

**Cherry Hill Mkt. Corp. v Cozen O'Connor**

2013 NY Slip Op 33562(U)

April 22, 2013

Sup Ct, New York County

Docket Number: 154292/12

Judge: Melvin L. Schweitzer

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: MELVIN L. SCHWEITZER
Justice

PART 45

CHERRY HILL MARKET CORPORATION, et al

INDEX NO. 154292/12

-v-

COZEN O'CONNOR, et al

MOTION DATE

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 by defendants to dismiss the complaint is GRANTED without prejudice for the attached Decision and Order.

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

Dated: April 22, 2013

Melvin L. Schweitzer
MELVIN L. SCHWEITZER

- 1. CHECK ONE: CASE DISPOSED
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED
3. CHECK IF APPROPRIATE: SETTLE ORDER, DO NOT POST, FIDUCIARY APPOINTMENT, REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : PART 45

-----X	
CHERRY HILL MARKET CORPORATION and	:
DAVID ISAEV,	:
	:
Plaintiffs,	:
	:
-against-	:
	:
COZEN O'CONNOR and HOWARD B. HORNSTEIN	:
	:
Defendants.	:
-----X	

Index No. 154292/12  
DECISION AND ORDER  
Motion Sequence Nos. 001and 002

**MELVIN L. SCHWEITZER, J.:**

Defendants have moved to dismiss the complaint pursuant to CPLR 3211 (a) (7). For the reasons below, the motion is granted and plaintiff's claims are dismissed.

**Background**

In this case Cherry Hill Market Corporation and David Isaev (collectively Cherry Hill) bring suit against their previous legal counsel, Cozen O'Connor P.C., and the particular attorney who worked on their matters, Howard Hornstein. In 2009, Cherry Hill engaged the defendants to work on two matters, a zoning issue and a lawsuit in which Cherry Hill was the defendant (the *Utrobin* Action). Taking the allegations in the Complaint as true for the purposes of this motion, their subsequent dispute was as follows.

The defendants agreed in a letter to cap their fees for the zoning matter at \$150,000. However, the parties did not enter into any written agreement regarding fees for the *Utrobin* Action, nor did the defendants ever explain to Cherry Hill how fees would be computed and billed. Cherry Hill paid more than \$300,000 in legal fees to defendants. At Cozen O'Connor's

insistence, Cherry Hill paid approximately \$83,000 of this amount directly to Howard Hornstein, which Cozen O'Connor then did not acknowledge as paid in subsequent billing disputes.

Cherry Hill alleges that the defendants did not adequately perform the agreed work in the zoning matter. It alleges that defendants did not prepare for, and missed the deadline for, a summary judgment motion in the *Utrobin* Action. Defendants moved to withdraw from the *Utrobin* Action on the basis of unpaid legal fees. Defendants represented to the court that they had charged reasonable fees and that Cherry Hill had not disputed these charges when in fact Cherry Hill had repeatedly done so. On that basis, the motion was granted.

Cherry Hill makes several other factual allegations in its motion papers. These allegations will not be considered on the present motion, which evaluates the sufficiency of the Complaint.

### **Discussion**

New York Courts operate under a liberal regime of notice pleading. *See* CPLR 3013. In a motion to dismiss under CPLR 3211 (a), “the court will 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.” *Nonnon v City of New York*, 9 NY3d 825, 827 (2007) (internal quotation omitted). The plaintiff is not required to identify particular legal theories or causes of action, but only to give notice as to the transactions or occurrences involved and the material elements of its complaint.

#### **I. Breach of Duty Claims**

Cherry Hill has presented three causes of action for a breach of duty (breach of duty of adequate representation in the zoning matter; breach of duty of adequate representation in the *Utrobin* matter; and breach of ethical and fiduciary duties) and one for declaratory relief on the

question of fees owed. The first two claims are negligence claims, and all negligence claims in connection with the rendition of legal services should be analyzed as legal malpractice claims. *Ulico Cas. Co. v Wilson, Elser, Moskowitz, Edelman & Dicker*, 56 A.D.3d 1, 8–9 (1st Dept 2008) (“[A] complaint seeking damages alleged to have been sustained by a plaintiff in the course of [an attorney-client] relationship will often advance one or more causes of action based upon the attorney’s breach of some contractual or fiduciary duty owed to the client. The courts normally treat the action as one for legal malpractice only.”). The third claim, for breach of fiduciary duty, is “essentially based on the same facts and seeking the same relief as the legal malpractice cause of action” and is therefore duplicative. *AmBase Corp. v Davis Polk & Wardwell*, 30 A.D.3d 171, 172 (1st Dept 2006), *affirmed*, 8 N.Y.3d 428 (2007).

A legal malpractice claim “requires proof of the attorney’s negligence, a showing that the negligence was the proximate cause of the injury, and evidence of actual damages.” *Russo v Feder, Kaszovitz, Isaacson, Weber, Skala & Bass, LLP*, 301 A.D.2d 63, 67 (1st Dept 2002). These three elements—negligence, causation, and damages—are all lacking in the Complaint as it is presently drafted.

To plead negligence, Cherry Hill must plead facts showing that defendants “failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession.” *AmBase Corp. v Davis Polk & Wardwell*, 8 NY3d 428, 434 (2007).

Cherry Hill’s allegation of negligence in the zoning matter is simply that defendants “never secured, and never effectively sought, the land use results needed.” This description does not identify any particular way in which defendant’s legal representation was inadequate. That defendants’ chosen methods, whatever they may have been, were ineffective, does not by itself indicate that defendants did not demonstrate ordinary reasonable skill.

In the *Utrobin* Action, Cherry Hill alleges that defendants did not prepare, and missed the filing deadline for, a summary judgment motion. The Complaint does not indicate whether Cherry Hill had a meritorious case for summary judgment, or whether filing such a motion would have been tactically advisable. The allegation regarding the *Utrobin* summary judgment motion does not indicate that defendants fell below the level of ordinary skill.

Cherry Hill makes two additional allegations, regarding the lack of a written explanation of fees for the *Utrobin* Action and the fee-splitting arrangement, which may violate the New York Rules of Professional Conduct. However, an alleged violation of professional rules is not actionable negligence and does not give rise to a private cause of action against an attorney. *Weintraub v Phillips, Nizer, Benjamin, Krim, & Ballon*, 172 AD2d 254 (1st Dept 1991).

The Complaint similarly lacks allegations which demonstrate that, “but for the attorney’s negligence” there would have been a more favorable outcome in the underlying legal action. *Leder v Spiegel*, 9 NY3d 836, 837 (2007) (applying “but-for” causation to legal malpractice). The Complaint contains no facts to indicate that, with more competent representation, Cherry Hill would have been able to secure its land use variance, obtain summary judgment in the *Utrobin* Action, or achieve any other favorable outcome.

Finally, Cherry Hill does not allege malpractice damages. The Complaint discusses only the legal fees paid to defendants, not a loss caused by defendants’ malpractice. For example, Cherry Hill does not allege that the failure to obtain the zoning variance damaged the value of its property, that due to defendants’ negligence it has been held liable in the *Utrobin* Action, or that it has been required to pay further legal fees to deal with the damage inflicted by defendants.

## II. Declaratory Judgment Claim

Cherry Hill's fourth cause of action for declaratory judgment is more properly adjudicated in the form of a dispute at law. This cause of action "is essentially a damage claim . . . , in the contrived form of a declaratory judgment complaint." *Seaboard Surety Co. v Massachusetts Bonding & Ins. Co.*, 42 Misc.2d 435, 436 (Sup. Ct. 1964). The availability of an adequate remedy at law is to be considered in determining whether to allow a claim for declaratory judgment, *Empire 33rd LLC v Forward Ass'n Inc.*, 87 AD3d 447, 448 (1st Dept 2001), and here there is no showing that Cherry Hill's injury could not be fully redressed by a damages award.

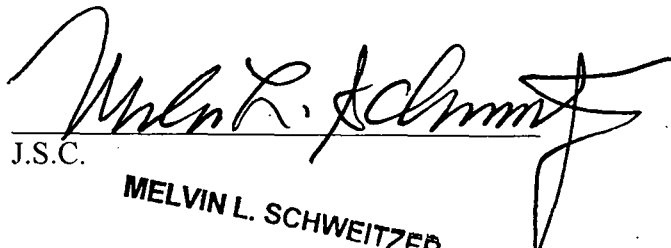
### Conclusion

The complaint as presently drafted does not state a claim for legal malpractice or for declaratory relief.

ORDERED that Cherry Hill's claims are dismissed without prejudice to bringing a complaint which states sufficient facts to sustain a cause of action.

Dated: April 22, 2013

ENTER:

  
J.S.C.  
MELVIN L. SCHWEITZER