

Liddle & Robinson, LLP v Byrne
2014 NY Slip Op 31328(U)
May 21, 2014
Supreme Court, New York County
Docket Number: 157825/2013
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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LIDDLE & ROBINSON, LLP,

Index No.:
157825/2013

Plaintiff,

- against -

Decision and Order

Motion Seq: 001

BRENDAN P. BYRNE,

Defendant.

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

This is an action for unpaid legal fees incurred by Plaintiff, Liddle & Robinson, LLP (“L&R”) in representing Defendant, Brendan P. Byrne (“Byrne”). The Complaint alleges that Byrne breached the parties’ Retainer Agreement by failing to pay L&R the outstanding amounts due for legal fees and disbursement expenses. The Complaint also asserts claims for quantum meruit and account stated.

Byrne interposed an Answer with Counterclaims against L&R for fraud and legal malpractice and Cross Claims against James Batson (“Batson”), a former partner at L&R, and David Feldstein (“Feldstein”), a former associate, for legal malpractice and fraud.

Presently before the Court is a motion by L&R, Batson, and Feldstein to dismiss Byrne’s Counterclaims and Cross Claims asserted against them, pursuant to CPLR § 3211(a)(1) and (a)(7). Plaintiff submits the attorney affirmation of David I. Greenberger, a Partner at L&R. Annexed to Greenberger’s affirmation, among other exhibits, is a copy of the parties’ Retainer Agreement, L&R’s invoices, and an Order granting L&R’s motion to withdraw entered on March 4, 2013.

Byrne does not oppose.

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:
 - (1) a defense is founded upon documentary evidence;
 - (7) the pleading fails to state a cause of action.

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]).

On a motion to dismiss pursuant to CPLR §3211(a)(1) “the court may grant dismissal when documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.” (*Beal Sav. Bank v. Sommer*, 8 NY3d 318, 324 [2007]) (internal citations omitted). “When evidentiary material is considered, the criterion is whether the proponent of the pleading *has* a cause of action, not whether he has stated one.” (*Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 [1977]) (emphasis added). A movant is entitled to dismissal under CPLR §3211 when his or her evidentiary submissions flatly contradict the legal conclusions and factual allegations of the complaint. (*Rivietz v. Wolohojian*, 38 A.D.3d 301 [1st Dept. 2007]) (citation omitted).

Byrne’s first Counterclaim against L&R and first Cross-Claim against Batson and Feldstein are for fraud, based on the following identical allegations:

- 6. BYRNE was explicit that he was not in a financial position and that he was not capable nor could he agree to pay for fees in excess of his retainer with the firm.
- 7. JAMES BATSON explained to BYRNE that it would be a difficult

process for attorneys to withdraw from a case, hence the large upfront retainer when taking on the case. Therefore, Batson advised that the firm continue to represent the BYRNE. BATSON continued to make representations that if defendants are unable to pay the firm would not pursue defendants as judges generally frown upon lawyers and firms suing their clients and assured BYRNE that the firm “has bigger fish to fry” than to chase small clients. It is evident in this action that these representations were fraudulent and misleading and subsequent invoices were fraudulent as well.

9. The Statements made by James Batson, with David Feldstein in regards to he [sic] and the firm does not pursue clients for billing hours over retainer which they are not capable of paying.
10. L&R has fraudulently misrepresented facts to induce Defendant to continue with the action, which the firm was originally retained.
11. As a result of the willful misrepresentations of L&R, BATSON and FELDSTEIN, BYRNE has been damaged.

“The elements of a cause of action sounding in fraud are material misrepresentation of an existing fact, made with knowledge of the falsity, an intent to induce reliance thereon, justifiable reliance upon the misrepresentation and damages.” (*Orchid Constr. Corp., v. Gottbetter*, 89 AD3d 708, 932 NYS2d 1000 [2nd Dept 2011]). CPLR §3016 requires particularity in the pleading of a fraud cause of action. Here, the first Counterclaim and Cross-Claims fail to plead with particularity the element of detrimental reliance based on L&R’s alleged misrepresentations. Furthermore, the claims are contradicted by the Retainer Agreement, L&R’s invoices and written efforts to recoup the legal fees owed to it, and the withdrawal of L&R, exhibits annexed to Greenberger’s supporting affirmation.

Byrne’s second Counterclaim against L&R and second Cross-Claim against Batson and Feldstein is for legal malpractice based on the following identical allegations:

13. Defendant retained Plaintiff for legal advice and representation and

expected a degree of care of an ordinary member of the legal profession.

13. [sic] L&R repeatedly delegated the handling of Defendant's case to underling and green associates who were unfamiliar with the case causing incompetence and neglect.
14. It is clear that L&R, BATSON and FELDSTEINS's motivations were aligned with the interests of the firm and themselves personally, opposed to those of BYRNE.
15. L&R conducted malpractice by failure to exercise that degree of care by an ordinary member of the legal profession, which would have obtained a better outcome.
16. The mishandling of this case has resulted in BYRNE being deprived of compensation for damages from one or more defendants in the related case in excess of \$3,000,000.

18. Defendant, BYRNE, has suffered actual damages of \$4,000,000

“To sustain a cause of action for legal malpractice, moreover, a party must show that an attorney failed to exercise the reasonable skill and knowledge commonly possessed by a member of the legal profession.” (*Darby & Darby v. VIS Int'l*, 95 N.Y. 3d 308, 313 [2000]). In order to prevail against an attorney on a legal malpractice claim, a plaintiff must first prove that the attorney was negligent, that such negligence was the proximate cause of the loss sustained, and that actual damages resulted. (*see Tydings v. Greenfield, Stein & Senior*, 2007 NY Slip Op 6734, *2 [1st Dept. 2007]). Speculative damages or conclusory claims of damage cannot be a basis for legal malpractice. *See Russo v. Feder, et. al.*, 301 A.D.2d 63, 67 [1st Dept 2002]).

“The failure to demonstrate proximate cause mandates the dismissal of a legal malpractice action regardless of whether the attorney was negligent.” *Leder v. Spiegel*, 31 A.D. 3d 266, 288 [1st Dept 2006], *aff'd* 9 N.Y. 3d 836 [2007], *cert.*

denied sub nom, Spiegel v. Rowland, 522 U.S. 1257 [2008].

Here, Byrne’s second Counterclaim and second Cross-claim fail to make out a claim for legal malpractice against L&R or Batson and Feldstein. These claims fail to allege any allegations concerning how L&R, Batson, and Feldstein were specifically negligent, and how that alleged negligence was the proximate cause of the loss allegedly sustained.

Wherefore, it is hereby,

ORDERED that the motion is granted without opposition, and the counterclaims asserted by Defendant, Brendan P. Byrne, against plaintiff, Liddle & Robinson, LLP, and the cross-claims asserted by Defendant, Brendan P. Byrne, against James A. Batson and David H. Feldstein are dismissed in their entirety.

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

Dated: MAY 21, 2014



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

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE