Mehra v Morrison Cohen LLP
2020 NY Slip Op 33234(U)
October 2, 2020
Supreme Court, New York County
Docket Number: 159868/2019
Judge: O. Peter Sherwood

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

- X

SANJIV MEHRA, individually and
SAMRITA MEHRA, as trustee of the
SANJIV MEHRA 2014 IRREVOCABLE TRUST,

Plaintiffs,

-against-

MORRISON COHEN LLP, STEVEN M. COOPERMAN and DANIELLE C. LESSER,

Defendants.

- X

DECISION AND ORDER
Index No.: 159868/2019

Motion Sequence No.: 001

O. PETER SHERWOOD, J.:

I. Facts:

As this is a motion to dismiss, these facts are taken from the complaint (NYSCEF Doc. No. 9) and assumed to be true.

Plaintiffs Sanjiv Mehra, individually, and Samrita Mehra, as trustee of the Sanjiv Mehra 2014 Irrevocable Trust (the Trust), bring this suit against the law firm Morrison Cohen LLP (the Firm) and two of its partners, Steven Cooperman and Danielle Lesser. Mehra holds a minority membership interest in EOS Investor Holding Company LLC (Holding) through the Trust. Holding owns 70% of the membership interest and 100% of the preferred interests in The Kind Group, LLC (Kind) which owns EOS Products, LLC (Products). Mehra is co-CEO of Products, along with co-founder Jonathan Teller. Products is the primary operating entity of the consumer products business referred to as EOS, which sells lip balm, shaving cream, and lotions.

In 2011, Mehra owned no membership stake in the business. Teller agreed to sell Mehra a 15% membership interest in EOS, which would leave Teller owning 85% through other entities. They had an understanding that, if the business was successful, they would be equal partners. In 2011, the defendants prepared a purchase agreement for the transfer of the 15% interest and advised on the formation of Holdco, preparing the initial version of the Holdco operating agreement.

In 2014, the business was succeeding and Mehra and Teller consulted defendants on how to establish an equal partnership between the two of them, with equal voting rights, control, and sharing of distributions. Defendants proposed a plan for how to do that. After a private meeting

with Teller, defendants proposed a different method, by which Mehra would retain only a 15% membership interest but would be entitled to 50% of distributions after a certain threshold was met. Defendants, acting as plaintiffs' attorneys, told Mehra this would protect his interests and make the two equal partners. Mehra agreed and the Holding operating agreement was revised accordingly.

Plaintiffs allege, upon information and belief, that defendants participated in an October 2016 revision of the Holding and Kind operating agreements, resulting in the operating agreements which remain in effect today.

In 2019, Teller took some steps that harm plaintiffs' interests, including attempting to dissolve Holding and deprive Mehra of his half of the distributions. Mehra alleges, upon information and belief, that defendants advised Teller on how to oust Mehra and drafted some of the relevant documents. If Teller is successful, Mehra's voting rights over Kind's preferred interests will be reduced from 50% at Holding to 15% through the Trust's interest in Kind. This should not be possible, based on the counsel of defendants. There is currently an action in the Delaware Court of Chancery between plaintiffs and Teller to deem the scheme void and asserting claims for breach of fiduciary duty and breach of contract (the Delaware Action).

Plaintiffs assert claims for:

1) Malpractice against all defendants, as defendants failed to exercise the required degree of care in drafting the Holding operating agreement to protect Mehra's voting and control rights, and possibly also his economic rights.
2) Breach of fiduciary duty against all defendants, for recommending a change to the Holding operating agreement which favored Teller over Mehra and for advising Teller on how to deprive Mehra of his rights to the business.

II. Motion to Dismiss or Stay

Defendants argue the claims are time-barred and fail to state a cause of action, and, if they survive this motion, the case should be stayed pending resolution of the action in Delaware Chancery Court.

A. Malpractice Claim

An action for legal malpractice requires the plaintiff prove the attorney's negligence, which was the proximate cause of the loss sustained, and actual damages (*Reibman v Senie*, 302 AD2d 290, 290 [1st Dept 2003], *Between the Bread Rlty. Corp. v Salans Hertzfeld Heilbronn Christy &*

Viener, 290 AD2d 380 [1st Dept 2002], lv denied 98 NY2d 603 [2002], *Prudential Ins. Co. of Am. v Dewey, Ballantine, Bushby, Palmer & Wood*, 170 AD2d 108, 114 [1st Dept 1991] *affd*, 80 NY2d 377 [1992]). To show proximate cause, a plaintiff must demonstrate that but for the attorney's negligence, the plaintiff would either have prevailed in the underlying matter or would not have sustained damages (*Reibman*, 302 AD2d at 290, *Senise v Mackasek*, 227 AD2d 184 [1st Dept 1996]; *Stroock Stroock & Lavan v Beltramini*, 157 AD2d 590, 591 [1st Dept 1990]).

Defendants argue that, since almost all of the allegations of their malpractice were for events in or before 2014, the only conduct alleged within the three-year statute of limitations is their participation in the 2016 operating agreement revisions, which is alleged only upon information and belief. Invoices subpoenaed from EOS show legal services relating to the operating agreement were performed only by Allen & Overy, not defendants (Memo, NYSCEF Doc. No. 17, at 8-9). Accordingly, defendants argue any claims related to their work in 2014 is barred by the statute of limitations or superseded by the intervening counsel by Allen & Overy in 2016. Even if the Firm did work on the 2016 revisions, the provisions at issue here were in the 2014 originals, meaning that the 2016 work (if there was any) was not the proximate cause of plaintiffs' injuries.

To succeed on a motion to dismiss pursuant to CPLR § 3211 (a) (1), the documentary evidence submitted that forms the basis of a defense must resolve all factual issues and definitively dispose of the plaintiff's claims (*see 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]; *Blonder & Co., Inc. v Citibank, N.A.*, 28 AD3d 180, 182 [1st Dept 2006]). Plaintiffs correctly argue the Allen & Overy invoices do not constitute documentary evidence that the Firm did not provide legal services to the plaintiffs in 2016 (Opp, NYSCEF Doc. No. 29, at 6). Those invoices only show Allen & Overy provided services and do not prove definitively that the Firm did not. Plaintiffs have alleged upon information and belief that the Firm participated in the revisions to the Holding and Kind LLC operating agreements as late as October 10, 2016. Plaintiffs commenced this action on October 10, 2016. Accordingly, plaintiffs argue this suit is timely (*id.* at 6-7).

However, plaintiffs have not alleged damages from the alleged 2016 revision work by the defendants. Plaintiffs effectively allege defendants worked on the revisions and failed to correct the alleged 2014 malpractice. However, defendants allege they were injured by the "loss of voting power and control over business operations" (Opp at 20), which occurred when the operating

agreements were signed in 2014. Plaintiffs also note that "[h]ad Defendants exercised the appropriate degree of care in implementing their clients' request for an equal partnership, [the injuries] could not have happened" (*id.* at 10). Accordingly, the malpractice claim accrued in 2014. As far as plaintiffs allege the statute of limitations was tolled by the continuous representation doctrine, they have not alleged continuous representation. "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, and realistically cannot be expected to question and assess the techniques employed or the manner in which the services are rendered. 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 (*Shumsky v Eisenstein*, 96 NY2d 164, 167 [2001] [internal citations omitted]). "Application of the continuous representation . . . doctrine is nonetheless generally limited to the course of representation concerning a specific legal matter . . . . Instead, in the context of a legal malpractice action, the continuous representation doctrine tolls the Statute of Limitations only where the continuing representation pertains specifically to the matter in which the attorney committed the alleged malpractice (*id.* at 168 [internal citations omitted]). Plaintiffs have not alleged continuous representation, but two instances of representation. They have not alleged representation on this matter was continuous from 2014 through 2016. Accordingly, the malpractice claim is barred by the statute of limitations and fails as untimely.

B. Claim for Breach of Fiduciary Duty

Defendants contend that, as far as this claim is predicated on the allegations of a conflict of interest, the allegation is insufficient (Memo at 15). A conflict of interest is a violation of attorney ethical rules, but not, by itself, a breach of fiduciary duty. Defendants also contend any fiduciary duties to plaintiffs would have ended in 2014, making this claim untimely, since there is no allegation defendants used plaintiffs' confidential information against them (*id.* at 16). Defendants also argue the fiduciary duty claim is duplicative of the malpractice claim, so should be dismissed *(id.* at 17). As to the allegations regarding defendants' actions in 2019, defendants point out that Mehra also signed a waiver in the EOS Operating Agreement, acknowledging that professionals, such as defendants, were retained by the company and Mehra consented to their subsequently representing the members or their affiliates (Reply at 9-10).

Plaintiffs argue their breach of fiduciary duty claim is based on different facts, so is entirely different from the malpractice claim (Opp at 18). Plaintiffs allege defendants advised Teller regarding how he could implement the agreements to strip plaintiffs of their rights, a breach of their duty of loyalty to plaintiffs, which does not end with their attorney/client relationship (*id.* at 18-19). Plaintiffs also argue they have been injured by the "loss of voting power and control over business operations" in addition to legal fees and costs related to the Delaware action (*id.* at 20). Also, there may be further damages, depending on the outcome of that case.

Where the complaint against an attorney alleges breach of fiduciary duty and the claims are predicated on the same allegations and seek identical relief to the legal malpractice claim, the former claims should be dismissed as redundant of the malpractice claim (*see Ulico Casualty Co. v Wilson, Elser, Moskowitz, Edelman & Dicker*, 56 AD3d 1, 14 [1st Dept 2008][dismissing breach of contract, breach of fiduciary duty, aiding and abetting breach of fiduciary duty and tortious interference with contractual relations claims as duplicative of the malpractice cause of action]; *Nevelson v Carro, Spanbock, Kaster & Cuiffo*, 290 AD2d 399, 400 [1st Dept 2002][dismissing claims for breach of contract and breach of fiduciary duty as those claims were "predicated on the same allegations and seek relief identical to that sought in the malpractice cause of action"] *Sitar v Sitar*, 50 AD3d 667, 670 [2d Dept 2008];[affirming dismissal of causes of action alleging fraudulent misrepresentation and negligent misrepresentations "insomuch as those causes of action arise from the same facts as the cause of action alleging legal malpractice and do not allege distinct damages"]; and *Sage Rlty Corp. v Proskauer Rose*, 251 AD2d 35, 39 [1st Dept 1998] [breach of contract and fraudulent misrepresentation claims dismissed as redundant of malpractice claim]). Accordingly, as far as this claim is based on the defendant's conduct with relation to the 2014 operating agreements and the 2016 revisions, this claim is dismissed as duplicative of the malpractice claim.

As far as this claim is based on defendants' alleged actions in 2019, claiming a breach of fiduciary duty for representing Teller against plaintiffs' interests, "an attorney is prohibited from representing parties whose interests are adverse to his or her former client in matters that are substantially related" (*Kurman v Schnapp*, 73 AD3d 435, 436 [1st Dept 2010]). However, Mehta signed a waiver in the EOS operating agreement. The clause provides:

> "Each Member hereby acknowledges and recognizes that the Company has retained, and may in the future retain, the services of various professionals, including general and special legal counsel, . . . for the purposes of representing and providing services to the Company . . . . Each Member hereby acknowledges that such Persons may have represented and performed and currently and/or may in the future represent or perform services for certain of the Members or their Affiliates. Accordingly, each Member and the Company consents to the performance by such Persons of services for the Company and waives any right to claim a conflict of interest based on such past, present or future representation or services to any of the Members or their Affiliates."

EOS Operating Agreement, attached as Exhibit A to Complaint, NYSCEF Doc. No. 10, § 11.11). Accordingly, plaintiffs have waived the conflict, and this claim also fails.

Accordingly, it is hereby

ORDERED that the motion to dismiss the complaint is GRANTED and the case dismissed with costs and disbursements awarded to the defendants as calculated by the Clerk of the court.

This constitutes the decision and order of the court.

DATED: October 2, 2020 **E N T E R,**

O. P. Sherwood

O. PETER SHERWOOD, J.S.C.