

Boye v Rubin & Bailin, LLP

2012 NY Slip Op 31951(U)

July 20, 2012

Supreme Court, New York County

Docket Number: 115987/09

Judge: Louis B. York

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY
LOUIS B. YORK J.S.C.
LOUIS B. YORK J.S.C.

PRESENT: _____

PART 2

Index Number : 115987/2009
BOYE, FRANK
vs
RUBIN & BAILIN, LLP
Sequence Number : 004
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is *is decided in accordance with the accompanying decision.*

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

FILED

JUL 24 2012

NEW YORK COUNTY CLERK'S OFFICE

Dated: 7/20/10

Levy, J.S.C.

- 1. CHECK ONE: CASE DISPOSED
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER

DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

~~LOUIS B. YORK~~ NON-FINAL DISPOSITION

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

-----X
 FRANK BOYE,

Plaintiff,

Index No. 115987/09

-against-

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

Defendants,

FILED

JUL 24 2012

NEW YORK
 COUNTY CLERK'S OFFICE

-----X
 YORK, J.:

Defendant Eric Vaughn-Flam P.C. ("EVFPC) moves, by notice of a motion dated March 15, 2012, for summary judgment, pursuant to CPLR 3212, to dismiss the action against it and for sanctions, pursuant to 22 NYCRR §130-1.1.

BACKGROUND

Plaintiff Frank Boye ("Boye") was the owner or authorized agent for a series of approximately 47 art objects which he brought to New York for the purpose of selling them. Boye contracted with a public relations firm, Jurdem Associates, to facilitate the sales (the "Jurdem Contract"), and on its recommendation, entered into a contract with Jan Amory to display the artwork in her Manhattan apartment (the "Amory Contract"). 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 LLP to represent him in an action to

recover some portion of the missing artwork, and a retainer agreement was allegedly signed on or about October 19, 2004. Defendants prepared and filed a complaint for Boye on March 20, 2006 in the matter of *Frank Boye Hansen (a/k/a Frank Boye) v. Jan Amory, Arnold Jurdem and Jurdem Associates, Inc.*, Docket No. 06 CV 2163 in U.S. District Court, Southern District of New York. The complaint in the underlying action asserted claims for breach of contract, conversion and fraud. Jan Amory failed to answer the complaint. On or about November 1, 2006, EVFPC and Rubin & Bailin LLP made a motion to withdraw as attorneys for Boye, which was granted on or about November 14, 2006. A new counsel for plaintiff, Jan Meyer, Esq. amended the complaint on June 7, 2007 to include claims for negligence and breach of fiduciary duty against Arnold Jurdem and Jurdem Associates (together “the Jurdem defendants”). Following a motion for summary judgment by the Jurdem defendants, 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 court also noted that claims for conversion and breach of the Amory Contract as against the Jurdem defendants were voluntarily withdrawn in a brief in opposition to summary judgment. The claims for breach of the Jurdem Contract, fraud, negligence and breach of fiduciary duty were to proceed to trial.¹ The case ultimately settled.

In the current action Boye sued Eric Vaughn-Flam individually, EVFPC and Rubin & Bailin LLP for malpractice and breach of fiduciary duty. The complaint was dismissed as against Eric Vaughn-Flam in an order of this court dated March 7, 2011. Boye alleges four causes of

¹ Plaintiff mischaracterized Judge Castel’s decision saying in paragraph 35 of its verified complaint that “defendants ... voluntarily withdrew all claims of conversion and breach of contract against Jurdem and Jurdem Associates, Inc.” Apart from ascribing this withdrawal to defendants, he failed to distinguish the withdrawal of the Amory Contract claims and the Jurdem Contract claims. EVFPC chose not to correct this mischaracterization.

action against EVFPC and Rubin & Bailin LLP. The first three causes of action allege, in tort and in contract, that the defendants negligently failed to render competent legal service by not filing a complaint in a timely manner and by unilaterally withdrawing claims for conversion and breach of contract against Jurdem defendants. The fourth cause of action alleges breach of fiduciary duty. Based on documentary evidence, establishing that the claims for conversion and breach of contract in the underlying action were withdrawn by Boye's successor counsel, Jan Meyer, the court dismissed that part of a malpractice claim against EVFPC and Rubin and Bailin LLP in its order dated 12 January, 2012.

Now EVFPC moves for summary judgment dismissing the remaining claims for malpractice and breach of fiduciary duty against it. It argues that, as a matter of law, defendants were free to select among several courses of action in framing the underlying complaint and cannot be held liable in malpractice for not timely filing the suit so that a successor counsel could later assert additional causes of action. It further contends that plaintiff's case fails for lack of proximate causation – plaintiff repeatedly admitted that withdrawal of the conversion and breach of contract claims was a proximate cause of his damages. In addition, successor counsel's failure to obtain a default judgment against Jan Amory was another intervening factor. Finally, it moves to dismiss the claim of breach of fiduciary duty as duplicative of its malpractice claims. EVFPC requests sanctions against Boye for filing a frivolous complaint.

Plaintiff opposes the motion on the ground that there was no discovery in this action and that defendant EVFPC failed to make its prima facie case on this motion by not providing an expert opinion. Defendant Rubin and Bailin LLP does not take a position in relation to the motion, but objects to plaintiff's statements that plaintiff did not have an opportunity to conduct discovery.

DISCUSSION

Professional malpractice

“An action for legal malpractice requires proof of the attorney's negligence, a showing that the negligence was the proximate cause of the plaintiff's loss or 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 actual ascertainable damages regardless whether negligence is established. Even if counsel improperly advises the client, the advice is not the proximate cause of the harm if the client cannot demonstrate its own likelihood of success absent such advice. Moreover, speculative damages cannot be a basis for legal malpractice.” Pellegrino v File, 291 AD2d 60, 63; 738 N.Y.S.2d 320 [1st Dept 2002](internal quotations omitted).

In the present case plaintiff alleges that defendants committed malpractice by not filing the underlying complaint in time to preserve some causes of action. In essence, this amounts to an allegation that causes of action actually asserted were insufficient, and could not allow plaintiff adequate recovery. Defendant EVFPC asserts that it and other defendants made a conscious choice of which claims to pursue, and that plaintiff now criticizes their trial strategy. It refers to the proposition that “selection of one among several reasonable courses of action does not constitute malpractice.” Rosner v Paley, 65 NY2d 736, 738; 492 N.Y.S.2d 13 [1985]. As a proof of reasonableness of its course of action, EVFPC cites numerous admissions in plaintiff's verified complaint. Boye, accusing defendants of negligent withdrawal of the conversion and breach of contract claims, stated in several paragraphs of the verified complaint that such claims had a high probability of success. These claims were filed by defendants. In EVFPC opinion,

“plaintiff’s admissions conclusively establish that defendants’ selection of claims was not only reasonable, but ultimately would have prevailed.” (Vaughn-Flam Aff. para. 40).

This court will not rely confidently on plaintiff’s predictions, but will evaluate the reasonableness of EVFPC course of action as a matter of law. (See Bernstein v Oppenheim & Co., P.C., 160 AD2d 428, 430; 554 N.Y.S.2d 487 [1st Dept 1990]). The allegations in the underlying action support the cause of action for conversion and breach of contract against Jan Amory, the cause of action for breach of contract against Jurdem Associates, and fraud against all defendants. District Judge Castel denied the motion for summary judgment to dismiss the breach of contract and fraud claims against the Jurdem defendants. Since Amory defaulted in answering the complaint, claims against her were not before the court. Jan Meyer only needed to file an entry of default against Amory by November 20, 2007, as ordered by the federal judge, to secure judgment against her. That he failed to do so cannot be attributed to EVFPC. All three claims asserted by present defendants in the underlying action were either successful or had a chance of success, and thus reflected a reasonable strategy. Judge Castel also found that claims of negligence and breach of fiduciary duty against Jurdem, asserted by the successor counsel, had merit, though at trial they could be found duplicative of the breach of contract claim. Asserting them in the first place would also be a reasonable strategy. Failure to assert them, though, cannot be characterized as malpractice.

Trial counsels can select adequate causes of actions to the exclusion of others without subjecting themselves to a malpractice suit. Ideal Steel Supply Corp. v Beil, 55 AD3d 544, 545-46; 865 N.Y.S.2d 299 [2d Dept 2008] (the Supreme Court properly dismissed so much of the cause of action alleging legal malpractice as challenged the defendants’ election to prosecute a RICO claim in the underlying action, to the exclusion of other claims. The plaintiff failed to

allege facts to support its conclusory allegations that other claims would have been viable and would have afforded it an expeditious, less costly recovery). They also have flexibility in proceeding with the case. MII Exports, Inc. v Mooney, 223 AD2d 499, 499; 637 N.Y.S.2d 95 [1st Dept 1996] (that third-party defendants moved to vacate, modify or reopen a prior summary judgment order in the underlying action instead of appealing that order, and that they negotiated a settlement upon the consent of their clients, plaintiffs herein, does not raise an issue of fact as to legal malpractice on the part of third-party defendants). Even if strategic choices were wrong, these are matters of professional judgment in a particular case, and not of an overall professional competence. Rodriguez v Fredericks, 213 AD2d 176, 178; 623 N.Y.S.2d 241 [1st Dept 1995] (plaintiffs' claims amount to no more than retrospective complaints about the outcome of defendant's strategic choices and tactics, without demonstrating that those exercises of judgment were so unreasonable at the inception as to have manifested professional incompetence). Stroock & Stroock & Lavan v Beltramini, 157 AD2d 590, 591; 550 N.Y.S.2d 337 [1st Dept 1990] (counsel's decision to proceed before the courts rather than in arbitration amounts *at worst* to an error in professional judgment which does not rise to the level of malpractice).

The record here unambiguously shows that EVFPC's handling of the underlying case was a reasonable exercise of professional judgment. Plaintiff failed to come with any evidence that would demonstrate that causes of action for conversion, breach of contract and fraud, asserted by defendants in the federal case could not lead to plaintiff's victory, while causes of action for negligence and breach of fiduciary duty by Jurdem defendants in the period prior to March 20, 2003 guaranteed success. For this reason alone the summary judgment must be granted in favor of EVFPC as a matter of law. Rubinberg v Walker, 252 AD2d 466, 467; 676

N.Y.S.2d 149 [1st Dept 1998] (where it is clear that the attorney exercised his or her judgment reasonably as to how to proceed, summary judgment should be granted dismissing the action).

Even assuming, for the sake of the argument, that EVFPC's litigation strategy was so unreasonable that it demonstrated professional negligence, plaintiff still fails to raise a material issue of fact concerning the proximate cause of his alleged injury. It is undisputed that plaintiff's successor counsel, Jan Meyer, has withdrawn the claims of conversion and breach of the Amory Contract against the Jurdem defendants. It is uncontroverted that the same counsel failed to timely file the entry of default judgment against the major tortfeasor, Jan Amory. The decision to settle rather than proceed to trial was also taken by Jan Meyer. At that point there were several viable causes of action available to plaintiff. The decisions to withdraw some causes of action and to forego trial could themselves be a reasonable strategy of the successor attorney, but they were an intervening event leading to the ultimate result of the case.

Plaintiff insists that EVFPC motion for summary judgment has a fatal defect – the absence of an expert opinion establishing that plaintiff is unable to prove at least one of the essential elements of his case. The issue in the present case was the reasonableness of defendants' course of action in the underlying suit. Courts do not rely on an expert testimony of an attorney to establish whether the strategy and performance of another attorney is competent. Essentially, it is a legal opinion as to what performance constitutes legal malpractice – an issue properly for the court. Russo v Feder, Kaszovitz, Isaacson, Weber, Skala & Bass, LLP, 301 AD2d 63, 68-69; 750 N.Y.S.2d 277 [1st Dept 2002].

Plaintiff's argument that summary judgment is premature at this junction is undermined by his own failure to conduct discovery. Both defendants, EVFPC and Rubin and Bailin LLP, documented their efforts to get a response from plaintiff to their discovery requests and to

arrange a scheduled deposition of Frank Boye. Plaintiff, in his turn, has not submitted a single discovery demand on defendants, despite a clear timetable for such submission in the preliminary conference order. In his opposition to the motion for summary judgment, plaintiff contends that the crucial information is in the exclusive possession of defendants, and thus he should be entitled to it, in accordance with CPLR 3212(f). Plaintiff seeks, on his timetable, information related to work conducted by defendants prior to filing the federal suit. Some of this information, such as billing records, is already in his possession. As to other information sought, such as correspondence concerning defendants' investigation of underlying claims or invoices for investigation and reproduction of art materials, plaintiff did not demonstrate that this information would be relevant to the issues raised in the present motion.

The cause of action for professional malpractice against defendant EVFPC is dismissed.

Breach of fiduciary duty

Plaintiff has not opposed this part of EVFPC's motion. The cause of action for breach of fiduciary duty is duplicative of the professional malpractice claim, being based on the same set of circumstances and requesting the same relief. Waggoner v Caruso, 68 AD3d 1, 6; 886 N.Y.S.2d 368 [1st Dept 2009]; Turk v Angel, 293 AD2d 284; 740 N.Y.S.2d 50 [1st Dept 2002] It is therefore dismissed as well.

Request for sanctions

EVFPC applied for sanctions against plaintiff Boye in a previous motion to dismiss the action. It argued that the suit utterly lacks in merit, and that plaintiff failed to conduct a minimal investigation even to determine the proper parties to sue. In particular, plaintiff should have known who withdrew the conversion and breach of contract claim in the underlying action, and not based its malpractice claim on actions wrongly attributed to defendants. This court agreed

with such assessment, but refused to punish this conduct with sanctions. EVFPC interpreted this decision as inviting it to resubmit the application at a summary judgment stage. The present application for sanctions is based mainly on the same grounds, though EVFPC added some strong language accusing plaintiff's attorney of lying about the conduct of discovery. The court is not impressed with the performance of the plaintiff's attorney, but nevertheless refuses to sanction him or plaintiff pursuant to 22 NYCRR §130-1.1.

CONCLUSION

For the foregoing reasons, it is

ORDERED that the motion of defendant Eric Vaugh-Flam P.C. for summary judgment dismissing the action against it is granted with costs and disbursements as taxed by the Clerk of the Court; and it is further

ORDERED that the motion for sanctions against plaintiff and his counsel is denied; and it is further

ORDERED that the remainder of the action shall continue.

Dated: 7/20/12

FILED

JUL 24 2012

NEW YORK
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ENTER:

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J.S.C.

LOUIS B. YORK
J.S.C.