

Doscher v Sobel & Co., LLC
2019 NY Slip Op 31857(U)
June 27, 2019
Supreme Court, New York County
Docket Number: 650467/2015
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 39EFM

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DREW DOSCHER,

Plaintiff,

- v -

SOBEL & CO., LLC, and MCMILLAN, CONSTABILE, MAKER
AND PERRONE, LLP,

Defendants.

INDEX NO. 650467/2015

MOTION DATE 12/12/2018,
12/12/2018

MOTION SEQ. NO. 003 004

DECISION AND ORDER

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HON. SALIANN SCARPULLA:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 139, 140, 141, 142

were read on this motion to/for JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 004) 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173

were read on this motion to/for DISMISS

In this action seeking damages for breaches of contract and fiduciary duty, defendants Sobel & Co., LLC (“Sobel”) and McMillan, Constabile, Maker and Perrone, LLP (“MCMP,” collectively, “Defendants”) each move for summary judgment dismissing the complaint.

Background

In June 2009, Plaintiff Drew Doscher (“Doscher”) and non-party Michael Meyer (“Meyer”) were employed at non-party Seaport Group Securities, LLC (“Seaport”); in

2010, Doscher and Meyer were allegedly offered partnership positions and, thereafter, were held out to be partners of Seaport.

Doscher maintains that, in 2012, Seaport asked him and Meyer to execute certain documents to formalize their partnership. Doscher allegedly directed MCMP – who he maintains were his personal trust and estate and business attorneys – to investigate Seaport’s financial, reporting, and compliance functions (the “Investigation”).¹

According to Doscher, it was his understanding that he was being simultaneously represented by his personal attorney at the time, Kieran Conlon, Esq. (“Conlon”), and MCMP in the Investigation and that MCMP was also representing Meyer. In March 2012, an MCMP attorney allegedly recommended that Doscher and Meyer retain Sobel (a forensic accounting firm) to assist in the Investigation.

Sobel sent MCMP an engagement letter (“Agreement”) dated April 3, 2012, which was signed by MCMP, Meyer, and Doscher. The Agreement defines the term “Potential Members” as Meyer and Doscher and the term “Company” as Seaport; although the Agreement contains the terms “Client” and “Clients,” neither is defined. The Agreement provides that Sobel was retained by MCMP “solely to assist the Potential Members in reviewing certain reporting and compliance aspects of the Company.”

Pursuant to the Agreement, Sobel would submit to MCMP a report of its findings on Seaport based on the financial and tax information provided to it by Seaport and using the criteria and procedures selected by the Potential Members. Sobel’s work was to “be

¹ Seaport allegedly agreed to pay the costs and expenses incurred in the Investigation.

conducted in accordance with attestation standards established by the American Institute of Certified Public Accountants” (“AICPA”). Sobel would then “submit a report listing the procedures performed and [its] findings,” which “is intended solely for the use of [MCMP], the Clients and [Conlon], counsel for Mr. Drew Doscher, and should not be used by anyone other than these specified parties.”² Sobel subsequently requested categories of documents from Seaport; Seaport responded to this request by making three separate document productions.

In or around December 2012, a dispute arose between Doscher and Seaport and Meyer, which resulted in Doscher being terminated from Seaport. Thereafter, Doscher commenced a FINRA arbitration (“Arbitration”) in which he sought, *inter alia*, a distribution of his partnership equity in Seaport. In September 2013, while the Arbitration was pending, Doscher requested from Sobel its copies of files pertaining to all matters covered by the Agreement, including the documents that Sobel relied on in its review of Seaport (the requested information is referred to as “Documents”), to demonstrate the value of his equity interest in Seaport. Sobel refused to provide the Documents to Doscher without either MCMP’s consent or a subpoena. MCMP refused to authorize Sobel to release of the Documents to Doscher.

On October 22, 2014, the Arbitration panel issued an award granting Doscher, *inter alia*, \$2,289,774 as the value of his equity interest in Seaport (“Award”). According

² The Agreement also provides that it is Sobel’s “understanding that the Potential Members will be responsible for the payment of [its] fees and reimbursement of [its] out-of-pocket expenses.”

to Doscher, Defendants' refusal to disclose the Documents to Doscher enabled Seaport to produce allegedly false accounting information in the Arbitration, which the Arbitration panel relied upon in valuing Doscher's equity. Doscher maintains that the Documents would have established that Doscher's equity interest exceeded \$15 million.

Doscher petitioned the United States District Court for the Southern District of New York to vacate the portion of the Award valuing his equity interest because the Arbitration panel failed to require the production of the Documents, which Doscher did not subpoena during the Arbitration. *See Doscher v Sea Port Group Sec., LLC*, Case No. 15-CV-384. Noting "the substantial deference owed to an arbitrator in handling procedural matters and rendering a decision on the merits," the court denied Doscher's petition because Doscher failed to "establish[] any of the limited grounds for vacating or modifying the Award." *Doscher v Sea Port Group Sec., LLC*, 2017 IER Cases 435703 (SDNY 2017), *affd*, 752 Fed Appx 102 (2d Cir 2019).

In February 2015, Doscher commenced this action against Defendants, alleging causes of action for breach of contract and breach of fiduciary duty. The complaint alleges that Doscher was represented by Defendants in the Investigation and was a party to the Agreement. Defendants allegedly breached the Agreement and their fiduciary duties owed to Doscher by refusing to provide Doscher with, or authorize the release of, the Documents. Defendants' refusal to disclose the Documents to Doscher allegedly enabled Seaport to produce false accounting information in the Arbitration, which the Arbitration panel relied upon in valuing Doscher's equity interest. Defendants now

each move for summary judgment dismissing the complaint for Doscher's failure to raise an issue of fact as to either of his claims.

Discussion

The party moving for summary judgment "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case," *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985) (citations omitted). Once the movant has established its prima facie entitlement to summary judgment, the burden shifts to the opposing party "to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact." *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986) (citations omitted).

Breach of Contract Cause of Action

To establish a breach of contract plaintiff must prove the "existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages." *Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 (1st Dept 2010). Defendants argue that Doscher's breach of contract claim fails as a matter of law because he cannot show that he was a party to the Agreement, or that either Sobel or MCMP breached the Agreement.

a. Sobel

Sobel first argues that the breach of contract cause of action must be dismissed against it because Doscher is neither a party to, nor an intended beneficiary of, the Agreement. To establish this, Sobel submits an affidavit of Darryl Neier ("Neier"), a

partner of Sobel. Neier avers that Sobel was retained by MCMP to assist in reviewing reporting and compliance matters related to Seaport and its affiliates and relies on the Agreement and an affidavit submitted of MCMP partner William J Foster, IV, Esq. (“Foster”). Foster avers that MCMP only represented Meyer in the Investigation and that Doscher was represented solely by Conlon.

In opposition, Doscher relies on the Agreement to establish that he was a signatory to the Agreement and argues that even if not a party, he was an intended beneficiary of the Agreement. Doscher argues that this representation is reflected in the Agreement because it refers to both him and Mayer as “Clients.”

“A non-party may sue for breach of contract only if it is an intended, and not a mere incidental, beneficiary” *LaSalle Nat. Bank v Ernst & Young LLP*, 285 AD2d 101, 108 (1st Dept 2001) (citation omitted). The non-party “will be deemed an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties . . . [and] the circumstances indicate that the promise intends to give the beneficiary the benefit of the promised performance.” *Id.* (citations and quotation marks omitted).

The Agreement was plainly executed by Doscher. Although the first paragraph of the Agreement states that “[Sobel is] pleased to confirm [its] understanding of the nature and limitations of the services [it is] to provide for [MCMP],” the Agreement also provides that “[t]his engagement is solely to assist the Potential Members in reviewing certain reporting and compliance aspects of the Company.” Notably, the Agreement

provides that Sobel's "report listing the procedures performed and [its] findings," "is intended solely for the use of [MCMP], the Clients and [Conlon], counsel for Mr. Drew Doscher, and should not be used by anyone other than these specified parties." The term "Clients" is not defined in the Agreement and may include Doscher himself.

Based upon a review of the Agreement and conflicting affidavits, genuine issues of fact remain as to whether Doscher was a party to the Agreement; at the very least, the Agreement could support the conclusion that Doscher was an intended beneficiary. *Cf. LaSalle Nat. Bank*, 285 AD2d at 108-09.

Next, Sobel argues that even if Doscher were a party to the Agreement, Doscher cannot establish a *prima facie* case for breach of contract because Sobel did not breach the Agreement by failing to disclose Documents. Specifically, the Agreement states:

All records and information [Sobel] receives will be held in the strictest of confidence and [Sobel] agrees that all of the work-product that [Sobel] generates will belong to and be the property of Sobel and [MCMP]. [Sobel] will not disclose to anyone, without [MCMP's] written permission, the nature or content of any such oral or written communication. In addition, [Sobel] agree[s] that [it] will not permit inspection of any papers or documents without [MCMP's] permission in advance. However, [Sobel is] free to produce such materials to any third person, if there is a direction to do so by a court of competent jurisdiction.

Doscher argues that, notwithstanding the foregoing clause, Sobel breached the Agreement, because Sobel was obligated "to apply the agreed-upon procedures [to] be conducted in accordance with attestation standards established by the [AICPA]."

Doscher submits some of AICPA's attestation standards and argues that they require Sobel to maintain information obtained and conclusions reached to enable its client to

evaluate the information obtained and results. Sobel allegedly violated this obligation by failing to disclose the Documents to Doscher, in breach of the Agreement.

Because “conflicting contract provisions should be harmonized, if reasonably possible, so as not to leave any provision without force and effect,” *Natixis Real Estate Capital Tr. 2007-HE2 v Natixis Real Estate Holdings, LLC*, 149 AD3d 127, 133-34 (1st Dept 2017) (citation and quotation marks omitted), the provision relied upon by Sobel may be read as pertaining to the disclosure of the Documents to third parties, not to parties to the Agreement. This interpretation would harmonize Sobel’s confidentiality obligation with its obligation to comply with AICPA attestation standards. Because questions remain as to whether Doscher was a party to the Agreement, and whether the Agreement requires Sobel to disclose the Documents, Sobel has failed to establish as a matter of law that it did not breach the Agreement by failing to disclose the Documents.

Finally, Sobel argues that Doscher’s damages are speculative, however, Sobel failed to meet its initial burden of establishing that Doscher’s claimed damages are so speculative that dismissal as a matter of law is required. *See Iannucci v Kucker & Bruh, LLP*, 161 AD3d 959, 960 (2d Dept 2018) (“The defendants’ styling of the plaintiffs’ damages theory as ‘speculative’ was merely an effort to point out gaps in the plaintiff’s proof, which was insufficient to meet the defendants’ burden as the party moving for summary judgment.” (citations omitted)).

For the reasons stated above, the portion of Sobel’s motion for summary judgment dismissing the breach of contract cause of action is denied.

b. MCMP

MCMP argues that the breach of contract cause of action must be dismissed because Doscher is neither MCMP's client nor a party to the Agreement. Because there was no attorney-client relationship or contractual privity between Doscher and MCMP, MCMP argues that it did not have a contractual duty that would require it to authorize Sobel to release the Documents to Doscher. The portion of MCMP's motion seeking dismissal of the breach of contract cause of action because Doscher is not a party to the Agreement is denied for the reasons set forth above.

To establish that Doscher was not MCMP's client, MCMP relies on the Agreement – which states that Doscher was being represented by Conlon – and the Foster Affidavit in which Foster avers that MCMP only represented Meyer in the Investigation. In his affidavit, Foster submits an unsigned engagement letter³ dated May 1, 2009 – which is addressed from a different MCMP attorney to Meyer – and argues that because it did not execute a similar engagement letter with Doscher, this proves that MCMP only represented Meyer in the Investigation.

In opposition, Doscher submits an affidavit in which he asserts that he was being simultaneously represented by MCMP and Conlon in the Investigation. Doscher maintains that he directed MCMP to conduct the Investigation on his behalf. Doscher maintains that he had fully paid all MCMP's bills incurred from its previous work on his

³ MCMP does not submit any evidence that this engagement letter to Meyer was ever sent by MCMP or received and accepted by Meyer.

behalf, and because he never received written notification that MCMP no longer represented him, he believed that he was still represented by MCMP.

Doscher further avers that Foster recommended that Doscher and Meyer retain Sobel to assist in the Investigation; however, during this time, Foster did not give any indication that MCMP was not acting in its capacity as Doscher's attorney. Allegedly, MCMP represented both Meyer and Doscher in the Investigation, and that as part of this representation, MCMP, Meyer, and Doscher executed the Agreement with Sobel.

Here, the Agreement's reference to Doscher being represented by Conlon (not a signatory to the Agreement) does not conclusively establish that Doscher was not *also* being represented by MCMP. Moreover, although MCMP maintains that no engagement letter exists that would establish an attorney-client relationship with Doscher, "an attorney-client relationship may exist in the absence of a retainer or fee." *Gardner v Jacon*, 148 AD2d 794, 795 (3d Dept 1989) (citation omitted). "Formality is not essential to create a legal services contract. Therefore, it is necessary to look to the words and actions of the parties to ascertain if an attorney-client relationship was formed." *Talansky v Schulman*, 2 AD3d 355, 358 (1st Dept 2003) (citations and quotation marks omitted).

Based on the parties' submissions and conflicting affidavits, genuine issues of fact exist as to the existence and scope of any attorney-client relationship between Doscher and MCMP. *See Asabor*, 102 AD3d at 527.

MCMP's remaining argument – that did not have a contractual obligation that would require it to authorize Sobel to release the Documents to Doscher – depends on the non-existence of privity or a contractual relationship. However, questions of fact remain regarding the existence and scope of the relationship. Therefore, the portion of MCMP's motion seeking dismissal of the breach of contract cause of action is denied.

Breach of Fiduciary Duty Cause of Action

The elements required to establish a breach of fiduciary duty include: (1) the existence of a fiduciary relationship; (2) misconduct; and (3) damages directly caused by the misconduct. *Pokoik v Pokoik*, 115 AD3d 428, 429 (1st Dept 2014) (citation omitted).

a. MCMP

MCMP argues that the breach of fiduciary cause of action should be dismissed because there was no attorney-client relationship and therefore no fiduciary duty owed to Doscher. MCMP also argues that even if an attorney-client relationship existed, MCMP did not have a fiduciary duty to authorize the disclosure of documents to Doscher because it was not in contractual privity with Doscher. However, as explained above, genuine issues of fact exist as to whether there was an attorney-client relationship or whether MCMP and Doscher were in contractual privity, therefore the portion of MCMP's motion seeking dismissal of the breach of fiduciary cause of action against it is denied.

b. Sobel

Sobel argues that the breach of fiduciary cause of action should be dismissed because Doscher was not Sobel's client,⁴ but even if an accountant-client relationship did exist, dismissal would still be required because Doscher only alleges a conventional accountant-client business relationship, which is not a fiduciary relationship.

In opposition, Doscher argues that the course of representation set forth in the Agreement gives rise to a fiduciary relationship between Doscher and Sobel because Doscher retained Sobel to advise him in the Investigation, not to perform bookkeeping services. Doscher also argues that a fiduciary relationship exists because Sobel knowingly participated in MCMP's alleged breach of fiduciary duty by knowing of and being complicit in MCMP's failure to authorize the release of the Documents.

"A conventional business relationship, without more, does not become a fiduciary relationship by mere allegation." *Friedman v Anderson*, 23 AD3d 163, 166 (1st Dept 2005) (citation and quotation marks omitted). "The duty owed by an accountant to a client is generally not fiduciary in nature," *Bitter v Renzo*, 101 AD3d 465 (1st Dept 2012) (citation omitted), "except where the accountants are directly involved in managing the client's investments." *Caprer v Nussbaum*, 36 AD3d 176, 194 (2d Dept 2006) (citations omitted).

Here, Sobel has met its initial burden of establishing the absence of a fiduciary relationship between itself and Doscher. Doscher alleges that he retained Sobel by executing the Agreement. The Agreement states that Sobel was retained "solely to assist

⁴ For the reasons stated above, questions of fact exist as to whether Doscher was Sobel's client.

the Potential Members in reviewing certain reporting and compliance aspects of the company.” Nothing in the complaint or in Doscher’s opposition to the motion demonstrates the existence of a fiduciary relationship between Doscher and Sobel.

Doscher failed to raise a triable issue of fact as to the existence of a fiduciary relationship. Doscher’s argument that a fiduciary relationship was created because Sobel was retained to provide advice rather than bookkeeping is without merit. *See Friedman*, 23 AD3d at 166 (“providing financial advice may be within the scope of an accountant’s duties, and so within the definition of a conventional business relationship”).⁵ Likewise, Doscher’s argument that Sobel’s knowledge of and complacency in MCMP’s alleged breach of fiduciary duty creates a fiduciary relationship between Sobel and Doscher is unavailing, and the cases Doscher cites in support pertain to causes of action for aiding and abetting a breach of fiduciary duty.⁶ Therefore, the portion of Sobel’s motion seeking dismissal of the breach of fiduciary cause of action against it is granted.

I have considered all of the parties’ remaining arguments and find that they would not change my determinations. In accordance with the foregoing, it is hereby

⁵ The cases relied on by Doscher are inapplicable to the facts here. *Cf. Lavin v Kaufman, Greenhut, Lebowitz & Forman*, 226 AD2d 107, 108 (1st Dept 1996) (fiduciary relationship alleged between plaintiff and “her accountant, who made all investment decisions for her from 1976 to 1992, and she always followed his advice and routinely signed whatever financial or tax documents he suggested”); *New York State Workers’ Compensation Bd. v Fuller & LaFiura, CPAs, P.C.*, 146 AD3d 1110 (3d Dept 2017).

⁶ *See, e.g. Caprer*, 36 AD3d at 194 (in the absence of a “direct fiduciary relationship the accountants may be held liable for aiding and abetting the breach of fiduciary duty”) (citations omitted)).

ORDERED that defendant McMillan, Constabile, Maker and Perone, LLP's motion for summary judgment dismissing the complaint against it is denied; and it is further

ORDERED that defendant Sobel & Co., LLC's motion for summary judgment dismissing the complaint against it is granted only to the extent that the second cause of action for breach of fiduciary duty against Sobel & Co., LLC is dismissed, and the motion is otherwise denied; and it is further

ORDERED that the parties appear for a status conference at 60 Centre Street, Room 208, on August 7, 2019 at 2:15 p.m.

This constitutes the decision and order of the Court.

Saliann Scarpulla
SALIANN SCARPULLA, J.S.C.

_____		DATE					
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER			<input type="checkbox"/>	SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN			<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE