

Pu v Mitsopoulos

2014 NY Slip Op 31038(U)

April 17, 2014

Sup Ct, New York County

Docket Number: 602986/06

Judge: Barbara Jaffe

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

BARBARA JAFFE
J.S.C.

PRESENT: _____
Justice

PART 12

Index Number : 602986/2006
PU, RICHARD
vs.
MITSOPOULOS, GEORGE
SEQUENCE NUMBER : 016
SUMMARY JUDGMENT

INDEX NO. 602488/06
MOTION DATE _____
MOTION SEQ. NO. 016

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s) 1, 2

Answering Affidavits — Exhibits _____ No(s) 3

Replying Affidavits _____ No(s) 4, 5

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

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

FILED

APR 22 2014

NEW YORK
COUNTY CLERKS OFFICE

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

Dated: 4/17/14

J.S.C.

- 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 : IAS PART 12

-----X
RICHARD PU,

Plaintiff,

- against -

Index No. 602986/06

Mot. seq. nos. 016, 017, 018

DECISION AND ORDER

GEORGE MITSOPOULOS, APOSTOLOS
MITSOPOULOS, ERFOSINI MITSOPOULOS, TITAN
PHARMACEUTICALS AND NUTRITION, INC.,

FILED

Defendants. APR 22 2014

-----X
BARBARA JAFFE, JSC:

NEW YORK

COUNTY CLERK'S OFFICE

For plaintiff self-represented:
Richard Pu, Esq.
120 E. 90th St., 10C
New York, NY 10018
212-427-3665

For plaintiff on counterclaims:
Matthew K. Flanagan, Esq.
Catalano Gallardo, *et al.*
100 Jericho Quadrangle, Ste. 326
Jericho, NY 11753
516-931-1800

For defendants:
Asher E. Taub, Esq.
Alatsas & Taub, P.C.
2115 Ave. U
Brooklyn, NY 11229
718-891-1200

By notices of motion, plaintiff moves pursuant to CPLR 3212 for orders granting him summary judgment on his claim and as to defendants' counterclaims. Defendants oppose.

By notices of motion, defendants move for orders reducing the fees allegedly owed plaintiff, granting them summary dismissal, and granting them summary judgment on their counterclaims against plaintiff. Plaintiff opposes.

The motions are consolidated for disposition.

I. PERTINENT UNDISPUTED BACKGROUND

In December 2004, defendant George Mitsopoulos contacted plaintiff, an attorney, to discuss an ongoing dispute between him and his company, defendant Titan Pharmaceuticals and Nutrition, Inc., in connection with a franchise agreement with franchisor Medicine Shoppe, Inc. The franchise agreement permitted Mitsopoulos to operate a pharmacy under franchisor's name

and required him to pay royalties based on the pharmacy's gross income. The parties also agreed that any disputes would be arbitrated and that franchisor was entitled to attorney fees in the event of litigation. (Affirmation of Matthew K. Flanagan, Esq., dated Sept. 25, 2013 [Flanagan Aff.]; Affidavit of Richard Pu, dated Sept. 13, 2013; Exhs. F, G, H).

To finance the deal, Titan borrowed \$100,000 from franchisor. Mitsopoulos personally guaranteed the loan, along with his parents, defendants Apostolo and Efrosini Mitsopoulos, who took out a \$100,000 mortgage on their retirement home as collateral. (*Id.*).

When Mitsopoulos first met with plaintiff, he told him that Titan was behind in paying franchisor and that on December 1, 2004, franchisor sued him, his parents, and Titan in federal court. Franchisor also commenced an arbitration proceeding in St. Louis, Missouri against Titan and Mitsopoulos. (*Id.*, Exhs. I, J).

On or about December 15, 2004, Mitsopoulos, his parents, and Titan retained plaintiff, and agreed to pay him \$275 an hour, plus expenses. They also agreed that if plaintiff sued them to recover his legal fees, they would compensate him for any fees incurred in connection thereof. (*Id.*, Exh. K).

By email dated April 2, 2005, Mitsopoulos instructed plaintiff to settle with franchisor under certain conditions and advised him to "take a hard line" and "play hardball" with franchisor. (*Id.*, Exh. M).

Between May 2006 and November 2006, for reasons not connected with the instant matter, plaintiff was suspended from practicing law in the U.S. District Court for the Southern District of New York (SDNY), and then reciprocally, in the New York State courts from January 2007 to January 2008. As of December 2006, he is readmitted to practice in the federal court but

not in state court.

On or about July 5, 2006, the arbitrator awarded franchisor \$78,953.03 and \$401,118.39 pursuant to the parties' various agreements and guarantees, and \$439,363.22 as attorney fees and costs, having rejected all of Titan's and Mitsopoulos's affirmative defenses. (*Id.*, Exh. T).

By email dated July 9, 2006, Mitsopoulos wrote to the arbitrator, as pertinent here:

(1) "I did not expect to win at the arbitration so the response was not shocking that I had lost";

(2) "I had to protect my parents by any means possible. That is the reason I allowed [plaintiff] to pursue the course of action [plaintiff] did"; and

(3) At various points I tried to settle with [franchisor] but each time it was the same response. In early 2005, I only owed them about \$240K. I asked to sell the store files to Rite Aid again as I had asked in the letter you saw. Again I was told no. When asked what they wanted their response was the \$250K that was owed plus \$700K for future royalties. I had no way to come up with that kind of money . . . with an unreasonable demand I had no choice [but] to keep trying to protect my parents. Later efforts were made again, but the numbers always seemed to be up there in the \$900K range. After the arbitration when you advised us to try to settle our difference [franchisor] again offered a settlement of an amount in the \$900K range. It was impossible. My store's value is in the \$400K range. Were [sic] would I get that kind of money. I asked Mr. Alatsas to help continue the negotiations . . . Once again, the amount exceeded the worth of the store by more than double. They were willing to except [sic] \$850K . . . With the numbers they wanted staying so high I chose to await your decision . . . Yes, [plaintiff] did run [franchisor] ragged with cases in front of courts all over the place, but [franchisor] never backed down either. They never said "let him sell the pharmacy and pay us what he owes us, so we could end this." They fought at every turn . . .

(*Id.*, Exh. Q).

On or about July 24, 2006, franchisor, Titan, and Mitsopoulos, now represented by Taub, agreed to settle their disputes as follows: (1) the pharmacy would close and its assets sold to Rite Aid for \$400,000, which was to be paid to franchisor; (2) Titan and Mitsopoulos would pay franchisor \$250,000 within three months of the sale to Rite Aid; (3) the parties would dismiss

with prejudice any other actions pending between them, including the federal action; and (4) upon a default in payment, Titan and Mitsopoulos would pay \$1,465,071.42 in liquidated damages. (*Id.*, Exh. W). Thereafter, Titan and Mitsopolous defaulted on the settlement.

In or about October 2006, plaintiff served defendants with a first amended complaint, asserting, as pertinent here, claims for breach of the retainer agreement, account stated, *quantum meruit*, and breach of the covenant of good faith. (*Id.*, Exh. A).

In December 2006, franchisor sued Mitsopoulos's parents in Supreme Court, Kings County, based on their guaranty, and separately sued Titan and Mitsopoulos for the liquidated damages provided for in the 2006 settlement agreement. On January 24, 2007, defendants moved to dismiss the actions based on franchisor's alleged failure to comply with Business Corporation Law (BCL) § 1312.

On February 28, 2007, the parties entered into a settlement agreement, with Titan and Mitsopoulos agreeing to pay \$570,000 in exchange for a release from the franchise agreement and any future royalty payments. (*Id.*, Exh. Z).

By third amended verified answer dated December 18, 2008, defendants asserted a counterclaim against plaintiff for legal malpractice. (*Id.*, Exh. B).

In or around March 2011, Mitsopoulos filed for bankruptcy in the Eastern District of New York. In May 2011, plaintiff opposed it. By decision dated March 8, 2013, Mitsopoulos was denied, pursuant to section 727(a) of the Bankruptcy Code, a bankruptcy discharge based on his failure to maintain records of Titan's finances. No mention is made in the decision of plaintiff's claim for attorney fees.

II. PLAINTIFF'S CLAIM FOR ATTORNEY FEES

As plaintiff has submitted the parties' retainer agreement along with an affidavit detailing the work he performed and his itemized bills, he has established, *prima facie*, his entitlement to the attorney fees and expenses he seeks. (*See eg Phillips Nizer et al. v Chu*, 240 AD2d 231 [1st Dept 1997] [reasonable value of attorneys' services itemized in invoices annexed to complaint]).

Apart from the malpractice counterclaims, defendants advance the following arguments for why plaintiff is not entitled to some of his fees: (1) plaintiff billed defendants for services rendered during his suspension from practicing law in the federal courts; and (2) plaintiff billed for unnecessary and wasteful motions. (Mem. of Law, dated Oct. 2, 2013).

A. Practicing while suspended

Plaintiff submits evidence that any work he did before the arbitration award was rendered was completed by July 13, 2006, six months before the effective date of his suspension in New York State, and that his work in the federal action was completed in March 2006, two months before the effective date of his Southern District suspension. He also observes that he was never suspended from practicing in the federal court in the Eastern District of New York.

Absent any dispute as to these dates, defendants have failed to demonstrate that plaintiff was suspended during the time he performed work on their behalf.

B. Unnecessary work or overbilling

As defendants raise a triable issue as to whether plaintiff performed unnecessary work on the case or overbilled them for work he should not have performed, the reasonableness of plaintiff's fees must be determined at a hearing. (*See eg Bomba v Silberfein*, 238 AD2d 261 [1st Dept 1997] [factual issue as to reasonableness of attorney's fees precluded summary judgment as

to damages]; *Morgan & Finnegan v Howe Chem. Co., Inc.*, 210 AD2d 62 [1st Dept 1994] [as defendant disputed whether amount of work performed by attorneys was required, hearing needed to determine reasonableness of attorneys' fees]).

III. DEFENDANTS' MALPRACTICE COUNTERCLAIM

Defendants allege that plaintiff knew that they would not prevail at the arbitration, that he pursued an unviable or nonexistent legal strategy in attempting to achieve a positive result for them, and that his actions or inactions caused them to be subject to an approximate \$900,000 judgment after arbitration rather than settling for \$267,000, the amount they allegedly owed franchisor at the time of the arbitration. They also contend that plaintiff should have filed motions to dismiss based on BCL 1312, and that had he done so, franchisor's actions against defendants would have ended in December 2004 and/or would have resulted in a settlement with franchisor for far less than the judgment. They rely on the expert opinion of Henry Rakowski, Esq., who states that he reviewed the applicable record on defendants' behalf, and that, had he represented defendants, he

would have discharged and exercised ordinary and reasonable skill and knowledge of a collections attorney defending a collection case by not resisting the arbitration, allowing a default judgment to be entered by a foreign court or arbitration panel, and then opposed attempts to domesticate the judgment in New York on the grounds that [franchisor] was a foreign corporation not licensed or authorized to do business by the New York Secretary of State, while doing business here within the meaning of BCL 1312.

(Affirmation of Asher E. Taub, Esq., dated Oct. 2, 2013, Exh. 12, Affirmation of Henry Rakowski, Esq., dated Aug. 19, 2013).

Rakowski further opines that plaintiff's strategy "only served to increase [franchisor's] legal fees, as well as those owed by [defendants] to [plaintiff]," and that plaintiff "ignored the

alternative strategy of simply doing nothing until a significantly lower money judgment was obtained by [franchisor] against defendants and then stopping [franchisor] by asserting the BCL 1312 defense.” (*Id.*).

In opposition, plaintiff contends that defendants’ characterization of communications between defendants and plaintiff and of their understanding of the proceedings against them is not based on personal knowledge, that Rakowski’s opinion solely raises questions of strategy, and that defendants’ claimed damages are speculative. He relies on the expert opinion of Michael Einbinder, Esq., a litigator in the area of franchise law and litigation, who attests that he reviewed plaintiff’s representation of defendants at issue here and concludes that plaintiff exercised the ordinary, reasonable skill and knowledge commonly possessed by a member of the legal profession in representing defendants, that there is no merit to their malpractice counterclaims, and that plaintiff “asserted viable claims on behalf of the defendants and from the outset of the litigation made efforts to attempt to resolve [franchisor’s] claims against defendants.” He also observes that Mitsopoulos had acknowledged that franchisor “consistently demanded far more money than he or his parents could pay in order to resolve the claims [, that t]hus, [plaintiff] had no alternative but to litigate . . .”, and that plaintiff acted reasonably in not seeking in either the arbitration proceeding or federal action a dismissal based on BCL 1312. (*Id.*; Affirmation of Michael Einbinder, Esq., dated Sept. 9, 2013).

To establish a claim for legal malpractice, a party must show 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 the party to sustain actual and ascertainable damages. (*Rudolph v Shayne, Dachs, Stanisci, Corker & Sauer*, 8

NY3d 438 [2007]). In other words, a plaintiff must show that the attorney was negligent, that the negligence was a proximate cause of the plaintiff's losses, and proof of actual damages. (*Nomura Asset Cap. Corp. v Cadwalader, Wickersham & Taft LLP*, __ AD3d __, 980 NYS2d 95 [1st Dept 2014]). To establish proximate cause, a plaintiff must demonstrate that but for the attorney's negligence, the plaintiff would have prevailed in the underlying matter or would not have sustained ascertainable damages. (*Id.*).

A. Failure to settle before arbitration award

Mitsopoulos's admission to the arbitrator that he had unsuccessfully offered to sell the store files to Rite Aid not only corroborates plaintiff's contention that he tried to settle the claim but could not do so because franchisor wanted more money than defendants were willing or able to pay, but also rebuts defendants' contention that the case could have been settled earlier. (*See Santiago v Fellows, Epstein & Hymowitz, P.C.*, 66 AD3d 758 [2d Dept 2009] [as defendants' insurer in underlying action never made settlement offer, attorney could not have acted on client's behalf to settle case, and thus failure to do so did not constitute legal malpractice]).

Consequently, defendants' contention that plaintiff should have settled franchisor's claim against them for the amount of unpaid fees that were allegedly owed when it commenced the arbitration proceeding, and thus committed malpractice by failing to do so, is undermined by the lack of any evidence that he could have done so, or rather, that franchisor was willing to settle then and for that amount. (*See Engelke v Brown Rudnick et al.*, 111 AD3d 444 [1st Dept 2013], *lv denied* 22 NY3d 861 [2014] [plaintiff could not show with sufficient certainty that he would have been able to settle underlying litigation and thereby avoided or reduced his costs]).

Moreover, defendants' claim that plaintiff falsely told them that they had an excellent

chance of winning the arbitration and that had he told them the truth, Mitsopolous would have insisted that plaintiff settle the claim rather than litigate it, is directly contradicted by his pre-arbitration emails to plaintiff in which he repeatedly expressed a disinclination to attend the arbitration given his knowledge that he would not prevail. He also clearly indicated his desired scorched earth strategy.

Consequently, defendants have not set forth a *prima facie* case of malpractice as to this claim.

B. Unwinnable case

Although it is not disputed that defendants had no viable defense to the arbitration as they owed franchisor money past due and possible larger sums, and that franchisor had every right to enforce the parents' guaranty, there is no allegation that plaintiff recommended that defendants litigate knowing that he could not prevail, leaving them owing franchisor damages as well as additional legal fees. Rather, plaintiff was faced with defending two actions against defendants with no viable defense to either, and having to choose a strategy whereby he could minimize defendants' losses. That plaintiff was unable to win a concededly unwinnable case does not establish that he was negligent. (*See eg Russo v Feder, Kaszovitz et al.*, 301 AD2d 63 [1st Dept 2002] [attorney's unsuccessful opposition to summary judgment motion in underlying action not legal malpractice as evidence eliminated client's theory of liability and attorney could not be faulted for failing to produce evidence that possibly did not exist]).

Generally, questions of or disputes as to an attorney's strategy in defending a case do not amount to legal malpractice. (76 NY Jur 2d, Malpractice § 42 [2013] [attorney not held liable for errors in judgment]; *see Warshaw Burstein et al. v Longmire*, 106 AD3d 536 [1st Dept 2013], *lv*

denied 21 NY3d 1059 [attorneys' decision not to move for reconsideration of dismissal of underlying lawsuit was strategic choice and selection of one among several reasonable courses of action, thus not malpractice]; *Siracuse v Sager*, 105 AD3d 937 [2d Dept 2013] [plaintiff's allegations did not constitute more than dissatisfaction with attorneys' strategic choices and thus, as matter of law, did not support malpractice claim]; *Pouncy v Solotaroff*, 100 AD3d 410 [1st Dept 2012], *lv denied* 21 NY3d 857 [2013] [allegations were only retrospective complaints about outcome of attorney's strategic choices and tactics with no demonstration that choices and tactics were unreasonable]; *Dweck Law Firm, LLP v Mann*, 283 AD2d 292 [1st Dept 2001] [malpractice claim consisting of allegations that amounted only to client's criticism of attorney's strategy may be dismissed]; *Alter & Alter v Cannella*, 284 AD2d 138 [1st Dept 2001] [errors of professional judgment did not constitute legal malpractice and client only speculated that litigation would have had outcome more favorable to him if attorney had made different tactical decisions in representing him]).

Defendants' objections to plaintiff's actions constitute a dispute over the strategy chosen by plaintiff, with defendants' current attorney and expert offering versions of a strategy that they believe plaintiff should have adopted. That they disagree with plaintiff's strategy does not prove that his strategic choices were unreasonable or negligent, or that he committed malpractice. (*See eg Russo*, 301 AD2d at 69 [affidavit submitted by attorney offering expert opinion as to other attorney's malpractice was "tinged with the sense that since the affiant would have done things differently, therefore the attorney being challenged was incompetent. Such a contest of strategies is easily reduced to a malpractice standard that impermissibly compares the defendant-attorney's choice of strategies with the afterthoughts later offered by plaintiff's now-favored attorney . . ."]).

C. BCL 1312 motion

Whether plaintiff could or should have filed a motion to dismiss pursuant to BCL 1312 is also a question of strategy and irrelevant to whether, by not doing so, he failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession. Here, defendants make no such a showing.

Moreover, defendants' claim that such a motion would have caused franchisor to settle its claims against defendants before the arbitration award was rendered is speculative, as is their belief that it was Taub's BCL 1312 motion that caused franchisor to settle its claims against defendants. It is just as likely that enough time had passed.

In any event, a foreign corporation's failure to comply with BCL 1312 is a curable defect, and there is no indication that franchisor would not or could not have cured its alleged failure. (*See Lew Beach Co. v Carlson*, 77 AD3d 1127 [3d Dept 2010] [foreign corporation's claim would only be dismissed if it persists in failing to comply with statute after having been given opportunity to do so]; *Showcase Limousine, Inc. v Carey*, 269 AD2d 133 [1st Dept 2000] [1st Dept 2000] [foreign corporation given opportunity to cure failure to comply before action dismissed]; *Uribe v Merchants Bank of New York*, 266 AD2d 21 [1st Dept 1999] [failure of plaintiff to comply with BCL 1312 may be cured prior to resolution of action]; *SD Protection, Inc. v Del Rio*, 498 F Supp 2d 576 [ED NY 2007] [observing that New York State courts have strong opposition to dismissing complaint on BCL 1312 ground and preference for giving corporation chance to remedy defect]; *see also Mobilevision Med. Imaging Svcs., LLC v Sinai Diagnostic & Interventional Radiology*, 66 AD3d 685 [2d Dept 2009] [court properly stayed proceeding for petitioner to comply with provision of Limited Liability Law analogous to BCL

1312 before dismissal of proceeding would be considered]; *Knoll N. Am., Inc. v IBF Group, Inc.*, 158 Misc 2d 227 [Sup Ct, New York County 1993] [while BCL 1312 does not apply to corporation's out-of-court commencement of arbitration, if it prevailed at arbitration and moved to confirm in court, it could then procure requisite BCL 1312 authority]).

D. Res judicata

As I am dismissing defendants' malpractice counterclaim, I need not address whether any findings made or contentions raised or that could have been raised in the bankruptcy proceeding bar defendants from asserting the counterclaim.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiff's motion for an order granting him summary judgment on his complaint is granted on liability with damages to be determined at a hearing; it is further

ORDERED, that plaintiff's motion for an order granting him summary judgment as to defendants' counterclaims is granted and the counterclaims are dismissed; it is further

ORDERED, that defendants' motion for an order reducing the alleged fees owed to plaintiff is granted to the extent of directing a hearing; it is further

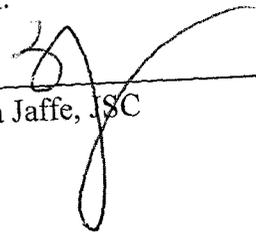
ORDERED, that defendants' motion for an order granting them summary dismissal of the complaint and summary judgment on their counterclaims is denied; it is further

ORDERED, that an assessment of damages against defendants is directed; and it is further

ORDERED, that a copy of this order with notice of entry be served upon the Clerk of the Trial Support Office (Room 158), who is directed, upon the filing of a note of issue and a

statement of readiness and the payment of the appropriate fees, if any, to place this action on the appropriate trial calendar for the assessment herein directed.

ENTER:


Barbara Jaffe, JSC

DATED: April 17, 2014
New York, New York

FILED
APR 22 2014
NEW YORK
COUNTY CLERK'S OFFICE