

Leschinski v Bailey

2012 NY Slip Op 30202(U)

January 11, 2012

Supreme Court, Nassau County

Docket Number: 1934/10

Judge: R. Bruce Cozzens

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK

PRESENT: HON. R. BRUCE COZZENS, JR.
Justice.

TRIAL/IAS PART 5
NASSAU COUNTY

CHARLES LESCHINSKI,

Plaintiff(s),

-against-

MOTION #003
INDEX # 1934/10
MOTION DATE:
October 18, 2011

THOMAS J. BAILEY, ESQ. and THOMAS J. BAILEY
& ASSOCIATES, P.C.,

Defendant(s).

The following papers read on this motion:

Notice of Motion.....	1
Affirmation in Opposition.....	1
Reply Affirmation.....	1

Motion by defendants Thomas J. Bailey, Esq. and Thomas J. Bailey & Associates, P.C., for an Order of this Court, pursuant to CPLR §3211 (a)(2),(3),(5),(7),(8),(10), dismissing the Complaint of plaintiff, Charles Leschinski, is denied.

This motion arises out of an underlying legal malpractice action concerning the sale of plaintiffs' business entity to a third party, Frances Bortone ("Bortone"). The plaintiff, in the Summons and Complaint filed in this Court in November 2010, alleged therein, inter alia, that the defendant attorney failed to draft a promissory note ("Note") containing the following provisions: payment is accelerated upon default by Bortone; Bortone is liable for attorney fees incurred by plaintiff upon his default; and a security interest is created in that a lien is perfected against the assets sold by Bortone in the event of a default.

The plaintiff owned and operated a business, Nothing But the Blues, Ltd. d/b/a Good Time Charlies ("Blues"), located in Glen Cove, NY. In January 2007, he sold the business to Bortone, as an individual and president of business entity, Hat Trick Enterprises. Plaintiff avers that he retained defendant attorneys to represent him regarding the transfer of the business and to represent him at the "closing." According to the Bill of Sale, Bortone paid \$20,000 in cash, while plaintiff and Bortone executed the Note in the amount of \$80,000, where Bortone would make monthly payments to plaintiff over a 5-year time period. Included

in the sale and for separate consideration, were fixtures and equipment, goodwill, lease and leasehold improvements, and a 5-year restrictive covenant.

Bortone made the monthly payments for the months of March, April, May and June of 2007, but failed to tender further payment. Upon Bortone's default, plaintiff filed a Summary Judgment motion in lieu of complaint in April 2008 in this Court, seeking full payment of the Note in the amount of about \$76,000. The motion was granted only to the extent that the plaintiff was entitled to recover the monthly payments due and owing at the time of the motion, plus the \$50.00 penalty to be added to the monthly increments, pursuant to the express provisions of the Note. The Court specifically noted that the instrument under which plaintiff demanded payment in full, did not provide for an acceleration of the Note upon default. The matter was set down for a hearing before the Court Referee for purposes of calculating the monies due to plaintiff. The Referee determined that as of April 2009, Bortone owed plaintiff for 23 months of defaulted payments, plus the monthly penalty, totaling the amount of \$37,584.30.

Plaintiff alleges that because the defendants failed to exercise due care and diligence in their representation, he was unable to collect the full amount and/or value of the Note.

Defendants argue that the plaintiff has no standing to bring the underlying action as he is precluded pursuant to the doctrine of res judicata in that the matter was already fully litigated before this Court. Further, defendant counsel contends that the corporate entity was his client, and not plaintiff as an individual. Defendants submit, as evidence, copies of the pleadings, the Bill of Sale, pleadings regarding plaintiffs' action against Bortone, and a transcript of the hearing before the Court Referee.

The defendants moved this Court to dismiss the plaintiff's underlying complaint pursuant to several sections of CPLR §3211(a) which provide that a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

"...2. the court has not jurisdiction of the subject matter of the cause of action; or 3. the party asserting the cause of action has not legal capacity to sue; or...5. the cause of action may not be maintained because of arbitration and award, collateral estoppel, discharge in bankruptcy, infancy or other disability of the moving party, payment, release, res judicata, statute of limitations, or statute of frauds; or...7. the pleading fails to state a cause of action; or 8. the court has not jurisdiction of the person of the defendant; ...or 10. the court should not proceed in the absence of a person who should be a party..."

As much of defendant counsel's argument is based on the viability of the plaintiff's claim against him, this Court will first address the statutory criteria for dismissal under CPLR §3211 (a)7. When a motion is based on a failure to state a cause of action, the petition's legal sufficiency is judged solely on the face of the allegations and no consideration of the facts alleged in support of the motion will be permitted. Said another way, the Court's scope of review is narrow and it is limited to ascertaining as to whether the pleading states any cognizable cause of action (see *Hogan v. New York State Office of Mental Health*, 115 AD2d 633 [2nd Dept 1985]).

In determining a motion to dismiss pursuant to CPLR §3211 (a) (7), the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail (see *Heffez v. L & G General Const., Inc.*, 56 AD3d 526 [2nd Dept 2008]). Further, on a motion to dismiss for failure to state a cause of action, the complaint must be liberally construed in the light most favorable to the plaintiffs and all factual allegations must be accepted as true (see *Holly v. Pennysaver Corp.*, 98 AD2d 570 [2nd Dept 1984], *Wayne S. v County of Nassau, Dept. of Social Servs.*, 83 AD2d 628 [2nd Dept 1981]).

An action for legal malpractice requires proof of three elements: 1) the negligence of the attorney; 2) that the negligence was the proximate cause of the loss sustained; and 3) proof of actual damages. In order to show proximate cause, the plaintiff-client must establish that "but for" the attorney's negligence, the plaintiff would have prevailed in the matter at issue or would not have sustained any damages (*Levine v. Lacher & Lovell-Taylor*, 256 AD2d 147 [1st Dept 1998]). In applying the foregoing legal standard and the elements for a claim of legal malpractice to the case at bar, this Court has determined that plaintiff sufficiently alleges that Bailey, an attorney, undertook to memorialize the terms of the transfer of his business interests to a third party, Bortone, and that Bailey and the plaintiff had a relationship that required Bailey to exercise the degree of skill commonly exercised by an ordinary member of the legal community. The pleadings also allege damages resulting from this Court's limiting of the plaintiff's award to the months of non payment as opposed to an accelerated judgment for the full value of the Note. Accordingly, the pleadings state a cognizable cause of action for legal malpractice.

As to defendants' proffered arguments for dismissal under CPLR §3211 (a) 5, a review of the doctrine of res judicata and collateral estoppel is in order. Generally, under res judicata, a final judgment precludes reconsideration of all claims which could have or should have been litigated in the prior proceedings **against the same party** (emphasis added) (see *Wisell v Indo-Med Commodities, Inc.*, 74 AD3d 1059 [2nd Dept. 2010]). The doctrine of collateral estoppel, precludes a party from relitigating in a subsequent action or proceeding **an issue clearly raised in the prior action or proceeding, and decided against that party or those in privity**, (emphasis added) whether or not the tribunals or causes of action are the same (see *Altegra Credit Co. v Tin Chu*, 29 AD3d 718 [2nd Dept. 2006]).

Where the prior adjudication involved the same parties and the same cause of action, res judicata applies. Under res judicata, or claim preclusion, a valid final judgment bars future actions between the parties on the same cause of action. Generally, once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy (see *Breslin Realty Development. Corp. v Shaw*, 72 AD3d 258 [2nd Dept. 2010]).

Based on the foregoing, the doctrine of res judicata and collateral estoppel is wholly

inapplicable to instant matter. The parties in the prior action, captioned Nothin' But The Blues, d/b/a Good Time [Charlies] v. Bortone under Index No. 7979/08, are not identical to the parties in the case at bar. Further, the issues litigated in that matter concerned Bortone's default under the Note. The claim of legal malpractice was not at issue nor was the defendant counsel a party to that action.

Arguably, the two actions are tangentially related as it can be reasonably inferred that plaintiff became aware of defendant counsel's alleged malfeasance during his attempt to recover full payment from Bortone on the Note. However, the related issues do not rise to the level to invoke the doctrine of either *res judicata* or collateral estoppel. Additionally, plaintiff did not commence the action against Bortone to argue the validity of the Note, as defendant counsel suggests. That issue was narrowly argued only for purposes of its enforcement against Bortone. Accordingly, defendants' argument under CPLR §3211 (a) 5 is without merit.

The defendant's remaining arguments are based on the contention that the corporate entity, Blues, was the actual client and not the individual plaintiff. Defendant makes much of the fact that the plaintiff has not submitted the retainer agreement between the parties into evidence; however, it is also noteworthy that defendant failed to attach the retainer to *his* motion. A defendant who seeks dismissal of a complaint pursuant to CPLR § 3211 on the grounds set forth therein bears the initial burden of proving, *prima facie*, that the condition or status asserted actually exists (see *Gravel v. Cicola*, 297 AD2d 620 [2nd Dept.2002]). As defendant counsel is seeking the relief of dismissing the complaint, it would be incumbent upon him to produce a retainer agreement evincing that the relationship between he and the plaintiff does or did not exist.

Further, based on the documents submitted into evidence, the Bill of Sale (see Notice of Motion, Exhibit E) indicates that the parties to that transaction were the corporate entity *and* plaintiff as an individual. Further, in the previous cause of action against Bortone, the corporate entity *and* plaintiff were the named plaintiffs (see Notice of Motion, Exhibit F). Additionally, the Note also names Blues *and* plaintiff as parties to that agreement (see Notice of Motion, Exhibit F, attached as Exhibit A to the Motion for Summary Judgment in Lieu of Complaint). As such, all indication is that the plaintiff and the corporate entity were consistently paired as parties and defendant, who has the burden, has not offered anything to the contrary. Accordingly, his argument under CPLR §3211(a) 3, is without merit.

The Court has reviewed the defendant's remaining arguments and based on the foregoing, has determined that they are unavailing.

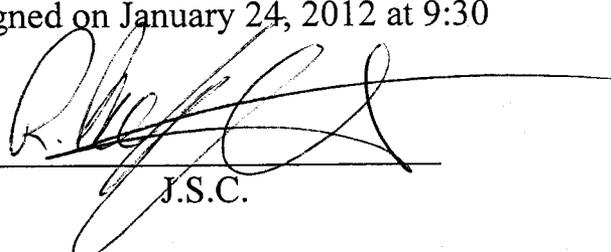
There shall be a conference before the undersigned on January 24, 2012 at 9:30 a.m.

Date: JAN 11 2012

ENTERED

JAN 19 2012

NASSAU COUNTY
COUNTY CLERK'S OFFICE


J.S.C.