

Sarasota, Inc. v Kurzman & Eisenberg, LLP
2003 NY Slip Op 30207(U)
September 22, 2003
Supreme Court, New York County
Docket Number: 116339/02
Judge: Marilyn Shafer
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. MARILYN SHAFER
Justice

PART 36

SARASOTA, INC., as successor/assignee of F.D.I.C.,
receiver of GOLDOME SAVINGS BANK,

INDEX NO. 116339/02

Plaintiff(s),

MOTION DATE _____

MOTION SEQ. NO. 001

-against-

MOTION CAL. NO. _____

KURZMAN & EISENBERG, LLP., THOMAS B.
DECEA, ESQ., PHILIPS, LYTLE, HITCHCOCK,
BLAINE & HUBER, ESQS., COOPER, LIEBOWITZ,
ROYSTER & WRIGHT, ESQS., and KLEIN, O'BRIEN &
TRACHTMAN, ESQS.,

SCANNED

OCT 01 2003

Defendant(s).

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits _____

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that

Defendants Kurzman & Eisneberg, LLP. (Kurzman) and Thomas B. Dacea, Esq. move, pursuant to CPLR 3211, for an order dismissing as against them the action by plaintiff Sarasota, Inc. (Sarasota). Plaintiff cross-moves, pursuant to CPLR 3212, for summary judgment in its favor.

Background

This is an action to recover damages arising from an alleged attorney malpractice in connection with representation of plaintiff in an underlying matter.

[* 2]

Plaintiff is an assignee of a note (the Note) issued in connection with a loan from Goldome Savings Bank to a certain Shashi Shah and Nishi Shah. On July **31, 1986**, in exchange for the Note, Goldome Savings Bank issued the loan in the amount of **\$58,500.00** to the Shahs for purchase of a cooperative apartment. According to the Note, in the event of default, a noteholder has a right to accelerate the debt. Note ¶ 5.B. The Note also provides that,

[i]n addition to the protection given to the Note Holder under the Note, a Loan Security Agreement affecting the shares of cooperative corporation stock and proprietary lease evidencing my ownership of the cooperative apartment described above protect the Note Holder from possible losses which might result if I do not keep promises which I make in this Note.

Note ¶ 10. The Shahs defaulted on the Note in July **1,1990**.

On September **1, 1993**, the Federal Deposit Insurance Corporation, as receiver of Goldome Savings Bank, retained Phillips, Lytle, Hitchcock, Blaine & Huber and filed a notice of motion for summary judgment in lieu of complaint on the Note against the Shahs. The Shahs defaulted, and on November **17,1993**, the court granted plaintiff's motion for summary judgment in lieu of complaint on default against the Shahs and severed, and referred to a referee to hear and report on the issue of attorneys' fees. Federal Deposit Ins. Co. v Shah, Sup Ct, NY County, November **17,1993**, Index No. **123492/93**. Subsequently, plaintiff waived its claim for attorneys' fees.

On March **2,1995**, plaintiff, as assignee of the Note, initially retained defendant Klein, O'Brien & Trachtman, and then retained defendant Cooper Lebowitz, Royster & Wright (Cooper) as counsel in connection with the underlying action. According to plaintiff, on July **24,1997**, moving defendant Decea, on behalf of Cooper, sent a letter to plaintiff stating that Cooper had taken steps to attach the Shahs' wages.

Subsequently, Decealeft Cooper for Kurzman and plaintiff retained Kurzman as a new counsel. On December **31,1996**, a consent to change attorneys was executed and Kurzman replaced Cooper as counsel in this action. Affidavit of Mark K. Anesh, Exhibit G. On February **11,1997**, Kurzman notified plaintiff that it discovered, upon the review of the file, that the final judgment had not been entered and stated that, “at this time we must enter final judgment with the clerk, prior to proceeding with the bank execution.” Id., Exhibit J. On June **16,1997**, Decea as an employee of Kurzman, sent a letter to plaintiff stating that, “[t]his letter confirms that our application for judgment has been marked fully submitted by the Court and that we are awaiting the entry of the judgment.”, Id. Exhibit K. The moving defendants concede that this letter was erroneous.

On January **11,1999**, plaintiff sent a letter to Kurzman stating that, “pursuant to our conversation it is my understanding that your firm will do whatever is necessary to obtain a judgment in this matter since your paralegal failed to submit the final judgment.” Id., Exhibit M. On March **4,1999**, plaintiff sent another letter to Kurzman stating that, “[a]s we have not been informed that the above files have been reduced to judgment, [plaintiff] is requesting that you please close the abovementioned files and forward them to Brian Rattner of Rattner & Associates... .” Id., Exhibit N. However, it appears that no consent to change attorneys was executed following this letter, and that the files were not forwarded.

None of the defendants entered judgment against the Shahs in the underlying action. On December **13,2001**, plaintiff commenced **its** first action for legal malpractice. Id., Exhibit O. In the meantime, by its new counsel, plaintiff commenced efforts to secure judgment in the underlying action against the Shahs. On July **22, 2002**, plaintiff discontinued its first malpractice action and commenced the present action. Id., Exhibit P. On November **26,2002**, plaintiff, by its new counsel, obtained judgment in the underlying action against the Shahs in the amount of **\$115,718.47**.

According to plaintiff, as a result of defendants' failure to obtain judgment, plaintiff lost an opportunity to collect from the Shahs the amounts due on the Note. Plaintiff asserts the following claims for: (1) legal malpractice against all defendants; (2) breach of contract against all defendants; (3) fraud against defendants Cooper and Decea; and (4) fraud against Kurzman and Decea.

Analysis

The moving defendants argue that plaintiff's claim for legal malpractice is barred by the applicable statute of limitations. A cause of action for legal malpractice is governed by the three-year statute of limitations under CPLR 214 (6). The moving defendants correctly state that a cause of action for legal malpractice occurs at the time the alleged malpractice was committed and not at the time the malpractice is discovered. See Shumskv v Eisenstein, 96 NY2d 164,166 (2001).

Plaintiff argues that the doctrine of continuous representation takes its claim outside the statute of limitations because the moving defendants acted as plaintiff's counsel until the filing of the initial action against the moving defendants on December 13, 2001. The doctrine of continuous representation tolls the statute of limitations until the ongoing representation is completed. Shumskv, 96 NY2d at 167.

The rationale underlying the doctrine of continuous representation which allows clients to repose trust and confidence in a professional is that, "[a] professional 'not only is in a position to identify and correct his or her malpractice, but is best placed to so.'" Pollicino v Roemer and Featherstonhaugh P.C., 260 AD2d 52, 54 (3d Dept 1999) (citation omitted). After the client obtains another attorney to provide services relating to the subject at issue, the client cannot be said to be relying on the actions of the professional with respect to the matter at issue. Thereafter, any further tolling of the statute of limitations would be unjustified, so that the doctrine of continuous representation does not apply. Id. at 55. Thus, when the attorney-

client relationship ceases to exist, the doctrine of continuous representation ceases to toll the statute of limitations, even absent a formal termination of the attorney-client relationship. Piliero v Adler & Stavros, 282 AD2d 511,511 (2d Dept 2001) (The relationship necessary to invoke the doctrine of continuous representation ceased to exist when the plaintiff retained new counsel, and not ten months later when defendants signed a stipulation formally substituting incoming counsel as attorneys for the plaintiff); Baker's Service v Robinson, 85 AD2d 811,812 (3d Dept 1981).

The moving defendants argue that their representation ceased upon the receipt of plaintiff's letter dated March 4, 1999 in which plaintiff requested Kurzman to forward the files to another attorney. It is undisputed that no other counsel was formally substituted for Kurzman. Plaintiff argues that the moving defendants continued to act as counsel for plaintiff even after the March 4 1999 letter. Plaintiff submits an affidavit of Jerome F. Squilante, in which he states that it was understood that the moving defendants would continue to represent plaintiff in the underlying matter despite plaintiff's March 4, 1999 letter. Affidavit of Jerome F. Squilante ¶ 10. Attached to this affidavit is a copy of a business record of plaintiff's communications with the moving defendants concerning the underlying matter, which states that, on April 2, 1999, plaintiff communicated with Decea, and that Decea would continue to work on the matter, and the file would not be sent to Brian Rattner. Plaintiff also submits a letter to Kurzman dated July 23, 1999, in which plaintiff inquires about the status of the action and the final judgment. Affirmation of Michael Rosen, Exhibit F. Although an attorney's inaction alone does not constitute continuous representation, where a client is aware of the further need for representation and relies on the attorney to provide representation, the doctrine of continuous representation applies Shumsky, 96 NY2d at 169. Plaintiff sufficiently states that it was aware of the need to enter judgment against the Shahs and that it relied on the moving defendants' assurances that they would correct the failure to file the judgment.

Plaintiff submits an affirmation by Brian Rattner in which he affirms that did not find any record that his firm ever received the file, and that his firm did not represent plaintiff in connection with the underlying matter. Affirmation of Brian Rattner ¶¶ 3-4. The record of communications indicates that the matter was sent to Stephen Satkin, a new attorney, only on October 15, 2001. Affirmation of Michael W. Rosen, Exhibit O. Plaintiff also submits an affidavit of Satkin in which he states that he was contacted by plaintiff in October 2001 in connection with the underlying litigation, and a letter dated January 16, 2002, by a co-counsel Michael W. Rosen, in which he notifies defendants that he is a new counsel for plaintiff. Affirmation of Michael W. Rosen, Exhibits C and H. It appears that, even after the request in its March 4, 1999 letter, Kurzman remained counsel, and that plaintiff relied on Kurzman to protect its interests, until 2001 or at least until July 23, 1999, which is within three years prior to the commencement of the present action on July 22, 2002. Therefore, dismissal of the claim as barred by statute of limitations is not appropriate.

The moving defendants further argue that plaintiff has failed to state a claim for legal malpractice. In order to state a cause of action for legal malpractice, plaintiff must show: (1) negligence of the attorney; (2) that the negligence was a proximate cause of the loss; and (3) actual damages. *Dweck Law Firm. LLP v Mann*, 283 AD2d 292, 293 (1st Dept 2001); *Levine v Lacher & Lovell-Taylor*, 256 AD2d 147, 149 (1st Dept 1998); *Zarin v Reid & Priest*, 184 AD2d 385, 386 (1st Dept 1992). Mere unsupported conclusory allegations are insufficient. Absent factual allegations showing that, but for the attorney's misconduct, plaintiff would have obtained a more favorable outcome in the underlying matter, a cause of action for legal malpractice fails. Dweck; Levine.

The moving defendants argue that plaintiff's claim fails because it failed to state that but for their negligence, the judgment would have been obtained. The moving defendants assert that even if they acted appropriately they would not have been able to obtain the

judgment because more than one year had elapsed since entering of an order in plaintiff's favor on its motion for summary judgment in lieu of complaint against the Shahs. The moving defendants' assertion is disputed. Subsequent to the commencement of the present action, plaintiff successfully obtained the judgment in the underlying action by its new counsel. Affidavit of Jerome F. Squillante; Affirmation of Michael W. Rosen, Exhibit L. According to Squillante of Sarasota, at the time that the moving defendants represented plaintiff, the Shahs had an account with Citibank which plaintiff could have attached, and which may not exist at this time. Affidavit of Jerome F. Squillante ¶ 28. Even though the complaint does not mention the judgment which was obtained subsequent to filing of the complaint, and even if the complaint may not artfully state the "but for" element, plaintiff has sufficiently stated its claim. It is the well established principle that on the motion to dismiss for failure to state cause of action plaintiff is afforded every reasonable inference and the court may freely consider affidavits submitted to cure any defect to preserve an inartfully pleaded but potentially meritorious claim. Leon v Martinez, 84 NY 2d 83, 87-88 (1994).

The moving defendants also argue that plaintiff failed to state that the judgment would have been collectible had it been obtained by the moving defendants. Also, the moving defendants argue that the plaintiff failed to show actual damages because judgment against the Shahs may still be collectible now that plaintiff obtained it by its new counsel.

A claim for attorney malpractice affords a client a recovery for a pecuniary loss. Wilson v City of New York, 294 AD2d 290,292 (1st Dept 2002). The measure of damages is an amount that plaintiff would have collected in an underlying action. See McKenna v Forsyth, Kaufman & Forsyth, 280 AD2d 79, 83 (4th Dept 2001). The collectibility of a hypothetical judgment in the underlying action is a factor for consideration by the trier of facts. Chiaffi v Wexler & Cruet, 116 AD2d 614,615 (2d Dept 1986). Also, "litigation expenses incurred in an attempt to avoid, minimize, or reduce the damage caused by the attorney's wrongful

conduct can be charged to the attorney.” DePinto v Rosenthal & Curry, 237 AD2d 482,482 (2d Dept 1997). On a pre-answer motion to dismiss, plaintiff is not required to show that it actually sustained these damages, but is merely required to plead allegations from which damages may be inferred. Inkine Pharm. Co., Inc. v Coleman, 305 AD2d 151,152 (1st Dept 2003). Thus, contrary to the moving defendants’ contention, plaintiff’s allegations are sufficient to state this element of its claim. Therefore, the moving defendants’ motion to dismiss the first cause of action for malpractice is denied.

The moving defendants also argue that the second cause of action for breach of contract should be dismissed as duplicative of the first cause of action for attorney malpractice. In order to state a claim for breach of contract against a former attorney, the client must allege a promise of a particular or assured result. A claim resting merely on allegations of breach of professional standards is duplicative of a claim for malpractice. IMO Indus., Inc. v Anderson Kill & Olick, P.C. 267 AD2d 10 (1st Dept 1999). Plaintiff alleges that defendant agreed that it “would take all steps legally proper to protect and advance plaintiff’s interest in connection with the litigation.” Because these allegations do not state a promise of a particular result, the claim is dismissed as duplicative of a claim for malpractice.

The moving defendants move to dismiss the third and fourth causes of action for fraud. The moving defendants argue that the fraud claims are barred by statute of limitations. Plaintiff bases its claim on the alleged misrepresentations contained in two letters sent on July 24, 1996 and on June 16, 1997. Contrary to the moving defendants’ contention, plaintiff’s claims asserted on July 22, 2002 are within the six-year statute of limitations applicable to fraud claims under CPLR 213 (8).

The moving defendants also argue that plaintiff failed to state a claim for fraud. In order to establish a cause of action for fraud, plaintiff must allege the elements of fraud, and support each element with detailed factual allegations regarding the circumstances

constituting the wrong. CPLR 3016. The elements of fraud are: a representation of a material existing fact; falsity of representation; scienter, reasonable reliance; and damages. New York Univ. v Continental Ins. Co., 87 NY2d 308,318 (1995); Channel Master Corp. v Aluminium Ltd. Sales. Inc., 4 NY2d 403,407 (1958). Plaintiff alleges that on July 24, 1996, defendant Cooper by Decea sent a letter in which it stated that, “we have of course taken steps to execute upon the debtor’s wages,” requesting plaintiff to forward any relevant information. Complaint, ¶ 51. Plaintiff further alleges that Kurzman and Decea sent a letter dated June 16, 1997 stating that, “our application for judgment has been marked fully submitted by the Court and that we are waiting for the entry of the judgment.” Id. ¶ 58. It is plaintiff’s contention that these letters were sent with an intent to conceal the moving defendants’ failure to submit or secure the judgment, and that plaintiff relied on these misrepresentations.

The moving defendants argue that plaintiff may not state reasonable reliance. The moving defendants contend that they were not retained to enter judgment but merely to collect upon the judgment and that they found out only in February 1997 that the judgment had not been entered. The moving defendants also argue that it was necessary to make a motion in order to enter judgment, and that they were not retained to make such motion. The moving defendants submit affidavits of defendant Decea and a former employee of plaintiff, E. Jeffrey Dolfinger. Reply Affidavit of Mark K. Anesh, Exhibits B and C. According to Dolfinger and Decea, Decea advised Dolfinger that he would not work on securing the final judgment unless he was paid on hourly basis and that Dolfinger advised him that plaintiff decided not to retain him to enter the judgment until plaintiff was able to locate the Shahs’ assets. Affidavit of Thomas B. Decea ¶¶ 12-14; Affidavit of Jeffrey Dolfinger ¶¶ 10-11. However, copies of letters dated February 11, June 13 and June 16 1997, and February 11 and July 23, 1999, submitted by the parties indicate that the moving defendants were to work on obtaining the judgment in the underlying matter. Affirmation of Michael W. Rosen, Exhibits E and F; Affidavit of

Mark K. Anesh, Exhibits J, K and M. Plaintiff also submits affidavit of Jerome F. Squilante, the Treasurer of plaintiff. According to Squilante, neither Decea nor Dolfinger ever advised him, as Dolfinger supervisor, that Decea would not proceed with entering the judgment. Affidavit of Jerome F. Shilante ¶¶ 2-3. Thus, plaintiff has presented sufficient factual allegations and presented sufficient support to sustain their claims for fraud.

The moving defendants also seek to dismiss plaintiff's request for punitive damages. In order to recover punitive damages, plaintiff must allege conduct on behalf of defendant which involves, "malice, fraud, oppression, insult, [or] wanton or reckless disregard of the plaintiff's rights." Le Mistral, Inc. v Columbia Broadcasting System, 61 AD2d 491,494 (1st Dept 1978). However, plaintiff's allegations of fraudulent concealment of an alleged malpractice by attorney are not sufficient to support a request for punitive damages. See Wolkstein v Morgenstern, 275 AD2d 635,637 (1st Dept 2000). Because plaintiff alleges only that the moving defendants fraudulently misrepresented that the judgment had been entered in order to cover their malpractice, plaintiff's request for punitive damages is dismissed.

Plaintiff seeks summary judgment on its claims. The appropriate time to assert a motion for summary judgment is upon the joinder of issue. CPLR 3212 (a). Defendant should be afforded an opportunity to submit proof in support of its denials and assert defenses. See Kronish, Lieb, Shainswit, Weiner and Hellman v John J. Reynolds, Inc., 33 AD2d 366 (1st Dept 1969). Furthermore, the ability to obtain the judgment and any collectibility of such potential judgment are disputed and are issues for the trier of the fact. Also, in the light of the contradictory contentions and supporting evidence, plaintiff has failed to show entitlement to summary judgment on its fraud claims. Therefore, plaintiff's motion is denied without prejudice to the subsequent motion for summary judgment upon the joinder of issue.

Conclusion

Therefore, the moving defendants' motion is granted, in part, to the extent of dismissing the second cause of action for breach of contract and striking plaintiff's request for punitive damages. Plaintiff's cross motion for summary judgment is denied.


Accordingly, it is hereby

ORDERED that the motion by defendants Kurzman & Eisneberg, LLP. and Thomas B. Dacea, Esq. is granted, in part, to the extent of dismissing the second cause of action for breach of contract and striking plaintiff's request for punitive damages, and it is otherwise denied; and it is further

ORDERED that the cross motion by plaintiff Sarasota, Inc. is denied without prejudice as to plaintiff's right to submit a new motion for summary judgment once issue is joined; and it is further

ORDERED that defendants are directed to serve answers to the complaint within 10 days after service of a copy of this order with notice of entry.

Dated: 9/24/03


MARILYN SHAFER
J.S.C.

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION