

First Mercury Ins. Co. v D'Amato & Lynch, LLP

2020 NY Slip Op 33020(U)

September 11, 2020

Supreme Court, New York County

Docket Number: 159185/2019

Judge: Lucy Billings

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

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FIRST MERCURY INSURANCE COMPANY,
acting through its agent, RIVERSTONE
CLAIMS MANAGEMENT, LLC,

Index No. 159185/2019

Plaintiff

- against -

DECISION AND ORDER

D'AMATO & LYNCH, LLP, LUKE LYNCH JR.,
ESQ., ARTURO BOUTIN, ESQ., MICHAEL
HAIG, DAVID BOYAR, ROBERT LANG, John
Does 1-20, and Jane Does 1-10,

Defendants

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LUCY BILLINGS, J.S.C.:

Defendant Boyar moves to dismiss the complaint against him pursuant to C.P.L.R. §§ 3016(b) and 3211(a)(1) and (7).

I. THE COMPLAINT

The complaint alleges that defendant D'Amato & Lynch, LLP, a law firm, entered an Engagement Agreement with plaintiff's agent RiverStone Claims Management, LLC, to represent plaintiff's insurance policyholders in defending litigation against them. In one action that D'Amato & Lynch handled, Cox v. Linco Restoration Corp., defendant Boutin, a partner of D'Amato & Lynch, advised plaintiff that the action was settled for \$1,000,000 to be paid by plaintiff. On October 15, 2018, plaintiff issued a check for that amount to "D'Amato & Lynch LLP Trust Account," Aff. of David A. Boyar Ex. A (V. Compl.) ¶ 20, to be held pending disbursement

to the settling plaintiff, but on October 17, 2018, D'Amato & Lynch deposited the check in the firm's operating account, where the firm used the funds for purposes other than to pay the plaintiff in settlement of the Cox action. Plaintiff in this action claims defendants' professional negligence, breach of fiduciary duty, conversion, unjust enrichment, fraudulent conveyance, violation of New York Judiciary Law § 487, and violation of the Rules of Professional Conduct.

II. BOYAR'S STATUS

The complaint's only allegation that mentions Boyar is that he "was a partner or limited partner of D & L." Id. ¶ 7. Upon his motion to dismiss pursuant to C.P.L.R. § 3211(a)(1) or (7), the court may not consider the facts alleged by his affidavits or his witness defendant Lynch's affidavit, Serao v. Bench-Serao, 149 A.D.3d 645, 646 (1st Dep't 2017); Calpo-Rivera v. Siroka, 144 A.D.3d 568, 568 (1st Dep't 2016); Asmar v. 20th & Seventh Assoc., LLC, 125 A.D.3d 563, 564 (1st Dep't 2015); City of New York v. VJHC Dev. Corp., 125 A.D.3d 425, 426 (1st Dep't 2015), but under § 3211(a)(1) the court may consider any admissible documents that these affidavits authenticate. Nomura Home Equity Loan, Inc., Series 2006-FM2 v. Nomura Credit & Capital, Inc., 30 N.Y.3d 572, 601 (2017); Goshen v. Mutual Life Ins. Co. of N.Y., 98 N.Y.2d 314, 326 (2002); Calpo-Rivera v. Siroka, 144 A.D.3d at 568. Lynch authenticates a Memorandum of Partnership Agreement as the

partnership agreement in effect on the date of his affidavit, February 14, 2018. This agreement designates George D'Amato and defendant Lynch as the only equity and general partners of D'Amato & Lynch and confers all authority over the firm's accounts with the general partners only. Although Boyar presents the same document, curiously he never authenticates it as in effect through his tenure at the firm ending in May 2019. Nor does the decision in Barrison v. D'Amato & Lynch, LLP, Index No. 653530/2011, 2019 WL 1502924 (Sup. Ct. N.Y. Co. Apr. 2, 2019), that Boyar also presents determine that the agreement remained in effect after February 14, 2018, or determine who were the general or limited partners or their respective responsibilities and authority after that date.

Nevertheless, the complaint itself alleges that, at the time of the transactions complained of, D'Amato & Lynch was a limited liability partnership; that Lynch was its sole general partner; that, as the general partner, he was responsible for the control and handling of trust account funds; and that he was the sole signatory on the trust account. New York Partnership Law § 26(b) provides that:

Except as provided by subdivisions (c) and (d) of this section, no partner of a partnership which is a registered limited liability partnership is liable or accountable, directly or indirectly . . . for any debts, obligations or liabilities of, or chargeable to, the registered limited liability partnership or each other, whether arising in tort, contract or otherwise, which are incurred, created or assumed by such partnership while such partnership is a

registered limited liability partnership, solely by reason of being such a partner or acting (or omitting to act) in such capacity or rendering professional services or otherwise participating (as an employee, consultant, contractor or otherwise) in the conduct of the other business or activities of the registered limited liability partnership.

Partnership Law § 26(c) and (d) provide that a limited partner is liable only "for any negligent or wrongful act or misconduct committed by him . . . or by any person under his . . . supervision and control," N.Y. P'ship Law § 26(c), or "to the extent at least a majority of the partners shall have agreed." N.Y. P'ship Law § 26(d). See Ederer v. Gursky, 9 N.Y.3d 514, 523 (2007); La Rock & Perez, LLP v. Song Joon Sim, 118 A.D.3d 473, 474 (1st Dep't 2014).

Therefore, as a partner other than a general partner and thus a limited partner, Boyar was not vicariously liable for the actions or omissions of D'Amato & Lynch, its general partner defendant Lynch, or its other limited partners or employees. Boyar potentially would be liable only if he was personally involved, or the partners had agreed to liability, which plaintiff does not allege. Ederer v. Gursky, 9 N.Y.3d at 523-24; La Rock & Perez, LLP v. Song Joon Sim, 118 A.D.3d at 474; Cooke-Zwiebach v. Oziel, 103 A.D.3d 558, 559 (1st Dep't 2013).

III. BOYAR'S CONDUCT

The complaint alleges no personal involvement by Boyar and thus gives no notice of the transactions or occurrences plaintiff

intends to prove to hold Boyar liable for any wrongful conduct. C.P.L.R. § 3013; Mid-Hudson Val. Fed. Credit Union v. Quartararo & Lois, PLLC, 31 N.Y.3d 1090, 1091 (2018); Herrmann v. CohnReznick LLP, 155 A.D.3d 419, 419 (1st Dep't 2017); Candelario v. Teperman, 15 A.D.3d 204, 205 (1st Dep't 2005). The complaint alleges that defendant Boutin handled the Cox action; as set forth above, advised plaintiff that the action was settled for \$1,000,000 to be paid by plaintiff; requested the funds from plaintiff; and received its check for that amount. The complaint further alleges that "D & L" deposited the check into the firm's operating account, Boyar Aff. Ex. A (V. Compl.) ¶ 21; that defendant Haig, the firm's comptroller "made the actual deposit," id. ¶ 26; and that Boutin also "handled the check, negotiated the Check and handled the funds along with Comptroller Haig." Id. ¶ 59. Finally, the complaint alleges that Daniel Lynch, defendant Lynch's brother, later admitted that the check had been deposited into the firm's operating account. The complaint does not allege that Boyar participated in any of this conduct or supervised Boutin, Haig, or anyone else at D'Amato & Lynch who participated.

Yet plaintiff's attorney suggests that Boyar handled and was responsible for the Cox action and participated in requesting, handling, and negotiating the \$1,000,000 check. The attorney further suggests that, after plaintiff's \$1,000,000 check was diverted and commingled into D'Amato & Lynch's operating account,

Boyar received compensation, distributions, or other payments from those funds. None of these suggestions, however, finds a sliver of support in the complaint or in any admissible evidence that plaintiff might offer to supplement the complaint. See Nonnon v. City of New York, 9 N.Y.3d 825, 827 (2007); Cron v. Hargro Fabrics, 91 N.Y.2d 362, 366 (1998); US Suite LLC v. Barata, Baratta & Aidala LLP, 171 A.D.3d 551, 551 (1st Dep't 2019); Ray v. Ray, 108 A.D.3d 449, 452 (1st Dep't 2013).

Plaintiff nonetheless may rely on the documentary evidence that Boyar presents to support his motion. This evidence includes an email from Haig to RiverStone Claims Management's claims analyst Carmen Place, July 25, 2019; an email from Place to Haig, with a copy to Boyar, July 30, 2019; an email later that day from Place forwarding the earlier email to Boyar at a different email address; and a subsequent email that day from Boyar to Daniel Lynch. No one, not even plaintiff's attorney, indicates why Place sent to Boyar a copy of Place's email to Haig inquiring about the settlement funds more than nine months after the original transaction and two months after Boyar left D'Amato & Lynch. His departure from the firm, however, explains why Place needed to forward the copy, first sent to Boyar at the firm, to him at a different email address after Place contacted Boyar via his cellphone.

Plaintiff claims that, once Boyar learned from Place that

the plaintiff in the Cox action had not received the settlement funds, Boyer, as an attorney, was obligated to report D'Amato & Lynch's violation of Rule of Professional Conduct 1.15(a), 22 N.Y.C.R.R. § 1200.0 Rule 1.15(a), to an "authority empowered to investigate or act upon such violation." 22 N.Y.C.R.R. § 1200.0 Rule 8.3(a). See N.Y. P'ship Law § 3. Rule 1.15 prohibits an attorney from commingling or misappropriating funds belonging to another person or entity and being held by the attorney. 22 N.Y.C.R.R. § 1200.0 Rule 1.15(a). First, nothing in Place's email demonstrates that D'Amato & Lynch commingled or misappropriated funds belonging to another person or entity. At most, the email indicates that the plaintiff in the Cox action was claiming she had not received her settlement funds. Nor, as demonstrated below, does the complaint claim Boyar's violation of Rule of Professional Conduct 8.3(a). Under the circumstances, as an attorney who was no longer at D'Amato and Lynch, Boyar's email demonstrates that Boyar responded to and assisted plaintiff as fully as possible: he immediately notified Daniel Lynch at the firm of Place's inquiry, advised Daniel Lynch to respond to Place by the next morning, and advised Place that Boyar had so notified Daniel Lynch.

Finally, the complaint admits that plaintiff suffered no damages from any inaction by Boyar. See C.P.L.R. § 3013; Gordon v. ROL Realty Co., 150 A.D.3d 466, 467 (1st Dep't 2017). The

complaint alleges that, by August 1, 2019, plaintiff had received a response from Daniel Lynch, who admitted that the check had been deposited into the firm's operating account, and plaintiff issued a written demand to D'Amato & Lynch for the \$1,000,000.

In sum, the complaint alleges nothing more about Boyar than the fact that he was a limited partner of D'Amato & Lynch. Plaintiff neither supplements the complaint with any admissible evidence of Boyar's involvement in misconduct, see C.P.L.R. § 3013; High Definition MRI, P.C. v. Travelers Cos., Inc., 137 A.D.3d 602, 603 (1st Dep't 2016), nor claims a need for disclosure to oppose Boyar's motion to dismiss the claims against him. See C.P.L.R. § 3211(d).

IV. THE SPECIFIC CLAIMS

Regarding plaintiff's claim for professional negligence, plaintiff concedes the absence of an attorney-client relationship with Boyar, but then fails to allege any "special circumstances" that would impose liability on Boyar in the performance of his attorney services. Good Old Days Tavern v. Zwirn, 259 A.D.2d 300, 300 (1st Dep't 1999); Town Line Plaza Assocs. v. Contemporary Props., 223 A.D.2d 420, 420 (1st Dep't 1996). See Alphas v. Smith, 147 A.D.3d 557, 558 (1st Dep't 2017). The complaint alleges as "special circumstances" that D'Amato & Lynch, in carrying out its Engagement Agreement to represent plaintiff's policyholders in defending actions against them,

accepted trust funds to be held in escrow for the benefit of the plaintiff in one of those actions and undertook to adhere to the Rules of Professional Conduct in handling those funds. Yet the complaint nowhere alleges that Boyar, in carrying out that Engagement Agreement, accepted trust funds to be held in escrow for the benefit of anyone and mishandled those funds in violation of the Rules of Professional Conduct, let alone details the circumstances amounting to his breach of trust. C.P.L.R. § 3016(b); RSSM CPA LLP v. Bell, 162 A.D.3d 554, 555 (1st Dep't 2018); Herrmann v. CohnReznick LLP, 155 A.D.3d at 429. In fact, the complaint alleges only that defendant Lynch was the managing or supervising attorney, general partner, or signatory of the trust account whom the Rules of Professional Conduct required to supervise the firm's other attorneys and other employees in maintaining the separation and integrity of funds to be placed in escrow. Therefore the court dismisses plaintiff's first claim against Boyar, whether for legal malpractice or for other negligence.

To support plaintiff's claim for breach of a fiduciary duty, the complaint alleges the same operative facts as for the professional negligence claim. Therefore these facts do not implicate Boyar in a breach of fiduciary duty any more than they implicate him in professional negligence. Plaintiff fails to show that Boyar undertook any duty to act for plaintiff regarding

the settlement of the Cox action or the receipt, deposit, or disposition of the proceeds of plaintiff's check for \$1,000,000. Moreover, because plaintiff's claim for breach of a fiduciary duty relies on the same factual allegations and seeks the same \$1,000,000 as plaintiff's professional negligence claim, the court must dismiss plaintiff's breach of fiduciary duty claim against Boyar as duplicative of its legal malpractice claim. Roth v. Oster, 161 A.D.3d 433, 435 (1st Dep't 2018); Eurotech Constr. Corp. v. Fischetti & Pesce, LLP, 155 A.D.3d 437, 437 (1st Dep't 2017); Ullman-Schneider v. Lacher & Lovell-Taylor, P.C., 121 A.D.3d 415, 416 (1st Dep't 2014). See Cascardo v. Dratel, 171 A.D.3d 561, 562 (1st Dep't 2019).

Since plaintiff does not allege that Boyar ever touched or in any way exercised any control over the check or its proceeds, plaintiff also fails to show that Boyar interfered with its personal property to support its claim for conversion against him. Pappas v. Tzolis, 20 N.Y.3d 228, 234 (2012); Colavito v. New York Organ Donor Network, Inc., 8 N.Y.3d 43, 49-50 (2006); AGFA Photo USA Corp. v. Chromazone, Inc., 82 A.D.3d 402, 403 (1st Dep't 2011); Abacus Fed. Sav. Bank v. Lim, 75 A.D.3d 472, 473 (1st Dep't 2010). Even if the court might infer that Boyar somehow assumed possession of funds from D'Amato & Lynch's operating account, any such funds would not have been specifically identifiable as the funds intended to be placed in

escrow or paid to the plaintiff in the Cox action. McBride v. KPMG Intl., 135 A.D.3d 576, 580 (1st Dep't 2016); Lemle v. Lemle, 92 A.D.3d 494, 497 (1st Dep't 2012); Thys v. Fortis Sec. LLC, 74 A.D.3d 546, 547 (1st Dep't 2010); Republic of Haiti v. Duvalier, 211 A.D.2d 379, 384 (1st Dep't 1995). Nor would such circumstances raise any inference of Boyar's intentional taking or control of the funds as required to plead conversion. Pappas v. Tzolis, 20 N.Y.3d at 234; Colavito v. New York Organ Donor Network, Inc., 8 N.Y.3d at 49; AGFA Photo USA Corp. v. Chromazone, Inc., 82 A.D.3d at 403; Abacus Fed. Sav. Bank v. Lim, 75 A.D.3d at 473. Therefore the court dismisses plaintiff's third claim against Boyar, for conversion.

Plaintiff's claim for a violation of the Rules of Professional Conduct is not a claim this court may adjudicate. N.Y. Jud. Law § 90; Shapiro v. McNeil, 92 N.Y.2d 91, 97 (1998); Suttongate Holdings Ltd. v. Laconm Mgt. N.V., 173 A.D.3d 618, 619 (1st Dep't 2019); Cohen v. Kachroo, 115 A.D.3d 512, 513 (1st Dep't 2014); Art Capital Group, LLC v. Neuhaus, 70 A.D.3d 605, 607 (1st Dep't 2010). Moreover, Rule 1.15(a) that plaintiff claims defendants violated prohibits an attorney from commingling or misappropriating funds belonging to another person or entity and being held by the attorney. 22 N.Y.C.R.R. § 1200.0 Rule 1.15(a). Since plaintiff does not allege Boyar's involvement in the commingling or misappropriation of plaintiff's \$1,000,000,

plaintiff fails to show that Boyar violated the rule even were such a violation actionable. Therefore the court dismisses plaintiff's fourth claim against Boyar, for violation of the Rules of Professional Conduct.

Although an attorney's violation of Judiciary Law § 487(2) as plaintiff pleads is actionable, such a claim requires that the attorney "wilfully receive[d] any money . . . which he has not laid out" and then failed to return it. N.Y. Jud. Law § 487(2). Any claim based on Judiciary Law § 487 requires a showing of "egregious conduct or a chronic and extreme pattern of behavior," Facebook, Inc. v. DLA Piper LLP (US), 134 A.D.3d 610, 615 (1st Dep't 2015); Savitt v. Greenberg Traurig, LLP, 126 A.D.3d 506, 507 (1st Dep't 2015), and "will be dismissed if the allegations as to scienter are conclusory and factually insufficient." Facebook, Inc. v. DLA Piper LLP (US), 134 A.D.3d at 615. See Freeman v. Brecher, 155 A.D.3d 453, 454 (1st Dep't 2017). As plaintiff alleges no facts that show Boyar's wilful receipt of any money, this claim fails as well. C.P.L.R. § 3016(b); Fried v. Lehman Bros. Real Estate Assoc. III, L.P., 156 A.D.3d 464, 464-65 (1st Dep't 2017). Again, even were the court to infer that Boyar received funds from D'Amato & Lynch's operating account, plaintiff nowhere suggests a pattern of behavior or that those funds were not in exchange for expenses or for services of value that he had advanced. See Liebert v. Gelbwaks, 234 A.D.2d

164, 164 (1st Dep't 1996). Therefore the court dismisses plaintiff's fifth claim against Boyar, for violation of Judiciary Law § 487(2).

The complaint also pleads defendants' fraudulent conveyance under New York Debtor and Creditor Law §§ 273-79. Each of these statutes requires at minimum Boyar's participation in the conveyance alleged and a conveyance for less than fair consideration. Since plaintiff alleges neither Boyar's conveyance nor his receipt of any part of plaintiff's \$1,000,000, plaintiff fails to plead a claim against Boyar under these statutes. Once again, even were the court to infer that Boyar received funds from D'Amato & Lynch's operating account, as compensation for his services for example, plaintiff nowhere suggests that he received those funds for less than fair consideration. Carlyle, LLC v. Quik Park 1633 Garage LLC, 160 A.D.3d 476, 477 (1st Dep't 2018); RTN Networks, LLC v. Telco Group, Inc., 126 A.D.3d 477, 478 (1st Dep't 2015). See Uni-Rty Corp. v. New York Guangdong Fin., Inc., 140 A.D.3d 446, 447 (1st Dep't 2016). Therefore the court dismisses plaintiff's sixth claim against Boyar, for a fraudulent conveyance.

To sustain plaintiff's final claim against Boyar, for unjust enrichment, plaintiff must show that (1) he was enriched, (2) at plaintiff's expense, and (3) it is against equity and good conscience to permit him to retain what plaintiff seeks to

recover. Georgia Malone & Co., Inc. v. Reider, 19 N.Y.3d 511, 516 (2012); Mandarin Trading Ltd. v. Wildenstein, 16 N.Y.3d 173, 182 (2011); Schroeder v. Pinterest Inc., 133 A.D.3d 12, 26 (1st Dep't 2015). Boyar challenges plaintiff's showing of the first element of this claim, because plaintiff alleges that Boutin received, handled, and negotiated its check; that D'Amato & Lynch, through its comptroller Haig, deposited the check into the firm's operating account; and that Boutin and Haig handled the funds. Plaintiff never articulates, in its complaint or through any admissible evidence, how Boyar received anything or benefitted from that transaction so as to be unjustly enriched. Plaintiff does not allege that Boyar misappropriated any part of the \$1,000,000 for his personal purposes. Because plaintiff fails to show, through allegations of evidentiary facts, that Boyar personally was enriched or otherwise benefitted from plaintiff's transactions with D'Amato & Lynch, Boutin, or Haig, the court must dismiss the seventh claim, for unjust enrichment, against Boyar as well. Mandarin Trading Ltd. v. Wildenstein, 16 N.Y.3d at 183; Abacus Fed. Sav. Bank v. Lim, 75 A.D.3d 472, 473 (1st Dep't 2010).

V. DISPOSITION

The absence of factual allegations in the complaint or via admissible evidence supplementing the complaint that implicate Boyar in any misconduct other than through his status as a

limited partner of defendant D'Amato & Lynch, LLP, is fatal to plaintiff's claims against him. N.Y. P'ship Law § 26(b). For all the reasons explained above, the court grants defendant Boyar's motion to dismiss each of the complaint's claims against Boyar. C.P.L.R. §§ 3013, 3016(b), 3211(a)(1) and (7).

DATED: September 11, 2020



LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C.