

Schiller v Bender, Burrows & Rosenthal, LLP

2012 NY Slip Op 33571 (U)

April 26, 2012

Supreme Court, Westchester County

Docket Number: 50400/2011

Judge: Orazio R. Bellantoni

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

P R E S E N T:

HON. ORAZIO R. BELLANTONI
JUSTICE OF THE SUPREME COURT

GERARD M. SCHILLER, M.D.,

Plaintiff,

- against -

SHORT FORM ORDER

Index No. 50400/11
Motion Date: 4/4/12

BENDER, BURROWS and ROSENTHAL, LLP,
BENDER, ROSENTHAL, ISAACS & RICHTER,
LLP, SUSAN BENDER, ESQ., MICHAEL
ETZRODT, ESQ., ADVOCATE &
LICHTENSTEIN, LLP and JASON ADVOCATE,
ESQ.,

Defendants.

Defendants Advocate & Lichtenstein, LLP and Jason A. Advocate (collectively Advocate) move for an order, pursuant to CPLR 3211(a)(1) and CPLR 3211(a)(7), dismissing plaintiff's complaint. Defendants Bender, Burrows and Rosenthal, LLP, Bender Rosenthal Isaacs & Richter, LLP, Susan Bender, Esq. and Michael Etzrodt, Esq. (Collectively BBR) also move for an order, pursuant to CPLR 3211(a)(1) and CPLR 3211(a)(7), dismissing plaintiff's complaint.

The following papers were read:

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Upon the foregoing papers the motions are decided as follows:

By way of background, this is a legal malpractice action arising out of an underlying matrimonial action which was commenced in 2006 entitled *Debra Guthrie v. Gerald Schiller*, Supreme Court of the State of New York, County of Westchester, Index No. 17088/2009 and out of an underlying tort action entitled *Schiller v. Guthrie*, Supreme Court of the State of New York, County of Westchester, Index No. 24366/2007. Plaintiff's complaint alleges six causes of action: (1) a violation of Judiciary Law §487 for deceit; (2) a violation of Judiciary Law §487 for chronic, extreme patterns of legal delinquency; (3) violation of General Business Law §349; (4) legal malpractice; (5) breach of fiduciary duty; and (6) breach of contract.

Initially, this Court notes that dismissal is warranted under CPLR 3211(a)(1) only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law (*see Leon v. Martinez*, 84 NY2d 83 [1994]). Further, on a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the standard is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action (*see Guggenheimer v. Ginzburg*, 43 NY2d 268 [1977]). In considering such a motion, the court must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*see Nonnon v. City of New York*, 9 NY3d 825 [2007]). Whether a plaintiff can ultimately establish its allegations is not part of the calculus (*see EBC I v. Goldman, Sachs & Co.*, 5 NY3d 11 [2005]).

Plaintiff's first and second causes of action allege violations of Judiciary Law 487. A violation of Judiciary Law § 487 may be established "either by the defendant's alleged deceit or by an alleged chronic, extreme pattern of legal delinquency by the defendant (*see Boglia v Greenberg*, 63 A.D.3d 973 [2nd Dept 2009]). Here the complaint as plead fails to state any specific facts sufficient to establish that the defendants had the intent to deceive the court or any party and also fails to state with specificity any facts showing that defendants willfully delayed the underlying actions with a view to their own gain (*see Fleyshman v. Suckle & Schlesinger, PLLC*, 91 AD3d 591 [2nd Dept 2012]; *Bernstein v.*

Oppenheim & Co., P.C., 160 AD2d 428 [1st Dept 1990]).

Plaintiff's third cause of action alleges that defendants violated New York General Business Law §349. The elements of a cause of action under New York General Business Law §349 are: (1) a deceptive consumer-oriented act or practice which is misleading in a material respect, and (2) injury from such act (*see Andre Strishak & Associates, P.C. v. Hewlett Packard Co.*, 300 AD2d 608 [2nd Dept 2002]). Parties claiming the benefit of General Business Law §349 must allege that the conduct is consumer oriented, it need not be repetitive, but must have a broad impact on consumers at large (*see New York University v. Continental Ins. Co.*, 87 NY2d 308 [1995]). Defendants' motions to dismiss this cause of action must be granted, the dispute herein solely effects the within parties and is not conduct which affects the consuming public at large (*see New York University v. Continental Ins. Co.*, 87 NY2d 308 [1995]; *Korn v. First UNUM Life Ins. Co.*, 277 AD2d 355 [2nd Dept 2000]).

Plaintiff's fourth cause of action alleges legal malpractice. To prevail in an action to recover damages for legal malpractice, a plaintiff must demonstrate that the attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession and that the attorneys breach of this duty proximately caused the plaintiff to sustain actual and ascertainable damages (*see Hashmi v. Messiha*, 65 AD3d 1193 [2nd Dept 2009]). Conclusory allegations of damages or injuries predicated on speculation cannot suffice for a malpractice action (*see Wald v. Berwitz*, 62 AD3d 786 [2nd Dept 2009]). Dismissal is warranted where the allegations in the complaint are merely conclusory and speculative (*see generally Riback v. Margulis*, 43 AD3d 1023 [2nd Dept 2007]). The fact that the plaintiff subsequently was unhappy with the settlement obtained by the defendants does not rise to the level of legal malpractice (*see Holschauer v. Fisher*, 5 AD3d 553 [2nd Dept 2004]). Nor does the selection of one of among several reasonable courses of action taken by the defendants (*id.*). Dismissal of the legal malpractice claim pursuant to CPLR 3211(a) (1) and CLR 3211(a)(7) is appropriate as plaintiff was sworn in and allocated on the record, that he understood the terms of the settlement, he had no further questions to pose to the Court, nor was he coerced into the settlement and that he further stated that he was satisfied with the legal representation given to him by the defendants (*see BBR Exhibit "M"*). Accordingly the fourth cause of action must be dismissed (*see Holschauer v. Fisher*, 5 AD3d 553 [2nd Dept 2004]).

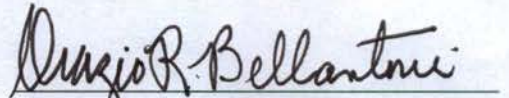
The fifth cause of action seeks to recover based upon defendants alleged breach of a fiduciary duty. In order to establish a breach of fiduciary duty, plaintiff must prove the existence of a fiduciary relationship, misconduct by the defendants, and damages directly caused by the defendants' misconduct (*see Kurtzman v. Bergstol*, 40 AD3d 588 [2nd Dept 2007]). Here, the fifth the cause of action arises from the same facts as the legal

malpractice cause of action, does not allege distinct damages and is thus, duplicative of the legal malpractice cause of action and must be dismissed (*see Kvetnaya v. Tylo*, 49 AD3d 608 [2nd Dept 2008]).

Plaintiff's sixth cause of action seeks damages for breach of contract. Here the breach of contract cause of action, similar to the breach of fiduciary cause of action, is premised upon the alleged inadequacy of defendants' representation and wrongful advice. Accordingly, as this cause of action is merely duplicative of the malpractice cause of action, it must be dismissed as there is no allegation that the defendants promised to obtain specific results and failed to do so (*see Ferdinand v. Crecca & Blair*, 5 AD3d 538 [2nd Dept 2004]).

Based up the foregoing, defendants' motions are granted and plaintiff's complaint is dismissed. A copy of this decision and order is forwarded to the Settlement Conference Part and has been filed electronically.

Dated: April 26, 2012
White Plains, New York


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Justice of the Supreme Court

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