SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 58

188-90 EIGHTH AVENUE HOUSING DEVELOPMENT FUND CORP.,

Plaintiff,

- against -

EDWARD JOSEPH FILEMYR, IV, ESQ.,

Defendant.

INDEX NO. 155664/13

DECISION/ORDER

DONNA M. MILLS, J.:

In this action alleging legal malpractice, defendant, Edward Joseph Filemyr IV, Esq. seeks an Order pursuant to CPLR 3211(a)(1) and (a)(7) dismissing the complaint of the plaintiff, 188-90 Eighth Avenue Housing Development Fund Corp., in its entirety with prejudice on the grounds that documentary evidence conclusively disposes of the plaintiff's claims, and the plaintiff has failed to plead a cognizable cause of action against the defendant.

The plaintiff sets forth in its complaint claims for legal malpractice, breach of contract and breach of fiduciary duty agaisnt the defendant, its former counsel who represented it in connection with the prosecution of a non-payment summary proceeding against a commercial tenant. After proceeding with a brief one day trial, the plaintiff entered into a settlement with the underlying commercial tenant. The Plaintiff now contends that as a result of the defendant's failure to have admissible documents to prove the leasehold estate, it was compelled to settle the underlying litigation.

Applicable Law & Discussion

A motion to dismiss a complaint pursuant to CPLR 3211 (a) (1) may be granted only

if the documentary evidence submitted by the moving party utterly refutes the factual allegations of the complaint and conclusively establishes a defense to the claims as a matter of law (see *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]). Put differently, the documentary evidence must "resolv[e] all factual issues as a matter of law and conclusively dispose of the plaintiff's claim" (*Paramount Transp. Sys., Inc. v Lasertone Corp.*, 76 AD3d 519, 520 [2010]). On a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211 (a) (7), "the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law [,] a motion for dismissal will fail" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

"In an action to recover damages for legal malpractice, a plaintiff must demonstrate that the attorney 'failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession' and that the attorney's breach of this duty proximately caused plaintiff to sustain actual and ascertainable damages. To establish causation, a plaintiff must show that he or she would have prevailed in the underlying action or would not have incurred any damages, but for the lawyer's negligence" (*Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438, 442 [2007]).

Applying the aforementioned law to the facts in this action, the defendant is entitled to dismissal of the legal malpractice cause of action pursuant to CPLR 3211(a)(1) and (a)(7). His documentary evidence, which comprised the transcript of the court proceedings setting forth the admission of the subject lease document at trial. The defendant submitted the deed and lease into evidence as per the introduction of a notice to admit. The plaintiff's

allegation that it was compelled to settle the litigation due to the defendant's ineptitude is not supported by the transcript. Additionally, this Court finds that the remaining allegations in the complaint are insufficient to show that the plaintiff stated a cause of action to recover damages for legal malpractice (*see Bua v. Purcell & Ingrao, P.C.,* 99 A.D.3d 843, 848, 952 N.Y.S.2d 592; *Dempster v. Liotti,* 86 A.D.3d 169, 176, 924 N.Y.S.2d 484; *Wald v. Berwitz,* 62 A.D.3d 786, 787, 880 N.Y.S.2d 293). The plaintiff's allegations amount to nothing more than hindsight criticism of counsel's reasonable course of action (*see Dweck Law Firm v. Mann,* 283 A.D.2d 292, 293, 727 N.Y.S.2d 58). The fact that the plaintiff subsequently is unhappy with the settlement obtained does not rise to the level of legal malpractice (*Holschauer v. Fisher,* 5 A.D.3d 553, 554, 772 N.Y.S.2d 836).

For similar legal reasons, plaintiff's breach of fiduciary duty also fails. "In order to establish a breach of fiduciary duty, a plaintiff must prove the existence of a fiduciary relationship, misconduct by the defendant, and damages that were directly caused by the defendant's misconduct." (*Kurtzman v. Bergstol*, 40 A.D.3d 588, 835 N.Y.S.2d 644 (2d Dept.2007). It is well-established that the " "but for" standard of causation, applicable to a legal malpractice claim, [also applies] to the claim for breach of fiduciary duty" where clients assert a claim for breach of fiduciary duty against their former attorney (*Weil, Gotshal & Manges, LLP v. Fashion Boutique of Short Hills, Inc.*, 10 A.D.3d 267, 272, 780 N.Y.S.2d 593 (1st Dept.2004). Moreover, the plaintiff failed to plead specific factual allegations showing that, had it not settled, it would have obtained a more favorable outcome (*see Keness v. Feldman, Kramer & Monaco, P.C.,* 105 A.D.3d 812, 813, 963 N.Y.S.2d 313; *Tortura v. Sullivan Papain Block McGrath & Cannavo, P.C.,* 21 A.D.3d at

1083, 803 N.Y.S.2d 571; *Dweck Law Firm v. Mann,* 283 A.D.2d at 293, 727 N.Y.S.2d 58; *Rau v. Borenkoff,* 262 A.D.2d 388, 389, 691 N.Y.S.2d 140).

The Appellate Division First Department has never differentiated between the standard of causation requested for a claim of legal malpractice and one for breach of fiduciary duty in the context of attorney liability. The claims are coextensive. Under New York law, to establish the elements of proximate cause and actual damages, where the injury is the value of the claim lost, the client must meet the "case within a case" requirement, demonstrating that " but for " the attorney's conduct the client would have prevailed in the underlying matter or would not have sustained any ascertainable damages (*Weil, Gotshal & Manges, LLP v. Fashion Boutique of Short Hills, Inc.*, supra, 10 A.D.3d at 271–72, 780 N.Y.S.2d 593). Thus, "to recover under a claim for damages against an attorney arising out of the breach of the attorney's fiduciary duty, the plaintiff must establish the but for element of malpractice" (*Ulico Cas. Co. v. Wilson, Elser, Moskowitz, Edelman & Dicker*, 56 A.D.3d 1, 865 N.Y.S.2d 14 [1st Dept.2008]). In addition, essential to a breach of fiduciary duty claim against an attorney, as well as to a legal malpractice claim, "is proof that the acts of an attorney proximately caused compensable damages.... If there are no damages, there can be no cause of action" (*Zletz v. Outten & Golden, LLP*, 18 A.D.3d 322, 324, 795 N.Y.S.2d 212 [1st Dept.2005]).

This Court also grants that branch of the defendant's motion to dismiss the cause of action to recover damages for breach of contract. This cause of action is duplicative of the legal malpractice cause of action since it arose from the same facts, and did not seek distinct and different damages (*see Alizio v. Feldman,* 82 A.D.3d at 805, 918 N.Y.S.2d

218; *Conklin v. Owen,* 72 A.D.3d 1006, 1007, 900 N.Y.S.2d 118; *Sitar v. Sitar,* 50 A.D.3d 667, 670, 854 N.Y.S.2d 536; *Town of Wallkill v. Rosenstein,* 40 A.D.3d 972, 974, 837 N.Y.S.2d 212).

Accordingly, it is

ORDERED that the defendant's motion to dismiss the complaint is granted, and the complaint is dismissed with costs and disbursements to said defendant as taxed by the Clerk of the Court upon submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk shall enter judgment accordingly.

Dated: 5/13/14

ENTER:

J.S.C.

DONNA M. MILLS, J.S.C.