

Patchogue Nursing Ctr. v Lacara

2008 NY Slip Op 31908(U)

June 17, 2008

Supreme Court, Suffolk County

Docket Number: 0017494/2007

Judge: William B. Rebolini

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Short Form Order

SUPREME COURT - STATE OF NEW YORK

D.C.M. PART - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Patchogue Nursing Center

Plaintiff,

-against-

Garrett R. Lacara and
Ralph G. Scofield, Jr.

Defendants.

Attorney for Third Party
Defendant Alice Adkins:

Roetzel & Andress, LPA
1375 East Ninth St., 9th Fl.
Cleveland, Ohio 44114

Motion Sequence No.: 001-MotD and
002-MotD

Motion Date: August 28, 2007
Submitted: October 23, 2007

Index No.: 017494/2007

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Attorney for Defendant
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Attorney for Defendant
Ralph G. Scofield, Jr.

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Upon the following papers numbered 1 to 71 read on this motion to dismiss and cross motion for leave to amend the complaint: Notice of Motion and supporting papers 1 - 20; Affirmation in Opposition and supporting papers 21 - 25; Notice of Cross Motion and supporting papers 26 - 52; Affirmation in Opposition to Cross Motion/Reply to Motion and supporting papers 53 - 63; Reply Affirmation to Cross Motion/Sur-Reply to Motion 64 - 68; Sur-Sur-Reply to Motion and supporting papers 69 - 71.

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This action is brought by the plaintiff Patchogue Nursing Center (hereinafter PNC) against the defendants Garrett R. Lacara (hereinafter Lacara) and Ralph G. Scofield, Jr. (hereinafter Scofield) for monies owed arising out of the care and services provided to the late Anna E. Ebinger (hereinafter Ebinger).

Lacara was the attorney for Ebinger and while she was alive prepared for her a Last Will and Testament, a trust agreement and a Power of Attorney. Scofield was named as the attorney-in-fact under the Power of Attorney and was the trustee of the Anna E. Scofield Irrevocable Trust.

On July 20, 2005, Lacara accompanied and assisted Ebinger while she was admitted to PNC and, in fact, signed as "attorney" an Admission Agreement which included various other documents which Lacara signed as well. Scofield allegedly did not do this because he was in Florida at the time.

The Admission Agreement (hereinafter the agreement) signed by Lacara makes it clear that Lacara is not responsible to pay for the resident's care from his own funds but, at the same time, imposes certain responsibilities upon him in his various signing capacities as the "Responsible Party" and the "Financial Agent." For example, as the "Responsible Party, he "personally guarantees continuity of payment from the Resident's funds" and the agreement provides that "the Responsible Party must have sufficient access to the Resident's funds and financial information" (Admission Agreement, 1.A.). As the "Financial Agent," Lacara represents, inter alia, that he "has access to some or all of the Resident's assets" (Admission Agreement, 1.C.).

In addition, as the person signing the agreement, Lacara agrees to be "personally and independently responsible for the timely filing of a Medicaid application (Admission Agreement, 4.B.1.[a]) along with providing complete information and documentation (Admission Agreement, 4.B.1.[c]).

In short, in signing the Admission Agreement for Ebinger, Lacara arguably represented that he was taking on more responsibilities than just being Ebinger's attorney.

Four months after Ebinger was admitted to PNC, an appraisal her home - which was an asset of her trust - was prepared for a corporation located at the same address as Lacara's office. About one year after the appraisal, on October 12, 2006, Lacara purchased the home from the trust for the 2005 appraised amount.

In the interim, Ebinger left PNC (on August 18, 2006) and died shortly thereafter on September 25, 2006.

The complaint names Lacara and Scofield as defendants and seeks compensation for services not paid for as well as costs and attorney's fees. Five of the eight causes of action in the

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original complaint name Lacara - either singly (1st, 3rd and 8th causes of action) or with Scofield (6th and 7th causes of action).

Lacara brings this motion (001) to dismiss the causes of action as to him; PNC and Scofield oppose the motion. PNC cross-moves (002) for leave to amend the complaint; Lacara opposes and raises arguments similar to the ones he raises in his motion to dismiss the original complaint.

As will be discussed below, the court is granting in part and denying in part the cross motion (002) for leave to amend the complaint. In considering this cross motion, the arguments put forth in the motion to dismiss pursuant to CPLR 3211 as well as in Lacara's opposition to the cross motion are considered with regard to the proposed amended complaint and, as such, that motion (001) is granted in part and denied in part.

Leave to amend a pleading should be freely granted in the absence of prejudice or surprise to the opposing parties (*see* CPLR 3025 [b]; *Sarro v Sarro*, 238 AD2d 330 [2d Dept 1997]) unless any particular proposed cause of action is palpably improper or insufficient as a matter of law (*see Amica Mutual Ins. Co. v Hart Alarm Systems, Inc.*, 218 AD2d 835 [3d Dept 1995]). Accordingly, the leave to amend the complaint is granted but only insofar as to those causes of action which are proper and sufficiently pleaded (*id.*).

The amended verified complaint contains ten causes of action. Eight pertain to Lacara, to wit: First Cause of Action - for breach of the Admissions Agreement; Third Cause of Action - for common law negligence; Fourth Cause of Action - Legal Malpractice; Sixth Cause of Action (both defendants) - Fraud; Seventh Cause of Action (both) - Constructive Trust; Eighth Cause of Action (both) - Fraud/Legal Malpractice; Ninth Cause of Action - violation of Judiciary Law §487; Tenth Cause of Action (both) - Attorney's fees, etc.

Lacara's application for dismissal, as it now pertains to the amended complaint, is upon the following grounds: Documentary evidence (CPLR 3211[a][1]) based upon the Power of Attorney and trust agreement which "prove" that Lacara had no access to or authority with regard to any of the Ebinger assets and, thus, cannot be responsible for same as they relate to any monies owed to PNC; Lack of legal capacity (CPLR 3211[a][3]) to bring this action against Lacara based upon the plaintiff having no relationship to or with Lacara as a matter of law; and, failure to state a cause of action (CPLR 3211[a][7]) based upon the various allegations being insufficient to support any of the causes of action against Lacara.

First of all, in order to dismiss a cause of action on the basis of documentary evidence (CPLR 3211[a][1]), the documents must conclusively resolve any fact issues in favor of the movant (*see AG Capital Funding Partners, L.P. v State Street Bank and Trust Co.*, 5 NY3d 582 573 [2005]; *New York Schools Ins. Reciprocal v Gagliotti Assocs.*, 305 AD2d 563 [2d Dept 2003]). In this case, Lacara contends that because the trust agreement and the Power of Attorney gave exclusive

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authority to Scofield with regard to any assets belonging to Ebinger, Lacara, therefore, could not be held responsible for the various obligations imposed pursuant to the Admission Agreement and its inclusive addenda notwithstanding the language contained therein.

This argument is not persuasive on this motion to dismiss pursuant to CPLR 3211. The complaint and the proposed amended complaint rely on an agreement signed by Lacara in various capacities (attorney, Financial Agent, Responsible Party) in which he clearly holds himself out as having access to Ebinger's assets and information and obligates himself under the agreement to cooperate with PNC to ensure, inter alia, that such assets will be accessible to pay for the care and services provided.

In this regard, the documents relied upon by Lacara as the basis to dismiss do not conclusively resolve the issues raised with regard to his responsibilities and obligations as alleged in the proposed amended complaint and, accordingly, Lacara's application to dismiss on the basis of documentary evidence (CPLR 3211[a][1]) is denied (*see AG Capital Funding Partners, L.P. v State Street Bank and Trust Co.*, 5 NY3d 582 573 [2005]; *New York Schools Ins. Reciprocal v Gagliotti Assocs.*, 305 AD2d 563 [2d Dept 2003]).

Lacara's two other grounds for dismissal - lack of capacity to sue and failure to state causes of action - will be considered together, where applicable, in the following discussion as to each separate proposed cause of action pertaining to Lacara.

First of all, the court notes that, in general, in considering a motion to dismiss pursuant to CPLR 3211(a)(7), the court's role is limited to "determining whether a cause of action is stated within the four corners of the complaint, and not whether there is evidentiary support for the complaint [citations omitted]" (*Frank v Daimler Chrysler Corp.*, 292 AD2d 118, 121 [1st Dept 2002], *lv denied* 99 NY2d 502 [2002]). In addition, the pleading "is to be afforded a liberal construction (CPLR 3026), and the court should accept as true the facts alleged in the complaint, accord the plaintiff the benefit of every possible inference, and only determine whether the facts, as alleged, fit within any cognizable legal theory [citations omitted]" (*Id.*, at 120-121).

In addition, the court shall consider allegations as true in any affidavits in support of the complaint and in opposition to a motion to dismiss pursuant to CPLR 3211 (*see Grossfield v Grossfield*, 224 AD2d 583 [2d Dept 1996]). Moreover, any affidavits submitted by the party-defendants are not appropriate for the court's consideration on a motion to dismiss for failure to state a cause of action (CPLR 3211[a][7]) since the focus for the court's review is simply the sufficiency of the pleadings themselves (*see Tsimerman v Janoff*, 40 AD3d 242, 835 NYS2d 146 [1st Dept 2007]).]

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First cause of action (Breach of Agreement):

This cause of action is premised upon the Admission Agreement signed by Lacara and sufficiently pleads a cause of action for breach of said agreement. On this cause of action there is no issue as to capacity to sue since it involves an agreement between PNC and Lacara and the alleged obligations attending to the agreement.

Third cause of action (Negligence/Non legal):

This cause of action alleges negligence against Lacara for his failure to comply with the terms of the Admission Agreement. Although the allegations of negligence repeat the allegations of breach of the agreement in the first cause of action, such repetition, in general, does not render a cause of action insufficient or duplicitous as a matter of law as long as the repeated allegations provide a basis for relief in the additional cause of action (*see Pomerance v Pomerance*, 301 NY 254 [1050]).

Fourth cause of action (Legal Malpractice):

In order to support a cause of action for legal malpractice, there must be a duty on the part of the attorney/defendant to provide legal services to the plaintiff. Here, there is no such duty. Lacara was only Ebinger's attorney and had no professional legal duties owed to PNC. (*See Kumar v American Tr. Ins. Co.*, 49 AD3d 1353, 1354-1355 [4th Dept 2008]). Accordingly, this cause of action is dismissed.

Sixth cause of action (Fraud):

Lacara argues that there is a lack of specificity with regard to this cause of action. In searching the four corners of the complaint as well as supporting affidavits and after affording the pleadings a liberal construction in which the plaintiff's allegation are accepted as true, the court finds sufficient specificity to support allegations of fraud, for example: The preparation of the appraisal of the Ebinger home for a corporation located at Lacara's business address which supports the allegation that the appraisal was prepared for Lacara's benefit, the purchase of the home by Lacara one year after the appraisal without an update of same and the resultant loss of the asset from Ebinger's trust which otherwise would have been available to satisfy the debt owed to PNC. In addition, the other elements of fraud, such as scienter, are all sufficiently pleaded and alleged. Accordingly, this cause of action alleging fraud is sufficiently stated.

Seventh cause of action (Constructive Trust):

This cause of action is based upon the alleged fraudulent conveyance of the Ebinger home

and alleges that PNC was irreparably harmed by the conveyance and has no other adequate remedy of law other than to have the court impose a construction trust. A search of the entire complaint and the affidavits in support satisfies the elements of a constructive trust and, thus, this cause of action is sufficiently pleaded.

Eighth cause of action (Fraud/Legal Malpractice):

This cause of action pertains to both defendants and alleges fraud on both their parts insofar as allegedly deceiving PNC to accept Ebinger as a resident. In addition, this cause of action alleges that said fraud represented legal malpractice on the part of Lacara.

With regard to the fraud allegations, this part of this cause of action is sufficiently pleaded. With regard to the legal malpractice, however, this allegation fails for the same reasons as stated above under the fourth cause of action.

Ninth cause of action (violation of Judiciary Law §487):

Judiciary Law §487 provides that,

An attorney or counselor who:

- 1. Is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party; . . .

* * *

Is guilty of a misdemeanor, and in addition to the punishment prescribed therefor by the penal law, he forfeits to the party injured treble damages, to be recovered in a civil action.

Such a claim may be stated against an attorney in a civil action even without a criminal proceeding be brought (*see Schindler v Issler & Schrage, P.C.*, 262 AD2d 226, 228 [1st Dept 1999], *lv dismissed* 94 NY2d 791, *rearg denied* 94 NY2d 859]). In such instances, however, the complaint must allege a larger and more broadly based scheme than fraud alleged to have been committed in merely one instance (*id.*).

Here, the allegation as to fraud (deceit and collusion) is only with regard to this one incident surrounding the admission of Ebinger to PNC. Accordingly, these allegations are insufficient to support a cause of action based upon Judiciary Law §487 and this cause of action is dismissed.

Tenth cause of action (Attorney's fees, etc):

This claim is premised upon the terms of the Admission Agreement and is sufficiently

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pleaded to support the allegation that Lacara is obligated under said terms.

In sum, the following causes of action in the amended complaint are dismissed, either in whole or in part:

Fourth cause of action (Legal malpractice);
Eighth cause of action (Fraud/Legal malpractice) - but only insofar as it makes a claim for legal malpractice; and,
Ninth cause of action (Judiciary Law §487).

The following causes of action in the amended complaint are not dismissed:

First cause of action (Breach of agreement);
Second cause of action (not contested);
Third cause of action (Negligence);
Fifth cause of action (not contested);
Sixth cause of action (Fraud);
Seventh cause of action (Constructive trust);
Eighth cause of action (Fraud/Legal malpractice) - but only as to the fraud allegations; and,
Tenth cause of action (Attorney's fees, etc.).

Accordingly, it is

ORDERED that this motion (001) by the defendant Garrett R. Lacara for an order dismissing the complaint pursuant to CPLR 3211(a)(1), 3211(a)(3) and/or CPLR 3211(a)(7) and this cross motion (002) by the plaintiff for leave to amend the complaint are decided insofar as both are granted in part and denied in part to the extent provided herein; and it is, therefore, further

ORDERED that the cross motion for leave to amend the complaint is granted insofar as allowing the causes of action numbered First, Second, Third, Fifth, Sixth, Seventh, Eighth but only insofar as it alleges fraud, and Tenth; and it is further

ORDERED that the cross motion for leave to amend the complaint is denied insofar as not allowing the causes of action numbered Fourth, Eighth but only insofar as it alleges legal malpractice, and Ninth; and it is further

ORDERED that the plaintiff is directed to file and serve the amended verified complaint consistent with this decision and order along with a copy of this decision and order within two weeks of the date of this decision and order; said service being upon the respective counsel for

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the defendants pursuant to CPLR 2103(b)(1), (2) or (3); and it is further

ORDERED that the preliminary conference previously scheduled for June 19, 2008 is adjourned to July 31, 2008 at the Supreme Court, DCM Part, Room A362, One Court Street, Riverhead, New York at 10:00 a.m. to allow enough time for the defendants to serve their respective answers in accordance with CPLR 3025(d).

Dated: *June 17, 2008*

William B. Rebolini
HON. WILLIAM B. REBOLINI, J.S.C.