Gerzog v Goldfarb
2020 NY Slip Op 32059(U)
June 26, 2020
Supreme Court, New York County
Docket Number: 653432/2018
Judge: Joel M. Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 3EFM

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IRA GERZOG,

Plaintiff,

- v -

STEVEN GOLDFARB, SONIA HERNIA, HARVEY MIGDEN,

Defendant.

INDEX NO. 653432/2018

MOTION DATE 02/20/2020

MOTION SEQ. NO. 014

DECISION + ORDER ON MOTION

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 014) 334, 335, 336, 337, 338, 339, 340, 341, 356, 358

were read on this motion to DISMISS.

The case involves a bitter dispute between former law partners. The gravamen of the Amended Complaint is that one of the partners (Defendant Goldfarb) improperly siphoned off revenue from the firm – by paying personal expenses and making payments to his family members out of firm funds – so as to deprive Plaintiff Gerzog of his agreed-upon share of firm profits.

Defendant Migden, a certified public accountant, prepared tax returns for the partnership *and* for Gerzog. Gerzog alleges that Migden "played an integral role in Goldfarb's theft" by "disguising hundreds of thousands of dollars per year of Goldfarb's personal charges on the Firm credit cards and from the Firm's operating account as 'case preparation' expenses, and then erroneously writing these expenses off the Firm's income so that Plaintiff would believe the Firm's overall income – and thus Plaintiff's share – was substantially lower that it was." (NYSCEF 312 ¶3) ("Am. Compl.")). In the alternative, Gerzog alleges, "Migden was negligent in his preparation of the Firm's tax returns and Schedules K-1 by erroneously writing off much

of Goldfarb's personal spending as 'case preparation' expenses, and thus committed professional malpractice." (*Id.*)

Gerzog asserts claims against Migden for aiding and abetting Goldfarb's breach of fiduciary duty (Fourth Cause of Action), breach of fiduciary duty (Fifth Cause of Action), and professional malpractice (Sixth Cause of Action). Migden moves to dismiss those claims. For the reasons discussed below, Migden's motion is granted with respect to Gerzog's claim for professional malpractice and denied with respect to the remaining claims.

ANALYSIS

The standard for assessing a motion to dismiss is a familiar one. The Court must afford the Complaint a liberal construction, accept the factual allegations as true, and accord the plaintiff the benefit of every favorable inference. The Court's job is to determine whether the facts, as alleged, fit within any cognizable legal theory. (*See, e.g., Maddicks v Big City Properties, LLC*, 34 NY3d 116, 123 [2019]; *Leon v Martinez*, 84 NY2d 83, 87 [1994]; *Grassi & Co. v Honka*, 180 AD3d 564, 564 [1st Dept 2020]). Allegations that are "bare legal conclusions," or that are inherently incredible or flatly contradicted by documentary evidence, are not sufficient to withstand a motion to dismiss. (*See, e.g., Myers v Schneiderman*, 30 NY3d 1, 11 [2017]; *Doe v Bloomberg, L.P.*, 178 AD3d 44, 47 [1st Dept 2019]; *JFK Holding Co., LLC v City of New York*, 68 AD3d 477, 477 [1st Dept 2009]).

Aiding and Abetting Goldfarb's Breach of Fiduciary Duty

"A claim for aiding and abetting a breach of fiduciary duty requires: (1) a breach by a fiduciary of obligations to another, (2) that the defendant knowingly induced or participated in the breach, and (3) that plaintiff suffered damage as a result of the breach" (*Kaufman v Cohen*, 307 AD2d 113, 125 [1st Dept 2003] [citations omitted]). As relevant here, "[a] person

knowingly participates in a breach of fiduciary duty only when he or she provides 'substantial assistance' to the primary violator. Substantial assistance occurs when a defendant affirmatively assists, helps conceal or fails to act when required to do so, thereby enabling the breach to occur However, the mere inaction of an alleged aider and abettor constitutes substantial assistance only if the defendant owes a fiduciary duty directly to the plaintiff" (*id*. at 126).

Migden's assertions that Gerzog's allegations are based on "pure speculation" and that they lack evidentiary support are unavailing. Gerzog's allegations with respect to Migden's "knowing participation" are sufficiently granular to survive a motion to dismiss. Whether those allegations are true presents issues of fact that cannot be resolved at this stage.

Breach of Fiduciary Duty

Migden correctly points out that, in general, an accountant does not owe a fiduciary duty to her or his clients (*e.g.*, *Bitter v Renzo*, 101 AD3d 465 [1st Dept 2012]). However, "where the allegations include knowledge and concealment of illegal acts and diversions of funds and failure to withdraw in the face of a conflict of interest, . . . such a cause of action against an accountant will be permitted to stand" (*Nate B. & Frances Spingold Found. v Wallin, Simon, Black and Co.*, 184 AD2d 464, 465-466 [1st Dept 1992]).

In *Nate B.*, the plaintiff (a not-for-profit charitable organization) alleged that its director/chief administrative officer "misappropriated or caused to be diverted to his law firm in excess of six million dollars." The defendant was an accounting firm that performed various services for the plaintiff and for the malefactor's law firm. In those circumstances, the court held that the plaintiff stated a viable claim for breach of fiduciary duty (*id.*; *see also Kanev v Turk*, 187 AD2d 395, 395 [1st Dept 1992] [complaint stated claim for breach of fiduciary duty against

accountant by alleging that accountant "intentionally deceived plaintiff" for the benefit of another client]).

Here, Migden simultaneously served as Gerzog's personal accountant and as accountant for the two-person law firm of which Gerzog was a partner. Accepting Gerzog's allegations as true, Migden was aware that Goldfarb was diverting money from the partnership and that such diversion had a direct and adverse impact on Gerzog's income as reflected in his personal income tax returns prepared by Migden. In those circumstances, Migden was burdened by the same conflict referenced in *Nate B.*, and, thus, is subject to a claim for breach of fiduciary duty.

Professional Malpractice

Gerzog has not stated a legally viable claim of professional malpractice. The alleged negligence, if any, occurred in connection with Migden's work for the law firm, not his work for Gerzog personally. (Am. Compl. ¶ 24 [asserting that "Migden was negligent in his preparation of the *Firm* tax returns"] [emphasis added]). Even assuming Migden undertook an obligation to search for malfeasance (rather than just preparing the firm's tax returns based on representations made by his client), and it is not clear that he did, the claim for professional malpractice in connection with preparing the firm's tax returns belongs to the firm, not to Gerzog personally. Any recovery from Migden would go to the firm, with Gerzog being entitled only to his partnership share.

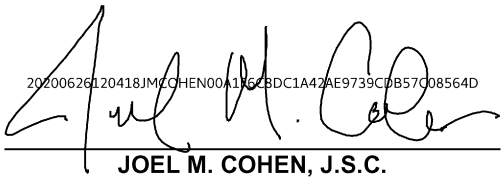
Migden owed a separate and independent duty of care to Gerzog with respect to the preparation of Gerzog's *individual* tax returns. But there is no allegation of negligence in performing that task, which reported the income that Gerzog actually received from the firm, which is not in dispute. Gerzog does not allege that he retained Migden to detect fraud or to audit the income and expenses reported by Goldfarb or the firm.

In sum, Gerzog's claims against Migden, if he has any, must be based on Migden's actual knowledge and active participation in Goldfarb's alleged malfeasance, as alleged in the Fourth and Fifth Causes of Action. Migden undertook no independent duty of care to Gerzog (in his individual capacity) to uncover and report such malfeasance.[1]

Accordingly, it is

ORDERED that Defendant Migden's motion to dismiss is granted with respect to the Sixth Cause of Action (Professional Malpractice) but otherwise denied.

This constitutes the decision and order of the Court.



6/26/2020
DATE

JOEL M. COHEN, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE

[1] Gerzog's reliance on *Benedict v. Whitman Breed Abbott & Morgan*, 282 AD2d 416 [2d Dept. 2001] is misplaced. On the particular facts of that case, the court found that one "equal partner" could assert a claim against a law firm that participated in "wrongdoing" with the other equal partner to "recover its own damages." *Id*. at 418. The Court does not view that case as broadly changing longstanding law with respect to the difference between individual and derivative claims. Here, Gerzog (who was not an "equal partner") is seeking to recover for Migden's alleged negligence in preparing the firm's tax returns. His professional malpractice claim presupposes, as an alternative ground for relief, that Migden was *not* involved in "wrongdoing" with Goldfarb, only that he should have uncovered the wrongdoing. Accordingly, *Benedict* is inapposite.