

Verdelis v Landsman
2011 NY Slip Op 32196(U)
August 8, 2011
Sup Ct, NY County
Docket Number: 651767/10
Judge: Judith J. Gische
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JUDITH J. GISCHE
J.S.C. Justice

PART 10

Index Number : 651767/2010
VERDELIS, KOSTAS
vs.
LANDSMAN, MICHAEL L.
SEQUENCE NUMBER : 001
DISMISS ACTION

INDEX NO. 651767/10
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

**motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.**

FILED

AUG 09 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 8/8/2011


HON. JUDITH J. GISCHE J.S.C.
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE
 SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Supreme Court of the State of New York
County of New York: Part 10

-----X
KOSTAS VERDELIS,

Plaintiff,

Decision/Order

-against-

Index# 651767/10
Seq. No.: 001

MICHAEL L. LANDSMAN and HOLM & O'HARA LLP,

Defendants.

-----X

Recitation, as required by CPLR §2219(a), of the papers considered in the review of this (these) motion(s):

- PAPERS
- Def's N/M, MKA affirm., exhs
- Def's Memo in Supp. (sep. back)
- Pltf's Opp w/ KV affid., exhs
- Pltf's Opp Memo w/LC affirm. (sep. back)
- Def's Reply Further Supp w/ ER affirm., exhs
- Def's Memo in Further Supp (sep. back)

FILED NUMBERED

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COUNTY CLERK'S OFFICE	

Gische, J.

Upon the aforementioned papers the decision and order of the court is as follows:

This is an action for legal malpractice, breach of contract and fraud arising from allegations brought by plaintiff, Kostas Verdellis ("Verdelis" or "Plaintiff"), against defendants, Michael L. Landsman ("Landsman") and Holm & Holm LLP ("H&H") (collectively known as "Defendants"), who are attorneys. Plaintiff claims that Defendants were retained to represent him in an uncontested divorce proceeding, *Daphne Simeon v. Konstantinos Verdellis*, 309811/07, (the "Underlying Action") involving his ex-wife, Daphne Simeon ("Simeon"). Defendants deny the allegations and bring this pre-answer motion to dismiss the complaint based upon: (1) a defense founded on documentary evidence

(CPLR § 3211 [a][1]), (2) the expiration of the statute of limitations (CPLR § 3211 [a][5]), and (3) failure to state a cause of action (CPLR § 3211 [a][7]). Plaintiff opposes the motion.

Facts Presented and Arguments Considered

In 2004 the Plaintiff and Simeon purchased a cooperative apartment in Manhattan using the Defendants as their attorneys. When they subsequently sold the apartment, in 2006, they again used the Defendants as their attorneys. At such time, Defendant Landsman acted pursuant to a power of attorney issued by Verdelis. In 2007, Plaintiff and Simeon decided to divorce and once again approached Defendants about handling the divorce for them.

Plaintiff alleges that in 2007, the defendants failed to inform him that they were not representing him. Specifically, Plaintiff claims that the Defendants improperly rendered legal advice to him and they did not advise him that there were adverse interests between him and his wife. Plaintiff claims that Simeon told him that the defendant's fees were \$5,476 and that he was to pay ½ of the fees by paying Simeon \$2,738.

Plaintiff further alleges that the Defendants protected Simeon to his disadvantage, and that they failed to advise him that he was entitled to equitable distribution of the marital assets that totaled approximately \$2,000,000. Plaintiff also claims that they did not advise him to seek outside counsel before he waived his right to approximately \$1,000,000 in distributable assets.

Plaintiff now claims that the decision to withhold relevant information fell squarely on the shoulders of the Defendants and that these omissions constitute the following causes of action, sounding in (1) legal malpractice, (2) breach of contract and (3) fraud. As

a result, plaintiff claims damages of \$1 million in each cause of action. He also seeks \$1 million in punitive damages.

In his first cause of action, for legal malpractice, plaintiff claims that the Defendants did not properly represent his interests because he was not encouraged to retain separate counsel and by failing to advise him of the financial ramifications of his Settlement Agreement with Simeon. Plaintiff's second cause of action, for breach of contract, restates the identical allegations set forth under the legal malpractice cause of action. Finally, plaintiff's third cause of action asserts a claim for fraud, in which he contends that the Defendants "failed to faithfully and properly perform their legal services on behalf of the plaintiff" and "misrepresented by virtue of their actions the implied representations of truth, fidelity and honesty required of them...."

Defendants assert that a dismissal of plaintiff's entire action is warranted for the following reasons: (a) that the documentary evidence shows that no attorney-client relationship existed between the parties; (b) plaintiff's claims are all time-barred by the applicable statute of limitations; (c) plaintiff does not set forth facts that tend to show that "but for" the Defendants acts or omissions he would have obtained a better result, or actual ascertainable damages; (d) plaintiff's breach of contract and fraud claims are duplicative of his legal malpractice claim; and (e) plaintiff's fraud cause of action is not pled with the required particularity.

Discussion

Standard of a CPLR §3211 Motion to Dismiss

Although the Plaintiff has stated the applicable legal standard for a motion for Summary Judgment under CPLR § 3212, this is a pre-answer motion to Dismiss.

Summary Judgment is never available until issue have been joined (CPLR § 3211 [c]; Gifts of the Orient v. Linden Country Club, 89 A.D.2d 508 [1st Dept. 1982]).

In the context of a motion to dismiss pursuant to CPLR § 3211, the court must afford the challenged pleadings a liberal construction, take the allegations as true, and provide the pleader with the benefit of every possible inference (Goshen v. Mutual Life Ins. Co. of N.Y., 98 N.Y.2d 314, 326 [2002]; Leon v. Martinez, 84 N.Y.2d 83 [1994]; Morone v. Morone, 50 N.Y.2d 481 [1980]; Beattie v. Brown & Wood, 243 A.D.2d 395 [1st Dept. 1997]). In deciding Defendant's motion to dismiss, the court must consider whether, accepting all Verdellis' facts, that they support the claims asserted (Rovello v. Orofino Realty Co., 40 N.Y.2d 633, 634 [1976]) and whether they fit within any cognizable legal theory (Goldman v. Metropolitan Life Ins. Co., 5 NY3d 561 [2005]).

In deciding whether any claims must be dismissed, the court does not have to consider whether plaintiff has pled claims that it will eventually succeed on. Rather, the court has to broadly examine the complaint to see whether, from its four corners, "factual allegations are discerned which taken together manifest any cause of action cognizable at law." Guggenheimer v. Ginzburg, 43 N.Y.2d 268 (1st Dept. 1977).

Applying these legal principals to the facts of this case, the court's decision is as follows:

Documentary Evidence (CPLR § 3211[a][1])

A motion brought pursuant to CPLR § 3211(a)(1) "may be granted where documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." " Held v. Kaufman, 91 N.Y.2d 425, 430-431 (1998), quoting Leon v. Martinez, 84 N.Y.2d at 88; Foster v. Kovner, 44 AD3d 23, 28 (1st Dept. 2007) ("[t]he

documentary evidence must resolve all factual issues and dispose of the plaintiff's claim as a matter of law").

Where the party whose pleadings are being challenged submits affidavits and/or other evidentiary materials in opposition to the motion, they may be considered to remedy any defects in the pleading (Leon v Martinez, 84 N.Y.2d 83, 88 [1994]). To prevail on a CPLR §3211 motion to dismiss, however, the documentary evidence submitted "must be such that it resolves all the factual issues as a matter of law and conclusively and definitively disposes of the plaintiff's claim." (Fernandez v. Cigna Property and Casualty Insurance Company, 188 A.D.2d 700,702 [1992]; Vanderminden v. Vanderminden, 226 A.D.2d 1037 [1996]; Bronxville Knolls, Inc. v. Webster Town Center Partnership, 221 A.D.2d 248. [1995]). Here, Defendants submitted the following documentary evidence: (A) Retainer Agreement with Simeon, dated July 25, 2007; (B) Summons and Complaint of the Underlying Action, dated August 10, 2007; (C) Certificate of Dissolution of Marriage; (D) Settlement Agreement, dated August 30, 2007; (E) Judgment of Divorce, September 26, 2007; (F) Copies of the legal invoices; (G) Copies of payments; (H) Summons with Notice of the Present Action, dated October 18, 2010; (I) Notice of Appearance and Demand for a Complaint, dated February 11, 2011; (J) Verified Complaint, dated March 4, 2011; (K) Correspondence between Landsman and Plaintiff, dated August 10, 2007; (L) Power of Attorney, dated November 20, 2006. Defendants claim, however, that the lack of a written Retainer Agreement between the parties is indicative of a lack of privity, thus there was no fiduciary duty owed to Verdalis at the time of the divorce negotiations.

The formation of an attorney-client relationship hinges upon the client's manifested intention to seek professional legal advice. Kingge v. Corvese, 2001 WL 830669, 8/2/01

NYLJ 23 (col. 1) (S.D.N.Y. Cote J.) [citations omitted]. However, a party's unilateral or unreasonable belief that there is an attorney-client relationship does not make it so. Rather, an attorney-client relationship is established where there is an explicit undertaking to perform a specific task. Wei Cheng Chang v. Pi, 288 A.D.2d 378, *app den* 99 N.Y.2d 501 (2002).

Although the attorney-client relationship is contractual in nature, formality is not an essential element to its formation. Talansky v. Schulman, 2 A.D.3d 355, 358 (1st Dept. 2003). An attorney-client relationship may exist where an attorney was involved in the drafting, preparation and execution of a separation agreement, even though the attorney did not negotiate its terms or provide advice to the plaintiff. Shanley v Welch, 31 A.D.3d 1127 (2006); *see also* Leon v Martinez, 84 NY2d 83 (1994) (plaintiffs pleaded enough to infer existence of attorney-client relationship where defendant attorneys had drafted agreement between their client and plaintiffs in which client agreed to pay portion of lawsuit proceeds to plaintiffs).

Allowing the complaint a liberal construction and taking into account the Plaintiff's submissions, Plaintiff has sufficiently pleaded a cause of action for legal malpractice. Defendants were the Plaintiff's attorneys as late as 2006. Additionally, Plaintiff alleges claims that he spoke to Defendant Landsman and discussed the terms of the Settlement Agreement with him. Plaintiff also paid Defendants legal fees, although it is not clear exactly how such payment was made, such as whether Simeon sent the checks to the Defendants. Furthermore, Plaintiff asserts in his affidavit that at no time did Landsman disavow Verdellis of his belief that he was not his attorney.

Defendant's documentary evidence relied upon by defendants does not

conclusively, taken in a light most favorable to the Plaintiff, eliminate the possibility that an attorney-client relationship existed between Plaintiff and Defendants. Therefore, the Motion to Dismiss pursuant to CPLR § 3211(a)(1) is denied.

Failure to State a Cause of Action (CPLR § 3211[a][7])

Where a motion to dismiss is premised upon CPLR § 3211(a)(7), the legal sufficiency of the factual allegations are tested. The court, under those circumstances, is required to presume the truth of all allegations contained in the challenged pleadings and resolve all inferences which may reasonably flow therefrom in favor of the non-movant. Cron v. Hargro Fabrics, Inc., 91 N.Y.2d 362 (1998); Sanders v. Winship, 57 N.Y.2d 391 (1982). If, from its four corners, factual allegations are discerned, which taken together, manifest any cause of action cognizable at law, the motion for dismissal will fail. The court's inquiry is whether the plaintiff has a cause of action, not whether it has stated one. Guggenheimer v. Ginzberg, *supra*, 43 N.Y.2d 268 (1st Dept. 1977).

[a] Legal Malpractice Claim (First Cause of Action)

A claim for legal malpractice is subject to a three-year statute of limitations. CPLR §214(6); Shumsky v. Eisenstein, 96 N.Y.2d 164, 166 (2001). A legal malpractice claim accrues when the malpractice is committed (McCoy v. Feinman, 99 N.Y.2d 295, 300 (2002), Glamm v. Allen, 57 N.Y.2d 87 [1982]), not when the client discovers it. Under the doctrine of "continuous representation," however, a client cannot reasonably be expected to assess the quality of the professional service while it is still in progress. See Greene v. Greene, 56 N.Y.2d 86, 94-5 (1982). The doctrine is "generally limited to the course of representation concerning a specific legal matter," and thus is "not applicable to a client's . . . continuing general relationship with a lawyer . . . involving only routine contact for

miscellaneous legal representation . . . unrelated to the matter upon which the allegations of malpractice are predicated." West Village Associates Ltd. Partnership v. Balber Pickard Battistoni, 49 A.D.3d 270 (1st Dept. 2008) *quoting* Shumsky v. Eisenstein, 96 N.Y.2d 164, 168 (2001). The pleading must assert more than simply an extended general relationship between the professional and client, and the facts are required to demonstrate continued representation in the specific matter directly under dispute. West Village Associates Ltd. Partnership v. Balber Pickard Battistoni, *supra* at 270.

Here, the Settlement Agreement merged into the Judgment of Divorce and was entered by the Clerk of the New York County Supreme Court on October 5, 2007. A cause of action for legal malpractice based upon a divorce proceeding accrues on the date the Judgment of Divorce was actually entered. Zorn v. Gilbert, 8 N.Y.3d 933 (2007). See, McCoy, *supra*, at 205 (Holding that the plaintiff had a cause of action on the day the divorce judgment was filed with the County Clerk's office and as a result, plaintiff's claim was time barred as she brought it more than three years later). Consequently, Plaintiff's argument that his claim accrued when he was mailed the Judgment of Divorce is rejected.

Based on the foregoing, Plaintiff was required to commence his action for legal malpractice against the Defendants by October 5, 2010. Since the instant action was not commenced until October 18, 2010, by the filing of a Summons with Notice, it is untimely under the applicable statute of limitations period. Plaintiff's First Cause of Action, for Legal Malpractice must therefore be dismissed as time-barred pursuant to CPLR §3211(a)(5). This cause of action is time barred by statute.

[b] Breach of Contract Claim (Second Cause of Action)

A claim for breach of contract is subject to a six-year statute of limitations. CPLR

§213. Pursuant to statute, plaintiff has filed the breach of contract cause of action within the prescribed time limit and thus is not subject to dismissal pursuant to CPLR § 3211(a)(7). Although this cause of action not time barred by the statute of limitations, Plaintiff has failed to state a proper cause of action for breach of contract for the following reasons.

In addition to any malpractice liability, an attorney may also be liable for breach of contract if he or she had made an express contract with the client to achieve a specific result or perform a particular act, (Sage Realty Corp. v. Proskauer Rose LLP, 251 A.D.2d 35 [1st Dept.1998]; Saveca v. Reilly, 111 A.D.2d 493 [3rd Dept. 1985]). However, a breach of contract claim premised on the attorney's failure to exercise due care or to abide by general professional standards is nothing but a redundant pleading of the malpractice claim and should be dismissed (Reidy v. Martin, 77 A.D.3d 903 [2d Dept. 2010]; Sarasota, Inc. v. Kurzman & Eisenberg, LLP, 28 A.D.3d 237 [1st Dept. 2006]; Levine v. Lacher & Lovell-Taylor, 256 A.D.2d 147 [1st Dept.1998]; Sage Realty Corp. v. Proskauer Rose LLP, 251 A.D.2d 35 [1st Dept.1998]). Malpractice is professional negligence; therefore, a cause of action asserted for negligence is also a duplication of a malpractice claim. Brooks v. Lewin, 21 A.D.3d 731 (1st Dept. 2005).

Plaintiff's breach of contract claim lacks merit because it is duplicative of his legal malpractice claim (Tsao v. Scudieri, 23 Misc.3d 128 [1st Dept 2009]; Turk v. Angel, 293 A.D.2d 284 [1st Dept 2002], lv dismissed 99 N.Y.2d 651 [2003]; Nevelson v. Carro, Spanbock, Kaster & Cuiffo, 290 A.D.2d 399, 400 [1st Dept 2002] ["We modify solely to dismiss the redundant claims for breach of contract and breach of fiduciary duty, which are predicated on the same allegations and seek relief identical to that sought in the

malpractice cause of action.

Contrary to plaintiffs' assumption, it is not the theory behind a claim that determines whether it is duplicative" (citations omitted)). Because the attorney-client relationship is both contractual and inherently fiduciary, a complaint seeking damages alleged to have been sustained by a plaintiff in the course of such a relationship will often advance one or more causes of action based upon the attorney's breach of some contractual or fiduciary duty owed to the client. The courts normally treat the action as one for legal malpractice only (Ulico Cas. Co. v. Wilson, Elser, Moskowitz, Edelman & Dicker, 56 A.D.3d 1 (1 Dept.,2008); see e.g. Brooks v. Lewin, 21 A.D.3d 731, 733 [2005], lv. denied 6 N.Y.3d 713 [2006] [claims for breach of fiduciary duty and punitive damages dismissed on motion].

Plaintiff's breach of contract claim is predicated on the same facts as his claim for legal malpractice. Both causes of action are supported by Plaintiffs' statements that he reasonably believed that his interests were being protected by the defendants. They also consist of allegations that the Defendants failed to take measures to represent Plaintiff's interests, failed to explain the provisions or ramifications of the Agreement, failed to provide the Plaintiff with a reasonable opportunity to review the Agreement, failed to provide Plaintiff with a reasonable opportunity to consult with an attorney in connection with the Agreement, failed to advise the Plaintiff that by signing the Agreement he would be giving up one-half of that to which he was entitled, and that the Defendants failed to advise the Plaintiff of the adverse financial consequences of the Agreement. Accordingly, Plaintiffs' second cause of action, based in breach of contract, is hereby dismissed as duplicative of the first cause of action, for legal malpractice.

[c] Fraud Claim (Third Cause of Action)

A claim for fraud is subject to a six-year statute of limitations. CPLR § 213. Pursuant to statute, plaintiff has filed the fraud cause of action within the prescribed time limit and thus is not subject to dismissal pursuant to CPLR § 3211(a)(7) for that reason. Although this cause of action not time barred by the statute of limitations, Plaintiff has failed to state a proper cause of action for fraud for the following reasons.

Claims for fraud and fiduciary breach causes of action which arise from the same facts as a legal malpractice claim and which do not allege distinct damages should be dismissed as duplicative. Weil, Gotshal & Manges, LLP v. Fashion Boutique of Short Hills, Inc., 10 A.D.3d 267 (1st Dept. 2004); Proskauer Rose v. Asia Elecs Holding Co., 2 A.D.3d 196 (1st Dept. 2003) (dismissing fiduciary duty claim as duplicative of legal malpractice claim); Murray Hill Invs. v. Parker Chapin Flattau & Klimpl, 305 A.D.2d 228 (1st Dept. 2003) (dismissing fraud and fiduciary breach claims as duplicative of legal malpractice cause of action); Laruccia v. Forchelli, Curto, Schwartz, Mineo, Carlino & Cohn, 295 A.D.2d 321, 322 (2002); Daniels v. Lebit, 299 A.D.2d 310 (2d Dept. 2002); Sonnenschine v. Giacomo, 295 A.D.2d 287, 288 (1st Dept. 2002)(fiduciary breach claim); Turk v. Angel, 293 A.D.2d 284 (1st Dept. 2002); Mecca v. Shang, 258 A.D.3d 570 (2nd Dept. 2008). Accordingly, Plaintiffs' third cause of action, based in fraud, is hereby dismissed as duplicative of the first cause of action, for legal malpractice.

Conclusion

In accordance with the foregoing, it is hereby:

ORDERED that Defendants Michael L. Landsman and Holm & Holm LLP, motion to dismiss the complaint against it is granted and the complaint is dismissed in its entirety

as against Defendants Michael L. Landsman and Holm & Holm LLP, with costs and disbursements to said defendant 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 Defendants Michael L. Landsman and Holm & Holm LLP against Plaintiff Kostas Verdelis; and it is further

ORDERED that any requested relief not otherwise expressly granted herein is deemed denied; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, NY
August 8, 2011

So Ordered:


Hon. Judith J. Gische, J.S.C.

FILED
AUG 09 2011
NEW YORK
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