

Boye v Rubin & Balin, LLP

2012 NY Slip Op 30087(U)

January 11, 2012

Supreme Court, New York County

Docket Number: 115987/2009

Judge: Louis B. York

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

LOUIS B. YORK

PRESENT.

PART _____

Index Number : 115987/2009

J.S.C.

BOYE, FRANK

vs

RUBIN & BAILIN, LLP

INDEX NO. _____

Sequence Number : 003

MOTION DATE _____

REARGUMENT/RECONSIDERATION

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

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

PAPERS NUMBERED

Answering Affidavits — Exhibits _____

Replying Affidavits _____

FILED

Cross-Motion: Yes No

JAN 17 2012

Upon the foregoing papers, It is ordered that this motion

NEW YORK
COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION

MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION

Dated: 1/17/12

Loy
LOUIS B. YORK J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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
FRANK BOYE,

Plaintiff,

Index No. 115987/09

-against-

RUBIN & BAILIN, LLP, f/k/a
RUBIN, BAILIN, ORTOLI
MAYER and BAKER LLP,
ERIC VAUGHN-FLAM P.C. and
ERIC VAUGHN-FLAM, ESQ.,

Defendants,
----- x

LOUIS B. YORK, J.:

FILED

JAN 17 2012

NEW YORK
COUNTY CLERK'S OFFICE

This decision addresses the following: the motion by defendant Eric Vaughn-Flam P.C. (Hereafter EVFPC), made by Notice of Motion dated April 28, 2011; and the cross-motion by Rubin & Bailin LLP, made by Notice of Cross-Motion dated May 5, 2011. The motion and cross-motion request respectively leave to reargue EVFPC's Combined Motion to Dismiss, Motion for Leave to Amend the Verified Answer, and Motion for Sanctions, dated April 26, 2010 and Rubin & Bailin's Cross-Motion to Amend Answer and to Dismiss the Verified Complaint. In addition, plaintiff Frank Boye had also previously made a Cross-Motion dated July 17, 2010, seeking leave to extend the time to serve opposition to EVFPC's underlying combined motion. For the reasons stated *infra*, the motion and cross-motion to reargue are granted and the Court's order of March 22, 2011 is modified to the extent that the underlying motions and cross-motions are partially granted and partially denied as discussed below.

FACTS

According to the Verified Complaint, Boye was the owner or authorized agent for a series of approximately 47 art objects which were to be sold. Based on the recommendations of a public relations firm, Jurdem Associates, Boye entered into a contract with Jan Amory to display the artwork in her Manhattan apartment. In March 2003, Boye discovered that a large portion of the artwork had gone missing from the apartment. Plaintiff then met with the defendants, EVFPC and Rubin & Bailin to represent him in an action to recover some portion of the missing artwork no later than May 13, 2004. Plaintiff states that he retained the defendants to represent him on or about October 19, 2004 and that the retainer agreement covered at least one object in the group of missing items. Defendants prepared and filed a complaint for Boye on March 20, 2006 in the matter of *Boyes v. Amory, Jurdem and Jurdem Associates, Inc.*, Docket No. 06 CV 2163, venued in U.S. District Court, Southern District of New York.

The complaint goes on to state that following a summary judgment motion by the Jurdem defendants¹, a decision was rendered in that case in an order dated August, 26, 2008. In that decision the court found that claims for negligence and breach of fiduciary duty based on the sale or other removal of the missing artwork occurring before March 20, 2003 were time-barred. The complaint further states that during their representation of Boye, that defendants EVFPC and Rubin & Bailin withdrew or discontinued causes of action for conversion and breach of contract against the Jurdem defendants which were dismissed with prejudice. On or about November 1, 2006, EVFPC and Rubin & Bailin made a motion to withdraw as attorneys for Boye which was granted on or about November 14, 2006.

In the present action, Boye alleges four causes of action against EVFPC and Rubin & Bailin². The first three causes of action allege, in tort and in contract, that the defendants

¹ Jan Amory failed to answer the complaint.

² The Complaint also names Eric Vaughn-Flam as an individual as a defendant however the action was dismissed as against him in an order by this Court dated March 7, 2011.

negligently failed to render competent legal service by failing to timely file a complaint and by unilaterally withdrawing claims for conversion and breach of contract. The fourth cause of action alleges breach of fiduciary duty by the defendants.

The present motion and cross-motion seek to reargue a previously submitted combined motion by EVFPC, a cross-motion by Boye, and a cross-motion by Rubin & Bailin which were never addressed by the court.

The underlying combined motion by EVFPC requests three things. First, EVFPC seeks dismissal of the action pursuant to CPLR § 3211(a)(1) based on documentary evidence, and CPLR § 3211(a)(7) for failure to state a cause of action. Second EVFPC seeks leave to amend its verified answer to assert an affirmative defense of documentary evidence as well as a counterclaim for fraud. Finally EVFPC seeks sanctions pursuant to 22 NYCRR 130-1.1.

The underlying cross-motion by Boye seeks to have the Court grant an extension of time to serve opposition to the EVFPC combined motion or to have his opposition deemed timely. Pursuant to a stipulation between the parties, Boye was to serve opposition to the motion by July 9, 2010 but did not serve his opposition until July 17, 2010. Boye states that his opposition was untimely due to law office failure caused by confusion between this motion and a previous motion to dismiss by Eric Vaughn-Flam, Esq.

The underlying cross-motion by Rubin & Bailin first seeks to amend its answer pursuant to CPLR §3025(b) to assert an affirmative defense based upon documentary evidence and counterclaims for fraud and negligence. In addition, Rubin & Bailin seeks to dismiss the complaint against it pursuant to CPLR § 3211(a)(1) based upon documentary evidence, CPLR § 3211(a)(5) based upon expiration of the statute of limitations, and CPLR § 3211(a)(7) for failure to state a cause of action.

DEFENDANTS' CONTENTIONS

EVFPC contends that it is entitled to dismissal of the action against it. First, EVFPC argues that Boye lacked privity with the defendants in that Boye was not the owner of the artwork and never obtained assignments of the claims from any of the owners of the artwork except for one who retained the defendants directly and who's object was recovered. Second, EVFPC argues that Boye's claim that defendants withdrew viable conversion and breach of contract claims is patently false as those claims were withdrawn by successor counsel. This is established by a memorandum of Law by the replacement council which withdraws the claims as part of an opposition to summary judgment in the federal action dated December 17, 2007.

In addition, EVFPC argues that Boye has failed to establish that the defendants were the proximate cause of any injuries suffered. Specifically EVFPC argues that the viable claims were withdrawn by successor counsel, Boye repeatedly ignored warnings regarding the statute of limitations for certain claims, that successor counsel failed to pursue a default judgment against the defendant who failed to answer, and Boye's decision to forgo trial of the surviving claims in favor of settlement. Finally EVFPC argues that the causes of action for legal malpractice are insufficient as a matter of law as they fail to establish that but for the alleged negligence Boye would have successfully prosecuted his claim and they fail to plead ascertainable damages.

Rubin & Bailin contends that dismissal is required on three grounds. First it argues that documentary evidence establishes that defendants were only retained to recover one art object by the actual owner which it succeeded in doing. In also repeats EVFPC's argument that documentary evidence established that the alleged negligence in withdrawing the conversion and breach of contract claims was performed by successor counsel. Second, Rubin & Bailin argue

that the statute of limitations has expired for the malpractice claim as a June 23, 2006 letter signed by Boye establishes that as of that time, defendants were only retained to recover the aforementioned art object. Finally Rubin & Bailin argue that the complaint fails to set forth facts establish "but for" the alleged negligence that plaintiff would have received a more favorable outcome.

DISCUSSION

As an initial matter, defendant's have correctly pointed out that the Court failed to rule on the motion and cross-motion to dismiss made by EVFPC and Rubin & Bailin respectively. It appears that due to some confusion, the Court's order dated March 22, 2011 which should have addressed EVFPC's combined motion as well as the two cross-motions instead addressed the motion and cross-motion that had been previously decided in the Court's order dated March 7, 2011. As such the Court grant's the present motions to reargue and will now address the combined motion and cross-motions.

A. Plaintiff's Cross-Motion to Extend Time to Reply

With respect to the underlying motion to dismiss, Boye's opposition was untimely. As such, Boye has requested the court extend the time to reply or deem his opposition timely. Under CPLR § 2001, "the court may permit a mistake, omission, defect or irregularity ... to be corrected, upon such terms as may be just...." While Boye is certainly expected to abide by stipulations agreed to with the other parties, the Court does not believe that justice is best served by preventing the plaintiff from arguing his case on the merits. Therefore, the Court grant's plaintiff's cross-motion and hereby deems timely Boye's opposition to the EVFPC motion.

B. Motion and Cross-Motion to Amend Defendants' Respective Answers

Both EVFPC and Rubin and Bailin have requested leave to amend their respective answers to include the affirmative defense of documentary evidence and to include counterclaims for fraud. Pursuant to CPLR § 3025(b), a request for leave to amend a party's pleading "shall be freely given upon such terms as may be just". In his opposition to both EVF's motion and Rubin & Bailin's cross-motion, Boye fails to raise any objection to their requests to amend. As such, leave to amend is granted to both defendants without opposition.

C. Motion and Cross-Motion to Dismiss

1. Legal Standard for a Motion to Dismiss

When considering a motion to dismiss pursuant to CPLR § 3211, pleadings must be construed liberally (NY CPLR § 3026). Thus in a determination of legal sufficiency under 3211(a)(7), the facts alleged in the complaint will be assumed to be true, given all favorable inferences, and only then considered to see if they fit "within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). However, "factual allegations which fail to state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or unequivocally contradicted by documentary evidence, are not entitled to such consideration" (*Leder v Spiegel*, 31 AD3d 266, 267 [1st Dept 2006]).

With respect to a motion pursuant to CPLR § 3211(a)(1), dismissal is granted only if the documentary evidence presented conclusively establishes a defense to the claims as a matter of law (*Leon*, 84 NY2d at 88). "[T]he defendant has the burden of demonstrating that the documentary evidence conclusively resolves all factual issues" (*Robinson v Robinson*, 303 AD2d 234, 235 [1st Dept 2003]).

2. Motion and Cross-Motion to Dismiss Pursuant to CPLR § 3211(a)(1)

With respect to plaintiff's allegations that defendants negligently withdrew the conversion and breach of contract actions, this does not appear to be the case. The memorandum in opposition to the Jurdem defendants motion for summary judgment in which the claims were withdrawn was filed by Boye's successor counsel, Jan Meyer and is dated December 17, 2007. Furthermore, it is undisputed that the defendants were granted leave to withdraw as counsel for Boye in an order dated November 14, 2006. As such this document clearly establishes that the defendants could not have been responsible for the withdrawal of these claims. Therefore, the cause of actions for negligence, with respect to that theory of negligence alone, must be dismissed.

3. Motion and Cross-Motion to Dismiss Pursuant to CPLR § 3211(a)(7)

However, that portion of the motion to dismiss for failure to state a cause of action is denied. With respect to a motion to dismiss, the Court must give deference to the facts stated in the complaint. To state a cause of action for legal malpractice, the plaintiff must allege the following: (1) the negligence of the attorney, (2) that the negligence was the proximate cause of the loss, and (3) proof of actual damages (*see Between The Bread Realty Corp. v Salans Hertzfeld Heilbronn Christy & Veiner*, 290 AD2d 380, 380 [1st Dept 2002]). Boye has successfully pleaded all the necessary elements for his causes of action, stating in essence that he retained the defendants who then failed to timely file a complaint such that certain actionable claims were lost. While the defendants have raised serious doubts about the accuracy of this description of events including, *inter alia*, what was the actual relationship between Boye and the defendants, whether Boye's own delay was responsible for certain claims being time-barred, and whether Boye would have been able to achieve a better result but for the actions of the

defendants, these issues are not appropriately addressed in a motion to dismiss. Rather they are issues of fact that would be more appropriately dealt with on a motion for summary judgment.

4. Cross-Motion to Dismiss Pursuant to CPLR § 3211(a)(5)

The cross-motion to dismiss due to the passing of the statute of limitation is denied. The continuous representation doctrine tolls the statute of limitation while representation continues for the "specific subject matter underlying the malpractice claim" (*McCoy v Feinman*, 99 NY2d 295, 306 [2002]). Here, defendants were the attorneys for plaintiff in the specific action that is the basis for the malpractice claim until the motion relieving the defendants as counsel for the plaintiff was granted on November 14, 2006. The index number was purchased and the verified complaint was filed with the New York County Clerk on November 13, 2009. Therefore the cause of action for legal malpractice is timely.

D. Motion Requesting Sanctions

Finally with respect to EVFPC's request for sanctions against plaintiff, pursuant to 22 NYCRR § 130-1.1, the Court "may award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct" Conduct is deemed frivolous if, *inter alia*, "it asserts material factual statements that are false" (22 NYCRR § 130-1.1[c][1]). Here the withdrawal of certain causes of action attributed to the defendants in the verified complaint was clearly performed by successor counsel. However, while in his opposition to this motion, plaintiff has failed to make any objection to the imposition of sanctions, the Court is not convinced that this misstatements rise to a level sufficient to impose sanctions. As such the motion for sanctions is denied.

The Court has considered the remaining arguments and finds them unpersuasive.

Based on the foregoing, it is

ORDERED that the motion to amend its answer by Eric Vaughn-Flam P.C is granted;
and it is further

ORDERED that the cross-motion to amend its answer by Rubin & Bailin, LLP is
granted; and it is further

ORDERED that the motion and cross-motion to dismiss is granted only to the extent that
the legal malpractice claims based on the withdrawal of all claims of conversion and breach of
contract against Jurdem and Jurdem Associates in the underlying lawsuit, is dismissed as to
defendants Eric Vaughn-Flam P.C. and Rubin & Bailin, LLP; and it is further

ORDERED that the remainder of the action shall continue; and it is further

ORDERED that the remainder of the motion and cross-motion to dismiss is denied; and
it is further;

ORDERED that the motion for sanctions is denied.

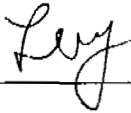
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Dated: 1/11/12



Louis B. York, J.S.C.

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