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Berg & Berg Enterprises, LLC v. Sherwood Partners, Inc. (2005) 131 Cal.App.4th 802

In the context of a claim of attorney-client conspiracy, the Sixth District holds that an attorney for an assignee for the benefit of creditors owes no duty to a creditor.

After Berg settled a dispute with Pluris Inc. it assigned its assets to Sherwood for the benefit of its creditors. Sulmeyer represented Sherwood when Berg sued it for breach of fiduciary duty for depleting Pluris's assets. Berg filed a motion to name Sulmeyer as a defendant and to add a claim for conspiracy against Sulmeyer and Sherwood arising from their joint conduct adversarial to Berg's efforts to advance its creditor's claim. Through Sulmeyer Berg opposed the motion contending that Berg had not met the requirements of C.C.P. § 1714.10, the gateway motion necessary to allege a claim of attorney and client conspiracy. The amendment alleged that Sulmeyer performed unnecessary and unreasonable services and charged excessively for those services. The trial court did not address the merits of the proposed amendment and granted the motion based on the liberality of allowing amended pleadings.

C.C. § 1714.10 prohibits the unauthorized filing of a civil conspiracy claim against an attorney based on representation of a client to contest or compromise a claim or dispute. The legislature was concerned about the use of frivolous conspiracy claims designed to disrupt the attorney-client relationship. The statute is intended to weed out harassing claims of conspiracy lacking in reasonable foundation. Thus, the plaintiff must show a reasonable probability of prevailing. A plaintiff must first file a verified petition naming the attorney as respondent. The attorney is given the opportunity to appear and contest the petition. Only if the petition is granted is the plaintiff permitted to file the complaint in the main action. If no petition is filed, the attorney may initiate the proceeding by demurring or moving to strike.

Civil conspiracy is not an independent tort but a legal doctrine that imposes liability on persons who, although not actually committing a tort themselves, share a common plan or design in its perpetration. Each participant is responsible as a joint tortfeasor for all damages ensuing from the wrong

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regardless of his or her degree of activity. C.C. § 1714.10 mirrors the "agent's immunity rule," which protects an individual acting only as an agent or employee of a party. An attorney acting only within the scope of official duties may not be held liable for civil conspiracy even though the attorney participated in the agreement underlying the injury. The protection does not apply where the attorney has an independent legal duty to the plaintiff, or the attorney's acts go beyond the performance of a professional duty to the client and involve a conspiracy in furtherance of the attorney's financial gain. Both of these settings involve conduct benefiting the attorney independently and it is appropriate that the agent's immunity rule does not protect this conduct.

The Court of Appeal concluded that the claims alleged against Sulmeyer fell within the scope of C.C. § 1714.10. The complaint alleged a union of conduct between attorney and client arising out of the legal representation and was absent of other allegations of independent conduct by Sulmeyer. It did not allege that Sulmeyer owed an independent duty to Berg or that Sulmeyer had any role other than as Sherwood's counsel. Nor did the pleading allege fraud.

The Court examined whether Sulmeyer owed an independent duty to Berg. Sherwood in its role as the assignee for the benefit of creditors does owe a fiduciary duty to the creditors. In the analogous trust context an attorney for the trustee is not the attorney for the beneficiaries of the trust. Similarly the attorney for the administrator of an estate represents the administrator, not the estate. An attorney-client relationship normally is essential to the existence of an attorney's duty. This is especially true where the attorney's client and a third party claiming it is owed a duty are adverse, as the attorney's duty of loyalty to his client cannot be divided or diluted by a duty owed to a third party. The court noted a conflict in federal case law about whether counsel for a debtor-in-possession or a trustee owes a duty to creditors and concluded that cases that thoroughly analyze the issue hold that such an attorney does not owe a duty of care directly to the creditors.

Case law sets forth an eight factor balancing test to determine whether an attorney owes a duty to a third party. The factors are the extent to which the transaction was intended to affect the plaintiff; the foreseeability of harm to the plaintiff; the degree of certainty that plaintiff suffered injury; the closeness of the connection between the defendant's conduct and the injury suffered; the moral blame attached to the defendant's conduct; the policy of preventing future harm; the likelihood that imposition of liability might interfere with the attorney's ethical duties to the client; and the likelihood that such liability would impose an undue burden on the legal profession.

The court took note of Berg's suggestion that Sulmeyer had a conflict of interest in defending Sherwood in the action. Berg's allegations against Sulmeyer would require a trier of fact to second-guess Sulmeyer's litigation and tactical strategies and require discovery of information protected by the attorney-client privilege and the attorney work-product exclusion. Thus the last two factors weighed against a finding of duty and overcame any of the other factors

that might favor a duty because it would put Sulmeyer in a conflicted ethical position regarding his client, to whom Sulmeyer owes undivided loyalty. This imposes too great a burden and a disincentive on a lawyer contemplating the representation of an assignee for the benefit of creditors. Thus the court declined to expand the circumstances under which an attorney owes a duty of care to a third party, particularly one who is adverse to the attorney's client.

Analyzing the second exception to the application of §1714.10, the court said the conduct must be in excess of the attorney's representative capacity. This means the attorney is acting not merely as an agent for a client, but also for the attorney's personal benefit. In addition, the conduct must violate a legal duty to the plaintiff and be in furtherance of the lawyer's own financial advantage. The court noted that the second part of the exception in a sense defines the first, because it suggests that the attorney's exceptional conduct outside the performance of legitimate duties to the client are activities taken in furtherance of the attorney's own financial advantage.

"Financial advantage" is a personal advantage or gain that is over and above ordinary professional fees earned as compensation. Allegations of excessive billing do not satisfy the financial gain requirement of the statute's exception, since an adversary could make them in any case and thus significantly weaken the gate keeping function of the statute.

The conduct alleged against Sulmeyer's was not beyond client representation. Furthermore Berg failed to satisfy the financial advantage component of the exception, despite the allegation of unconscionable fees. Sulmeyer charged his client hourly professional fees for services rendered, which is insufficient to allege conduct in furtherance of a personal financial advantage. There were no allegations of self-dealing or of a financial advantage by controlling the distribution of Pluris's assets in payment of its fees.

Comment: Courts have long struggled with issues concerning an attorney's liability to non-clients. This case demonstrates that courts are especially skeptical of third party claims made by a client's adversary.