

Cohen v Kachroo

2013 NY Slip Op 30416(U)

February 22, 2013

Supreme Court, New York County

Docket Number: 111735/10

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. EILEEN A. RAKOWER

PRESENT: _____

PART 15

Justice

Index Number : 111735/2010

COHEN, PATRICIA

vs.

KACHROO, ESQ., GAYTRI D.

SEQUENCE NUMBER : 007

DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

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

FILED

RECEIVED IN ACCORDANCE WITH
ADJUDICATORY PROCEDURE
FEB. 28 2013

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 2/22/13


_____, J.S.C.

HON. EILEEN A. RAKOWER

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

-----X
PATRICIA COHEN,

Plaintiff,
- against -

Index
No.:111735/10

Decision and
Order
Motion Seq: 007

GAYTRI KACHROO, ESQ. and
KACHROO LEGAL SERVICES, P.C.,

Defendants.

FILED

FEB 28 2013

HON. EILEEN A. RAKOWER, J.S.C.

NEW YORK
COUNTY CLERK'S OFFICE

Plaintiff Patricia Cohen ("Plaintiff") commenced this action by filing a Complaint in or about October 2010 and filed an amended Complaint, on or about November 28, 2010, and a filed a Verified Second Amended Complaint. Plaintiff asserts nine claims against defendants Gaytri Kachroo ("Kachroo") and Kachroo Legal Services, P.C.'s ("KLS") (collectively, "Defendants"), including breach of contract, breach of fiduciary obligations, breach of the New York Rules of Professional Conduct, breach of New York Judiciary Law 470 and 487, and legal malpractice. Plaintiff seeks the return of fees paid to the KLS, treble damages, interest, punitive damages, and a declaratory judgment that Plaintiff is not indebted to Defendants.

As set forth in the Verified Second Amended Complaint, Plaintiff entered into a retainer agreement with Defendants on January 5, 2010, wherein Defendants agreed to represent Plaintiff in prosecuting her claims against her husband in federal court, and to defend any claims brought by the attorney who previously represented her in the federal action.

Pursuant to the retainer agreement, Plaintiff was to pay a \$25,000 initial retainer, and to supplement that amount in order "to cover minimal costs of litigation." The agreement further states:

We shall be compensated upon recovery, whether by settlement or judgment . . . compensation shall be in the amount awarded by the Court, but, in no event, shall We seek contingency compensation in excess of 30% . . . of any recovery plus reasonable expenses less the retainer amounts received . . .

Plaintiff paid the retainer amount. On June 7, 2010, Defendant KLS resigned as Plaintiff's attorney in the federal action allegedly due to Plaintiff's inability to meet her financial obligations. Plaintiff alleges that Defendants threatened to abandon her action if she not did pay additional money to them, and that they tried to coerce her into adding payment terms to the retainer agreement. Plaintiff alleges that, as she was only required to pay the initial \$25,000, and a percentage of any recovery made in the federal action, Defendants misrepresented to the federal court judge that she failed to pay her legal fees when they sought withdrawal, and that they subsequently abandoned the action without cause.

Defendants now move to dismiss certain causes of action contained in Plaintiff's Verified Second Amended Complaint pursuant to CPLR 3211(a)(7). Defendants seek to dismiss Plaintiff's claims for legal malpractice, breach of fiduciary duty, breach of the New York Rules of Professional Conduct, Breach of New York Judiciary Law 487 for failure to state a claim, and punitive damages. Defendants contend that "this matter does not constitute anything more than a fee dispute."

On a motion to dismiss pursuant to CPLR §3211(a)(7), the pleading is to be afforded a liberal construction and the plaintiff accorded the benefit of every possible inference. (*See, Leon v. Martinez*, 84 NY2d 83, 614 NYS2d 972, 638 NE2d 511 [1994]). In determining whether dismissal is warranted for failure to state a cause of action, the court must "accept the facts alleged as true ... and determine simply whether the facts alleged fit within any cognizable legal theory." (*People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 AD2d 91 [1st Dept. 2003]) (internal citations omitted) (*see* CPLR §3211[a][7]). The court's function on a motion to dismiss pursuant to CPLR §3211(a)(7) is to determine whether the plaintiff's factual allegations fit within any cognizable theory, without regard to whether the allegations ultimately can be established. (*See, Union State Bank v. Weiss*, 65 AD3d 584, 884 NYS2d 136 [2nd Dept 2009]).

The first cause of action alleges that Defendants breached the "law of the State

of New York and the Rules of Professional Conduct” by coercing Plaintiff to pay legal fees that Plaintiff did not owe and threatening to cease work on a matter if the fees were not paid. The Verified Complaint alleges earlier in paragraph 51 that Defendants violated Rule of Professional Conduct 1.5(d)(3). Rule of Professional Conduct 1.5(d)(3) prohibits a lawyer from entering into an arrangement for, charge or collect a “fee based on fraudulent billing.” Defendants contend that this cause of action is duplicative of Plaintiff’s legal malpractice claim; however, as the cause of action is based on Defendants’ alleged fraudulent billing practices, Plaintiff’s first cause of action sets forth a separate cause of action.

The third cause of action alleges legal malpractice. “To establish a cause of action for legal malpractice, the plaintiff must show (1) that the attorney was negligent in failing to exercise that degree of care, skill and diligence commonly exercised by an ordinary member of the legal community; (2) that but for the attorney’s negligence, plaintiff would have prevailed in the underlying action; and (3) that actual damages were sustained as a direct result of the attorney’s actions.” (*Wilson v. City of New York*, 294 A.D.2d 290, 293 [1st Dept. 2000]) (citation omitted).

Plaintiff alleges that Defendants “did not exercise that degree of care, skill and diligence commonly possessed and exercised by an ordinary member of the legal community, especially by a member of the RICO bar in the Underlying Action or the Batista Action.” Plaintiff alleges that, “As a result of their misconduct and failure to provide the degree of care, skill and diligence required of them, Kachroo and KLS are not entitled to and must forfeit the fees received by them.” The alleged misconduct stems mainly from Defendants’ billing practices, although the Complaint also alleges deficiencies in the legal work that Defendants performed on Plaintiff’s behalf, including deficiencies in the pleading prepared by Defendants on Plaintiff’s behalf in Plaintiff’s litigation with her husband. However, the Complaint fails to state a cause of action for legal malpractice because it does not allege that “but for” the negligence, Plaintiff would have prevailed in the underlying action. As such, Plaintiff’s claim for legal malpractice fails to state a claim.

Plaintiff’s fifth cause of action alleges that Defendants “breached their fiduciary obligations, as attorneys, to Cohen and are required to disgorge all monies received by them from Cohen plus damages incurred as a result of the breach of their fiduciary obligations.” Defendants contend that Plaintiff’s breach of fiduciary claim

is duplicative of its breach of contract claims; however, as Plaintiff's Verified Complaint contains other allegations of Defendants' misconduct aside from their alleged improper billing practices, Plaintiff's fifth cause of action is not duplicative of its breach of contract claim.

Plaintiff's sixth cause of action alleges that Defendants breached Judiciary law, Section 487. Judiciary Law, Section 487 permits a party to recover treble damages against an attorney who:

1. Is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party; or,
2. Wilfully delays his client's suit with a view to his own gain; or, wilfully receives any money or allowance for or on account of any money which he has not laid out, or becomes answerable for.

Plaintiff's allegations concerning the alleged deceit by Defendants to Plaintiff and to the Courts are sufficient to establish a violation of Judiciary law 487(1).

"Because damages for breach of a contract are allowed as compensation for the injury or damage resulting from such breach rather than by way of punishment, the general rule in actions for breach of contract is that the damages are limited to the pecuniary loss sustained, and that exemplary damages are not recoverable. However, punitive damages are recoverable in an action to recover for breach of contract upon a showing of gross, wanton, or willful fraud or of high moral culpability of the defendant." (36 N.Y. Jur. 2d Damages Section 188). Here, Plaintiff's allegations of alleged coercion by Defendants are sufficient to support Plaintiff's prayer of relief for punitive damages.

Wherefore it is hereby

ORDERED that Defendants' motion is granted only to the extent that Plaintiff's legal malpractice claim is dismissed.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: 2/22/13



EILEEN A. RAKOWER, J.S.C.

FILED
FEB 28 2013
NEW YORK
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