Personal-Touch Home Care, Inc. v Program Risk Mgt. Inc.
2011 NY Slip Op 34158(U)
June 10, 2011
Supreme Court, Nassau County
Docket Number: 017065-10
Judge: Timothy S. Driscoll
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SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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PERSONAL-TOUCH HOME CARE, INC., and COMMUNITY HOME CARE REFERRAL SERVICE, INC.,

Plaintiffs,

-against-

PROGRAM RISK MANAGEMENT, INC., PRM CLIAMS SERVICES, INC., JOHN CONROY, DeCHANTS, FUGLEIN & JOHNSON, LLP, and SGRisk, LLC,

Defendants.

--x

TRIAL/IAS PART: 20
NASSAU COUNTY

Index No: 017065-10
Motion Seq. Nos. 1 and 2
Submission Date: 5/2/11

The following papers having been read on these motions:

Notice of Motion, Affirmation in Support and Exhibits....................................x
Memorandum of Law in Support..x
Affirmation in Opposition and Exhibits...x
Memorandum of Law in Opposition..x
Defendant SKRisk's Reply Memorandum of Law..x
Reply Memorandum of Law in Further Support...x
Correspondence dated December 30, 2010 and January 10, 14 and 25, 2011....x
Notice of Motion, Affirmation in Support and Exhibits....................................x
Memorandum of Law in Support..x

This matter is before the Court for decision on 1) the motion filed by Defendant SGRisk, LLC ("SGRisk") on October 21, 2010, and 2) the motion filed by Defendant DeChants, Fuglein & Johnson, LLP ("DFJ") on March 30, 2011, both of which were submitted on May 2, 2011 following oral argument before the Court. The Court grants the motions based on the Court's conclusion that dismissal of this action is appropriate in light of the decision issued by the Honorable Ira B. Warshawsky on December 22, 2010 in the related action of *Health Acquisition Corp. d/b/a Allen Home Health Care Bestcare, Inc. and Aides at Home, Inc. v. Program Risk Management, Inc., PRM Claims Services, Inc., John Conroy, DeChants, Fuglein & Johnson,*

[* 2]

LLP and SKRisk, LLC, Nassau County Index Number 8714/10.

A. Relief Sought

SGRisk moves for an Order, 1) pursuant to CPLR §§ 3211(a)(1), (3), and (7), dismissing the Verified Complaint ("Complaint"); and 2) directing a change of venue. By letter dated December 22, 2010, counsel for SGRisk advised the Court that it withdraws the portion of its motion for a change of venue, in light of a December 22, 2010 decision ("Related Decision") by the Honorable Ira B. Warshawsky in the related matter of *Health Acquisition Corp. d/b/a Allen Home Health Care Bestcare, Inc. and Aides at Home, Inc. v. Program Risk Management, Inc., PRM Claims Services, Inc., John Conroy, DeChants, Fuglein & Johnson, LLP and SKRisk, LLC*, Nassau County Index Number 8714/10 ("Related Action").

DFJ moves for an Order, pursuant to CPLR § 3211(a)(7), dismissing the Complaint as against Defendant DFJ.

Plaintiffs Personal-Touch Home Care, Inc. ("Personal Touch") and Community Home Care Referral Service, Inc. ("Community Home Care") (collectively "Plaintiffs") oppose the motions.

B. The Parties' History

The parties' history is set forth in a prior decision of the Court dated March 1, 2011 ("Prior Decision"), in which the Court directed oral argument on the motion by SGRisk (motion sequence number 1). The Court noted, in the Prior Decision, that although there were submissions suggesting that a separate motion was filed by DJF, the Court did not have that motion before it. Counsel for all parties were present at the oral argument, which addressed both motions before the Court, and the Court is now in possession of the motion by DFJ (motion sequence number 2). Accordingly, this decision will address both motions. The Court incorporates the Prior Decision herein by reference. The Prior Decision outlined the parties' history as follows:

The Complaint, filed on September 8, 2010, alleges that Plaintiffs Personal Touch and Community Home Care Referral Service, Inc., also doing business as Helping Hands Attendant Service, are home health care agencies with offices in the State of New York. SGRisk is a company that is authorized to provide accounting and actuarial services to and for businesses in New York. Defendant Program Risk Management, Inc. ("PRM"), of which Defendant John Conroy ("Conroy") was president, provided risk management services to and for businesses in

[* 3]

New York, including self-insurance programs, retention programs and their members. Defendant DFJ was authorized to provide accounting and audit services to and for businesses in New York, including self-insurance trusts.

The Complaint alleges, further, that in or about 1993, PRM and/or Conroy created Health Care Providers Self-Insurance Trust ("HCPSIT" or "Trust"), a group self-insurance trust. Personal Touch joined HCPSIT as a retention program provider in or about 2000 and remained a member until June 30, 2009 when the Workers Compensation Board ("Board") revoked HCPSIT's authorization ("Revocation"). Community Home Care joined HCPSIT as a retention program provider in or about 1994, and was a member from 1997 until the Revocation.

In his Affirmation in Support, counsel for SKRisk affirms as follows:

Plaintiffs allege, in the Instant Action, that they participated in retention programs offered by the Trust, and that PRM, the Trust's administrator, and other Defendants engaged in improper conduct that caused Plaintiffs to suffer damages. Counsel for SGRisk provides documentation on which SGRisk relies in support of its motion to dismiss, including 1) a forensic analysis of the Trust prepared by an accounting firm retained by the Board, 2) the agreement that Plaintiffs entered into to participate in the retention plan, 3) copies of engagement letters between SGRisk and the Trust's administrator, 4) relevant cases from the Southern District of New York, and the Supreme Courts of Erie and New York Counties, 5) SGRisk's loss reserve analyses for the Trust from 2001, 2003, 2004, 2006, 2007, 2008 and 2009, and 6) SGRisk's premium rate analysis for the Trust as of November 1, 2008. Counsel for DFJ also provides copies of the documentary evidence on which DFJ relies, which includes engagement letters between DFJ and the Trust (Exs. B - G to Larkin Aff. in Supp.).

SGRisk submits that the complaints in the Related Action and the action *sub judice* ("Instant Action") assert "virtually identical factual allegations" (Cummings Aff. at ¶ 8). In support, SGRisk provides a comparison of the two complaints (Ex. C to Cummings Aff.) which confirms that the two complaints contain many of the same allegations.

In the Related Decision, Justice Warshawsky outlined the allegations as follows:

> In sum and substance, the plaintiffs' claims as to [DFJ] are predicated on allegations that these defendants were hired, *inter alia*, for the "benefit of the plaintiffs" and the Trust (Cmplt., ¶¶ 310, 328). According to the complaint, the defendants held themselves out as possessing expertise with respect to, *inter alia*, the auditing, accounting, management and administration of group self-insured trusts, including the import of applicable regulatory law (*e.g.*, Cmplt.,

[* 4]

> ¶¶ 309, 327). Despite these representations, the plaintiffs contend that the defendants thereafter negligently failed to perform their respective administrative, accounting and auditing/actuarial duties by, *inter alia*, underestimating and misrepresenting the Trust's claims reserves and projected liabilities, and/or by otherwise negligently failing to ascertain, disclose and properly document the true nature of the Trust's "financial condition, liabilities assets and exposures" (Cmplt., ¶¶ 313-314[;] *see also*, ¶¶ 74-84; 98, 100-106; 182-183; 240).
>
> Moreover, the defendants knew or should have known that the individual group Trust members would rely on their respective reports for the purposes of, among other things, assessing the risks of Trust membership and/or whether they should either join the Trust or retain their memberships in the future (Cmplt., ¶¶ 303-304; 317-319; 334-335).
>
> The complaint further alleges that by virtue of the foregoing misconduct, the plaintiffs have suffered undescribed damages and will continue to incur, "undue excessive and unreasonable costs, liabilities, fees and damages" (Cmplt., ¶¶ 315, 324; 331-332; 341).
>
> Related Decision at p. 4

Judge Warshawsky also discussed the documentation provided by defendants, including a May 1993 engagement letter, actuarial reports and evaluations, and report cover/retention letters addressed to the Trust which included a letter defining the scope and nature of the services to be rendered (Prior Decision at pp. 5-6). Judge Warshawsky noted that it was "undisputed" that neither DFJ nor SGRisk entered into any contractual arrangement directly with the plaintiffs, but rather contracted with either RPM and/or the non-party group Trust (*id.* at p. 6).

Judge Warshawsky agreed with SGRisk and DFJ that the complaint did not set forth facts establishing a relationship with the plaintiffs constituting the "functional equivalent of privity," and, therefore, no duty existed to the plaintiffs, including any duty based on a third-party beneficiary theory (*id.*). In reaching this determination, Judge Warshawsky outlined the relevant legal principles regarding the limited circumstances under which it is appropriate to extend liability to third parties, citing, *inter alia*, *Prudential Ins. Co. of America v. Dewey Ballantine, Bushby, Palmer & Wood*, 80 N.Y.2d 377 (1992) and *Security Pacific Business Credit, Inc. v. Peat Marwick Main & Co.*, 79 N.Y.2d 695 (1992). Judge Warshawsky concluded as follows:

> With these conclusions in mind, and guided by the "cautious" and circumspect approach adopted by the Court of Appeals, the Court agrees that the plaintiffs' allegations establish - at most - that they were incidental or collaterally situated

[* 5]

beneficiaries, whose relationship with the movants did not amount to the functional equivalent of privity [citations omitted].

Contrary to the plaintiffs' contentions, there are no pleaded claims interposed against the movants based on an "aiding and abetting" theory, *i.e.*, aiding and abetting the breach of PRM's alleged fiduciary duty to the Trust or its commission of fraud [citation to Plaintiffs' brief]. Rather, the complaint contains only two causes of action involving the moving defendants, both of which assert claims grounded solely on negligent misrepresentation and professional negligence [citations to relevant provisions in complaint].

Even if an unstated, aiding and abetting claim could somehow be discerned from the complaint, it is settled that plaintiff "may not merely rely on conclusory and sparse allegations" in pleading a cause of action based on an aiding and abetting theory of recovery" [citations omitted].

C. The Parties' Positions

SGRisk and DFJ submit that the Complaint should be dismissed on several grounds, including but not limited to Plaintiffs' lack of standing, failure to plead the fraud cause of action with sufficient particularity and failure to allege the requisite elements of aiding and abetting a breach of fiduciary duty.

SGRisk also maintains that the Instant Action, notwithstanding the slight difference in its caption, is identical to the Related Action that was the subject of the Related Decision. SGRisk contends that the Related Decision is dispositive of the motions pending before the Court. At oral argument, DFJ adopted SGRisk's argument on this issue.

Plaintiffs dispute that the Court should deny the pending motions in light of the Related Decision, submitting that the Complaint sufficiently states causes of action as to the moving Defendants making dismissal inappropriate. Plaintiffs amplified these arguments at the oral argument before the Court.

RULING OF THE COURT

Under *res judicata*, or claim preclusion, a valid final judgment bars future actions between the same parties on the same cause of action. *Parker v. Blauvelt Volunt. Fire Co., Inc.*, 93 N.Y.2d 343, 347 (1999), citing *Matter of Reilly v. Reid*, 45 N.Y.2d 24, 27 (1978) and *Schuylkill Fuel Corp. v. Nieberg Realty Corp.*, 250 N.Y. 304, 306-307 (1929). As a general rule, once a claim is brought to a final conclusion, other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different

remedy. *Id.*, quoting *O'Brien v. City of Syracuse*, 54 N.Y.2d 353, 357 (1981). *See, e.g., Smith v. Russell Sage College*, 54 N.Y.2d 185 (1981) (second action precluded where, although second action was "embellished by later events," two actions originated from identical agreement and involved same time period, chief participants and claims).

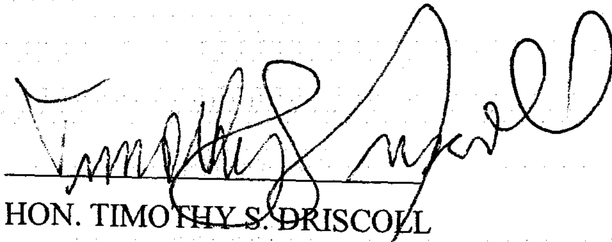
The Court concludes that the Instant and Related Actions, notwithstanding the differences in their captions, are, in effect, identical actions. Thus, under the doctrine of *res judicata*, dismissal of the Complaint against Defendants SGRisk and DFJ is appropriate in light of the Related Decision. Moreover, to the extent that dismissal is not required pursuant to the doctrine of *res judicata*, the Court adopts the reasoning of Justice Warshawsky in the Related Decision, and grants the motions of Defendants SGRisk and DFJ to dismiss the Complaint as against them.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

ENTER

DATED: Mineola, NY
June 10, 2011



HON. TIMOTHY S. DRISCOLL
J.S.C.

ENTERED
JUN 13 2011
NASSAU COUNTY
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