

David v Hack

2011 NY Slip Op 32443(U)

September 14, 2011

Sup Ct, NY County

Docket Number: 103705/11

Judge: Donna M. Mills

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

PRESENT : DONNA M. MILLS
Justice

PART 58

DANY DAVID,

INDEX No. 103705/11

Plaintiff,

MOTION DATE _____

-v-

MOTION SEQ. No. 001

MICHAIL Z. HACK, et al.,

MOTION CAL. No. _____

Defendants.

The following papers, numbered 1 to _____ were read on this motion _____.

PAPERS NUMBERED

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

145

Answering Affidavits- Exhibits _____

243

Replying Affidavits _____

4

CROSS-MOTION: _____ YES NO

FILED

Upon the foregoing papers, it is ordered that this motion is:

SEP 19 2011

DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM **NEW YORK COUNTY CLERK'S OFFICE**

Dated: 9/14/11

Donna M. Mills
DONNA M. MILLS, J.S.C.
J.S.C.

Check one: _____ FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 58

DANY DAVID,

INDEX NO.
103705/11

Plaintiff,

- against -

MICHAIL Z. HACK, WILLIAM J. O'MAHONEY
and QUADRINO & SCHWARTZ,

DECISION/ORDER

FILED

Defendants.

SEP 19 2011

DONNA M. MILLS, J:

NEW YORK
COUNTY CLERK'S OFFICE

In this legal malpractice and defamation action, defendants, Michael Z. Hack, William J. O'Mahoney and Quadrino & Schwartz (collectively referred to as "the law firm") move by way of a pre-answer motion seeking an Order dismissing plaintiff's complaint, in its entirety, pursuant to CPLR § 3211(a)(1), (5) and (7).

The underlying claim arises out of the law firm's representation of plaintiff in his claim for disability benefits from his disability insurer. Plaintiff alleges that he retained the law firm in 2009 and the law firm failed to present his claim to his disability insurer with accurate information, and that his claim was therefore denied. Plaintiff further alleges that after such denial, he was forced to retain a new attorney to appeal such denial, and that such appeal was successful. As a result, plaintiff seeks the amount of appellate attorney fees and expenses he incurred.

In addition to the foregoing claim for legal malpractice, plaintiff also seeks to assert a claim for defamation against the law firm. Plaintiff alleges that defendant William O'Mahony has stated that plaintiff has engaged in insurance fraud, causing plaintiff to suffer injury to his reputation, as well as emotional distress and mental suffering.

It is undisputed that the law firm ceased its representation of plaintiff by December 23, 2009. Thereafter, plaintiff contested the amount due and owing for the services

provided by the law firm during its prior representation of plaintiff, and such dispute was resolved with a refund to plaintiff by the law firm in the amount of \$250.00. In consideration of such refund, plaintiff executed a mutual release on March 31, 2010, in favor of the law firm. The subject release specifically "RELEASES, ACQUITS AND FOREVER DISCHARGES" the law firm and its attorneys:

from any and all claims, rights, demands, liabilities, controversies, or causes of action, known or unknown, asserted or unasserted, liquidated or unliquidated, fixed or contingent, or of any nature whatsoever including without limitation, claims in contract, tort, or legal malpractice, under statutory or common law, or in equity...from the beginning of the world to the date of execution of this Agreement.

Moreover, such release also states as follow:

5. Careful Review and Understanding of Agreement

The parties to this Agreement acknowledge, represent and warrant that:

- a. They have fully read this Agreement, understand its contents, and agree to its terms and conditions; and
- b. They have consulted with legal counsel prior to executing this Agreement and the consequences of this Agreement have been completely explained to them by their attorneys and those terms are fully understood and voluntarily accepted by them.

Accordingly, the law firm contends that the plaintiff's action against it are barred by the subject release.

As a general rule, a valid release that is clear and unambiguous on its face constitutes a complete bar to an action on a claim which is the subject of the release absent fraudulent inducement, fraudulent concealment, misrepresentation, mutual mistake

or duress (see Littman v Magee, 54 AD3d 14, 17 [2008]).

While plaintiff acknowledges signing the subject release, he contends that he was unrepresented at the time he signed it, and was under the impression that the release was limited to his fee dispute, and not a malpractice action. Plaintiff cites Rule 1.8(h)(2) in support of his position, which provides as follows:

(h) A lawyer shall not:

(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking, and is given a reasonable opportunity to seek, the advice of independent legal counsel in connection therewith.

There is no evidence presented by the law firm that the plaintiff was given a reasonable opportunity to seek, the advice of independent legal counsel in connection with the signing of the release. Additionally, plaintiff in his opposition annexes correspondence sent from the law firm to him, suggesting that he come into their office to sign the release and pick up the check in the amount of \$250.00 to complete the pending fee dispute.

A motion to dismiss pursuant to CPLR § 3211 (a)(1) will be granted only if the “documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiffs claim” (Fortis Fin. Servs. v Fimat Futures USA, 290 AD2d 383 [2002]). At this time, factual issues exist as to whether plaintiff who was unrepresented, was given a reasonable opportunity to seek the advice of independent legal counsel before signing the release in question.

The law firm also contends that plaintiff’s claim for legal malpractice against it fails to state a cause of action upon which relief may be granted. When evaluating a defendant’s motion to dismiss, pursuant to CPLR 3211 (a) (7), the test “is not whether the

plaintiff has artfully drafted the complaint but whether, deeming the complaint to allege whatever can be reasonably implied from its statements, a cause of action can be sustained." Jones Lang Wootton USA v LeBoeuf, Lamb, Greene & McRae, 243 AD2d 168, 176 (1st Dept 1998), quoting Stendig, Inc. v Thom Rock Realty Co., 163 AD2d 46, 48 (1st Dept 1990). To this end, the court must accept all of the facts alleged in the complaint as true, and determine whether they fit within any "cognizable legal theory." Arnav Indus., Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner, L.L.P., 96 NY2d 300, 303 (2001).

To prevail in a legal malpractice action, a plaintiff must show that the attorney "failed to exercise that degree of care, skill, and diligence commonly possessed and exercised by a member of the legal community" (Volpe v Canfield, 237 AD2d 282, 283 [1997]), that such negligence was the proximate cause of their damages, and that, but for the attorney's negligence, the plaintiff would have prevailed on the underlying claim (see Rau v Borenkoff, 262 AD2d 388 [1999]).

Accepting all the facts alleged in the complaint as true, the plaintiff stated a cause of action alleging legal malpractice in the disability action. The plaintiff alleged in his complaint, inter alia, that the law firm was negligent in providing misinformation to his disability insurer regarding the plaintiff's date of disability, and that its negligence proximately caused the plaintiff to sustain actual and ascertainable damages.

The law firm also seeks to dismiss plaintiff's claim for defamation on the grounds of being barred by the release, and that it failed to state a claim upon which relief can be granted. This court has already addressed the legal issues pertaining to the subject release and determined that at this time it does not resolve all of the factual issues.

In support of his claim for defamation, plaintiff generally alleges that defendant William O'Mahony has stated to others that plaintiff has engaged in insurance fraud. The

elements of a cause of action for defamation are a "false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and, it must either cause special harm or constitute defamation per se." (Dillon v City of New York, 261 AD2d 34, 38 [1999]). "The complaint must set forth the particular words allegedly constituting defamation (see CPLR 3016[a]), and it must also allege the time when, place where and manner in which the false statement was made." (Epifani v Johnson, 65 AD3d 224, 233 [2009]). Failure to comply with this requirement results in the dismissal of the claim for failure to state a cause of action (see Lewittes v Blume, 18 AD3d 261 [2005]).

Even though plaintiff pleads the particular words complained of, he has not alleged with particularity the time, place and manner of the allegedly false statements. Plaintiff only states in his complaint that defendant O'Mahony, has stated in email, letters, correspondence, print and verbally that the plaintiff has engaged in "Insurance Fraud." Absent allegations that a specific statement was made to a particular person, and detailed factual information as to when and where specific statements were made, plaintiff's conclusory allegations are insufficient to satisfy the pleading requirements of CPLR 3016 (a). See Dillon v City of New York, 261 AD2d at 38.

Accordingly, it is

ORDERED that the motion of defendants to dismiss the complaint herein is granted only to the extent of dismissing the second cause of action for defamation; and it is further

ORDERED that defendants are directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 574, 111 Centre Street, on 10 | 21, 2011, at 10:00 AM.

Dated: 9/14/11

ENTER:

Donna

J.S.C.

DONNA M. MILLS, J.S.C.

FILED

SEP 19 2011

NEW YORK
COUNTY CLERK'S OFFICE