Economic Alchemy LLC v Byrne Poh LLP
2017 NY Slip Op 31640(U)
August 4, 2017
Supreme Court, New York County
Docket Number: 653632/2015
Judge: Manuel J. Mendez

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

PRESENT: MANUEL J. MENDEZ *Justice* **PART** 13

ECONOMIC ALCHEMY LLC,

Plaintiff,

-against-

BYRNE POH LLP, MATTHEW T. BYRNE, PHILIP R. POH and GARY WALPERT,

Defendants.

INDEX NO.	653632/2015
MOTION DATE	08/02/17
MOTION SEQ. NO.	002
MOTION CAL. NO.	

The following papers, numbered 1 to 8 were read on this motion to dismiss.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1 - 3
Answering Affidavits — Exhibits	4 - 6
Replying Affidavits	7 - 8

Cross-Motion: X Yes ☐ No

Upon a reading of the foregoing cited papers, it is Ordered that Defendants Byrne Poh LLP, Matthew T. Byrne, Philip R. Poh and Gary Walpert's motion to dismiss the Complaint pursuant to CPLR §3211[a][7], is granted to the extent of dismissing the breach of contract cause of action. Plaintiff's Second Cause of Action for breach of contract is dismissed as duplicative. Plaintiff's cross-motion to amend the Complaint is denied, as moot.

On March 31, 2016 Plaintiff Economic Alchemy LLC ("EA") commenced this action against Defendants alleging that the Defendants- who, as a law firm, represented EA in certain patent applications before the United States Patent and Trademark Office ("USPTO") beginning on October 11, 2012- were liable for damages because of legal malpractice and breach of contract. EA was formed in 2011 to employ social media and other real time data to quantify economic expectations and to forecast the United States economy. EA alleges that Defendants committed numerous errors in the process of filing five (5) separate "placeholder claim" patents created by EA and failing to amend them at a later date. Allegedly, this has caused substantial impairment to the value of EA's patent portfolio and caused EA significant damages to mitigate the potential losses. The patents, if granted, would be breakthrough technology that would help track the United States economy in real-time and be a highly attractive software for market speculators.

The Defendants now move to dismiss the Complaint pursuant to CPLR §3211[a][7]. Defendants contend that Plaintiff fails to sufficiently plead how any alleged negligence by Defendants is a "proximate cause" of Plaintiff's damages and Plaintiff also failed to sufficiently plead ascertainable damages required in a legal malpractice claim. Plaintiff opposes the motion and in the alternative, cross-moves to amend the Complaint.

The Defendants have not stated a basis for dismissal of the legal malpractice causes of action under CPLR §3211[a][7]. To dismiss a complaint for failure to state a cause of action there can be no legally cognizable theory that could be drawn from the complaint. The test of the sufficiency of a complaint is whether liberally construed, it states in some recognizable form, a cause of action known to the law (Union Brokerage, Inc. v Dover Insurance Company, 97 AD2d 732, 468 NYS2d 885 [1st Dept. 1983]). The court must accept as true the facts alleged in the complaint as well as all reasonable inferences that may be extracted from those facts (Amaro v Gani Realty Corp., 60 AD3d 491, 876 NYS2d 1 [1st Dept. 2009]). The court is not permitted to assess the merits of the complaint or any of its factual allegations, but may only determine if, assuming the truth of the facts alleged, the complaint states the elements of a legally cognizable cause of action (Skillgames, LLC v Brody, 1 AD3d 247, 767 NYS2d 418 [1st Dept. 2003]). Deficiencies in the complaint may be remedied by affidavits submitted by the plaintiff (Amaro, *supra*).

"Recovery for professional malpractice against an attorney requires proof of three elements: (1) attorney negligence; (2) the negligence was the 'proximate cause' of the actual loss sustained; and (3) quantifiable damages (Cosmetics Plus Group, Ltd. v Traub, 105 AD3d 134, 960 NYS2d 388 [1st Dept. 2013]). It requires the plaintiff to establish that counsel failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession and that 'but for' the attorney's negligence the plaintiff would have prevailed in the matter or would have avoided damages (Ulico Cas. Co. v. Wilson, Elser, Moskowitz, Edelman & Dicker, 56 A.D.3d 1, 865 N.Y.S.2d 14, 15 [1st Dept. 2008]).

The Complaint sufficiently pleads attorney negligence. Plaintiff alleges that the Defendants "fail[ed] to provide competent representation to EA, repeatedly miss[ed] USPTO deadlines, [lied] about the status of patent applications and provid[ed] erroneous information" (Complaint). Importantly, Plaintiff plead that Defendants "filed 'placeholder' patents that were supposed to be used temporarily to meet the deadline, but never filing the legitimate claims" to amend them as they promised (id).

This court has jurisdiction to entertain lawsuits regarding contracts relating to patents regardless if the validity of the patent may somehow be involved (Am. Harley Corp. v Irvin Indus., Inc., 27 NY2d 168, 263 NE2d 552, 315 NYS2d 129 [1970]). It is not for this court to determine whether Plaintiff's software is currently patentable under recent Supreme Court decisions and therefore, Plaintiff sufficiently plead that Defendants' negligence was the "proximate cause" of its damages. Plaintiff alleges that "[h]ad Byrne Poh not committed malpractice, upon information and belief, EA would have received patent protection for all five patents by March of 2014" (id).

Finally, Plaintiff sufficiently plead quantifiable damages to withstand Defendants' motion to dismiss. Plaintiff seeks damages for "destroying EA's ability to obtain patents for otherwise patentable inventions while allowing EA's competitors to benefit from Defendants' mistakes" (Complaint). Specifically, Defendants' alleged malpractice caused "lost licensing revenue, royalty income, and ongoing costs in connection with mitigating damages" (id). Although the threat of future damages, not yet realized, is insufficient (IGEN, Inc. v White, 250 AD2d 463, 672 NYS2d 867 [1st Dept. 1998)], Plaintiff sufficiently plead actual damages suffered as a result of Defendants alleged negligence.

In totality, Plaintiff's pleading of its legal malpractice causes of action, if accepted as true, and accorded the benefit of every possible favorable inference, is sufficient to survive Defendants' motion. The alleged facts, when evaluated only as to whether they fit within any cognizable legal theory, sufficiently plead that Defendants' negligence in failing to amend the five (5) 'placeholder' patents caused a substantial diminution of the value of the Plaintiff's patent portfolio by allowing competitors additional time to enter a marketplace not yet penetrated, and suffered actual damages (InKine Pharm. Co. v Coleman, 305 AD2d 151, 759 NYS2d 62 [1st Dept. 2003]). To avoid dismissal at this pleadings stage, the Plaintiff was not obligated to show that it actually sustained damages; it had to plead allegations that damages attributable to Defendants' conduct could be reasonably inferred (InKine Pharm. Co., *supra; citing* Tenzer, Greenblatt, Fallon & Kaplan v Ellenberg, 199 AD2d 45, 604 NYS2d 947 [1st Dept. 1993]).

The Second Cause of Action for breach of contract must be dismissed as duplicative. The breach of contract claim, which relates to the retainer agreement between Plaintiff and Defendants, arose from the same facts as the legal malpractice claim and alleges similar damages (Sonnenschine v Giacomo, 295 AD2d 287, 744 NYS2d 396 [2002]).

ACCORDINGLY it is ORDERED, that Defendants' motion to dismiss the Complaint pursuant to CPLR §3211[a][7] is granted to the extent of dismissing the breach of contract cause of action, and it is further,

ORDERED, that the Second Cause of Action in the Complaint asserted against the Defendants for breach of contract, is hereby severed and dismissed, and it is further,

ORDERED, that the remaining Causes of Action in the Complaint asserted against Defendants remain in effect, and it is further,

ORDERED, that Plaintiff's cross-motion is denied, and it is further,

ORDERED, that the parties appear for a Preliminary Conference on November 22, 2017 at 9:30 a.m. in IAS Part 13 at 71 Thomas Street, New York, NY 10013.

ORDERED, that the Clerk enter judgment accordingly.

ENTER:

Dated: August 4, 2017

MANUEL J. MENDEZ
J.S.C.

MANUEL J. MENDEZ
J.S.C.

Check one: ☐ **FINAL DISPOSITION** **X NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**