SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. SALIANN SCARPULLA **PART** 39
Justice

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BISON CAPITAL CORPORATION

Plaintiff,

- v -

HUNTON & WILLIAMS, LLP,

Defendant.

INDEX NO. 153793/2015

MOTION DATE 10/7/2016

MOTION SEQ. NO. 002

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number 57, 58, 59, 60, 61, 62, 63, 64, 65, 67, 68, 69, 70, 71, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91

were read on this application to/for Amend Caption/Pleadings

Upon the foregoing documents, it is

Plaintiff Bison Capital Corporation ("Bison") moves, pursuant to CPLR 3025(b), for leave to serve a second amended complaint against defendant Hunton & Williams, LLP ("Hunton & Williams").

Hunton & Williams, a law firm, previously represented Bison in a litigation in which Bison sued ATP Oil and Gas Corporation ("ATP") for fees allegedly earned by Bison in procuring financing for ATP from Credit Suisse (the "Bison/ATP action"). The Bison/ATP action was commenced and tried in the United States District Court for the Southern District of New York. Following a four-day bench trial, on or about March 8, 2011, Judge Stanley H. Stein issued Findings of Fact & Conclusions of Law ("FFCL"),

which included the following determinations: (1) the contract between ATP and Bison provided for Bison to be paid a fee based on "the value of the new funds made available to ATP in a Capital Transaction," rather than "one percent of the entire face amount of each Capital Transaction," as advocated by Bison; and (2) Paragraph 7 of the Agreement only entitled Bison to fees if ATP "consummates or enters into an agreement or arrangement providing for a Capital Transaction prior to April 1, 2005." Also in the FFCL, Judge Stein discredited Bison's President's "in-court testimony that March 31, 2005 marks a cut-off for triggering Bison's right to perpetual fees," as he found it at odds with the President's earlier interpretation of the parties' Agreement, as expressed in a 2004 letter.

Ultimately, Judge Stein awarded Bison $1.65 million, plus interest, and the United States Court of Appeals for the Second Circuit affirmed the judgment.[1] Subsequent to the affirmance, Bison terminated Hunton & Williams and retained separate counsel to pursue enforcement of the judgment. Through new counsel, Bison requested an amended judgment, along with fees and costs, which the District Court issued on August 15, 2012. Two days later, on August 17, 2012, ATP filed for bankruptcy.

In this action Bison initially alleged five causes of action against Hunton & Williams for: (1) legal malpractice; (2) breach of contract; (3) breach of fiduciary duty; (4) negligence; and (5) fraud. In sum, Bison alleged that Hunton & Williams'

[1] *See Bison Capital Corp. v ATP Oil & Gas Corp.*, 473 Fed. Appx. 40 (2d Cir. 2012); Stein Dec., *Bison Capital Corp. v ATP Oil & Gas Corp.*, 2011 WL 8473007 (SD NY 2011).

preparation for the trial was deficient because, among other things, Hunton & Williams failed to call an expert witness, failed to introduce into evidence ATP's SEC report, and failed to rebut attacks on the credibility of Bison's President.

In addition, Bison alleged that Hunton & Williams should have sought enforcement of the judgment prior to ATP filing for bankruptcy protection, but failed to do so. Finally, Bison claimed that Hunton & Williams had promised that Marty Steinberg, a Hunton & Williams partner during the relevant time, would conduct all significant depositions and participate in the trial, but did not do so.

In a decision and order dated July 28, 2016 ("July 28, 2016 Decision"), I granted Hunton & Williams's motion to dismiss Bison's original complaint to the extent of dismissing all claims except for that portion of the second cause of action for breach of contract "insofar as the First Amended Complaint alleges that Hunton & Williams breached the retainer agreement by not having Marty Steinberg conduct certain depositions and participate at trial." I also determined, in the July 28, 2016 Decision, that Bison's malpractice allegations were "plainly disagreements with Hunton & Williams professional decisions related to trial strategy and [were] not actionable as a matter of law."

With respect to Bison's claims about Hunton & Williams' alleged failure to secure the judgment, I similarly held that the firm's "decision to wait to enforce the judgment against ATP during its appeal to the Second Circuit was a 'reasonable course[] of action [which] does not constitute malpractice.'" *quoting Rosner v. Paley*, 65 N.Y.2d 736, 738

(1985). Finally, I deemed Bison's breach of fiduciary duty, negligence and fraud claims redundant of the legal malpractice claim and dismissed them.

By Notice of Appeal, dated August 31, 2016, Bison filed its appeal from the July 28, 2016 Decision. However, that appeal was never perfected and, by Notice of Withdrawal Without Prejudice, dated May 22, 2017, Bison withdrew its appeal, choosing instead to rely on its motion to amend the complaint.

In opposition to Hunton and Williams's original motion to dismiss the first amended complaint, Bison had sought leave to amend, in the alternative, however it did not attach any proposed amended pleading, as mandated by CPLR 3025 (b). I therefore declined to grant it such relief. Now, in its proposed second amended complaint (the "SAC"), Bison seeks to assert the following three causes of action: (1) breach of contract; (2) legal malpractice; and (3) violation of New York rules of professional conduct and disgorgement.

Discussion

It is well settled, under CPLR § 3025(b), that leave to amend or supplement the pleadings "shall be freely given upon such terms as may be just including the granting of costs and continuances." The party seeking the amendment has the burden to establish the merit of any proposed new pleading. *Manhattan Real Estate Equities Group, LLC v Pine Equity NY, Inc.*, 27 A.D.3d 323, 323 (1st Dept. 2006). Where the proposed amendment is palpably insufficient, leave to amend should be denied. *Id.* The determination of whether to allow or disallow the amendment is within the court's sound discretion. *Kimso Apts., LLC v. Ghandi*, 24 N.Y.3d 403, 411 (2014). However, to

conserve scarce judicial resources, the merits underlying a proposed cause of action must be examined. *Konrad v. 136 E. 64th St. Corp.*, 246 A.D.2d 324, 325 (1st Dept. 1998).

The standard employed by courts on a motion to amend "is demonstrably different from the standards applied to either a CPLR 3211 motion to dismiss or a CPLR 3212 motion for summary judgment." *Daniels v. Empire-Orr, Inc.*, 151 A.D.2d 370, 371 (1st Dept. 1989). The "merit of a proposed amended pleading must be sustained ... unless the alleged insufficiency is clear and free from doubt." *Id.* Once the proponent of an amendment establishes its merit, it is "[t]he party opposing the amendment" who "must overcome a presumption of validity in favor of the moving party, and [to] demonstrate that the facts alleged and relied upon in the moving papers are obviously not reliable or are insufficient." *Id.* This is not to say that those facts need to be proven at this stage.

Bison contends that its proposed SAC alleges "a qualitatively different set of assertions" than the first amended complaint. Specifically, Bison claims that the SAC contains allegations that Hunton & Williams: 1) ignored deadlines imposed by the Federal Rules of Civil Procedure; 2) made a knowing misrepresentation to Judge Stein to obscure that violation; 3) failed to carry out certain pre-trial preparations; 4) did not hire an expert witness to place the parties' agreement in its proper context, despite knowing ATP was hiring its own expert; and 5) disregarded client instructions to safeguard and secure the judgment.

Hunton & Williams advances several arguments as to why Bison's proposed SAC should not be permitted. First, Hunton & Williams argues that Bison is precluded from seeking to amend by virtue of its election to appeal the original decision on the dismissal

motion. This argument has been mooted by Bison's withdrawal of its notice of appeal. Moreover, to the extent that this Court previously denied Bison leave to amend, that decision was not on the merits of the proposed amendment, but because no proposed amended pleading was ever provided to the Court.

Second, Hunton & Williams argues that the claims set forth in the proposed SAC have already been dismissed and/or remain insufficient as a matter of law. I with therefor review the amended claims (and allegations) for their sufficiency.

Breach of Contract Cause of Action

As Bison's breach of contract claim survived the motion to dismiss, there is no prejudice to Hunton & Williams to permit Bison to add additional allegations to support this cause of action, like allegations that Hunton & Williams breached its obligations under the Retainer Agreement by:

> (a) failing to see that Steinberg conducted all significant depositions in Bison's case; (b) failing to ensure that he was well-prepared for trial; (c) failing to oversee and direct Hunton & Williams' representation of Bison; (d) failing to assign competent attorneys knowledgeable about enforcement matters to Bison's case; (f) failing to obtain an enforceable judgment against ATP in New York and Texas, where ATP had assets; and (g) failing to safeguard and secure Bison's ability to enforce the Judgment against ATP pending appeal by filing a lien on ATP assets.

Thus, Bison may amend its complaint to add additional allegations to the breach of contract cause of action.

Legal Malpractice Cause of Action

Although I dismissed Bison's legal malpractice cause of action in the July 28, 2016 Decision, Hunton & Williams again asserts this claim in the SAC and provides

additional allegations in support of the claim. For example, Bison alleges that Hunton and Williams "failed to exercise reasonable care, skill and diligence in the performance of its duties representing Bison" by, among other things:

> (a) failing to satisfy FRCP 26 requirements and having ATP's SEC Reports excluded because of Hunton & Williams' negligence, purposeful misrepresentation to the Court and wrongful deal with ATP; (b) failing to understand importance of customary "junk bond" fee practices and instructing Bison it did not need expert testimony even though Hunton & Williams knew that ATP was hiring an expert, even though expert testimony was needed to address the Court's view that the Contract was ambiguous and even though Bison was willing and able to retain an expert upon Hunton & Williams' recommendation to do so... (d) ignoring and failing to comply with Wells' instruction to safeguard, secure and enforce the Judgment with a lien on ATP assets.

Whether Bison's proposed new claim for malpractice will survive a motion to dismiss is not before me now. On a motion to amend, Bison "need not establish the merit of its proposed new allegations [], but simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit." *MBIA Ins. Corp. v. Greystone & Co.*, 74 A.D.3d 499, 500 (1st Dept. 2010). For the purposes of this motion, Bison has submitted sufficient new allegations regarding malpractice cause of action – such as Hunton & Williams's alleged failure to follow Bison's instructions to pursue and secure the judgment – to establish that the proposed amendment is neither palpably insufficient nor meritless. Bison may therefore reallege the legal malpractice cause of action in the SAC.

Cause of Action for Violation of the New York Rules of Professional Conduct and Disgorgement

Unlike its breach of contract and legal malpractice claims, Bison's proposed cause of action for violation of the New York rules of professional conduct and disgorgement may not be maintained, even under the liberal standard imposed by CPLR § 3025(b).

Generally, a violation of a disciplinary rule does not, without more, generate an independent cause of action. *See Fletcher v. Boies, Schiller & Flexner LLP*, 140 A.D.3d, 587, 587 (1st Dept. 2016); *Cohen v. Kachroo*, 115 AD3d 512, 513 (1st Dept. 2014). At most, any alleged violation of the rules of professional conduct here goes to Hunton & Williams's alleged legal malpractice, and is, therefore, duplicative of that cause of action.

Similarly, to the extent that this cause of action seeks a return of attorneys' fees paid to Hunton & Williams, it is, essentially, a claim for monetary damages and, therefore, also duplicative of the legal malpractice claim. *See Access Point Medical, LLC v. Mandell*, 106 A.D.3d 40, 44 (1st Dept. 2013) (holding that plaintiffs' use of the term "disgorgement" should not distort the nature of its claim, which was a demand for the return of attorneys' fees they paid to defendants, and thus, "essentially, a claim for monetary damages"). Bison's use of the term "disgorgement" does not obscure the fact that this claim is based on the same facts as the malpractice claim rather than a distinct cause of action. Bison's claim for violation of the New York rules of professional conduct and disgorgement is devoid of merit and Bison may not assert this cause of action in the SAC.

In permitting Bison to serve its SAC, I am mindful of the fact that Bison's failure to supply a proposed amended pleading together with its request for the same relief in opposition to Hunton & Williams's original motion to dismiss resulted in additional legal fees and delay for Hunton & Williams, and may result in additional costs incurred in making a new motion to dismiss.

As noted above, CPLR § 3025(b) provides that leave to amend "shall be freely given upon such terms as may be just including the granting of costs and continuances." If the newly amended legal malpractice cause of action does not survive a second motion to dismiss, I intend to award Hunton & Williams its costs in moving a second time to dismiss this cause of action.

In accordance with the foregoing, it is

ORDERED that Bison Capital Corporation's motion to amend the complaint is granted, in part, as follows: leave is granted to amend the first and second causes of action for legal malpractice and breach of contract and to this extent the second amended complaint in the form annexed to the moving papers shall be deemed served;

ORDERED that leave to amend the complaint is denied with respect to Bison Capital Corporation's proposed third cause of action for violation of the New York rules of professional conduct and disgorgement and that cause of action is stricken; and it is further

ORDERED that Hunton & Williams, LLP shall answer the second amended complaint or otherwise respond thereto within 20 days from the date of said service; and it is further

ORDERED that counsel are directed to appear for a status conference on March 14, 2018 at 2:15 p.m. at 60 Centre Street, in Part 39, Room 208.

This constitutes the decision and order of the Court.

1/12/2018
DATE

SALIANN SCARPULLA, J.S.C.

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