Goldberg & Connolly v Xavier Contr., LLC

2008 NY Slip Op 31897(U)

June 26, 2008

Supreme Court, Nassau County

Docket Number: 8713-06/

Judge: Daniel R. Palmieri

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

[* 1]

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present:
HON. DANIEL PALMIERI
Acting Justice Supreme Court

TRIAL TERM PART: 48

---x

GOLDBERG & CONNOLLY,

Plaintiff,

-against-

XAVIER CONTRACTING, LLC.,

Defendants.

---x

INDEX NO.:008713/06

MOTION DATE:5-12-08
SUBMIT DATE:6-16-08
SEQ. NUMBER - 003

The following papers have been read on this motion:

Notice of Motion, dated 4-14-08..1
Memorandum of Law, dated 4-14-08.......................................2
Affirmation in Opposition, dated 5-31-08................................3
Memorandum of Law in Opposition dated 5-11-07.................4
Reply Affidavit, dated 6-16-08..5
Memorandum in Support of Reply, dated 6-16-08..................6

This motion for summary judgment by the plaintiff pursuant to CPLR 3212 for an order dismissing the counterclaims asserted by the defendant is granted and the counterclaims are dismissed.

The facts of this case have previously been recounted in this Court's decision dated May 30, 2007, and will be repeated here only to the extent required.

A party moving for summary judgment must establish a *prima facie* case for judgment as a matter of law in its favor. CPLR 3212 (b); *Alvarez v Prospect Hosp.*, 68 NY2d 966 (1986). This may be accomplished by including documentary evidence or deposition

transcripts annexed to an attorney's affirmation. *Olan v Farrell lines*, 64 NY2d 1092 (1985). The burden then shifts to the non-moving party. To defeat the motion for summary judgment the opposing party must come forward with evidence to demonstrate the existence of a material issue of fact requiring a trial. CPLR 3212 (b); *see also GTF Marketing, Inc. v Colonial Aluminum Sales, Inc.*, 66 NY2d 965 (1985); *Zuckerman v City of New York*, 49 NY2d 557 (1980).

The non-moving party must lay bare all of the facts at its disposal regarding the issues raised in the motion. *Mgrditchian v Donato*, 141 AD2d 513 (2d Dept. 1988). Conclusory allegations are insufficient (*Zuckerman v City of New York, supra*), and the defending party must do more than merely parrot the language of the complaint or bill of particulars. The reviewing court is obligated to evaluate admissible proof in favor of the non-moving party, drawing every inference in favorable to the motion opponent. *See, Nicklas v Tedlen Realty Corp.*, 305 AD2d 385 (2d Dept. 2003); *Rizzo v Lincoln Diner Corp.*, 215 AD2d 546 (2d Dept. 1995). Nevertheless, summary judgment remains an appropriate tool to weed out meritless claims. *Lewis v Desmond*, 187 AD2d 797 (3d Dept. 1992); *Gray v Bankers Trust Co. of Albany, N. A.*, 82 AD2d 168 (3d Dept. 1981).

Applying these well-established principles to the case at bar, the Court finds that the plaintiff has sufficiently met its burden of establishing a *prima facie* case regarding the malpractice and disgorgement claims, and that it is unrebutted by the defendant.

"In an action to recover damages for legal malpractice, a plaintiff must demonstrate that the attorney 'failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession' and that the attorney's breach of this duty

proximately caused plaintiff to sustain actual and ascertainable damages." *Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438 (2007), quoting *McCoy v Feinman*, 99 NY2d 295, 301 (2002). To establish causation, a plaintiff must show that he or she would have prevailed in the underlying action or would not have incurred any damages, but for the lawyer's negligence." *Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer supra*. "The burden of proving a 'case within a case' is a heavy one." *Aquino v Kuczinski, Vila & Associates, P.C.*, 39 AD3d 30, 34 (1st Dept. 2004). Where a defendant attorney presents evidence in admissible form establishing that the plaintiff client would be unable to prove any of one of these elements, the defendant attorney has sustained his *prima facie* burden of demonstrating his entitlement to summary judgment. *Town of North Hempstead v Winston & Strawn, LLP*, 28 AD3d 746, 748 (2d Dept. 2006).

In the instant case the movant successfully established its *prima facie* case by demonstrating that there was no breach of its professional obligations to the defendant. The counterclaiming defendant Xavier rests its case on a lengthy footnote in Justice Lippman's decision granting its motion for summary judgment, dismissing what remained of the underlying case brought against it by a plaintiff school district. In that footnote, that Court referred to defendant Xavier's initial motion to dismiss, which had been granted in part and denied in part; [1] the malpractice damages are alleged to be the additional expenditures required to obtain complete dismissal, which as noted was achieved on the later motion. In that key footnote, Justice Lippman stated as follows:

[1] Plaintiff law firm represented defendant Xavier at the time a motion to dismiss was made, but was replaced by another firm, which made the later motion for summary judgment.

> "In connection with the original motion to dismiss, Xavier's arguments focused solely on Section 11.2 of Instructions to Bidders and the language of the bid bond provided by Fidelity in support of its position that plaintiff's recovery must be limited to the bid bond amount. Xavier did not bring the language of Section 11.1... into the mix to shed further light on the parties' intent. Furthermore, in connection with the instant motion for summary judgment, there are uncontested material facts presented that 'Xavier had no negotiations, discussions, or any other form of communication with [School District] concerning any provision set forth in the Requirements... and that the Requirements section was drafted solely by the School District with Xavier having no input into the drafting of the Bid Proposal...Even if the Court were to stand by the its prior ruling of ambiguity, the Court may still resolve the ambiguities appearing in the documentation on a motion for summary judgment (citation omitted).

An attorney cannot be held liable for making what amounts to a tactical decision. *See Pistilli v. Gandin*, 10 AD3d 353 (2d Dept. 2004). Plaintiff did in fact submit the document in question to the motion Court, and thus the only error, if it can be categorized as such, was in not highlighting Section 11.1 to the Court, as noted by Justice Lippman in his footnote.

This Court thus finds that the alleged negligence, at most, amounts to a mistake in professional judgment, which does not rise to actionable malpractice. *Alter&Alter v Cannella*, 284 A.D.2d 138 (1st Dept. 2001). "Neither an error in judgment nor in choosing a reasonable course of action constitutes malpractice." *Hand v Silberman*, 15A.D.3d 167 (1st Dept. 2005) *See also, Allen v Potruch*, 282 A.D.2d 484 (2d Dept. 2001).

Moreover, and as is made clear in the footnote itself, the motion Court also looked to the results of the discovery, which had been conducted after it decided the initial motion to dismiss. It thus is clear that this also convinced the Court to grant the summary judgment motion, where it had denied the earlier motion to dismiss. Put somewhat differently, the footnote demonstrates that Justice Lippman's determination was not based solely on an evaluation that could have been made earlier had Goldberg & Connelly stressed the section

cited; he was also influenced by proceedings after the motion to dismiss was made. This undermines the claim made by Xavier that "but for" the alleged professional negligence the case against it would not have survived the initial motion to dismiss.

In view of the foregoing, the Court must grant summary judgment to the plaintiff dismissing the malpractice claim against it. *See generally, Paley v. Rosner*, 65 N.Y.2d 736 (1985).

The second counterclaim, sounding in disgorgement of fees, must also be dismissed. As a remedy, disgorgement requires the attorney's dismissal from employment for cause, or a breach of fiduciary duty. *Grutman Katz Greene & Humphrey v. Goldman*, 251 A.D.2d 7 (1st Dept. 1998). In this case, however, it is clear from the defendant's papers in opposition that the disgorgement is predicated upon alleged overbilling, and nothing else. Although overbilling can form a defense to the fees sought in plaintiff's own case, there is no authority presented in support of the dubious proposition that an attorney must forfeit all fees solely on that ground. The one case cited was based on misconduct that amounted to a breach of fiduciary duty – not alleged here – and had nothing to do with billing. *See, Ulico Casualty v Wilson, Elser, Moskowitz Edelman & Dicker et al.,* 16 Misc 3d 1051 (Sup Ct. New York County 2007).

Finally, the Court disagrees with the defendant regarding two procedural arguments it raises. The first is that the previous ruling of this Court must result in denial of this motion. In its prior order the Court simply granted leave to amend the answer to include counterclaims. As stated in the previous ruling, ". . in the absence of prejudice or unfair surprise, requests leave to amend shall be granted freely." *Daniels v. Empire-Orr Inc.*, 151 AD2d 370, 372 (1st Dept. 1989); *See* CPLR 3025 (b). Absent prejudice, it is only where the

claim sought to be added clearly is without merit as a matter of law that the court should deny an application to amend the pleading. *See e.g., Jackson Heights Care Ctr., LLC v. Block*, 39 AD3d 477 (2d Dept. 2007). The burden on defendant in seeking leave to amend is thus not the same as its burden in opposing a motion for summary judgment, which law is recited above. Consequently the prior ruling, granting leave to amend, cannot serve as a basis for denying the current motion. The Court also notes the defendant's contention that the present application violates the policy against allowing successive summary judgment motions. The counterclaims that are the subject of the instant motion had not been asserted until defendant was permitted to amend its answer, which request was made in a cross motion to the earlier summary judgment motion. Thus, the rule noted is not offended.

This shall constitute the Decision and Order of this Court.

DATED: June 26, 2008

ENTER

HON. DANIEL PALMIERI
Acting Supreme Court Justice

ENTERED

JUL 01 2008
NASSAU COUNTY
COUNTY CLERK'S OFFICE

TO: Goldberg & Connolly
Plaintiff Pro Se
By: Michael J. Rosenthal, Esq.
66 North Village Avenue
Rockville Centre, NY 11570

Richard M. Maltz, Esq.
Attorney for Defendant
488 Madison Avenue - 9th Floor
New York, NY 10022