Shackelford v White

2014 NY Slip Op 33180(U)

November 17, 2014

Supreme Court, Queens County

Docket Number: 704577/14

Judge: Timothy J. Dufficy

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. TIMOTHY J. DUFFICY **PART 35**
Justice

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AUDLEY SHACKELFORD,

Plaintiff(s),

-against-

GERARD J. WHITE, ESQ. And GERARD J. WHITE, P.C.,

Defendant(s).

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ORIGINAL

Index No.: 704577/14
Mot. Date: 10/30/14
Mot. Cal. No. 153
Mot. Seq. 1

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NOV 21 2014
COUNTY CLERK
QUEENS COUNTY

The following papers numbered EF 1 to 9, EF 11 to 19, EF 20 to 23 read on this motion by defendants **GERARD J. WHITE, ESQ. and GERARD J. WHITE, P.C.**, for an order granting dismissal of plaintiff's first and second causes of action pursuant to CPLR 3211(a)(1)(7) and (10).

	PAPERS NUMBERED
Notice of Motion-Affirmation-Exhibits	EF 1 to 9
Affirmation in Opposition-Exhibits	EF 11 to 19
Reply Affidavit-Exhibits	EF 20 to 23

Upon the foregoing papers, it is ordered that the motion by defendants **GERARD J. WHITE, ESQ. and GERARD J. WHITE, P.C.** for an order granting dismissal of the plaintiff's first and second causes of action pursuant to CPLR 3211(a)(1)(7) and (10) is denied in all respects.

Plaintiff brings this action seeking damages for legal malpractice. He claims that defendant White allegedly was negligent in handling a personal injury claim based upon an accident which allegedly occurred on February 6, 2006 on the premises of National Regional Off Track Betting Corporation a/k/a Nassau Downs OTB (Nassau OTB), and legal malpractice actions against plaintiff's former attorneys, Taller & Wizman, P.C. and

Palermo, Palermo & Tuohy (the Taller and Palermo firms).

To establish a cause of action sounding in legal malpractice, a plaintiff must prove (1) that the attorney failed to exercise "the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession," and (2) that "the breach of this duty proximately caused the plaintiff to sustain actual and ascertainable damages" (Frederick v Meighan, 75 AD3d 528, 531 [2d Dept. 2010]; see Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer, 8 NY3d 438, 442 [2007]; Markowitz v Kurzman Eisenberg Corbin Lever & Goodman, LLP, 82 AD3d 719 [2d Dept. 2011]).

When considering a motion to dismiss for failure to state a cause of action, pursuant to CPLR 3211 (a)(7), a court must accept the factual allegations of the complaint as true and afford the plaintiff the benefit of every possible favorable inference, determining only whether those allegations make out any cognizable legal claim. (see Matter of Walton v New York State Dept. of Correctional Servs., 13 NY3d 475 [2009]; see also Leon v Martinez, 84 NY2d 83 [1994]; Melnicke v Brecher, 65 AD3d 1020 [2d Dept. 2009].) "Affidavits submitted by a [defendant] will almost never warrant dismissal under CPLR 3211 unless they 'establish conclusively that [plaintiff] has no . . . cause of action'." (Lawrence v Miller, 11 NY3d 588, 595 [2008], quoting Rovello v Orofino Realty Co., 40 NY2d 633, 636 [1976] [*emphasis omitted*].) "Indeed, a motion to dismiss pursuant to CPLR 3211 (a)(7) must be denied 'unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it'." (Sokol v Leader, 74 AD3d 1180, 1182 [2d Dept. 2010], quoting Guggenheimer v Ginzburg, 43 NY2d 268, 275 [1977].)

Similarly, to succeed on a motion to dismiss, pursuant to CPLR 3211 (a)(1), the documentary evidence which forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim. (see Leon v Martinez, supra; see also Palmetto Partners, L.P. v AJW Qualified Partners, LLC, 83 AD3d 804 [2d Dept. 2011]; Paramount Transportation Systems, Inc. v Lasertone Corp., 76 AD3d 519 [2d Dept. 2010].) It "may be appropriately granted only where the documentary evidence utterly refutes [the] plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (Goshen v Mutual Life Ins. Co. of N.Y., 98 NY2d 314, 326 [2002]; see Rodolico v Rubin & Licatesi, P.C., 114 AD3d 923,

924-925 [2d Dept. 2014]). The court's function is to determine only whether the facts as alleged fit within any cognizable legal theory (see Leon v Martinez, supra at 87-88; Grant v LaTrace, 119 AD3d 646 [2d Dept. 2014]). "Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove [his or her] claims, of course, plays no part in the determination of a prediscovery CPLR 3211 motion to dismiss" (Shaya B. Pac., LLC v Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, 38 AD3d 34, 38 [2d Dept. 2006]).

"The evidence submitted in support of such motion must be documentary or the motion must be denied" (Cives Corp. v George A. Fuller Co., Inc., 97 AD3d 713, 714 [2d Dept. 2012]; see Fontanetta v John Doe 1, 73 AD3d 78, 84[2d Dept. 2010]; see also David D. Siegel, Practice, McKinney's Cons Laws of NY, Book 7B, CPLR C 3211:10, at 21-23). In order for evidence submitted in support of a CPLR 3211(a)(1) motion to qualify as "documentary evidence," it must be "unambiguous, authentic, and undeniable" (Granada Condominium III Assn. v Palomino, supra at 996-997 *[internal quotation marks omitted]*; see Cives Corp. v George A. Fuller Co., Inc., supra at 714). "[J]udicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable, would qualify as documentary evidence in the proper case" (Fontanetta v John Doe 1, supra at 84-85 [*internal quotation marks omitted*]; see Cives Corp. v George A. Fuller Co., Inc., supra). At the same time, "[n]either affidavits, deposition testimony, nor letters are considered documentary evidence within the intendment of CPLR §3211(a)(1)" (Granada Condominium III Assn. v Palomino, supra at 997 *[internal quotation marks omitted]*; see Cives Corp. v George A. Fuller Co., Inc., supra at 714; Suchmacher v Manana Grocery, 73 AD3d 1017 [2d Dept. 2010]).

In support of their motion for dismissal, the individual and corporate defendant submitted attorney White's affirmation as an attorney and the principal shareholder of the defendant professional corporation. This affirmation must be disregarded, since the attorney, who was also a defendant, should have submitted an affidavit (see CPLR 2106; LaRusso v Katz, 30 AD3d 240, 243 [2d Dept. 2006]; Finger v Saal, 56 AD3d 606, 607 [2d Dept. 2008]). In addition, affidavits and letters cannot properly be considered as documentary evidence on a motion pursuant to CPLR 3211(a)(1) (see Cives Corp. v

George A. Fuller Co., Inc., supra at 714). These deficiencies, standing alone, render the defendants' moving papers insufficient to support the relief requested, warranting a denial of the motion.

As to CPLR 3211(a)(7), the defendants have simply failed to resolve all factual issues or demonstrate that the plaintiff simply has no cause of action. Defendant White was retained on November 12, 2007, after he claims that the underlying personal injury claim - which occurred on February 6, 2006 - was already time-barred against the non-attorney defendant (Nassau OTB). He fails to explain why he did not file a summons and complaint in the combined negligence and legal malpractice matter until February, 2009, when he filed a combined action against Nassau OTB and the Palermo and Taller firms. He states that

> The documentary evidence before this Court shows that more than a year and 90 days passed from the dated [*sic*] of plaintiff's alleged accident at Nassau OTB to the date in which plaintiff retained your firm to prosecute an action on his behalf.

(reply affidavit of Gerard J. White at p.1, paragraph 3). The retainer agreement corroborates that he agreed to prosecute a matter that he knew was stale. The declination letter from Zurich Insurance, dated July 11, 2007, that attorney White erroneously suggests is "documentary evidence" in support of his motion, states that:

> [t]he Racing Law requires that an action against Nassau OTB must be commenced within one year and ninety days after the cause of action thereof shall have accrued. The cause of action in this case accrued when the accident happened on February 6, 2006. Any complaint by Mr. Shackelford needed to be be filed no later than May 7, 2007 to avoid being time-barred. To date, no action has been filed

Attorney White fails to explain why he knowingly agreed to pursue a lawsuit which he knew or should have known was time-barred (see 22 NYCRR §130-1.1 pertaining to "frivolous litigation"). In the retainer, he purports to charge the plaintiff a fee of $750.00 to file a motion to extend the time to file a notice of claim. Conspicuous by its absence is any explanation by attorney White as to why he agreed to make a motion and to charge the plaintiff therefor, that he knew or should have known was outside the

discretion of the court to grant once the statute of limitations had expired. It is axiomatic that the court lacks authority to grant a motion for leave to serve a late Notice of Claim that is made after the one-year-and-90-day statute of limitations has expired, unless the statute has been tolled (see Young Soo Chi v Castelli, 112 AD3d 816, 816-817 [2d Dept. 2103]). Here, no toll existed. Morever, he fails to submit any proof that this fee was paid or, if paid to him, that he, in fact, filed the motion.

Had attorney White filed the motion, as promised, and had it been denied, that would have terminated the personal injury matter against Nassau OBT. Any malpractice on the part of the attorney defendants could then be said to have proximately caused Mr. Shackelford's damages. The lawsuit against the Palermo attorney, which was found to be premature in an Order of this Court, dated February 1, 2010 (J. Taylor), would then have ripened for adjudication. Notwithstanding the foregoing decision, Attorney White inexplicably failed to procure an adjudication of the saliency of the case against Nassau OBT. He provides no explanation of his failure to do so.

Rather, on or about September 24, 2012, attorney White filed a duplicative action on behalf of Audley Shackelford, under Index Number 19734/2012, as against Nassau OBT.

On September 24, 2012, he had certified on the back of the document that it was non-frivolous. The Court is astonished that he could do so while acknowledging throughout the instant papers that the action was time barred when he received the case in 2009 (see 22NYCRR §130-1.1). Attorney White notarized the verification of Mr. Shackelford in the 2012 complaint, averring that the contents were true. Yet, in his motion papers, he reveals to the Court[1] that his file, which he received from the plaintiff's prior attorneys on August 22, 2007, revealed that the plaintiff had attributed three different causes to his injuries, a motor-vehicle accident, a job-related injury, and a fall at Nassau OTB. He states that the hospital records indicate that Mr. Shackelford fell down "on backside on Monday at work" (see attorney affirmation of Gerard J. White at p. 2,

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[1] Attorney White is reminded of his responsibility to refrain from committing acts of disloyalty to his former client, which might in any way compromise Shackelford's former confidences to him or otherwise a breach his fiduciary (see Ulico Cas. Co. v. Wilson, Elser, Moskowitz, Edelman & Dicker, 56 A.D.3d 1, 865 N.Y.S.2d 14 [1st Dept. 2008]).

paragraph 6). The insinuation is that the plaintiff's allegations are less than truthful. Yet, armed with this knowledge, he pursued not one, but two actions on Mr. Shackelford's behalf.

Under these circumstances, various issues as to the efficacy of attorney White's representation remain unresolved by the defendants' motion. The balance of the defendants' arguments are non-meritorious.

Accordingly, based upon the foregoing, it is,

ORDERED, that the motion by defendants Gerard J. White, Esq. and Gerard J. White, P.C. is denied in all respects; and it is further,

ORDERED, that any other applications not specifically addressed herein are denied.

This constitutes the opinion, decision and order of the Court.

Dated: November 17, 2014

TIMOTHY J. DUFFICY, J.S.C.