]ne who deals with an agent does so at his peril, and must make the necessary effort to discover the actual scope of authority" (***Ford v Unity Hospital, supra***, *see* ***Collision Plan Unlimited, Inc. v Bankers Trust Co.***, 63 NY2d 827, 830 [1984]; ***Marshall v Marshall, supra***). Nor can an "agent by his [or her] own acts imbue himself [or herself] with apparent authority" (***Hallock v State of New York, supra***, at 231; ***Chelsea Nat. Bank v Lincoln Plaza Towers Associates***, 61 NY2d 817, 819 [1984]; ***1230 Park Assoc., LLC v Northern Source, LLC***, 48 AD3d 355, 356 [1st Dept 2008]; ***Morgold, Inc. v. ACA Galleries, Inc.***, 283 AD2d 407, 408 [2d Dept 2001]).

While Sahn claims that it took direction from Frascogna as a Lizjan corporate officer during the litigation (***Hallock v State of New York, supra***), there are unresolved questions concerning the precise scope of whatever authority Frascogna may have possessed; namely, whether his authority, if any, extended to the disposing of settlement funds owned by Lizjan within the factual context presented *(see,* ***Collision Plan Unlimited, Inc. v Bankers Trust Co.,***

supra, 63 NY2d at 830-832; ***Cash v Titan Fin. Servs., Inc., supra***, 58 AD3d at 789 *see*, ***Matter of Ginzburg, supra***, 89 AD3d 938, 940 [2d Dept 2011]).

Here, the settlement in the underlying Suffolk County action created a corpus of funds owned exclusively by Lizjan, which were to be held by Sahn prior to their subsequent disbursement (Settlement, ¶ 1[g], at 4). There is no dispute, however, that Frascogna's directive contemplated a transfer to an entity other than Lizjan, i.e., to an corporation, which was not the owner of the settlement proceeds. The fact that Frascogna may have been Sahn's primary litigation contact (Ward Aff., ¶ 4), does not, upon the record as developed to date, establish that Frascogna must therefore have possessed the authority, apparent or otherwise, to dispose of settlement proceeds on behalf of Lizjan in this fashion. Further buttressing this inference is the fact that certain key documents reflect what appears to be a deliberately created disparity in the representational status conferred upon Ullman as opposed to Frascogna since Ullman alone executed both the retainer and settlement on behalf of "Lizjan" whereas it appears that Frascogna did not (***Matter of Ginzburg, supra***, 89 AD3d 938, 940 *cf.*, ***Red-Kap Sales, Inc. v Northern Lights Energy Prods., Inc.***, 94 AD3d 1281, 1282-1283; ***Beizer v Bunsis, supra***, 38 AD3d 813 [2d Dept 2007]; ***Goldstein v Block***, 288 AD2d 182, 184 [2d Dept 2001]). Relatedly, it was Ullman who, on Lizjan's behalf, executed the key contractual documents relevant to the underlying Suffolk County action (*see*, Zimmerman Exhs., "F," "G" [internal Exhs., "A", "B," Lizjan Lease, Rider, "Purchase and Sale Agreement"]).

Nor does the record establish that Sahn made any inquiries with Lizjan prior to what at least ostensibly appears to be an unusual request, *i.e.*, a request that a client's escrowed settlement funds be transferred to an account owned by a distinct, third-party payee. It is settled that "[b]y invoking the doctrine of apparent authority to justify the propriety of its actions," a party "concomitantly assume[s] a duty of reasonable inquiry as to a person's "actual perimeter of authority" (***Collision Plan Unlimited, Inc. v Bankers Trust Co., supra***, 63 NY2d at 830). Further, "[t]he mere creation of an agency for some purpose does not automatically invest the agent with "apparent authority" to bind the principal without limitation (***Ford v Unity Hospital, supra***, at 472; ***Edinburg Volunteer Fire Co., Inc. v Danko Emergency Equip. Co.***, 55 AD3d 1108, 1109-1110 [3d Dept 2008]; ***Goldstein v Block***, 288 AD2d 182, 183 [2d Dept 2001]; ***Florida Corporate Funding, Inc. v Always There Home Care, Inc.***, 2011 NY Slip Op 3084(U), 2011 WL 1430028 [Sup Co, Nass Co 2011] *see also*, ***Standard Funding Corp. v Lewitt***, 89 NY2d 546, 551 [1997]).

Lastly, and at this early juncture, "[w]hether . . . [Lizjan] can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (***EBC I, Inc. v Goldman, Sachs & Co.***, 5 NY3d 11, 19 [2005]; ***Haberman v Zoning Bd. of Appeals of City***

of Long Beach, 94 AD3d 997, 1000-1001; *see also*, ***Stuart Realty Co. v Rye Country Store, Inc.***, 296 AD2d 455 [2d Dept 2002]).

The Court has considered Sahn's remaining contentions and concludes that they do not establish Sahn's entitlement to dismissal of the plaintiff's complaint "at this CPLR 3211 motion stage" of the action (***Held v Kaufman***, 91 NY2d 425, 433 [1998]).

Accordingly, it is,

ORDERED that the motion by the defendant Sahn, Ward Coschignano & Baker, P.C., for an order dismissing the complaint pursuant to CPLR § 3211[a][7], is denied.

The foregoing constitutes the decision and order of the Court

Dated: August 7, 2012
Mineola, N.Y.

Karen V. Murphy
J. S. C.

ENTERED
AUG 10 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE