Sarasota, Inc. v Kurzman & Eisneberg, LLP
2004 NY Slip Op 30301(U)
December 30, 2004
Supreme Court, New York County
Docket Number: 0116339/2002
Judge: Marilyn Shafer
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SCANNED ON 1/6/2005

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. MARILYN SHAFER, JSC
Justice

PART 36

0116339/2002

SARASOTA, INC.
VS
KURZMAN & EISENBERG, LLP

SEQ 2

DISMISS ACTION

INDEX NO. ______

MOTION DATE ______

MOTION SEQ. NO. ______

MOTION CAL. NO. ______

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion + x motion is decided pursuant to attached Rem

FILED
JAN 06 2005
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 12/30/04

J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK - IAS PART 36

SARASOTA, INC., as successor/assignee of F.D.I.C., receiver of GOLDOME SAVINGS BANK, Plaintiff,	)	
v.	)	Index No. 116339/2002
KURZMAN & EISNEBERG, LLP., THOMAS B. DECEA, ESQ., PHILIPS, LYTLE, HITCHCOCK, BLAINE & HUBER, ESQS., COOPER, LIEBOWITZ, ROYSTER & WRIGHT, ESQS., and KLEIN, O'BRIEN & TRACHTMAN, ESQS., Defendant.	)	

MARILYN SHAFER, J.:

Defendants Kurzman & Eisenberg, LLP. (Kurzman) and Thomas B. Decca, Esq. (Decca) move, pursuant to CPLR 3211, for an order dismissing, as against them, plaintiff's amended supplemental verified complaint. Plaintiff cross-moves, pursuant to CPLR 3025 (c), to serve an amended supplemental verified complaint.

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

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 the purchase of a cooperative apartment. According to the Note, in the event of default, a noteholder has a right to accelerate the debt. 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.

The Shahs defaulted on the Note on 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. Sarasota Inc. v Shah, Sup Ct, NY County, November 17, 1993, Gammerman, J., 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, 1996, moving defendant Decea, on behalf of Cooper, sent a letter to plaintiff stating that Cooper had taken steps to attach the Shahs' wages.

Subsequently, Decea left 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. 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." On June 16, 1997, Decca 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." 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." 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... ." 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. 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. 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 the amount due on the Note from the Shahs.

Plaintiff initially served a verified complaint containing four causes of action. The first cause of action asserted a claim of legal malpractice against all defendants. The second cause of action asserted a claim of breach of contract against all defendants. The third cause of action

asserted a claim of fraud against defendants Cooper and Decea. The fourth cause of action asserted a claim of fraud against defendants Kurzman and Decea. The complaint also sought punitive damages.

In February 2003, moving defendants served a pre-answer motion to dismiss plaintiff's complaint. By order dated September 22, 2003, this Court granted said motion in part, dismissing the second cause of action and the claim for punitive damages. Thereafter, moving defendants served a verified answer.

In November 2003, plaintiff served a supplemental verified complaint which added three causes of action. The cause of action denominated as the fifth asserted a claim of legal malpractice against defendants Kurzman and Decea. The cause of action denominated as the sixth asserted a claim for breach of contract against defendants Kurzman and Decea. The cause of action denominated as the seventh asserted a claim of fraud against defendants Kurzman and Decea. Thereafter, moving defendant served a verified answer to said complaint.

In mid December 2003, without leave of the court, plaintiff served an amended supplemental verified complaint which added another cause of action denominated as eighth. This last cause of action asserts a claim against Decea for violation of Judiciary Law § 487 and asks for treble damages.

Defendants move to dismiss the amended supplemental complaint on the ground that plaintiff did not obtain leave of the court to serve said complaint.

Plaintiff now cross-moves for leave to serve said complaint.

Defendants also move to dismiss the sixth and eighth causes of action because they fail to state a cause of action.

Defendants argue that the sixth cause of action for breach of contract is duplicative

of the legal malpractice claim.

In order to state a claim for breach of contract against a former attorney, the client must allege a promise of a particular 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). Thus, the court previously dismissed defendants' second cause of action because it was based on plaintiff's claim that defendants agreed that it would take all steps legally proper to protect and advance plaintiff's interest in connection with the litigation. This does not constitute a promise of a particular result and is merely duplicative of the malpractice claim.

Plaintiff now alleges, in the sixth cause of action, that moving defendants agreed to enter judgment at no cost to plaintiffs. This constitutes a promise of a particular result. As such, it alleges a valid breach of contract action.

Turning to the eighth cause of action, the court notes that Judiciary Law § 487 provides that an attorney who is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party, forfeits to the party injured treble damages, to be recovered in a civil action. Schindler v Issler & Schrage, P.C., 262 AD2d 226 (1st Dept 1999). The statute applies only to wrongful conduct by an attorney in a suit actually pending. Henry v Brenner, 271 AD2d 647 (2d Dept 2000).

This court already found in its order of September 22, 2003, that plaintiffs alleged a valid fraud action against moving defendants. Since the alleged acts that constitute the fraud were carried out with respect to the underlying action, plaintiffs have alleged a valid claim under Judiciary Law § 487.

Defendants argue that treble damages under the statute is warranted only where the

defendant attorney has engaged in a chronic, extended pattern of legal delinquency. Schindler, supra.

However, whether the alleged fraud was so pervasive is a question of fact best left for trial.

The court now turns to the cross motion to amend the complaint.

Amendment of a pleading should ordinarily be freely granted as long as the proposed cause of action is not lacking in merit. Sharon Ava & Co., v Olympic Tower Assoc. , 259 AD2d 315 (1st Dept 1999). The standard for determining merit on such a motion is not the same as the standards applied on a motion to dismiss or a motion for summary judgment. Hawkins v Genesee Place Corp., 139 AD2d 433 (1st Dept 1988).

"The analysis established by this court in East Asiatic Co. v Corash (34 AD2d 432, 436 [1st Dept 1970]) begins with a two-pronged test. First, the proponent must allege legally sufficient facts to establish a prima facie cause of action or defense in the proposed amended pleading. If the facts alleged are incongruent with the legal theory relied on by the proponent the proposed amendment must fail as a matter of law. (Goldstein v Brogan Cadillac Oldsmobile Corp., 90 AD2d 512, 514 [1st Dept 1982]; Sharapata v Town of Islip, 82 AD2d 350, 362 [2d Dept 1981], *aff'd* 56 NY2d 332 [1981].) The next step is for the nisi prius court to test the pleading's merit. The merit of a proposed amended pleading must be sustained, however, unless the alleged insufficiency or lack of merit is clear and free from doubt (East Asiatic Co. v Corash, supra). The party opposing the motion to amend, therefore, must overcome a presumption of validity of favor of the moving party, and demonstrate that the facts alleged and relied upon in the moving papers are obviously not reliable or are insufficient. (Brennan v City of New York, 99 AD2d 445, 446 [1st Dept. 1984].) This does not mean, however, that those facts need to be proven at this stage. (See, Hawkins v Genesee Place Corp., supra, at 434; Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book

does not mean, however, that those facts need to be proven at this stage. (See, Hawkins v Genesee Place Corp., supra, at 434; Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B CPLR 3025:11, at 482.)" Daniels v Empire-Orr, Inc., 151 AD2d 370, 371 (1st Dept. 1989).

Here for the reasons given above and those referred to in the court's prior order of September 22, 2003, plaintiff have sufficiently pleaded the causes of action and, moving defendants have not shown that the facts alleged are obviously not reliable.

For the foregoing reasons, it is;

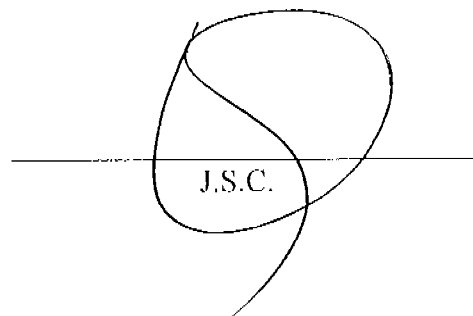
ORDERED that defendants' motion to dismiss the amended complaint is denied; and it is further

ORDERED that leave to amend the complaint is granted; and it is further

ORDERED that the amended complaint is deemed served; and it is further

ORDERED that moving defendants have 20 days from the service of this order with notice of entry to serve an answer on plaintiff.

Dated: December 30, 2004



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