[* 1]

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

PRESENT: _____ PART _____

Justice

Index Number : 105183/2007
JORDAN, KATHRYN
VS.
PHELAN, GARY
SEQUENCE NUMBER : # 004
DISMISS (AMENDED COMPLAINT)

INDEX NO. 105183-07
MOTION DATE _____
MOTION SEQ. NO. #004
MOTION CAL. NO. _____

on this motion to/for dismiss

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3

Memo

M1, M2

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER.

FILED
JUN 06 2008
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 5-30-08

J.S.C.
MARCY S. FRIEDMAN

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY - - PART 57

KATHRYN JORDAN,
Plaintiff(s),

against

GARY PHELAN, WAYNE OUTTEN and OUTTEN GOLDEN,
Defendant(s).

Index No.: 105183/07

DECISION/ORDER

KATHRYN JORDAN,
Plaintiff(s),

against

DAVID FISH,
Defendant(s).

Index No.: 601806/07

DECISION/ORDER

KATHRYN JORDAN,
Plaintiff(s),

against

LAWRENCE LEBOWITZ, KLEIN ZELLMAN,
Defendant(s).

Index No.: 600246/07

DECISION/ORDER

Present: HON. MARCY FRIEDMAN
Justice, Supreme Court

In this action, plaintiff, Kathryn Jordan, sues several former attorneys for legal malpractice arising out of their representation of plaintiff in two employment discrimination cases against employers Bates Advertising ("Bates") and Verizon Communications ("Verizon"). In the action by plaintiff against defendants Gary Phelan ("Phelan"), Wayne Outten and Outten & Golden (Index No. 105183/07), defendant Phelan moves to dismiss plaintiff's amended complaint, pursuant to CPLR 3211(a), subdivisions 7 and 1, among others. By separate motion,

defendants Outten and Outten & Golden (the "Outten defendants") move to dismiss the complaint pursuant to CPLR 3211(a), subdivision 7, among others. In the action by plaintiff against David Fish (Index No. 601806/07), plaintiff moves to amend the complaint to add Howard Leff and Robert Rosen, partners in Mr. Fish's former firm. Defendant Fish cross-moves to dismiss the complaint pursuant to CPLR 3211(a), subdivision 8, among others. In the action by plaintiff against defendants Laurence Lebowitz and his law firm Klein Zelman Rothermel LLP (the "Lebowitz defendants") (Index No. 600246/07), defendants move to dismiss the complaint pursuant to CPLR 3211(a), subdivision 7, among others.[1]

It is well settled that on a motion to dismiss pursuant to CPLR 3211(a)(7), "the pleading is to be afforded a liberal construction (see CPLR 3026). We 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 within any cognizable legal theory." (Leon v Martinez, 84 NY2d 83, 87-88 [1994]. See 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144 [2002].) However, "the court is not required to accept factual allegations that are plainly contradicted by the documentary evidence or legal conclusions that are unsupportable based upon the undisputed facts." (Robinson v Robinson, 303 AD2d 234, 235 [1st Dept 2003]. See also Water St. Leasehold LLC v Deloitte & Touche LLP, 19 AD3d 183 [1st Dept 2005], lv denied 6 NY3d 706 [2006].) When documentary evidence under CPLR 3211(a)(1) is

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[1]By order dated August 28, 2007, this Court expressly notified the parties that it would not entertain any letters or requests for relief by letter in these actions, and that any letters would be deemed rejected. This order also provided that no papers would be accepted on the motions other than the papers specifically authorized in the order. Plaintiff filed papers and letters in violation of this order. These unauthorized papers and letters accordingly have been deemed rejected and have not been considered by the court in the determination of the instant motions.

considered, "a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." (Leon v Martinez, 84 NY2d at 88; Arnav Indus., Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner, L.L.P., 96 NY2d 300 [2001].)

Defendant Phelan

Plaintiff's claims against Phelan based on his representation of plaintiff in the Verizon action are time-barred. It is undisputed that plaintiff's original complaint against Phelan asserted claims based solely on Phelan's representation of plaintiff in the Bates litigation. The complaint in plaintiff's action against Fish alleges that plaintiff retained Fish to represent her in the Verizon case on or about May 15, 2004 (Fish Complaint, ¶1). In her papers in opposition to the motion by Phelan, plaintiff acknowledges that she was represented by Fish as of May 18. (See Jordan Aff. In Opp., ¶ 24.) In her amended complaint against Phelan, plaintiff also alleges that her relationship with Phelan ended "on or around mid May 2004." (Amended Complaint, ¶20.) Plaintiff's amended complaint is dated July 23, 2007, more than three years after Phelan's representation ended. The claim against Phelan in the amended complaint regarding the Verizon litigation is accordingly barred by the statute of limitations. (See CPLR 214[6].)

Plaintiff's claims against Phelan based on his representation of plaintiff in the Bates matter must also be dismissed. Plaintiff alleges that Phelan failed to conduct adequate discovery or to bring a motion to compel discovery, and that "[w]hile subsequent counsel had an opportunity to mitigate these matters, the amount of discovery that could have been conducted was clearly reduced by Phelan malpractice." (Amended Complaint, Count II, ¶ 10.) This allegation fails to state a cause of action, as it lacks any facts tending to show that successor

counsel did not have sufficient time to complete discovery (see Somma v Dansker & Aspromonte Assocs., 44 AD3d 376 [1st Dept 2007]; Ramcharan v Pariser, 20 AD3d 556 [2d Dept 2005]), or that additional discovery would have resulted in a better outcome.

Plaintiff's causes of action for breach of contract, gross negligence, fraudulent inducement, fraud, and negligent misrepresentation are duplicative of the legal malpractice cause of action and must therefore also be dismissed. (See e.g. Sabo v Alan B. Brill, P.C., 25 AD3d 420 [1st Dept 2006]; Campbell v Tamsen, 37 AD3d 636 [2d Dept 2007].) In addition, the allegations of the complaint do not state causes of action for fraud, as a fraud claim may not be maintained based on the mere allegation that a party "did not intend to meet his contractual obligations." (See Rocanova v Equitable Life Assur. Soc'y of the United States, 83 NY2d 603, 614 [1994]; Hudson v Greenwich I Assocs., 226 AD2d 119 [1st Dept 1996], lv dismissed 89 NY2d 860.)

The Outten Defendants

The Outten defendants' motion to dismiss the complaint should be granted for the reasons stated above in connection with defendant Phelan's motion. In view of this holding, the court need not reach the issue of whether there was an attorney client relationship between plaintiff and these defendants.

Defendant Fish

Plaintiff's motion to add defendant Fish's former partners, Rosen and Leff, as defendants in this action must be denied based on plaintiff's failure to show any merit to the proposed amendment.

Defendant Fish's cross-motion seeks dismissal of the complaint, as a threshold matter, on

the ground that Fish was not properly served with the summons because it was left with an employee of another law firm that shares a suite with him. (Fish Aff. In Support, ¶ 5.) Plaintiff's own affidavit of service on its face demonstrates that service was not proper. Although Fish was named as an individual, the affidavit of service alleges service on a corporation. Moreover, the affidavit notes that the person with whom the process was left was not the assistant for Mr. Fish. No claim is made that a follow-up mailing was made and that the service could be found proper as service on a person of suitable age and discretion pursuant to CPLR 308(2). The complaint will therefore be dismissed based on lack of personal jurisdiction.

The Lebowitz Defendants

The Lebowitz defendants, who were plaintiff's trial counsel in the Bates litigation, move for dismissal of the complaint on the ground that it fails to state a cause of action. The complaint pleads causes of action for legal malpractice, breach of contract, and fraudulent inducement based on allegations that defendant Lebowitz failed to call certain witnesses and to present certain documents necessary to establish plaintiff's full damages, failed to request that the jury specify the source of plaintiff's damages, and failed to litigate certain claims including plaintiff's claim for emotional distress or pain and suffering.

The court takes judicial notice that after the submission of the motions to dismiss, the Appellate Division of this Department rendered a decision in the Bates action setting aside the verdict in plaintiff's favor as to liability. (See Jordan v Bates Adv. Holdings, Inc., 46 AD3d 440 [1st Dept 2007].) Based on the Appellate Division decision, plaintiff's claims as to defendants' alleged malpractice with respect to proof of plaintiff's damages appear to be moot.

In any event, construing the complaint liberally in favor of plaintiff, as the court must do

on a motion to dismiss, the court finds that the complaint "alleges no more than an error of judgment [by the Lebowitz defendants] which does not rise to the level of malpractice." (Rosner v Paley, 65 NY2d 736, 738 [1985].) Moreover, while plaintiff sets forth alternatives that she claims defendants should have pursued, "selection of one among several reasonable courses of action does not constitute malpractice." (Id.)

The court further holds that the breach of contract and fraudulent inducement claims must be dismissed for the reasons set forth in connection with defendant Phelan's motion to dismiss. Plaintiff's punitive damage claim does not set forth the intentional misconduct or "aggravating or outrageous circumstances" required to sustain a claim for punitive damages in tort. (See Gamiel v Curtis & Riess-Curtis, P.C., 16 AD3d 140 [1st Dept 2005].)

Conclusion

The court has no doubt that plaintiff holds a deeply-felt, abiding belief that defendants in these actions committed malpractice. However, plaintiff's allegations are insufficient to support maintenance of these malpractice actions under governing legal standards. Given the lack of legal basis for plaintiff's numerous claims in these actions, plaintiff will be precluded from commencing any further actions relating to defendants' representation of plaintiff without prior leave of Court. (See Sibersky v Winters, 42 AD3d 402 [1st Dept 2007]; Melnitzky v Apple Bank for Sav., 19 AD3d 252 [1st Dept 2005], rearg denied 2006 NY App Div Lexis 1773.)

It is accordingly ORDERED that the complaint against Gary Phelan, Wayne Outten and Outten Golden is dismissed and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the complaint against David Fish is dismissed and the Clerk is directed

to enter judgment accordingly; and it is further

ORDERED that the complaint against Lawrence Lebowitz, Klein Zellman is dismissed and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that, as provided in this court's August 28, 2007 order, any future motions in the above-captioned actions shall be brought only by order to show cause, and the face of the order to show cause shall indicate that it must be referred to the undersigned for consideration for signature. As also provided in that order, this court will not entertain any letters or requests for relief by letter in these actions. Any letters will be deemed rejected; and it is further

ORDERED that plaintiff is enjoined from commencing any pro se future litigation in the courts of the State of New York against defendants in the instant actions regarding their representation of plaintiff, without prior approval of the Administrative Judge of the Court in which she seeks to bring the future action; and the Clerk of such Court is directed not to accept any new summons or complaint from plaintiff without prior leave of the Administrative Judge of such Court.

This constitutes the decision and order of the court.

New York, York, New York
May 30, 2008

MARCY FRIEDMAN, J.S.C.