

Katehis v Sacco & Fillas, LLP
2011 NY Slip Op 31134(U)
March 31, 2011
Supreme Court, Queens County
Docket Number: 27063/2010
Judge: David Elliot
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT
Justice

IA Part 14

SPIROS KATEHIS x

Index
Number 27063 2010

- against -

Motion
Date January 11, 2011

SACCO & FILLAS, LLP x

Motion
Cal. Number 19

Motion Seq. No. 1

The following papers numbered 1 to 11 read on this motion by Sacco & Fillas, LLP (S&F), to dismiss the complaint pursuant to CPLR 3211 (a) (7), for failure to state a cause of action.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits.....	1-4
Answering Affidavits - Exhibits.....	5-8
Reply Affidavits.....	9-11

Upon the foregoing papers it is ordered that the motion is granted.

In his complaint, self-represented plaintiff asserts claims for legal malpractice, breach of fiduciary duty and breach of contract against S&F, his former attorneys, stemming from S&F's representation of plaintiff in a personal injury lawsuit (underlying lawsuit), that was ultimately dismissed on appeal by the New York State Appellate Division, Second Judicial Department (Second Department). Defendants move to dismiss the complaint pursuant to CPLR 3211 (a) (7), on the ground that plaintiff fails to state a legal cause of action. Plaintiff opposes the motion.

In the underlying lawsuit, plaintiff commenced an action to recover damages for the injuries he sustained when he was assaulted by three unknown assailants at a bar. The facts surrounding that action were that, on September 14, 2003, plaintiff, while patronizing La Oficina, a bikini bar located in Corona, New York, went to the backyard of the bar to smoke a cigarette. Upon entering the backyard, plaintiff noticed three men (assailants) there. After finishing his cigarette, plaintiff proceeded to walk back toward the entrance of the bar when one of the assailants pushed plaintiff, who fell over a step and to the ground. Plaintiff tried to get up from the ground but fell and was then repeatedly kicked by the assailants. After the manager of the bar intervened, the assailants left and plaintiff was transported to Elmhurst Hospital in Queens.

The suit was commenced on January 11, 2005 against Naut, Inc., La Oficina, Inc., and Wong Chau Shing (the owner of the building where the incident occurred), (collectively referred to herein as the underlying defendants), in New York State Supreme Court, Kings County. When the complaint was filed, plaintiff was represented by Chaim Dahan, Esq., an attorney based in Flushing, New York.

On December 20, 2005, plaintiff served a verified bill of particulars which amplified the claim that his injuries were proximately caused by a defective step in the bar. The underlying bill of particulars indicates that plaintiff was then represented by Altasas & Taub, P.C. (A&T). On January 9, 2006, plaintiff, through A&T, served a supplemental bill of particulars to further amplify the allegations attendant to his previously advanced defective step theory along with claims of negligent security. On June 13, 2006, plaintiff retained S&F to represent him in the underlying lawsuit.

On May 31, 2007, the underlying defendants moved for summary judgment on two grounds: that plaintiff's injury was not caused by the defective step and that there was no evidence that those defendants were reasonably aware of the need to control the conduct of the assailants prior to the assault as required under the common law. By short form order dated February 1, 2008, the court denied the motion (Martin Schneier, J.), which was appealed to the Second Department.

In a decision and order dated March 17, 2009, the Second Department unanimously reversed Justice Schneier's decision and dismissed Katehis' suit. In reaching its decision, the Second Department relied extensively on Katehis' deposition testimony in finding that no issues of fact existed with respect to the claims of a defective step and negligent security. With respect to the defective step, the court noted that Katehis fell only as a result of being pushed by the assailants and that plaintiff did not, himself, believe that the step was defective. Likewise, with respect to negligent security, the court noted that based on plaintiff's testimony, the assailants acted in a sudden and unexpected manner, thereby

preventing the defendants from being reasonably aware of the need to “control the conduct of persons on its premises” as required. Thus, in the absence of a basis to find those defendants liable for plaintiff’s injuries, the Second Department dismissed the complaint in its entirety.

Plaintiff commenced the instant action against S&F on October 27, 2010, alleging legal malpractice, breach of fiduciary duty and breach of contract. In support of his claims, plaintiff’s complaint asserts two separate theories: that S&F failed to allege in the underlying lawsuit a claim for civil assault; and that the complaint therein was defective because the Second Department “never considered a cause of action for failure of a duty to supervise drunken customers to protect patrons such as [Katchis] from assault.” The instant motion seeks to dismiss the two causes of action pursuant to CPLR 3211 (a) (7).

A motion pursuant to CPLR 3211 (a) (7) seeks dismissal on the grounds that the complaint fails to state a claim upon which relief may be granted. “The court’s function on a motion to dismiss pursuant to CPLR 3211 (a)(7) is to determine whether the plaintiff’s factual allegations fit within any cognizable legal theory, without regard to whether the allegations ultimately can be established” (*Colasacco v Robert E. Lawrence Real Estate*, 68 AD3d 706 [2009]). The plaintiff is afforded the benefit of every favorable inference (*Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314 [2002]). While the plaintiff is entitled to liberal construction of the complaint, “the court is not required to accept factual allegations that are plainly contradicted by the documentary evidence or legal conclusions that are unsupported based upon the undisputed facts” (*Robinson v Robinson*, 303 AD2d 234 [2003]). Finally, in assessing the legal sufficiency of a complaint under CPLR 3211, the court may consider affidavits or other evidentiary material (*Rovello v Orofino Realty Co., Inc.*, 40 NY2d 633 [1976]).

It is settled that an action for legal malpractice requires proof of three elements: the negligence of the attorney; that the negligence was the proximate cause of the loss sustained; and actual damages (*Between The Bread Realty Corp. v Salans Hertzfeld Heilbronn Christy & Viener*, 290 AD2d 380 [2002], *lv denied* 98 NY2d 603 [2002]; *Prudential Ins. Co. of Am. v Dewey, Ballantine, Bushby, Palmer & Wood*, 170 AD2d 108 [1991], *affd* 80 NY2d 377 [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 (*Aversa v Safran*, 303 AD2d 700 [2003]; *Senise v Mackasek*, 227 AD2d 184 [1996]; *Stroock & Stroock & Lavan v Beltramini*, 157 AD2d 590 [1990]). Stated another way, plaintiff is required to prove a “case within a case” (*McKenna v Forsyth & Forsyth*, 280 AD2d 79 [2001], *lv denied* 96 NY2d 720 [2001], quotations omitted). The failure to establish proximate cause mandates the dismissal of a legal malpractice action, regardless of the negligence of the attorney (*Tanel v Kreitzer &*

Vogelman, 293 AD2d 420 [2002]; *Pellegrino v File*, 291 AD2d 60 [2002], *lv denied* 98 NY2d 606 [2002]). Here, plaintiff bases his legal malpractice cause of action and attendant claims on S&F's failure (1) to assert a claim for civil assault and (2) to amend the underlying complaint to allege a failure to "protect patrons from assault."

The statute of limitations for both assault and battery is one year (*see Yong Wen Mo v Gee Ming Chan*, 17 AD3d 356 [2005]). For statute of limitations purposes, claims for assault and battery accrue when the tortious acts occur (*Grullon v City of New York*, 222 AD2d 257 [1995]). To the extent, if any, that plaintiff's potential claims for assault and battery could have been colorably asserted against the assailants, the potential claims accrued when plaintiff was assaulted on September 14, 2003. The limitations period for plaintiff to bring a timely claim for assault and battery would thus have been by September 14, 2004. Plaintiff did not commence the underlying lawsuit until January 11, 2005, or over three months after the expiration of the limitations period. Furthermore, plaintiff did not retain S&F until June 13, 2006, well over two years after the expiration of the limitations period. Since the assault and battery claims were time-barred before plaintiff even retained S&F, his cause of action for legal malpractice based thereon is dismissed.

Plaintiff also contends that S&F committed malpractice by failing to "seek leave of court to correct through amendment" the complaint to assert a claim for "failure of a duty to supervise drunken customers to protect patrons such as plaintiff from assault [i.e. negligent security]." While landowners in general have a duty to act in a reasonable manner to prevent harm to those on their property, an owner's duty to control the conduct of persons on its premises arises only when it has the opportunity to control such persons and is reasonably aware of the need for such control (*see D'Amico v Christie*, 71 NY2d 76, 85 [1987]; *Petrus v Saci, Inc.*, 18 AD3d 848 [2005]; *Cutrone v Monarch Holding Corp.*, 299 AD2d 388, 389 [2002]). Thus the owner of a public establishment has no duty to protect patrons against unforeseeable and unexpected assaults (*id.*).

In considering plaintiff's claim for negligent security, the Second Department noted that: "plaintiff was injured as the result of a sudden and unexpected assault by unidentified assailants which [the underlying defendants] could not have reasonably anticipated or prevented. Therefore [those defendants] cannot be held liable for plaintiff's injuries." The Second Department's conclusion was supported by plaintiff's deposition testimony which showed the unexpected nature of the assault. Plaintiff testified that there were no words exchanged before the attack and that the assailants "were laughing . . . They were like yelling and laughing between them, having a good time . . ." Thus, the Second Department specifically considered the viability of plaintiff's negligent security claim and determined that there was no basis for liability against the underlying defendants. Accordingly, there is no merit to plaintiff's contention that S&F committed malpractice by failing to amend the

complaint to assert a claim for negligent security (*see Millan v AMF Bowling Ctrs., Inc.*, 38 AD3d 860 [2007]).

As to the claims for breach of fiduciary duty and breach of contract against S&F, the courts have consistently held that such claims, premised on the same facts and seeking the identical relief sought in the legal malpractice cause of action, are redundant and should be dismissed (*Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267 [2004]; *Estate of Nevelson v Carro, Spanbock, Kaster & Cuiffo*, 290 AD2d 399 [2002]; *see Murray Hill Invs. v Parker Chapin Flattau & Klimpl, LLP*, 305 AD2d 228 [2003]). Here, plaintiff's breach of fiduciary duty and breach of contract claims are predicated on the same underlying theories used to support the legal malpractice claim -- namely that S&F failed to assert claims for assault and negligent security in the underlying litigation. Accordingly, the causes of action for breach of fiduciary duty and breach of contract against S&F are dismissed (*see also Sage Realty Corp v Proskauer Rose, LLP*, 251 AD2d 35 [1998]).

Accordingly, defendant's motion to dismiss is granted. Plaintiff's complaint is hereby dismissed.

Dated: March 31, 2011

J.S.C.