SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: PART 39

CITRIN COOPERMAN & COMPANY, LLP,

Plaintiff,

-against-

INDEX NO. 653051/12
MOTION SEQ. NO. 002
DECISION and ORDER

ANDREW TARGUM, ERIKA TARGUM,
ANDREW S. TARGUM, P.C.,
ANDREW SCOTT TARGUM, P.C. and TARGUM
BRITTON & TOLUD, LLP,

Defendants.

HON. SALIANN SCARPULLA, J.:

In this action for aiding and abetting breach of fiduciary duty, tortious interference with contract, and declaratory relief, defendants Andrew Targum, Erika Targum, Andrew S. Targum, P.C., Andrew Scott Targum, P.C. and Targum Britton & Tolud, LLP (collectively, "Targum Defendants") move, pursuant to CPLR 3211 (a) (1), (a) (5) and (a) (7), for an order: (i) dismissing the amended complaint ("Amended Complaint") and declaring that defendants were clients of Citrin Cooperman & Company, LLP as of April 2005 and (ii) awarding sanctions and attorney's fees pursuant to 22 NYCRR 130-1.1.

Unless otherwise noted, the following allegations are taken from the Amended Complaint. Plaintiff Citrin Cooperman & Company, LLP ("Citrin," "Citrin Cooperman," or "plaintiff") is an accounting firm. Defendant Andrew Targum ("Targum") is an attorney licensed to practice law in New York, and defendant Erika Targum is Targum's wife. Defendants Andrew S. Targum, P.C., Andrew Scott Targum, P.C. (collectively

with Andrew S. Targum, P.C., "Targum P.C.s"), and Targum Britton & Tolud, LLP ("TBT") (collectively with the Targum P.C.s, "Defendant Law Firms") are law firms with offices at the same address in Manhattan. The first two entities are allegedly "owned and controlled by Andrew Targum," and Targum is the managing partner of TBT.

Nonparty Matthew G. Weber ("Weber") is a certified public accountant and a friend of Targum. Prior to joining Citrin, Weber worked for Richard Friedman & Associates, C.P.A., P.C. ("Friedman"), and plaintiff alleges that while at Friedman, Targum and Weber allegedly entered into an agreement, pursuant to which "Targum provided legal services to Weber on the one hand, and Weber provided accounting services to Targum and the other Targum Defendants on the other (excluding TBT, which at that time had not yet been formed)."[1] Later, Weber began working at Financial Appraisal Services, Ltd. ("FAS"). While working for these entities, Weber provided accounting services to Targum and his wife, as well as to the Targum P.C.s, as his personal clients, and not as clients of either Friedman or FAS.

On August 1, 2004, Weber joined Citrin. On the same date, he and Citrin executed an admission agreement ("Admission Agreement"), which stated that "'Weber shall provide professional services *only on behalf of* [Citrin Cooperman].'" Citrin also

[1] Defendants argue that the Targum P.C.s could not have entered into this agreement when Weber was at Friedman because, at the time, Andrew Scott Targum, P.C. and Andrew S. Targum, P.C. were not yet formed and, in fact, the Targum P.C.s were not formed until years after Weber left Friedman. I note this argument, but find that determining which entity or entities entered into the alleged agreement is not necessary in determining this motion.

alleges that "[p]ursuant to the Admission Agreement, Weber became bound by the partnership agreement of Citrin Cooperman, as restated and amended from time-to-time, (the 'Partnership Agreement')."

Plaintiff alleges that "at the time that Weber negotiated the Admission Agreement with Citrin Cooperman, Andrew Targum was engaged by Weber to provide Weber with legal services in exchange for Weber providing the Targum Defendants (or some of them) with accounting services." Plaintiff further alleges that "as Weber's lawyers at the time, it is believed that Targum and the Law Firm Defendants were informed about the terms of Weber's Admission Agreement and advised Weber concerning that agreement, and the Partnership Agreement to which it refers."

Citrin alleges that, pursuant to the Admission and Partnership Agreements, Weber could not provide accounting services to anyone other than Citrin clients and immediate family members, and he was prohibited from remitting fees paid for accounting services to anyone other than Citrin. Citrin additionally alleges that, by virtue of the fact that Weber was a partner, "Weber owed fiduciary duties of undivided loyalty and candor to Citrin Cooperman." Pursuant to the duty of undivided loyalty, Citrin alleges that Weber could not provide accounting services to non-Citrin clients and Weber was obliged to be bound by his "contractual duties and obligations." Citrin further avers that "Weber's fiduciary duty of candor required Weber to disclose to Citrin Cooperman any violations of his contractual or fiduciary duties, and required him to inform Citrin Cooperman of the existence of lawsuits filed against him, and of other material events."

In 2005, after Weber joined Citrin, Weber was sued for accounting malpractice that allegedly took place while he worked at FAS ("Cederbaum Case"). Plaintiff alleges that Targum and Weber entered into another agreement ("2005 Agreement"), pursuant to which "Targum, personally and through the Defendant Law Firms that he owned and controlled, agreed to provide no-cost legal representation to Weber in the Cederbaum Case, and in exchange, Weber agreed to personally provide the Targum Defendants with accounting services for years." Citrin claims that it was not aware of the 2005 Agreement until 2012 when Weber was terminated.

Plaintiff alleges that Weber, as Citrin's partner, owed it a fiduciary duty to inform it about the Cederbaum Case and Targum's defense of Citrin's reputation in that action. Plaintiff further alleges that Targum was aware that Weber failed to disclose these facts related to the Cederbaum Case to Citrin.

Plaintiff alleges that "it appears that one purpose of the 2005 Agreement was for Targum to assist Weber in concealing the existence of that lawsuit from Citrin Cooperman, so that Weber would not be terminated from Citrin Cooperman." Targum's defense of Weber in the Cederbaum Case enabled Weber to remain a partner at Citrin for another seven years, during which time "Weber . . . breach[ed] his fiduciary and contractual duties . . . owed to Citrin Cooperman." Plaintiff further avers that "Targum assisted in this concealment not only to help his friend, but also to enable Weber to misappropriate [services and resources] from Citrin Cooperman for the benefit of the Targum Defendants and others."

Relying on a complaint filed in the Southern District of New York ("Federal Action"), Citrin alleges that Weber informed the Targum Defendants that their representation of him in the Cederbaum Case would be beneficial to Citrin, because Citrin would not have to pay to defend Weber, a Citrin partner, and its own reputation. Targum allegedly represented Weber in the Cederbaum Case as a Citrin partner, and agreed to defend Citrin's reputation. Therefore, plaintiff alleges that "the Targum Defendants owed a duty to Citrin Cooperman to inform the firm management of the Cederbaum Case, their representation, and the case's progress," which duty Targum failed to fulfill.

Targum and Weber allegedly represented to plaintiffs' counsel in the Cederbaum Case that there was no available insurance even though "Citrin Cooperman's insurance was written on a claim-made basis." Plaintiff alleges that "Targum's failure to ensure the timely reporting of the Cederbaum Case exposed Citrin Cooperman to potential loss of insurance coverage," and the failure to report also ran contrary to the "alleged commitment to defend and protect Citrin Cooperman's reputation and to supposedly discharge a contractual duty that Citrin Cooperman owed to Weber."

Citrin alleges that "[a]s part of the 2005 Agreement, the Targum Defendants agreed with Weber to take specific steps that would conceal from Citrin Cooperman the fact that Weber was performing services for the Targum Defendants (the 'Acts of Concealment')." The alleged Acts of Concealment included the following: (1) the Targum Defendants would wire money to Weber's own bank accounts; (2) the Targum Defendants would make checks out to Weber individually, who would deposit those

checks in his own bank account; (3) the Targum Defendants would not execute a written retainer agreement with plaintiff; (4) the Targum Defendants would not execute a written agreement with Weber; (5) there would be no client accounts opened for the Targum Defendants at Citrin; (6) there would be no invoices or statements of account that were sent from Citrin to the Targum Defendants, as Weber allegedly sent his own invoices; (7) the Targum Defendants would not pay Citrin; and (8) "[t]he Targum Defendants would not contact any Citrin Cooperman partners or management (except of course for Targum's contact with Weber)." The reason behind the Acts of Concealment was allegedly to make sure that Citrin did not know about the 2005 Agreement and the Cederbaum Case.

Citrin alleges that the fiduciary duties that Weber owed to Citrin prohibited him from, *inter alia*, (1) "maintaining secret 'on the side' clients;" (2) "receiving compensation personally for the performance of professional services;" (3) "exposing Citrin Cooperman to potential liability for conduct undertaken in performing the 2005 Agreement;" (4) "retaining compensation received for performing professional services for the Targum Defendants;" and (5) "failing to introduce the Targum Defendants to Citrin Cooperman as proposed new clients of Citrin Cooperman."

Plaintiff alleges that "[d]uring the term of the 2005 Agreement, for the checks written by certain Targum Defendants to 'Matthew G. Weber, C.P.A.' for accounting services, the total monetary value of such checks exceeded $25,000." The Targum Defendants allegedly knew that Weber did not work in Citrin's Tax Department, but rather in the Valuation and Forensic Services Department, and "that the preparation of tax

returns was not within the scope of Weber's duties at Citrin Cooperman." Weber allegedly provided "the Targum Defendants, for free, professional services . . . and resources that were the property of Citrin Cooperman."

Plaintiff alleges that the Targum Defendants and Weber conspired to receive the unauthorized services from Citrin without paying Citrin for them, and "[d]efendants knew that this was all in violation of Weber's contractual and fiduciary duties owed to Citrin Cooperman." Allegedly, defendants intended to profit from Weber's breach of contractual duties.

Citrin further avers that, when Weber started working at Citrin, he had approximately 150 personal clients, including the Targum Defendants. Plaintiff alleges that "Weber breached his fiduciary duty to an unknown number of his unauthorized personal clients. Weber's breaches include his apparently having converted funds belonging to such clients, and committing various acts of malfeasance, details of which have been admitted subsequently by Weber in legal proceedings taken against him (. . . 'the Weber Misconduct')."

Upon discovery of the Weber Misconduct, Citrin reported it to the Manhattan District Attorney. Weber was indicted and pled guilty to a number of crimes. Due to the Weber Misconduct and Weber and the Targum Defendants' actions, plaintiff alleges that "Citrin Cooperman has suffered damage to its reputation and business." Citrin claims that, "[b]ut for the wrongdoing of the Targum Defendants alleged in this complaint, Weber would have been found out and stopped before he could accomplish his improper aims." Citrin further alleges that because of the Targum Defendants' actions, Citrin,

some of Citrin's clients, and "certain of Weber's private unauthorized clients" have experienced "substantial harm to reputation and economic damages."

On these facts, Citrin alleges two causes of action against the Targum Defendants—aiding and abetting breach of fiduciary duty and tortious interference with contract. In addition to an award of damages, costs, expenses, and fees, Citrin seeks a declaration that defendants were not its clients.

Citrin commenced this action on August 30, 2012. In motion sequence number 001, the Targum Defendants moved, pursuant to CPLR 3211 (a) (1) and (7), to dismiss the complaint, and also moved for sanctions and attorney's fees pursuant to 22 NYCRR 130-1.1. By order dated February 11, 2013, the court (Kapnick, J.) granted the motion with leave to amend. During oral argument on that motion, Judge Kapnick stated that the allegations in the complaint lacked sufficient specificity (*see* 02/11/13 oral arg tr at 11-13). On March 18, 2013, Citrin filed the Amended Complaint, which is the subject of the Targum Defendant's current motion.

The Targum Defendants now move to dismiss the Amended Complaint, as well as for declaratory relief and sanctions and attorney's fees. The Targum Defendants first argue that Citrin's claims, as well as its request for declaratory relief, are time-barred. They also argue that Citrin has failed sufficiently to state its aiding and abetting breach of fiduciary duty and tortious interference with contract claims. As to the tortious interference claim, the Targum Defendants additionally argues that Citrin cannot plausibly allege that "'but for'" the actions of defendants, it would not have been injured. Moreover, the Targum Defendants claim that Citrin cannot show that it has been

damaged. They also argue that I should dismiss the Amended Complaint based on documentary evidence, award defendants a declaration that they were Citrin clients as of April 2005, and sanction Citrin and its attorneys for bringing a frivolous lawsuit.

In opposition to the Targum Defendants' motion, Citrin initially asks me to resolve the motion on the basis of the Amended Complaint alone. It next argues that its causes of action are not time-barred, and, specifically, it argues that the aiding and abetting claim is timely because the fiduciary tolling rule and a six-year statute of limitations applies. Citrin additionally argues that its two causes of action are properly pleaded, it has sufficiently pleaded damages, and defendants' motion for sanctions should be denied.

Discussion

A motion to dismiss pursuant to CPLR 3211 (a) (1) "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *Berardino v Ochlan*, 2 AD3d 556, 557 [2d Dept 2003]).

On a 3211 motion to dismiss, "the pleading is to be afforded a liberal construction. We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994] [internal citation omitted]).

CPLR 3211 (a) (5) provides that "the cause of action may not be maintained because of . . . statute of limitations."

Tortious Interference with Contract Cause of Action

> The tort of . . . interference with contractual relations, consists of four elements: (1) the existence of a contract between plaintiff and a third party; (2) defendant's knowledge of the contract; (3) defendant's intentional inducement of the third party to breach or otherwise render performance impossible; and (4) damages to plaintiff

(*Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 94 [1993]).

The statute of limitations under CPLR 214 (4) for the tort of intentional interference with existing contract is three years (*IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 141 [2009]). "[A] tort cause of action cannot accrue until an injury is sustained. That, rather than the wrongful act of defendant or discovery of the injury by plaintiff, is the relevant date for marking accrual" (*Kronos*, 81 NY2d at 94 [internal citations omitted]; *see also IDT Corp.*, 12 NY3d at 140 ["To determine timeliness (of a tort), we consider whether plaintiff's complaint must, as a matter of law, be read to allege damages suffered so early as to render the claim time-barred"]; *American Fed. Group v Edelman*, 282 AD2d 279, 279 [1st Dept 2001] ["a cause of action for tortious interference with contract generally accrues when an injury is sustained, not discovered"]).

Here, the injury to Citrin took place as early as 2005 when, pursuant to the 2005 Agreement, Targum undertook Weber's representation in the Cederbaum Case in exchange for Weber's provision of accounting services for the Targum Defendants and

the two allegedly agreed to engage in the Acts of Concealment. Because the tortious interference cause of action accrued in 2005 (*see IDT Corp.*, 12 NY3d at 140; *see also Kronos, Inc.*, 81 NY2d at 94; *American Fed. Group, Ltd.*, 282 AD2d at 279), to satisfy the statute of limitations, Citrin was required to commence this action in 2008. However, Citrin waited until 2012 to do so.

"[T]ortious interference with contract is not a continuing tort" (*Spinap Corp. v Cafagno*, 302 AD2d 588, 588 [2nd Dept 2003] [finding unavailing the fact "that (former employee) continued to solicit (former employer's) customers up until the time of the filing of the complaint, or that most of the solicitations occurred" after the former employee started working for the new employer]; *see also Andrew Greenberg, Inc. v Svane, Inc.*, 36 AD3d 1094, 1099 [3rd Dept 2007] [stating that a claim for tortious interference with contract "is not a continuing tort"]). Citrin's reliance on *Thome v Alexander & Louisa Calder Foundation* (70 AD3d 88, 108 [1st Dept 2009]) for its argument that "[d]efendants took a 'further step' for each tax return that they asked Weber to prepare for each of the years 2005 through 2012" is unpersuasive. In *Thome*, the First Department discussed the limitations period for a tortious interference with prospective business advantage claim, and *Thome v Alexander & Louisa Calder Foundation* does not stand for the proposition that tortious interference with contract is a continuing tort (*see id.*). Therefore, the cause of action for tortious interference with contract is dismissed as time-barred (*see IDT Corp.*, 12 NY3d at 141).

Aiding and Abetting Breach of Fiduciary Duty Cause of Action

"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]; *see also Baron v Galasso*, 83 AD3d 626, 629 [2nd Dept 2011]).

The statute of limitations for an aiding and abetting breach of fiduciary duty claim follows that for breach of fiduciary duty (*see, e.g., Cusimano v Schnurr*, 27 NYS3d 135, 138-139 [1st Dept 2016]). "A breach of fiduciary duty claim falls under either a three-year or six-year limitation period, depending on the nature of the relief sought" (*Yatter v Morris Agency*, 256 AD2d 260, 261 [1st Dept 1998]). "Where the remedy sought is purely monetary in nature, courts construe the suit as alleging 'injury to property' within the meaning of CPLR 214 (4), which has a three-year limitations period. Where, however, the relief sought is equitable in nature, the six-year limitations period of CPLR 213 (1) applies" (*IDT Corp.*, 12 N.Y.3d at 139 [internal citation omitted]).

A cause of action for breach of fiduciary duty, "[a] tort claim[,] accrues as soon as 'the claim becomes enforceable, *i.e.,* when all elements of the tort can be truthfully alleged in a complaint'" (*id.* at 140 [citation omitted]). Like the tortious interference with contract claim, "the claim 'is not enforceable until damages are sustained'" (*id.* [citation omitted]).

Like the intentional interference with contract claim, the cause of action for aiding and abetting breach of fiduciary duty cause of action accrued as early as 2005, when

Weber and Targum entered into the 2005 Agreement and Weber and defendants allegedly began to engage in the Acts of Concealment to enable Weber to misappropriate accounting services from Citrin for defendants' benefit. Further, because Citrin seeks monetary damages, it was required to assert this cause of action by 2008 (*see id.* at 139), but Citrin waited until 2012 to do so.

Citrin argues that the fiduciary tolling rule should apply under the circumstances. "Under [the fiduciary tolling] rule, the statute of limitations on claims against a fiduciary for breach of its duty is tolled until such time as the fiduciary openly repudiates the role." *Access Point Med., LLC v Mandell*, 106 AD3d 40, 45 (1st Dept 2013). However, "the requirement of a clear repudiation applies only to claims seeking an accounting or other equitable relief" (*Matter of Kaszirer v Kaszirer*, 286 AD2d 598, 599 [1st Dept 2001]). Here, Citrin seeks damages, and therefore the fiduciary tolling rule does not apply.

Citrin further argues that a limitations period of six years applies because its "claim is predicated on 'fraud' that is not 'incidental to the claim'" (citation omitted). "[A] fraud cause of action may be predicated on acts of concealment where the defendant had a duty to disclose material information" (*Kaufman*, 307 AD2d at 119-120). Citrin claims that "the [Amended Complaint] alleges that Targum represented Weber in the Cederbaum Case 'as a partner in Citrin Cooperman' and, in so doing, Targum 'assumed a professional duty' that Defendants owed to Citrin Cooperman," and because of that duty, the Targum Defendants were required to inform Citrin about the Cederbaum Case (citation omitted).

Citrin's allegations are taken from an allegation in the complaint in the Federal Action that "WEBER expressed to TARGUM that having [TBT] represent WEBER would benefit not only his personal interests but also CITRIN's interests as well, as CITRIN would thus not have to incur any financial expense defending the professional actions of one of its Partners and . . . defending the reputation of the firm."

Citrin, however, does not sufficiently allege that the Targum Defendants had a duty to inform Citrin about the Cederbaum Case. Without sufficient allegations concerning an alleged duty to inform, Citrin may not benefit from the extended statute of limitations period for a cause of action for breach of fiduciary duty based on allegations of actual fraud. *See Kaufman*, 307 AD2d at 119.

Finally, as to all cause of action, Citrin argues that equitable estoppel should prevent defendants from relying on a defense based on the statute of limitations. "A defendant may be estopped from pleading the Statute of Limitations where a plaintiff was induced by fraud, misrepresentation, or deception to refrain from timely commencing an action" (*Gleason v Spota*, 194 AD2d 764, 765 [2d Dept 1993]). However, "[w]here concealment without actual misrepresentation is claimed to have prevented a plaintiff from commencing a timely action, the plaintiff must demonstrate a fiduciary relationship--not present here--which gave the defendant an obligation to inform him or her of facts underlying the claim" (*id.*).

Here, Citrin claims that the "*active* and *affirmative* misconduct" that the Targum Defendants engaged in was "in concealing the facts behind Citrin Cooperman's claims."

However, Citrin has not sufficiently pleaded a fiduciary relationship, and therefore equitable estoppel is inapplicable.

Citrin's Claim for Declaratory Relief

Citrin also seeks a declaration that the Targum Defendants were not its clients. The Targum Defendants, in addition to seeking dismissal of the Amended Complaint, seek an affirmative declaration in their favor that they were, in fact, Citrin clients. This issue is central to a companion case, *Targum v Citrin Cooperman & Company, LLP* (index no. 650665/2014), that has been assigned to this Part. Therefore, I dismiss this claim for relief in this action, without prejudice, and the claim will be addressed in the companion case.

Sanctions

Defendants seek sanctions and attorney's fees. 22 NYCRR 130-1.1 [a], in relevant part, provides that

> [t]he court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defined in this Part.

"The court, as appropriate, may make such award of costs or impose such financial sanctions against either an attorney or a party to the litigation or against both" (22 NYCRR 130-1.1 [b]).

The statute provides that "conduct is frivolous if," among other things, "it is completely without merit in law and cannot be supported by a reasonable argument for an

extension, modification or reversal of existing law" (22 NYCRR 130-1.1 [c] [1]). Conduct will also be deemed frivolous when "it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another" (22 NYCRR 130-1.1 [c] [2]).

22 NYCRR 130-1.1 [c] further provides that

> [i]n determining whether the conduct undertaken was frivolous, the court shall consider, among other issues the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party.

Although I dismiss both causes of action, I do not find that this action "is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law" (22 NYCRR 130-1.1 [c] [1]), nor that the Amended Complaint was filed "primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure [defendants]" (22 NYCRR 130-1.1 [c] [2]). Additionally, Citrin's original complaint in this action was dismissed for lack of specificity, and Citrin was granted leave to amend. Citrin has included additional allegations in its Amended Complaint (*see* 22 NYCRR 130-1.1 [c]). Finally, I find that Citrin's failure to inform me that the Targum Defendants were victims of Weber's criminal actions is not sanctionable under the circumstances. Defendants' request for an award of sanctions and attorney's fees is therefore denied.

In accordance with the foregoing, it is hereby

ORDERED that the motion of defendants Andrew Targum, Erika Targum, Andrew S. Targum, P.C., Andrew Scott Targum, P.C., and Targum Britton & Tolud, LLP to dismiss the complaint herein is granted and the Amended Complaint is dismissed in its entirety as against defendants, and the Clerk is directed to enter judgment accordingly in favor of defendants; and it is further

ORDERED that defendants' requests for declaratory relief as well as for an award of sanctions and attorney's fees pursuant to 22 NYCRR 130-1.1 are denied.

Dated: August 25, 2016

ENTER:

J.S.C.

HON. SALIANN SCARPULLA