

Habib v Gleason & Koatz, LLP
2012 NY Slip Op 33371(U)
July 2, 2012
Supreme Court, New York County
Docket Number: 110233/2011
Judge: O. Peter Sherwood
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: O. PETER SHERWOOD
Justice

PART 49

JOELLE HABIB and PATRICIA BENHARBSON,

Plaintiffs,

-against-

GLEASON & KOATZ, LLP, JOHN GLEASON, ESQ.,
SIMON & PARTNERS LLP and BRADLEY D.
SIMON, ESQ.,

Defendants.

INDEX NO. 110233/2011

MOTION DATE June 26, 2012

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to ___ were read on this motion to dismiss action.

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

Table with 1 column: PAPERS NUMBERED

Cross-Motion: [] Yes [] No

Upon the foregoing papers, it is ordered that this motion to dismiss is decided in accordance with the accompanying decision and order.

Dated: July 2, 2012

O. Peter Sherwood signature
O. PETER SHERWOOD, J.S.C.

Check one: [] FINAL DISPOSITION [x] 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 49**

-----X
JOELLE HABIB and PATRICIA BENHARBSON,

Plaintiffs,

-against-

**GLEASON & KOATZ, LLP, JOHN GLEASON, ESQ.,
SIMON & PARTNERS LLP and BRADLEY D. SIMON, ESQ.,**

Defendants.
-----X

**DECISION AND
ORDER**

Index No. 110233/2011

O. PETER SHERWOOD, J.:

In motion sequence 001 defendants Gleason & Koatz, LLP (“Gleason Firm”) and John Gleason, Esq. (“Attorney Gleason”) move, pursuant to CPLR 3211(a)(1), CPLR 3211(a)(5), and CPLR 3211(a)(7), to dismiss in its entirety, the complaint brought against them by Plaintiffs, Joelle Habib (“Habib”) and Patricia Benharbson (“Benharbson”, collectively, “Plaintiffs”). In motion sequence 002, defendants Simon & Partners LLP and Bradley D. Simon, Esq. move for the same relief.

BACKGROUND

The complaint alleges in count one, legal malpractice; in count two, successor tortfeasor liability for injuries suffered by the Plaintiffs; and in count three against the Gleason Firm and Attorney Gleason, violation of Judiciary Law § 487. These claims are related to a separate action involving, non-party Societe de Banque Occidentale, whose assets were acquired by non-party CDR Creances (“CDR”) against the Plaintiffs and their former bosses, Maurice Cohen and his son, Leon Cohen (collectively, the “Cohens”). The Cohens were convicted of federal tax crimes and are currently serving time in federal prison.

In the separate lawsuit, Attorney Gleason represented Plaintiffs and the Cohens against CDR in connection to a claim that the Cohens converted business loan proceeds to themselves and their family. The Plaintiffs are sisters who were employed by the Cohens in France. The Cohens had arranged for a multi-million dollar loan from a french bank for the purpose of acquiring certain Manhattan real estate and converting it into a hotel. Plaintiffs allege the Cohens manipulated them into assuming various titles and positions in entities used by the Cohens to perpetuate a fraud.

Plaintiffs claim they had no corporate governance training, advanced education or any knowledge of the fraud. CDR has obtained multiple judgments in efforts to recover the money the Cohens misappropriated. Plaintiffs were also named as defendants in a CDR lawsuit, allegedly incurred significant expense as a result of the suit, and had a default judgment in excess of \$200 million entered against them. The default judgment was later vacated but Plaintiffs allege they incurred legal expenses in obtaining this relief.

Plaintiffs claim they were damaged as a result of their attorneys' malpractice. They allege that Attorney Gleason's failure as their attorney allowed the Cohens to control them and prevented them from providing truthful testimony in connection to the CDR lawsuit. The Plaintiffs also allege that Maurice Cohen repeatedly threatened that if they did not cooperate with him, he would stop paying their legal bills since he provided them with attorneys. Plaintiffs allege further that they have not met, spoken with or otherwise communicated directly with Attorney Gleason. Attorney Gleason, who was also representing Maurice Cohen, thus never told the Plaintiffs that they had a right to independent counsel. Habib alleges that in the CDR lawsuit, Attorney Gleason improperly waived her lack of personal jurisdiction defense and entered a general appearance in her name, despite Habib having never been served with a summons or complaint. CDR allegedly wanted to settle with the Plaintiffs in exchange for their cooperation in unearthing the Cohens' fraud but Attorney Gleason never alerted Plaintiffs to that fact.

The Cohens eventually terminated Attorney Gleason and hired Bradley D. Simon ("Attorney Simon") and his law firm, Simon & Partners LLP ("Simon Firm") to represent Plaintiffs. An agent of the Cohens, Allegría Aich, allegedly instructed the Plaintiffs not to tell Simon the true nature of the fraud and threatened that if they did not cooperate, Maurice Cohen would not pay Plaintiffs' legal fees. CDR allegedly approached Simon and communicated its willingness to settle with the Plaintiffs in exchange for cooperation against the Cohens, which was also never communicated to Plaintiffs. Plaintiffs claim this allowed the Cohens to continually coerce them into giving perjurious testimony in the CDR lawsuit. Therefore, Plaintiffs assert Simon is liable for damages incurred pursuant to the CDR lawsuit.

In the present action, defendants seek to dismiss all three causes of actions against them.

DISCUSSION

A. Standard CPLR § 3211 (a) (1)

To succeed on a motion to dismiss, pursuant to CPLR § 3211 (a) (1), the documentary evidence that forms the basis of a defense must resolve all factual issues and definitively dispose of the plaintiff's claims (*see, 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]; *Blonder & Co., Inc. v Citibank, N.A.*, 28 AD3d 180 [1st Dept 2006]). A motion to dismiss pursuant to CPLR § 3211 (a) (1) “may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law [citation omitted]” (*McCully v. Jersey Partners, Inc.*, 60 AD3d 562, 562 [1st Dept. 2009]).

CPLR § 3211 (a) (1) does not explicitly define “documentary evidence.” As used in this statutory provision, “‘documentary evidence’ is a ‘fuzzy term’, and what is documentary evidence for one purpose, might not be documentary evidence for another” (*see Fontanetta v John Doe 1*, 73 AD3d 78, 84 [2d Dept 2010]). “[T]o be considered ‘documentary,’ evidence must be unambiguous and of undisputed authenticity” (*id.* at 86, citing Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR 3211:10, at 21-22). Typically that means judicial records such as judgments and orders, as well as documents reflecting out-of-court transactions such as contracts, releases, deeds, wills, mortgages and any other papers, “the contents of which are ‘essentially undeniable’” (*id.* at 84-85). On the other hand, courts have held that letters, affidavits and deposition testimony, which may be considered “documentary” in other contexts, do not constitute documentary evidence within the intended scope of CPLR § 3211 (a) (1) (*Fontanetta*, 73 AD3d at 86; *see also Integrated Construction Servs. v Scottsdale Ins. Co.*, 82 AD3d 1160, 1163 [2d Dept 2011]; *Granada Condominium III Assoc. v Palomino*, 78 AD3d 996, 997 [2d Dept 2010]). Nor may e-mails, which are not otherwise admissible, or any other items of proof that raise issues of credibility that are for the jury to decide, serve as documentary evidence (*see Advanced Global Technology, LLC v Sirius Satellite Radio, Inc.*, 44 AD3d 317, 318 [1st Dept 2007]; *Weil, Gotschal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267, 271 [1st Dept 2004]; *see also Fontanetta*, 73 AD3d *supra* at 85).

B. Standard CPLR § 3211 (a) (5)

A defendant who seeks to dismiss a cause of action pursuant to CPLR § 3211 (a) (5) on the ground that it is barred by the statute of limitations bears the initial burden of proving, *prima facie*,

that the time in which to sue has expired. (*See, Gravel v. Cicola*, 297 AD2d 620 [2d Dept 2002]; *Duran v. Mendez*, 277 AD2d 348 [2d Dept 2000]). If the defendant satisfies this initial burden by demonstrating that the alleged legal malpractice occurred, the burden then shifts to the plaintiff to aver evidentiary facts establishing that the cause of action falls within an exception to the statute of limitations, or to raise an issue of fact as to whether the limitations period or such exception has expired (*see Kennedy v. Fischer*, 78 AD3d 1016 [2d Dept 2010]; and *Gravel*, 297 AD2d at 620).

C. Standard CPLR § 3211 (a) (7)

On a motion to dismiss a plaintiff's claim pursuant to CPLR § 3211 (a) (7) for failure to state a cause of action, the court is not called upon to determine the truth of the allegations (*see, Campaign for Fiscal Equity v State*, 86 NY2d 307, 317 [1995]; *219 Broadway Corp. v Alexander's, Inc.*, 46 NY2d 506, 509 [1979]). Rather, the court is required to "afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference [citation omitted]. Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). The court's role is limited to determining whether the pleading states a cause of action, not whether there is evidentiary support to establish a meritorious cause of action (*see, Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *Sokol v Leader*, 74 AD3d 1180 [2d Dept 2010]).

While affidavits may be considered on a motion to dismiss for failure to state a cause of action, unless the motion is converted to a 3212 motion for summary judgment the court will not consider them for the purpose of determining whether there is evidentiary support for properly pleaded claims, but, instead, will accept such submissions from a plaintiff for the limited purpose of remedying pleading defects in the complaint (*see Nonnon v City of New York*, 9 NY3d 825, 827 [2007]; *Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-636 [1976]). Affidavits submitted by a defendant will almost never warrant dismissal under CPLR 3211 "unless they 'establish conclusively that [plaintiff] has no * * * cause of action'" (*Lawrence v Miller*, 11 NY3d 588, 595 [2008], citing *Rovello v Orofino Realty Co.*, 40 NY2d *supra* at 636). In this posture, the lack of an affidavit by someone with knowledge of the facts will not necessarily serve as a basis for denial of a motion to dismiss.

D. Legal Malpractice Claim Against All Defendants

In order to proceed with an action for legal malpractice, a plaintiff must establish all four of the following: 1) the existence of an attorney-client relationship; 2) negligence on the part of the attorney or some other conduct in breach of that relationship; 3) a showing that the attorney's conduct was the proximate cause of the injury to the plaintiff; and 4) actual and ascertainable damages suffered by plaintiff (*see Carmel v. Lunney*, 70 NY2d 169 [1987]). Additionally, an attorney is liable for malpractice only if it is proven that his or her conduct fell below the ordinary and reasonable skill and knowledge commonly possessed by a member of the profession (*see Bernstein v. Oppenheim & Co., P.C.*, 160 AD2d 428, 430 [1st Dept 1990]).

It is not disputed that Plaintiffs had an attorney-client relationship with all defendants.

As to attorney negligence, the complaint alleges that Attorney Gleason incorrectly waived Habib's lack of personal jurisdiction defense without her knowledge or permission. Additionally, he did not communicate to Plaintiffs his conflict of interest arising from concurrent representation of the Cohens and he failed to inquire if Plaintiffs wanted independent counsel because of the conflict. As to Attorney Simon, the complaint alleges that he acted negligently by failing to pursue an opportunity to settle the case when he first learned of CDR's settlement overtures. It is alleged that an attorney representing CDR approached Attorney Simon and communicated CDR's willingness to settle with Habib and Benharbson in exchange for their cooperation against the Cohens. This was never pursued, nor was it ever discussed with Plaintiffs, it is alleged. These allegations are sufficient to support the second element of Plaintiffs' legal malpractice claim.

Plaintiffs must also sufficiently allege proximate cause in their complaint, that "but for" their counsels' deficient representation, there would have been a more favorable outcome to the underlying matter or some provable damages would not have been sustained. (*Franklin v. Winard*, 199 AD2D 220, 221 [1st Dept 1993]). Plaintiffs allege specific examples of deficient representation, which deficiencies they contend were a proximate cause of Plaintiffs' damages. Plaintiffs allege that the aforementioned negligent actions of their lawyers resulted in the CDR lawsuit needlessly continuing as to them when there were opportunities to settle. Further, Plaintiffs' assert their interests would likely have been pursued more favorably had they been represented by non-conflicted counsel. Habib also claims that she would have been dismissed from the case entirely based on the

personal jurisdiction argument that Attorney Gleason never raised. These allegations are adequate to support the proximate cause element of Plaintiffs' claim.

Lastly, damages recoverable in a legal malpractice action include any loss “[w]ithin the range of probable contemplation.” (*Trimboli v. Kinkel*, 226 NY 147 [1919]). The damages must be “[a]ctual and ascertainable damages, and must not be “too speculative and incapable of being proven with reasonable certainty.” (*Zarin v. Reid & Priest*, 184 AD2d 385, 387 [1st Dept 1992]). In this case, the \$250 million default judgment was never entered, and thus Plaintiffs cannot claim damages in that regard. However, Plaintiffs claim damages in the form of \$100,000 in attorney fees incurred as well as travel expenses relating to the threat of federal prosecution which they claim were avoidable had they been aware that CDR wanted to settle. Plaintiffs acknowledge that CDR paid the costs of cooperating with the investigation but assert that CDR did not pay lodging and other expenses related to the litigation.¹ Plaintiffs have sufficiently alleged in their complaint that they incurred damages. Though the Defendants dispute these damages, the court is only required to determine whether the pleading states a cause of action, not whether there is evidentiary support to establish a meritorious cause of action. (*see, Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *Sokol v Leader*, 74 AD3d 1180 [2d Dept 2010]). The exact amount of these damages need not be resolved on motion to dismiss; it is sufficient to allege facts from which damages attributable to defendant's conduct may reasonably be inferred. (*InKine Pharmaceutical Co, Inc. V. Coleman*, 305 Ad2d 151[1st Dept 2003]). Whether Attorney Gleason or Attorney Simon are liable separately or jointly for damages Plaintiffs may have incurred is to be determined after the pleading stage. (*Somma v. Dansker & Aspromonte Associates*, 44 AD3d 376, 843 NYS2d 577 [1st Dept 2007]).

Plaintiffs also allege they suffered damages for severe emotional distress incurred as a result of the alleged deficient representation. This aspect of the claim should be dismissed. Any damages, other than pecuniary damages, that result from an attorney's malpractice will not be awarded (*Wolkstein v. Morgenstern*, 275 AD2d 635, 713 NYS2d 171 [1st Dept 2001]) [“A cause of action for

¹Whether defendants are entitled to avoid responding in damages for an injury they caused because those damages were assumed by a non-party volunteer, is not before the court on this motion. (*See, e.g. NYP Holding v. McClier Corp.*, 65 AD3d 168 [1st Dept 2009]).

legal malpractice does not afford recovery for any item of damages other than pecuniary loss so there can be no recovery for emotional or psychological injury.”].

E. The Statute of Limitation Defense

Attorney Gleason argues that the malpractice claim is time-barred. Attorney malpractice actions must be brought within three years of the alleged malpractice. (CPLR 214 (6); *Shumsky v. Eisenstein*, 96 NY2d 164, 726 NYS2d 365 [2001]). However, only when an attorney’s representation is terminated in its entirety does the statute of limitations begin to run (*see Glamm v. Allen*, 43 NY2d 268 [1982]).

Attorney Gleason argues that his representation of Plaintiffs concluded on August 19, 2008. As proof, he has submitted a Notice of Substitution of Counsel signed by the Cohens. The notice is not signed by the Plaintiffs and it makes no mention that Attorney Gleason was no longer representing the Plaintiffs. This action was commenced on September 8, 2011. Plaintiffs’ malpractice claim would normally be time-barred if the attorney-client relationship had ended on August 19, 2008, but it did not.

CPLR 321 (b) (1) states, “[a]n attorney of record may be changed by filing with the clerk a consent to the change signed by the retiring attorney and signed and acknowledged by the party.” No consent to change attorney notice was signed and acknowledged by either Habib or Benharbson. No such notice is entered in the records of the court clerk. Pursuant to CPLR 321 (b) (2), an attorney of record may withdraw or be changed by order of the court in which the action is pending upon motion. No motion to withdraw was ever filed.

Accordingly, the claims against Gleason cannot be dismissed as time-barred at this stage. Attorney Gleason has not carried his burden of showing that his representation of Plaintiff terminated more than three years prior to commence of this action.

II. Plaintiffs’ Successor Tort Claim Against Simon

Plaintiffs allege a cause of action for successor tort liability against all defendants. Plaintiffs claim that, but for defendants’ negligence, they would not have been exposed to tortious acts committed by the Cohens, and suffered emotional distress. At oral argument, Plaintiffs’ counsel acknowledged that he has been unable to find any legal support for or against this novel theory. The facts in this case do not present an occasion to chart the new course Plaintiffs seek.

Plaintiffs' tort claim, if it exists, arise from the same facts on which the attorney malpractice claims are based and are also duplicative of those claims. This cause of action must be dismissed as duplicative of the malpractice claim (*see Amodeo v. Kolodny, P.C.*, 35 AD3d 773 [2d Dept 2006] [dismissing as duplicative a claim which arose from attorney malpractice]).

III. The Judiciary Law § 487 claim against Attorney Gleason

The third cause of action based on alleged violation of Judiciary Law § 487 applies to Attorney Gleason only. Judiciary Law § 487 provides that any attorney or counselor who is “guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party...[i]s guilty of a misdemeanor, and in addition to the punishment prescribed therefore by the penal law, he forfeits to the party injured treble damages, to be recovered in a civil action.” Plaintiffs allege that Attorney Gleason violated Judiciary Law § 487 because he engaged in a chronic, and extreme pattern of legal delinquency (*Wiggin v. Gordon*, 115 Misc 2d 1071 [Civ Ct, NY County, 1982]). Plaintiffs claim that Attorney Gleason never alerted them that they were entitled to independent counsel, despite many opportunities to do so. Additionally, Plaintiffs allege that because Attorney Gleason was also representing the Cohens' interest, he never notified them about the opportunity to settle and also waived Habib's lack of personal jurisdiction claim. Plaintiffs argue that Attorney Gleason's behavior was chronic and manifests an extreme pattern of legal delinquency. As set for in CPLR § 3211, the role of the court on a motion dismiss is not to determine the truth of the allegations. Instead, it must accept the allegations of the complaint as true. Since there are allegations in the complaint sufficient to state a cause of action based on violation of Judiciary Law § 487, the claim should not be dismissed.

Attorney Gleason also seeks to dismiss the §487 claim as time-barred. This defense must be rejected for the same reasons it was rejected as to the legal malpractice claim.

Accordingly, it is hereby

ORDERED that the motions of defendants to dismiss the complaint (motion sequences 001 and 002) are **DENIED** except that the second cause of action for successor tortfeasor shall be dismissed; and it is further

ORDERED that Defendants shall serve and file their answers on or before, August 10, 2012; and it is further

ORDERED that counsel shall appear for a preliminary conference on Wednesday, September 19, 2012 at 9:30 AM, in Part 49, Courtroom 252, 60 Centre Street, New York, New York.

This shall constitute the decision and order of the Court.

DATED: July 2, 2012

ENTER,

O. PETER SHERWOOD
J.S.C.