Bartone Props., LLC v Meyer, Suozzi, English & Klein, P.C.
2018 NY Slip Op 33835(U)
October 10, 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

TRIAL/IAS, PART 1
NASSAU COUNTY

BARTONE PROPERTIES, LLC,

Plaintiff,

-against-

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

Defendants.

INDEX No. 605873/17

MOTION DATE: 9/24/18
Motion Sequence 006

The following papers read on this motion:

Notice of Motion....................................X
Affirmation in Support............................X
Affirmation in Opposition........................X
Memorandum of Law in Opposition........X
Reply Affirmation..................................X

Motion by plaintiff Bartone Properties, LLC for leave to reargue defendant Meyer, Suozzi, English & Klein, PC's motion to dismiss the complaint based upon the statute of limitations is **denied**.

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.

By order dated April 3, 2018, defendant Satin's motions to dismiss plaintiff's malpractice claims for a defense founded upon documentary evidence and failure to state a cause of action was denied.

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 (**Dombrowski v Bulson**, 19 NY3d 347, 350 [2012]). With regard to the issue of causation, 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]).

Defendant Satin s argued that, because Bartone was under financial pressure, he had little choice but to enter into the limited partnership agreement. However, the limited

partnership agreement provided that the development manager could be an affiliate of the general partner and provided TDI with an incentive to limit the increase in Bartone's deemed capital contribution by increasing the construction budget. Thus, the court was required to give plaintiff the benefit of the possible favorable inference that Satin's failure to explain the terms of the limited partnership, construction management, and development management agreements caused Bartone to receive a lesser amount of distributions upon the sale of the project.

In the April 3, 2018 order, the court denied defendant Satin's motion to dismiss plaintiff's malpractice claim based upon the statute of limitations. 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]).

Defendants Satin argued that any 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.

"[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]). 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 by Satin. Indeed, defendant Satin had not submitted any affidavit disclaiming any mutual understanding of the need for legal representation after November 2013.

However, plaintiff's second cause of action for breach of the retainer agreement and third cause of action for breach of fiduciary duty were dismissed as to defendants Satin and Meyer, Suozzi on the ground that they were duplicative of plaintiff's malpractice claims. Additionally, plaintiff's claims against defendant Schnader Harrison were dismissed in the April 3, 2018 order. Defendant Schnader Harrison's advice concerning the statute of limitations did not cause plaintiff any damages because plaintiff's claims against Satin were timely.

By order dated July 24, 2018, the court, upon reargument, granted defendant Meyer, Suozzi's motion to dismiss the complaint based upon the statute of limitations. As noted, the doctrine of continuous representation is rooted in recognition that a client cannot be expected to jeopardize a pending case or relationship with an attorney during the period that the attorney continues to handle the case (**Waggoner v Caruso**, 68 AD3d 1, 7 [1st Dept. 2009]). Nevertheless, it was undisputed that Bartone had no relationship with Meyer, Suozzi after Satin left the firm in 2014. Thus, there was no continuous representation as to Meyer, Suozzi.

By notice of motion dated August 23, 2018, plaintiff moves for leave to reargue defendant Meyer, Suozzi's motion to dismiss based upon the statute of limitations. Plaintiff argues that defendant Satin is subject to potential claims for contribution or indemnity by Meyer, Suozzi (See, Waggoner v Caruso, 68 AD3d 1, 7 [1st Dept. 2009]).

In its answer filed on April 30, 2018, defendant Meyer, Suozzi did not assert any cross-claim for contribution or indemnity against Satin (Doc 94). In any event, plaintiff has not established that the court overlooked or misapprehended any matter of fact or law in deciding the prior motion (CPLR 2221[d]). Plaintiff Bartone Properties' motion for leave to reargue defendant Meyer, Suozzi's motion to dismiss the complaint based upon the statute of limitations is **denied**.

So ordered.

Date: OCT 10 2018

J.S.C.

ENTERED
OCT 12 2018
NASSAU COUNTY
COUNTY CLERK'S OFFICE