Bartone Props., LLC v Meyer, Suozzi, English & Klein, P.C.
2018 NY Slip Op 33834(U)
April 3, 2018
Supreme Court, Nassau County
Docket Number: 605873/17
Judge: Stephen A. Bucaria
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

BARTONE PROPERTIES, LLC,

Plaintiff,

-against-

MEYER, SUOZZI, ENGLISH & KLEIN, P.C., SCHNADER HARRISON SEGAL & LEWIS, P.C. and RICHARD SATIN, ESQ.,

Defendants.

TRIAL/IAS, PART 1
NASSAU COUNTY

INDEX No. 605873/17

MOTION DATE: 1/19/18
Motion Sequence 001, 002, 003

The following papers read on this motion:

Notice of Motion.....XXX
Affirmation in Support.....XXX
Affirmation in Opposition.....XXX
Memorandum of Law.....XXXXXX
Reply Affirmation.....XXX

Motion (seq. # 1) by defendant Meyer, Suozzi, English & Klein, PC to dismiss the complaint based upon a defense founded upon documentary evidence, the statute of limitations, and failure to state a cause of action is **denied**. Motion (seq # 2) by defendant Schnader Harrison Segal & Lewis, PC to dismiss the complaint for a defense founded upon documentary evidence and failure to state a cause of action is **granted**. Motion (seq #3) by defendant Richard Satin to dismiss the complaint for a defense founded upon documentary evidence, statute of limitations, and failure to state a cause of action is **granted** in part and **denied** in part.

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This is an action for legal malpractice. Anthony Bartone is the managing member of plaintiff Bartone Properties, LLC, which was developing a 154-unit mixed use residential property in Farmingdale, known as Bartone Plaza. Because Bartone was in need of additional financing, on November 9, 2012, it entered into a limited partnership agreement with TDI Real Estate Holdings, LLC and TDI Real Estate Acquisition, LLC (Doc 10). Bartone and TDI Real Estate Holdings were limited partners; TDI Real Estate Acquisition was the general partner. The name of the limited partnership was Farmingdale Development Company, LP. The agreement called for TDI Real Estate Holdings to make an initial additional capital contribution of $300,000 and to make additional capital contributions in proportion to its "residual sharing ratio."

Bartone Properties retained defendant Richard Satin to represent it in connection with the negotiation and execution of the limited partnership agreement. At the time he was retained, Satin was a member of defendant Meyer, Suozzi, English & Klein, PC. Satin left the firm in 2014 and joined defendant Schnader Harrison Segal & Lewis, PC.

The limited partnership agreement provides in section 4.7(a) that the partnership may enter into a "development agreement" with TDI Multifamily Development Services, LLC, an affiliate of the general partner, to manage the development of the project. The agreement provides that the development manager shall be paid a fee of up to 5.25% of "total project hard costs."

In section 4.7(b), the limited partnership agreement provides that the partnership shall enter into a "construction agreement" with TDI Construction Services, LLC, the "construction manager," which shall be paid a fee of up to 5% of the "total project hard costs" for "the construction of the project." Section 4.7(b) further provides that the construction manager shall reasonably consult with Bartone "in the selection and utilization of local construction companies."

In section 6.1, the limited partnership agreement provides that Bartone would assign its interest in two contracts of sale to the partnership and be deemed to have made a capital contribution of $1,473,000. Upon the acquisition of the project and the execution of the construction agreement, the deemed value of Bartone's capital contribution would be increased by 25% of the difference between the construction budget for "Phase 1" and $26,500,000.

Section 8.2 of the limited partnership agreement provides the order of priority for distribution of "net cash flow" and "capital proceeds" to the partners. "Net cash flow" was defined as net operating income, less debt service on loans. "Capital proceeds" were defined as funds arising from the sale, financing, or refinancing of the project. Capital contributions

would be returned first, in proportion to the partners' capital balances, and then net cash flow would be distributed in accordance with their "residual sharing ratios." The "residual sharing ratio" of each partner was defined as the partner's capital contribution divided by the aggregate capital contributions made by all partners.

A First Amendment to the limited partnership agreement was executed on November 6, 2013 (Doc 11). The first amendment amended section 8.2 dealing with the order of priority of distributions of net cash flow and capital proceeds. Additionally, the first amendment provided that the partnership would make a "special one-time distribution" of $100,000 to Bartone on the acquisition date.

On the same date as the first amendment to the limited partnership agreement, TDI Jefferson Station, LLC, as owner, and TDI Construction Services, LLC, as contractor, entered into a Construction Management Agreement covering the project (Doc 52). The contractor was to be paid a fee of 3% of the cost of the work. The agreement provided for a guaranteed maximum cost to owner of $38,227,671. The agreement was signed by Kirk Motsenbocker, Sr, as executive vice president of both the owner and the contractor.

Additionally on November 6, 2013, TDI Jefferson Station, as owner, and TDI Multifamily Development Services, LLC, as developer, entered into a Development Management Agreement covering the project (Doc 53). The agreement provided that the developer was to be paid 2% of the "proforma hard costs and soft costs," which was set at $1,202,672. The 2% fee was not imposed on financing costs. Similar to the construction management agreement, the development management agreement was signed by Kirk Motsenbocker, Sr, as executive vice president of the owner and the developer.

Around January 2016, a dispute arose between Bartone and the TDI interests concerning the amount due Bartone upon the sale of the project. Bartone alleges that the first amendment to the limited partnership agreement, as well as the construction and development management agreements, reduced by $1,350,000 the amount of distributions to which he was entitled pursuant to section 8.2 of the limited partnership agreement.

On January 27, 2016, Satin, on behalf of Schnader Harrison, wrote to TDI stating that they had been retained to represent Bartone "in connection with its rights under the limited partnership agreement" (Doc 48).

On May 12, 2016 TDI Real Estate Holdings and TDI FDC GP, LLC, the successor to TDI Real Estate Acquisition, commenced an action against Bartone in the United States District Court for the Eastern District of New York (Doc 13). TDI sought a declaration that Section 8.2 was unambiguous and controlled the distribution of capital proceeds.

Additionally, TDI asserted a claim for breach of the limited partnership agreement on the theory that Bartone breached its obligation to provide "consulting services" under Section 4.8 and its obligation to provide "reasonable assistance" to the general partner pursuant to Section 12.13.

On June 23, 2016, Bartone retained defendant Schnader Harrison to represent it in the federal action (Doc 44). In the engagement letter (which is incorrectly dated January 23, 2016), Schnader Harrison disclosed to Bartone that there was a "theoretical possibility of a conflict of interest" because Satin, who was now with Schnader Harrison, had represented Bartone in connection with the 2013 amendment to the limited partnership agreement, when he was a member of Meyer, Suozzi. Schnader Harrison informed Bartone that TDI might argue that it was "counsel's fault" that Bartone did not understand the terms of the amendment. While Schnader Harrison stated that it believed that Satin's representation "fully satisfied the standard of care required of lawyers," it cautioned Bartone that "[Y]ou should satisfy yourself that you agree." Finally, Schnader Harrison urged Bartone that, "You should feel free to consult with independent counsel before agreeing to have Schnader undertake this representation."

The federal action which TDI commenced against Bartone was resolved pursuant to a Settlement and Release Agreement dated April 17, 2017. Bartone alleges that it incurred attorney's fees of $93,874 to defend the federal action, and agreed to pay 61.29% of TDI's legal fees, for a total of over $245,000 in attorney fees. A Second Amendment to the limited partnership agreement was executed on the same date as the settlement agreement. On April 26, 2017, TDI and Bartone stipulated to dismiss the federal action without prejudice.

The present action was commenced on June 20, 2017. In the first cause of action, plaintiff asserts a claim for legal malpractice against defendants Satin and Meyer, Suozzi by allegedly failing to advise it properly with respect to the first amendment to the limited partnership agreement and the construction and development management agreements. Plaintiff alleges that defendant Schnader Harrison committed malpractice by failing to advise plaintiff as to the statute of limitations on a malpractice claim against Satin and Meyer Suozzi. The second cause of action is for breach of the retainer agreement. In the third cause of action, plaintiff asserts a claim for breach of fiduciary duty.

By notice of motion dated August 16, 2017, defendant Meyer, Suozzi moves to dismiss the complaint for a defense founded upon documentary evidence, statute of limitations, and failure to state a cause of action. Meyer, Suozzi argues that any claim for malpractice would have accrued on November 6, 2013, the date the first amendment to the limited partnership agreement, the construction management, and development management

agreements were executed. Meyer, Suozzi argues that even if plaintiff's claim for malpractice was timely, it is legally insufficient.

In opposition, plaintiff argues that the statute of limitations was tolled by the doctrine of continuous representation.

The statute of limitations on an action for legal malpractice is three years (CPLR § 214[6]). The cause of action accrues when the malpractice is committed, not when the client discovered it **(Shumsky v Eisenstein**,96 NY2d 164, 166 [2001]). The continuous representation doctrine recognizes that a person seeking professional assistance has a right to repose confidence in the professional's ability and good faith (Id at 167 [2001]). The client cannot realistically be expected to question and assess the techniques employed by the attorney or the manner in which the services are rendered (Id). The doctrine also appreciates the client's dilemma if required to sue the attorney while the latter's representation on the matter at issue is ongoing (Id). The client is not expected to jeopardize his pending case or his relationship with the attorney handling that case during the period that the attorney continues to represent the client. The rule of continuous representation tolls the running of the statute of limitations on the malpractice claim until the ongoing representation is completed. However, the doctrine is inapplicable where the client's continuing general relationship with the attorney involves only "routine contact" for miscellaneous legal representation (Id. at 168). The burden of proving that the doctrine of continuous representation applies is on the plaintiff (**Deep v Boies**, 121 AD3d 1316 [3d Dept. 2014]).

Plaintiff's claim for malpractice accrued on November 6, 2013, the date the first amendment to the limited partnership agreement, the construction management, and development management agreements were executed. Since this action was commenced on June 20, 2017, it is untimely as to defendants Satin and Meyer, Suozzi, unless the statute of limitations was tolled by the doctrine of continuous representation.

"[A]n attorney's representation in litigation relating to a corporate transaction is only continuous with his or her representation with respect to the transaction if it was contemplated by the parties" (**Offshore Express, Inc v Milbank, Tweed, Hadley & McCloy**, 291 Fed. Appx 358, 359 [2d Cir. 2008]). In **Offshore Express**, a law firm represented a corporation in connection with its "divisive reorganization" into two separate companies and subsequently represented one of the companies in an arbitration over the tax obligations of the successor corporations as a result of the reorganization. The Second Circuit held that a malpractice claim arising from the negotiation of the reorganization was untimely because there was no continuous representation.

Because of the complicated formula for the distribution of "net cash flow" and "capital proceeds," and because TDI was self-dealing in both the development and construction agreements, the interests of Bartone and TDI were in conflict even though they were partners. Thus, it was in the nature of the limited partnership agreement that Satin's representation of Bartone would be ongoing, and the parties clearly contemplated continuous representation. Under the **Offshore Express** approach, plaintiff's malpractice claim against Satin is timely.

Moreover, in a case specifically rejecting **Offshore Express**, it has been held that there is no "sharp division" between litigation and transactional work (**Red Zone v Cadwalader, Wickersham & Taft**, 45 Misc.3d 672, 691 [Sup Ct NY Co 2013]). In **Red Zone**, a company retained a law firm in connection with the potential acquisition of another company. The law firm also advised the client in connection with an "engagement agreement" whereby the client hired an investment bank to assist it in connection with the acquisition. The engagement agreement provided that the investment bank would earn a $10 million fee if, by a certain date, there was a merger, a stock acquisition, or an acquisition of control through a "proxy contest or otherwise."

The client and the investment banker subsequently developed a plan for a "consent solicitation," whereby the client obtained control of three of seven positions on the target company's board of directors. The client refused to pay the investment banker its full $10 million fee, and the law firm represented the client in an action brought by the investment banker. After the Appellate Division ruled in favor of the investment banker, the client commenced an action against the attorney for malpractice in connection with the engagement agreement. Supreme Court held that the action was timely under the doctrine of continuous representation.

The limited partnership agreement in the present case is more similar to the engagement agreement in **Red Zone** than it is to the reorganization agreement in **Offshore Express**. The division of the reorganized corporation into two separate companies did not by its nature involve continuing representation as to matters between the two companies. By contrast, even though the investment banker and the acquiring company were working together, their interests were somewhat diverse because the acquiring company had an interest in structuring the transaction to avoid the acquisition fee. Thus, under **Red Zone**, which focuses more on the nature of the transaction than the intention of the parties, the statute of limitations was tolled by the doctrine of continuous representation. Defendant Satin's motion to dismiss the complaint based upon the statute of limitations is **denied.**

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The running of the statute of limitations against a law firm is tolled as long as the attorney handling the case continues to represent the client on the same matter, even though that attorney has taken the matter to another firm (**Waggoner v Caruso**, 68 AD3d 1 [1st Dept 2009]). Even though Satin was associated with Schnader Harrison by the time the dispute with TDI occurred, the statute of limitations was tolled as to Meyer Suozzi. Defendant Meyer, Suozzi's motion to dismiss the complaint based upon the statute of limitations is **denied**.

By notice of motion dated October 16, 2017, defendant Schnader Harrison moves to dismiss the complaint for a defense founded upon documentary evidence and failure to state a cause of action. Schnader Harrison argues that its representation of Bartone was limited to the federal action. Schnader Harrison argues that it advised plaintiff to seek the advice of independent counsel and did not have a duty to advise plaintiff as to the statute of limitations on his malpractice claim against Satin. Finally, Schnader Harrison argues that it has not caused plaintiff any damages because its claim against Satin and Meyer, Suozzi is timely.

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction....[The court must] accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory"(**Arnav Industries, Inc. v. Brown**, 96 NY2d 300, 303 [2001]).

Where a written retainer agreement plainly indicates the specific purpose of the representation, an attorney will generally not be liable in malpractice for failing to explore legal issues outside the scope of the agreement (See, **AmBase Corp. v Davis, Polk & Wardwell**, 8 NY3d 428 [2007]; **Keld v Giddins Claman**, 2018 N.Y. Misc. LEXIS 892 [Sup Ct NY Co 2018]). The June 2016 retainer agreement refers only to the action which TDI had commenced against Bartone in the federal court. However, Satin's letter of January 27, 2016 states that Schnader Harrison represented Bartone in connection with "its rights under the limited partnership agreement," suggesting a scope of representation broader than the federal action.

In legal malpractice cases, the plaintiff is required to prove that "but for" defendants' negligence, plaintiff would have obtained a more favorable result in the underlying litigation or would not have sustained the claimed loss in the underlying transaction (**Wagoner v Caruso**, 14 NY3d 874 [2010]). Because plaintiff's claim against Satin and Meyer, Suozzi is timely, defendant Schnader Harrison has not caused plaintiff any damages. Defendant Schnader Harrison's motion to dismiss the complaint for failure to state a cause of action is **granted**.

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An action for legal malpractice requires proof of three elements: 1) the attorney's failure to exercise that degree of care, skill, and diligence commonly possessed by a member of the legal profession, 2) causation, and 3) damages. The limited partnership agreement disclosed that the development manager could be an affiliate of the general partner. Moreover, the agreement provided TDI with an incentive to limit the increase in Bartone's deemed capital contribution by increasing the construction budget. Defendants argue that, because Bartone was under financial pressure, he had little choice but to enter into the limited partnership agreement. While TDI's power to limit Bartone's distributions was created by the limited partnership agreement, the court must give plaintiff the benefit of the possible favorable inference that Satin's failure to explain the terms of the construction management and development management agreements caused plaintiff damages. Defendant Satin's motion to dismiss the complaint for a defense founded upon documentary evidence and failure to state a cause of action is **denied.**

However, plaintiff's claims for breach of the retainer agreement and breach of fiduciary duty are duplicative of plaintiff's malpractice claim. Defendant Satin's motion to dismiss the second and third causes of action is **granted**.

Please be advised that a Preliminary Conference has been scheduled for **April 25, 2018 at 9:30 a.m.** in Chambers of the undersigned. Please be further advised that counsel appearing for the Preliminary Conference **shall** be fully versed in the factual background and their client's schedule for the purpose of setting **firm** deposition dates.

So ordered.

Date: APR 0 3 2018

J.S.C.

ENTERED
APR 0 6 2018
NASSAU COUNTY
COUNTY CLERK'S OFFICE