EFiled: Jan 25 2018 11:51AM EST
Filing ID 61609453
Case Number 296,2017

IN THE SUPREME COURT OF THE STATE OF DELAWARE

Sokol Holdings, Inc., Thomas Sinclair, and Brian Savage,	:	No. 296, 2017
	:	
	:	On Appeal from the
Defendants and Counterclaimants Below, Appellants and Cross-Appellees,	:	Superior Court in and for New Castle County
	:	
	:	The Honorable
v.	:	John A. Parkins, Jr.
	:	
Margolis Edelstein, Marcus & Auerbach LLC, Jerome Marcus, Jonathan Aurebach and Herbert Mondros,	:	Consolidated No. N14C-01-217JAP
	:	
	:	
Plaintiffs and Counterclaim Defendants Below, Appellees and Cross-Appellants.	:	

APPELLANTS' REPLY BRIEF AND ANSWER TO CROSS-APPEAL

KLEIN LLC
Julia B. Klein (DE 5198)
919 North Market Street, Suite 610
Wilmington, Delaware 19801
Tel: 302-438-0456

Attorney for Defendants and Counterclaimants Below-Appellants and Cross-Appellees

Of Counsel

Paul Gordon
GORDON | MELUN | MATON LLP
5500 East Yale Avenue, Suite 300
Denver, Colorado 80222
Tel: 303-756-0800

Dated: January 26, 2018

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Statutes

ARGUMENT

I. The trial court erred in granting summary judgment because a reasonable jury could find in favor of the clients on whether the lawyers were negligent and whether the negligence was a cause of the clients' damages.

A. A reasonable jury could find in favor of the clients on "Allegation 1."

The lawyers perpetuate their ongoing effort to obfuscate this case. To this end, they argue that Dorsey sought "reimbursement" of fees and costs in the United States District Court of Colorado. Of course, and again, the clients have never denied the fact that Dorsey sought reimbursement *eventually*. The issue is whether Dorsey should have sought "permission" *before* incurring the fees and costs.

The lawyers rely on Dorsey's July 13, 2007 brief [LA297]. Their reliance fails. The July 13, 2007 brief was an effort to quash the 1782 subpoenas, not an effort to obtain permission to incur fees at the expense of the persons requesting the documents. Further, it was a response to a motion to compel. The ship already had sailed. Dorsey already had served objections to the 1782 subpoenas, but failed to request advanced instruction on incurring fees and costs. Finally, the response makes clear Dorsey's negligent strategy. Dorsey was trying to preserve a right to "apply to the Court for attorneys' fees **following** production . . . ." [LA303 (**emphasis** added).] The July 13, 2007 brief hurts the lawyers' defense.

The lawyers argue, as did the trial court conclude, that the clients had an interest in the underlying litigation and, presumably therefore, a duty to pay some of the cost of responding to the subpoena. The argument is unavailing for two reasons. First, the original suggestion that the clients had an interest was itself caused by Dorsey's malpractice, a fact that discovery would have illuminated. Second, the interest, if it existed at all, was not so significant as to cause the clients to be responsible for a $4 million response to the subpoena. Again, discovery would have illuminated the relationship between the subpoena and any such interest in the underlying litigation.

Likewise, the lawyers assert that certain arguments lack sufficient factual support. The lawyers ignore the procedural posture of the case. No discovery took place before the motions for summary judgment. The lawyers induced the posture, having objected to discovery. The development of certain discovery, such as the lawyers' depositions, was a factual prerequisite to soliciting qualified and helpful expert testimony on the standard of care and the breaches of the standard of care applicable to the lawyers. Instead, given the lack of discovery, the trial court was obligated to accept the unrebutted allegations of the complaint as true. The failure to do so was reversible error.

Further, the lawyers ignore the causal connection between their malpractice and Dorsey's malpractice and the clients' damages. Had Dorsey requested

permission to incur certain fees and costs and had the District of Colorado court specified what Dorsey would do, *Dorsey never would have incurred the fees and costs in the first instance*. The lawyers keep assuming that the causation issue turns on whether the District of Colorado would have granted permission to incur $4 million. Almost certainly it would not have permitted such an absurd amount for the simple task of responding to a subpoena. The issue for trial is not whether the District of Colorado would have permitted $4 million, but whether the District of Colorado would have permitted a reasonable amount, undercutting Dorsey's effort to gouge the clients.

Finally, the lawyers argue that the issue of costs and fees is for the trial court to resolve and that the clients would not have been permitted a jury trial. This represents a fundamental misunderstanding of the relationship between the trial court and the jury in legal malpractice cases. Even if the underlying case was to a court or was required to be to a court, the legal malpractice cases is presented to a jury. *See Brust v. Newton*, 852 P.2d 1092, 1095 (Wash. App. 1993) (the purpose of the 'trial within a trial' that occurs in a legal malpractice action is not to recreate what a particular judge or factfinder would have done. Rather, the jury's task is to determine what a reasonable judge or factfinder would have done"); *Chocktoot v. Smith*, 571 P.2d 1255, 1257 (Or. 1977) (holding that, in a malpractice action, questions of fact are for the jury to decide, and reversing trial court's determination

that it, rather than a jury, was responsible for the issue of causation); *Goodman v. Levy*, 2007 WL 641562, *9 (N.D. Ill. Feb. 28, 2007) ("an action for legal malpractice exist[s] at common law, and it its thus a cause of action for which plaintiff has a right to a jury trial"); *Phillips v. Clancy*, 733 P.2d 300, 306 (Ariz. App. 1986) ("If the underlying suit would have been tried to a jury, … we conclude that the jury in the malpractice case should decide the disputed factual issues pertaining to the original suit").

B. A reasonable jury could find in favor of the clients on The Bahamian Trust claim.

In keeping with the theme of avoiding the real issue, the lawyers mischaracterize the issue regarding the Bahamian Trust. Nothing about this case would prevent a party from walking down to a courthouse and filing a complaint. At issue is whether such a complaint, more probably than not, would have resulted in an actual recovery. The lawyers argue that the clients should "sue" Dorsey for legal malpractice regarding the Bahamian Trust. However, more probably than not, the doctrine of claim preclusion (*res judicata*) will bar recovery from Dorsey, because the lawyers failed to include the claim in their case against Dorsey. The lawyers caused the clients to lose the claim by making the *res judicata* defense available to Dorsey.

In an ongoing red herring, the lawyers complain that the clients did sue Dorsey, in England, thereby allegedly proving the lawyers did nothing to prevent the clients from suing Dorsey. This argument ignores that the England action failed, proving that any attempt to claim against Dorsey likely is to be stillborn.

Similarly, the lawyers attack the clients' attorneys for not disclosing the England action. The argument assumes that counsel knew about the England action. Recognizing their mistake, the lawyers now argue that the lack of knowledge is a new issue on appeal. The lawyers miss the point. The lawyers had the burden of proof on their motion for sanctions. They failed to present any

evidence suggesting that United States counsel was aware of the England action. It is the lawyers who cannot now argue that counsel knew about the England action.

Alternatively, the lawyers suggest that, because the clients must have known about the England action, the clients should have disclosed it. However, neither the clients nor the England attorneys knew of any sort of affirmative duty to disclose the England case, because England counsel did not know about any sort of affirmative duty to voluntarily disclose such a fact and, for different reasons, neither England counsel nor United States counsel explained the duty to the clients.

To be clear, the lawyers do not seek the exclusion of evidence or a favorable inference from discovery violation. The lawyers seek money. The trial court did not abuse its discretion in deny the relief the lawyers actually requested.

In addition, the lawyers attempt to argue their way around their negligence by suggesting that, even though lawyers have a duty to issue spot, the lawyers could and did negotiate out their duty to issue spot by narrowly crafting their fee agreement to exclude such issue spotting. The argument has no merit. At issue is whether a reasonably careful attorney would have spotted the issue, given the scope of the representation. The scope of the representation is a relevant factor, but not a dispositive factor, in deciding whether the duty encompassed the particular issue.

(With no small amount of irony) the lawyers argue that they did not know about certain foreign law and therefore had no reason to spot the Bahamian claim. The argument is unavailing. Again, whether an issue involves foreign law is merely a factor to consider in deciding whether the scope of representation encompassed the particular issue. Moreover, the word "foreign" is a matter of degree. An issue may involve a different subject matter, a different State, a difference between federal law and State law, or a difference between United States law and the law of some other country. Again, by its nature, whether the issue to spot is within the scope of the representation is a fact-intensive analysis and a question of fact for a jury to consider with the help of expert testimony.

Last, the lawyers suggest that, because the clients had foreign attorneys, they had no duty to spot issues of foreign law. Again, the existence of other attorneys, and the relationships between the lawyers and such other attorneys, are just additional factors for a jury to consider with the help of expert testimony.

In sum, because a reasonable jury could find in favor of the clients on their legal malpractice claims against the lawyers, the trial court erred in granting summary judgment against the clients.

II. Reversal of the summary judgment on the legal malpractice claims requires reversal of the adverse judgments on the lawyers' breach of contract claims.

The clients have nothing to add to their opening brief on this argument.

III. The trial court committed reversible error in denying the clients leave to conduct certain discovery after the trial court converted the motions to dismiss into motions for summary judgment.

The lawyers argue that discovery would have been futile. The argument assumes that no lawyer could be obligated to spot an issue beyond the letter of a written retainer agreement. As set forth above, the assumption is false. Lawyers have a duty to spot issues, and whether a particular issue falls within the scope of the duty depends on numerous factors for a jury to consider with the help of expert testimony. The trial court abused its discretion by not allowing discovery before requiring the clients to respond to the motions for summary judgment.

IV. The trial court lacked subject matter jurisdiction over Marcus & Auerbach's breach of contract claims, because the claims are subject to binding arbitration.

The lawyers confuse the difference between conduct at the time of the contract and conduct at the time of the contractual dispute. If parties agree – at the formation of the contract – to arbitrate future contractual disputes, they have deprived the trial court of subject matter jurisdiction over the future disputes. The trial court loses subject matter jurisdiction by operation of 10 Del. C. § 5701 (2017), which the lawyers have ignored in their answer brief. Where a mandatory arbitration clause governs the resolution of a dispute, the trial court's subject matter jurisdiction is restricted by law and is therefore not waivable. *See, e.g.*, *CAPROC Manager, Inc. v. Policemen's & Firemen's Ret. Sys.*, 2005 Del. Ch. LEXIS 50, *4 (Del. Ch. Mar. 18, 2005) ("The Court of Chancery does not have jurisdiction over claims that are properly committed to arbitration because the availability of arbitration provides an adequate legal remedy. Delaware public policy favors resolution of disputes through arbitration and requires that any doubt regarding the arbitrability of a dispute be resolved in favor of arbitration."). Otherwise, the mandatory aspect of mandatory arbitration would be illusory.

The lawyers complain that, if the clients are right, arbitration would never be waivable. The argument has no merit. As the lawyers correctly point out, under certain circumstances Delaware courts may determine that a party has waived its

right to arbitrate. *Parfi Holding AB v. Mirror Image Internet, Inc.*, 842 A.2d 1245, 1260 n.39 (Del. Ch. 2004). But waiver is only found where such a party has "actively participated in litigation" with respect to the arbitrable claim, *id.*, and the litigation has been sufficiently advanced. *See ll. Farmers Ins. Co. v. Glass Serv. Co.*, 683 N.W.2d 792, 799 (Minn. 2004) (holding that arbitration *had not* been waived under the circumstances and distinguishing matter from cases where it *had*, because they "involved actions that were litigated in court on their merits").

The lawyers argue that the clients waived their right to arbitration by "establishing an intent to litigate." However, the trial court's decision, and the lawyers' argumentation, depended on a series of purely defensive actions in this case. For example, the clients' counterclaim was compulsory. The only offensive action was the request for discovery before having to respond to the motion for summary judgment. A request for discovery is not enough to effectuate an intent to waive arbitration, because discovery could be used in both litigation and arbitration. This Court should uphold Delaware's established policy in favor of arbitration and parties' freedom of contract and enforce the arbitration clause as the lawyers drafted it.

ANSWER TO CROSS-APPEAL

RESPONSE TO SUMMARY OF THE ARGUMENT WITH REGARD TO CROSS-APPEAL

Denied in part. The lawyers did file a motion against Sokol and its counsel. However, the motion was itself a frivolous and vexatious tactic and had no merit. The trial court expressed concern about the relevance of the England action, but could not know and did not know at the time that United States counsel had been unaware of the England action and, therefore, could not advise Sokol of the duty to disclose the existence and posture of the England action. Similarly, not practicing in the State of Delaware or anywhere in the United States, England counsel did not know about Sokol's duties in this action. The trial court correctly exercised its discretion not to impose sanctions under the unique circumstances.

ARGUMENT IN RESPONSE TO CROSS APPEAL

V. The motion for sanctions had no merit, and the trial court properly denied the motion.

The motion for sanctions, which the trial court properly denied, is based on repetition of the arguments addressed above and addressed in the clients' opening brief. In lieu of repeating them here, the clients and their counsel incorporate the arguments above and in the opening brief, as well as the arguments in the January 5, 2018 Answering Brief on Cross-Appeal, which was filed by Cross-Appellees Schwartz & Schwartz, Attorneys at Law, P.A. and attorney Benjamin A. Schwartz.

The lawyers argue that the clients' Colorado counsel has provided inconsistent answers regarding the England action. The argument is wrong. Clients' counsel did not know about the England action, and the clients did know the England action was relevant. Likewise, England counsel did not know that the England action needed to be identified in the Delaware action. Nothing about these facts is inconsistent.

The motion for sanctions is textbook vexatious. The lawyers are unhappy about being challenged about their malpractice, so they make their attack on "lead" counsel rather than "local" counsel. If the motion had been based on a good faith effort to recover fees and costs, they would not have limited their motion. In reality, the motion for sanction also is frivolous, which is why the trial court correctly denied it.

CONCLUSION

This Court should vacate the entry of judgment in favor of Marcus & Auerbach, Jerome Marcus, and Jonathan Auerbach and remand to the trial court with instructions to dismiss all claims by and against those parties. This Court should vacate the summary judgment in favor of Margolis Edelstein and Herbert Mondros and remand for further proceedings.

On the cross-appeal, this Court should affirm the decision of the trial court not to impose sanctions.

KLEIN LLC

/s/ Julia B. Klein
Julia B. Klein (DE 5198)
919 North Market Street, Suite 610
Wilmington, Delaware 19801
Tel: 302-438-0456

Attorney for Defendants and Counterclaimants Below-Appellants and Cross-Appellees

Of Counsel

Paul Gordon (CO 21860)
Gordon | Melun | Maton LLP
5500 East Yale Avenue, Suite 300
Denver, Colorado 80222
Tel: 303-756-0800

January 25, 2018