Roslyn Union Free School Dist. v Jaspan Schlesinger Hoffman LLP

2006 NY Slip Op 30632(U)

July 7, 2006

Supreme Court, Nassau County

Docket Number: 7083-05/

Judge: Kenneth A. Davis

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. KENNETH A. DAVIS,

Justice

TRIAL/IAS, PART 7
NASSAU COUNTY

ROSLYN UNION FREE SCHOOL DISTRICT,

Plaintiff,

SUBMISSION DATE: 06/01/06
INDEX No.: 17083/05

-against-

JASPAN SCHLESINGER HOFFMAN LLP and
CAROL M. HOFFMAN, ESQ.,

MOTION SEQUENCE #3

Defendants.

The following papers read on this motion:

Notice of Motion/ Order to Show Cause.....	X
Answering Papers.....	X
Reply.....	X
Briefs: Plaintiff's/Petitioner's.....	
Defendant's/Respondent's.....	

Upon the foregoing papers, defendants' motion to dismiss the amended complaint on the grounds that it fails to state a cause of action and that a defense is founded upon documentary evidence is decided as follows.

This is an action alleging legal malpractice and breach of fiduciary duty. Plaintiff is a public school district which provides educational services to the Roslyn community. Defendant Carol Hoffman is a partner in the law firm of Jaspan Schlesinger Hoffman LLP, ("Jaspan Schlesinger") which represented the District as its general counsel. Ms. Hoffman was primarily responsible for performing legal services for the District.

Early in October, 2002, Andrew Miller, the district's outside auditor, received information that a large number of items had been purchased with plaintiff's credit card at a Home Depot store in Riverhead. The purchases were not items that would ordinarily be purchased by a school district. On October 11, Miller notified Frank Tassone, the Superintendent of the District, and Michael Barkan, the Vice President of the School Board, about the purchases. Miller conducted an investigation and discovered credit

card charge receipts indicating that Pamela Gluckin, the Assistant Superintendent for Business, had made approximately $223,000.00 in unauthorized purchases. When confronted with this information, Gluckin admitted that she was not authorized to charge these personal expenditures to the District.

On October 18, Hoffman met with Tassone and Barkan to discuss Gluckin's misappropriation. The District alleges that Hoffman informed Tassone and Barkan that Gluckin's theft constituted a crime that should be reported to law enforcement authorities. Unbeknownst to Hoffman, Tassone had also stolen substantial sums from the District and was presumably concerned with preventing detection of his own criminal activity. Tassone allegedly told Hoffman that he wanted to keep Gluckin's crime "quiet" to "avoid negative publicity."

On October 23, 2002, the Board of Education held a special meeting concerning Gluckin's unauthorized expenditures. Thomas Hession, an attorney with expertise in criminal law, had also been invited to the meeting to advise the Board "in connection with a particular personnel matter." Hession was of the view that the Board was not obligated to report Gluckin's theft to law enforcement if full restitution was made. Upon request of the Board, Hession subsequently gave the Board an opinion letter to that effect. The District alleges that Hoffman led the Board to believe that she agreed with Hession's opinion, although she had privately advised Tassone and Miller to the contrary. At the October 23 meeting, Hoffman allegedly failed to advise the School Board that Gluckin's theft was covered by insurance. Plaintiff claims that Hoffman gave the Board this improper advice due to loyalty to Tassone and Gluckin.

Rather than reporting the theft to law enforcement, the District entered into an agreement with Gluckin whereby she agreed to pay the District $250,000.00 ($223,000.00 plus accounting and legal fees), surrender her teacher's license, and retire from her position with the District. The District alleges that it entered into this agreement upon the advice of Hoffman and Jaspan Schlesinger.

At the time that the unauthorized expenditures occurred, the District had various insurance policies which covered employee dishonesty and theft. The District had a fidelity bond insurance policy issued by Liberty Bond Services covering employee theft,

with a limit of $1,000,000.00 each for the Superintendent and Assistant Superintendent for Business. The fidelity bond policy required the insured to notify the insurer "as soon as possible" after a loss was discovered. The District also had two (2) errors and omissions policies, which covered the District's leadership, issued by National Union Fire Insurance Company and New York Schools Insurance Reciprocal, each with a limit of $1,000,000.00. The National Union policy required the insured to notify the insurer "as soon as practicable" after a loss was discovered. The New York Schools Insurance policy required the insured to notify the insurer "promptly of an occurrence or offense which may result in a claim." Additionally, the District had an excess catastrophe liability policy issued by New York Schools Insurance Reciprocal with a limit of $25,000,000.00. The excess catastrophe liability policy also required the insured to notify the insurer "promptly of an occurrence or offense" which might result in a claim. The District alleges that Hoffman and Jaspan Schlesinger advised the District that by virtue of the repayment agreement with Gluckin, the District had not sustained a "loss" within the meaning of the insurance policies. The District alleges that defendants further advised them that they had no obligation to report Gluckin's theft to the insurers unless they first notified the District Attorney.

In early 2004, additional information came to light indicating a much greater misappropriation of funds over a broader time period. In response to certain anonymous letters, the Nassau County District Attorney began an investigation of the District's finances on February 11, 2004. As a result of the investigation, Tassone was convicted of Grand Larceny in the First Degree. Also convicted of criminal activity were Miller, Deborah Rigano, an account clerk for the District, and Stephen Signorelli, Tassone's roommate.

Around March 15, 2004, the District finally submitted a claim to New York Schools Insurance Reciprocal. The District discharged Jaspan Schlesinger as their general counsel on May 26, 2004. Despite being terminated, Jaspan Schlesinger advised plaintiff to file a claim with its insurers on June 8, 2004. Liberty Insurance was notified on September 8, 2004. A claim was also filed with National Union Fire Insurance on October 19, 2004. The District alleges that its insurers have disclaimed as to all of the losses on the ground that the insured failed to notify them promptly as required by the terms of the various policies.

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Plaintiff alleges that the defendants departed from the standard of care expected of an attorney by failing to advise plaintiff to file claims with its insurance carriers and to report Gluckin's theft to law enforcement authorities.

In moving to dismiss the complaint, defendants argue that Hoffman's advice to Tassone and Barkan to report the theft was "notice to the Board itself." Alternatively, defendants assert that Hession was retained as a criminal law "expert," and his advice that there was no obligation to report the theft was not "in error." Thus, defendants argue that because plaintiff did not rely upon their advice, instead concurring in Hession's opinion, their advice was not the proximate cause of plaintiff's damages. Finally, defendants argue that when Gluckin's theft was discovered, the full extent of the misappropriation was not foreseeable.

CPLR § 3211 provides for various grounds to dismiss an action. CPLR § 3211(a)(7) provides that complaints are to be "liberally construed and the facts alleged accepted as true; the court must determine whether the facts as alleged fit within any cognizable legal theory." Wiener v. Lazard Freres & Co., 241 A.D.2d 114 citing Leon v. Martinez, 84 N.Y.2d 83. The court is limited to determining whether the complaint states a cause of action and must be liberally construed in favor of the plaintiff. Edmond v. IBM, 91 N.Y.2d 949. The question for the trial court "is not whether an issue of fact exists warranting a trial, or even whether there is any evidentiary support for the complaint, but whether it can be determined, from within the four corners of the complaint, that plaintiffs have stated any cognizable cause of action." Glassman v. Vatli, 111 A.D.2d 744.

Malpractice

An action for legal malpractice requires proof of three essential elements: 1) the negligence of the attorney, 2) that the negligence was the proximate cause of the loss sustained, and 3) proof of actual damages. Prudential Ins. v. Dewey, Ballantine, Bushby, Palmer & Wood, 170 AD 2d 108, 114 [1st Dept. 1991]. In order to establish negligence, plaintiff must show that the attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession Darby & Darby v. VSI International, Inc., 95 NY 2d 308, 313 [2000]. What constitutes ordinary and reasonable skill and knowledge cannot be fixed with precision but should be measured at the time of the representation. Id. While a breach of the Code of Professional

Responsibility does not constitute malpractice per se, a violation of an ethical rule may be evidence of the attorney's negligence Fullerton v. Fahrenkopf, 1999 U.S. App. LEXIS 13337 [Fed Cir. 1999].

Among the ethical obligations of an attorney, the duty of undivided loyalty is among the most fundamental to the attorney-client relationship. Matter of Cooperman, 83 NY2d 465, 472 [1994]. The Code of Professional Responsibility provides:

> The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of the client and free of compromising influences and loyalties. Neither the lawyer's personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute the lawyer's loyalty to the client. Code of Prof. Resp. EC 5-1.

In particular, a lawyer who represents an organization owes a duty of loyalty to the organization, and not to any officer, director, or other constituent(22 NYCRR § 1200.28[A]). As the attorney for the District, defendants owed their duty of loyalty to the District and not to Tassone or Gluckin.

If a lawyer for an organization knows that an officer is engaged in action in violation of law that may result in substantial injury to the organization, the lawyer must proceed in the best interest of the organization(22 NYCRR § 1200.28[B]). Acting in the best interest of the organization may include, among other measures, referring the matter to a higher authority within the organization. (Id). Here, the plaintiff has set forth a claim that defendants did not act in the best interests of the plaintiff since the advice was not discussed with the full Board of Education, while defendants claim that the plaintiff received notice once the Board Vice-President and District Superintendent were given the advice by Ms. Hoffman.

Members of a Board of Education act as fiduciaries for the residents of its district, as such they have a heightened obligation to report a theft of money or property belonging to the school district Education Law §1709(9); Merritt Meridian Corp. v. Gallagher, 96 AD2d 933 [2d Dept. 1983]. Defendants, as reasonably skilled and knowledgeable attorneys, had a duty to advise the

District to report Gluckin's theft to law enforcement. Whether the defendants failed in their duty must be determined by the finder of fact.

A failure by an attorney to give the client proper advice as to insurance coverage will not give rise to a cause of action for malpractice where coverage under the policy is based on a novel theory. Darby & Darby v. VSI International, Inc., 95 NY2d 308, 312 [2000]. However, a cause of action for malpractice may arise where an attorney fails to give proper advice as to a routine insurance matter, clearly falling within the terms of the policy. Moreover, it appears that defendants' claimed advice was allegedly influenced by Tassone's reluctance to notify the carrier which might have led to further investigation and the detection of his own criminal activity. By heeding defendants' advice and failing to notify the insurance companies of Gluckin's misappropriation, the District allegedly sustained a loss of a substantial amount of insurance proceeds.

"Although the precise manner in which the harm occurred need not be foreseeable, liability does not attach unless the harm is within the class of reasonably foreseeable hazards that the duty exists to prevent." Sanchez v. New York, 99 NY2d 247, 252 [2002].

Here, plaintiff has sufficiently plead a cause of action relating to whether the defendants gave their client faulty advice as to the notice requirements of the policies and whether it was foreseeable that an insurance claim could be compromised.

The documentary evidence submitted to the court does not utterly refute plaintiff's factual allegations or conclusively establish a defense as a matter of law. Goshen v. Mutual Life Ins. Co., 98 NY2d 314, 326 [2002].

Based on the above, the court finds that plaintiff has set forth a claim of legal malpractice and defendant's motion to dismiss is denied.

Breach of fiduciary duty

It is fundamental to the attorney-client relationship that the lawyer should preserve the confidences and secrets of a client. Code of Prof. Resp. Canon 4. "The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of a client not only facilitates the full development of

facts essential to proper representation of the client but also encourages non-lawyers to seek early legal assistance." Code of Prof. Resp. EC 4-1. Statutes and regulations prohibiting the disclosure of confidential information by attorneys invoke the possibility of administrative sanctions for improper disclosure. See e.g., 22 NYCRR § 1200.19[B]. Improper disclosure of confidential information may also give rise to a cause of action for breach of fiduciary duty of confidentiality Tighe v. Ginsberg, 146 AD2d 268 (4th Dept. 1989).

Plaintiff alleges that the defendants breached their fiduciary duty to plaintiff by revealing confidential information in statements which they gave to the press in the spring of 2004. Plaintiff alleges that Hoffman stated to a New York Times reporter that she told "some school officials" that the crime should be reported to the District Attorney. Additionally, plaintiff alleges that in a statement to Newsday Hoffman stated that the Board "made a mistake" [in not reporting the theft] and Jaspan Schlesinger had not agreed with Hession's opinion. Finally, plaintiff alleges that a Jaspan Schlesinger partner told the Law Journal that the firm had advised the Board to "go to the District Attorney."

Disciplinary Rule DR 4-101[C] provides "A lawyer may reveal ... confidences or secrets necessary ... to defend the lawyer or his or her employees or associates against an accusation of wrongful conduct." The right to reveal confidential information in the attorney's own defense applies not only in grievance proceedings but also in civil litigation commenced against the attorney by the client. Nesenoff v. Dinerstein & Lesser, 12 AD3d 427 [2d Dept. 2004]. In determining what confidences and secrets may be disclosed, the standard is one of "reasonable necessity," that is disclosure is authorized as to information that seems likely to provide significant assistance to the lawyer's defense. First Fed. Savings & Loan v. Oppenheim, Appel, Dixon & Co., 110 FRD 567, 567 [SDNY 1986]. The court notes in this regard that by the time the disclosures complained of by plaintiff occurred, the Roslyn "scandal" was already in the public domain. The Court concludes that the information disclosed was significant to the defendants' defense and involved minimal, if any, disclosure of material that had not already been revealed. Accordingly, the Court finds that plaintiff has not stated a claim for breach of fiduciary duty, defendants' motion to dismiss is granted as to the third cause of action.

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It is hereby ordered that the third cause of action in the amended complaint is dismissed. Defendant is hereby ordered to serve an answer within ten (10) days from the date of this Order. Furthermore, the parties are hereby directed to appear for a preliminary conference on August 2, 2006 to set forth a discovery schedule.

This shall constitute the decision and order of the court.

Dated: JUL - 7 2006

J.S.C.

HON. KENNETH A. DAVIS

ENTERED

JUL 12 2006

NASSAU COUNTY
COUNTY CLERK'S OFFICE