

Kleinser v Astarita

2008 NY Slip Op 31229(U)

April 18, 2008

Supreme Court, New York County

Docket Number: 0116844/2006

Judge: Judith J. Gische

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PRESENT: **JUDITH J. GISCHE, J.S.C.**

PART 10

Justice

Index Number : 116844/2006

KLEINSER, DALE

vs.

ASTARITA, MARK

SEQUENCE NUMBER : # 004

DISMISS COMPLAINT

INDEX NO. 116844-06

MOTION DATE

MOTION SEQ. NO. #004

MOTION CAL. NO.

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

**motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.**

FILED
APR 28 2008
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4/18/08

JUDITH J. GISCHE, J.S.C. *J.S.C.*

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate DO NOT POST REFERENCE

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

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10**

-----X
Dale Kleinser,

Plaintiffs,

-against-

Mark Astarita, Brian Graifman,
Martin Kaplan, Gusrae Kaplan &
Bruno, Cirino Bruno, Robert Perez,
Lawrence Nusbaum and
Melvyn Falis,

Defendants.

DECISION/ORDER

Index No.: 116844/06
Seq. No.: 004

Present:
Hon. Judith J. Gische
J.S.C.

-----X
Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of
this (these) motion(s):

Papers	Numbered
Defs' n/m (§3211) w/BJ affirm, CB, RP, LN and MF affid, exhs	1
Pltff's opp w/DK affid, exhs	2
Defs' reply w/BJ affirm, exhs	3

-----X
Upon the foregoing papers, the decision and order of the court is as follows:

This is an action by plaintiff *pro se*, the former client of Gusrae Kaplan & Bruno, a law firm ("GK&B"). Plaintiff claims that GK&B committed legal malpractice and that he has sustained monetary damages as a result. Although issue was joined as to the original complaint, plaintiff has now served a supplemental summons and amended complaint adding four (4) individually defendants. These new defendants, Cirino Bruno, Robert Perez, Lawrence Nusbaum and Melvin Falis were attorneys of the firm at the time the alleged malpractice occurred ("moving defendants").

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The moving defendants seek the preanswer dismissal of this action based upon documentary evidence [CPLR § 3211 (a)(1)] and because plaintiff has failed to state a cause of action [CPLR § 3211 (a)(7)] against them. The motion is opposed by plaintiff.

On a motion to dismiss, the facts as alleged in the complaint must be accepted by the court as true, and are to be accorded every favorable inference. Morone v. Morone, 50 NY2d 481 (1980); Beattie v. Brown & Wood, 243 AD2d 395 (1st dept. 1997). Moreover, in deciding this motion to dismiss, the court will consider whether, accepting all of the plaintiff's facts, they support the causes of action he has asserted against them Rovello v. Orofino Realty Co., 40 N.Y.2d 633, 634 (1976). The court will also consider whether the moving defendants have presented documentary evidence that conclusively establishes a defense to the cause of action, as a matter of law. Goshen v. Mutual Life Insurance Co., 98 NY2d 314 (2002); Bronxville Knolls Inc. v. Webster Town Center Partnership, 221 AD2d 248 (1st dept. 1995).

Factual Allegations and Arguments Presented

Plaintiff hired GK&B to represent him in a lawsuit against Rockrimmon Securities and Andy Smukler ("Rocksimmon action"). That case was tried before the Hon. Charles Ramos at a bench trial. Judge Ramos directed entry of a money judgment against the defendants in that action for \$67,534.72; it was filed September 29, 2003. Plaintiff appealed Judge Ramos' decision, and it was affirmed on appeal.

Plaintiff factually alleges that GK&B, and attorneys who are employed or partners thereof, committed legal malpractice by not heeding his demands about how to draft the complaint in the Rockrimmons action, by for example, mis-stating certain facts that he contends was fatal to his obtaining a better result at trial. Moreover, plaintiff contends

he had demanded a jury trial, but through GK&B's further negligence, had a bench trial.

In both the original and amended complaint plaintiff makes factual allegations about defendants Astarita, Graifman, Kaplan and the law firm. In support of this claims against the moving defendants plaintiff only states that they "conduct business" in New York. In opposition to the moving defendants' motion to dismiss, plaintiff does not elaborate any further. He states that he added the defendants because he learned their names through court ordered discovery, and believes that under New York law, every partner of a firm must be named individually.

In support of their motion to dismiss, the moving defendants have provided their sworn affidavits wherein each of the state that they had no involvement with the Rockrimmons case or with plaintiff. Further, they contend that there are no factual allegations to sustain his cause of action against any one of them individually.

Discussion

At the outset, the court notes that the amended complaint was apparently served without leave of court and not in compliance with the requirements set forth in either CPLR 3025 (a) or (b). Nonetheless, even if the amended complaint was served properly, the claims against the moving defendants must be severed and dismissed, not because of documentary evidence, but because plaintiff has failed to state a cause of action against them.

The affidavits that the moving defendants have provided are not "documentary evidence" but simply sworn statements that they did not participate in the Rockrimmons actions or have any involvement with plaintiff. Thus, they would not be documents that establish a defense to the causes of action against them, as a matter of law. Goshen v.

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Mutual Life Insurance Co., supra. Bronxville Knolls Inc. v. Webster Town Center Partnership, supra.

However, plaintiff offers no facts to support any claims against the moving defendants, in their individual capacity. His factual claims are only about Astarita, Graifman and Kaplan. According the amended complaint every favorable inference, plaintiff has failed to state a cause of action against any one of the moving defendants. Their motion to dismiss the claims against them (Cirino Bruno, Robert Perez, Lawrence Nusbaum and Melvin Falis) is granted.

Although plaintiff has not cross moved, he requests certain discovery that has been addressed by the defendants. He seeks a copy of their partnership agreement, and the firm's balance sheets and income statements. He contends that this information is important for him to prove "who of the partners knew what and when did they know it." Further, he claims the firm is now a professional corporation, but was a professional limited liability corporation.

Pretrial disclosure extends not only to admissible proof but also to testimony or documents which may lead to disclosure of admissible proof. Fell v. Presbyterian Hosp. in City of New York at Columbia-Presbyterian Medical Center, 98 A.D.2d 624 (1st Dept 1983). Discovery however cannot be a fishing expedition, and it must relate to facts bear on the controversy. Fell v. Presbyterian Hosp. in City of New York at Columbia-Presbyterian Medical Center, supra. This standard has not been met by plaintiff or the claims in the complaint. Not only has plaintiff completely failed to state any facts to support his claims against the individual defendants that have now been dismissed by virtue of this order, he has not provided any basis for these documents

connection with the individuals who remain. Therefore, his request for this discovery is denied.

Conclusion

It is hereby

ORDERED that the motion by defendants Cirino Bruno, Robert Perez, Lawrence Nusbaum and Melvin Falis to dismiss the amended complaint against them is granted because plaintiff has failed to state a cause of action against them [CPLR 3211 (a)(7)]; and it is hereby

ORDERED that the clerk shall enter judgment severing and dismissing the claims against defendants Cirino Bruno, Robert Perez, Lawrence Nusbaum and Melvin Falis, and strike their names from the caption of this case; and it is further

ORDERED that plaintiff's request for the documents addressed in this decision/order is also denied for the reasons stated; and it is further

ORDERED that this case will appear for a status conference on **May 15, 2008 at 9:30 a.m. In Part 10**; and it is further

ORDERED that any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, New York
April 18, 2008

So Ordered:

FILED
APR 28 2008
NEW YORK
CLERK'S OFFICE

Hon. Judith J. Gische, JSC