

Phoenix Erectors LLC v Fogarty

2011 NY Slip Op 34056(U)

February 9, 2011

Supreme Court, New York County

Docket Number: 100701/2010

Judge: Louis B. York

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

PRESENT: LOUIS B. YORK

PART 2

Index Number : 100701/2010
PHOENIX ERECTORS LLC.
vs.
FOGARTY, JR., ESQ., EDWARD M.
SEQUENCE NUMBER : 002
DISMISS

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

MOTION IS DECIDED BY JUDGE JORDAN
WITH ACCOMPANYING MEMORANDUM DECISION.

FILED

FEB 17 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 2/9/11

Luy
LOUIS B. YORK J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

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

-----x
PHOENIX ERECTORS LLC,

Plaintiff,

Index No. 100701/2010

-against-

EDWARD M. FOGARTY, JR., ESQ., LITCHFIELD
CAVO, LLP AND WHITE & MCSPEDON, P.C.,

DECISION/ORDER

Defendants.

-----x
LOUIS B. YORK, J.:

Motion Sequence Numbers 1 and 2 are consolidated for disposition, and decided as follows:

Defendants Edward M. Fogarty and White & McSpedon, P.C. ("W & M") move for dismissal of the complaint filed against them by Plaintiff Phoenix Erectors, LLC ("Phoenix"). For the reasons below, the Court grants both Fogarty and Cavo's motions.

In or about 2002, Phoenix hired Edward M. Fogarty to represent it in a litigation which Hera Construction, LLC ("Hera") commenced against it in Suffolk County. The action related to the Monorail Project at the Newark, New Jersey International Airport ("the Monorail Project").

The caption for that action ("the Suffolk Action") read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

-----x
HERA CONSTRUCTION, INC.,

Plaintiff,

Index No.: 00044/02

-against-

PHOENIX ERECTORS, LLC,

Defendant.

FILED

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According to the complaint, Hera paid Phoenix \$438,169 for materials which the latter never provided.

At the same time, there was an ongoing action in Federal District Court in New Jersey, in which Phoenix was the plaintiff and Hera as well as other parties were the defendants. The caption for that action ("the New Jersey Action") was as follows:

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

-----X

PHOENIX ERECTORS, LLC,

Plaintiff,

Civil Action

Docket No. 02-CV-2329

-against-

HERA CONSTRUCTION CORPORATION,
AIRFLEX CORPORATION, ULICO
CASUALTY COMPANY, and GENERAL
ACCIDENT INSURANCE COMPANY OF
AMERICA,

Defendants.

-----X

A New Jersey attorney, John H. Rittley, Esq., represented Phoenix in this action. The complaint identified Hera and Airflex Corporation ("Airflex") as "apparent New York incorporated entit[ies]," Compl., New Jersey Action, at ¶¶ 2-3. In addition, ULICO Casualty Company ("ULICO") was a surety of Hera on the Monorail Project, and General Accident Insurance Company of America ("GAICA") was the surety for the general contractor, Terminal Construction Corporation, which was not a defendant in the action. According to the complaint, either Hera or Airflex may have been a shell corporation for the other; moreover, Phoenix asserted that it was Hera and/or Airflex which owed it money – in particular, \$181,099. As for the money which it

allegedly owed to Hera and Airflex, Phoenix stated this was due to “a bogus list of chargebacks,” *Id.* at ¶ 13.

The first through fifth counts of the complaint in the New Jersey Action are against Hera and Airflex. Though the legal claims are different, essentially the causes of action stem from the allegedly outstanding balance of \$181,099. The sixth count of the complaint is against ULICO and GAICA. This count stems from the fact that these parties issued surety bonds relating to the Monorail Project.

When he first became Phoenix’s counsel in the Suffolk Action, Fogarty was a partner at defendant W & M. When Phoenix answered the Suffolk complaint, in fact, W & M was the attorney of record. The answer denied all the critical allegations and also asserted several affirmative defenses.

In stipulations dated December 23, 2003, the parties in the New Jersey and Suffolk Actions agreed to discontinue the New Jersey Action in its entirety. In addition, ULICO agreed not to raise jurisdictional issues in the Suffolk Action. However, it only consented to appear in New York as a third party rather than a direct defendant; and it only consented to those claims which might be raised in a third-party action. In a document which also is dated December 23, 2003, Phoenix commenced a third party action against Airflex and ULICO in the Suffolk Action. In this third party action, as in the New Jersey Action, Phoenix asserted that either Airflex or Hera was a shell corporation for the other. On this basis it asserted five counts against Airflex which essentially were the same as those asserted in the New Jersey action. The sixth count, against ULICO, sought contribution and indemnification against ULICO.

The Court notes that when he signed the stipulations above and commenced the third party action in Suffolk, Fogarty was still a partner at W & M. Subsequently, Fogarty left W & M and became a partner at Litchfield Cavo (“Cavo”). The stipulation relating to the substitution of counsel is dated March 10, 2004. After changing firms, Fogarty amended the third party complaint.

on its counterclaim. On January 23, 2007, plaintiff entered judgment against these parties in the amount of \$194,340.30, including interest and costs. Having obtained judgment, Phoenix's sole claim against ULICO, for indemnity and contribution, was moot. Accordingly, Fogarty, now at Cavo, discontinued the third-party action against ULICO.

A verdict which granted Phoenix all the monetary relief it requested should have been a happy resolution for Phoenix, but in this case it was not. Unfortunately for Phoenix, it has been unable to collect its judgment against either Hera or Airflex. Moreover, as it discontinued the third party action against ULICO, Phoenix also could not pursue judgment against ULICO in its capacity as surety.

Phoenix blames Fogarty for these problems, and in February 2010 commenced a legal malpractice against him, W & M and Cavo. As against Fogarty and W & M, Phoenix claims that Fogarty, while at W & M, negligently drafted the stipulation for the Suffolk action and negligently drafted the third party complaint by his failure to include all possible claims necessary to preserve Phoenix's rights against ULICO. As against Fogarty and Cavo, Phoenix claims that Fogarty, while at Cavo, negligently drafted the amended complaint, and negligently discontinued the third-party complaint.

Subsequently, Fogarty and Cavo separately moved to dismiss the claims against them. These motions are currently before the court. In addition, plaintiff attempted to cross-move for summary judgment. However, based on its untimely submission to the Court, the Court does not accept the cross motion. Instead, it considers plaintiff's papers solely as opposition papers to both motions. For the reasons below, the Court grants both Fogarty and Cavo's motions.

ANALYSIS

Whether or not a pleading is sufficient to state an action for attorney malpractice is a question of law, which can be determined on a motion to dismiss. (*see Rosner v. Paley*, 65 NY2d 736, 492 NYS2d 13, 14 (Ct. App. 1985)). To determine if a complaint is adequate in light of a CPLR 3211(a) motion to dismiss, a court must afford the pleadings a liberal construction, accept the allegations of the

[* 6]

complaint as true and provide plaintiff the benefit of every possible favorable inference.” (*AG Capital Funding Partners, L.P. v. State St. Bank & Trust Co.*, 5 NY3d 582, 591, 808 NYS2d 573, 577-578 (Ct. App. 2005)). It does not matter if a plaintiff ultimately cannot establish its allegations. (*see Id.*). A court should “determine only whether the facts as alleged fit within any cognizable legal theory.” (*Arnav Indus. v. Brown, Raysman, Millstein, Felder & Steiner, LLP*, 96 NY2d 300, 303, 727 NYS2d 688, 690 (Ct. App. 2001)). A case should be dismissed if the evidence “conclusively establishes a defense to the asserted claims as a matter of law.” (*511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 NY2d 144, 152, 746 NYS2d 131, 134 (Ct. App. 2002)).

To sustain a cause of action for legal malpractice, a party must show that an attorney failed to exercise the reasonable skill and knowledge commonly possessed by a member of the legal profession. (*Arnav Indus. v. Brown, Raysman, Millstein, Felder & Steiner, LLP*, 96 NY2d 300, 303, 727 NYS2d 688, 690 (Ct. App. 2001)). The plaintiff must demonstrate the following elements: (1) the attorney’s negligence, (2) a causal relationship between the attorney’s negligence and the loss and (3) actual and ascertainable damages. (*Dweck Law Firm, LLP v. Mann*, 283 AD2d 292, 293, 727 NYS2d 58, 59 (1st Dept. 2001)). To establish causation, a plaintiff must show that, but for the attorney’s negligence, the plaintiff would have prevailed in the underlying action or would not have incurred any damages. (*see Davis v Klein*, 88 NY2d 1008, 1009-1010, 648 NYS2d 871, 872 [Ct. App. 1996]). A plaintiff must state “specific factual allegations establishing that but for counsel’s defendant representation, there would have been a more favorable outcome to the underlying matter; unsupported factual allegations; conclusory legal arguments or allegations contradicted by documentation do not suffice.” (*see Id.*). A client’s mere criticism of counsel’s legal strategy does not constitute malpractice, as attorneys may select among reasonable courses of action to advance their clients’ cases. (*see Id.*).

In this case, Phoenix’ allegations fail to satisfy the threshold standard necessary to maintain a legal malpractice action. Plaintiff has not demonstrated that Phoenix would have endured a pecuniary loss but for Defendants’ negligence. First, Plaintiff has not shown that Defendants failed to exercise the reasonable skill and knowledge commonly possessed by a

member of the legal profession. Plaintiff argues that Defendant negligently drafted the stipulation for the Suffolk action and the third party complaint. However, Plaintiff's counsel in the New Jersey Action also stipulated to dismiss the case and file a counterclaim against Hera and a third-party complaint against ULICO in New York.

Second, Plaintiff has not shown that but for Defendants' negligence, Phoenix would have successfully litigated a claim against ULICO in New York State. As Defendants correctly point out, New York State did not have jurisdiction over ULICO when the Stipulation was being drafted. Plaintiff has not provided evidence to prove that but for Fogarty's negligence, ULICO would have consented to be a direct defendant, that Phoenix would have prevailed in its case, or that Phoenix would have been able to collect any money from ULICO.

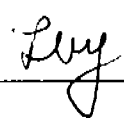
Based on the above, therefore it is

ORDERED that Defendants Fogarty and Cavo's motion to dismiss is granted; and it is further

ORDERED that the action as applied to Defendant White & McSpedon shall continue.

Dated: 2/9/11

ENTER:



LOUIS B. YORK, J.S.C.

FILED

FEB 17 2011

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