Dial Car Inc. v Tuch & Cohen, LLP
2021 NY Slip Op 30407(U)
February 10, 2021
Supreme Court, Kings County
Docket Number: 514138/20
Judge: Leon Ruchelsman

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL PART 8

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DIAL CAR INC.,

Plaintiff, Decision and order

- against - Index No. 514138/20

TUCH & COHEN, LLP, PIKE, TUCH & COHEN LLP, PIKE & PIKE P.C., ROBERTA PIKE, KENNETH TUCH and LAURENCE COHEN,

Defendants, February 10, 2021

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PRESENT: HON. LEON RUCHELSMAN

The defendants have moved pursuant to CPLR §3211 seeking to dismiss the plaintiff's complaint on the grounds essentially that it does allege any cause of action. The plaintiff opposes the motion. Papers were submitted by the parties and after reviewing all the arguments this court now makes the following determination.

The plaintiff is a black car livery service catering to high end clients in Brooklyn. In 2015 Yakov Guzman initiated a shareholder derivative action against Michael Kordonsky and Jeffrey Goldberg, members of the corporation on the grounds they wasted corporate assets. The defendants represented Dial in that proceeding. The complaint alleges the defendants, who should have championed the allegations of Guzman instead acted in ways which benefitted Kordonsky and Goldberg to the detriment of Dial. Specifically, the defendants agreed with a motion to dismiss that was filed by Kordonsky and Goldberg. Further, the defendants unsuccessfully opposed Guzman's motion to replead the complaint

and a further motion to dismiss the amended complaint.

Further, the complaint alleges the defendants negotiated retirement payments to Goldberg in violation of the By-Laws which require a shareholder vote. Moreover, the complaint alleges the defendants negotiated a general release in favor of Goldberg following the service of the Guzman complaint in violation of the By-Laws.

The complaint alleges the defendants engaged in five distinct conflicts of interest and have asserted causes of action for scheme to defraud, five distinct causes of action for malpractice, a claim for a violation of Judiciary Law §487, a claim for disgorgement, a claim for aiding and abetting a breach of fiduciary duty and a breach of a fiduciary duty.

The defendants have now moved seeking to dismiss the complaint on the grounds it fails to allege any cause of action. As noted, the plaintiff opposes the motion.

Conclusions of Law

"[A] motion to dismiss made pursuant to CPLR §3211[a][7] will fail if, taking all facts alleged as true and according them every possible inference favorable to the plaintiff, the complaint states in some recognizable form any cause of action known to our law" (AG Capital Funding Partners, LP v. State St. Bank and Trust Co., 5 NY3d 582, 808 NYS2d 573 [2005]). Whether

the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a pre-discovery CPLR 3211 motion to dismiss (see, EBC I, Inc. v. Goldman Sachs & Co., 5 NY3d 11, 799 NYS2d 170 [2005]).

The first cause of action really accuses the defendants of being involved in a conspiracy to commit fraud. Indeed, paragraph 105 of the complaint states that "Defendants conspired with Goldberg to defraud Dial" (id). However, conspiracy to commit fraud is not a cause of action (see, Agostini v. Sobel, 304 AD2d 395, 757 NYS2d 555 [2d Dept., 2003]). This is particularly true in this case where the plaintiff has not alleged anything other than conclusory allegations that the defendants were somehow involved in any fraud (MBF Clearing Corp., v. Shine, 212 AD2d 478, 623 NYS2d 204 [1st Dept., 1995]). The plaintiff is surely correct that to succeed upon a claim of fraud it must be demonstrated there was a material misrepresentation of fact, made with knowledge of the falsity, the intent to induce reliance, reliance upon the misrepresentation and damages (Cruciata v. O'Donnell & Mclaughlin, Esqs,149 AD3d 1034, 53 NYS3d 328 [2d Dept., 2017]). These elements must each be supported by factual allegations containing details constituting the wrong alleged (see, JPMorgan Chase Bank, N.A. v. Hall, 122 AD3d 576, 996 NYS2d 309 [2d Dept.,

2014]). The complaint in this case states that "upon information and belief, the participation and conspiracy by Defendants in the scheme to defraud Dial was accomplished by misrepresentation and/or concealment to the Board and shareholders of Dial: (1) misrepresenting that shareholders' approval was not necessary; (2) concealing from the Board/shareholders' that approval was necessary or that it was given; and/or (3) misrepresenting that that shareholder approval was necessary and such approval had been properly obtained" (see, Complaint ¶54). First, an allegation based upon 'information and belief' is "not sufficient to establish the necessary quantum of proof to sustain allegations of fraud" (see, Weinberg v. Kaminsky, 166 AD3d 428, 88 NYS3d 16 [1st Dept., 2018]). More importantly, the allegation does not provide the necessary detail outlining what precisely was stated to the shareholders, when such alleged misrepresentations took place and who made the misrepresentations. Therefore, the fraud allegations are conclusory and improperly pled. The motion seeking to dismiss the first cause of action is granted.

The plaintiff has withdrawn the fourth, fifth and sixth causes of action. Thus, the malpractice claims now involve only the second and third causes of action which relate to the defendants legal actions during the Guzman matter.

To succeed on a claim for legal malpractice it must be shown

the attorney failed to act with the "ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession" (Darby & Darby, P.C. v. VSI International, Inc., 95 NY2d 308, 716 NYS2d 378 [2000]). Those terms cannot be defined with precision but are rather fact specific and must be judged against the actual representation afforded the client in each particular case. Moreover, the client must further establish that the malpractice was a proximate cause of any loss sustained and the client must also demonstrate 'actual damages' (Prudential Insurance Company v. Dewey Ballantine, Bushby, Palmer & Wood, 170 AD2d 108, 573 NYS2d 981 [1st Dept., 1991]). The claim cannot be based upon an attorney's choosing of a reasonable, yet unsuccessful, strategy or course of action (Palazzolo v. Herrick, Feinstein, LLP, 298 AD2d 372, 751 NYS2d 401 [2d Dept., 2002]). Moreover, in Lindenman v. Kreitzer, 7 AD3d 30, 775 NYS2d 4 [1st Dept., 2004], the court held "a plaintiff's burden of proof in a legal malpractice action is a heavy one. The plaintiff must prove first the hypothetical outcome of the underlying litigation and, then, the attorney's liability for malpractice in connection with that litigation" (id).

It is further well settled that allegations of conflicts of interest without more do not support a cause of action for malpractice (Sumo Container Station Inc., v. Evans, Orr, Pacelli, Norton & Laffan, P.C., 278 AD2d 169, 719 NYS2d 223 [1st Dept.,

2000]).

Moreover, the entire allegation the defendants harmed the corporation when they sought to defeat the derivative claim cannot possibly be malpractice. As observed by the United Stated Supreme Court "the derivative form of action permits an individual shareholder to bring 'suit to enforce a corporate cause of action against officers, directors, and third parties'" (Kamen v. Kemper Financial Services Inc., 500 US 90, 111 S.Ct. 1711 [1991]). Business Corporation Law §626(c) states that no derivative lawsuit may be commenced unless the complaint alleges "with particularity the efforts of the plaintiff to secure the initiation of such action by the board or the reasons for not making the effort" (id). As the Supreme Court noted, for a stockholder to sue derivatively "he must make an earnest, not a simulated effort, with the managing body of the corporation, to induce remedial action on their part, and this must be made apparent to the court" (see, Hawes v. City of Oakland, 104 US 450, 14 Otto 450 [1881]). Thus, by its very nature a derivative lawsuit is against the corporate entity as well and there can be no malpractice seeking to dismiss a lawsuit the corporation believes is meritless. In any event, the motions proved unsuccessful thus the plaintiff cannot demonstrate any damages sustained as a result of the dismissal efforts. The plaintiff has voluntarily altered the damages sought, however, that does

not cure the fact the plaintiff cannot demonstrate any damages at all suffered as a result of trying, without success, to dismiss the Guzman lawsuit. Therefore, the motion seeking to dismiss the second and third counts of the complaint is granted.

Concerning Judiciary Law §487, it is well settled that to establish such a cause of action the plaintiff must present evidence an attorney acted "with intent to deceive" either the court or any party (see, Moormann v. Perini Hoerger, 65 AD3d 1106, 886 NYS2d 49 [2d Dept., 2009]). The allegations concerning the deception must be pled with particularity (Betz v. Blatt, 160 AD3d 696, 74 NYS3d 75 [2d Dept., 2018]). Moreover, the cause of action is only applicable if the conduct alleges took place in a proceeding where the plaintiff was a party (Barouh v. Law offices of Jason L. Abelove, 131 AD3d 988, 17 NYS3d 144 [2d Dept., 2015]). First, it must be noted that the Second Department no longer maintains a cause of action pursuant to Judiciary Law §487 based upon an attorney's egregious, extreme or chronic delinquent activities. Rather, "the only liability standard recognized in Judiciary Law §487 is that of an intent to deceive" (Dupree v. Vorhees, 102 AD3d 912, 959 NYS2d 235 [2d Dept., 2013]). Second, considering the intent to deceive, such intent can hardly be demonstrated. The complaint merely alleges in conclusory fashion that the defendants "have continuously consented to deceit or collusion, with the intent to deceive and harm Dial" (see,

Complaint, ¶157) without elaborating upon those allegations. The mere pursuant of the dismissal of the Guzman lawsuit can hardly be considered an intent to deceive the plaintiff. Further, since that is the only conduct alleged wherein Dial was a party in a pending action all of the other allegations of the complaint cannot sustain a cause of action in this regard. Therefore, the motion seeking to dismiss the seventh cause of action is granted. Moreover, since all the causes of action related to attorney misconduct as counsel have been dismissed the motion seeking to dismiss the eight cause of action for disgorgement is granted.

The last two causes of action concern breach of fiduciary duty and aiding such breach. The essential basis for this claim is that the defendants assisted Goldberg in breaching his duty to the corporation, thus the defendants here breached their duty to Dial and aided Goldberg in his breach. The basis for these causes of action is the allegation that the defendants negotiated a retirement benefits package for Goldberg which violated the corporation's By-Laws since the package bypassed the shareholder consent requirement or by misrepresenting such approval was obtained. Article III Section 4(c) relied upon by the plaintiff states that "no written contract for a managerial position in Dial Car Inc., will be given to an Officer or Director without the approval of a majority vote of all outstanding shareholders" (id). There can be no dispute the retirement package negotiated

with Mr. Goldberg was not a contract for a managerial position and thus did not require shareholder approval. Likewise, the release approved on behalf of Mr. Goldberg was not a contract for a managerial position. Thus, there is no basis upon which the allegations of any breach of any fiduciary duty can rest. Consequently, the motion seeking to dismiss the ninth and tenth causes of action is granted. Thus, the motion seeking to dismiss the entire complaint is granted.

So ordered.

ENTER:

DATED: February 10, 2021
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC