

W.S. Corp. v Cullen and Dykman LLP

2014 NY Slip Op 30353(U)

February 5, 2014

Sup Ct, New York County

Docket Number: 654176/12

Judge: Marcy S. Friedman

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

PRESENT: MARCY S. FRIEDMAN PART 60
Justice

W.S. CORPORATION, et al., INDEX NO. 654176/2012

Plaintiffs,

-against-

MOTION DATE

CULLEN AND DYKMAN LLP,

Defendant.

MOTION SEQ. NO. 001

The following papers, numbered 1 to were read on this motion to change venue and, in the alternative, to dismiss.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... No (s).
Answering Affidavits — Exhibits No (s).
Replying Affidavits No (s).

Cross-Motion: Yes No

Defendant's motion to change venue, and in the alternative, to dismiss is decided in accordance with the attached decision/order, dated February, 5th 2014.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 2-5-14 Marcy S. Friedman, J.S.C.

MARCY S. FRIEDMAN, J.S.C.

- 1. Check one: CASE DISPOSED NON-FINAL DISPOSITION
2. Check as appropriate: Motion is: GRANTED DENIED GRANTED IN PART OTHER
3. Check if appropriate: SETTLE ORDER SUBMIT ORDER DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 60

PRESENT: HON. MARCY S. FRIEDMAN, J.S.C.

_____ x
W.S. CORPORATION, et al.,

Plaintiffs,

Index No.: 654176/12
Motion Seq. 001

- against -

DECISION/ORDER

CULLEN AND DYKMAN LLP,

Defendant.

_____ x

In this action, plaintiff W.S. Wilson Corporation (Wilson or the Company) and various individuals (the Baugher plaintiffs) sue defendant Cullen and Dykman LLP (Cullen) for legal malpractice, breach of fiduciary duty, aiding and abetting breach of fiduciary duty, and tortious interference with contract. Defendant moves to change venue and, alternatively, to dismiss the complaint pursuant to CPLR 3211 (a) (1), (5), and (7).

The action arises out of a dispute between siblings. The Baugher plaintiffs and their brothers, Jeffrey and Kirk Baugher, were all presumptive remainder beneficiaries of a trust. (Complaint, ¶ 23.) Their mother, Phebe Baugher, was lifetime income beneficiary of the trust and a de facto trustee until her death on November 4, 2008. (*Id.*, ¶¶ 22, 27.) Jeffrey was appointed by Phebe as a trustee and served in that capacity without official appointment by the Surrogates Court. (*Id.*, ¶ 28.) In addition, he was a director of the Company’s board, and was appointed as its president in January 2007, after the death of another brother who had been president. (*Id.*, ¶ 46.) The complaint alleges that Cullen engaged in conflicted simultaneous

representation of the Company on the one hand, and Jeffrey and Kirk on the other. (Id., ¶12.)

More particularly, the complaint alleges:

“Cullen aided and abetted Jeff in breaching his fiduciary duties as an officer and director of W.S. Wilson, and as a trustee of the trust that owned the Company, by engaging with him and/or Kirk to develop a strategy (“the Strategy”) to exclude the Baugher Plaintiffs from the operation and management of the Company in order to ensure that a claim for more than \$22 million of its retained earnings would be preserved for Phebe or Phebe’s Estate, of which Kirk and Jeff became the primary beneficiaries under a will that Cullen drafted and had Phebe execute days after being discharged from the hospital.”

(Id., ¶ 14.) Cullen allegedly gave legal advice to Jeffrey which he used as a basis for the Company not to hold meetings of the board of directors on which the Baugher plaintiffs had previously served. (Id., ¶¶ 16, 32-33, 56-70.) Cullen also allegedly gave legal advice to Jeffrey on the basis of which the Company did not recognize the Baugher plaintiffs as shareholders after the termination of the trust. (Id., ¶ 16.) As the complaint further alleges, Cullen’s conflict of interest caused plaintiffs to become embroiled in numerous litigations and to incur legal fees that would not otherwise have been incurred. (Id., ¶¶ 237-241.)

Venue

Defendant seeks a discretionary change of venue to Nassau County, pursuant to CPLR 510 (3), for the convenience of witnesses. Defendant fails to make any showing in support of its assertion that Jeffrey, who suffers from a physical disability, can travel from his home in Manhasset to a court in Nassau County (see Aff. of Marian Rice [D.’s Attorney], ¶ 44 [a]), but cannot travel the slightly longer distance to Manhattan. Nor does defendant show that the other witnesses, most of whom reside in Nassau, will be materially inconvenienced by a trial in New York County. Based on defendant’s failure to make “the detailed evidentiary showing that the

convenience of nonparty witnesses” would be served by the requested change of venue, such change should be denied. (See generally O’Brien v Vassar Bros. Hosp., 207 AD2d 169 [2d Dept 1995].)

Failure to State a Cause of Action

It is well settled that on a motion to dismiss pursuant to CPLR 3211(a)(7), “the pleading is to be afforded a liberal construction (see, CPLR 3026). [The court must] accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.” (Leon v Martinez, 84 NY2d 83, 87-88 [1994]. See 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144 [2002].) However, “the court is not required to accept factual allegations that are plainly contradicted by the documentary evidence or legal conclusions that are unsupportable based upon the undisputed facts.” (Robinson v Robinson, 303 AD2d 234, 235 [1st Dept 2003]; see also Water St. Leasehold LLC v Deloitte & Touche LLP, 19 AD3d 183 [1st Dept 2005], lv denied 6 NY3d 706 [2006].) When documentary evidence under CPLR 3211(a)(1) is considered, “a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.” (Leon v Martinez, 84 NY2d at 88.)

Legal Malpractice

The first cause of action for legal malpractice is brought on behalf of all plaintiffs based on Cullen’s alleged breach of its duty of loyalty, and seeks disgorgement of all compensation paid to Cullen during the period of its conflicted representation, other damages including legal fees incurred in numerous litigations allegedly resulting from Cullen’s conflict in representing

Jeffrey and Kirk against the interests of the Company, and punitive damages. (Complaint, ¶¶ 237-241, 242-253.)

An attorney's conflict of interest, as a result of dual representation of clients in violation of the Code of Professional Responsibility (22 NYCRR 1200.24), does not alone support a cause of action for legal malpractice. However, "liability can follow where the client can show that he . . . suffered actual damage as a result of the conflict." (Kaminsky v Herrick, Feinstein LLP, 59 AD3d 1, 13 [1st Dept 2008], lv denied 12 NY3d 715, quoting Tabner v Drake, 9 AD3d 606, 610 [2d Dept 2004]; Pillard v Goodman, 82 AD3d 541, 542 [1st Dept 2011]; Ulico Cas. Co. v Wilson, Elser, Moskowitz, Edelman & Dicker, 56 AD3d 1, 10 [1st Dept 2008].)

In seeking dismissal, Cullen argues that its conduct was not the proximate cause of the cited litigations. (D.'s Memo. In Support at 14.) This issue cannot be determined as a matter of law on this record. The pleadings on their face allege Cullen's conflict of interest and damages in the form of attorney's fees incurred by the Company as a result. The documentary evidence, which consists of selected pleadings, decisions, or other papers in the various litigations in which Cullen allegedly had a conflict, does not demonstrate that the conflict did not result in damage to the Company.

At least some of the litigations arguably involved a conflict of interest. For example, in July 2009, one month before Cullen withdrew as counsel for the Company, it filed a petition on behalf of Kirk, as preliminary executor of Phebe's Estate, seeking turnover of the Company's retained earnings from the trust. (Complaint, ¶¶ 186, 187.) While the lawsuit was brought

against the trust rather than the Company,¹ the estate and the Company arguably had differing interests with respect to the disposition of the retained earnings.² Another example of a lawsuit that apparently involved a direct conflict was an Article 78 proceeding brought by plaintiffs Laraine and Lisa Baugher to compel Jeffrey, as president of the Company, to call a special meeting of the board of directors. The complaint alleges that although Cullen did not formally appear for Jeffrey in this proceeding, it assisted him in opposing the petition. (*Id.*, ¶¶139-145.) Moreover, Jeffrey, in his official capacity as an officer of the Company, defended this proceeding based on advice that Cullen allegedly gave to him not to call a meeting of the board. (*Id.*, ¶¶ 56-70.)³ In contrast, some of the lawsuits arguably did not involve a conflict. For example, it is undisputed that Cullen did not represent Jeffrey in an arbitration of a wrongful termination claim (Arbitration) that he filed after some or all of the Baugher plaintiffs gained control of the board and terminated him. (*Rice Aff.*, ¶ 33.)

The court notes that Cullen does not attach all of the pleadings in the various lawsuits and does not explain the nature of the particular conflict allegedly presented by Cullen's involvement in each of the lawsuits. The court accordingly declines on this record to review each of the

¹In October 2009, Cullen filed a turnover petition for the same relief against the Company. (Complaint, ¶ 198.)

²The court advisedly uses the word "arguably," as the pleadings contain virtually no allegations setting forth the Company's position with respect to the retained earnings or the effect disposition of such earnings to Phebe or her estate would have had on the Company. Moreover, the trust instrument is not provided on this record, and there is no discussion in the briefs of the extent to which Phebe or her estate might have had a legal right to the retained earnings.

³This proceeding resulted in a decision on appeal, reversing so much of the trial court's dismissal of the branch of the petition seeking to compel a special meeting of the board of directors, and directing Jeffrey, as president and secretary of Wilson, to call such meeting. (*Matter of Baugher Stueck v Baugher*, 72 AD3d 1103 [2d Dept 2010].)

lawsuits in order to determine whether it involved a conflict and thus provides a basis for the malpractice claim. Rather, the court holds that Cullen has not demonstrated that none of the lawsuits involved a conflict that damaged the Company by causing it to incur legal fees.

The court also rejects Cullen's argument that the Company is judicially estopped from alleging that Cullen advised Jeffrey that he did not have to call a board meeting, because the Company took the opposite position at the Arbitration. (Ds.' Memo. In Support at 15.) Cullen cites statements by the Company in its opening statement at the Arbitration (D.s' Ex. 9) and in its post-hearing brief (D.'s Ex. 10 at 40) that Cullen never specifically advised Jeffrey not to hold board or shareholder meetings. However, the post-hearing brief also argued that Jeffrey unreasonably relied on advice from Cullen that it might not be "prudent" to hold a board meeting. (Id. at 42, 40.) This equivocal evidence as to the Company's position at the Arbitration does not support a determination as a matter of law that the Company is barred by judicial estoppel from asserting that Jeffrey relied on Cullen's advice regarding board meetings. In any event, contrary to Cullen's contention, this action is not based solely on the allegation that Cullen advised the Company not to hold board meetings but, as discussed above, is also based on Cullen's conflict of interest in the cited litigations.

The court accordingly holds that the malpractice claim is maintainable by the Company. The court reaches a different result as to the Baugher plaintiffs. The malpractice claim is not maintainable by them as they did not retain Cullen and were not in privity with the Company for purposes of the retention. (See Federal Ins. Co. v Galaxy Gen. Contr. Corp., 47 AD3d 52, 59 [1st Dept 2007].)

Breach of Fiduciary Duty

The court further holds that the fiduciary duty cause of action is maintainable by the Company, as it is not duplicative of the malpractice cause of action. It is based on at least one alleged conflict that arose after Cullen withdrew as counsel for the Company – namely, Cullen’s representation of Kirk, as preliminary executor of Phebe’s estate, in October 2009 in a petition filed against the Company for turnover of the retained earnings. (See Complaint, ¶ 198.) The fiduciary duty cause of action is not maintainable by the Baugher plaintiffs, as they had no direct relationship with Cullen and were not in privity with the Company for purposes of a fiduciary duty claim.

Aiding and Abetting

The court holds that both the Company and the Baugher plaintiffs may maintain the aiding and abetting causes of action. The third cause of action alleges that Cullen aided and abetted Jeffrey, in his capacity as president and director of the Company, in breaching his duties to the Company and its shareholders. (Complaint, ¶¶ 262-272.) The fourth cause of action alleges that Cullen aided and abetted Jeffrey, in his capacity as trustee, in breaching his fiduciary duties to the trust and its beneficiaries. (Id., ¶¶ 273-280.) In particular, the complaint alleges that Jeffrey breached these duties by not holding board meetings at which the Baugher plaintiffs could vote, and by not recognizing them as shareholders after the termination of the trust. (See id., ¶ 16.)

It is well settled that “[a] claim for aiding and abetting a breach of fiduciary duty requires: (1) a breach by a fiduciary of obligations to another, (2) that the defendant knowingly induced or participated in the breach, and (3) that plaintiff suffered damage as a result of the breach.” (Kaufman v Cohen, 307 AD2d 113, 125 [1st Dept 2003].) “A person knowingly participates in a

breach of fiduciary duty only when he or she provides ‘substantial assistance’ to the primary violator.” (Id. at 126.) Moreover, “public policy demands that attorneys, in the exercise of their proper functions as such, shall not be civilly liable for their acts when performed in good faith and for the honest purpose of protecting the interests of clients.” (Art Capital Group, LLC v Neuhaus, 70 AD3d 605, 606 [1st Dept 2010] [dismissing aiding and abetting claims against attorney where all of plaintiffs’ causes of action fell “completely within the scope of defendant’s duties as an attorney”].) An attorney may, however, be liable to a third party “who sustains an injury in consequence of his wrongful act or improper exercise of authority, where the attorney has been guilty of fraud or collusion, or of a malicious or tortious act.” (Hahn v Wylie, 54 AD2d 629, 629 [1st Dept 1976]; Ito v Suzuki, 57 AD3d 205, 208 [1st Dept 2008] [upholding aiding and abetting claim which alleged that attorney for corporation knowingly assisted manager of corporation in structuring a transaction in a manner that was detrimental to interests of part owner of corporation to whom manager had fiduciary duty]; compare Ulico Cas. Co. [Wilson, Elser], 56 AD3d at 11-12 [dismissing aiding and abetting claim against attorney where attorney merely performed filings on client’s behalf that could readily have been performed by client itself, and complaint did not plead any specific legal advice that damaged third party].)

Cullen argues that the breach of fiduciary duty claims at issue are barred by a determination of an arbitral tribunal in a proceeding brought by Jeffrey against the Company challenging his termination. (See Baughner v W.S. Wilson Corp., American Arbitration Assn. Case No. 13 166 02059 10, Award dated Jan. 18, 2012 [Award].) More particularly, Cullen claims that the Award determined that the Company “failed to establish that Jeff breached his fiduciary duty” and that the aiding and abetting claim is barred as there was no underlying

breach. (D.'s Memo. In Support at 22.)

In fact, the Award determined that Jeffrey breached his employment contract by “refusing to call Board meetings and otherwise persistently opposing the efforts of the Majority Family Members, [here, the Baugher plaintiffs] as Directors to participate in the Company’s affairs and management. (Award, ¶ 3.11.) The Award also made findings that Jeffrey’s “fiduciary duties as a de facto trustee and director as well as those that derive from his obligations as CEO under the Employment Agreement were breached by his failure to exercise the type of prudent and independent judgment required of him under the Agreement and New York law.” (Id., ¶ 5.9.) The Award thus in fact found that Jeffrey breached his fiduciary duties. However, the Award held that Jeffrey’s conduct did not rise to “the level of egregiousness of breach of fiduciary duty or faithlessness required under applicable New York precedents that would give rise to the relief of disgorgement and expense reimbursement.” (Id., ¶ 3.19.) The Award then denied the Company’s counterclaims for breach of contract and breach of fiduciary duty, except to the limited extent of awarding the Company attorney’s fees incurred in the proceeding to compel a meeting of the board of directors.

The doctrine of collateral estoppel therefore does not bar the aiding and abetting claims on the ground, asserted by Cullen, that the arbitration panel determined that there was no underlying breach of fiduciary duty by Jeffrey.⁴ Moreover, the aiding and abetting causes of

⁴A more difficult question, which is not addressed by the parties and will therefore not be resolved by the court on this motion, is whether the panel’s denial of damages to the Company for legal fees, except fees for the one litigation identified above, bar the Company’s claim in this action against Cullen for such fees and, if so, whether the Baugher plaintiffs were in privity with the Company in the arbitration such that they are also subject to the collateral estoppel bar. (See generally Buechel v Bain, 97 NY2d 295 [2001], cert denied 535 US 1096 [2002].)

action plead sufficient allegations that Cullen knowingly gave Jeffrey advice not to hold Board meetings and assisted him in opposing the Baugher plaintiffs' litigations. (See supra at 2, 5.)

The motion to dismiss these causes of action will accordingly be denied.

Tortious Interference With Contract

This cause of action will be dismissed as duplicative of the legal malpractice and breach of fiduciary duty causes of action.

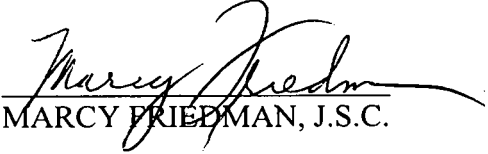
Punitive Damages

In order to plead a claim for punitive damages, "the law requires intentional or deliberate wrongdoing, aggravating or outrageous circumstances, fraudulent or evil motive, or conscious act in willful and wanton disregard of another's rights." (Ulico Cas. Co. [Wilson, Elser], 56 AD3d at 13.) Here, the complaint does not plead the "malice, moral turpitude or wanton dishonesty" that warrants punitive damages. (See id.)

It is accordingly hereby ORDERED that the motion of defendant Cullen and Dykman LLP is granted to following extent: The first cause of action (legal malpractice) and second cause of action (breach of fiduciary duty), to the extent brought on behalf of the Baugher plaintiffs, are dismissed; and the fifth cause of action (tortious interference with contract) and the claim for punitive damages are also dismissed; and the motion is otherwise denied.

This constitutes the decision and order of the court.

Dated: New York, New York
February 5, 2014


MARCY FRIEDMAN, J.S.C.