Cusimano v Wilson, Elser, Moskowitz, Edelman & Dickler, LLP
2013 NY Slip Op 32148(U)
September 9, 2013
Supreme Court, New York County
Docket Number: 152754/2013
Judge: Cynthia Kern
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Kern CYNTHIA S. KERN J.S.C. PART 55
Justice

Cusimano, Rita

-v-

Wilson, Elser, Moskowitz, et al.

INDEX NO. 152754/13
MOTION DATE 000
MOTION SEQ. NO. 001

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

is decided in accordance with the annexed decision.

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

Dated: 9/9/13

CK CYNTHIA S. KERN, J.S.C.
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: Part 55

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RITA S. CUSIMANO,

Plaintiff,

-against-

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKLER, LLP and ED BOYLE,

Defendant.

----------x

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DECISION/ORDER

HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :_____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Answering Affidavits.....	2
Cross-Motion and Affidavits Annexed.....	
Answering Affidavits to Cross-Motion.....	
Replying Affidavits.....	
Exhibits.....	3

Plaintiff commenced the instant action alleging that defendants negligently represented her in an underlying arbitration. Defendants now move pursuant to CPLR § 3211(a)(1), (a)(5) and (a)(7) to dismiss plaintiff's complaint with prejudice on the grounds that: (1) the record from the underlying litigation unequivocally establishes that plaintiff's claim is without merit; (2) plaintiff is barred from asserting her claims by collateral estoppel; and (3) plaintiff's complaint fails to state a cause of action as a matter of law. For the reasons stated below, defendants' motion is granted.

The relevant facts are as follows. In April of 2010, plaintiff retained defendants Ed Boyle ("Ed Boyle") and Wilson, Elser, Moskowitz, Edelman & Dicker LLP ("Wilson Elser") to represent her interests in connection with a family asset. Thereafter, Boyle and Wilson Elser initiated a special proceeding on behalf of plaintiff against her sister in Supreme Court, Nassau County seeking dissolution of the Strianese Family Limited Partnership ("FLIP"). Bernard and Carmella Strianese, plaintiff's parents, intervened in the action for an accounting and dissolution, asserting that they remained the majority owners of the FLIP. They further asserted that the FLIP Agreement governed the dispute and as such was subject to arbitration. The Supreme Court, Nassau County permitted intervention by stipulation and order dated May 24, 2010, and granted interveners' motion to compel arbitration.

In December 2010, arbitration commenced before the American Arbitration Association (the "AAA"). The issue on arbitration was whether the parents transferred 100% of the FLIP to their daughters. During arbitration, plaintiff argued that her parents gifted full ownership of the FLIP to herself and her sister Bernadette and no longer owned any part of the FLIP. Specifically, plaintiff and her sister sought to invoke, *inter alia*, the doctrine of tax estoppel on the ground that the tax returns of the FLIP did not reflect her parents' ownership and as such her parents should be estopped from claiming ownership during arbitration. In opposition to this argument, plaintiff's parents offered evidence demonstrating that the FLIP's accountant and plaintiff's sister Bernadette were responsible for preparing the FLIP's tax returns from 2001 on and that those tax returns were signed by Bernadette, not Bernard. Bernadette herself testified that the 2001-2009 tax returns for the FLIP were signed by her in Bernard Stiranese's name. Only the FLIP's tax returns were offered into evidence.

On February 10, 2011, the AAA issued a decision and award, as modified, determining that the parents retained roughly 91% ownership in the FLIP, while plaintiff and her sister had amassed 4.5% ownership interests each (the "Award"). Specifically, the arbitration panel stated: "We did not find either [of respondent's] position[s] credible, nor the various tax and Florida filing documents they offered sufficient to equitably estop Claimants from asserting their rightful ownership interest or to legally effectuate a transfer."

Following the arbitration decision, plaintiff terminated her relationship with defendants Boyle and Wilson Elser and retained new counsel to continue litigating the matter. The Strianeses moved to confirm the Award and plaintiff and her sister cross-moved to vacate the Award on the ground that the arbitration panel should have applied the doctrine of tax estoppel to preclude the parents from asserting ownership in the FLIP. By decision dated August 10, 2011, the Supreme Court, Nassau County denied the cross-motion in its entirety and confirmed the Award (the "Supreme Court Decision"). Specifically, the court noted that as to the tax estoppel issue, the arbitrator could have denied the application of tax estoppel on any of the following grounds: (1) Bernadette and the FLIP's accountant's testimony confirming that Bernadette had provided all the information for and signed the FLIP's tax forms from 2001 through 2009; (2) the fact that the 1998 FLIP tax return, the last one signed by Bernard, reported 50% partnership shares for each of plaintiff's parents; and/or (3) the arbitrators could have believed that the partnership shares reported or the reported assets reflected error by the FLIP's accountant that were not known to either of plaintiff's parents. Additionally, in dicta, the court noted "neither is there an already established precedent that the application of tax estoppel is not subject to an arbitrator's independent judgment."

Thereafter, plaintiff appealed the Supreme Court Decision to the Appellate Division, Second Department. The Second Department affirmed the trial court's decision. Plaintiff then moved for reargument and/or for permission to appeal to the Court of Appeals. Reargument was denied. On appeal, the Court of Appeals denied in part and dismissed in part, finally disposing of plaintiff's underlying action.

On or about March 26, 2013, plaintiff commenced the instant action asserting a claim for malpractice against defendants based on their failure to introduce her parent's individual tax returns during arbitration, which she contends would have estopped her parents from asserting ownership of the FLIP as a matter of law during arbitration.

On a motion addressed to the sufficiency of the complaint, the facts pleaded are assumed to be true and accorded every favorable inference. *Morone v. Morone*, 50 N.Y.2d 481 (1980). "[A] complaint should not be dismissed on a pleading motion so long as, when plaintiff's allegations are given the benefit of every possible inference, a cause of action exists." *Rosen v. Raum*, 164 A.D.2d 809 (1st Dept 1990). However, "'[i]n those circumstances where the legal conclusions and factual allegations are flatly contradicted by documentary evidence they are not presumed to be true or accorded every favorable inference.'" *Morgenthow & Latham v. Bank of New York Company, Inc.*, 305 A.D.2d 74, 78 (1st Dept 2003) *(quoting Biondi v. Beekman Hill House Apt. Corp.*, 257 A.D.2d 76, 81 (1st Dept 1999), *aff'd*, N.Y.2d 659 (2000)). Additionally, "conclusory allegations–claims consisting of bare legal conclusions with no factual specificity–are insufficient to survive a motion to dismiss." *Godfrey v. Spano*, 13 N.Y.3d 358, 373 (2009).

In order to state a claim for legal malpractice, "the plaintiff must plead factual allegations

which, if proven at trial, would demonstrate that counsel had breached a duty owed to the client [i.e. acted negligently], that the breach was the proximate cause of the injuries, and that actual damages were sustained." *Dweck Law Firm, LLP v. Mann*, 283 A.D.2d 292, 293 (1st Dept 2001). Specifically, "in order to survive dismissal, the complaint must show that but for counsel's alleged malpractice, the plaintiff would not have sustained some actual ascertainable damages." *Pellegrino v. File*, 291 A.D.2d 60 (1st Dept 2002) (internal citations omitted). Stated another way, "the client must plead specific factual allegations establishing that but for counsel's deficient representation, there would have been a more favorable outcome to the underlying matter. *Dweck Law Firm, LLP* , 283 A.D.2d at 293. "Unsupported factual allegations, conclusory legal argument or allegations contradicted by documentation, do not suffice." *Id.*

In the present case, plaintiff cannot maintain a claim for legal malpractice against defendant as she cannot demonstrate that but for defendant's failure to introduce her parents' individual tax returns, she would have received a more favorable outcome in the underlying arbitration as a matter of law. "[T]he doctrine of tax estoppel precludes a party from asserting a position in litigation when that position is contrary to the position taken by the party in their tax returns." *Mahoney-Buntzman v. Buntzman*, 12 N.Y.3d 415, 422 (2009). However, whether or not to apply the doctrine of tax estoppel is within an arbitrator's discretion as "arbitrators are not bound by principles of substantive law or rules of evidence." *Lentine v. Fundaro*, 29 N.Y.2d 382, 385 (1972). Indeed, as the court noted in the Supreme Court Decision in this matter, there is not an "already established precedent that the application of tax estoppel is not subject to an arbitrator's independent judgment." Accordingly, plaintiff cannot demonstrate as a matter of law that the introduction of her parents' individual tax returns would have changed the outcome of

the arbitration. Instead, plaintiff's allegation that "[h]ad defendants obtained [the] individual returns and submitted them into evidence, the Strianees, as a matter of law, would have been estopped from claiming an ownership interest in the FLIP," is merely speculative, which is insufficient to sustain a claim for legal malpractice. Moreover, while not dispositive of the issue, the arbitration record suggests that plaintiff's tax estoppel argument based on her parents' individual tax returns would have suffered the same fate as the FLIP return as plaintiff's father testified during the arbitration that his daughter Bernadette was solely responsible for providing the accountant the information to prepare his individual tax returns as well.

Additionally, to the extent that plaintiff also argues in her opposition papers that defendant committed malpractice by failing to procure FLIP distribution checks from her sister, such contention is without merit. As an initial matter, plaintiff's complaint is devoid of any allegations relating to these checks. Additionally, it is not clear in what way these checks could serve to demonstrate malpractice by defendants.

Based on the foregoing, defendants' motion to dismiss is granted. The Clerk is directed to enter judgment accordingly. This constitutes the decision and order of the court.

Dated: 9/9/13

Enter: _____
J.S.C.

CYNTHIA S. KERN
J.S.C.