Skvara v Kamaras
2007 NY Slip Op 32054(U)
July 5, 2007
Supreme Court, New York County
Docket Number: 0102229/2007
Judge: Martin Shulman
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SCANNED ON 7/10/2007

[* 1]

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

Index Number : 102229/2007

SKVARA, JURAJ

vs.

KAMARAS, PHILIP

SEQUENCE NUMBER : 001

SUMMARY JUDGMENT/LIEU COMPLAINT

PART 1

INDEX NO. 102229/07

MOTION DATE ______

MOTION SEQ. NO. 001

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~~ ...	1, 2
Cross-motion + Answering Affidavits — Exhibits	3, 4
Replying Affidavits	

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision and order.

FILED
JUL 10 2007
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: July 5, 2007

MARTIN SHULMAN J.S.C.

J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 1
---X
JURAJ SKVARA,

Plaintiff,

-against-

Index No. 102229/07

PHILIP KAMARAS,

Defendant.
---X

FILED
JUL 10 2007
NEW YORK
COUNTY CLERK'S OFFICE

Hon. Martin Shulman, J.S.C.:

In this action for legal malpractice, plaintiff Juraj Skvara ("plaintiff" or "Skvara") moves, pursuant to CPLR §3213, for summary judgment in lieu of complaint on his legal malpractice cause of action against his former attorney, defendant Philip Kamaras ("defendant" or "Kamaras"). Plaintiff seeks a money judgment in the amount of $1,000,000. Defendant cross-moves, pursuant to CPLR 3211(a)(1) and (7), for an order dismissing the complaint on the grounds that plaintiff's action was improperly commenced by motion for summary judgment in lieu of complaint, plaintiff's summons in lieu of complaint fails to state a valid cause of action for legal malpractice, and the documentary evidence provides a complete defense to plaintiff's claim for legal malpractice. For the reasons set forth below, plaintiff's motion for summary judgment in lieu of complaint is denied, and defendant's cross motion is granted.

Skvara first retained Kamaras on February 23, 2006 to handle matrimonial and family court proceedings after plaintiff's New York divorce judgment against his ex-wife, Andrea Skvarova, was vacated (Kamaras Aff. ¶3). Defendant provided plaintiff with a written retainer agreement and a Client's Bill of Rights (id., Exh. A).

Plaintiff commenced an action for divorce in New York on September 2, 2005 (id., ¶6). Prior to defendant's representation, plaintiff proceeded in the matrimonial action *pro se* (id., ¶7). On December 19, 2005, Skvara's New York divorce judgment was granted on default (id., Exh. C).

In his petition for divorce, plaintiff affirmed that no other action for divorce had previously been filed (id., ¶9; Exh. B). However, on January 9, 2006, in Kings County Supreme Court, plaintiff's ex-wife moved by order to show cause to vacate the New York judgment on the ground that she had commenced a prior action for divorce in Florida in April 2005 (id., Exh. D). Ms. Skvarova affirmed in an affidavit that a summons and a petition for divorce had been served on plaintiff on April 13, 2005, and attached a copy of these documents to her papers (id., Exh. F). In fact, plaintiff had filed an answer in response (id., Exh. G), and made a personal appearance, *pro se*, at a scheduled conference in the Florida action on April 19, 2005 (id., ¶8). Ms. Skvarova further stated that, although plaintiff appeared in the Florida action, he never formally contested the court's jurisdiction over the divorce.

On January 26, 2006, Skvara submitted opposition papers, *pro se*, on the theory that the Florida court lacked subject matter jurisdiction over the divorce proceedings (id., Exh. E). Plaintiff alleged that the Florida court did not have jurisdiction over the divorce as Ms. Skvarova had not met the Florida residency requirements necessary to obtain a Florida divorce. Although plaintiff's opposition papers set forth allegations that Ms. Skvarova did not reside in Florida at the time her Florida divorce action was commenced, his papers failed to include any evidence supporting these allegations (see id.).

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On January 31, 2006, Justice Eric I. Prus granted Ms. Skvarova's order to show cause and vacated the New York divorce judgment. Justice Prus held that the Florida action predated the New York proceeding and, as such, the Florida court had jurisdiction over the divorce (see id., Exh. H ["the parties are litigating in a Florida action which was commenced prior to the New York action(s) being commenced"] [emphasis in original]). As a result of Justice Prus' order, Ms. Skvarova's Florida divorce judgment was granted (id., Exh. I).

Shortly thereafter, on February 23, 2006, Skvara approached Kamaras to discuss his legal options with respect to Justice Prus' order (id., ¶5). Defendant alleges that, during his initial meeting with plaintiff, plaintiff claimed that the Florida court erroneously vacated the New York divorce judgment because his ex-wife had not satisfied the Florida residency requirement before filing for divorce (id., ¶11). Kamaras advised plaintiff that, in order to reopen his New York divorce action, and to prevail on a theory that the Florida courts lacked subject matter jurisdiction over the divorce, he would need to confirm that Ms. Skvarova did not reside in Florida at the time she commenced her action for divorce (id.).

On March 1, 2006, defendant filed a Notice of Appeal on plaintiff's behalf to protect his right of appeal. However, Kamaras alleges that he saw no legal issue to raise in a reargument or on appeal at that time (id., ¶13; Exh. J). Defendant further alleges that he advised plaintiff that without actual proof that his ex-wife resided outside the state of Florida at the time her divorce action was commenced, plaintiff would be unable to successfully appeal Justice Prus' order to vacate the New York divorce judgment (id., ¶12).

Kamaras alleges that, after he thoroughly researched and investigated the issue and reviewed all of the documentary evidence, he concluded that it was undisputed that Ms. Skvarova's Florida divorce action preceded plaintiff's New York divorce action, and that the Florida court had jurisdiction over the divorce (id., ¶¶ 13, 16). Defendant also concluded that there was no evidence indicating that Ms. Skvarova did not satisfy the Florida residency requirement. Indeed, Mr. Skvara hired a private investigator, Intercontinental Investigations, to locate Ms. Skvarova and to establish her residency outside of Florida (id., ¶15). The investigator provided plaintiff with proof that his ex-wife resided in Florida, and included a Florida address (id., Exh. L). Accordingly, Kamaras advised plaintiff that he had no legal basis to reargue Justice Prus' order and could not proceed with perfecting an appeal, as he had no legal arguments to set forth in such an appeal (id., ¶¶ 13, 16).

Plaintiff's appeal was never perfected. On November 20, 2006, the Appellate Division dismissed the appeal on its own motion. Although Kamaras refused to perfect an appeal of Justice Prus' order to vacate, upon Skvara's request, and after the time frame to perfect an appeal had expired, defendant continued to act as plaintiff's counsel (id., ¶¶ 19-21, 23-24). Defendant appeared on plaintiff's behalf on four subsequent and separate occasions in New York Family Court through December 2006, when a final order for child support for his daughter was entered (id., ¶21).

On February 15, 2007, Skvara commenced this legal malpractice action by the service of a Summons with Notice of a Summary Judgment Motion in Lieu of a Complaint. In support of the motion for summary judgment, plaintiff submits only a brief one-page, two-paragraph affidavit in which he alleges that defendant "never went to the

CAMP Conference," "never obtained an extension of time to perfect," and "never perfected the Appeal" (Skvara Aff. at ¶1). Plaintiff further alleges that there are no "issue[s] of fact since the Appellate Division dismissed the Appeal" (id). Skvara also submits the affidavit of his attorney, Paul Lieber, who alleges that, "but for" Kamaras' inaction, i.e., his alleged failure to move to reargue or to perfect an appeal of Justice Prus' order vacating plaintiff's New York divorce judgment, to attend a CAMP conference, and to provide a written retainer, plaintiff would have been successful in the underlying matrimonial action. Plaintiff alleges damages totaling $1,000,000.

However, Skvara's CPLR §3213 motion must be denied, as a motion for summary judgment in lieu of complaint is not the appropriate vehicle for the determination of his legal malpractice claims. Pursuant to CPLR §3213, under narrow circumstances, a plaintiff will be allowed to serve a defendant with a summons, notice of motion and supporting papers in lieu of a complaint. The categories to which CPLR §3213 applies are actions "based upon an instrument for the payment of money only" or "any judgment" (CPLR §3213; see Schulz v Barrows, 94 N.Y.2d 624, 627-628, 709 N.Y.S.2d 148 [2000], quoting Siegel, NY Prac § 288, at 448-449 [3d ed] ["The CPLR gives 'greater presumptive merit' to two categories of claims-actions based on instruments for the payment of money, and actions based on judgments-allowing them to be brought on by 'motion-action' for summary judgment, bypassing pleading, motion and discovery delays"]).

Here, plaintiff has not alleged that the action for which he is moving pursuant to CPLR §3213 is one "based upon an instrument for the payment of money only or upon any judgment." Rather, Skvara has brought an action alleging legal malpractice. As

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CPLR §3213 is inapplicable to a legal malpractice cause of action, plaintiff's motion must be denied (see CPLR §3213; see e.g. Santo v. Government Employees Ins. Co., 31 A.D.3d 525, 819 N.Y.S.2d 279 [2nd Dept., 2006] ["Because the plaintiff's action was not based upon an instrument for the payment of money only, it was improperly commenced by motion for summary judgment in lieu of complaint"]; Gottlieb v. Blue Ridge Ins. Co., 300 A.D.2d 541, 542, 752 N.Y.S.2d 565 [2nd Dept., 2002] ["the use of a 'motion-action' pursuant to CPLR 3213 was not appropriate"]).

Where a motion for summary judgment in lieu of complaint is denied, the court is not obliged to treat the CPLR §3213 motion papers and any opposition as a complaint and answer, and has the discretion to dismiss the action outright (Schulz v. Barrows, 94 N.Y.2d at 629 [holding it was not an abuse of discretion for lower court to grant defendant's cross motion and dismiss the action upon the denial of plaintiff's motion for summary judgment in lieu of complaint]; see also, Weissman v. Sinorm Deli, Inc., 88 N.Y.2d 437, 646 N.Y.S.2d 308 [1996]). Here, because Skvara fails to sufficiently plead a claim for legal malpractice, Kamaras' cross motion is granted, and the action is dismissed.

To properly plead a claim for legal malpractice, a claimant must establish: 1) the existence of an attorney-client relationship; 2) negligence on the part of the attorney or some other conduct in breach of that relationship; 3) that the attorney's conduct was the proximate cause of the injury to the plaintiff; and 4) that plaintiff suffered actual and ascertainable damages (see Russo v. Feder, Kaszovitz, Isaacson, Weber, Skala & Bass, LLP, 301 A.D.2d 63, 750 N.Y.S.2d 277 [1st Dept., 2002]; Zarin v Reid & Priest, 184 A.D.2d 385, 585 N.Y.S.2d 379 [1st Dept., 1992]; Julien v Goldin, 15 Misc.3d

1106(A), 836 N.Y.S.2d 500 [Sup Ct., Kings County, 2007]). In the absence of proper pleading and proof of these elements, a cause of action for legal malpractice must fail (see id.).

In order to establish the element of proximate cause, the plaintiff must plead and prove that he or she would have "succeeded on the merits of the underlying action but for the attorney's alleged negligence" (Maillet v. Campbell, 280 A.D.2d 526, 527, 720 N.Y.S.2d 203 [2nd Dept., 2001]; Zarin v. Reid & Priest, supra; see also, Brady v. Bisogno & Meyerson, 32 A.D.3d 410, 819 N.Y.S.2d 558 [2nd Dept., 2006], *lv. to app. den.* 7 N.Y.3d 715, 826 N.Y.S.2d 181 [2006] [on a cause of action to recover damages for legal malpractice, the plaintiff must plead that "but for" the attorney's failure to exercise due care, the plaintiff would have prevailed in the underlying action, or would not have incurred damages as a result of the attorney's conduct]). The failure to establish proximate cause in and of itself requires dismissal of the legal malpractice action, regardless of whether it is demonstrated that the attorney was negligent (see Tanel v. Kreitzer & Vogelman, 293 A.D.2d 420, 741 N.Y.S.2d 221 [1st Dept., 2002]; Pellegrino v File, 291 A.D.2d 60, 738 N.Y.S.2d 320 [1st Dept, 2002], *lv. to app. den.* 98 N.Y.2d 606, 746 N.Y.S.2d 456 [2002]).

An attorney may be found negligent for failing to perfect an appeal only where it appears that such an appeal would have resulted favorably to the client (see Weiner v. Hershman & Leicher, P.C., 248 A.D.2d 193, 669 N.Y.S.2d 583 [1st Dept., 1998] [plaintiff failed to allege that "but for" the negligence of the defendants, he would have prevailed in an appeal]; see also, Suffolk Ave. Car Wash & Lube, Inc. v. Oberman, 256 A.D.2d 75, 681 N.Y.S.2d 254 [1st Dept., 1998]). It is well settled that a party perfecting an

appeal is prohibited from relying upon matters outside the record (see News America Marketing, Inc. v. Lepage Bakeries, Inc., 16 A.D.3d 146, 791 N.Y.S.2d 80 [1st Dept., 2005] [appellate court is bound by the record]; Broida v. Bancroft, 103 A.D.2d 88, 93, 478 N.Y.S.2d 333 [2nd Dept., 1984] ["It is axiomatic that appellate review is limited to the record made at *nisi prius* and, absent matters which may be judicially noticed, new facts may not be injected at the appellate level"]; see, e.g., Kent v. Kent, 29 A.D.3d 123, 810 N.Y.S.2d 160 [1st Dept., 2006] [on appeal of a divorce action for modification, the First Department refused to consider financial matters outside the record to which the petitioner referred]).

Here, if an appeal had been perfected in the underlying matrimonial action, Skvara would have been barred from introducing any evidence outside the record to support his papers. The documents and arguments set forth in Skvara's opposition to his ex-wife's motion to vacate the New York divorce judgment are devoid of any evidence conclusively demonstrating that she did not meet the residency requirements needed to obtain a judgment of divorce in Florida (see Kamaras Aff., Exh. E). As such, the appeal would have been denied. Accordingly, plaintiff has failed to set forth sufficient facts demonstrating that "but for" defendant's failure to exercise due care and perfect an appeal, plaintiff would have ultimately prevailed in the underlying matrimonial action.

Moreover, Skvara's papers in support of his summary judgment allegations contain only conclusory allegations of negligence (see Skvara Aff., ¶1 [defendant "never went to the CAMP Conference," "never obtained an extension of time to perfect," and "never perfected the Appeal"]). In addition, plaintiff fails to demonstrate, as he must

(see Brooklyn Law School v. Great Northern Ins. Co., 283 A.D.2d 383, 723 N.Y.S.2d 861 [2nd Dept., 2001]; Russo v. Feder, Kaszovitz, Isaacson, Weber, Skala & Bass, LLP, supra), that he has sustained actual and ascertainable damages directly resulting from defendant's alleged negligence.

The loss attributable to malpractice must be real and not hypothetical, and the damages must be readily measurable in economic terms (see Oot v. Arno, 275 A.D.2d 1023, 713 N.Y.S.2d 382 [4th Dept., 2000]; Zarin v. Reid & Priest, supra]). Mere speculation of loss resulting from attorney negligence is insufficient to sustain a prima facie case of legal malpractice (see Luniewski v. Zeitlin, 188 A.D.2d 642, 591 N.Y.S.2d 524 [2nd Dept., 1992]; see, e.g., Igen, Inc. v. White, 250 A.D.2d 463, 672 N.Y.S.2d 867 [1st Dept., 1998], *lv. to app. den.* 92 N.Y.2d 918, 684 N.Y.S.2d 489 [1998] [dismissing legal malpractice claim on the ground that alleged failure to perfect a patent caused speculative damages only, and plaintiff failed to prove actual damages]).

Here, plaintiff can point to no damages that he has actually incurred. While plaintiff sets forth a blanket allegation of damages in the amount of $1,000,000, he fails to allege what these numbers represent, or how he arrived at that figure. As such, plaintiff's damages are completely speculative (see Oot v. Arno, supra; Igen, Inc. v. White, supra). Absent the showing of actual damages, there can be no cause of action for legal malpractice (see Postel v. Jaffe & Segal, 237 A.D.2d 127, 654 N.Y.S.2d 25 [1st Dept., 1997]).

Accordingly, because Skvara failed to properly plead each of the required elements of a legal malpractice cause of action, this action must be dismissed in its entirety, pursuant to CPLR 3211(a)(7). This action must also be dismissed for the

independent reason that the documentary evidence Kamaras submits establishes a complete defense to plaintiff's claims. On a motion to dismiss under CPLR 3211(a)(1), the documentary evidence must "utterly [refute] plaintiff's factual allegations, conclusively establishing a defense as a matter of law," as well as resolve all factual issues (Goshen v. Mutual Life Ins. Co. of New York, 98 N.Y.2d 314, 326, 746 N.Y.S.2d 858 [2002]; Leon v. Martinez, 84 N.Y.2d 83, 88, 614 N.Y.S.2d 972 [1994]).

Although plaintiff alleges that defendant was negligent in his failure to obtain a written retainer agreement, to attend a scheduled CAMP Conference, to properly file a motion to reargue, and to perfect an appeal of Justice Prus' order, the documentary evidence utterly refutes these claims. Kamaras submits a written retainer agreement entered into between the parties which clearly establishes that, contrary to plaintiff's allegations, defendant did obtain a written retainer agreement (see Kamaras Aff., Exh. A). Furthermore, the affidavit of Ksakousti Lazarus, an associate at defendant's law firm, in which she attests that she appeared at the April 17, 2006 CAMP conference, refutes plaintiff's allegation of a non-appearance (see Kamaras Aff., Exh. M).

Finally, the record from the underlying matrimonial action demonstrates that defendant had no valid legal argument to support a motion to reargue or an appeal of Justice Prus' order, as it was clear that the Florida divorce action pre-dated plaintiff's New York divorce action, Ms. Skvarova met the residency requirement to obtain a Florida divorce, and thus, the Florida court had jurisdiction over the divorce (see Kamaras Aff., Exhs. F, L). Consequently, Kamaras was entirely correct in refusing to move to reargue or to perfect an appeal on Skvara's behalf.

As such, the documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of plaintiff's claim for legal practice (see Goshen v. Mutual Life Ins. Co. of New York, 98 N.Y.2d 314, supra; Leon v. Martinez, supra). Hence, this action must be dismissed in its entirety.

Accordingly, it is

ORDERED that the motion for summary judgment in lieu of complaint is denied; and it is further

ORDERED that the cross motion to dismiss is granted, and the action is dismissed with costs and disbursements to defendant as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes this court's Decision and Order. Courtesy copies of same have been provided to counsel for the parties.

DATED: New York, New York
July 5, 2007

HON. MARTIN SHULMAN, J.S.C.

HON MARTIN SHULMAN, J.S.C.

FILED
JUL 10 2007
NEW YORK
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