

SHORT FORM ORDER

**SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU**

PRESENT:

**HON. IRA B. WARSHAWSKY,
Justice.**

TRIAL/IAS PART 7

RODEO FAMILY ENTERPRISES, LLC, in its individual capacity, and derivatively on behalf of OYSTR BAY GROUP LLC and SAMIR M. SHAH,

Plaintiff,

INDEX NO.: 600378/2010
MOTION DATE: 2/28/11
SEQUENCE NO.: 08

- against -

SCOTT MATTE, NEIL MATTE, NMY GROUP, S & CM ENTERPRISES, LLC, OYSTER BAY GROUP LLC and HERTZ, HERSON & CO., LLP,

Defendants,

-and-

OYSTER BAY GROUP LLC,

Nominal Defendant.

The following documents were read on this motion:

- Notice of Motice by Hertz, Herson & Co. to Dismiss Cross-claims 1.
- Affirmation of Thomas Filardo, Esq. In Support of Motion 2,
- Affidavit of James S. Pellen in Support of Motion 3.
- Memorandum of Law in Support of Motion 4.
- Affirmation of Joseph N. Campolo, Esq. in Opposition to Motion 5.
- Supplemental Affirmation of Joseph N. Campolo, Esq. 6.
- Reply Memorandum of Law in Support of Motion 7.

PRELIMINARY STATEMENT

Hertz, Herson & Company, LLP moves to dismiss the Second through Sixth Cross-claims of defendant Oyster Bay Group, LLC “OBG”).

BACKGROUND

Insofar as relevant for this motion, OBG owns an interest in RJM Acquisitions, LLC (“RJM”), LTR Support Services LLC (“LTR”), and Island National Group, LLC (“Island”). RJM Acquisitions Funding LLC is a subsidiary of RJM. The members of OBG are Rodeo, NMY and S & CM, which are managed by Samir Shah, Neil Matte, and Scott Matte respectively. The ownership interests are Rodeo 25%, NMY 37.5% and S & CM 37.5%. OBG, in turn, owns 100% of three subsidiaries, RJM Acquisitions, LLC (“RJM”), Island National Group, LLC (“Island”), and LTR Support Services, LLC (“LTR”).

In conjunction with Mr. Shah’s termination of his participation in OBG, it became necessary to value the Rodeo 25% interest in OBG. A June 30, 2004 Cross-Purchase Agreement contained a methodology for the valuation of the assets of OBG, specifically in Section 2(b)(1). Cross-Claims 3 — 5 in OBG’s Answer assert claims of negligence on the part of Hertz Herson in the development of the formula (the Curve), the continued application of the Curve in the face of awareness that the formula was not accurate for the valuation of Demand Deposit Accounts, which OBG was acquiring through RJM in ever-increasing amounts, that a modified Curve, referred to as the DDA Curve was more effective in reflecting the value of these DDA portfolios in the hands of OBG; and that Hertz Herson negligently failed to re-structure the Curve and adopt the DDA formula as opposed to the Curve as set forth in the Cross-Purchase Agreement.

OBG makes general allegations that Mr. Pellen, a partner in Hertz Herson, “assisted in the drafting of and advised the use of a formula to calculate what is referred to in Section 2(b)(i) of the Cross-Purchase Agreement as the ‘Net Liquidation Value’ of RJM (the ‘Formula’)”. Hertz Herson contends that these general allegations are refuted by

documentary evidence in the forms of Letters of Engagement between Hertz Herson and subsidiaries of OBG, but not with OBG, and letters from subsidiaries of OBG which confirm the accuracy of materials submitted for the performance of services by Hertz Herson. Movant therefore argues that OBG is without standing to make claims of negligence in conjunction with services performed on behalf of subsidiaries.

The First Cross-claim, which is not a subject of this motion, alleges negligence in the valuation of the 25% interest of Rodeo in OBG. As distinguished from the Second, Third and Fourth Cross-claims, there is a December 17, 2009 Letter of Engagement from Hertz Herson to OBG, in which it agrees to undertake the valuation of the amount due Shanti (predecessor of Rodeo) in accordance with paragraph 2(b)(i) of the Cross-Purchase Agreement. The allegation in the cross-claim is that Hertz Herson performed their duties under this agreement in a negligent fashion.

There is no evidence that Hertz Herson participated in the development of the Curve, or negligently permitted the Curve to continue despite its alleged deficiencies in valuing Demand Deposit Accounts. On the contrary, Hertz Herson has produced documentary evidence as to the purposes for which they have been retained over the years, and, importantly, by whom. Exhs. "A" and "B" to Affidavit of James S. Pellen). OBG's assertion that Hertz Herson continuously represented OBG from 2004 through April 20, 2010, the date of resignation, is belied by the documentary evidence and is not rebutted by OBG.

Annexed to the affirmation of Joseph N. Campolo, Esq. in opposition to the motion, are what he classifies as "emails and notes conclusively proving that Hertz Herson represented OBG in 2003 and 2004 in connection with drafting the Buy/Sell Agreement and Cross Purchase Agreement and use of the Formula and Curve and provided advice in connection with the agreements:". While Exh. "B" contains documentation confirming Hertz Herson's involvement in the valuation of the Rodeo share of OBG in 2009, there is no clear evidence that they developed the Curve. Contained in Exh. "B" is an email from

Donald Laufer to Mr. Shah, with a copy to Mr. Pellen under cover of which Mr. Laufer enclosed a Rider covering release or indemnity by surviving/purchasing Members, and two changes requested by Mr. Shah. While this reflects that the accountants were provided with a copy of the Cross-Purchase Agreement, and may well have had input, it does not indicate that they undertook responsibility for its preparation.

Even if Mr. Pellen were involved in the development of the Curve Formula, the cross-claims with respect to the preparation of the Formula are barred by the three-year statute of limitations. CPLR § 214 (6). The statute begins to run upon the client's receipt of the accountants work product. (*Ackerman v. Price Waterhouse*, 84 N.Y.2d 535, 541 [1994]). OBG's position that the statute only begins to run when the client relies to the allegedly negligent act to its detriment is not the prevailing law. To the extent the Third Counterclaim asserts negligent preparation of annual statements, any such claims prior to August 17, 2007 are time-barred. Reliance on the "continuous representation" is misplaced. This exception to the Statute of Limitations requires continual work on the same transaction, just as the "continuous treatment" exception in the medical field requires treatment for the same condition. (*ATC Healthcare Inc. v. Goldstein, Golub & Kessler LLP*, 28 Misc.3d 1237(A) [Sup.Ct.Nass.Co. 2010]). This is not the case in the facts presented.

The motion to dismiss the Second, Third and Fourth Cross-claims is granted. Although some of the claims of negligence in the auditing of RJM's statements are not time-barred, they are not claims which belong to OBG; they belong to the client, RJM. The previously referred to letters of engagement and verification letters were between Hertz Herson and RJM, and OBG, although related, is a stranger to these transactions. Even under circumstances where a corporation is seeking to pursue a claim belonging to a shell corporation, which it dominates and controls, courts should not pierce the corporate veil so as to allow another to pursue the claims of the subsidiary. (*Diesel Systems, Ltd. v. Yip Shing Diesel Engineering Co., Ltd.*, 861 F.Supp. 179, 181 [E.D.N.Y.1994]).

The Fourth Cross-claim alleges that Hertz Herson owed a duty to Oyster Bay to investigate and ensure that the Formula, as drafted, reflected the intent of the parties, including with regard to the effect of the Curve used by Oyster Bay and its subsidiaries. It further claims that they breached their duty by failing to advise OBG that the use of the Curve in the valuation of DDA accounts could produce an over-inflated, inaccurate, unfair and irrational statement of the purchase price for Rodeo's membership interest in Oyster Bay.

There is no evidence that OBG, or anyone else, engaged Hertz Herson to evaluate the accuracy of the Curve, in particular, as it may affect the valuation of DDA portfolios. This is despite claims by OBG that in-house accountants recognized the inapplicability of the standard Curve in the valuation of the DDA portfolios, and brought this to the attention to the principals of OBG. The failure of the members of OBG to modify their 2004 Agreement cannot be blamed upon their accountants. They did not draft the original Formula, and were never retained to modify it. The sole evidence of their involvement was the request that they calculate the value of the Rodeo share of OBG under the terms of the Cross-Purchase Agreement as it existed.

The motion to dismiss the Fourth Cross-claim is granted.

The Fifth Cross-claim asserts breach of fiduciary duty by Hertz, Herson, in that they failed to provide OBG, RJM and Oyster Bay's other subsidiaries with complete audited financial statements for 2009, as required by OB to carry on its business. They claim that the resignation of Hertz Herson without completing its audit of the 2009 financial statements for these entities, thereby exposing Scott and Neil Matte to the Credit Facility asserting claims under personal guarantees which they executed as managers of members of OBG, was a breach of a fiduciary duty.

Accountants may be held to the standards of a fiduciary relationship, but only under special circumstances. In *Lavin v. Kaufman, Greenhut, Lebowitz & Forman*, 226 A.D.2d (1st Dept.1996), for example, the Appellate Division reversed the trial court's dismissal of

the claim of breach of fiduciary duty, noting that complaint asserted that “plaintiff trusted the individual defendant, her accountant, who made all the investments decisions for her from 1976 to 1992, and she always followed his advice and routinely signed whatever financial documents he suggested.” *Lavin* is an exception to the widely accepted proposition that accountants do not generally owe a fiduciary duty to their clients. Moreover, cross-claimants do not assert a special relationship, under which they placed total trust in the accountant, and relied upon him for making decisions of import on their behalf. Conclusory allegations of a fiducial relationship are inadequate to create one. (*Kamhi v. Tay*, 244 A.D.2d 266 [1st Dept.1997]).

In the absence of a fiduciary relationship, there can be no breach. The claim that Hertz Herson breached its fiduciary duty when it resigned without completing its audit of the 2009 statement for various entities is therefore without merit. In addition, the RJM/LTR Engagement Agreement for Year End 2009 (Exh. “A” to Pellin Aff.) explicitly authorizes Hertz Herson to decline to express an opinion and to resign at any time.

The motion to strike the Fifth Cross-claim is granted.

The Sixth Cross-claim seeks contribution, indemnification or judgment over on behalf of OBG against Hertz Herson. It asserts that if there are damages over and above the fair value of Rodeo’s buy-out amount, as alleged in the Complaint against Oyster Bay, they are entitled to full indemnity and/or contribution from Hertz Herson.

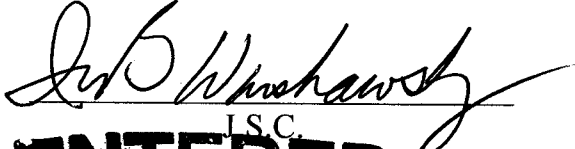
There is no basis for a claim of contractual indemnity. A cause of action for common law indemnification is recognized by New York Courts; but, in order to state a claim for common law indemnification, claimants must allege that their “injury was due solely to the appellant’s negligent performance or nonperformance of an act solely within its province”. (*Corley v. Country Squire Apts., Inc.*, 32 A.D.3d 978, 979 [2d Dept.2006]). Cross-claimants so allege in paragraph 505 of their Answer, in which they claim that such damages were caused solely by the negligence and/or breach of fiduciary duty of Hertz Herson.

While there is no fiduciary duty owed by Hertz Herman, they may be responsible for negligence in the application of the Formula to estimate Rodeo's interest in OBG, as set forth in First Cross-claim. If, on this limited allegation, OBG can establish that damages in excess of the value of Rodeo's share were caused solely by such negligence of Hertz Herson in applying the Formula set forth in the Cross-Purchase Agreement of 2004, they may be entitled to indemnification or contribution.

The motion to strike the Sixth Cross-claim is denied. The Motion to strike the Second through Fifth Cross-claims is granted.

This constitutes the Decision and Order of the Court.

Dated: April 25, 2011


I.S.C.
ENTERED
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NASSAU COUNTY
COUNTY CLERK'S OFFICE