Ortega v Mallilo & Grossman, LLP
2011 NY Slip Op 30069(U)
January 11, 2011
Supreme Court, New York County
Docket Number: 102241/10
Judge: Louis B. York
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[* 1] SCANNED ON 1/11/2011

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

PRESENT: LOUIS B. YORK J.S.C. Justice

PART 2

Index Number : 102241/2010

ORTEGA, MARGARITA

VS.

MALLILO & GROSSMAN, LLP

SEQUENCE NUMBER : 001

DISMISS ACTION

INDEX NO. ______

MOTION DATE ______

MOTION SEQ. NO. ______

MOTION CAL. NO. ______

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~~ the motion to dismiss against the individual is denied in accordance with the accompanying decision.

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

FILED

JAN 11 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: 1/6/11

______ J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 2

MARGARITA ORTEGA,

Plaintiff,

Index No.: 102241/10

-against-

DECISION

MALLILO & GROSSMAN, LLP, and
JAWAN FINLEY

Defendants.

FILED
JAN 11 2011
NEW YORK
COUNTY CLERK'S OFFICE

LOUIS B. YORK, J.S.C.:

BACKGROUND

Defendants Mallilo & Grossman, LLP (M&G) and Jawan Finley (Finley) (together, defendants) move, pursuant to CPLR 3211 (a) (1), (a) (7) and (a) (8), to dismiss the complaint.

In her complaint, plaintiff asserts two causes of action: (1) legal malpractice, tort; and (2) legal malpractice, contract. The basis of this action lies in the allegation that defendants, who represented plaintiff in her wrongful termination action against her former employers, committed legal malpractice by failing to interpose opposition to her former employers' summary judgment motion, thereby causing plaintiff to lose the underlying wrongful termination suit.

Defendants maintain that plaintiff cannot establish the proximate cause of her malpractice claim against them.

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Defendants state that plaintiff failed to include her wrongful termination cause of action, which, allegedly, accrued when she was fired on April 18, 1997, in her April 22, 1997, Chapter 7 bankruptcy petition. As a result of this failure to disclose the wrongful termination claim, defendants aver that plaintiff lost her capacity to sue her former employers, and, hence, cannot establish that the alleged negligence of defendants was the proximate cause of her losing her wrongful termination suit.

Plaintiff was initially discharged from her debts, pursuant to her bankruptcy proceeding, on May 30, 1997. Subsequently, in 2000, plaintiff filed her wrongful termination suit against her former employers, a law firm where she had been engaged as a paralegal. After learning of plaintiff's discharge in bankruptcy, her former employers moved for summary judgment and for leave to amend their answer to her wrongful termination case to include the affirmative defense of lack of capacity. This motion was initially denied, but was eventually granted on appeal by the Appellate Division, Second Department. *Ortega v Bisogna & Meyerson*, 2 AD3d 607 (2d Dept 2003). Concurrently with defending the wrongful termination suit, plaintiff's former employers contacted the trustee of plaintiff's bankruptcy estate in 2001, who subsequently re-opened her estate to determine whether the wrongful termination claim would be an asset of the estate. Plaintiff's Chapter 7 case was converted to a Chapter 13 case on

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November 29, 2001. Motion, Ex. 2.

Defendants contend that, even if the conversion of her Chapter 7 bankruptcy case to a Chapter 13 bankruptcy case on November 29, 2001, were deemed to revive her right to assert a wrongful termination claim, by that time the statute of limitations had run on her cause of action against her former employers.

Further, defendants argue that plaintiff's cause of action for legal malpractice, contract, is duplicative of her cause of action for legal malpractice, tort, and should therefore be summarily dismissed. In addition, Finley has provided an affidavit in which she states that she has not been served, averring that she never received a copy of the summons by mail, and that, to the best of her knowledge, the summons was neither left with a person of suitable age and discretion nor affixed to the door of M&G's office or her home.

In support of the instant motion, defendants have included the docket for plaintiff's bankruptcy proceeding (Ex. 2), a portion of plaintiff's examination before trial (EBT) in the underlying wrongful termination proceeding, in which plaintiff admitted that she signed her bankruptcy petition in blank without reading it (Ex. 4), and the decision of the Supreme Court, Queens County, dated January 7, 2005, in which the underlying wrongful termination case was dismissed based on plaintiff's lack of

capacity to sue, which was re-affirmed by that court on July 26, 2005. M&G had failed to file opposition to plaintiff's former employers' motion, and attempted to vacate the decision dismissing the case based on law office failure and a meritorious cause of action. The Court found that M&G failed to establish a reasonable excuse for the default, but also determined that plaintiff lacked a meritorious defense because she lacked the capacity to sue based on the bankruptcy proceedings.

In opposition, plaintiff has provided an affidavit of service on Finley, alleging that a copy of the summons and complaint was left with Maggie Canales, a co-worker of Finley's, on June 1, 2010, and that a copy of the summons and complaint was mailed to her on June 3, 2010. In addition, plaintiff argues that the documentary evidence supplied by defendants does not conclusively establish that they are entitled to dismissal of the complaint. Plaintiff contends that, at the time that she filed her petition in bankruptcy, she had not contacted an attorney regarding her termination and, therefore, could not reasonably know that she had a potential cause of action against her former employers so as to require her to list that claim as a potential asset of her bankruptcy estate. Additionally, plaintiff claims that her bankruptcy attorneys were dilatory in filing her petition, which, she alleges, she completed before she was fired.

Moreover, plaintiff avers that, in addition to defendants'

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failure to oppose her former employers' summary judgment motion, in their motion to vacate that determination, defendants failed to argue that the Appellate Court indicated, in its decision to allow plaintiff's former employers to amend their answer, that plaintiff had asserted a viable claim for unlawful termination and sexual harassment. This failure, according to plaintiff, contributed to her losing the underlying action.

Plaintiff also contends that defendants failed to proffer evidence to the appellate court that the conversion of her Chapter 7 bankruptcy action to a Chapter 13 bankruptcy action revived her capacity to maintain her wrongful termination cause of action. This, according to plaintiff, was the proximate cause of her wrongful termination case being dismissed.

Lastly, plaintiff asserts that the court papers and decisions submitted by defendants in support of their motion cannot be considered "documentary evidence" so as to support a motion to dismiss pursuant to CPLR 3211 (a) (1).

The court notes that, in the memorandum of law submitted in opposition to the instant motion, plaintiff argues a breach of a fiduciary duty, presumably based on the breach of contract claim, but such specific cause of action was not included in her complaint.

DISCUSSION

CPLR 3211 (a), governing motions to dismiss a cause of

action, states that:

> "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that: (1) a defense is founded upon documentary evidence; or
>
> * * *
>
> (7) the pleading fails to state a cause of action; or
>
> * * *
>
> (8) the court has not jurisdiction of the person of the defendant ... ."

On a motion to dismiss, pursuant to CPLR 3211, the pleading should be liberally construed, the facts alleged by the plaintiff should be accepted as true, and all inferences should be drawn in the plaintiff's favor (*Leon v Martinez*, 84 NY2d 83 [1994]); however, the court must determine whether the alleged facts "fit within any cognizable legal theory." *Id.* at 87-88. Moreover, "[a]llegations consisting of bare legal conclusions ... are not presumed to be true [or] accorded every favorable inference [internal quotation marks and citation omitted]." *Biondi v Beekman Hill House Apartment Corp.*, 257 AD2d 76, 81 (1st Dept 1999), *affd* 94 NY2d 659 (2000).

Defendants' motion to dismiss the complaint is granted.

> "[A]n action for legal malpractice requires proof of the attorney's negligence, a showing that the negligence was the proximate cause of the injury, and evidence of actual damages. In order to survive dismissal, the complaint must show that but for counsel's alleged malpractice, the plaintiff would not have sustained some ascertainable damages [internal quotation marks and citation omitted]."

Fielding v Kupferman, 65 AD3d 437, 439 (1st Dept 2009).

"Proximate cause requires a showing that 'but for' the

attorney's negligence, the plaintiff would either have been successful in the underlying matter or would not have sustained any ascertainable damages." *Barbara King Family Trust v Voluto Ventures LLC,* 46 AD3d 423, 424 (1st Dept 2007). "The failure to establish proximate cause mandates the dismissal of a legal malpractice action, regardless of the attorney's negligence." *Brooks v Lewin,* 21 AD3d 731, 734 (1st Dept 2005); *Russo v Feder, Kaszovitz, Isaacson, Weber, Skala & Bass, LLP,* 301 AD2d 63 (1st Dept 2002).

The Court in the underlying case determined that, regardless of M&G's failure to provide a reasonable excuse for their failure to oppose the summary judgment motion of plaintiff's former employers, plaintiff lacked capacity to sue based on her earlier bankruptcy proceeding, in which she failed to list her wrongful termination cause of action as a potential asset.

> "The Bankruptcy Code broadly defines the property of a debtor to include causes of action existing at the time of the commencement of the bankruptcy action. The debtor must schedule the causes of action as assets on the bankruptcy petition in order for the trustee to formally abandon the claims. The Supreme Court properly granted the defendants' motion fo dismiss the complaint on the ground that the plaintiff[] lacked standing to sue because [she] failed to properly list on [her] bankruptcy petition the [wrongful termination] claims regarding assets about which [she] knew or should have known when [her] bankruptcy petition was filed [internal citation omitted]."

Weitz v Lewin, 251 AD2d 402, 402 (2d Dept 1998).

Plaintiff's failure to include the cause of action for wrongful termination in her bankruptcy petition, when she knew or

should have known about the potential lawsuit, deprives her of the legal capacity to sue on that cause of action later on. *Mathus v Bouton's Business Machines, Inc.*, 73 AD3d 476 (1st Dept 2010). This is true even if the omission was innocent, or whether the petition was filed under Chapter 7 or Chapter 13. *Gray v City of New York*, 58 AD3d 448 (1st Dept 2009).

> "Conclusory allegations that a plaintiff did not disclose a cause of action in a prior bankruptcy proceeding because the plaintiff was not aware of the facts giving rise to the alleged cause of action at the time the bankruptcy petition was filed or because the plaintiff did not learn of the cause of action until after the conclusion of the bankruptcy proceedings are insufficient to raise a triable issue of fact.

Whelan v Longo, 23 AD3d 459, 460 (2d Dept 2005), *affd* 7 NY3d 821 (2006).

In the instant matter, plaintiff was fired prior to the filing of her Chapter 7 bankruptcy petition, and the incidents that she alleged constituted her cause of action based on sexual harassment dated from years before her termination. As a consequence, the court is unpersuaded that plaintiff could not reasonably know that she might have a potential claim against her former employers.

The court is also unpersuaded by plaintiff's assertion that she signed the bankruptcy petition in blank and without reading it because that was the way things were usually done in the law offices where she worked. Plaintiff is held to be responsible for the documents that she signs, more so because she is a legal

professional. *See Beattie v Brown & Wood,* 243 AD2d 395 (1st Dept 1997).

The court is similarly unpersuaded by plaintiff's argument that the documents submitted by defendants in support of their motion do not qualify as documents under CPLR 3211 (a) (1). Court orders and opinions have been held to be sufficient to sustain dismissal pursuant to CPLR 3211 (a) (1). *Weiss v TD Waterhouse,* 45 AD3d 763 (2d Dept 2007).

The major thrust of plaintiff's opposition to the instant motion is that the conversion of her bankruptcy proceeding from a Chapter 7 action to a Chapter 13 action revived her capacity to sue, and that such argument should have been presented to the court in the underlying case by M&G.

A Chapter 13 creditor retains the right to bring actions in her own name, and a bankruptcy trustee's participation is not needed to protect the creditors' rights. *In re Dawnwood Properties/78,* 209 F3d 114 (2d Cir 2000). Conversely, a debtor seeking protection under Chapter 7 of the Bankruptcy Code loses standing to litigate causes of action that are not part of the identified estate assets. *Olick v Parker & Parsley Petroleum Co.,* 145 F3d 513 (2d Cir 1998). Plaintiff argues that the conversion of her action from Chapter 7 to Chapter 13 revived her capacity to sue her former employers. The court disagrees.

In the first place, plaintiff had been discharged in

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bankruptcy prior to her instituting the action against her former employers, and it was the former employers who notified the bankruptcy trustee of the lawsuit. The bankruptcy trustee, sua sponte, reopened the estate under Chapter 13 to see whether any proceeds from that action belonged to the estate. This is distinguishable from cases cited by plaintiff in which the debtor brought about the conversion.

Furthermore, when plaintiff originally filed suit against her former employers, she lacked capacity based on her petition in the bankruptcy proceeding. The fact that she may have later gained capacity does not relate back to her institution of the lawsuit. *See generally Goldberg v Camp Mikan-Recro,* 42 NY2d 1029 (1977). This negates any argument that plaintiff regained her capacity to sue in November, 2001, after the institution of her wrongful termination action.[1]

11 USC § 108 of the Bankruptcy Code states:

> "If applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period within which the debtor may commence an action, and such period has not expired before the date of the filing of the petition, the trustees may commence such action only before the later of--
> (1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or
> (2) two years after the order for relief."

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[1] The case cited by plaintiff for the proposition that the conversion relates back to the filing of the lawsuit, *Landau, P.C. v Oliveri & Schwartz, P.C.* (73 AD3d 635 [1st Dept 2010]), is inapposite, because that case involved nonpayment of corporate state taxes, and the statute itself specifically allows for curing such deficiencies; the Bankruptcy Code does not.

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In Re Olympia & York Maiden Lane Company, LLC, 233 BR 662 (SD NY 1999).

In her wrongful termination action, plaintiff asserted five causes of action: (1) harassment/hostile work environment, pursuant to Executive Law § 296; (2) intentional and/or negligent infliction of emotional distress; (3) breach of an oral employment contract; (4) assault and/or offensive touching; and (5) intentional interference with employment contract. Motion, Ex. 6.

A cause of action for harassment/hostile work environment has a three-year statute of limitations. NY Executive Law § 297 (9). A cause of action for intentional infliction of emotional distress and assault are governed by a one-year statute of limitations. CPLR 215 (3). A cause of action for negligent infliction of emotional distress has a one-year statute of limitations. CPLR 215 (3). A cause of action for intentional interference with contract is subject to a three-year statute of limitations. *IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 141 (2009). An oral employment contract is terminable at will.

The order discharging plaintiff in bankruptcy was issued on August 4, 1997 (Motion, Ex. 2), and plaintiff filed her wrongful termination action in October, 2000. Motion, Ex. 6. Since the longest statutory period for any cause of action asserted by

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plaintiff is three years, and the latest that any of the causes of action could have accrued was the date of her termination, April 18, 1997, more than three years elapsed prior to the institution of the lawsuit. Even if the court were to accept plaintiff's argument that the conversion of her bankruptcy action related back to her initial petition, the statutory period for instituting the wrongful termination lawsuit expired prior to October 2000, either under New York law or the provisions of the Bankruptcy Code cited above. Hence, the reason postulated by the Appellate Court, that plaintiff lacked the ability to sue her former employers, remains accurate, and any alleged negligence on the part of defendants was not the proximate cause of her losing the underlying wrongful termination action.

Based on the foregoing, the court need not address Finley's argument regarding lack of personal jurisdiction, since plaintiff cannot prevail in the instant matter.

The court notes that the statutory period for instituting a legal malpractice action is three years. *Tsafatinos v Wilson Elser Moskowitz Edelman & Dicker, LLP*, 75 AD3d 546 (2d Dept 2010); *Amodeo v Kolodny, P.C.*, 35 AD3d 773 (2d Dept 2006). Although plaintiff filed this suit more than three years after her alleged cause of action accrued, defendants have failed to argue this point and, therefore, such defense to the present action is deemed waived.

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CONCLUSION

Based on the foregoing, it is hereby

ORDERED that defendants' motion to dismiss this action is granted and the Clerk is directed to enter judgment in favor of defendants dismissing this action, together with costs and disbursements to defendants, as taxed by the Clerk upon presentation of a bill of costs.

Dated: 6/10

ENTER:

Louis B. York, J.S.C.

FILED
JAN 11 2011
NEW YORK
COUNTY CLERK'S OFFICE