

Alves v 152-154 W. 131st St. Holding Co., Inc.

2011 NY Slip Op 32328(U)

August 25, 2011

Supreme Court, New York ounty

Docket Number: 116783/10

Judge: Donna M. Mills

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SUPREME COURT OF THE STATE OF NEW YORK—NEW YORK COUNTY

PRESENT : DONNA M. MILLS
Justice

PART 58

ALVES, CAPRICE

Plaintiff,

-against-

152-154 WEST 131ST STREET HOLDING CO., INC.,
et al.,

Defendants.

INDEX No. 116783/10

MOTION DATE _____

MOTION SEQ. No. 002

MOTION CAL No. _____

The following papers, numbered 1 to _____ were read on this motion for _____

PAPERS NUMBERED

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

145

Answering Affidavits- Exhibits _____

2,344

Replying Affidavits _____

CROSS-MOTION: YES NO

FILED

Upon the foregoing papers, it is ordered that this motion

AUG 26 2011

DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION
NEW YORK COUNTY CLERK'S OFFICE

Dated: 8/25/11

Donna M. Mills
DONNA M. MILLS, J.S.C.

Check one: _____ FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 58

-----X
CAPRICE ALVES,

Plaintiff,

Index No.

-against-

116783/10

152-154 WEST 131ST STREET HOLDING CO., INC.,
BARRY MALLIN & ASSOCIATES, P.C., MICHAEL
SCHWARTZ, WILLIAM T. HURLEY, ADAM L.
BAILEY, STEVEN DE CASTRO, and GREGORY
CALABRO,

Defendant.

FILED

AUG 26 2011

-----X
DONNA MILLS, J. :

NEW YORK
COUNTY CLERK'S OFFICE

Plaintiff, pro se, moves for leave to amend her complaint.

Plaintiff is suing defendants based on the results of a prior Civil Court proceeding in which an eviction-holdover proceeding brought against plaintiff was ultimately dismissed. Plaintiff brings claims sounding in malpractice against some of the defendants, who were her former attorneys. She is also suing her landlord, defendant 152-154 West 131 Street Holding Co., Inc. (the landlord), and the president of the Board of Directors of her co-operative apartment complex; for malicious prosecution and/or abuse of process.

In her affidavit, plaintiff states that she was originally represented by an attorney, Romeo Salta (Salta), who filed the initial complaint, which allegedly contained errors and was incorrectly served upon the parties. Salta was thereafter relieved by this court on March 18, 2011. Plaintiff is representing herself, and wishes to continue in that status.

Plaintiff elaborates that the original complaint was vague in its language. In addition, she claims that Salta failed to sue defendant William T. Hurley (Hurley) both personally and as the

President of the Board of Directors of the co-op, and did not serve him. She contends that the amended complaint would not prejudice defendants at this early stage of the action.

A copy of the proposed amended complaint is submitted. This complaint contains fourteen causes of action. The first cause of action is brought against the landlord and Hurley, in his dual capacities, for malicious prosecution and/or abuse of process. The second cause of action is brought against the landlord and Hurley as president of the Board of Directors, for violation of Section 223-b of the Real Property Law. The third cause of action is brought against Hurley, in his dual capacities, for harassment. The fourth cause of action is brought against the landlord for respondeat superior. The fifth cause of action is brought against defendant Michael Schwartz (Schwartz), the landlord's attorney, for negligence. The sixth cause of action is brought against defendant Barry Malin & Associates, P.C. (Malin), Schwartz's employer, for respondeat superior. The seventh cause of action is brought against Malin, Schwartz, the landlord and Hurley, in his dual capacities, for intentional infliction of emotional distress. The eighth cause of action is brought against defendants Adam L. Bailey (Bailey) and Steven Decastro (Decastro), former attorneys of plaintiff, for negligence. The ninth cause of action is brought against defendants Bailey and Decastro for breach of fiduciary duty. The tenth cause of action is brought against Bailey, Decastro and defendant Gregory Calabro (Calabro), a former attorney of plaintiff, for breach of contract. The eleventh cause of action is brought against Calabro for breach of fiduciary duty. The twelfth cause of action is brought against Calabro for fraud and/or negligence. The thirteenth cause of action is brought against Calabro for conversion. The fourteenth cause of action is brought against Bailey, Decastro and Calabro based on a fee dispute.

Opposition to this motion is brought by Bailey, Calabro, the landlord and Hurley. Bailey argues that this motion must be denied because it lacks colorable merit. He claims that he did not represent plaintiff in his personal capacity but that his firm was retained by her. According to him, the retainer checks she sent to that firm were not made out to him, but to the professional corporation, "Adam Leitman Bailey, P.C."

Moreover, he states that there are no grounds for negligence or breach of contract due to the fact that she did not lose the Civil Court suit. He avers that the timeliness of the suit was not due to any actions taken by his firm. The fee dispute concerns a demand for a refund of money to which Bailey claims his firm was entitled.

Calabro opposes the motion on the ground that there is no merit to the breach of fiduciary duty claim, since, through his efforts, plaintiff was relieved from the Civil Court suit, and he, not plaintiff, was entitled to attorney's fees in that case.

The landlord and Hurley oppose the motion, arguing that, as well as lacking in merit, plaintiff's amended complaint was improperly served on them. They acknowledge that this court, by Order dated March 18, 2011, granted plaintiff's former counsel's motion to withdraw as plaintiff's counsel, and directed him to serve notice to plaintiff directing her to appoint a "substitute attorney" within 60 days. This Order prevented them, and other defendants, from taking any further proceedings against plaintiff without leave of court for a period of 90 days after entry of this Order, which allegedly expire on July 6, 2011. The landlord and Hurley request that the court prevent plaintiff from filing or serving the proposed amended complaint until after the expiration date of the stay.

In reply, plaintiff states that she is suing Bailey in his capacity as the owner of his law

firm. She asserts that the claim of malpractice against him is valid and that he did not give her a retainer. She argues that Calabro was not entitled to all legal fees and that he initiated a Civil Court suit against her to recover other unearned fees. She claims that she was not present or represented at the proceeding. That suit is allegedly stayed by court order.

Plaintiff contends that the claims against the landlord and Hurley are valid as these defendants brought a holdover proceeding based on false grounds and as a vehicle for abuse and harassment, that was finally dismissed after three years of litigation. She opposes their request to delay her motion as pointless, since the order was allegedly meant to protect her temporarily from further actions brought by defendants. She defends her decision to sue Hurley in a dual capacity, due to the nature of his alleged misconduct.

Leave to amend pleadings should be freely granted in the absence of prejudice or surprise, but should be denied when the proposed amendment is lacking in merit. *See Sepulveda v Dayal*, 70 AD3d 420, 421 (1st Dept 2010).

The court shall examine each cause of action in the proposed amended complaint in order to determine its merit. The first cause of action is based on malicious prosecution and/or abuse of process, and is brought against the landlord and Hurley, personally and in his capacity as President of the Co-op. "To state a claim for malicious prosecution, a plaintiff must prove (1) the initiation or continuation of a legal action against him; (2) termination of a proceeding in his favor; (3) absence of probable cause to commence the proceeding; and (4) actual malice." *Rivera v City of New York*, 40 AD3d 334, 337 (1st Dept 2007). Plaintiff alleges the initiation of a civil proceeding by these defendants, the absence of probable cause and malicious intent. She also alleges a favorable termination. So, based on these allegations, plaintiff has made out a valid

cause of action in malicious prosecution.

“Abuse of process has three essential elements: (1) regularly issued process, either civil or criminal; (2) intent to do harm without excuse or justification; and (3) use of the process in a perverted manner to obtain a collateral objective.” *Greco v Christoffersen*, 70 AD3d 769, 770 (2d Dept 2010), citing *Curiano v Suozzi*, 65 NY2d 113, 116 (1984). “[T]he mere commencement of a lawsuit cannot serve as a basis for a cause of action alleging abuse of process.” *Schwartz v Sayah*, 72 AD3d 790 (2d Dept 2010), citing *Greco v Christoffersen*. The complaint does not allege the issuance of a process, and only refers to the commencement of a civil proceeding. Despite her allegations of malice and lack of justification, plaintiff does not provide a sufficient basis for abuse of process. Leave to amend this claim shall be denied.

The second cause of action alleges that the landlord and Hurley, as President of the Co-op, violated section 223-b of the Real Property Law, which provides remedies for a tenant who was a victim of the retaliatory actions of a landlord. Here, plaintiff alleges that her relationship with the landlord is governed by the statute, and that defendants’ actions, as alleged in the first cause of action, constituted retaliatory conduct, and hence, a violation. Plaintiff has alleged a valid cause of action with respect to violation of section 223-b.

The third cause of action alleges harassment by the aforesaid defendants, with Hurley being sued in his dual capacities. Although plaintiff alleges malicious and intentional conduct amounting to mental and emotional distress, there is no legal claim for harassment per se. New York does not recognize a cause of action to recover damages for harassment. *See Ralin v City of New York*, 44 AD3d 838, 839 (2d Dept 2007); *Santoro v Town of Smithtown*, 40 AD3d 736, 738 (2d Dept 2007). Leave to amend this cause of action shall be denied.

The fourth cause of action alleges malicious prosecution against the landlord, which is being sued in its position as Hurley's principal. Plaintiff sees Hurley as an agent of the landlord and imputes his allegedly improper conduct to the landlord. Her legal theory is based upon respondeat superior. The court finds that plaintiff has made out a cause of action in respondeat superior.

The fifth cause of action alleges negligence on the part of Schwartz, alleged to be the landlord's attorney. Plaintiff alleges that Schwartz violated his duty to investigate Hurley's allegations against plaintiff which resulted in the civil proceeding. Schwartz also allegedly made a intentional misrepresentation during the proceeding. This conduct is said to constitute a violation of a duty owed to the courts, the public and plaintiff. Here, plaintiff, though alleging violations of ethical standards, has failed to show a legal duty owed to her by Schwartz. Unless a relationship to plaintiff is established, a prima facie case of negligence is not made out. See *Warech v Trustees of Columbia University*, 203 AD2d 53, 54 (1st Dept 1994). The record establishes that there is no attorney-client relationship between plaintiff and Schwartz and, accordingly, the fifth cause of action is dismissed. See *Win Hay LLC v Chin*, 920 NYS 2d 340, 341 (1st Dept 2011).

The sixth cause of action alleges negligence on the part of Schwartz's employer, based upon the theory of respondeat superior. Again, there is no proof of an attorney-client relationship between this defendant and plaintiff which would provide a basis for negligence. Leave to amend the sixth cause of action shall be denied.

The seventh cause of action alleges that the landlord, Hurley, in his dual capacities, Schwartz and his employer are liable for the intentional infliction of emotional distress. "[T] he

'circumstances under which recovery may be had for purely emotional harm are extremely limited and, thus, a cause of action seeking such recovery must generally be premised upon a breach of a duty owed directly to the plaintiff which either endangered the plaintiff's physical safety or caused the plaintiff fear for his or her own physical safety.'" *Jason v Krey*, 60 AD3d 735, 736 (2d Dept 2009), citing *Creed v United Hospital*, 190 AD2d 489, 491 (2d Dept 1997).

Plaintiff alleges outrageous and extreme actions on these defendants' part and severe emotional distress. She seeks compensatory and punitive damages in this claim. The court finds that plaintiff has not made out a cause of action for intentional infliction of emotional distress. The extreme actions alleged are not specified and, in effect, do not reach the level of serious emotional distress. Leave to amend the seventh cause of action shall be denied.

The eighth cause of action alleges that defendants Bailey and Decastro, plaintiff's former attorneys, committed negligent acts against her, violating their duty to her in their alleged failure to bring the previous proceeding to a more prompt conclusion. Essentially, plaintiff is bringing a malpractice suit against these defendants. There is a duty alleged by her, as well as a breach of that duty. However, a cause of action for legal malpractice requires that the complaint allege "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), *aff'd* 9 NY3d 836 (2007), *cert denied* 552 US 1257 (2008). Plaintiff failed to establish defendants' negligence by showing that they did not exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession. *See AmBase Corp. v Davis Polk & Wardwell*, 8 NY3d 428, 434 (2007). She also failed to establish proximate cause in that but for defendants' alleged malpractice, she could have prevailed on the underlying claim. *See Fenster v Smith*, 39

AD3d 231 (1st Dept 2007). Leave to amend the eighth cause of action will be denied because plaintiff fails to show that she failed to prevail in the previous proceeding due to the defendants' professional conduct.

The ninth cause of action alleges that the aforesaid defendants in the eighth cause of action are liable for breach of fiduciary duty, in their alleged failure to properly represent plaintiff in the previous proceeding. The court finds that this cause of action is duplicative of the previous cause of action and leave to amend will be denied. *See Garten v Shearman & Sterling LLP*, 52 AD3d 207, 207-208 (1st Dept 2008).

The tenth cause of action alleges that the aforesaid defendants in the eighth and ninth causes of action, as well as defendant Calabro, another former attorney, are liable for breach of contract. The court finds that this cause of action is duplicative of the eighth cause of action and leave will not be granted to amend to include this cause of action. *See id.*

The eleventh cause of action is brought against Calabro alone, and sounds in breach of fiduciary duty. The breach of fiduciary duty cause of action is based upon Calabro's alleged failure to provide plaintiff with funds that were legally meant for her upon the resolution of the Civil Court proceeding. Plaintiff also alleges that Calabro breached his duty by, contrary to plaintiff's best interests, consenting for defendants to make a claim for unsubstantiated maintenance arrears which ultimately allowed the landlord to reduce the amount of the court-ordered restitution awarded to plaintiff.

It is well settled that the relationship of client and counsel is one of "unique fiduciary reliance" and that the relationship imposes on the attorney "[t]he duty to deal fairly, honestly and with undivided loyalty ... including maintaining confidentiality, avoiding conflicts of interest,

operating competently, safeguarding client property and honoring the clients' interests over the lawyer's." *Ulico Casualty Co. v Wilson, Elser, Moskowitz, Edelman & Dicker*, 56 AD3d 1, 9 (1st Dept 2008), citing *Matter of Cooperman*, 83 NY2d 465, 472 (1994). Plaintiff has made out a cause of action here. Calabro has allegedly enriched himself at plaintiff's expense through the retention of the funds owed to plaintiff. Violating plaintiff's trust would constitute the breach of a fiduciary relationship.

The twelfth cause of action alleges fraud and/or negligence on Calabro's part. Plaintiff does not provide the elements of legal negligence in this claim. However, there are allegations of fraud. The elements of fraud require "a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages." See *Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 (2009), citing *Ross v Louise Wire Services, Inc.*, 8 NY3d 478, 488 (2007). Plaintiff alleges that Calabro made misrepresentations to her concerning attorney's fees, claiming personal possession of them, knowing they were false, as said money was actually the property of plaintiff. Upon her reliance on him, plaintiff argues that these fees were meant for her and she has been deprived of her right to them due to the alleged fraud. Plaintiff has made out a sufficient cause of action for fraud, in terms of being deceived of the her right to legal funds through Calabro's alleged misrepresentations.

The thirteenth cause of action against Calabro for conversion is based on the aforesaid funds, which are allegedly withheld by Calabro. "Two key elements of conversion are (1) plaintiff's possessory right or interest in the property and (2) defendant's dominion over the property or interference with it, in derogation of plaintiff's rights [interior citations omitted]."

See Colavito v New York Organ Donor Network, Inc., 8 NY3d 43, 50 (2004).

Plaintiff has made out a cause of action for conversion, alleging a right to certain funds and Calabro's unjust dominion of that right.

The last cause of action alleges that Bailey, Decastro and Calabro are involved in a fee dispute with plaintiff. This is apparently another negligence/ malpractice claim. The details of a fee dispute are not actually alleged here. The court finds this cause of action duplicative of the earlier negligence cause of action and shall deny leave to amend to include it.

Accordingly, it is

ORDERED that plaintiff's motion for leave to amend the complaint is granted, in part, as follows: leave is granted to amend the second, fourth and seventh, eleventh, twelfth and thirteenth causes of action. Leave to amend the first cause of action is granted in part and denied in part; and it is further

ORDERED that the amended complaint in the form annexed to the moving papers, but as modified above, shall be deemed served upon service of a copy of this order with notice of entry; and it is further

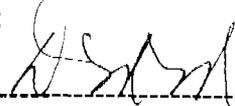
ORDERED that leave to amend the complaint is denied with respect to the proposed third, fifth, sixth, eighth, ninth, tenth and fourteenth causes of action; and it is further

ORDERED that defendants shall answer the amended complaint or otherwise respond thereto within 20 days from the date of said service; and it is further

ORDERED that the parties are directed to appear for a [preliminary] [status] conference
in Room 574, 111 Centre Street, on October 20th, 2011, at 11:30 am.

DATED: 5 / 25 / 11

ENTER:



DONNA M. MILLS, J.S.C.

FILED

AUG 26 2011

**NEW YORK
COUNTY CLERKS OFFICE**