

**Law Offices of Bart J. Eagle PLLC v Spector**

2013 NY Slip Op 30029(U)

January 8, 2013

Sup Ct, NY County

Docket Number: 111626/11

Judge: Doris Ling-Cohan

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

PRESENT: DORIS LING COHAN  
J.S.C.

PART 36

Index Number : 111626/2011  
BART J. EAGLE PLLC  
vs  
SPECTOR, GILBERT  
Sequence Number : 002  
DISMISS

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for dismiss counterclaims

Notice of Motion/Order to Show Cause — Affidavits — Exhibits MEMO No(s). 1, 2

Answering Affidavits — Exhibits MEMO No(s). 3

Replying Affidavits MEMO No(s). 4

Upon the foregoing papers, it is ordered that this motion ~~is~~ by plaintiff to dismiss  
defendant's counterclaims is granted in accordance  
with the attached memorandum decision.

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

## FILED

JAN 09 2013

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 1/8/13

[Signature], J.S.C.

DORIS LING COHAN

- 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 36

-----x

LAW OFFICES OF BART J. EAGLE PLLC,

Plaintiff,

- against -

GILBERT SPECTOR and MYRA SPECTOR,

Defendants.

-----x

Index No. 111626/11

Motion Seq. No. 002

**FILED**

JAN 09 2013

NEW YORK  
COUNTY CLERK'S OFFICE

HON. DORIS LING-COHAN, J.:

Plaintiff, Law Offices of Bart J. Eagle PLLC, moves pursuant to CPLR 3211(a)(1), (5), and (7), to dismiss the amended counterclaims of defendants Gilbert Spector and Myra Spector (collectively, the "Spectors").

**BACKGROUND**

This is an action to recover legal fees. The Complaint includes the following factual allegations. Plaintiff performed legal services on behalf of the Spectors, pursuant to written retainer agreements. In particular, plaintiff represented the Spectors in three actions, *Hogil Pharm. Corp v Spector* (Sup Ct, Westchester County, Index No. 25128/06) (the "*Hogil Action*"), *Spector v Wendy* (Sup Ct, Westchester County, Index No. 23749/06) (the "*First Wendy Action*"), and *Spector v Wendy* (Sup Ct, Westchester County, Index No. 22199/07) (the "*Second Wendy Action*"). In the *Hogil Action*, plaintiff represented the interests of Gilbert Spector in Hogil Pharmaceuticals Corp. ("*Hogil*"), a company in which nonparty Diana Wendy or her husband, nonparty Howard Wendy, also had interests. The

complaint in the First *Wendy* Action sought contribution for Howard Wendy's proportionate share of a judgment against the Spectors for attorney's fees incurred in a prior action. The complaint in the Second *Wendy* Action alleged causes of action against both Diana and Howard Wendy for fraud and unjust enrichment in connection with the procurement of approximately \$1,000,000 in judgments against the Spectors.

Although plaintiff successfully secured the dismissal of the *Hogil* Action, its efforts in the two *Wendy* Actions resulted in unfavorable outcomes for defendants. Specifically, Supreme Court granted cross motions for summary judgment dismissing the First *Wendy* Action (Dec & Order, Not of Mot, Exh I), and the Appellate Division, Second Department affirmed (Dec & Order, Not of Mot, Exh J). In addition, in the Second *Wendy* action, the Supreme Court dismissed the first through fourth causes of action, and continued the fifth and sixth causes of action (Dec & Order, Not of Mot, Exh E). Thereafter, the Appellate Division, Second Department dismissed the fifth and sixth causes of action and the remainder of the complaint (Dec & Order, entered June 9, 2009, Not of Mot, Exh G).

The Westchester Supreme Court also granted plaintiff's application for leave to withdraw as counsel for defendants in the Second *Wendy* Action. In addition, the within parties entered into a written agreement wherein, among other things, plaintiff agreed to release its files pertaining to such matter and

defendants acknowledged that they owed plaintiff \$38,207.39 for legal services, disbursements, and expenses, as of April 30, 2009 (see Letter Agreement, Not of Mot, Exh A). The agreement also granted plaintiff a lien against any sums recovered by the Spectors in connection with the three actions.

Plaintiff made numerous demands for payment of the amount owed, plus interest, however, Defendants failed to make any payments and this action ensued.

The Complaint alleges causes of action for breach of the retainer agreement (first cause of action); reasonable value of services rendered (second cause of action); an account stated (third cause of action); breach of the parties' Letter Agreement (fourth cause of action); and specific performance of said agreement (fifth cause of action) (see Verified Complaint, Notice of Mot., Exh A).

Defendants answered, generally denying the allegations in the Complaint, asserting numerous affirmative defenses, and asserting counterclaims for legal malpractice and breach of contract (see Verified Answer and Counterclaim, Notice of Mot., Exh. B). Thereafter, defendants filed an amended answer further detailing the basis of their legal malpractice and breach of contract counterclaims. Defendants also seek judgment declaring that the plaintiffs' invoices for legal services rendered to defendants are unenforceable and that any amounts already paid to plaintiff must be returned to defendants (*id.*).

Plaintiff now moves to dismiss the amended counterclaims on various grounds, including failure to state a cause of action and the existence of documentary evidence to refute the counterclaims.

#### DISCUSSION

On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction (see CPLR 3026; *Leon v Martinez*, 84 NY2d 83, 87 [1994]). The Court must accept the facts alleged therein as true, accord the pleader the benefit of every favorable inference, and determine whether the facts as alleged fit within any cognizable legal theory (*Leon v Martinez, supra*).

Under CPLR 3211(a)(1), "dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claim as a matter of law" (*id.*). In asserting a motion under CPLR 3211(a)(7), however, the Court may freely consider affidavits submitted by the pleader to remedy any defects in the pleading, and "the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one" (*id.* at 88, quoting *Guggenheimer v Ginzburg*, 43 NY2d 268 [1977]).

As stated, defendants allege counterclaims for legal malpractice, breach of contract, declaratory judgment and equitable relief. Legal malpractice is defined as the failure by an attorney to exercise that degree of skill degree of care,

skill, and diligence commonly exercised by a member of the legal community (see *Franklin v Winard*, 199 AD2d 220, 221 [1<sup>st</sup> Dept 1993]). In order to state a cause of action for legal malpractice, the pleading must allege (1) that an attorney-client relationship existed between the parties; (2) that the defendant attorney breached the duty of care owed to the plaintiff client; and (3) that the plaintiff suffered actual and ascertainable damages as a result of the attorney's actions (see *Franklin v Winard*, 199 AD2d 220, 221 [1<sup>st</sup> Dept 1993]). Furthermore, to adequately allege proximate cause and actual damages, the pleading must set forth facts to show that the plaintiff would have obtained a favorable outcome but for the attorney's negligence (see *Zarin v Reid & Priest*, 184 AD2d 385, 386 [1<sup>st</sup> Dept 1992]). The test is whether a proper defense would have altered the result of the underlying action (*id.* at 386-387). The mere "selection of one among several reasonable courses of action does not constitute malpractice" (*id.* at 387). Moreover, errors in judgment do not rise to the level to constitute malpractice (*Rosner*, 65 NY2d at 738). Whether the pleading was sufficient to state a cause of action for legal malpractice is a question of law which could be determined on a motion to dismiss (*Rosner v Paley*, 65 NY2d 736, 738 [1985]).

Here, defendants allege that plaintiff committed legal malpractice by failing to provide adequate representation in the two *Wendy* Actions, and failing to commence a separate action to

recover Gilbert Spector's shares in an entity called Hogil Pharmaceuticals, Inc. and by erroneously characterizing debt in the underlying *Hogil* action. However, construing the factual allegations in the amended counterclaims liberally in light most favorable to defendants as this court must on a motion to dismiss, the facts as alleged are insufficient to support a claim for legal malpractice.

Defendants contend that Supreme Court dismissed the fraud claim in the Second *Wendy* Action, and the Appellate Division affirmed, because plaintiff failed to properly plead "justifiable reliance." Defendants also argue that plaintiff took no action to remedy the defect in the pleading, including filing motions to amend, reargue, renew, or reconsider, after the courts dismissed the fraud claim.

Contrary to defendants' position, the pleading in the Second *Wendy* Action expressly alleges that Myra Spector relied on certain false statements and representations in making payment of two judgments to Diana Wendy (Complaint, Not of Mot, Exh D, ¶¶ 96, 97). Furthermore, the courts determined that dismissal of the fraud claim was warranted, not merely based on the failure to allege "justifiable reliance," but because the factual allegations in the pleading do not establish that Diane Wendy made false representations or material omissions upon which the Wendys reasonably relied in paying the judgments (see Decisions, Not of Mot, Exh E, G). Moreover, the contention that plaintiff

failed to file certain motions after the court dismissed the Second *Wendy* Action reflects nothing more than an error in judgment, which do not give rise to a claim for legal malpractice (see *Rosner v Paley*, 65 NY2d 736, 738 [1985]).

Similarly, the assertions that plaintiff failed to highlight inconsistencies between statements in Diane Wendy's affidavit and her subsequent deposition testimony and failed to subsequently file an order to show cause to vacate a prior judgment after discovering the inconsistencies, do not rise to the level of malpractice (*id.*). In any event, documentary evidence conclusively establishes that the deposition testimony of Diana Wendy was taken on November 12, 2008, more than four months after the entry of Supreme Court's decision dismissing the Second *Wendy* Action (see Examination Before Trial of Diana Wendy, Not of Mot, Exh F; Notice of Entry of Dec, Not of Mot, Exh E).

Likewise, the assertions that plaintiff negligently filed a complaint in an action to recover post-judgment legal fees, failed to commence a separate action to recover defendants' shares in Hogil Pharmaceuticals, Inc., and failed to advise defendants not to proceed with the prior actions reflect only a selection of one among several reasonable courses of action, which does not constitute malpractice (see *Rosner*, 65 NY2d at 738).

Defendants' assertion that plaintiff erroneously characterized the underlying debt in the Second *Wendy* Action as

"forgiven" is refuted by the express language of the pleading (see Complaint, Not of Mot, Exh D, ¶55). The pleading alleges, upon information and belief, that the Obligation, Note and Guarantee were either owned by Howard Wendy or had already been cancelled, with the debt having been converted to equity by Howard Wendy and, thus, any obligation of the Spectors was no longer extant (*id.*). Paragraph 10 of the order confirming Hogil's Chapter 11 Plan of Reorganization affirms the cancellation of the underlying debt, stating:

Pursuant to Section 524 of the Bankruptcy Code, the entry of this Order (a) voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the Debtor with respect to any debt discharged hereunder; and (b) operates as an injunction against the commencement or continuation of any action, the employment of process, or any act, to collect, recover or offset any such debt as a personal liability of the Debtor

(Order, Not of Mot, Exh K, p. 10).

Thus, the branch of the motion that seeks to dismiss the counterclaim for legal malpractice is granted.

The branch of the motion that seeks to dismiss defendants' counterclaim for breach of contract is also granted. Defendants essentially allege that plaintiff breached the retainer agreement between the parties by failing to provide prudent and professional representation in the above actions, and submitting invoices for incompetent legal services. These allegations are duplicative of the legal malpractice claim since they arose from

the same facts and do not seek distinct and different damages (see *Ofman v Katz*, 89 AD3d 909, 911 [2d Dept 2011]).

Based on the foregoing, defendants' request for declaratory and equitable relief is also without merit and therefore dismissed.

Accordingly it is

ORDERED that plaintiff's motion to dismiss defendants' counterclaims is granted and, thus, the counterclaims of defendants Gilber Spector and Myra Spector are dismissed; and it is further

ORDERED that both sides shall expeditiously complete all discovery; and it is further

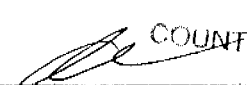
ORDERED that within 30 days of entry of this order, plaintiff shall serve a copy upon defendants, with notice of entry.

Dated: January 8, 2013

**FILED**

JAN 09 2013

NEW YORK  
COUNTY CLERK'S OFFICE

  
Doris Ling-Cohan, J. S. C.

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