Schembre v Saggese
2018 NY Slip Op 30191(U)
February 1, 2018
Supreme Court, New York County
Docket Number: 656328/2016
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 39

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FRANK SCHEMBRE, KERRY SCHEMBRE, EXECUTIVE CLEANING CONTRACTORS, INC.,

Plaintiffs,

- v -

MARIO SAGGESE, JVC 1000 CORPORATION, GAF FINANCIAL GROUP, INC., TIMOTHY JOINT, JOINT VENTURE CAPITAL, LLC, CHARLES WRIGHT EMS GLOBAL ONE, LLC,

Defendants.

INDEX NO. 656328/2016

MOTION DATE 3/20/2017

MOTION SEQ. NO. 001

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number 22, 23, 24, 25, 26, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 55, 65, 66, 67, 68

were read on this application to/for Dismiss

HON. SALIANN SCARPULLA:

Defendant GAF Financial Group, Inc. ("GAF") moves, pursuant to CPLR 3211 (a) (5) and (a) (7), to dismiss the causes of action asserted against it by plaintiffs Frank Schembre ("Frank"), Kerry Schembre ("Kerry"), and Executive Cleaning Contractors, Inc. ("Executive," collectively "plaintiffs") as time-barred under the applicable statutes of limitation, and for failure to state a cause of action.

Background

Frank and Kerry own and operate Executive, a snow removal business based in Maspeth, NY (complaint, ¶¶ 4, 16). In May 2011, Frank and Kerry were introduced to defendant Mario A. Saggese ("Saggese"), a financial advisor and certified public

accountant (CPA) (*id.*, ¶ 17). Plaintiffs allege that Saggese worked for GAF, and that he promoted both GAF and himself as "sophisticated investment advisors" (*id.*, ¶¶ 17-18). Between May 2012 and October 2012, Saggese, Frank, and Kerry had several conference calls to discuss investment opportunities, none of which came to fruition (*id.*, ¶ 19).

In November 2012, Saggese proposed that plaintiffs, as part of a "joint venture" between themselves, Saggese, and defendant Timothy Joint ("Joint"), provide a $2.5 million short-term loan to refurbish a Boeing 737 (FAA # N-146JS), to be owned by defendant Charles Wright (*id.*, ¶ 20). Saggese allegedly represented to plaintiffs that Joint was a sophisticated moneylender, that Joint would provide $500,000 of the $2.5 million, and that the plane was "airworthy and in active service" (*id.*, ¶¶ 21-22).

Saggese's proposal to plaintiffs provided that the loan would be for a total of $2.5 million, be for a term of 90 days, and have a 12.99% interest rate; plaintiffs would be responsible for $1.6 million (*id.*, ¶¶ 23, 27). As collateral, Wright offered to transfer title to two additional aircraft to defendant Joint Venture Capital, LLC ("JVC"), which held title to the Boeing, for the term of the loan (*id.*, ¶¶ 23, 25). After the loan was repaid, title to all three aircraft would revert to Wright (*id.*, ¶ 25).

Plaintiffs allege that they had no experience "in valuing aircraft or estimating the costs of aircraft repair" (*id.*, ¶ 28). Accordingly, they trusted Saggese, who was aware of their lack of knowledge, to negotiate and structure the deal for them, and to represent them at the closing (*id.*). Plaintiffs further allege that Saggese requested that they not attend the loan closing (*id.*, ¶ 29).

At the closing, in December 2012, plaintiffs allege that Saggese transferred more than $2 million from plaintiffs to various defendants through a bank account owned by defendant JVC 1000 Corporation ("JVC 1000") (*id.*, ¶ 30). JVC then took title to all three aircraft (*id.*, ¶ 31). The most recent communication between the parties regarding the loan was on February 14, 2013, at which time Saggese assured Kerry that Wright was busy with upgrades on the Boeing, and that Wright and Joint would be in touch to discuss repayment shortly (*id.*, ¶ 33).

Plaintiffs allege that the "joint venture was a scam" and that Wright and Joint, facilitated by Saggese, obtained "by false pretense and deceit" more than $1 million of money from Executive's pension fund (*id.*, ¶¶ 38-40). Saggese allegedly failed to conduct due diligence of the loan offer, by, among other things, letting Wright choose the appraiser for the Boeing, which was appraised at $2.5 million (*id.*, ¶ 41). Further, Saggese allegedly failed to file the appropriate Uniform Commercial Code forms with respect to the three planes, and failed to prevent Joint from transferring the titles to the two other planes to unknown parties before the loan was repaid (*id.*, ¶¶ 36, 41).

Saggese also allegedly caused Frank to enter into a Commercial Services Agreement with Saggese and JVC 1000, under which, among other things, GAF allegedly received $111,375.00 in unspecified fees, and Saggese issued checks out of JVC 1000's account to himself, Joint, and defendant EMS Global One, LLC, owned by Wright (*id.*, ¶ 41). Plaintiffs never received any loan payments from any of the defendants (*id.*, ¶ 43).

In July 2015, Frank and Kerry flew out to Arizona to examine the Boeing (*id.*, ¶ 34). They found it gutted and untouched in an aircraft junkyard, and not airworthy (*id.*). A subsequent appraisal, paid for by plaintiffs, valued the Boeing at $36,515 at the time of closing in 2012 (*id.*, ¶ 35). Further, the appraisal found that it would cost $5.8 million to make the Boeing airworthy (*id.*).

On December 5, 2016, plaintiffs filed the complaint in this action. The complaint alleges eight causes of action: fraud by false pretenses and false promises against Joint, Wright, JVC, and EMS (first cause of action); aiding and abetting fraud against Joint and Wright (second cause of action); breach of contract against Saggese, Joint, and Wright (third cause of action); unjust enrichment against Saggese, Joint, Wright, and JVC (fourth cause of action); professional malpractice against Saggese and GAF (fifth cause of action); breach of fiduciary duty against Saggese and GAF (sixth cause of action); negligent performance of duties against Saggese and GAF (seventh cause of action); and for an accounting against all defendants (eighth cause of action). GAF now moves to dismiss the fifth, sixth, and seventh causes of action as time-barred, and the eighth cause of action for failure to state a cause of action.

Discussion

Pursuant to CPLR 3211, a party may move to dismiss the complaint on the ground that "the cause of action may not be maintained because of . . . [the] statute of limitations . . ." (CPLR 3211 [a] [5]). "The time within which an action must be commenced, except as otherwise expressly prescribed, shall be computed from the time the cause of action accrued to the time the claim is interposed" (CPLR 203 [a]). If the defendant establishes

that the statute of limitations governing a cause of action has expired, the plaintiff must raise an issue of fact as to whether the cause of action falls within an exception to the statute (*e.g. Hadda v Lissner & Lissner LLP*, 99 AD3d 476, 476-77 [1st Dept 2012]).

Professional Malpractice (Fifth Cause of Action)

In their fifth cause of action, plaintiffs allege that Saggese, and GAF, as Saggese's employer, gave bad advice and failed to conduct appropriate due diligence on the proposed loan, rising to the level of professional malpractice (complaint, ¶¶ 63-66). GAF argues that professional malpractice claims are governed by a three-year statute of limitations. It points out that the last acts of malpractice alleged in the complaint are Saggese's issuance of checks to himself and Joint in January 2013, and his alleged misrepresentation to Kerry on February 14, 2013.

GAF also notes that, by March 2013, plaintiffs were on notice that the loan had not been repaid, and GAF claims that plaintiffs should have made further inquiries at that time. Accordingly, defendants assert that the statute of limitations expired in March 2016, almost nine months before plaintiffs commenced this action.

In opposition, plaintiffs argue that the statute of limitations was tolled by Saggese's continuous representation of them after the loan closing. Specifically, plaintiffs claim that Saggese continued to service the loan through July 26, 2015, and continued to act as if this was a bone fide transaction through various letters, checks, and other means. Plaintiffs assert that a question of fact exists as to whether the statute should be tolled, and dismissal would be improper at this stage. Moreover, plaintiffs

claim that they did not discover Saggese and GAF's alleged malpractice until 2015, and, therefore the statute has not yet expired.

Non-medical professional malpractice claims are governed by a three-year statute of limitations (CPLR 214 [6]). A claim for professional malpractice accrues "when the malpractice is committed, not when the client discovers it" (*Williamson v PricewaterhouseCoopers LLP*, 9 NY3d 1, 7–8 [2007]). "The continuous representation doctrine tolls the statute of limitations only where there is a mutual understanding of the need for further representation on the specific subject matter underlying the malpractice claim" (*McCoy v Feinman*, 99 NY2d 295, 306 [2002]).

Here, the last act of malpractice and/or misrepresentation concerning the loan that is alleged in the complaint is the February 14, 2013 email between Saggese and Kerry, and plaintiffs were aware, by March 2013 at the latest, that the loan had not been repaid in accordance with its terms (complaint, ¶¶ 33-34). Accordingly, the statute of limitations for professional malpractice expired in March 2016, almost nine months before plaintiffs filed their complaint (*see Maya NY, LLC v Hagler*, 106 AD3d 583, 586 [1st Dept 2013] [accounting malpractice claims accrued "at the time the negligent investment advice was given, or, at the very latest, when Hagler, without apparent explanation, failed to pay both the loan when due . . . and the initial payment on the investment that was due"]). Because malpractice claims accrue at the time that advice was given, rather than upon discovery, it is irrelevant that plaintiffs allegedly learned that the transaction was a scam in June 2015 (*Williamson*, 9 NY3d at 7-8).

Plaintiffs' attempt to establish continuous representation by Saggese and, by extension, GAF, is unavailing. Plaintiffs submit an affidavit from Frank, as well as various documents, purporting to establish that Saggese continued to service the loan through 2015. However, plaintiffs' malpractice claim is predicated on Saggese's alleged professional failure to conduct appropriate due diligence before recommending that plaintiffs' make the loan in 2012, not upon any alleged continuing professional failures concerning subsequent loan servicing.[1] Also, upon a review of the documents submitted, none of the documents dated after the March 2013 loan due date refer to the loan at all. For these reasons, the continuous representation toll does not apply and plaintiffs have failed to raise an issue of fact on the issue (*McCoy*, 99 NY2d at 306).

Accordingly, that branch of GAF's motion to dismiss the fifth cause of action for professional malpractice is granted.

Breach of Fiduciary Duty (Sixth Cause of Action)

For their sixth cause of action, plaintiffs allege that Saggese and GAF owed them a fiduciary duty as financial advisors, and breached that duty by giving bad advice related to, and failing to conduct appropriate due diligence on, the loan (complaint, ¶¶ 69-70). GAF argues that, as plaintiffs seek primarily monetary damages, a three-year statute of limitations governs this cause of action. It claims that, as with the statute of limitations

[1] *See* complaint, ¶ 63 (Saggese and GAF should have, but did not "gather all relevant documents, should have reviewed all relevant documents, should have analyzed the financial aspects of the transaction; had [Saggese] done so, he would have discovered the obvious fraud that was being perpetuated right under his nose.")

for the professional malpractice claim, such limitations period began to run in March 2013 and expired in March 2016, prior to plaintiffs' filing their complaint. In opposition, plaintiff argues that a six-year statute of limitations should apply.

On a breach of fiduciary duty claim,

> "New York law does not provide a single statute of limitations for breach of fiduciary duty claims. Rather, the choice of the applicable limitations period depends on the substantive remedy that the plaintiff seeks. 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. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 139 [2009] [internal quotation marks and citations omitted]). Courts look to the "reality, rather than the form of [the] action," to determine which limitations period applies (*id.* at 140). "A breach of fiduciary duty claim accrues where the fiduciary openly repudiates his or her obligation—i.e., once damages are sustained" (*Lebedev v Blavatnik*, 144 AD3d 24, 28 [1st Dept 2016]).

Here, plaintiffs seek monetary damages of $1,064,043.07 and also seek disgorgement of fees incidental to their actual damages (*id.*, ¶ 72). GAF has shown that monetary damages are the primary object of this action, the three-year statute of limitations applies (*IDT Corp.*, 12 NY3d at 139-140). Plaintiffs' damages were sustained, at the latest, in March 2013, when the loan was not repaid. Thus, the three-year statute of limitations expired in March 2016, prior to the filing of plaintiff's complaint, and consequently the breach of fiduciary claim against GAF is time-barred.

Accordingly, that branch of GAF's motion to dismiss the sixth cause of action for breach of fiduciary duty is granted.

Negligent Performance of Duties (Seventh Cause of Action)

For their seventh cause of action, plaintiffs allege that Saggese and GAF were negligent in "handling . . . their responsibilities owed to plaintiffs" (complaint, ¶¶ 74-75). GAF argues that the three-year statute of limitations applicable to negligence claims has expired. Moreover, GAF claims that the negligence claim is duplicative of the professional malpractice claim. In opposition, plaintiff's do not respond to these arguments.

Negligence claims are governed by a three-year statute of limitations (CPLR 214 [5]). Here, as with the professional malpractice and breach of fiduciary duty claims, plaintiffs' negligence claim accrued, at the latest, in March 2013 (*e.g. Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 94 [1993] [internal quotation marks and citations omitted] ["(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"]). Thus, the statute of limitations expired in March 2016, prior to the filing of the complaint in this action. Further, the negligence claim is entirely duplicative of the professional malpractice claim.

Accordingly, that branch of GAF's motion to dismiss the seventh cause of action for negligent performance of duties is granted.

Accounting (Eighth Cause of Action)

For their eighth cause of action, plaintiffs allege that they are entitled to an accounting of "how and where the loan money was spent" (complaint, ¶ 77). GAF argues that plaintiffs are not entitled to an accounting because they have not alleged a confidential or fiduciary relationship between themselves and GAF. Further, GAF asserts that plaintiffs have an adequate remedy at law. In opposition, plaintiffs argue that they are entitled to an accounting based on unjust enrichment.

A claim for an accounting requires a fiduciary relationship (*Eden v St. Luke's-Roosevelt Hosp. Ctr.*, 96 AD3d 614, 615 [1st Dept 2012]). Moreover, "a claimant must demonstrate that he or she has no adequate remedy at law" (*Unitel Telecard Distrib. Corp. v Nunez*, 90 AD3d 568, 569 [1st Dept 2011]). Here, plaintiffs do not allege that they lack an adequate remedy at law. As discussed above, the gravamen of plaintiffs' complaint is a demand for more than $1 million in monetary damages. To the extent that plaintiffs argue that they are entitled to an accounting based on defendants' collective unjust enrichment, plaintiff explicitly asserted that claim against Saggese, Joint, Wright, and JVC, but not against GAF (complaint, ¶¶ 61-62).

Accordingly, that branch of GAF's motion to dismiss the eight cause of action for an accounting is granted. The court has examined the remaining contentions of the parties, and finds them to be without merit.

In accordance with the foregoing, it is hereby:

ORDERED that the motion of defendant GAF Financial Group, Inc. to dismiss the complaint is granted, the complaint is dismissed in its entirety as against GAF Financial Group, Inc. and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the remainder of this action is severed and shall continue; and it is further

ORDERED that counsel are directed to appear for a status conference in Room 208, 60 Centre Street, on March 7, 2018, at 2:15 p.m.

This constitutes the decision and order of the Court.

2/1/2018
DATE

SALIANN SCARPULLA, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
	X	GRANTED		DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER		
CHECK IF APPROPRIATE:		DO NOT POST				FIDUCIARY APPOINTMENT		REFERENCE