Finkel v Wedeen
2019 NY Slip Op 31395(U)
May 9, 2019
Supreme Court, New York County
Docket Number: 161019/2015
Judge: Paul A. Goetz

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. PAUL A. GOETZ **PART** IAS MOTION 47EFM

Justice

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NORMAN FINKEL, I. FINKEL ELECTRICAL CONTRACTOR, INC.,

Plaintiff,

- v -

TIMOTHY WEDEEN, WEDEEN & KAVANAGH, CHRISTINE KAVANAGH

Defendant.

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INDEX NO. 161019/2015

MOTION DATE 12/06/2018

MOTION SEQ. NO. 003

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 003) 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 68, 69, 70, 73, 74, 75, 76, 77, 78, 79

were read on this motion to/for JUDGMENT - SUMMARY.

Paul A. Goetz, J.:

In this action to recover damages for legal malpractice and fraud, defendants move for summary judgment dismissing the complaint (Mot. Seq. No. 003). For the reasons that follow the motion is denied.

Background

In 2005, Norman Finkel (Finkel) and I. Finkel Electrical Contractor, Inc. (together plaintiffs) opened three brokerage accounts with Bank of America/Merrill Lynch (BOA/ML) (Marchetti EBT Transcript at 38-39, NYSCEF Doc. No. 62; Affirmation of Plaintiffs' Counsel in Opposition to Motion at ¶ 8, NYSCEF Doc. No. 73 [referring to Statement of Claim for recitation of facts]; Statement of Claim, ¶¶ 6,7,4, NYSCEF Doc. No. 60). According to plaintiffs, all three accounts were opened by broker Philip Marchetti (Marchetti), who advised them that the accounts would be protected by a so-called "5% stop loss order" that would trigger an automatic liquidation of the accounts in the event of a 5% or greater depreciation in any asset

(Finkel EBT Transcript at 37-38, 50-51, NYSCEF Doc. No. 56; Marchetti EBT Transcript at 40-41, 48, NYSCEF Doc. No. 62; Affirmation of Plaintiffs' Counsel in Opposition at ¶ 8, NYSCEF Doc. No. 73 [referring to Statement of Claim for recitation of facts]; Statement of Claim at ¶ 7, NYSCEF Doc. No. 60).

Marchetti left BOA/ML in 2007, at which point Robert Schiano (Schiano) became the account executive on plaintiffs' accounts (Schiano EBT Transcript at 22-23, NYSCEF Doc. No. 63; Affirmation of Plaintiffs' Counsel in Opposition to Motion at ¶ 8, NYSCEF Doc. No. 73 [referring to Statement of Claim for recitation of facts]; Statement of Claim at ¶ 9, NYSCEF Doc. No. 60). Plaintiffs claim that between August 2008 and April 2009, their accounts incurred losses of $727,831 (dropping in value from roughly $2.303 million to $1.575 million) because BOA/ML and Schiano failed to execute the 5% stop loss order (Affirmation of Plaintiffs' Counsel in Opposition to Motion at ¶ 8, NYSCEF Doc. No. 73 [referring to Statement of Claim for recitation of facts]; Statement of Claim at ¶¶ 15, 18, NYSCEF Doc. No. 60).

In connection with opening the brokerage accounts, Finkel apparently signed an agreement containing an arbitration clause, pursuant to which plaintiffs agreed to settle all disputes by Financial Industry Regulatory Authority (FINRA) arbitration (Affirmation of Plaintiffs' Counsel in Opposition to Motion at ¶ 8, NYSCEF Doc. No. 73 [referring to Statement of Claim for recitation of facts]; Statement of Claim at Intro ¶, NYSCEF Doc. No. 60). According to plaintiffs, on or about August 10, 2010, they retained Timothy Wedeen (Wedeen) and his law firm, Wedeen & Kavanagh, to initiate a FINRA arbitration proceeding against BOA/ML and Schiano, based upon their alleged mismanagement of plaintiffs' investment portfolio from August 2008 through April 2009 (Complaint at ¶ 4, NYSCEF Doc. No. 1).

In October 2015, plaintiffs commenced the instant action against Wedeen and Wedeen & Kavanagh seeking to recover damages for legal malpractice and fraud (Complaint, NYSCEF Doc. No. 1). In the first cause of action for legal malpractice, plaintiffs allege that Wedeen failed to timely commence the FINRA arbitration proceeding. Plaintiffs assert in this regard that Wedeen told them that he would timely submit their claim for FINRA arbitration. However, in May 2015, when plaintiffs called to inquire about the status of their claim, Wedeen informed them for the first time that he never submitted the claim (*id.* at ¶ 7). At that point, the six-year statute of limitations for submitting the claim to arbitration had already elapsed. Plaintiffs allege that they had a meritorious and valuable claim against BOA/ML and that but for Wedeen's misrepresentation and negligence, they would have prevailed and recovered on their claim (*id.* at ¶ 12).

In the second cause of action seeking damages for fraud, plaintiffs assert that they paid Wedeen a $3,400 retainer for the sole purpose of advancing the expenses of filing the FINRA arbitration. In May 2015, when Wedeen told plaintiffs that he never filed their claim, he also told plaintiffs that he sent them a letter, posted on December 9, 2014, in which he enclosed a $900 check, representing part of their retainer (*id.* at ¶ 8). However, plaintiffs never received such a letter or the $900 check (*id.* at ¶ 9). Plaintiffs assert that if Wedeen actually returned the $900, as he claimed, "then it was done with the intention of defrauding the plaintiffs of $2,500 as no FINRA arbitration was ever filed and therefore no filing fees were ever paid" (*id.* at ¶ 15). In the alternative, plaintiffs posit Wedeen never mailed the $900 check to plaintiffs and his "claim of having done so was made with the intent to defraud the plaintiffs and further to avoid malpractice liability with a pretense that the plaintiffs' claim was timely rejected" (*id.* at ¶ 15).

Plaintiffs assert that based on the foregoing, they are entitled to treble damages, attorney's fees, and an award of punitive damages (*id.* at ¶ 16).

On December 29, 2017, plaintiffs commenced a related action in this court under Index No. 161490/2017 against Wedeen's wife, Christine Kavanagh, Esq. (Complaint, NYSCEF Doc. No. 53). In the related action, plaintiffs allege that Christine Kavanagh and Wedeen are partners in Wedeen & Kavanagh, and that they are each liable for the acts and omissions of the other. By order, dated April 17, 2018, this court consolidated the two actions for all purposes (Consolidation Order, NYSCEF Doc. No. 55).

Defendants' Motion for Summary Judgment Dismissing the Complaint

Defendants now move for summary judgment dismissing the complaint (Notice of Motion, NYSCEF Doc. No. 49). In support of their motion, defendants argue that plaintiffs could never prevail on their claim that BOA/ML failed to exercise a supposed automatic 5% stop loss trigger on plaintiffs' accounts because such a trigger is a legal and practical impossibility in the context of the type of investment vehicle chosen by plaintiffs. Defendants contend that since it was not possible in the first instance to place an alleged stop loss trigger on plaintiffs' accounts, plaintiffs' allegation that they were prevented from pursuing a successful claim against BOA/ML for failing to activate such a trigger is frivolous. Defendants assert that since plaintiffs' first cause of action for legal malpractice is predicated on defendants' failure to timely file a FINRA claim that had no chance of succeeding, the complaint must be dismissed.[1]

[1] Although defendants seek dismissal of the entire complaint, they do not proffer a legal argument in support of dismissing the second cause of action for fraud (*see* Affirmation of Defendants' Counsel in Support of Motion at 8-10, NYSCEF Doc. No. 50; Memorandum of Law in Support of Motion at 5-9, NYSCEF Doc. No. 66).

In support of their motion, defendants submit BOA/ML's response to a "draft notice of claim" (denominated a "Statement of Claim") Wedeen sent to BOA/ML in May 2012, wherein BOA/ML took the position that plaintiffs' claim had no merit because BOA/ML's system does not allow for an automatic liquidation upon a 5% drop in asset value (Letter [dated 5/23/12], NYSCEF Doc. No. 61 [responding to Statement of Claim, NYSCEF Doc. No. 60]). Therefore, if such triggers were discussed, it would have been an agreement between Finkel and Marchetti, and Finkel failed to make Schiano aware of any such agreement (*id.*). Moreover, Schiano consistently tried to meet to discuss Finkel's goals and objectives, but Finkel often did not return his calls. When they spoke, Finkel specifically stated that no changes were to be made to his portfolio. As the subject accounts were non-discretionary, no changes could be made without Finkel's authorization (*id.*). Therefore, BOA/ML concluded that plaintiffs' claim against it was without merit and no settlement was warranted (*id.*).

According to defendants, upon receiving this response from BOA/ML, Wedeen showed it to Finkel and explained that the only way to recoup any money based upon the failure to exercise an alleged 5% automatic trigger was to sue Marchetti (Memorandum of Law in Support of Motion at 4, NYSCEF Doc. No. 66; Wedeen EBT Transcript at 69, 79-80, NYSCEF Doc. No. 58; Finkel EBT Transcript at 125, NYSCEF Doc. No. 56). However, Finkel refused to do so and continued to instruct Wedeen to find proof to substantiate the existence of a 5% trigger on plaintiffs' accounts (Memorandum of Law in Support of Motion at 4, NYSCEF Doc. No. 66; Wedeen EBT Transcript at 149-150, NYSCEF Doc. No. 59; Finkel EBT Transcript at 126, NYSCEF Doc. No. 56).

Defendants assert that after trying unsuccessfully to find such proof, Wedeen sent plaintiffs a letter in December 2014, informing them that he would not continue as their counsel and returned $900 of the $1800 plaintiffs had paid him as a retainer (Memorandum of Law in Support of Motion at 4, NYSCEF Doc. No. 66; Letter [dated 12-9-14], NYSCEF Doc. No. 57). He asked to keep the remaining $900 on account of the time and expense he incurred in pursuit of plaintiffs' claim (*id.*). However, plaintiffs never responded or cashed the $900 check. Wedeen spoke to Finkel again in January 2015. Finkel claimed not to have received the December 2014 letter or the check (Wedeen EBT Transcript at 181-182, NYSCEF Doc. No. 59). Wedeen again advised Finkel that his representation of plaintiffs had ceased and told Finkel that he had no case against BOA/ML (*id.*).

In further support of their motion, defendants submit an unsworn expert report, wherein their expert, Peter J. DeMarco, states that all three of plaintiffs' accounts were "open end mutual funds" and that such investment vehicles "do not accept stop-loss orders on their shares" (Peter J. DeMarco Report, NYSCEF Doc. No. 65). Therefore, DeMarco opines, "no stop-loss orders or any kind of automatic trigger could have been put in place by BOA/ML" on the accounts (*id.*).

DeMarco also states that when Finkel reviewed his January 31, 2008 account statements, he should have seen that two of his accounts were down in excess of 5% and that the third was down almost 4% (*id.*). DeMarco opines that "[t]hese statements made it clear to Mr. Finkel that no 'trigger' at 5% generated a stop-loss order" (*id.*).

Defendants also submit the deposition testimony of Finkel and Marchetti, emphasizing that while both claim that a 5% stop loss trigger was placed on plaintiffs' accounts, they admit, under oath, that they have nothing in writing confirming that such a trigger existed (Finkel EBT

Transcript at 100, NYSCEF Doc. No. 56; Marchetti EBT Transcript at 42, NYSCEF Doc. No. 62). In addition, defendants rely on the deposition testimony of Schiano, wherein he testified that the initial paperwork opening plaintiffs' accounts did not indicate that a trigger or stop loss order was placed on the accounts (Schiano EBT Transcript, at 13, NYSCEF Doc. No. 63).

Schiano testified that while such a trigger can be placed on individual equity accounts, it is not possible to do so on the mutual fund accounts opened by plaintiffs (*id.* at 14). Schiano testified that while it was possible for a client to have an understanding with a particular broker that if a mutual fund investment lost 5% of its value it should be sold, it would not be possible to automate this directive with a mutual fund (*id.* at 52-53). Schiano further testified that it appeared plaintiffs' accounts were non-discretionary, meaning that the adviser must contact the client before making any changes (*id.* at 28). Defendants also highlight Schiano's testimony that when he spoke with Finkel in 2008 and 2009, Finkel never mentioned that Marchetti placed a stop loss order on his accounts (*id.* at 32, 35, 39, 41-44).

Plaintiffs' Opposition

In opposition to defendants' motion, plaintiffs submit, among other things, a sworn expert affidavit, wherein their expert, Michael Kalmus, opines that while mutual funds are not suitable for computerized stop loss orders, he disagreed with DeMarco's conclusion that it was not possible to place a stop loss order on plaintiffs' accounts (Kalmus Affidavit at ¶ 11, NYSCEF Doc. No. 75). Kalmus states in this regard that

> "[t]here is no reason why Mr. Finkel's accounts could not have a stop-loss noted in the old fashioned manner, such that his broker would have to learn of the decline in value (more than 5%) of his mutual funds at the end of the day and then contact the customer to place a sell order for the following day"'

(*id.* at ¶ 15).

Kalmus points out that Marchetti testified that there was a stop-loss order recorded in the computer notes pertaining to plaintiffs' accounts and that he discussed the trigger with Finkel on numerous occasions (Kalmus Affidavit at ¶ 15, NYSCEF Doc. No. 75; *see* Marchetti EBT Transcript at 40-41, 47, 84, NYSCEF Doc. No. 62). If Marchetti testified truthfully, then his successor Schiano failed to act and prevent plaintiffs' losses (Kalmus Affidavit at ¶ 11, NYSCEF Doc. No. 75). If he did not testify truthfully and no 5% stop loss trigger existed "then he mislead Mr. Finkel and, as its agent, then BOA would be responsible for his actions. In either case BOA could be held responsible for plaintiffs' losses" (*id.*).

In addition, Kalmus notes that "Marchetti testified that there had been a complete change of the BOA computer system because there was a purchase or merger of Merrill Lynch by Bank of America resulting in a new computer system" and that "Schiano confirmed that fact" (*id.* at ¶ 12; *see* Marchetti EBT Transcript at 89, 97, NYSCEF Doc. No. 62; Schiano EBT Transcript at 62, NYSCEF Doc. No. 63). Kalmus opines that this might explain "how there was a 5% trigger in place under Mr. Marchetti and then no trigger under Mr. Schiano" (Kalmus Affidavit at ¶ 12, NYSCEF Doc. No. 75).

Kalmus further opines that

> "there was [sic] ample opportunities for [BOA/ML] to prevent [plaintiffs'] losses all along the way to March of 2009 when [plaintiffs] pulled [the] accounts (and the market hit rock bottom). Not surprisingly, [plaintiffs'] diversified mutual funds tracked the market and there were a number of months during that period when his investments lost better than 5% in value. Had there been a trigger, [plaintiffs] would have avoided most of [their] losses"

(*id.* at ¶ 17). Kalmus concludes: "It is my opinion based on years of evaluating and arbitrating customer/broker dealer claims both for claimants and respondents that this was a viable FINRA

arbitration claim which would have either settled or resulted in an award to plaintiffs" (*id.* at ¶ 19).

Defendants' Reply

In reply, defendants submit DeMarco's sworn affidavit, wherein DeMarco opines:

> "Open-End Mutual Fund shares do not trade at all like stocks or bonds. Consistent therewith, stop loss, stop limit and trading stop orders that can be entered on individual stock positions, cannot and have never been accepted by Open End Mutual Funds. This holds true both as to electronic orders currently and paper tickets used before electronic trading became the norm"

(DeMarco Affidavit, at ¶ 5, NYSCEF Doc. No. 78).

Based on DeMarco's opinion, defendants argue that the supposed 5% trigger, as testified to by Marchetti, could never have existed within the legal confines regulating open end mutual funds (Affirmation in Reply at ¶ 8, NYSCEF Doc. No. 77). Therefore, plaintiffs cannot make a prima facie showing that they would have prevailed on a FINRA arbitration claim against BOA/ML (*id.*).

Furthermore, defendants challenge Kalmus's opinion that BOA/ML is responsible for Marchetti's actions and therefore a claim could have been brought against BOA/ML regardless of whether a 5% trigger existed. Defendants assert in this regard that Marchetti, as the BOA/ML employee who originated the accounts, would have been a necessary party to any such litigation (*id.* at ¶ 11). However, Wedeen and Finkel both testified that Finkel refused to initiate a lawsuit against Marchetti despite Wedeen's advice that plaintiffs needed to do so (*id.*; *see* Wedeen EBT Transcript at 149-150, NYSCEF Doc. No. 59; Finkel EBT Transcript at 126, NYSCEF Doc. No. 56 56). Therefore, defendants contend, plaintiffs could not have prevailed on this theory.

Discussion

"In order to recover damages in a legal malpractice action, a plaintiff must establish that the attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession and that the attorney's breach of this duty proximately caused plaintiff to sustain actual and ascertainable damages" (*Dombrowski v Bulson*, 19 NY3d 347, 350 [2012][internal quotation marks and citations omitted]). "An attorney's conduct or inaction is the proximate cause of a plaintiff's damages if 'but for' the attorney's negligence the plaintiff would have succeeded on the merits of the underlying action or would not have sustained actual and ascertainable damages" (*Nomura Asset Capital Corp. v Cadwalader, Wickersham & Taft LLP*, 26 NY3d 40, 50 [2015][internal quotation marks and citations omitted]). "A lawyer seeking summary judgment dismissing a legal malpractice claim cannot satisfy its prima facie burden without providing an expert opinion that any or all of the foregoing elements were not met, so long as the subject matter is not within the ken of an ordinary person" (*Cosmetics Plus Group, Ltd. v Traub*, 105 AD3d 134, 141 [1st Dept 2013]).

Here, defendants seek to dismiss the cause of action to recover damages for legal malpractice on the ground that plaintiffs cannot establish that they would have succeeded on their claim against BOA/ML but for defendants' failure to timely submit the claim to FINRA arbitration. This is not an issue involving subject matter within the ken of an ordinary person and cannot be adequately judged based on the ordinary experience of the fact finder without expert testimony (*cf. Boye v Rubin & Bailin, LLP*, 152 AD3d 1, 9 [1st Dept 2017]).

Although in support of their motion, defendants submit DeMarco's expert report, it is unsworn and therefore not in admissible form (*see Accardo v Metro-North R.R.*, 103 AD3d 589, 589 [1st Dept 2013]; *221 E. 50th St. Owners, Inc. v Efficient Combustion & Cooling Corp.*, 2018

NY Slip Op 33160[U][Sup Ct, NY County 2018]). This error "could not be cured by submitting a sworn affidavit by this expert in reply papers" (*Accardo v Metro-North R.R.*, 103 AD3d at 589; *see Henry v Peguero*, 72 AD3d 600, 602 [1st Dept 2010]["a deficiency of proof in moving papers cannot be cured by submitting evidentiary material in reply"]). As such, defendants' expert report may not be considered (*see Accardo v Metro-North R.R.*, 103 AD3d at 589). Since, without the expert affidavit, defendants failed to meet their prima facie burden, their motion must be denied without regard to the sufficiency of plaintiffs' opposition papers (*see Suppiah v Kalish*,76 AD3d 829, 832 [1st Dept 2010]["By failing to submit the affidavit of an expert, defendant never shifted the burden to plaintiff"]; *see generally Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Furthermore, even if defendants' expert report had been in admissible form, it was insufficient to establish their prima facie entitlement to judgment as a matter of law because it does not address whether plaintiffs had a viable claim against BOA/ML based upon Marchetti's representation to Finkel that plaintiffs' accounts were protected by a stop loss order. Assuming defendants' expert correctly opined that it was impossible to place a stop loss order on the type of accounts opened by plaintiffs, this does not establish that Marchetti never promised Finkel that the accounts were protected by such a trigger. Although the expert's opinion may cast doubt on the truth of Marchetti's and Finkel's testimony in this regard, "[i]t is not the function of a court deciding a summary judgment motion to make credibility determinations or findings of fact" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505 [2012]).

In their reply papers, defendants argue that plaintiffs were unwilling to bring a claim against Marchetti and therefore could not have succeeded on this theory because Marchetti would have been a necessary party to such a claim. However, defendants fail to establish that

Marchetti would have been a necessary party (*see Durante Bros. Constr. Corp. v St. John's Cemetery*, 285 AD2d 578, 580 [2d Dept 2001][a principal, once disclosed, may be sued directly without joining the agent]; 12 Warren's Weed New York Real Property § 124.60 ["Generally, where the contract is made by an agent for a principal, the agent is not a necessary party, but the principal is"]; *see also Performance Comercial Importadora E Exportadora Ltda v Sewa Intl. Fashions Pvt. Ltd.*, 79 AD3d 673, 673 [1st Dept 2010]["An agent for a disclosed principal will not be personally bound unless there is clear and explicit evidence of the agent's intention to substitute his or her personal liability for, or to, that of the principal"]; *Weinreb v Stinchfield*, 19 AD3d 482, 483 [2d Dept 2005]["when an agent acts on behalf of a disclosed principal, the agent will not be personally liable for a breach of contract unless there is clear and explicit evidence of the agent's intention to be personally bound"]).

In accordance with the foregoing, it is hereby

ORDERED that defendants' motion for summary judgment dismissing the complaint is denied.

5/9/19
DATE

PAUL A. GOETZ, J.S.C.

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