

**Caso v Miranda Sambursky Slone Sklarin,
Verveniotis LLP**

2016 NY Slip Op 30965(U)

May 26, 2016

Supreme Court, New York County

Docket Number: 159192/2015

Judge: Carol R. Edmead

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

-----X
THOMAS CASO,

Plaintiff,
-against-

Index No. 159192/2015

DECISION/ORDER

MIRANDA SAMBURSKY SLONE SKLARIN,
VERVENIOTIS LLP, MICHAEL MIRANDA,
RICHARD SKLARIN and ONDINE SLONE,

Defendants.

-----X
HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

In this legal malpractice action, defendants Miranda Sambursky Slone Sklarin, Verveniotis LLP, Michael Miranda, Richard Sklarin and Ondine Slone (collectively, "defendants") move to dismiss this action pursuant to CPLR 3211(a)(1) and (a)(7) on the grounds that a defense is founded upon documentary evidence and the complaint fails to state a cause of action.

Factual Background

Plaintiff Thomas Caso ("plaintiff") alleges that on June 24, 2007, at approximately 4:45 a.m., he was hit by a truck in Manhattan and the driver of the vehicle left the scene. Within three weeks thereafter, plaintiff hired defendants as his attorneys to prosecute an action against responsible parties.

On September 16, 2007, New York Police Department ("NYPD") Detectives arrested Anibal Santos ("Santos") as the driver of the hit-and-run accident, and closed its investigation. On September 20, 2007, defendants submitted a claim for benefits on plaintiff's behalf to the Motor Vehicle Accident Indemnification Corporation.

On October 8, 2007 the District Attorneys' office declined to prosecute Santos.

Yet, defendants filed a complaint against, *inter alia*, Santos in the Bronx Supreme Court (the "underlying action"). After an eight-day jury trial, at which Santos and his co-defendants claimed that there was insufficient evidence that they were the owner/driver of the offending vehicle, a jury denied any recovery to plaintiff.

Thereafter, this action for malpractice ensued, in which plaintiff claims that defendants' failure to conduct a reasonable and prompt investigation of the accident by taking various, certain steps to correctly identify the driver, was a substantial contributing cause and substantial factor in plaintiff's non recovery of his damages.

In support of dismissal, defendants argue that neither of plaintiff's malpractice claims sufficiently allege what actions or inactions form the basis of the alleged negligence, nor how said negligence caused plaintiff's losses. Plaintiff fails to allege any specific item of investigation that defendants failed to perform in the underlying action; or that defendants to the underlying action were incorrectly named. Plaintiff's inability to identify the "correct" party to the underlying action requires dismissal of the claim that defendants named the incorrect party. And, the jury's verdict does not mean that the incorrect parties were named, or that defendants were negligent in their prosecution of the case. Plaintiff also fails to plead that either of his theories of liability was the "but for" proximate cause of his damages. Further, the record in the underlying action establishes that defendants fully investigated and prosecuted plaintiff's case, and that defendants undertook each of the investigative efforts that plaintiff's complaint now claims were not done. Plaintiff's claims amount to speculation and conjecture.

In opposition, plaintiff argues that the documents submitted by defendant, such as

affidavits, including those of persons lacking personal knowledge, partial transcripts and other materials, do not constitute documentary evidence under CPLR 3211(a)(1). The motion is premature, in that full discovery, including documents, materials, and files in defendants' possession relating to their representation of the plaintiff, is not complete. Further, plaintiff's complaint pleads the essential elements of a legal malpractice claim, which is amply supported by documents demonstrating the negligence which contributed to defendants' loss of the underlying action. Plaintiff pleads no less than 12 specific failures and departures, and adds a 13th, the failure to have taken "other steps necessary to investigate properly and diligently Plaintiff's accident..., etc." Plaintiff also pleaded causation, in that caselaw holds that the proximate test is satisfied where it is more likely so than not that a defendant's professional negligence has deprived the plaintiff of a "substantial possibility" of a better outcome, or that professional negligence resulted in "some diminution" of plaintiff's chances of a better recovery.

In further opposition, plaintiff submits the affidavit Stephen Coulon, a purported expert in accident investigation, preparation and reconstruction. Coulon opines that defendants failed to identify the underlying defendants early September 2007 through FOIL requests, or in October 2007 when the District Attorney's records became available after they declined to prosecute. Defendants then could have commenced the underlying action in November 2007 and availed themselves of additional disclosure devices. Defendants' investigation, in large part, did not get done until 2009 and 2010, and defendants' interview of the sole eye witness and inquiries as to which private garbage collection companies operated in the subject area, did not occur until almost two years after the accident. Interviewing and then deposing the sole eyewitness Theodore Arenas ("Arenas") in May and June 2009 were fatal to plaintiff's trial, as Arenas's

deposition testimony that the truck had a front-hooded engine conflicted with Arenas's earlier, and more reliable account to NYPD that the truck had a "flat front cab"; the account of a front-hooded engine provided the prevailing defense to plaintiff's trial. Defendants failed to post flyers in the subject area seeking eyewitnesses or identify other garbage collectors with the similar territory until 2010, and there is no record of defendants authorizing their independent investigators to perform additional investigation. Also, defendants failed to conduct surveillance of the accident over the following consecutive 10 Sunday mornings to either identify additional potential hit-and-run suspects or to rule out any defense that different company committed the accident.

In reply, defendants argue that plaintiff's opposition and supporting affidavits fall short of stating a malpractice claim. In any event, it would be unethical for defendants to prepare Arenas's deposition with NYPD's notes to have him match his testimony with earlier accounts; and, defendants refreshed Arenas's memory with NYPD's notes at his deposition. And, Coulon is not an attorney qualified to opine on whether defendants committed malpractice. The caselaw cited by plaintiff is not controlling, and none of the alleged failures, or discrepancies created by Arenas's deposition and outsourcing of the investigation, constitutes actionable malpractice. No additional discovery is warranted, given that defendants made their entire file available to plaintiff, at the Court's direction.

Discussion

A party may move to dismiss a cause of action pursuant to CPLR 3211(a)(1) on the ground that "a defense is founded upon documentary evidence." Such a motion may be granted "only where the documentary evidence utterly refutes [the complaint's] factual allegations,

conclusively establishing a defense as a matter of law” (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326, 746 NYS2d 858 [2002]; *Mill Financial, LLC v Gillett*, 122 AD3d 98, 992 NYS2d 20 [1st Dept 2014]). The documentary evidence submitted must “conclusively” establish a defense to the asserted claims “as a matter of law” (*Mill Financial, LLC v Gillett, supra, citing Art and Fashion Group Corp. v Cyclops Production, Inc.*, 120 AD3d 436, 992 NYS2d 7 [1st Dept 2014]). Prior statements or averments of parties or their agents in the course of litigation that refute an essential element of a plaintiff’s present claim may constitute documentary evidence within the meaning of CPLR 3211(a)(1) (*Morgenthau & Latham v Bank of New York Co.*, 305 AD2d 74, 760 NYS2d 438 [1st Dept 2003]; *cf. IMO Indus. Inc. v Anderson Kill & Olick, P.C.*, 267 AD2d 10, 11, 699 NYS2d 43 [1st Dept 1999] (legal malpractice defendant’s submission of excerpts of client’s Answer and selected pre-litigation correspondence did not conclusively establish firm’s defense as a matter of law)).

In determining a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the Court’s role is deciding “whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail” (*African Diaspora Maritime Corp. v Golden Gate Yacht Club*, 109 AD3d 204, 968 NYS2d 459 [1st Dept 2013]; *Siegmund Strauss, Inc. v East 149th Realty Corp.*, 104 AD3d 401, 960 NYS2d 404 [1st Dept 2013]). On such a motion, the court must “accept the facts as alleged in the complaint as true, accord plaintiffs “the benefit of every possible favorable inference,” and “determine only whether the facts as alleged fit into any cognizable legal theory” (*Siegmund Strauss, Inc. v East 149th Realty Corp.*, 104 AD3d 401, *supra*; *Nonnon v City of New York*, 9 NY3d 825 [2007]; *Leon v Martinez*, 84 NY2d 83, 87-88,

614 NYS2d 972, 638 NE2d 511 [1994]). However, “allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not” presumed to be true or accorded every favorable inference (*David v Hack*, 97 AD3d 437, 948 NYS2d 583 [1st Dept 2012]; *Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81, 692 NYS2d 304 [1st Dept 1999] (extrinsic evidence submitted by defendant including affirmations, exhibits, a settlement agreement from another action, correspondence and a complaint submitted in a previous federal action showed that plaintiff did not have a cause of action), *affd* 94 NY2d 659, 709 NYS2d 861, 731 NE2d 577 [2000]; *Kliebert v McKoan*, 228 AD2d 232, 643 NYS2d 114 [1st Dept], *lv denied* 89 NY2d 802, 653 NYS2d 279, 675 NE2d 1232 [1996]), and the criterion becomes “whether the proponent of the pleading has a cause of action, not whether he has stated one” (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275, 401 NYS2d 182, 372 NE2d 17 [1977]; *see also Leon v Martinez*, 84 NY2d 83, 88, 614 NYS2d 972, 638 NE2d 511 [1994]; *Ark Bryant Park Corp. v Bryant Park Restoration Corp.*, 285 AD2d 143, 150, 730 NYS2d 48 [1st Dept 2001]; *WFB Telecom. v NYNEX Corp.*, 188 AD2d 257, 259 [1992], *lv denied* 81 NY2d 709 [1993] (letter from plaintiffs' counsel flatly contradicted plaintiffs' prima facie tort claim)).

In order to prevail on his cause of action for legal malpractice, plaintiff must allege and demonstrate that defendants “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 plaintiff to sustain actual and ascertainable damages” (*Pannone v Silberstein*, 118 AD3d 413, 990 NYS2d 164 [1st Dept 2014]; *Gonzalez v Ellenberg*, 5 Misc 3d 1023 [Sup. Ct., New York County 2004] *citing Hatfield v Herz*, 109 F Supp 2d 174, 179 [SDNY 2000]). To establish proximate cause and actual damages, plaintiff “must meet the ‘case within a

case' requirement," by demonstrating that "but for" defendants' conduct, plaintiff would have prevailed in the underlying matter (*Levine v Lacher & Lovell-Taylor*, 256 AD2d 147 [1st Dept 1998]; *Rubinberg v Walker*, 252 AD2d 466, 676 NYS2d 149 [1st Dept 1998]; *Pannone v Silberstein*, 118 AD3d at 414 ("To establish causation, a plaintiff must show that he or she would have prevailed in the underlying action or would not have incurred any damages, but for the lawyer's negligence"); *Davis v Klein*, 88 NY2d 1008, 1009-10, 648 NYS2d 871, 872, 671 NE2d 1268 [1996] (plaintiff must show that (s)he would have had a favorable or successful outcome on the merits of the underlying claim "but for" the attorney's negligence)).

Here, plaintiff alleged that defendants breached its duty to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession in that defendants "should have been aware of," the NYPD and DA's investigations and ultimate decision to decline to prosecute Santos through October 8, 2007 (Complaint ¶15).

Specifically, defendants failed to (1) inquire of Detective Greene to determine the steps taken in the police investigation of the criminal matter, and to obtain relevant police reports and 911 records; (2) visit the hospital to interview the treating physician regarding a list and location of plaintiff's injuries in order to determine the direction of travel and mechanisms of injury of the offending vehicle; (3) photograph and examine the injury pattern on plaintiff; (4) obtain the medical reports of and interview the EMT responders; (5) retain clothing plaintiff wore at the time of the Accident, with which to match trace elements against an examination of the offending vehicle; (6) photograph, inspect, and diagram the accident scene at or near the time of the accident; (7) conduct a 10-14 day surveillance of the accident location between 3 AM and 5AM to identify all private garbage removal carting trucks passing through the area, and pursue the

records, logs, data and information relating thereto; (8) canvass the area between West 50th through 55th Streets and 8th through 10th Avenues for the names of all garbage removal carters making pickups between 3 AM and 5 AM, and pursuing the records, logs, data and information relating thereto; (9) contact local media sympathetic to pedestrian safety issues to bring public attention to the accident and possibly locate additional eyewitnesses; (10) obtain legal process to obtain pickup logs from all garbage removal carters making pickups in the area showing which of their trucks were operating in the vicinity of the accident at the time of the accident; (11) determine the final destination for any suspect vehicle, and obtaining logs of the vehicles that used such facilities in the hours following the accident; (12) create a photo-array showing the various truck models potentially involved in the accident, for examination by eyewitness early in the investigation when his memory was fresh; (13) and take such other steps necessary to investigate properly and diligently plaintiff's accident and identifying the driver and owner of the vehicle which struck and injured the plaintiff.

Such failures, according to plaintiff, were the substantial cause of his non-recovery of damages for his injuries, and his lost of his chance of a better outcome of the underlying action; plaintiff would have recovered compensation and damages for his injuries but lost his trial based on the defense that Santos and his co-defendants were not the driver or owner of the offending vehicle, which was proximately caused by defendants' failures to timely and properly investigate the accident.

Accepting the above allegations as true, as this court must, it cannot be said that plaintiff failed to "allege" a cause of action for legal malpractice.

However, in light of the numerous documents and transcripts generated in the underlying action, to which plaintiff had full and complete access, the inquiry is whether plaintiff “has” a cause of action for legal malpractice.

Defendants’ alleged failure to interview the treating physician to determine the direction of travel and mechanisms of injury, examine the injury pattern on plaintiff, obtain the medical reports of and interview the EMT responders, and retain clothing plaintiff wore at the time of the Accident to match trace elements *against an examination of the offending vehicle* is insufficient to support any claim that such failures were a proximate cause of plaintiff’s inability to recover for his injuries. These claims are speculative in nature, and plaintiff does not allege the manner in which any of such information would have revealed or confirmed the identity of offending vehicle. And, the EMT report bears no information on the identity of the offending vehicle. In the absence of any specific factual allegations demonstrating that, but for the defendant's alleged failures, there would have been a more favorable outcome in the underlying action, these claims do not support a legal malpractice claim against defendants.

As to plaintiff’s allegation that defendants failed to inquire of Detective Greene to determine the steps taken in the police investigation of the criminal matter, and to obtain relevant police reports and 911 records, the letters of July 30, 2007, August 13, 2007, and December 31, 2007 from defendants’ investigator indicate the numerous attempts the investigator made to obtain such records and information from Detective Greene (who was initially on vacation and then upon his return, failed to return the investigator’s phone calls). Defendants’ investigator ultimately obtained Detective Green’s notes (*i.e.*, DD5s) pertaining to the accident. Detective Greene’s trial testimony of the steps undertaken in his investigation indicate that the sole eye

witness to the accident, Arenas, saw a dark green truck without any writing on it hit the plaintiff; that during Detective Greene's surveillance on Saturday to Sunday from 3:00 AM to 5:30 AM a week following the accident, he saw a dark-green garbage truck; he did not notice any writing on the truck, until he pulled alongside of it and saw "Vanguard Carting" lettering "very hard to see" (pp. 20-21). Such information is consistent with the information defendants' obtained independently, that the offending vehicle was (allegedly) a green, Vanguard Carting truck.

As to plaintiff's claim that defendants failed to photograph, inspect, and diagram the accident scene at or near the time of the accident, defendants' investigator's reports demonstrate that the investigator visited the scene soon after the accident and inspected the area. Although there is no indication that photographs were taken, the complaint (and opposition papers) do not allege how the absence of photographs was a proximate cause of plaintiff's non-recovery of damages for his injuries, or that but for the absence of the photographs, plaintiffs would have obtained a more favorable result in the underlying action.

As to plaintiff's allegation that defendants failed to conduct a 10-14 day canvas or surveillance of the accident location between certain early morning hours for other garbage removal carters making pickups, or obtain pickup logs from all garbage removal carters making pickups in the area the time of the accident, the aforementioned letters of the investigator also reference canvassing and surveillance performed at the accident location (at defendants' direction) to identify "all witnesses" to the accident in "hopes that the garbage truck would be returning to the area." The canvassing produced the identity of "Vanguard Carting," the company defendants later sued along with the driver of the alleged truck. Defendants also identified private garbage removal carting trucks potentially passing through the area, and

obtained records, logs, data and information relating thereto, such as East Coast Carting Service,¹ Action Carting,² Isabella City Carting,³ and D&D Carting Company Incorporated,⁴ and subpoenaed same for trial; defendants ruled out the possibility that they were involved in the accident. It is noted that Detective Greene's DD5s also indicate that he did a "canvass for [and found] surveillance cameras in the vicinity of the accident" and "None of them were recording or showed the vantage point that I needed"; Detective Greene also posted "fliers asking for anyone, any witnesses or anyone who saw anything on the time and date of the incident" in the vicinity of the accident location; such actions yielded no results (Trial transcript, p. 11). Plaintiff fails to specifically allege any link between defendants' failure to obtain the identities of these other carting trucks or witnesses *earlier in the investigation* and plaintiff's non recovery for damages, or, that but for defendants' failure to obtain such information earlier, plaintiff would have obtained a more favorable result.

As to the allegation that defendants failed to contact local media to bring public attention to the accident and possibly locate additional eyewitnesses, defendants' investigator (and Detective Greene) canvassed the area of local establishments and interviewed their employees as

¹ According to East Coast Carting Service's trial testimony, its trucks were green, but did not have an overnight route from Saturday to Sunday in Manhattan in 2007 (p. 4).

² According to Action Carting's trial testimony, its trucks were gray in 2007, and bore the label "Action Carting Environmental Services" in bright colors. (p. 4).

³ According to Isabella City Carting's trial testimony, its trucks were black or red in 2007, bearing "Isabella City Carting" in "huge" red, white and grey lettering, larger than required by regulation. (pp. 3-4).

⁴ According to D&D Carting Company Incorporated's trial testimony, its trucks bore the following "company name, business, a big wreath. In yellow letters, D&D. White ribbon. Says carting on the cab of the truck. It has bright yellow, orange and yellow stripes, about a foot wide, that wrap around the wheel well in the front." (P. 10).

potential witnesses to the accident and as to identity of any carting trucks servicing their establishments. Again, Detective Greene also posted fliers, to no avail. (Trial transcript, p. 11). Plaintiff's claim that defendants failed to contact media cannot support a legal malpractice claim as it is speculative as to whether the undertaking of such action would have led to a more favorable result or whether the failure to undertake such action was a substantial factor in causing plaintiff's non-recovery.

And, plaintiff fails to allege how the failure to obtain the final destination of any suspected vehicle was a proximate cause of plaintiff's non-recovery of damages for his injuries, or that knowledge of the final destination of any suspected vehicle would have yielded a more favorable result.

Further, while plaintiff alleges that defendants failed to create a photo array of various truck models potentially involved in the accident to refresh the memory of eyewitnesses early in the investigation, Detective Greene's DD5 dated September 6, 2007 (approximately 2 1/2 months after the accident) indicates that Arenas initiated a call to advise Detective Greene that he "recalled the garbage truck as having a 'flat front' cab area, meaning a newer type cab (driver/passenger area) as opposed to an older garbage truck with an engine block in front of the cab/driver/passenger area." Plaintiff fails to allege that the failure to use such a photo array, under the circumstances, was a proximate cause of plaintiff's non-recovery of damages for his injuries.

Plaintiff's reliance on the affidavit of an investigator is misplaced, as such investigator is not an attorney qualified to opine on the reasonable skill and knowledge commonly possessed by a member of the legal profession. Further, plaintiff cites no authority for the position that a law

firm's engagement of an independent investigation firm to assist in the preparation of a hit-and-run investigation constitutes negligence.

Therefore, based on the uncontroverted submissions, plaintiff does not have a legal malpractice claim against defendants.

Further, plaintiff's claim for further discovery was obviated by virtue of this Court's directive that defendants make available for discovery and inspection their entire litigation file for purposes of opposing this motion.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion by defendants to dismiss this action pursuant to CPLR 3211(a)(1) and (a)(7) on the grounds that a defense is founded upon documentary evidence and the complaint fails to state a cause of action, is granted solely to the extent that dismissal is granted pursuant to CPLR 3211(a)(7); and it is further

ORDERED that defendants shall serve a copy of this order with notice of entry upon plaintiff within 20 days of entry; and it is further

ORDERED that the Clerk may enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: May 26, 2016



Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL R. EDMED
J.S.C.