

Pu v Mitsopoulos

2009 NY Slip Op 32339(U)

October 7, 2009

Supreme Court, New York County

Docket Number: 602986/2006

Judge: Paul G. Feinman

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
HON. PAUL G. FEINMAN

PRESENT: _____

PART 1

Index Number : 602986/2006

PU, RICHARD

vs

MITSOPOULOS, GEORGE

Sequence Number : 008

STRIKE

INDEX NO.

602986/06

MOTION DATE

8/28/09

MOTION SEQ. NO.

008

MOTION CAL. NO.

118

The following papers, numbered 1 to _____ were filed in this motion to/for SA

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...

Answering Affidavits -- Exhibits _____

Replying Affidavits _____

[Handwritten signature]

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH
THE ANNEXED DECISION AND ORDER.

FILED

OCT 13 2009

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 10/7/09

[Handwritten signature]

J.S.C.

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

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 12

-----X

RICHARD PU,
Plaintiff,

-against-

GEORGE MITSOPOULOS, APOSTOLOS
MITSOPOULOS, EFROSINI MITSOPOULOS,
TITAN PHARMACEUTICALS AND NUTRITION, INC.,
Defendants.

Index Number 608986/2006
Mot. Seq. No. 008
Submission Date 8-28-09
Cal. No. 118

DECISION AND ORDER

-----X

For the Plaintiff:
Richard Pu, Esq. *Pro Se*¹
120 E. 90th Street, 10C
New York, NY 10018

For Defendants:
Alatsas & Taub, P.C.
By: Asher E. Taub, Esq.
2115 Avenue U
Brooklyn, NY 11229

Papers considered in review of this motion to strike and cross-motion for sanctions:

Papers	Numbered
Motion & Attachments, Moving	1, 2
Amended Cross-Motion & Attachments	3

PAUL G. FEINMAN, J.:

Plaintiff moves for an order striking the counterclaims or, alternatively, compelling a supplemental bill of particulars, as well as for an order directing production of the February 28, 2007 settlement agreement, and for attorney’s fees. Defendants cross-move for costs and sanctions. For the reasons which follow, plaintiff’s motion is granted in part and the defendants’ cross-motion is denied.

Plaintiff Pu commenced this action in August 2006, seeking attorney’s fees for work he performed from December 2004 through May 2006 (Am. Compl. ¶ 12), for defendants George Mitsopoulos, a licensed pharmacist, his franchise pharmacy, and his parents. Plaintiff represented the

¹Plaintiff, as of today, remains suspended from the practice of law in New York State courts according to the O.C.A. attorney registration website.

pharmacy in an action brought against it by the franchiser, MSI, after the pharmacy fell in arrears in paying loan and royalty payments (Am. Compl. pp. 3-4, et seq.). Plaintiff seeks \$178,315.44 in legal fees pursuant to the retainer agreement (Am. Compl. ¶¶ 1 [a]; 14).²

Defendants' third amended verified answer, filed with court permission as set forth in its decision and order dated October 21, 2008, resolving motion sequence 004, contains two counterclaims. The first counterclaim alleges attorney malpractice on behalf of George Mitsopoulos and Titan Pharmaceuticals. The second counterclaim alleges attorney malpractice on behalf of the parents, Apostolos and Efrosini Mitsopoulos. Plaintiff filed a Reply to Counterclaims on May 5, 2009.³

The first counterclaim, comprised of 88 numbered paragraphs, alleges in relevant part that plaintiff represented himself as an expert in franchise law, that defendants retained him to defend them in a federal litigation brought by the franchisor MSI who sued the parents as guarantors for their son and Titan Pharmacy, that as of June 30, 2004, Titan Pharmacy had fallen behind in its royalty payment to MSI in the amount of about \$231,000.00, and that George Mitsopoulos and Titan also retained plaintiff to defend them in the anticipated arbitration between them and MSI (Mot. Third Am. Ver. Answer, stamped p. 87 et seq. ¶¶ 28-30, 34-38). Plaintiff "knew that defendants George Mitsopoulos and Titan would lose at the arbitration" (Third Am. Ver. Answer ¶ 40). In an attempt to forestall the arbitration, plaintiff engaged in extensive motion practice, including motions to reargue, before the American Arbitration Association, and in federal and state court, and also appealed to the Second Circuit, all the while assuring defendants that he would be able to stay the arbitration (Third Am. Ver.

²He has been paid a total of \$82,000.00 (Mot. (Cross-Mot. Ex. 4, *Pu v George Mitsopoulos et al*, Sup Ct NY County, June 30, 2008, Kapnick, J., index No. 602986/06, at 7).

³See Supreme Court Record Online Library [SCROLL], found in the website of the Unified Court System at www.courts.state.ny.us.

Answer ¶¶ 41-46). However, the four-day arbitration was ultimately held in St. Louis beginning May 15, 2006 (Third Am. Ver. Answer ¶¶ 48-49).⁴ On July 5, 2006, the arbitrator issued an award against George Mitstopolous and Titan who were ordered to pay MSI the sum of \$919,434.64, which included \$439,363.22 for the MSI attorney's fees (Third Am. Ver. Answer ¶¶ 52-53).

At this time, defendants had paid plaintiff "over \$80,000 and according to the plaintiff had a outstanding balance of approximately \$178,000.00." (Third Am. Ver. Answer ¶ 84). There was also an arbitration bill for \$7,500.00 (Third Am. Ver. Answer ¶ 55). In sum, a debt of approximately \$231,000.00 had turned into a total debt of about \$1,184,934.00 (Third Am. Ver. Answer ¶ 56). Defendants contend that plaintiff acted negligently or recklessly, in that no attorney would have reasonably believed that Titan would prevail in an arbitration, and that he took the course of action that he did to generate fees. (Third Am. Ver. Answer ¶¶ 57-65).

According to the counterclaim, MSI was a foreign corporation doing business in New York but had not paid any State or City taxes since 1996 and owed "several million dollars" (Third Am. Ver. Answer ¶¶ 69-74). Under Business Corporation Law § 1312, a foreign corporation which conducts business in the state without authority cannot maintain an action in the state, and any action initiated that corporation must be dismissed (Third Am. Ver. Answer ¶ 75). MSI and defendants agreed in July 2006 to settlement the underlying matter; defendants agreed to pay \$650,000.00, however in December 2006, a third party breached the settlement, and defendants declared the settlement null and void (Third Am. Ver. Answer ¶¶ 76-77). When MSI brought two actions in Kings County, defendants filed two motions to dismiss both actions pursuant to CPLR 3211 (a) (3) (Third Am. Ver. Answer ¶¶ 78-81). The motions set forth the allegations concerning MSI's improper doing of business in New York State without paying proper taxes, and that it could not bring suit against them (Third Am. Ver.

⁴ Plaintiff was suspended from the practice of law in the federal district courts on May 31, 2006 (Third Am. Ver. Answer ¶ 50).

Answer ¶ 82). “Within one week of receiving the twin motions the basic settlement terms had been agreed upon by the parties,” which was because, defendants state upon information and belief, “MSI understood its tax exposure” (Third Am. Ver. Answer ¶¶ 83, 84). The settlement agreement, signed on February 28, 2007, canceled the mortgage on the parents’ home, and released Titan from the MSI contract and future royalties, and required them to repay MSI \$570,000.00 in full settlement, and allowed George Mitsopoulos to continue to operate Titan Pharmacy (Third Am. Ver. Answer ¶¶ 85-89).

Defendants argue that plaintiff failed to make a CPLR 3211 (a) (3) motion based on BCL § 1312, although he made “myriad” motions (Third Am. Ver. Answer ¶ 90). Defendants argue that “any competent attorney” would have made a CPLR 3211 (a) (3) motion, and in particular an attorney competent to practice franchise law would have made such a motion, possibly resulting in a settlement of a sum less than \$100,000.00 (Third Am. Ver. Answer ¶¶ 91-96). They contend that this failure was malpractice, and that it resulted in them having to pay an additional \$470,000 to MSI (Third Am. Ver. Answer ¶¶ 97-100). They seek reimbursement of the \$80,000.00 in fees already paid to plaintiff, as well as reimbursement for the \$7,500.00 arbitration fee (Third Am. Ver. Answer ¶¶ 103-105). They allege that plaintiff’s malpractice resulted in a monetary loss to defendants in the amount of \$575,500.00 (Third Am. Ver. Answer ¶ 106).

The second counterclaim on behalf of the parents, alleges that plaintiff never told them that he would not win the arbitration or that he created a conflict of interest between them and their son and Titan, and that his strategies placed them in “great monetary risk,” including the mortgaging of their home for its full value and the payment of \$470,000.00 to MSI (Third Am. Ver. Answer ¶¶ 109-117). They seek return of the \$80,000 in legal fees previously paid to plaintiff, claiming a total loss of \$570,00.00 (Third Am. Ver. Answer ¶¶ 120-121).

In an action to recover for legal malpractice, “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, 442 [2007], citing *McCoy v Feinman*, 99 NY2d 295, 301-302 [2002]). An attorney is not held to a rule of infallibility and is not liable for an honest mistake in judgment where the proper course is open to reasonable doubt. (see, *Gray v Wallman & Kramer*, 184 AD2d 409, 413 [1st Dept 1992]). In order to establish proximate cause, “plaintiff must demonstrate that *but for* the attorney’s negligence, plaintiff would have prevailed in the matter in question or would not have sustained any ascertainable damages The failure to establish proximate cause mandates the dismissal of a legal malpractice action, regardless of the negligence of the attorney.” (*Reibrnan v Senie*, 302 AD2d 290, 291 [1st Dept. 2003], emphasis added, citation omitted). Speculative damages or mere conclusory allegations of damages cannot be the basis for a claim of legal malpractice (*Pellegrino v File*, 291 AD2d 60, 63 [1st Dept 2002]).

Plaintiff seeks dismissal of the counterclaims on several grounds. He notes that he has twice previously sought to dismiss the counterclaims for failure to state a cause of action, and that both motions were denied (Pl. Moving Brief 3). His first argument, which he has made before, without success, is that the claims are “vague” and conclusory. The claims sufficiently allege that plaintiff made many motions over the course of the year and a half he represented defendants in the underlying matter, but that a competent attorney would have made a motion to dismiss based on BCL § 1312, and that plaintiff selected a course of action which he knew could not be successful, but which he undertook for the purpose of generating fees. Plaintiff’s second argument that the July 2006 settlement agreement between defendants and MSI, repudiated in December 2006, and renegotiated in late February 2007, was an intervening cause of any losses by defendants, has no merit, given that the amount of damages *decreased* from that awarded by the arbitrator, and that which was ultimately

agreed to in February 2007. Therefore, the branch of the motion to strike the counterclaims is denied. The alternative relief seeking a supplemental bill of particulars is also denied. Defendants have previously responded to plaintiff's demands with sufficient detail. The adequacy of their response must also be assessed in light of the fact that plaintiff has not turned over the legal file to defendants, from which even more specific responses would be derived, and many of the demands are outside the scope of a bill of particulars in any event (see *Patterson v Jewish Hosp. Med. Center of Brooklyn*, 94 Misc 2d 680 [Sup. Ct., Kings County], *aff'd* 65 AD2d 553 [2d Dept 1978] [function of a bill of particulars is not to obtain evidentiary matter]; *Marotta v John Hancock Mutual Life Ins. Co.*, 14 AD2d 579 [2d Dept 1961] [bill of particulars is not a substitution for an examination before trial]).

Plaintiff also seeks production of the February 28, 2007 settlement agreement. The court's previous decision and order dated October 1, 2009, mistakenly indicated that this settlement agreement had been produced, having misunderstood which agreement plaintiff was seeking a copy of. Defendants argue that the production of the February 28, 2007 agreement was previously addressed by the justice originally assigned to this litigation, and that she "ruled from the bench that Mr. Pu was not entitled to see the 2/28/07 settlement agreement." (Cross-Mot. Taub Aff. p. 39, Response to Point II; Ex. 7). However, as neither party has submitted a transcript of the proceeding, nor pointed to a decision and order addressing the topic, the court cannot say that the prior justice made a ruling which is now the law of the case. Therefore, defendants are directed to provide a copy of the settlement to chambers for an *in camera* review of the terms; alternatively, they may submit a copy of a written order or transcript containing a ruling from the prior judge assigned to this litigation holding that the settlement is not discoverable. The foregoing shall occur within 20 days of entry of this order. The court will then address what further action need be taken at the next compliance conference.

Plaintiff's request for attorney's fees is denied.

The cross-motion for costs and sanctions is denied.

Accordingly it is,

ORDERED that plaintiff's motion to strike defendants' counterclaims or to compel a supplemental bill of particular is granted only to the extent that the defendants are directed to provide a copy of the settlement in the underlying proceeding to chambers for an *in camera* review of the terms; alternatively, they may submit a copy of a written order or transcript containing a ruling from the prior judge assigned to this litigation holding that the underlying settlement is not discoverable. The foregoing shall occur within 20 days ; and it is further

ORDERED that defendants' cross-motion for sanctions and costs is denied.

ORDERED that the parties shall appear for the previously scheduled compliance conference in Supreme Court, 60 Centre Street, Part 12, room 212, on November 18, 2009 at 2:15 p.m., together with proof of compliance with the foregoing.

Dated: October 7, 2009
New York, New York



J.S.C.

HON. PAUL G. FEINMAN

FILED

OCT 13 2009

**COUNTY CLERK'S OFFICE
NEW YORK**