SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 42

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LAUREN BRENNER, PURE POWER BOOT CAMP, INC., PURE POWER BOOT CAMP FRANCHISING CORPORATION, and PURE POWER CAMP JERICHO, INC.,

Plaintiffs

v

REISS EISENPRESS, LLP, MATTHEW HENRY SHEPPE, and SHERRI L. EISENPRESS,

Defendants.

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Index No. 161032/2014

DECISION AND ORDER

SEQ 001

BANNON, J.:

I. INTRODUCTION

In this legal malpractice action, the defendants move pursuant to CPLR 3211(a) to dismiss the complaint on the grounds that the action is time-barred (CPLR 3211[a][5]) and the complaint fails to state a cause of action (CPLR 3211[a][7]). Although the action is not time-barred since the continuous representation doctrine tolled the time to commence the action until November 7, 2014, the complaint fails to state a cause of action, as it alleges only a disagreement with the defendant attorneys' tactical decisions at the trial of an underlying action, and not a departure from accepted legal practice.

II. BACKGROUND

Defendants are a law firm, a former principal of the firm,

and a principal of its successor firm, who represented plaintiffs in an underlying federal court action, which sought to recover damages from plaintiffs' competitor and its principals, who were plaintiffs' former employees. Plaintiffs alleged that the competitor and its principals stole plaintiffs' business model, customers, and confidential and commercially sensitive documents, breached contractual and employee fiduciary duties, and infringed plaintiffs' trade-dress. The federal action was tried before a magistrate judge for 13 days, who found in favor of plaintiffs, and, in a 147-page decision and order, awarded them the sums of $55,196.70 in forfeiture damages and $110,393.40 in punitive damages against one of the competitor's principals, and the sums of $40,177 in forfeiture damages and $40,177 in punitive damages against another of the competitor's principals. See Pure Power Boot Camp, Inc. v Warrior Fitness Boot Camp, LLC, 813 F Supp 2d 489, 557 (SD NY 2011).

The defendants were the fourth set of attorneys to represent plaintiffs in the federal action, and tried the federal action to conclusion. In this legal malpractice action, plaintiffs allege that, in the course of litigating the federal action, defendants failed to exercise the ordinary reasonable skill and knowledge commonly possessed by members of the legal profession, and that their breach of this duty proximately caused plaintiffs to

recover far less than they otherwise would have recovered. Plaintiffs assert that defendants, by virtue of their negligence, did not offer admissible proofs in the federal action with respect to plaintiffs' economic loss and other damages, proximate cause, the existence and breach of employment contracts containing covenants not to compete, breach of common-law duty, statutory trade-dress infringement, unfair competition, unjust enrichment, conversion, defamation, tortious interference with prospective economic advantage, and tortious interference with contract. The federal court, however, concluded that the covenants signed by plaintiffs' employees, pursuant to which they agreed not to compete with the plaintiffs after they left plaintiffs' employ, were unenforceable because they were unreasonable in terms of duration, geographic scope, and the activities from which the former employees were prohibited in engaging. Id. at 507. Plaintiffs, although conceding that they themselves drafted the unenforceable provisions, allege that defendants, by virtue of their negligence in making an overbroad application to the federal court, were unsuccessful in their request that the court sever the unenforceable provisions from the employment agreements. Plaintiffs allege that defendants, by virtue of their negligence, did not introduce any direct evidence to establish that 147 of their competitor's customers were improperly solicited by plaintiffs' former employees, but do not

allege that such evidence even existed, let alone what it consisted of. Plaintiffs allege that defendants negligently sought and recovered only consequential damages for breach of certain nondisclosure agreements, rather than making a claim for general damages, including lost profits, although they do not allege that they actually sustained a loss of profits, as opposed to mere loss of revenue, by virtue of their former employees' wrongdoing; moreover, plaintiffs made this allegation despite the fact that, under the circumstances of this case, lost profits are properly characterized as consequential, rather than general, damages inasmuch as the lost profits sought to be recovered were from lost sales to third-parties that are not governed by the nondisclosure agreements. See Biotronik v Conor Medsystems, 22 NY3d 799, 807-808 (2014). Plaintiffs also allege that defendants negligently relied on an expert who calculated damages based on a "mass asset" theory of loss, which was ultimately rejected by the federal court, rather than on actual losses occasioned by the loss of individual customers.

III. DISCUSSION

A. STATUTE OF LIMITATIONS

Contrary to defendants' contentions, the action is not time-barred, since the continuous representation doctrine tolled

the limitations period until one day after the action was commenced. In addressing a statute of limitations issue arising from a CPLR 3211 motion, the allegations of the complaint must be given a liberal construction and accepted as true. See Simcuski v Saeli, 44 NY2d 442, 446-447 (1978); Johnson v Proskauer Rose, LLP, 129 AD3d 59, 67 (1st Dept 2015). Further, a plaintiff must be accorded the benefit of every possible favorable inference, and "[w]hether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss." Johnson v Proskauer Rose, LLP, supra, at 67 (internal quotation marks omitted). The statute of limitations for a legal malpractice claim is three years running from the date the alleged malpractice was committed. See CPLR 214(6); Waggoner v Caruso, 68 AD3d 1, 6 (1st Dept 2009), affd 14 NY3d 874 (2010). Under the continuous representation doctrine, the statute of limitations for legal malpractice is tolled while there is an "ongoing provision of professional services with respect to the contested matter or transaction." Matter of Lawrence, 24 NY3d 320, 341 (2014). The ongoing representation must relate "specifically to the matter in which the attorney committed the alleged malpractice." Shumsky v Eisenstein, 96 NY2d 164, 168 (2001). The continuous representation doctrine operates as a toll "only where there is a mutual understanding of the need for further representation on the specific subject

matter underlying the malpractice claim." McCoy v Feinman, 99 NY2d 295, 306 (2002).

The rationale underlying the doctrine is that a person seeking legal advice "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." Shumsky v Eisenstein, supra, at 167 (internal quotation marks omitted). Although plaintiffs complained several times to defendants about various alleged insufficiencies in the provision of representation shortly after the judgment was entered in the federal action, and may have been in the process of discharging defendants as their attorneys of record in that action, they had yet to do so. Nonetheless, the plaintiffs had filed a grievance with the Grievance Committee, and had retained other counsel, their fifth, to appeal the judgment as insufficient. However, since one of the alleged insufficiencies communicated to the defendants was that they had failed to seek an award of prejudgment interest, they thus moved to amend the judgment in September 2011, and filed a reply brief in connection with that motion on November 7, 2011. Submission of the reply brief was not a mere ministerial filing (cf. Farage v Ehrenberg, 124 AD3d 159 167-169 [1st Dept 2014]; Aaron v Roemer, Wallens & Mineaux, 272 AD2d 752 [3rd Dept 2000]), but was directly relevant to the merits of the matter for

which defendants were retained, since it affected the actual amount of plaintiff's recovery. Thus, the pendency of the motion to amend the judgment created a mutual understanding of the need for further representation. Accordingly, even though the attorney-client relationship between plaintiffs and defendants was strained to the breaking point, it was just shy of a complete rupture, and defendants continued to represent plaintiffs in connection with the underlying federal action up to and including November 7, 2011. This action, commenced on November 6, 2014, was thus timely.

B. FAILURE TO STATE A CAUSE OF ACTION

Nonetheless, the complaint fails to state a cause of action to recover damages for legal malpractice. In an action to recover damages for legal malpractice, a plaintiff must demonstrate that the attorney "failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession" and that the attorney's breach of this duty proximately caused plaintiff to sustain actual and ascertainable damages. McCoy v Feinman, supra, at 301-302; see Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer, 8 NY3d 438, 442 (2007). To establish causation, a plaintiff must show that it would have prevailed in the underlying action or would not have incurred any damages, but for the lawyer's negligence. See Rudolf v Shayne,

Dachs, Stanisci, Corker & Sauer, supra, at 442; Davis v Klein, 88 NY2d 1008, 1009-1010 (1996); Carmel v Lunney, 70 NY2d 169, 173 (1987). On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. The court must 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. See Leon v Martinez, 84 NY2d 83, 87-88 (1994). Here, however, the allegations in the complaint amount "to no more than retrospective complaints about the outcome of defendant[s'] strategic choices and tactics," with no demonstration that those choices and tactics were unreasonable. Rodriguez v Fredericks, 213 AD2d 176, 178 (1st Dept 1995); see Pouncy v Solotaroff, 100 AD3d 410, 410 (1st Dept 2012). Moreover, the allegations are factually insufficient to support a claim that any of the alleged failures of defendants was the proximate cause of the allegedly insufficient award in favor of plaintiffs. See Feinberg v Boros, 99 AD3d 219, 223 (1st Dept 2012); David v Hack, 97 AD3d 437, 438 (1st Dept 2012); O'Callaghan v Brunelle, 84 AD3d 581, 582 (1st Dept 2011); Fenster v Smith, 39 AD3d 231, 231 (1st Dept 2007).

The defendants correctly contend that the breach of contract and breach of fiduciary duty causes of action are duplicative of

the legal malpractice cause of action (see Mamoon v Dot Net, Inc., 135 AD3d 656, 658 [1st Dept 2016]; Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc., 10 AD3d 267, 271 [1st Dept 2004]; Sage Realty Corp. v Proskauer Rose, 251 AD2d 35, 38-39 [1st Dept 1998]) and, hence, must also be dismissed for failure to state a cause of action.

IV. CONCLUSION

In light of the foregoing, it is

ORDERED that the defendants' motion to dismiss the complaint is granted on the ground that it fails to state a cause of action; and it is further,

ORDERED that the Clerk of the court shall enter judgment accordingly.

This constitutes the Decision and Order of the court.

Dated: 8/10/16

ENTER: _____
J.S.C.
HON. NANCY M. BANNON