

O'Callaghan v Goodman
2012 NY Slip Op 33415(U)
August 17, 2012
Sup Ct, New York County
Docket Number: 108764/11
Judge: Richard F. Braun
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. RICHARD F. BRAUN
J.S.C. Justice

PART 23

Index Number : 108746/2011
O'CALLAGHAN, JAMES
VS.
GOODMAN, ANDREW
SEQUENCE NUMBER : 001
DISMISS

INDEX NO. _____
MOTION DATE 7/26/12
MOTION SEQ. NO. _____

The following papers, numbered 1 to 3, were read on this motion to dismiss plaintiff's complaint

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1
Answering Affidavits — Exhibits _____ | No(s). 2
Replying Affidavits _____ | No(s). 3

Upon the foregoing papers, it is ordered that this motion is granted to the extent of
dismiss[ing] plaintiff's complaint, with prejudice, and it is
further
ORDERED that the Clerk shall enter judgment
accordingly.
This constitutes the decision and order of the
Court. See separate Opinion.

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

FILED

AUG 23 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: New York, New York, August 16, 2012

ENTERED RFB, J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 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

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 23**

----- X
JAMES O'CALLAGHAN

Index No. 108746/11

Plaintiff(s)

OPINION

-against-

FILED

ANDREW GOODMAN
of
GARVEY SCHUBERT BARBER

AUG 23 2012

Defendant(s)

NEW YORK
COUNTY CLERK'S OFFICE

----- X

RICHARD F. BRAUN, J.:

In his complaint, pro se plaintiff alleges that defendant Andrew Goodman (Goodman) committed legal malpractice while representing plaintiff on an appeal to the United States Securities and Exchange Commission (SEC) from a New York Stock Exchange (NYSE) hearing panel determination that plaintiff had engaged in improper stock trading on the Exchange floor. Plaintiff alleges that Goodman never read the minutes of the NYSE hearing and that, had he done so, plaintiff would still be a NYSE member. Plaintiff further asserts that on the appeal Goodman never detailed anything in plaintiff's favor. Plaintiff states that Goodman's briefs on the appeal failed to expose false witness testimony or to provide the SEC with information that a compliance officer, Alan Lederfriend, was himself under investigation. Plaintiff alleges that defendant never delivered what plaintiff paid for, which resulted in plaintiff's being damaged in the amount of \$20 million due to the permanent loss of his NYSE membership. Plaintiff also seemingly pleads a conclusory breach of contract claim against Goodman.

Goodman moves, pursuant to CPLR 3211 (a) (1) and (7), to dismiss the complaint. On a motion pursuant to CPLR 3211 (a) (1) and (7), a complaint must be liberally construed, the factual

allegations therein must be accepted as true, the plaintiff must be given the benefit of all favorable inferences therefrom, and the court must decide only whether the facts alleged fall under any recognized legal theory (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]; *Wiener v Lazard Freres & Co.*, 241 AD2d 114, 120 [1st Dept 1998]; see *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]; *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *DeMicco Bros., Inc. v Consolidated Edison Co. of N.Y., Inc.*, 8 AD3d 99, 99-100 [1st Dept 2004]). “Factual allegations presumed to be true on a motion pursuant to CPLR 3211 may properly be negated by affidavits and documentary evidence (citation omitted).” (*Wilhelmina Models, Inc. v Fleisher*, 19 AD3d 267, 269 [1st Dept 2005].) To succeed on a CPLR 3211 (a) (1) motion to dismiss, the documents upon which the movant relies must definitively dispose of the cause(s) of action of the opposing party (see *AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 590-591 [2005]; *Scott v Bell Atl. Corp.*, 282 AD2d 180, 183 [1st Dept 2001]; *Fischbach & Moore v Howell Co.*, 240 AD2d 157 [1st Dept 1997]).


Goodman has shown through comprehensive documentary evidence that the complaint should be dismissed as a matter of law (see *O’Callaghan v Brunelle*, 84 AD3d 581, 581-582 [1st Dept 2011], *lv denied* 18 NY3d 804 [2012]). Furthermore, the complaint fails to state a cause of action for legal malpractice (*id.* at 582; see *Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438, 442 [2007]).

Plaintiff uses the term breach of contract in the complaint, but the gravamen of his complaint and affidavit assertions are grounded in legal malpractice, not contract. To the extent that plaintiff seeks to recover under both a legal malpractice and a breach of contract cause of action, his claim for breach of contract should be dismissed as duplicative, because it arises from the same facts as

the legal malpractice claim and does not seek different damages (*Bernard v Proskauer Rose, LLP*, 87 AD3d 412, 416 [1st Dept 2011]; *Schulte Roth & Zable LLP v Kassover*, 80 AD3d 500, 501 [1st Dept 2011]).

Therefore, by this court's August 16, 2012 decision and order, the complaint in this action has been dismissed. Because the documentary evidence submitted by Goodman definitively disposed of the allegations of the complaint, the dismissal was with prejudice.

Dated: New York, New York
August 17, 2012



RICHARD F. BRAUN, J.S.C.

FILED
AUG 23 2012
NEW YORK
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