

Gallet Dreyer & Berkey, LLP v Basile

2013 NY Slip Op 30101(U)

January 16, 2013

Supreme Court, New York County

Docket Number: 109687/11

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

GALLET DREYER & BERKEY, LLP,

INDEX No. 109687/11
11590897/11

Plaintiff,

MOTION DATE _____

-v-

MOTION SEQ. NO. 001 002

FRANK BASILE,

MOTION CAL NO. _____

Defendant.

FRANK BASILE and CELESTE HOLM,

Third-Party Plaintiffs,

-v-

GALLET DREYER & BERKEY, LLP and
HOFFMAN & POLLOCK, LLP,

Third-Party Defendants.

FILED

JAN 23 2013

NEW YORK
COUNTY CLERK'S OFFICE

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

PAPERS NUMBERED

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

1, 2, 4, 7 & 8

Answering Affidavits- Exhibits _____

3, 5, 9, 11

Replying Affidavits _____

6, 10, 12

CROSS-MOTION: _____ YES NO

Upon the foregoing papers, it is ordered that this motion is:

DECIDED IN ACCORDANCE WITH THE ATTACHED DECISION.

Dated: 1/16/13

Donna M. Mills
J.S.C.

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

GALLET DREYER & BERKEY, LLP,

Plaintiff,

- against -

FRANK BASILE,

Defendant.

INDEX NO.
109687/11

DECISION/ORDER

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Third-Party Plaintiffs,

- against -

GALLET DREYER & BERKEY, LLP and
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DONNA MILLS, J.:

NEW YORK
COUNTY CLERK'S OFFICE

Motion sequence numbers 001 and 002 are consolidated for decision.

Plaintiff, Gallet, Dreyer & Berkey, LLP ("Gallet") commenced the underlying action against Frank Basile ("Mr. Basile") for unpaid legal fees incurred in their representation of him in an underlying Surrogate's Court action and subsequent nonpayment proceeding in Landlord Tenant Court. Mr. Basile and his wife Celeste Holm ("Ms. Holm") commenced a third-party action against Gallet, and the law firm Hoffman and Pollack ("H&P") for legal malpractice. Third-party defendants, Gallet and H&P now bring these motions to dismiss the third-party complaint pursuant to CPLR §§ 3211(a)(1) and (7).

BACKGROUND

H&P was retained in 2006 to represent Ms. Holm in an existing Surrogate's Court action seeking to revoke an irrevocable trust into which the bulk of Ms. Holm's assets had been transferred. That action was commenced two months after Ms. Holm married the

significantly younger Mr. Basile, and her sons, as trustees, fought the revocation. Gallet was initially retained by Mr. Basile to defend him at a deposition in the Surrogate's Court Case.

The Surrogate's Court matter was concluded with all parties entering into a Stipulation of Settlement while a motion for summary judgment by Holm's sons was pending. The Stipulation provided for the payment of costs associated with Ms. Holm's living expenses on a monthly basis as well as a cash allowance per month to be paid from the Trust. With respect to a farm property located in New Jersey (the "Farm") that was transferred to her sons by Ms. Holm in 2002 and 2003, the Stipulation specifically acknowledged the validity of that transfer and specified that Trust funds were not to be used for the upkeep of the Farm, and discontinued an action commenced by summons with notice relating to the transfer of the Farm. A complaint was never filed in that matter and Ms. Holm never retained H&P to perform any services with respect to that matter.

The stipulation also addressed various loans made by Ms. Holm to her sons, setting forth the rates of interest, and that the loans were forgiven upon her death. The Stipulation further provided for the distribution of Ms. Holm's estate upon her death, one-third to each son and one-third to Mr. Basile with applicable reductions for each. Also pursuant to the settlement, the Trust was to be funded by a refinance of Ms. Holm's apartment.

The crux of the allegations in the third-party complaint is that in hindsight, the settlement of the underlying Surrogate's Court action, allegedly constituted malpractice.

DISCUSSION

A motion to dismiss a complaint pursuant to CPLR 3211 (a) (1) may be granted only if the documentary evidence submitted by the moving party utterly refutes the factual allegations of the complaint and conclusively establishes a defense to the claims as a matter of law (see Goshen v Mutual Life Ins. Co. of N.Y., 98 NY2d 314, 326 [2002]). Put

differently, the documentary evidence must “resolv[e] all factual issues as a matter of law and conclusively dispose of the plaintiff’s claim” (Paramount Transp. Sys., Inc. v Lasertone Corp., 76 AD3d 519, 520 [2010]).

When evaluating a defendant’s motion to dismiss, pursuant to CPLR 3211 (a) (7), the test “is not whether the plaintiff has artfully drafted the complaint but whether, deeming the complaint to allege whatever can be reasonably implied from its statements, a cause of action can be sustained.” Jones Lang Wootton USA v LeBoeuf, Lamb, Greene & McRae, 243 AD2d 168, 176 (1st Dept 1998), quoting Stendig, Inc. v Thom Rock Realty Co., 163 AD2d 46, 48 (1st Dept 1990). To this end, the court must accept all of the facts alleged in the complaint as true, and determine whether they fit within any “cognizable legal theory.” Arnav Indus., Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner, L.L.P., 96 NY2d 300, 303 (2001). However, where the allegation in the complaint consist only of bare legal conclusions, or of factual claims which are inherently incredible or are flatly contradicted by documentary evidence, the foregoing considerations do not apply. See e.g. Tectrade Intl. Ltd. v Fertilizer Dev. and Inv., B.V., 258 AD2d 349 (1st Dept 1999).

To recover damages for legal malpractice, a plaintiff must prove, inter alia, the existence of an attorney-client relationship (see Volpe v. Canfield, 237 A.D.2d 282, 283, 654 N.Y.S.2d 160). “It is well established that, with respect to attorney malpractice, absent fraud, collusion, malicious acts, or other special circumstances, an attorney is not liable to third parties, not in privity, for harm caused by professional negligence” (Rovello v. Klein, 304 A.D.2d 638, 757 N.Y.S.2d 496, citing Conti v. Polizzotto, 243 A.D.2d 672, 663 N.Y.S.2d 293). Since an attorney-client relationship does not depend on the existence of a formal retainer agreement or upon payment of a fee (see Hansen v. Caffry, 280 A.D.2d 704, 720 N.Y.S.2d 258), a court must look to the words and actions of the parties to ascertain the existence of such a relationship (see Tropp v. Lumer, 23 A.D.3d 550, 806

N.Y.S.2d 599).

As is set forth in the third-party complaint, Gallet was initially retained by Mr. Basile to defend him at a deposition in the Surrogate's Court Case. Mr. Basile executed a retainer agreement for the legal service of his own separate and independent, in connection with the lawsuit commenced by his wife, Ms. Holm in the Surrogate's Court. The third-party complaint admits that while Ms. Holm retained H&P, Basile retained Gallet as his attorneys. The complaint further admits that while Ms. Holm was invoiced for legal services by H&P, Mr. Basile was invoiced for legal services by Gallet.

In opposition to the motion to dismiss, Mr. Basile argues, inter alia, that H&P was his counsel by virtue of a "joint representation" of Ms. Holm and Mr. Basile by both H&P and Gallet. Mr. Basile argues that H&P communicated nearly exclusively with him regarding litigation of the Surrogate Court Case, the State Court Case and related matters. Mr. Basile annexes emails purporting to show that H&P established a relationship in privity, or sufficiently near privity, to support his malpractice cause of action against it.

"[A] relationship of near privity may ... be sufficient to sustain a legal malpractice claim" only in cases where there is negligent misrepresentation (Federal Ins. Co. v North American Specialty Insurance Co., 47 A.D.3d at 60, 847 N.Y.S.2d 7) and, here, although the third-party complaint alleges that Gallet and H&P made negligent misrepresentations upon which the third-party plaintiffs relied, in light of the fact that the third-party plaintiffs were separately represented by counsel, any justifiable reliance on the purported negligent misrepresentation can only be directed at their own retained counsel. Moreover, contrary to the contention of third-party plaintiffs, their unilateral belief that they had an attorney-client relationship with each others counsel, in addition to their own, does not by itself confer upon them the status of clients of their spouses' counsel.

Since Ms. Holm and Mr. Basile clearly had separate representation in the underlying

litigations, they cannot now argue that they were in privity or near-privity with each others lawyers, notwithstanding the fact that both law firms worked closely together and engaged in discussions and decisions jointly. As such, the documentary evidence submitted in support of the third-party defendants' motion to dismiss, clearly proves that Gallet solely represented Mr. Basile in the underlying actions, and that H&P solely represented Ms. Holm.

Additionally "[i]n an action to recover damages for legal malpractice, a plaintiff must demonstrate that the attorney 'failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession' and that the attorney's breach of this duty proximately caused plaintiff to sustain actual and ascertainable damages. 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 lawyer's negligence" (Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer, 8 NY3d 438, 442 [2007]).

According to the third-party complaint, H&P and Gallet's purported malpractice arises from three instances of alleged negligence: (1) the purported failure to conduct due diligence relating to the ownership of the apartment; (2) the failure to prosecute the Supreme Court Action; and (3) that they were forced to enter into the Stipulation of Settlement which caused them to lose access to certain assets.

"A claim for legal malpractice is viable, despite settlement of the underlying action, if it is alleged that the settlement of the action was effectively compelled by the mistakes of counsel" (Bernstein v. Oppenheim & Co., P.C., 160 A.D.2d 428, 430, 554 N.Y.S.2d 487 [1990] [citation omitted]). The third-party complaint alleges that, but for third-party defendants' negligence in failing to conduct due diligence and the consequential erroneous advice based on this failure, third-party plaintiffs would not have executed the stipulation

in the Surrogates Court action, and would have received either a higher settlement or trial verdict. These allegations are sufficient to withstand a CPLR 3211(a)(7) motion. At this stage, third-party plaintiffs do not have to show a “likelihood of success,” but are required only to plead facts from which it could reasonably be inferred that third-party defendants’ negligence caused their loss (see InKine Pharm. Co. v. Coleman, 305 A.D.2d 151, 759 N.Y.S.2d 62 [2003]). Third-party plaintiff’s also do not have to *show* that they actually sustained damages but are required only to allege facts from which actual damages could reasonably be inferred (see *id.*).

A motion to dismiss for failure to state a cause of action “must be denied if from the pleadings’ four corners ‘factual allegations are discerned which taken together manifest any cause of action cognizable at law’ ” (511 W. 232nd Owners Corp. v. Jennifer Realty Co., 98 N.Y.2d 144, 152, 746 N.Y.S.2d 131, 773 N.E.2d 496, quoting Polonetsky v. Better Homes Depot, 97 N.Y.2d 46, 54, 735 N.Y.S.2d 479, 760 N.E.2d 1274). Construing the complaint liberally and giving third-party plaintiff’s the benefit of every possible favorable inference (see Harrison v. Constantino, 2 A.D.3d 1315, 768 N.Y.S.2d 918), I conclude that it sufficiently alleges that third-party defendants had a relationship with their respective clients that required them to “exercise the degree of skill commonly exercised by an ordinary member of the legal community” (McKenna v. Forsyth & Forsyth, 280 A.D.2d 79, 80, 720 N.Y.S.2d 654; see Marshall v. Nacht, 172 A.D.2d 727, 727–728, 569 N.Y.S.2d 113; Marquez v. J. Ross Dev., 162 A.D.2d 1011, 557 N.Y.S.2d 802).

Accordingly it is

ORDERED that third-party defendant’s motion to dismiss the complaint is granted only to the extent that Ms. Holm’s complaint against Gallet is dismissed and Mr. Basile’s complaint against H&P is similarly dismissed; it is further

ORDERED that third-party defendants are directed to serve an answer to the

complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a conference in Room 574, 111 Centre Street, on 2/8/, 2013, at 1030 AM.

Dated:

ENTER:



J.S.C.

DONNA M. MILLS, J.S.C.

FILED

JAN 23 2013

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