Schoolman v McAuliffe
2020 NY Slip Op 34228(U)
December 21, 2020
Supreme Court, Suffolk County
Docket Number: 4311/2019
Judge: Sanford Neil Berland

COPY

SHORT FORM ORDER **INDEX NO.: 4311/2019**

SUPREME COURT - STATE OF NEW YORK
PART 6- SUFFOLK COUNTY

PRESENT:
Hon. Sanford Neil Berland, A.J.S.C.

WILLIAM SCHOOLMAN, PRO SE,

Plaintiff,

-against-

MICHAEL McAULIFFE,

Defendant..

ORIG. RETURN DATE: January 10, 2020
FINAL RETURN DATE: August 25, 2020
MOT. SEQ.#: 001 **MG; CASEDISP**

PLAINTIFF PRO SE:
WILLIAM SCHOOLMAN
26 Johns Road
Setauket, New York 11733

DEFENDANT'S ATTORNEY:
MILBER MAKRIS PLOUSADIS & SEIDEN, LLP
1000 Woodbury Road, Suite 402
Woodbury, New York 11747

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion by defendant dated November 20, 2019 and supporting papers; (2) Response to Motion to Dismiss by plaintiff dated May 24, 2020; and (3) Reply Affirmation by defendant dated August 24, 2020 it is

ORDERED, that defendant's motion to dismiss the complaint herein pursuant to CPLR 3211 is **GRANTED**.

This action arises out of three petitions initially brought under Chapter 11 of the United States Bankruptcy Code by, respectively, by Hampton Transportation Ventures, Inc. (HTV), Schoolman Transportation System, Inc. (STS) and 1600 Locust Avenue Associates, LLC (1600) (collectively, the debtor companies), which subsequently were converted to a consolidated Chapter 7 Bankruptcy proceeding and led to the liquidation of the three companies. Plaintiff was the founder, president and CEO of the debtor companies, and defendant, an attorney, represented the debtor corporations in the bankruptcy proceedings. Plaintiff commenced this action by filing a summons with notice on August 16, 2019, and served the complaint on defendant upon demand on October 6, 2019. Plaintiff seeks to allege claims against the defendant for breach of fiduciary duty, legal malpractice, fraud and honest services fraud arising from his representation of the debtor companies in the bankruptcy proceedings.

Defendant now moves to dismiss the complaint against him pursuant to CPLR 3211 [a][1], [a]3] and [a][7], asserting that plaintiff lacks the capacity to prosecute the claims he seeks to assert in his complaint, has failed to state any legally cognizable cause of action against him and, in addition, has failed to plead fraud with the requisite specificity.

In support of the motion, defendant proffers, *inter alia*, the pleadings, the docket from the bankruptcy proceedings, retainer agreements between defendant and the debtor companies, a letter from defendant to plaintiff setting forth a proposed strategy in the bankruptcy proceedings, and a copy of a Notice of Appearance by counsel on behalf of plaintiff dated February 27, 2017 and filed with the bankruptcy court.

"[I]n considering a motion to dismiss pursuant to CPLR § 3211 [a] [7], the court should 'accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory'" (***Sinensky v Rokowsky***, 22 A.D.3d 563,564, 802 NYS2d 491 [2d Dept. 2005] quoting ***Leon v Martinez***, 84 N.Y.2d 83,87-88, 614 NYS2d 972 [1994]; ***Miglino v Bally Total Fitness of Greater N.Y., Inc.***, 20 NY3d 342, 351, 961 NYS2d 364 [2013]); ***Simos v. Vic-Armen Realty, LLC***, 92 A.D.3d 760, 938 NYS2d 609 [2d Dept. 2012]). However, the movant has come forward with evidentiary material for the court's consideration. "When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one, and, unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, again dismissal should not eventuate" (***Guggenheimer v Ginzburg***, 43 NY2d 268, 275, 401 NYS2d 182 [1977]; *see* ***"John Doe 1" v Board of Educ. of Greenport Union Free Sch. Dist.***, 100 AD3d 703, 705, 955 NYS2d 600, 287 Ed. Law Rep. 524 [2d Dept 2012]). Likewise, "[a] motion to dismiss pursuant to CPLR 3211(a)(1) will be granted only if the 'documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim' (***Fortis Fin. Servs. v. Fimat Futures USA***, 290 A.D.2d 383, 383, 737 N.Y.S.2d 40; *see Leon v. Martinez*, 84 N.Y.2d 83, 88, 614 N.Y.S.2d 972, 638 N.E.2d 511 . . .). '[I]f the court does not find [their] submissions 'documentary', it will have to deny the motion' (Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C3211:10 at 22)" (***Fontanetta v Doe***, 73 AD3d 78, 83-84 [2d Dept 2010]).

In substance, the complaint alleges as follows: The debtor companies started suffering financial reversals in 2008. In 2014, they were forced by a hedge fund that had purchased the companies' debt to hire a consultant. The consultant forced the companies into hard money loans to the companies' detriment, while enriching the consultant. Defendant learned of this from an SBA loan underwriter who was working with plaintiff and whose office was in the same building as defendant's office. Defendant told the underwriter that the plaintiff was the victim of

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[1] The complaint frequently conflates the plaintiff with the three companies he founded and over which he had presided. Nonetheless, it seems to be undisputed that, as alleged in Paragraph 14 of the complaint, that the defendant was hired to serve "as counsel to the Debtors."

"lender liability" and that he could help plaintiff with that and with Chapter 11. Plaintiff met with defendant and another lawyer who was introduced to him as an associate of defendant, and it was represented to plaintiff that defendant and the associate would file a lender liability lawsuit while the debtors were in Chapter 11. They further represented that they were well-versed in bankruptcy proceedings and would go "all-out" for their clients. Defendant never brought the lender liability lawsuit, did not prepare a reorganization plan or take the steps to facilitate a possible purchase of the debtor companies' assets pursuant to Section 363 of the Bankruptcy Code (a "363 sale") or follow up on interest expressed by other bus companies in purchasing plaintiff's companies. Defendant filed only a tepid response to the motion for the appointment of a Chapter 11 trustee, who, he alleges, was corrupt. The Trustee imposed a purportedly unnecessary 10% non-refundable deposit on a $5.5 million 363 offer, which proved prohibitive to the prospective 363 purchasers. The 363 sale never came to fruition, and the debtor companies were, consequently, forced to liquidate. Plaintiff alleges that the defendant deliberately timed the bringing of an order to show cause, aimed at preventing the debtor companies from being shut down, so that the bankruptcy judge would not be able to see the papers until two days after the debtor companies were, in fact, shut down. Further, according to plaintiff, in the order to show cause, defendant stated that he was only making the motion because his client asked him to. Defendant failed to bring to the court's attention various infractions by the trustee. Although defendant's associate was supposed to represent the debtor companies, he was not approved to do so under bankruptcy court's rules, so his involvement had to remain secret. Defendant basically did nothing, plaintiff alleges, to advocate zealously on behalf of the debtor companies.

In support of his motion, defendant contends, *inter alia*, that plaintiff lacks the capacity to sue for legal malpractice as any such claims here, whether they accrued before or after the bankruptcy proceedings were commenced, belong to the debtors' bankruptcy estates; that plaintiff lacks standing to bring this action because there was no attorney-client relationship between plaintiff and defendant that would afford him such standing; that as to the allegations of fraud, the complaint further fails to meet the specificity requirement of CPLR 3016; that the complaint fails properly to set forth with sufficient specificity facts that make out the elements of the causes of action alleged in the complaint; and that as to the cause of action for honest services fraud, there is no private right of action under the criminal statute upon which plaintiff relies.

Defendant maintains that he represented the debtor companies and not plaintiff individually in the underlying bankruptcy proceedings. In support of the motion, he proffers copies of his retainer agreement with each of the three corporation. He proffers, as well, a Notice of Appearance by the law firm that represented plaintiff individually in the proceedings. Although plaintiff suggests that the fact that the retainer agreements proffered by defendant are not executed is "suspicious," he does not dispute that defendant had been retained by the corporations, and in fact, his complaint so alleges (see footnote 1, *infra*). Plaintiff claims that, although he did have an attorney who represented him individually, this is irrelevant to the current action since that representation occurred only after the Chapter 11 proceedings had been

converted to a consolidated Chapter 7 proceeding, after the businesses had been "closed" and the damage about which he is complaining sustained.

"'Upon the filing of a voluntary bankruptcy petition, all property which a debtor owns, including a cause of action, vests in the bankruptcy estate,'" (***Burbacki v. Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara & Wolf, LLP***, 172 AD3d 1300, 1300, 99 NYS3d 671 [2d Dept 2019], *quoting* ***Keegan v. Moriarty-Morris***, 153 AD3d 683, 684 [2d Dept 2017], *citing* 11 USC § 541 [a][1]; ***In re Osborne***, 2013 WL 113177662, *2, 2013 US Dist LEXIS 190402, *5-6 {SDNY 2013]). Therefore, a plaintiff may not maintain a legal malpractice cause of action in his or her individual capacity relating to a bankruptcy. The right to sue is only exercisable by the trustee in bankruptcy, whether the claim asserted in the complaint accrued prior to the filing of the bankruptcy petition, or post-petition (*see* 11 USC § 541 [a][1]; ***Burbacki v. Abrams, Fensterman, Fensterman, Eiseman, Formato, Ferrara & Wolf, LLP***, *supra* 172 AD3d at 1300, *citing* ***Williams v. Stein***, 6 AD3d 197, 775 NYS2d 255 [1st Dept 2004], ***In re Osborne***, 2013 WL 11317662, *2-3, 2013 US Dist LEXIS 190402, *7-8, ***In re Alvarez***, 224 F3d 1273, 1275-1278 [11th Cir 2000]). Therefore, to the extent that plaintiff asserts claims for legal malpractice in connection with defendant's representation of the three companies, plaintiff lacks the capacity to sue as a matter of bankruptcy law.

"It is well-established that, with respect to attorney malpractice, absent fraud, collusion, malicious acts, or other special circumstances, an attorney is not liable to third parties, not in privity, for harm caused by professional negligence" (***Rovello v. Klein***, 304 AD2d 638, 638, 757 NYS2d 496 [2d Dept 2003] *citing* ***Conti v. Polizzotto***, 243 AD2d 672, 663 NYS2d 293 [2d Dept 1997]; ***Council Commerce Corp v. Schwartz, Sachs & Kamhi, P.C.,*** 144 AD2d 422, 534 NYS2d 1 [2d Dept 1988]; *see also* ***Estate of Schneider v. Finmann***, 15 NY3d 306, 308-309, 907 NYS2d 119 [2010]). Attorneys retained by a corporation do not have an attorney-client relationship with the corporation's principal (*see* ***Moran v. Hurst,*** 32 AD3d 909, 822 NYS2d 564 [2d Dept 2006]; ***Eurycleia Partners, LP v. Seward & Kissel LLP***, 12 NY3d 553, 883 NYS2d 147 [2009]; ***Griffin v. Anslow***, 17 AD3d 889, 793 NYS2d 615 [3d Dept 2005]; ***Kushner v. Herman***, 215 AD2d 633, 628 NYS2d 123 [2d Dept 1995]). The complaint, however, articulates no allegations that would cast defendant in liability to him or otherwise confer upon plaintiff the capacity to sue the defendant for legal malpractice.[2] Rather, the allegations in the complaint are focused on claimed failures by the defendant to take allegedly appropriate actions in the bankruptcy proceedings to prevent the liquidation of the debtor companies or to challenge certain allegedly improper or corrupt actions on the part of the trustee in connection with such

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[2] In paragraph 23 of his opposition to the motion, plaintiff claims that there are judgments against him on personal guarantees, but he does not allege any connection between those guarantees and the "hard money" loans of the debtor companies that he complains defendant failed to take action against or that the defendant was engaged by him individually to seek relief from personal guarantees plaintiff may have given.

liquidation. Indeed, the issues and objections alleged in the complaint are all in the nature of claims that belong to the debtor companies and not to plaintiff individually.

Accordingly, plaintiff has no standing to maintain against the defendant the claims he seeks to assert in this action. Therefore, defendant's motion to dismiss the complaint is granted in its entirety.

The court has considered the remaining contentions of the parties and finds that they do not require additional discussion or alter the determination above.

The foregoing constitutes the decision and order of the court.

Dated: 12/31/2020
Riverhead, New York

HON. SANFORD NEIL BERLAND, A.J.S.C.

XX **FINAL DISPOSITION** ____ **NON-FINAL DISPOSITION**