UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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PROTOSTORM LLC

Plaintiffs,

-against-

MEMORANDUM & ORDER
08-CV-931 (PKC) (JO)

ANTONELLI, TERRY, STOUT & KRAUS, LLP, FREDERICK D. BAILEY, and CARL I. BRUNDIDGE

Defendants.

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PAMELA K. CHEN, United States District Judge:

Before the Court is Defendant Antonelli, Terry, Stout & Kraus, LLP's ("ATS&K") post-verdict motion regarding apportionment of damages.

BACKGROUND

The Court assumes the parties familiarity with the extensive trial record in this case and the context in which this motion arises. Only background directly relevant to the resolution of the instant motion is set forth below.

After trial, the Jury found ATS&K and two of its former attorneys, both of whom were individual Defendants, Carl Brundidge ("Brundidge") and Frederick Bailey ("Bailey"), liable to Plaintiff Protostorm LLC ("Protostorm") for legal malpractice.[1] The Jury found that Protostorm proved by a preponderance of the evidence that it was entitled to $6.975 million in compensatory damages. (Dkt. 534, ECF p. 32, q. 9.) On the Verdict Sheet, the Jury was instructed to factually

[1] The Jury did not find that there was an attorney-client relationship between Plaintiff Peter Faulisi ("Faulisi") and Defendants. (Dkt. 534, ECF p. 28.) "ECF p._" refers to the pagination of the Court's Electronic Document Filing System as opposed to the referenced document's internal pagination.

apportion the *fault* among the Defendants, as well as among Plaintiffs and non-party Dale Hogue based on Defendants' assertion of comparative negligence. The Jury apportioned the fault as follows:

- Plaintiff Protostorm LLC 4%
- Plaintiff Peter Faulisi 0%
- Defendant ATS&K 75%
- Defendant Frederick Bailey 6%
- Defendant Carl Brundidge 15%
- Defendant Alan Schiavelli 0%
- Dale Hogue 0%[2]

Separately, the Jury assessed $900,000 in punitive damages to ATS&K, and $100,000 in punitive damages to Brundidge. (Dkt. 534, ECF p. 32, q. 12.) It assessed no punitive damages to Bailey. (*Id.*)

DISCUSSION

ATS&K, through its new counsel,[3] asserts that "the jury's apportionment of liability and damages (both compensatory and punitive) to Defendants Bailey and Brundidge should not and

[2] Throughout this litigation, including the majority of trial, Defendants maintained third-party contribution claims against third-party defendants Kathy Worthington, Esq., John Ginley, Esq., and Duval & Stachenfeld ("Third-Party Defendants"). On August 13, 2014, two days prior to the completion of trial, ATS&K dropped its claims against the Third-Party Defendants. Accordingly, the Court removed all references and instructions related to the Third-Party Defendants from its Jury Instructions and circulated that draft to the remaining parties for final review.

[3] On August 26, 2014, trial counsel for defendants, L'Abbate, Balkan, Colavaita & Contini, filed a letter stating that because attribution would impact all defendants, it had an "inherent conflict" and all defendants would retain individual counsel for the purposes of this motion only. (Dkt. 536 at 1.) Thereafter, all counsel for defendants submitted the proper notices of appearance and substitution.

cannot be attributed to ATS&K." (Dkt. 550 ("ATS&K Br.") at 1.) ATS&K makes two arguments in support of its position, which it deems "procedural" and "substantive," respectively. First, ATS&K argues that Protostorm cannot now object to the Jury Instructions and Verdict Sheet because Protostorm "proposed and agreed to the verdict sheet requiring the jury to allocate separate fault to each defendant individually." (*Id.* at 2.) Second, ATS&K argues that legally, "[t]here is nothing inappropriate about an allocation of separate damages as to each defendant." (*Id.*)

I. Procedural Propriety: The Jury Instructions, Verdict Sheet, and Objections Thereto

ATS&K's first argument is that it is "procedurally improper to now alter the very scheme that was submitted to the jury for adjudication as to the claims asserted." (ATS&K Br. at 2.) Specifically, ATS&K contends that the "case was tried to the jury based upon rulings and instructions as to what would be deemed liability of the firm as opposed to liability of the individuals . . . . Having tried and submitted the case to the jury in that respect, the allocation cannot now be shifted or ignored." (*Id.*) ATS&K then goes on to cite support for its position that because Protostorm did not object to the Jury Instructions or Verdict Sheet prior to jury deliberations, it waived any potential post-trial objections on the apportionment issue. (*Id.* at 2-4.) This contention fails for several reasons.

First, ATS&K's argument rests on a fundamental misunderstanding of the way the case was tried. ATS&K *never* attempted to argue that the individual Defendants acted outside the scope of their duties or that they should otherwise be held individually liable. In fact, this was confirmed by ATS&K when Protostorm proposed a change to page 10 of the Jury Instructions, which would instruct the Jury that it had to attribute the acts of the individual Defendant attorneys to ATS&K:

[Mr. Goodman[4]]: I would respectfully suggest that you read, 'I also instruct you that you *must* attribute the acts of the individual defendant attorneys to ATS&K, et cetera.

[The Court]: I guess – let me think about this. Is it possible that the jury would find that the lawyers were acting outside the scope of their responsibility in some way?

[Mr. Goodman]: There has been no evidence, assertion of that issue, nothing.

[The Court]: Right. That's not going be your theory, Mr. Colavita?

[Mr. Colavita[5]]: No, that's not the theory.

(T. 2841 (emphasis added).) Based on the foregoing, the Court changed the subject language on page 10 of the Jury Instructions to read: "you must attribute the acts of the individual defendant-attorneys to ATS&K in determining whether ATS&K is liable for negligence."[6]

Second, ATS&K's argument rests on a fundamental misunderstanding of the Jury Instructions and Verdict Sheet. Item 10 on the Verdict Sheet merely instructed the Jury to factually apportion *fault*, which was necessary because the parties requested that the Jury find liability with respect to each Defendant and because ATS&K asserted comparative negligence defenses against two Plaintiffs, the Third-Party Defendants, and a non-party.[7] "Under New York

[4] References to "Mr. Goodman" refer to Robert S. Goodman, Esq., trial counsel for Protostorm and Faulisi.

[5] References to "Mr. Colavita" refer to Anthony P. Colavita, Esq., trial counsel for all Defendants.

[6] The instruction previously read: "you *may* attribute the acts of the individual defendant-attorneys to ATS&K in determining whether ATS&K is liable for negligence." (Dkt. 529.) The Court's purpose in including an attribution instruction was to ensure that the Jury understood that it could find ATS&K, an entity as opposed to an individual, liable for the acts of its individual attorneys. By requesting the change from "may" to "must," to which Defendants did not object, Plaintiffs made plain their theory that ATS&K was legally responsible for all acts undertaken by the individual defendants in their capacity as ATS&K attorneys.

[7] Defendants previously requested, and the Court granted, an instruction charging the Jury that, if it found non-party Dale Hogue's negligence contributed to Plaintiffs' injury, it "must

law, joint and several liability is a question of law that is not related to the factual apportionment of fault among defendants." *Wells Fargo Bank, N.A. v. Nat'l Gasoline, Inc.*, 13-2048-CV, 2014 WL 4251230 (2d Cir. Aug. 29, 2014) (citing *Ravo v. Rogatnick*, 70 N.Y. 2d. 305, 313 (1987)). The Court did not ask the Jury to apportion damages or to make a determination regarding joint and several liability or vicarious liability because ATS&K did not put in a single piece of evidence to suggest that it should not be held vicariously liable for the acts of its employees. Simply put, apportionment of damages, until now, was not a disputed issue in this case. In fact, during a conference related to the Jury Instructions, ATS&K specifically requested that the Court decide the issue of whether ATS&K ought to be held liable for the fault of the individual Defendants post-verdict.

> [Mr. Colavita]: Getting back to the verdict sheet, your Honor, if Mr. Goodman is saying he wants to take out the individual names, we will consent.
>
> [Mr. Goodman]: That's not what I'm saying.
>
> [Mr. Colavita]: Then what are you saying?
>
> [Mr. Goodman]: What I'm saying is[,] you have to find the fault and then say that the fault of the individuals is attributable to the firm.
>
> [Mr. Colavaita]: Judge, that's a post – you will allocate [post-judgment].

(T. 2837-38.)

* * *

> [The Court]: In this regard, I agree with Mr. Colavita. I think that it's important, at least for consistency, since we break down the verdict sheet as to each defendant, which is how you have charged this – have pled this case, to assign responsibility on a percentage basis, if they think that's appropriate. I think, to maintain consistency and to avoid confusion at the damages phase, because the jury won't understand that if they assign[,] for example[,] ten percent

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then apportion the fault between Hogue, Defendants, and any other party that [it] found liable." (Dkt. 534, ECF p. 24.)

responsibility to Mr. Brundidge, that when they get to the damages allocation why they can't assign him that same ten percent. Right? I think we are going to have some confusion.

I agree [ ] with Mr. Colavita that I can – *and I assume Mr. Colavita has waived any objection* – I can post-judgment reallocate any percentage assigned to the individual defendants back to ATS&K on the theory that I think everyone agrees that the principals, the acts of the principals are attributable to the law firm. I think then Mr. Colavita could not argue that that ten percent that went to Mr. Brundidge has to be paid by ATS&K.[8] Do you agree with that, Mr. Colavita?

[Mr. Colavita]: Yes, your Honor. I think that's the law anyhow.

[The Court]: *So he is waiving post-judgment objection to that.*

[Mr. Goodman]: When you say post-judgment, the judgment that is actually entered would recognize the attribution, would it not?

[The Court]: I should say post-verdict.

(T. 2838-39) (emphasis added).)

Even, after the Jury rendered its verdict, ATS&K agreed that the question of whether ATS&K would be liable for the fault of its employees would be determined by the Court post-verdict:

[Mr. Goodman]: The six percent to [ ] Bailey and the 15 percent to Brundidge have to be attributed back up to ATS&K.

[Mr. Colavita]: Well, can be.

[The Court]: Yes.

(T. 3024.)

[8] This sentence appears to contradict the Court's comments immediately preceding it. Although the Court may have misspoken, that sentence was simply meant to reiterate that ATS&K could not argue, post-trial, that it is not responsible for the percentage of fault and damages assessed against Brundidge. Indeed, Mr. Colavita's response—in which he expresses agreement with the Court's view of the attribution principle (T. 2839)—does not indicate that the Court's statements were internally contradictory or that the parties were confused about their meaning.

In sum, the parties agreed that a breakdown of each potentially responsible party (including plaintiffs, the Third-Party Defendants, and a non-party) would remain on the Verdict Sheet in order to avoid confusing the Jury, but that this breakdown did not preclude the re-apportionment of liability from the individual Defendants to ATS&K. Moreover, the Court accepted *Defendants*' suggestion to deal with the issue of damages apportionment post-verdict, specifically whether the Court should attribute, for damages purposes, any percentage of fault assigned to the individual Defendants back to ATS&K. Consistent with that understanding, the parties agreed to change the Verdict Sheet from "Apportionment of Compensatory Damages" to "Apportionment of Fault," and remove the word "liable," demonstrating that the Jury was not asked to apportion damages to liable parties. *Compare* 8/13/14 Proposed Verdict Sheet, Item 10 (Dkt. 529-1) *with* Final Verdict Sheet, Item 10 (Dkt. 534, ECF p. 32).)

Third, ATS&K's argument that Plaintiffs waived the right to object to any post-trial re-apportionment of fault because they did not object to the Jury Instructions and Verdict Sheet borders on frivolous. Plaintiffs did not object because they *correctly* believed, as reflected in the above-quoted colloquy, that the Jury Instructions and Verdict Sheet were consistent with Plaintiffs' theory that the individual defendants' conduct "must" be attributed to ATS&K (T. 2841), and that any liability apportioned to the individual defendants in the verdict sheet—simply to avoid confusion—could be reallocated "back to ATS&K" post-trial. (T. 2839.) If any party could be deemed as having waived an objection to post-trial re-apportionment, it would be ATS&K. Indeed, at trial, Defendants failed to object when the Court specifically stated that Defendants were "*waiving* post-judgment objection" to the reallocation "back to ATS&K" of any percentage of fault attributed to the individual Defendants. (*Id.*) At the end of the day, the

parties are exactly in the position they expected, and agreed, that they would be post-verdict, namely briefing the "substance" of the apportionment motion.

II. Substantive Issue: Respondeat Superior

The Court now turns to issue of whether, for damages purposes, the Court must hold the principal, ATS&K, liable for the acts of its agents, Bailey and Brundidge. This question must be answered separately with respect to the compensatory and punitive damages.

A. Compensatory Damages

Under New York law, it is well settled that a principal is liable to third parties for the acts of an agent operating within the scope of his real or apparent authority. *News Am. Mktg., Inc. v. Lepage Bakeries, Inc.*, 16 A.D.3d 146, 147-48 (2005); *Citibank, N.A. v. Nyland (CF8) Ltd.*, 878 F.2d 620, 624 (2d Cir. 1989). Under the doctrine of respondeat superior, a corporation, including a "professional services corporation," is liable for a tort committed by its employee. *Yaniv v. Taub*, 683 N.Y.S.2d 38, 256. At trial, it was established that Bailey and Brundidge committed legal malpractice while employed by ATS&K. There was no testimony or other evidence indicating that either Brundidge or Baily acted outside the scope of his authority with respect to the conduct that the Jury found to be negligent.[9] In fact, as discussed above, Defendants affirmed at trial that this was not its theory of the case:

[The Court]:	Is it possible that the jury would find that the lawyers were acting outside the scope of their responsibility in some way?
[Mr. Goodman]:	There has been no evidence, assertion of that issue, nothing.
[The Court]:	Right. That's not going be your theory, Mr. Colavita?
[Mr. Colavita]:	No, that's not the theory.

[9] However, as discussed *infra*, there was evidence upon which the Jury found that certain conduct by Brundidge was wanton or malicious, *i.e.*, beyond mere negligence or malpractice, so as to support an award of punitive damages against him.

(T. 2841.) ATS&K is therefore liable for the compensatory damages assessed to Bailey and Brundidge. *See Holmes v. Gary Goldberg & Co.*, 838 N.Y.S.2d 105, 106 (2007) ("Pursuant to the doctrine of respondeat superior, liability for an employee's tortious acts may be imputed to the employer when they were committed 'in furtherance of the employer's business and within the scope of employment'") (quoting *N.X., v. Cabrini Medical Ctr.*, 97 N.Y.2d 247, 251).

B. Punitive Damages

Under New York law, an employer may only be called upon to pay punitive damages for the malicious acts of its employees "where management has authorized, participated in, consented to or ratified the conduct giving rise to such damages, or deliberately retained the unfit servant . . . ." *Loughry v. Lincoln First Bank, N.A.*, 67 N.Y.2d 369, 378 (1986). At trial, the Jury was instructed that it could assess punitive damages as to any Defendant based on a finding that the Defendant had acted "wantonly" or "maliciously." (Dkt. 535, ECF p. 20.)

Even though Brundidge was a partner at ATS&K during the relevant time period, no evidence was presented at trial establishing that he constituted or represented the collective "management" of the firm, which was comprised of numerous other partners. There also was no evidence to suggest that any "wanton" or "malicious" conduct that could have supported the Jury's punitive damage assessment against Brundidge was approved of, or ratified by, the firm's collective management.[10] Without further evidence about the precise acts for which the Jury found Brundidge responsible for punitive damages, the Court cannot conclude that Brundidge's conduct was authorized or ratified by ATS&K. Accordingly, there will be no re-apportionment of the punitive damage award of $100,000 assessed against Brundidge to ATS&K.

[10] For example, the Jury was instructed that it could award punitive damages based on a finding that Brundidge "abused his professional status and breached his duty of trust and confidence by making repeated misrepresentations to his client." (Dkt. 535, ECF p. 20-21.)

CONCLUSION

For the reasons set forth above, ATS&K is liable for the entirety of the $6.975 million in compensatory damages awarded to Protostorm. Brundidge is responsible individually for the $100,000 in punitive damages awarded against him.

SO ORDERED:

/s/ Pamela K. Chen
PAMELA K. CHEN
United States District Judge

Dated: October 8, 2014
Brooklyn, New York