Scopia Windmill LP v Olshan Frome Wolosky LLP
2017 NY Slip Op 32031(U)
September 26, 2017
Supreme Court, New York County
Docket Number: 650616/2016
Judge: Saliann Scarpulla
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650SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 39

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SCOPIA WINDMILL LP, SCOPIA CAPITAL MANAGEMENT LP, SCOPIA HOLDINGS LLC	**INDEX NO.**	650616/2016
Plaintiff,	**MOTION DATE**	4/8/2016
	MOTION SEQ. NO.	001
- v -		
OLSHAN FROME WOLOSKY LLP,		
Defendant.		

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40

were read on this application to/for Dismiss.

HON. SALIANN SCARPULLA:

In this legal malpractice action, defendant Olshan Frome Wolosky LLP ("Olshan") moves, pursuant to CPLR 3211(a)(1) and (7) to dismiss the complaint of plaintiffs Scopia Windmill LP ("Windmill"), Scopia Capital Management ("SCM") and Scopia Holdings, LLC ("Holdings") (collectively "Scopia").

Windmill is a hedge fund and private equity fund, managed by SCM. In the complaint, Scopia alleges that in 2011, Windmill decided to invest in the guar bean

industry.[1] In March 2012, Windmill and Holdings[2] invested $4 million in West Texas Guar ("WTG"), a company which sold guar bean seeds to farmers, and then took the beans back for processing. After processing the guar beans, WTG sold the processed guar to purchasers in the oil and gas industry.

WTG was financially struggling, so in the fall of 2012, WTG borrowed $6 million from Windmill (the "2012 Loan"). SCM retained Olshan to represent Windmill's interest in the 2012 Loan transaction. In December 2012, WTG and Windmill executed a Loan and Security Agreement, which was allegedly drafted primarily by Olshan (the "2012 Security Agreement"). Section 4.1 of the 2012 Security Agreement states:

> To secure the prompt payment and performance in full of all the Obligations, the Borrower hereby pledges, hypothecates, assigns, charges, mortgages, delivers and transfers to the Lender, and hereby grants to the Lender, a continuing security interest in all of the Borrower's right title and interest in, to and under, all of the Property of the Borrower wherever located and whether now existing or hereafter existing or arising (collectively, the "Collateral").

Scopia alleges that Olshan was responsible for filing a UCC-1 financing statement to perfect Scopia's security interest in the WTG collateral pledged in the 2012 Security Agreement.

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[1] Scopia alleges that, in 2011, it had various investments in the pressure pumping and hydraulic fracturing ("fracking") sectors, and that guar beans are used in the fracking industry to quickly thicken water and increase the efficiency of the fracking process.

[2] Scopia avers that Holdings is an entity through which the principals and employees of SCM may make investments in projects of interest to Windmill.

According to Scopia, in September 2013, and because of another law firm's review of WTG's continued dire financial circumstances, Scopia learned that Olshan had never filed a UCC-1 financing statement after the execution of the 2012 Security Agreement. After discovering the oversight, Olshan filed a UCC-1 on September 11, 2013, nine months after the 2012 Loan closing.

On October 29, 2013, Scopia and WTG executed an Amended and Restated Loan and Security Agreement (the "2013 Loan") in which Windmill made an additional $1.5 million loan to WTG, which again was secured by WTG's pledge of collateral. On November 7, 2013, Scopia's new law firm filed a UCC-1 financing statement for the new $1.5 million loan. In addition, Scopia agreed to equitize part of the original 2012 Loan, eventually becoming an 83% owner of WTG.

WTG continued to suffer financial difficulties, and Scopia alleges that it contemplated placing WTG in voluntary bankruptcy toward the end of 2013. However, it was unable to do so, due to the lateness of the UCC-1 filing on the WTG property securing the 2012 Loan. Scopia claims that it "was vulnerable to an attack that [securing the 2012 loan] was a voidable preference in any bankruptcy proceeding commenced within one year after the UCC-1 filing."

In March 2014, certain of WTG's creditors filed a Chapter 11 Involuntary Petition for Relief against WTG in the United States Bankruptcy Court for the Northern District of Texas. Scopia alleges that, in the bankruptcy proceeding, WTG's creditors claimed that the September 2013 UCC-1 filing was purposefully delayed and was therefore a voidable preference under the United States Bankruptcy Code.

Scopia further alleges that the involuntary bankruptcy caused Scopia to be sued in multiple proceedings in the Texas state court. In the fall of 2014, Scopia, WTG and other parties participating in the bankruptcy proceeding reached a settlement of that proceeding which, according to Scopia, required it to contribute $18.7 million to WTG. Scopia also claims that it incurred $2.5 million in legal fees during the bankruptcy proceeding.

In its complaint against Olshan Scopia alleges three causes of action: (1) legal malpractice, for failing to file a UCC-1 financing statement when the 2012 Loan and Security Agreement and 2012 Loan were executed and for "drafting the 2012 Loan Agreement with problematic provisions that increased the likelihood that a bankruptcy court would recharacterize the loan as equity; and . . . otherwise failing to draft the 2012 Loan and Security Agreement and 2012 Term Loan Note in a competent manner so as to establish Scopia's position as a senior secured debtor," (2) for breaching the retainer agreement; and (3) for breach of fiduciary duty.

In its motion to dismiss, Olshan first argues that it has no attorney-client relationship with two of the three named plaintiffs – Holdings and Windmill – and that any claim of malpractice does not extend to these two plaintiffs because they are not in privity with Olshan. Olshan further argues that SCM's main contention -- that due to Olshan's late filing of the UCC-1 it was prevented from filing a petition for reorganization and enjoying the undisputed status of secured creditor – is disproved as a matter of law by testimony and affidavits filed by the principals of SCM and WTG in other proceedings. Olshan also claims that Scopia's damages are impermissibly

speculative. Finally, Olshan argues that Scopia's breach of fiduciary duty and breach of contract causes of action are duplicative of the malpractice cause of action and must be dismissed.

Discussion

In its opposition papers, Scopia withdraws its third cause of action for breach of fiduciary duty. Further, in its breach of contract claim, Scopia pleads the same facts and damages that underlie its legal malpractice claim. I therefore dismiss the second cause of action for breach of contract in its entirety as duplicative, particularly because Scopia does not allege that Olshan promised a particular result in the retainer agreement. Instead, in the retainer agreement Olshan simply agreed to provide "general advice on equity investments." *See Leading Ins. Group Ins. Co., v. Friedman LLP,* 2016 N.Y. Misc LEXIS 713 (Sup. Ct., N.Y.Co. 2016).

On the legal malpractice claim, Olshan claims that it is not in privity with either Windmill or Holdings, thus, their malpractice claims must be dismissed. As Scopia concedes, only SCM signed the retainer agreement with Olshan. Thus, for Windmill and Holdings to maintain this action, they must plead facts showing near privity to Olshan.[3]

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[3] To maintain a cause of action for legal malpractice, the plaintiff must first plead the existence of an attorney-client relationship. *See, e.g., AG Capital Funding Partners, L.P. v. State St. Bank & Trust Co.,* 5 NY3d 582, 595 (2005) (affirming dismissal of legal malpractice claim for failure to plead facts showing actual privity, near privity, or an exception to privity). *Cal. Pub. Employees Ret. Sys. v. Shearman & Sterling,* 95 N.Y.2d 427, 434 (2000) (same); Estate of Spivey v. Pulley, 138 A.D.2d 563, 564 (2nd Dep't 1988) ("'with respect to attorney malpractice . . . absent fraud, collusion, malicious acts or other special circumstances, an attorney is not liable to third parties, not in privity, for harm caused by professional negligence").

To show "near privity," a plaintiff must allege that the attorney was aware that its services were used for a specific purpose, that the plaintiff relied upon those services, and that the attorney demonstrated an understanding of the plaintiff's reliance. *Cal. Pub. Employees Ret. Sys. v. Shearman & Sterling*, 95 N.Y.2d 427, 434 (2000).

Scopia alleges that, although SCM retained Olshan, Windmill, the actual lender to WTG, was a "foreseeable third-party beneficiary" of the retainer agreement between Olshan and SCM. The 2012 loan documents submitted show that Windmill was the lender for whom Olshan prepared and/or reviewed loan documents. These documents support Scopia's allegation that Windmill was in near privity with Olshan.

However, there are no similar factual allegations with respect to Holdings. Scopia fails to allege any facts showing that Olshan was aware that it was providing legal services to Holdings, that Holdings relied upon those legal services, and that Olshan understood that Holdings was relying on Olshan's legal advice. Accordingly, I dismiss Holding's malpractice claim against Olshan.

Finally, with respect to the malpractice claim of SCM and Windmill, Olshan argues that testimony and documents submitted in the bankruptcy and other legal proceedings conclusively refute their allegations of proximate cause and damages. "Under CPLR 3211 (a) (1), 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 N.Y.2d 83, 88 (1994).

After reviewing the documents and testimony submitted by Olshan, and the affidavits submitted by Scopia, I find that Olshan has failed to refute conclusively

Scopia's allegations of proximate cause and damages. Accordingly, I deny the motion to dismiss the legal malpractice claim against Olshan asserted by Windmill and SCM.

In accordance with the foregoing, it is

ORDERED that the motion of defendant Olshan Frome Wolosky LLP to dismiss the complaint of plaintiffs Scopia Windmill LP, Scopia Capital Management and Scopia Holdings, LLC is granted in part and denied in part; and it is further

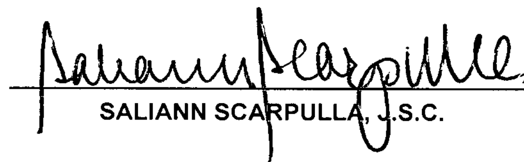
ORDERED that plaintiff's second cause of action for breach of contract is dismissed as against all defendants and plaintiff's third cause of action is withdrawn; and it is further

ORDERED that plaintiff's first cause of action for legal malpractice is dismissed as to defendant Scopia Holdings, LLC only, but continues against defendants Scopia Windmill LP and Scopia Capital Management LP; and it is further

ORDERED that defendants shall serve an answer to the complaint within twenty days of the date of this decision.

This constitutes the decision and order of the Court.

9/26/2017
DATE



SALIANN SCARPULLA, J.S.C.

CHECK ONE:	[ ] CASE DISPOSED		[X] NON-FINAL DISPOSITION	
APPLICATION:	[ ] GRANTED	[ ] DENIED	[X] GRANTED IN PART	[ ] OTHER
	[ ] SETTLE ORDER		[ ] SUBMIT ORDER	
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