

Melendez v Renfro, Driscoll & Foster, LLP
2021 NY Slip Op 31462(U)
April 29, 2021
Supreme Court, New York County
Docket Number: 157344/2019
Judge: W. Franc Perry
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. W. FRANC PERRY PART IAS MOTION 23EFM

Justice

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JORGE MELENDEZ,

Plaintiff,

- v -

RENFROE, DRISCOLL & FOSTER, LLP, LAW OFFICES
OF PAUL R. KING, P.C., PATRICK FOSTER, PAUL KING

Defendants.

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INDEX NO. 157344/2019
MOTION DATE N/A
MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55 were read on this motion to/for DISMISS

This legal malpractice action arises out of the Defendants' representation of Plaintiff in an action before the Surrogate's Court, County of Suffolk, regarding the disposition of certain assets of Luis Melendez, Plaintiff's father. Following an adverse decision to Plaintiff issued by the Honorable John M. Czygier, Jr., Plaintiff brings this action alleging malpractice against Defendants. In motion sequence 002, remaining Defendants Paul King and Law Offices of Paul R. King move to dismiss the complaint as against them. The motion has been submitted to the court without opposition.

Background

The facts of this case are outlined in detail in this court's August 11, 2020 decision, wherein the court granted motion sequence 001 and dismissed the action as against Defendants Patrick Foster and Renfroe, Driscoll & Foster, LLP. (NYSCEF Doc No. 40.) Now, remaining Defendants Paul King and Law Offices of Paul R. King, P.C. (collectively "King") move to dismiss the

complaint based on documentary evidence and for failure to state a claim, pursuant to CPLR 3211 [a] [1] and [7], respectively. (NYSCEF Doc No. 46.)

Discussion

It is well established that “[o]n a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction.” (*Leon v Martinez*, 84 NY2d 83, 87 [1994].)

Where dismissal of an action is sought, pursuant to CPLR 3211 [a] [1], on the ground that it is barred by documentary evidence, such relief may be warranted only where the documentary evidence ““utterly refutes plaintiff’s factual allegations”” and ““conclusively establishes a defense to the asserted claims as a matter of law.”” (*Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc.*, 120 AD3d 431, 433 [1st Dept 2014] [internal citations omitted].)

On a pre-answer motion to dismiss a complaint for failure to state a cause of action, pursuant to CPLR 3211 [a] [7], “the court should accept as true the facts alleged in the complaint, accord plaintiff the benefit of every possible inference, and only determine whether the facts, as alleged, fit within any cognizable legal theory.” (*Frank v DaimlerChrysler Corp.*, 292 AD2d 118, 121 [1st Dept 2002].) However, the court is not required to accept factual allegations that are plainly contradicted by the documentary evidence or legal conclusions that are unsupported based upon the undisputed facts. (*See Bishop v Maurer*, 33 AD3d 497 [1st Dept 2006]; *Igarashi v Higashi*, 289 AD2d 128 [1st Dept 2001].)

“In order to state a cause of action for legal malpractice, the complaint must set forth three elements: the negligence of the attorney; that the negligence was the proximate cause of the loss sustained; and actual damages.” (*Leder v Spiegel*, 31 AD3d 266, 267 [1st Dept 2006].) To establish causation, a plaintiff must show that he or she would have prevailed in the underlying action or would not have incurred any damages but for the attorney's negligence. (*See Rudolf v*

Shayne, Dachs, Stanisci, Corker & Sauer, 8 NY3d 438, 441 [2007].) “A failure to establish proximate cause requires dismissal regardless of whether negligence is established.” (*Mallow, Konstam, Mazu, Bocketti and Nisonoff, P.C. v Zeidman*, 2015 WL 4078529, *1 [Sup Ct, NY County 2015].)

Here, Plaintiff’s only allegations against King are that he failed to demand a jury trial in the Surrogate’s Court action and that he advised Plaintiff to retain the former Defendants as trial counsel. (NYSCEF Doc No. 1, Complaint, at ¶¶ 15, 20.) The rest of the allegations against King and Law Offices of Paul R. King, P.C. are stated as allegations against King and the former Defendants as a whole: namely, that Defendants were negligent in failing to call certain witnesses to the stand and for failing to submit a gift tax return into evidence. (*Id.* at ¶¶ 33, 35, 41, 42.)

In granting Defendants Renfroe, Driscoll & Foster LLP and Patrick Foster’s motion to dismiss, this court has already decided that Plaintiff failed to set forth a cause of action for legal malpractice because he did not show that “but for” the alleged malpractice, he would have prevailed in the underlying action. First, this court held that the allegations against the Defendants as a whole were insufficient (*see* NYSCEF Doc No. 40) and as such those allegations are likewise insufficient as alleged against King as an individual and as against the Law Offices of Paul R. King, P.C.

Further, Plaintiff’s only specific allegation against King, that he was negligent in failing to timely demand a jury trial, is insufficient to allege a claim for legal malpractice. Plaintiff simply cannot prove that “but for” the delayed demand, he would have succeeded in the underlying action, especially considering the record before the Surrogate’s Court and the court’s findings. (*See generally* NYSCEF Doc Nos. 51, 53, Transcript and Decision.) Even accepting as true the allegations asserted against King and Law Offices of Paul R. King, P.C., and considering the

documentary evidence, Plaintiff's complaint fails to state a cause of action for legal malpractice because it does not sufficiently allege that Defendants' negligence was the proximate cause of Plaintiff's damages. (*Leder v Spiegel*, 31 AD3d at 268.) Accordingly, it is hereby

ORDERED that the motion of Defendants Paul King and Law Offices of Paul R. King to dismiss the complaint, motion sequence number 002, is granted and the complaint is dismissed in its entirety as against said Defendants, with costs and disbursements to said Defendants as taxed by the Clerk of the Court, and it is further

ORDERED that the Clerk is directed to enter judgment accordingly in favor of said Defendants.

04/29/2021
DATE



W. FRANC PERRY, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input type="checkbox"/> NON-FINAL DISPOSITION	
	<input checked="" type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE