

Keness v Feldman, Kramer & Monaco, P.C.
2012 NY Slip Op 33709(U)
January 4, 2012
Supreme Court, Kings County
Docket Number: 23688/10
Judge: Bernadette Bayne
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At an IAS Term, Part 18 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, Brooklyn, New York, on the 4th day of January 2012.

P R E S E N T:

HON. BERNADETTE BAYNE

Justice.

NANCY KENESS,

Plaintiff,

- against -

FELDMAN, KRAMER & MONACO, P.C.,
CANDACE DELLAONA, HERB KRAMER
and ALFREIDA KENNY,

Defendants.

DECISION AND ORDER

Index No. 23688/10

<u>The following papers numbered 1 to 6 read on this motion:</u>	<u>Papers Numbered</u>
Notices of Motion/ Affidavits (Affirmations) Annexed _____	1, 4 _____
Affirmations in Opposition _____	2, 5 _____
Affirmation in Reply _____	3, 6 _____

In this action sounding in legal malpractice, defendants FELDMAN, KRAMER & MONACO, P.C., CANDACE DELLAONA, and HERB KRAMER, (hereinafter referred to as "defendants FELDMAN"), move this Court for an Order, pursuant to CPLR §3211 (a)(7), dismissing the plaintiffs' complaint in its entirety " for failure to state any cause of action as a

matter of law". Defendant ALFREIDA KENNY, (hereinafter referred to as "defendant KENNY), similarly moves this Court, via a separate motion, for an Order dismissing the plaintiff's complaint, in its entirety, pursuant to CPLR §3013 and CPLR §3211(a)7, based upon her contention that the complaint "fails to allege any specific wrongdoing attributable to" defendant KENNY and "fails to properly allege any cause of action".

Discussion

In considering the sufficiency of a pleading subject to a motion to dismiss for failure to state a cause of action, the Court must determine whether, accepting as true the factual averments of the complaint, the plaintiff can succeed on any reasonable view of the facts stated, and the Court is required to accord the plaintiff the benefit of all favorable inferences which may be drawn from the pleading, without expressing an opinion as to whether the plaintiff can ultimately establish the truth of the allegations before the trier of fact. *See Campaign for Fiscal Equity, Inc. v. State*, 86 N.Y.2d 307, 631 N.Y.S.2d 565, 655 N.E.2d 661, (1995). When a cause of action may be discerned, no matter how poorly stated, the complaint should not be dismissed for failure to state a cause of action. *L. Magarian & Co., Inc. v. Timberland Co.*, 245 A.D.2d 69, 665 N.Y.S.2d 413, (1st Dept., 1997). However, vague and conclusory allegations are insufficient to sustain a breach of contract cause of action. *Fowler v. American Lawyer Media, Inc.*, 306 A.D.2d 113, 761 N.Y.S.2d 176, (1st Dept., 2003).

A court may dismiss a complaint that fails to conform to the requirements that pleadings consist of plain and concise statements in consecutively numbered paragraphs, furnish sufficient particularity to give notice of the transactions, occurrences, or series of occurrences intended to be proved, and include material elements of each cause of action. A complaint may be dismissed

if it fails to include the material elements of each cause of action, as such a failure prejudices the defendant by rendering said defendant unable to prepare a defense. Further, a cause of action must fail where the complaint is devoid of factual allegations which sufficiently demonstrate a causal relationship between the purported conduct on the part of the defendants and the damages suffered by the plaintiff. CPLR §§3013, 3014.

Legal malpractice consists of the failure of an attorney to exercise that degree of skill commonly exercised by an ordinary member of the legal community, proximately resulting in damages to the client. Arnav Industries, Inc. Retirement Trust v. Brown, Raysman, Millstein, Felder & Steiner, L.L.P., 96 N.Y.2d 300, 727 N.Y.S.2d 688, 751 N.E.2d 936, (NYS Court of Appeals, 2001). The tripartite test governing the establishment of a prima facie case for legal malpractice includes sufficient allegations that the attorney was negligent, that the attorney's negligence was the proximate cause of the plaintiff's damages, and that the plaintiff suffered actual damages as a direct result of the attorney's actions. Tibodeau v. Abrahams, 260 A.D.2d 367, 687 N.Y.S.2d 696, (2nd Dept., 1999); Pirro & Monsell, P.C. v. Freddolino, 204 A.D.2d 613, 614 N.Y.S.2d 232 (2nd Dept., 1994).

A cause of action for legal malpractice may not be sustained where the plaintiff failed to show any damage or loss attributable to the alleged malpractice. A mere speculation of loss resulting from the attorney's alleged omissions is insufficient to sustain a prima facie case of legal malpractice. Giambrone v. Bank of New York, 253 A.D.2d 786, 677 N.Y.S.2d 608, (2nd Dept., 1998); Luniewski v. Zeitlin, 188 A.D.2d 642, 591 N.Y.S.2d 524, (2nd Dept., 1992); Brown v. Samalin & Bock, P.C., 168 A.D.2d 531, 563 N.Y.S.2d 426, (2nd Dept., 1990). Damages alleged by the plaintiff in a legal malpractice claim must be actual and ascertainable. Giambrone

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v. Bank of New York, supra.; Perkins v. Norwick, 257 A.D.2d 48, 693 N.Y.S.2d 1 (1st Dept., 1999).

The elements of a legal malpractice claim, arising out of the negligent conduct of litigation, are the existence of an attorney-client relationship, negligence on the part of the attorney or some other conduct in breach of that relationship, proof that the attorney's conduct was the proximate cause of the injury to the plaintiff, and proof that "but for" the alleged malpractice the plaintiff would have been successful in the underlying action. Hanlin v. Mitchelson, 794 F.2d 834, 5 Fed. R.Serv.3d 969, (U.S. Court of Appeals, 2nd Cir., 1986); Wald v. Berwitz, 62 A.D.3d 786, 880 N.Y.S. 2d 293, (2nd Dept., 2009).

In the context of the negligent giving of advice, the elements of a malpractice claim which must be adequately pled and proven, are that within the context of an attorney client relationship, the attorney negligently, gave improper advice, which was the proximate cause of the client doing things which he or she would not have otherwise done, and resulting in harm and damage to the client. Marks Polarized Corp. v. Solinger & Gordon, 124 Misc. 2d 266, 476 N.Y.S.2d 743, (Sup. Ct., 1984). However, a cause of action for malpractice for the negligent giving of advice may not be sustained where the plaintiff fails to show any damage or loss attributable to such alleged malpractice or where the advice is correct or accurate or is not unreasonable. Colleran v. Rockman, 275 A.D.2d 222, 712 N.Y.S.2d 108 (1st Dept., 2000); Cahill v. Ryan, 266 A.D.2d 75, 699 N.Y.S.2d 8 (1st Dept., 1999); Freese v. Schwartz, 203 A.D.2d 513, 611 N.Y.S.2d 37 (2nd Dept., 1994); Zeller v. Copps, 294 A.D.2d 683, 741 N.Y.S.2d 343 (3rd Dept., 2002); Tinter v. Rapaport, 253 A.D.2d 588, 677 N.Y.S.2d 325 (1st Dept., 1998); Weiler v. Kuba & Kuba, 251 A.D.2d 118, 674 N.Y.S.2d 322 (1st Dept., 1998).

A cause of action challenging the reasonableness and adequacy of advice given by an attorney to a client appears to fall more clearly within the classical definition of legal malpractice than breach of contract. However, an attorney is not an insurer or guarantor of his or her advice, since no attorney is bound to know all the law which the court may see fit to apply in the particular case. Keller v. Barry, 84 A.D.2d 575, 443 N.Y.S.2d 436 (2nd Dept., 1981).

A client's causes of action against a law firm, for breach of contract and for fraudulent misrepresentation of legal expertise, may properly be dismissed as duplicative of a cause of action for legal malpractice, where the contract claim did not involve a promise to achieve a specific result, and instead involved claims of failure to exercise due care or abide by professional standards that are also present in the malpractice action, and the same allegations of misrepresentation and nondisclosure are involved in both the malpractice and misrepresentation causes of action. Sage Realty Corp. v. Proskauer Rose LLP, 251 A.D.2d 35, 675 N.Y.S.2d 14 (1st Dept., 1998).

It is also well settled that an allowance of punitive damages is not warranted in a legal malpractice case, where the conduct does not transcend mere carelessness and no evidence is provided showing that the attorney's motive was malicious, intentional, or reckless. Stated differently, a defendant attorney in an action for legal malpractice is entitled to the dismissal of a claim for punitive damages, where the plaintiff did not allege facts demonstrating that the attorney's conduct was so outrageous as to evince a high degree of moral turpitude and such wanton dishonesty as to imply a criminal indifference to civil obligations. Robinson v. Way, 57 A.D.3d 872, 871 N.Y.S.2d 233, (2nd Dept., 2008); Cary v. Fisher, 101 A.D.2d 924, 475 N.Y.S.2d 628, (3rd Dept., 1984); Zarin v. Reid & Priest, 184 A.D.2d 385, 585 N.Y.S.2d 379, (1st Dept.,

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1992).

In this case, the Court finds that defendant KENNY has made a prima facie showing of entitlement to dismissal of the plaintiff's action in its entirety as against her, due to the fact that the complaint fails to either allege or state that any privity exists or existed between the plaintiff and defendant KENNY, in addition to the fact that the plaintiff's complaint contains no specific allegations of any kind directed at defendant KENNY. Based upon the foregoing, this Court is of the opinion that the plaintiff's complaint is not sufficiently particular so as to give either the Court or defendant KENNY notice of the transactions intended to be proved and the material elements of each cause of action. As such, the plaintiff's claims as against defendant KENNY are dismissed in their entirety. CPLR §3211(a)7; CPLR §3013.

With regard to the motion for dismissal made by defendants FELDMAN, the Court similarly finds that the verified complaint is devoid of factual allegations which sufficiently demonstrate a causal relationship between the purported conduct on the part of defendants FELDMAN and the damages that the plaintiff claims that she suffered. This being the case, each of the three causes of action asserted therein, in addition to the demand for punitive damages contained at the end of the second cause of action, must fail. *See Foley v. D'Agostino*, 21 A.D.2d 60, 248 N.Y.S.2d 121, (1st Dept., 1964).

The cause of action for legal malpractice fails to allege specific facts and detail to show that defendants FELDMAN acted negligently in the provision of legal representation, but rather contains only conclusory allegations and the Court finds that the plaintiff has failed to satisfactorily plead any actual or ascertainable damages as a result of the alleged malpractice of defendants FELDMAN.

The Court is also of the opinion that the plaintiff's causes of action for alleged breach of contract and breach of fiduciary duty, were insufficiently pleaded and are duplicative of the plaintiff's claim of legal malpractice. With regard to the plaintiff's cause of action alleging breach of fiduciary duty, the Court also notes that the complaint fails to satisfy the specificity requirements required by CPLR §3016(b). Finally, it should be noted that although not set forth as a separate cause of action, this Court finds that the plaintiff has failed to satisfactorily make a claim for entitlement to punitive damages, particularly in light of the fact that said damages are rarely, if ever, warranted as a result of claims sounding in legal malpractice.

Conclusion

Accordingly, it is

ORDERED, that the motion for dismissal of the plaintiff's complaint made by defendants FELDMAN, KRAMER & MONACO, P.C., CANDACE DELLACONA, and HERB KRAMER, is granted in its entirety; and it is further,

ORDERED, that defendant ALFREIDA KENNY's motion for dismissal of the plaintiff's complaint is granted in its entirety.

This constitutes the Decision and Order of the Court.

E N T E R


HON. BERNADETTE BAYNE

J. S. C.
BERNADETTE BAYNE
Supreme Court Justice