

Cruz v Law Office of Cory J. Covert, P.C.

2014 NY Slip Op 30370(U)

January 28, 2014

Supreme Court, Suffolk County

Docket Number: 4802-09

Judge: Hector D. LaSalle

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 48 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. HECTOR D. LaSALLE
Justice of the Supreme Court

MOTION DATE: 11/13/13
SUBMITTED: 11/26/13
Mot. Seq. # 014 - MOTD

JOHN CRUZ,

Plaintiff,

-against-

LAW OFFICE OF CORY J. COVERT,
P.C.

Defendants.
_____x

ATTORNEY FOR PLAINTIFF:
NICHOLAS J. DAMADEO, P.C.
27 WEST NECK ROAD
HUNTINGTON, NY 11743

ATTORNEY FOR DEFENDANT:
L'ABBATE BALKAN COLAVITA
& CONTINI, LLP
1001 FRANKLIN AVENUE, 3RD FLOOR
GARDEN CITY, NY 11530

Upon the following papers numbered 1 to 53 read on this motion; Ex-Parte Notice of Motion/ Order to Show Cause and supporting papers 1 - 23 ; Notice of Cross Motion and supporting papers____; Affirmation in Opposition and supporting papers 26 - 41 ; Replying Affirmation and supporting papers 43 - 51 ; Other; Plaintiff's Memorandum of Law 24 - 25 ; Other; Defendant's Memorandum of Law 42 ; Other; Plaintiff's Reply Memorandum of Law 52 - 53 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows; it is

ORDERED, that the motion (#014) by the defendant for an order (1) pursuant to CPLR 3211(a)(7), dismissing the plaintiff's cause of action under the Fair Credit Reporting Act ("FCRA"), and thereupon granting judgment notwithstanding the Jury's verdict; or (2) pursuant to CPLR 4404(a), setting aside the verdict and directing that judgment be entered in favor of the defendant; or (3) pursuant to CPLR 4404(a) ordering a new trial because the verdict is contrary to the weight of the evidence or in the interests of justice, is hereby determined as follows; and it is further

ORDERED, that the movant is directed to serve a copy of this order with Notice of Entry

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upon counsel for the defendant and the Clerk of the Court by first class mail and thereafter file copies of the affidavits of service with the Clerk of the Court.

The defendant brings this post-verdict motion to dismiss pursuant to CPLR 3211(a)(7), seeking an order dismissing the plaintiff's cause of action under the Fair Credit Reporting Act (hereinafter "FCRA"), and thereupon a further order pursuant to CPLR 4404(a) granting judgment notwithstanding the jury's verdict in response to Question #6 of the verdict sheet which found that plaintiff sustained \$944,000.00 of actual damages as a result of Toyota's failure to comply with FCRA. The defendant also moves generally on other grounds for an order pursuant to CPLR 4404(a) setting aside the verdict and directing that judgment be entered in favor of the defendant, or alternatively, for a new trial on the grounds that the verdict is against the weight of the evidence or in the interests of justice.

In support of his motion defendant makes various arguments. With respect to the motion to dismiss defendant argues that notwithstanding that defendant is moving post-verdict, that a motion pursuant to CPLR 3211(a)(7) may be made at any time. Defendant contends that the FCRA is a consumer protection statute and that consumers are not entitled to recover damages under that statute for lost business profits. The defendant submits that the only damages plaintiff alleged he sustained were lost business profits and accordingly, not recoverable under the FCRA thereby warranting a dismissal pursuant to CPLR 3211(a)(7), and judgment notwithstanding the verdict dismissing the jury's award of \$944,000.00 in damages.

In further support of his motion for an order setting aside the verdict and directing that judgment be entered in favor of the defendant, or alternatively for a new trial, the defendant argues that the evidence at trial was insufficient for the jury to find in favor of the plaintiff, and that the verdict was against the interests of justice.

In opposition to the motion, the plaintiff submits that defendant has failed to demonstrate that the verdict was against the weight of the evidence, that defendant is barred from raising the defense that lost profits are not recoverable under the FCRA, and that lost profits are recoverable under the FCRA.

This is an attorney malpractice action. The trial of this action commenced on October 21, 2013 and ended on October 29, 2013 when the jury returned a verdict in favor of the plaintiff as follows:

1. Defendant failed to exercise the degree of skill, care and diligence commonly used by an ordinary member of the legal profession in litigating the plaintiff's action against Toyota for violation of the Fair Credit Reporting Act.

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2. Defendant failed to exercise the degree of skill, care and diligence commonly used by an ordinary member of the legal profession in opposing Toyota's motion to renew and reargue its motion to dismiss the complaint in the plaintiff's action against Toyota for violation of the Fair Credit Reporting Act.
3. Plaintiff notified a credit reporting agency of a dispute with information furnished to the credit reporting agency by Toyota.
4. That credit reporting agency notified Toyota of the dispute.
5. Toyota failed to delete or permanently block the inaccurate information, or continued to report the same inaccurate information, to that credit reporting agency.
6. Plaintiff sustained \$944,000.00 in actual damages as a result of Toyota's failure to comply with the Fair Credit Reporting Act.
7. Plaintiff expended \$10,000.00 for reasonable attorney's fees in his action against Toyota.

The evidence reveals the following facts. In 2003, the plaintiff retained the defendant to prosecute an action against Toyota Motor Credit Corporation to correct his credit reports and seeking damages for the false reporting concerning the plaintiff's credit. The false reporting concerned Toyota Motor Credit Corporation's reports to various credit agencies that plaintiff was in default on his lease payments of a Lexus vehicle.

On or about May 14, 2003, defendant commenced the underlying action, *Cruz v Toyota Motor Credit Corporation and Lexus Financial Services*, Supreme Court, Suffolk County, Index No. 03-17730, alleging only state law causes of action. Thereafter, defendant, Toyota, moved to dismiss the complaint and plaintiff, Cruz, cross-moved for leave to amend the complaint to include a cause of action under the FCRA. The Court denied defendant Toyota's motion to dismiss and granted plaintiff's application to amend his complaint. Subsequently, defendant Toyota moved to renew and reargue the Court's decision. The Court granted defendant Toyota's motion to renew and reargue, and dismissed the plaintiff's complaint. Thereafter, the attorney for the plaintiff filed a notice of appeal, however the Appellate Division, Second Department dismissed the appeal due to counsel's failure to timely perfect.

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Defendant's Motion to Dismiss pursuant to CPLR 3211(a)(7)

A motion to dismiss for failure to state a cause of action may be entertained at any time (*see, Herman v Greenberg*, 221 AD2d 251, 634 NYS2d 99 [1st Dept 1995]; *Quigley v City of Oswego*, 71 AD2d 795, 419 NYS2d 27, *lv denied*, 48 NY2d 607 [1979]).

Pursuant to CPLR §3211(a)(7), pleadings shall be liberally construed, the facts as alleged accepted as true, and every possible favorable inference given to plaintiffs (*Leon v Martinez*, 84 NY2d 83, 614 NYS2d 972 [1994]). On such a motion, the Court is limited to examining the pleading to determine whether it states a cause of action (*Guggenheimer v Ginzburg*, 43 NY2d 268, 401 NYS2d 182 [1977]). In examining the sufficiency of the pleading, the Court must accept the facts alleged therein as true and interpret them in the light most favorable to the plaintiff (*Pacific Carlton Development Corp. v 752 Pacific, LLC*, 62 AD3d 677, 878 NYS2d 421 [2d Dept 2009]; *Gjonlekaj v Sot*, 308 AD2d 471, 764 NYS2d 278 [2d Dept 2003]). On such a motion, the Court's sole inquiry is whether the facts alleged in the complaint fit within any cognizable legal theory, not whether there is evidentiary support for the complaint (*Leon v Martinez, supra*; *International Oil Field Supply Services Corp. v Fadeyi*, 35 AD3d 372, 825 NYS2d 730 [2d Dept 2006]). Upon a motion to dismiss, a pleading will be liberally construed and such motion will not be granted unless the moving papers conclusively establish that no cause of action exists (*Chan Ming v Chui Pak Hoi et al*, 163 AD2d 268, 558 NYS2d 546 [1st Dept 1990]).

To plead a cause of action for legal malpractice, a plaintiff must allege (1) that the defendant attorney failed to exercise that degree of care, skill and diligence commonly possessed by a member of the legal community, (2) proximate cause, (3) damages, and (4) that the plaintiff would have been successful in the underlying action had the attorney exercised due care (*see, Tortura v Sullivan Papain Block McGrath & Cannavo, P.C.*, 21 AD3d 1082, 803 NYS2d 571 [2d Dept 2005]; *Iannarone v Gramer*, 256 AD2d 443, 682 NYS2d 84 [2d Dept 1998]).

The defendant's motion to dismiss the complaint is denied. The Court finds that a cognizable cause of action for legal malpractice was plead in the plaintiff's complaint.

Defendant's motion pursuant to CPLR 4404(a)

The power to set aside a jury verdict and order a new trial is an inherent one, which is codified in CPLR §4404(a) (*see, McCarthy v Port of N.Y. Authority*, 21 AD2d 125, 127, 248 NYS2d 713; *Siegel NY Practice*, Sec. 406.) The statute provides that a Court may order a new trial "when the verdict is contrary to the weight of the evidence, in the interests of justice or where the jury cannot agree."

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Whether a jury verdict is against the weight of the evidence is essentially a discretionary and factual determination (*Nicastro v Park*, 113 AD2d 129, 495 NYS2d 184 [2d Dept 1985]). This question is distinguished from the assessment of whether a jury verdict, as a matter of law, is supported by sufficient evidence (*Cohen v Hallmark Cards*, 45 NY2d 493, 410 NYS2d 282, *accord*, *Dominguez v Manhattan & Bronx Surface Tr. Operating Auth.*, 46 NY2d 528, 415 NYS2d 634). To sustain a determination that a jury verdict is not supported by sufficient evidence as a matter of law, there must be no valid line of reasoning and permissible inferences which could possibly lead rational men to the conclusion reached by the jury, on the basis of the evidence presented at trial (*Cohen v Hallmark Cards*, *supra*). The result of such a determination leads to a directed verdict terminating the action.

The criteria to set aside a jury verdict as against the weight of the evidence is less stringent as such a determination results in a new trial and does not deprive the parties of their right to ultimately have all disputed facts resolved by a jury.

Setting aside a verdict as against the weight of the evidence requires a discretionary balancing of many factors (*Cohen v Hallmark Cards*, *supra* at 499). The discretionary power to set aside a jury verdict and order a new trial must be exercised with considerable caution as a successful litigant is entitled to the benefits of a favorable verdict. Fact finding is, in general, the province of the jury, not the trial court (*Nicastro v Park*, *supra*; *Ellis v Hoelzel*, 57 AD2d 968, 394 NYS2d 91 [3d Dept 1977]; *Curreri v New Town & Country Corp.*, 60 AD3d 718, 875 NYS2d 207 [2d Dept 2009]).

In support of his motion pursuant to CPLR 4404(a), the defendant indicates that business losses are not recoverable pursuant to the FCRA, that plaintiff's damages were for business losses and accordingly, the damages awarded by the jury must be overturned.

The Court notes that this theory by the defendant has been raised for the first time in this post-trial motion. The issue of whether defendant's damages were or were not business losses was never submitted to the jury. This is indeed a factual determination which should have been determined by the jury. In other words, the determination of whether the damages sustained by the plaintiff in the underlying FCRA case were of a nature to be recoverable under that statute, was a factual determination required to be made by the fact finder.

In support of his position, defendant cites numerous cases that indeed find that damages due to lost business profits are not actionable under the FCRA (*see*, *George v Equifax Mortgage Servs.*, 2010 WL 3937308 [E.D.N.Y. 2010], *Podell v Citicorp Diners, Inc.*, 914 F. Supp. 1025 [S.D.N.Y. 1996]; *Lucchesi v Experian Information Solutions, Inc.*, 2003 WL 21542317 [S.D.N.Y. 2003]). However, the developing caselaw on FCRA claims, suggests that the fact finders inquiry should also include whether the credit reports in question can be considered consumer reports. As part of that

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inquiry, the caselaw suggests, that the fact finders focus should be on the purpose for which the information was obtained by the credit collection agency, as well as the purpose for which the credit report is released (*see, Aldrich v Northern Leasing Systems, Inc.* 2009 NY Slip Op 30654(U) [Sup. Ct. New York County 2009]; *Boothe v TRW Credit Data and Fidelifacts/Metropolitan, N.Y., Inc.*, 523 F. Supp. 631 [1981]; *Breed v Nationwide Insurance Comp.*, 2007 U.S. Dist. LEXIS 30714 [2007]). Again, this is factual determination which the jury in this case did not have an opportunity to decide.

As stated, the power to set aside a verdict is an inherent one, which is codified in CPLR 4404(a). Fair interpretation of the evidence must be utilized as a standard in conjunction with the respect to be accorded the jury verdict. This means that although the scales tilt in favor of the verdict's survival, it leaves the Court with a breath of discretion which varies with the facts in each case (*see, Nicastro*, supra).

Balancing all of the factors in the present litigation, including but not limited to the lack of testimony for the jury's consideration of whether the reports in the underlying matter could be considered consumer reports; the purpose for which the reports were prepared; the purpose for which the reports were released; and whether the damages sought qualify under the FCRA, the Court hereby concludes that the jury did not have sufficient evidence to render a damages award which is sound under the law. Accordingly, the Court hereby sets aside the verdict.

The Clerk is directed to remit the matter to the Calendar Control Part for purposes of setting a trial date.

This constitutes the Decision and Order of the Court.

Dated: January 28, 2014
Riverhead, NY


HON. HECTOR D. LASALLE, J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION