

**Dalewitz v Gropper**

2014 NY Slip Op 30892(U)

April 7, 2014

Supreme Court, New York County

Docket Number: 100198/2007

Judge: Jeffrey K. Oing

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This opinion is uncorrected and not selected for official publication.



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JANICE DALEWITZ,

Plaintiff,

-against-

JOSHUA GROPPER,

Defendant.  
-----x

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Mtn Seq. Nos. 003  
and 004

DECISION AND ORDER

FILED

APR 09 2014

JEFFREY K. OING, J.:

In motion sequence no. 003, defendant moves, pursuant to  
CPLR 3126, to strike the complaint due to plaintiff's alleged  
continuing and repeated failure to comply with this Court's  
discovery orders, or alternatively, pursuant to 22 NYCRR §  
202.21(e), to vacate the note of issue.

In motion sequence no. 004, defendant moves, pursuant to  
CPLR 3212, for summary judgment dismissing the complaint.  
Plaintiff cross-moves for summary judgment in her favor.  
Alternatively, plaintiff seeks an order directing non-party  
Empire City Subway to produce a witness for deposition.

**Factual Background**

This legal malpractice action arises out of plaintiff's trip  
and fall at a Manhattan crosswalk located on 8<sup>th</sup> Avenue and West  
45<sup>th</sup> Street in March of 2000. Following her accident, plaintiff  
retained defendant to commence a personal injury action on her  
behalf against the City of New York City (the "underlying  
action"). Following completion of discovery in the underlying

action, on June 15, 2006, Supreme Court (Michael Stallman, J.) granted the City's motion for summary judgment and dismissed the action against it on the grounds that the City had "no prior written notice of the allegedly defective condition," and there was no evidence that the City "'caused or created' the defect" (Dalewitz v City of New York, Index No. 106373/2001, Klein Affirm., Ex. O).

In bringing the instant action, plaintiff contends that defendant committed legal malpractice because he sued the City, when Empire City Subway ("ECS") and/or Consolidated Edison ("Con Ed") may have been the responsible parties. Plaintiff bases her claim on the fact that attached to the complaint in the underlying action were two photographs of the accident site (Klein Affirm., Ex. P). According to plaintiff, a review of the two photographs reveals the letters "CS" spray-painted on the roadway and a metal plate in the crosswalk with the letters "ECS" etched onto the plate. Another photograph of the accident scene shows a barricade with the letters "ECS" stenciled across it (Id., Ex. Q).

After plaintiff retained her counsel in the instant matter, he filed FOIL requests with the New York City Department of Transportation ("DOT") for permit applications at the accident location for the two years prior to the date of plaintiff's accident (Id., ¶ 35; Ex. R). ECS and Con Ed were two entities

identified in DOT's FOIL response as having performed work at the intersection of West 45<sup>th</sup> Street and 8<sup>th</sup> Avenue (Id.).

Plaintiff asserts that, "[d]efendant failed to conduct a comprehensive investigation of Plaintiff's accident that would have revealed the party responsible" for her accident, and that "[a]t best, [his] 'investigation' can be described as cursory: he procured a Big Apple Map, may have visited the accident location and may have taken measurements of the defect" (Id., ¶¶ 53-54). Plaintiff contends that had defendant "actually investigated the claim (i.e., visited the accident location or submitted a FOIL request to DOT), he would have realized there was active construction at the intersection where Plaintiff fell" and would have commenced a suit against ECS before the statute of limitations on such an action had run (Id., ¶¶ 56-58). Based on these allegations, the verified complaint contains two causes of action: (1) for legal malpractice and (2) for breach of contract.

#### Discussion

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," (Ulico Cas. Co. v Wilson, Elser, Moskowitz, Edelman & Dicker, 56 AD3d 1, 6 [1st Dept 2008]). To establish negligence, a plaintiff must show that the attorney

"failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession" (AmBase Corp. v Davis Polk & Wardwell, 8 NY3d 428, 434 [2007]). As for proximate cause, a plaintiff must "demonstrate that 'but for' the attorney's negligence," it "would have prevailed in the underlying matter" (Nomura Asset Capital Corp. v Cadwalader, Wickersham & Taft, LLP, 980 NYS2d 95, 100, 2014 NY Slip OP 00954 [1st Dept 2014] [quotation and citation omitted]). Mere speculation that a plaintiff has been damaged as a "proximate cause" of the attorney's alleged malpractice is insufficient to sustain the claim (Schloss v Steinberg, 100 AD3d 476 [1st Dept 2012]; 180 E 88<sup>th</sup> St. Apartment Corp. v Law Office of Robert Jay Gummenick, 84 AD3d 582 [1st Dept 2011]). Thus, in the case at bar, plaintiff must show that "but for" defendant's alleged malpractice in not bringing suit against additional defendants, she would have prevailed in any underlying action against ECS and/or Con Ed. In essence, she must demonstrate in this lawsuit: (1) that had a suit been brought against the proper parties, namely, ECS and Con Ed, they would have been found responsible for the depression in the sidewalk, (2) that the depression constituted a dangerous or defective condition, and (3) that ECS and/or Con Ed had actual or constructive knowledge of such condition.

Plaintiff's claim is simply too speculative and attenuated. The record indicates that no fewer than four different entities were issued permits to open the roadway at or near the intersection, and plaintiff's inability to identify which of these entities was responsible for or created the depression renders her contentions entirely conjectural. Additionally, the record does not support a finding that the depression in the crosswalk constituted an actionable, dangerous condition. Plaintiff testified at her EBT in the underlying action that she was unsure if she actually fell or just twisted her ankle, that she did not know whether her foot was partially or completely in the depression at the time her ankle twisted, and that she did not even know if her foot got "caught" in the depression (Gropper Aff., Ex. B, Dalewitz 2/24/2005 EBT, pp. 22-24, 39).

Moreover, plaintiff fails to raise a triable issue of fact. Instead, rather than proffering sufficient evidentiary proof, plaintiff simply argues that, "upon information and belief," ECS and Con Ed are responsible for the alleged defect. Her arguments are based entirely on speculation and conjecture and are insufficient to preclude a finding of summary judgment in favor of defendant. In light of the foregoing, plaintiff's claim for legal malpractice must be dismissed.

Turning to her claim for breach of contract, plaintiff does not dispute defendant's contention that this claim is redundant of the malpractice cause of action. Moreover, this claim must be dismissed for the additional reason that plaintiff cannot allege any actual breach of contract even if such claim was not duplicative of the legal malpractice cause of action. Plaintiff does not -- and likely cannot -- allege that defendant promised her a favorable outcome when he agreed to represent her in the underlying action. To the extent plaintiff and defendant had a contract -- for defendant to represent her in the underlying action -- defendant performed his part of the agreement. Therefore, the second cause of action for breach of contract is also dismissed.

Accordingly, defendant's motion for summary judgment dismissing the complaint is granted, and it is hereby dismissed. Plaintiff's cross-motion for summary judgment is denied. Defendant's motion to strike the complaint is denied as moot.

Accordingly, it is

ORDERED that the defendant's motion to strike (mtn seq. no. 003), is denied as moot, and it is further

ORDERED that the defendant's motion for summary judgment (mtn seq. no. 004) is granted, and the complaint is hereby dismissed; and it is further

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ORDERED that the plaintiff's cross-motion for summary judgment is denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: 4/7/14

  
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HON. JEFFREY K. OING, J.S.C.

FILED

APR 09 2014

COUNTY CLERK'S OFFICE  
NEW YORK