

Brady v Freidlander

2013 NY Slip Op 31238(U)

June 7, 2013

Sup Ct, NY County

Docket Number: 156825/2012

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. EILEEN A. RAKOWER
Justice

PART 15

Index Number : 156825/2012
BRADY, JAMES H
vs.
FREIDLANDER, MARK S.
SEQUENCE NUMBER : 001
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). 1, 2, 3

Answering Affidavits — Exhibits _____ | No(s). 4, 5, 6

Replying Affidavits _____ | No(s). 7

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

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

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

6/7/13

Dated: 6/3/13

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
JAMES H. BRADY, WEST SIDE LOFT INC.,
JAMES CATERING INC., LOFT ELEVEN, INC, d/b/a
LOFT ELEVEN,

Index No.
156825/2012

Plaintiffs,

- against -

**DECISION
and ORDER**

MARK S. FREIDLANDER, a/k/a MARK S.
FREIDLANDER, ESQ.,

Mot. Seq. 01 and 2

Defendant.

-----X

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

The Complaint alleges the following causes of action against Defendant based primarily on defendant Mark S. Friedlander’s (“Defendant”) withdrawal as Plaintiffs’ counsel in several related commercial nonpayment proceedings commenced by Plaintiffs’ landlord IGS Realty: (1) violation of Section 487 of Judiciary Law; (2) Refund of Unreasonable Legal Fees; (3) legal malpractice; (4) misrepresentation; and (5) breach of contract.

As alleged in the Complaint, Defendant was retained in June 2009 and appeared for Plaintiffs in the matters of *West Side et. v. IGS Realty*, Index No. 600740/2009, and *West Side et. al. v. IGS Realty*, Index No, 650463/2009. These actions had been previously commenced by Plaintiffs against IGS Realty, their commercial landlord, and were then pending in Supreme Court (“the Supreme Court Actions”).

At the same time, IGS Realty had commenced the following commercial non-payment proceedings against the corporate Plaintiffs in Civil Court: *IGS Realty v. James Catering Inc.*, 55601/2009; *IGS Realty v. West Side Loft et. al.*, 55602/2009; and *IGS v. Loft Eleven Incorporated, d/b/a Loft Eleven*, 55603/2009. In the proceeding commenced against Loft Eleven, Plaintiffs interposed a ninth affirmation

defense of constructive eviction, among others. These matters were joined for trial purposes in the Civil Court.

Prior to Defendant's retention, Plaintiffs had moved to consolidate the commercial non-payment proceedings that had been commenced by IGS Realty in Civil Court with Plaintiffs' actions in Supreme Court. In May 2009, Justice Lowe denied Plaintiffs' motion. Upon their retention of Defendant, Plaintiffs allege that Defendant "insisted on filing an unnecessary motion to renew [Plaintiffs' motion to consolidate] and charged excessive legal fees in excess of \$20,000, when in fact he knew that there was almost no likelihood that such motion would be granted."

As alleged in the Complaint, on September 10, 2009, represented by Defendant, Plaintiffs were ready to proceed to trial in the Civil Court matters, but the matter was adjourned until September 30, 2009. Defendant moved to be relieved as Plaintiffs' counsel. On September 30, 2009, Defendant's motion was heard before the Honorable Debra Rose Samuels, Plaintiffs opposed, and the Court granted Defendant's motion. The Complaint alleges that "Defendant intentionally and maliciously misrepresented to the Plaintiffs and to the Court that he was withdrawing from the representation of plaintiffs because of conflicts involving trial strategy when in fact the defendant's sole concern [was] that his future legal bills would not be paid."

Judge Samuels then adjourned the proceedings for all purposes until October 13, 2009 to provide the corporate Plaintiffs with the opportunity to obtain new counsel. Plaintiffs allege that they could not obtain new counsel, and Judge Samuels granted IGS Realty's then pending motions to quash Plaintiffs' trial subpoenas on default and issued default judgments against all three corporate plaintiffs totaling approximately \$150,000.

As further alleged in the Complaint, Plaintiffs thereafter moved to vacate the default judgments by way of Order to Show Cause. Judge Engoran denied Plaintiffs' motion on the basis that it was "brought ten months too late" and that Plaintiffs' failure to find replacement counsel to appear in court on October 13, 2009 was "not a reasonable excuse."

As further alleged in the Complaint, IGS Realty thereafter moved for a second summary judgment seeking to dismiss Plaintiffs' two Supreme Court Actions, which

was granted by Judge Schweitzer based on grounds of res judicata.

As further alleged in the Complaint, IGS Realty then moved for summary judgment in lieu of complaint seeking to hold Brady personally liable on the Good Guy Guaranty contained in the leases in *IGS Realty v. James H. Brady*, 603561/2009, which was granted by Judge Madden.

Plaintiffs subsequently appealed Justice Schweitzer and Judge Madden's decisions, and on October 11, 2012, the First department in *IGS Realty v. James Catering*, 99 A.D. 3d 528 [1st Dept 2012] reversed the defaults and the decisions of Judge Schweitzer and Madden, by stating in relevant part:

As a result of tenants' inability to obtain substitute counsel within 13 days of prior counsel being relieved by the court, tenants and Brady, their principal, have been deprived of their day in court in four cases: the Civil Court proceedings brought by the IGS Realty, the Supreme Court actions between tenants and IGS Realty, and the Supreme Court action between IGS Realty and Brady. Given the disputed issues of fact in these cases, they should be resolved by trial, not default (*see Ackerson v. Stragmaglia*, 176 A.D. 602 [1st Dept 1991]). Since we are granting the motion to vacate the Civil Court judgments, they no longer have res judicata effect (*see e.g. Trisingh Enters. v Kessler*, 249 AD2d 45, 46 [1st Dept 1998]). Thus, the Supreme Court order and judgment, which were based on res judicata, must be reversed.

Defendant now moves for an Order (Motion Seq. #1), pursuant to CPLR §§ 3211(a)(8) and (a)(7), dismissing Plaintiffs' Complaint. Among other arguments, Defendant alleges that Plaintiffs are barred from bringing the instant action based on Judge Samuels' decision and res judicata. Plaintiffs oppose and cross move for sanctions pursuant to 22 NYCRR 130.1.1(c). Plaintiffs also move for leave to file a sur-reply (Mot. Seq. #2), which Defendant opposes. Plaintiffs' motion sequence 2 is granted and Plaintiffs' sur-reply is hereby considered.

CPLR §3211 provides, in relevant part:

- (a) a party may move for judgment dismissing one or more causes of action asserted against him on the

ground that:

- (7) the pleading fails to state a cause of action; or
- (8) the court has not jurisdiction of the person of the defendant.

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]).

“An attorney with just cause may withdraw from a case and may recover for his services rendered.” *In the Matter of the M.E. v. S.G.*, 124 Misc. 2d 851, 851 (N.Y. County 1984). Furthermore, “An attorney may be permitted to withdrawn from employment where a client refuses to pay reasonable legal fees.” *Weiss v. Spitzer*, 46 A.D. 3d 675 [2d Dept 1987]).

It is well established that an attorney’s alleged threat to cease representing a client unless the attorney is paid does not constitute duress. *See Levitt v. Brooks*, 102 A.D. 3d 547 [1st Dept 2013] (a lawyer’s threat to cease rendering services unless paid does not constitute coercion); *Duane Morris LLP v. Astor Holdings, Inc.*, 61 A.D. 3d 418 [1st Dept 2009]; *Fred Ehrlich, P.C. v. Tullo*, 274 A.D. 2d 303 [1st Dept 2000] (“[P]laintiff’s ‘threats’ to cease representing defendants unless he were paid were not wrongful. The threatened exercise of a legal right is not economic duress.”)

“The doctrine of the ‘law of the case’ is a rule of practice, an articulation of sound policy that, when an issue is once judicially determined, that should be the end of the matter as far as Judges and courts of co-ordinate jurisdiction are concerned.” *See Martin v. City of Cohoes*, 37 N.Y. 2d 162, 165 [1975])

“Under a transactional analysis, ‘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.’” *Nottenberg et al. v. Walber*, 160 A.D. 2d 574, 575 [1st Dept 1990]) (citations omitted). “The doctrine

of res judicata bars both claims that were actually litigated and those relevant issues that could have been litigated.” (*Id.*) (citations omitted).

Here, in this case, after considering Plaintiffs’ opposition to Defendant’s motion to be relieved as Plaintiffs’ counsel in the Civil Court landlord/tenant matters, Judge Samuels granted the motion on September 30, 2009 “without prejudice to the defendant seeking any refunds in attorneys fees paid in connection with attorney Friedlander’s defense of this case and withdrawal.” Judge Samuels’ decision allowing Defendant to be relieved as counsel was not appealed.

Plaintiffs’ first cause of action alleges that Defendant 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.

Plaintiffs allege that Defendant deceived the Court when he moved in open court to withdraw as their counsel on the basis that plaintiff James Brady questioned strategy and lacked trust in Defendant’s representation “when in fact the real reason for withdrawal was the Defendant’s concern that Plaintiffs could or would not pay defendant’s future legal bills.” However, Plaintiffs had the opportunity to raise these issues when opposing Defendant’s motion to be relieved of counsel, and after considering Plaintiff’s opposition, Judge Samuels permitted Defendant to be relieved of counsel. Plaintiffs did not thereafter appeal Judge Samuels’ decision on that point. Furthermore, even if Plaintiffs’ allegations are true and Defendant was seeking to withdraw based on Plaintiffs’ failure to pay legal fees, an attorney may be permitted to seek withdrawal on this ground. Thus, the conclusion that Defendant acted “with intent to deceive the court or any party” is without factual support.

Plaintiffs’ third cause of action is for 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). The Complaint fails to allege facts sufficient to show that "but for" Defendant's negligence, Plaintiffs would have prevailed in the underlying action. Here, while the Complaint states that "Plaintiff would have won the trial in the Civil Court based on defendants of Constructive Eviction and breach of warranty . . . had the defendant not abandoned representation and provided adequate advice concerning the surrender of the possession issue of the Yellowstone injunction. . . and Plaintiffs would not have lost their [commercial spaces]", these allegations are conclusory and without factual support. Rather, based on the Complaint, after Defendant was relieved of counsel, Plaintiffs were provided with time to obtain new counsel, and the default entered against the corporate plaintiffs was based on their failure to do so, and that default has now been reversed.

Plaintiffs' fourth cause of action alleges misrepresentation. The Complaint alleges that "Defendant intentionally and maliciously misrepresented to the Plaintiffs and to the Court that he was withdrawing from the representation of plaintiffs because of conflicts involving trial strategy when in fact the defendant's sole concern [was] that his future legal bills would not be paid." Here, in light of the fact that Defendant moved in open court to be relieved as counsel, Plaintiffs opposed, Judge Samuels' granted Defendant's motion, and Plaintiffs' did not appeal that order on that issue, the issue was previously litigated and cannot be relitigated here.

Turning now to the second and fifth causes of action of the Complaint, which together assert a breach of the retainer agreement and resulting damages, the four corners of the Complaint state a claim. Judge Samuels' September 30, 2009 Order, which relieved Defendant as Plaintiffs' counsel, was made "without prejudice to the defendant seeking any refunds in attorneys fees paid in connection with attorney Friedlander's defense of this case and withdrawal."

Wherefore, it is hereby,

ORDERED that Plaintiff's motion for leave to file and serve a sur reply is granted; and it is further

ORDERED that Defendant's motion to dismiss is granted only to the extent that the first cause of action for violation of Section 487 of Judiciary Law, third cause of action for legal malpractice, and fourth cause of action for misrepresentation of Plaintiffs' Complaint are dismissed; and it is further

ORDERED that the remainder of the action shall continue; and it is further

ORDERED that Plaintiffs' cross motion for sanctions is denied.

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

DATED: June 7, 2013



EILEEN A. RAKOWER, J.S.C.