

Stewart v Berger

2014 NY Slip Op 33719(U)

January 7, 2014

Supreme Court, Kings County

Docket Number: 2041/12

Judge: Debra Silber

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 9**

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STEVEN STEWART a/k/a STEVEN McINTOSH,

Plaintiff,

-against-

**DAVID M. BERGER, ESQ., TENENBAUM & BERGER,
LLP and TENENBAUM, DUNBAR & BERGER, LLP.,**

Defendants.

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DECISION/ORDER

**Index No. 2041/12
Mot. Seq. No. 3**

HON. DEBRA SILBER, A.J.S.C.:

Recitation, as required by CPLR §2219(a), of the papers considered in the review of plaintiff's motion to vacate plaintiff's default in responding to defendants' motion to dismiss:

| Papers | Numbered |
|---|------------------|
| Notice of Motion, Affirmation and Affidavits Annexed | <u>1-9</u> |
| Affirmation in Opposition, Exhibits Annexed and Memorandum..... | <u>10-23, 24</u> |
| Reply | <u>25</u> |

Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:

This is a motion by plaintiff to vacate an order, entered upon his default, which dismissed the instant action following defendants' motion for said relief.

Plaintiff filed this action on January 26, 2012. It is an action by plaintiff Steven Stewart, a/k/a Steven McIntosh, against the named law firms (Tenenbaum & Berger, LLP and Tenenbaum, Dunbar & Berger, LLP¹) and an individually named lawyer with the firm _____

¹The NYS Department of State website indicates that since the first date plaintiff engaged the defendant law firm, it was named Tenenbaum & Berger LLP, and the

(David M. Berger, Esq.). Plaintiff claims they are liable for breach of contract, breach of fiduciary duty, attorney malpractice, fraud, misrepresentation and conversion².

On April 23, 2012, the aforementioned defendants filed a pre-answer motion to dismiss the action as against them, pursuant to CPLR § 3211(a)(5), alleging that the plaintiff's claims are time-barred; pursuant to CPLR § 3211(a)(1), based upon documentary evidence; pursuant to CPLR § 3211(a)(7), for failure to state a valid cause of action; and pursuant to CPLR 3016(b), claiming plaintiff failed to allege the circumstance constituting the alleged fraud with the requisite specificity. Defendants also claimed that plaintiff's prayer for punitive damages must be dismissed as a matter of law.

On, June 21, 2012, another judge of this court granted the defendants' motion upon plaintiff's default. (Order, Baynes J., 6/21/2012 "prior order.")

Plaintiff now moves to vacate the order. His attorney contends that he was stuck in traffic and attempted to contact the court on the return date, January 21, 2012. Defendants note that plaintiff had not filed or served any opposition to the motion to dismiss prior to the return date of the motion, and that defendant Berger was present in the courtroom for a considerable period of time on June 21, 2012 while waiting for the copy of the dismissal order, and the part clerk never informed him of any call from plaintiff's counsel. Further, they note that plaintiff's counsel waited ten months after his claimed traffic problems to make this motion to vacate. Thus, defendants argue plaintiff has not shown any excuse for his default. Alternatively, even if he has offered a reasonable excuse, they contend his

caption is hereby amended to reflect that there is one law firm. Prior to 2004, the firm was named Tenenbaum, Dunbar and Berger LLP, but their name was changed, and there were never two separate firms.

²Initially, there were also two title insurance companies named in the action, but they were dismissed as defendants, and the instant motion pertains solely to the named law firms and the individual attorney.

claims have no merit.

To obtain relief from an order or judgment on the basis of excusable default, a party must provide a "reasonable excuse" and demonstrate the merit of his cause of action or defense. CPLR § 5015 [a] [1]. While it is unclear, even after reading plaintiff's counsel's affirmation, why he waited ten months to make this motion, the court accepts the excuse provided by plaintiff's counsel as law office failure, and moves on to consider whether plaintiff has meritorious claims against the defendants. The law clearly favors dispositions of disputes on the merits.

Facts

Plaintiff's affidavit alleges that in October 2005, plaintiff retained defendant Berger, of defendant Tenenbaum and Berger, LLP, to represent him in commencing litigation concerning 896A and 898 Lafayette Avenue in Brooklyn, New York. Initially, as per the retainer agreement, plaintiff paid defendant firm \$5,000 up-front as a retainer, and the firm agreed to work for a rate of \$250 per hour. Subsequently, the agreement was modified in May 2006, a copy of which is defendants Exhibit C.

The litigation was to recover the subject properties from Edwin Moore, Uman Oton, and others who had allegedly, with the use of forged documents, obtained title to these two properties which were owned by plaintiff. Defendants succeeded in recovering said properties for plaintiff. The Index No. is 37488/05, *McIntosh v Moore, et al.* The order granting plaintiff's motion for summary judgment and quieting title is dated January 16, 2007.

Moore and Oton subsequently filed an Order to Show Cause which claimed that, while they were in possession of the properties, they paid \$310,000 in water bills and real estate taxes and other liens, which inured to plaintiff's benefit.

Defendant Berger told plaintiff that Oton and Moore came to his office and showed him cancelled checks and other proof that they had paid these sums to the City. Berger advised plaintiff to settle the motion and pay Oton and Moore the \$310,000 upon the sale of the subject properties. Plaintiff agreed and did pay them. A stipulation settling their motion was executed and filed with the court August 31, 2007.

On November 9, 2007, plaintiff closed on the sale of the two properties, with defendant Tenenbaum & Berger representing him at the closing. Plaintiff makes various claims in his complaint with regard to the closing expenses paid, and alleges that several of them were improper or miscalculated.

Plaintiff alleges that \$200,000 was collected by the title insurance company at the closing on November 9, 2007, which was escrowed because of what plaintiff calls "sham mortgages." These escrowed funds were sent back to tenenbaum & Berger in March 2010, after Ruth Selby, the holder of the "sham mortgages," subsequently (2008) settled her claims with plaintiff. Plaintiff claims Berger advised him to settle the suit for \$80,000, and after that was done, plaintiff received \$90,000 from the money returned by the title insurance company. He was not provided with proof of the payment to Ms. Selby nor an accounting of the remaining \$30,000. Plaintiff claims he sent defendants a written request to provide him with an accounting of expenses made on his behalf with proof in the form of cancelled checks, but he never received any response.

The court takes judicial notice that plaintiff was sued by Ruth Selby, his former attorney, in foreclosure actions on the two mortgages encumbered by the subject properties (33101/07 and 33102/07), and that defendants represented plaintiff in those actions as well. The complaints allege that plaintiff executed the mortgages as security for attorneys's fees incurred by Ms. Selby, and that he refused to pay the fees after she demanded payment.

Defendants filed a motion to dismiss those actions on plaintiff's behalf. The motion was denied by Justice Battaglia on February 14, 2008, as Justice Battaglia found that the mortgages were valid and enforceable. Plaintiff settled the actions with Ms. Selby on April 13, 2008, and obtained a stipulation of discontinuance with prejudice. He was represented by defendants in the settlement. Once the actions were settled, the funds escrowed at the November 9, 2007 closing were available to be disbursed. It is not known why it took two more years for the funds to be disbursed by the title company.

The Complaint

Plaintiff's first cause of action alleges that defendants committed legal malpractice by unreasonably relying upon the statements of Moore and Oton that they had made payments to remove encumbrances on the subject properties without demanding and receiving proof of the actual bills they claimed to have paid, and that they failed to check public records concerning such bills, and as a result, plaintiff reimbursed Moore and Oton, when, in fact, Moore and Oton had not paid those bills, and therefore defendants were negligent.

Plaintiff's second cause of action alleges that defendants breached their fiduciary duty to plaintiff by acting as "brokers" during the sale of the properties without plaintiff's knowledge or consent; by paying themselves as the broker from the proceeds of the sale; by flipping the property for a higher price without informing plaintiff; by having plaintiff pay the additional fees and transfer taxes incurred as a result of flipping the property; by failing to advise plaintiff that Oton and Moore had failed to pay the sums they claimed to have paid; by enriching themselves at the expense of plaintiff; and by violating various ethical and disciplinary rules.

Plaintiff's third cause of action alleges that defendants breached their retainer agreement with plaintiff by taking approximately \$52,500 more in fees for the litigation than

they were entitled to.

Plaintiff's fourth cause of action alleges that defendants fraudulently induced plaintiff to allow them to keep \$100,000 allegedly as reimbursement for a payment to help obtain a mortgage for the purchaser, which was never obtained. This is a claim for conversion.

Plaintiff's fifth cause of action alleges plaintiff has never received an accounting of the \$200,000 returned by the title insurance company, and that he is entitled to a return of additional funds.

Discussion

Pursuant to CPLR §5015, in order to prevail on his motion to vacate, plaintiff must demonstrate the merit of his causes of action. This is not merely a matter of restating his pleadings emphatically. To the extent defendants' motion to dismiss raised legitimate issues concerning the merits of plaintiff's causes of action, plaintiff is required to address those issues.

There were several different bases for defendants' motion to dismiss. In the interest of brevity, the court will first address the question of whether any of defendants' claims are time-barred, since an action which is time-barred cannot be meritorious.

Defendants argue that plaintiff's first cause of action for legal malpractice is time-barred by the applicable statute of limitations.

A cause of action for legal malpractice accrues when the malpractice occurs. *McCoy v Feinman*, 99 NY2d 295 [2002]. An action to recover damages for legal malpractice must be commenced within three years of such accrual. CPLR § 214(6); *Shumsky v Eisenstein*, 96 NY2d 164, 166 [2001].

Plaintiff's legal malpractice claim relates solely to the "quiet title" action which was settled by Stipulation dated June 14, 2007. Defendants argued in their summary judgment

motion that the statute of limitations for the legal malpractice action stems from that date at the latest. Plaintiff's motion does not address this issue at all, though in his reply, his counsel argues that the "quiet title" action continued until March 2010, when the title insurance company sent defendants back the money they were holding in escrow.

In actuality, a reading of plaintiff's pleading and plaintiff's affidavit does not indicate any further activity concerning the "quiet title action" after August 31, 2007, when the stipulation was filed, other than payment of the settlement funds pursuant to that stipulation, which was paid by plaintiff from the proceeds of the sale of the properties, held on November 9, 2007.

The money that was held by the title insurance company had nothing to do with the "quiet title" action. The money was being held in connection with the Selby mortgages which were the subject of the Selby foreclosure proceeding, a separate action, which was commenced in August of 2007. As plaintiff acknowledges in his affidavit, the litigation which was the subject of the retainer agreement was to recover the subject properties from Edwin Moore, Uman Oton, and the others who had allegedly improperly obtained title to the properties.

Plaintiff's counsel's citation of *Amedeo v Koldny, PC*, 35 AD3d 773, 774 [2nd Dept 2006] is inapposite. In *Amedeo*, the court held that defendant's representation of the plaintiff in the underlying personal injury action ended when they sent him his share of the settlement proceeds and the closing statement. In other words, the representation ceased when plaintiff received the relief he was seeking. The date plaintiff received the relief he was seeking in the "quiet title" action was January 16, 2007.

Even if the court were to take the reference in *Amedeo* concerning the [OCA personal injury case] closing statement to mean that the date plaintiff's counsel received

payment for the services rendered in that action as the date their representation ceased, that date would be the date the properties were sold, which was November 9, 2007. In either event, the statute of limitations ran prior to the commencement of this action on January 26, 2012. Thus, plaintiff's first cause of action for legal malpractice is time barred and therefore cannot be a meritorious claim. The court further notes that plaintiff's counsel's affirmation does not even attempt to address the merits of the first cause of action, and admits that Moore and Oton did, in fact, pay the \$310,000 to the City of New York, so they were impliedly entitled to reimbursement as per the settlement.

Turning to plaintiff's second cause of action, for breach of fiduciary duty, defendants argued in their motion and again in their opposition hereto, that plaintiff's second cause of action is in actuality a claim for legal malpractice, subject to the same statute of limitations. Once again plaintiff does not even address this issue in his motion, instead only addressing it in his reply.

The court must note that the claims in plaintiff's second cause of action for breach of fiduciary duty, to the extent they relate to the "quiet title" proceeding against Moore and Oton, are in actuality premised on the same facts and seek the identical relief sought in the legal malpractice cause of action, and are redundant and therefore do not qualify as a meritorious claim. See, *Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267 [1st Dept 2004]; *Estate of Nevelson v Carro, Spanbock, Kaster & Cuiffo*, 290 AD2d 399, 400 [2002]; *Murray Hill Invs. v Parker Chapin Flattau & Klimpl, LLP*, 305 AD2d 228, 229 [2003]. Further, counsel states plaintiff is no longer pursuing this claim, that is, related to the quiet title action.

The remaining claims in the second cause of action for breach of fiduciary duty concern defendants' actions related to the sale of the subject properties. They are not

premised on the same facts as the legal malpractice claim, as they relate to a separate transaction whose only commonality is that they relate to the same properties.

New York law does not provide a single statute of limitations for breach of fiduciary duty claims. Rather, the applicable limitations period depends on the substantive remedy that the plaintiff seeks. See, *Loengard v Santa Fe Indus.*, 70 NY2d 262, 266 [1987]. Where the remedy sought is purely monetary in nature, courts construe the suit as alleging "injury to property" within the meaning of CPLR 214 (4), which has a three-year limitations period. See, e.g., *Yatter v Morris Agency*, 256 AD2d 260, 261 [1st Dept 1998].

The question is then what date to use for calculating the statute of limitations. Plaintiff's position is that the final proceeds from the closing were not distributed until March 2010, and that under *Amedeo*, that is the applicable date. Defendants' position is that the applicable date is the date of the closing, which was November 9, 2007.

Defendants' position is the correct one. Defendants' subsequent distribution of the escrowed funds returned by the title insurance company in March 2010 was a ministerial act that was no more than a "continuity of a general professional relationship" between the parties, which did not constitute continued legal representation. See, *Nahoum v Weiss*, 17 Misc 3d 1118 (A) [Sup Ct NY Co 2007].

Application of the continuous legal representation doctrine is limited to situations where an attorney's involvement after the injurious conduct is for "the performance of the same or related services and is not merely the continuity of a general professional relationship." *Luk Lamellen U. Kupplungbau GmbH v Lerner*, 166 AD2d 505, 507 [2nd Dept 1990]. For the continuous representation doctrine to apply, there must be clear indicia of an ongoing, continuous, developing, and dependent relationship between the client and the attorney. *International Electron Devices (USA) LLC v Menter, Rudin & Trivelpiece, P.C.*, 71

AD3d 1512 [2nd Dept 2010]; *Luk Lamellen U. Kupplungbau GmbH v Lerner*, 166 AD2d 505, 506-507; *Aaron v Roemer, Wallens & Mineaux*, 272 AD2d 752, 754 [2000], *lv dismissed* 96 NY2d 730 [2001]. If there is merely a continuing general relationship with an attorney involving only routine contact unrelated to the matter upon which the allegations of wrongdoing are predicated, a toll of the statute of limitations will not be found. See *International Electron Devices (USA) LLC v Menter, Rudin & Trivelpiece, P.C.*, 71 AD3d 1512; *Chicago Tit. Ins. Co. v Mazula*, 47 AD3d 999, 1000 [3rd Dept 2008]; *Shumsky v Eisenstein*, 96 NY2d 164, 168 [2001].

The entirety of plaintiff's second cause of action concerns the closing itself; none of it relates to the subsequent distribution of the escrow funds held by the title insurance company. Thus, plaintiff's second cause of action is time barred and therefore cannot be deemed a meritorious claim.

Defendants also argue that plaintiff's third cause of action, for breach of the retainer contract, is also time-barred. CPLR § 214(6) sets the statute of limitations for breach of contract claims against attorneys in non-medical malpractice cases at three years, whether the case is brought in contract or tort. See, *In Re R.M. Kliment & Frances Halsband*, 3 NY3d 538, 539 [2004]. The claim here relates solely to the retainer agreement, specifically to the payment for legal fees received by defendants at the closing on November 9, 2007. Plaintiff's claim that this was continuous representation fails for the same reasons it failed concerning the first cause of action. As such, the statute of limitations has run, and plaintiff's third cause of action is time barred and cannot be determined to be a meritorious claim.

Defendants next argue that plaintiff's fourth cause of action, for conversion, is time barred. Conversion claims are subject to a three-year statute of limitations. See, *Sporn v*

MCS Records, 58 NY2d 482 [1983]; *Mohan v Hollander*, 303 AD2d 473, 474 [2nd Dept 2003]. This claim relates entirely to the funds distributed at the closing of the subject properties on November 9, 2007. As such, the statute of limitations has run, and plaintiff's fourth cause of action is time barred and therefore cannot be determined to be a meritorious claim.

Defendants next argue that plaintiff's fifth cause of action, for an accounting, is time barred. They offer no reason other than that the cause of action is premised on the identical facts as the legal malpractice claim. This clearly is not the case. The accounting concerns the distribution of the funds released by the title insurance company in 2010, which were held because of the Selby mortgages, which are not the subject matter of the malpractice claim. The cause of action for an accounting, and attendant relief is not time barred.

The court must now address the question of whether plaintiff has stated a meritorious cause of action on the one claim which is not time-barred, the fifth cause of action, which concerns the escrowed funds.

The court concludes that plaintiff's claim is meritorious, as the Selby foreclosure complaints sought \$50,000 and \$30,000 plus attorney's fees incurred in connection with the foreclosure action. The plaintiff claims the action was settled for \$80,000,³ and that he received \$90,000 from defendants, with \$30,000 unaccounted for.

The court therefore grants plaintiff's motion to the sole extent of vacating plaintiff's default and reinstating his fifth cause of action, and then, taking plaintiff's motion papers as opposition to defendants' pre-answer motion to dismiss, proceeds to consider said motion

³Exhibit I and J to defendants' opposition confirms the sums.

solely as regards the fifth cause of action in plaintiff's complaint.

On a motion to dismiss pursuant to CPLR § 3211, the pleading is to be afforded a liberal construction, the facts as alleged in the complaint as true, and plaintiff is accorded the benefit of every possible favorable inference. *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]. However, allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence are insufficient to defeat a motion to dismiss. *Sud v Sud*, 211 AD2d 423, 424 [1st Dept 1995].

Defendants contended in their motion to dismiss that plaintiff failed to state a cause of action in any of the claims that are not legal malpractice claims. They claimed they should all be dismissed because they stem from the attorney's work and therefore sound in malpractice. However, defendants misconstrue the law. The cases they cite all concern claims which are duplicative of a plaintiff's claim for legal malpractice, based on the same facts and seeking the same relief. The remaining claim herein is not a claim involving the same facts as the legal malpractice claims, and does not seek the same relief.

Defendants do not raise any other basis for dismissal of plaintiff's fifth cause of action. As such, there is no reason for the court to conclude that plaintiff, under the standards embodied in CPLR § 5015 and 3211, has not stated a meritorious cause of action in his fifth cause of action.

Finally, the court must note that defendants' motion to dismiss also asked that plaintiff's prayer for punitive damages be dismissed in its entirety. Although plaintiff did not discuss this issue in his Motion to Vacate, he did address it in his reply. At any rate, the fifth cause of action for the allegedly unaccounted for \$30,000 does not set forth a claim for punitive damages.

It is noted that punitive damages are only awarded in rare cases, such as those which involve an improper state of mind, or malice or other aggravated circumstances which affect a public interest or involve wrongdoing to the public, or imply a criminal indifference to civil obligations. See, *Rocanova v Equitable Life Assurance Society of the United States*, 83 NY2d 603 [1994]; *Laurie Marie M. V Jeffrey T.M.*, 159 AD2d 52, 58 [2nd Dept 1990]. A punitive damages claim is an extraordinary remedy; and claims for punitive damages should be dismissed when a party fails to present sufficient ultimate facts of a fraudulent or deceitful scheme in dealing with the general public or which imply a criminal indifference to civil obligations. See, *New York Univ v Continental Insurance Co.*, 87 BY2d 308 [1995]. Clearly, this does not apply to plaintiff's remaining claim. Therefore, plaintiff's claims for punitive damages must be dismissed.

Conclusion

Plaintiff has demonstrated an excuse for his default, and has demonstrated that his fifth cause of action, seeking an accounting for the distribution of the escrowed funds and attendant relief has merit, and therefore plaintiff's motion to vacate his default in opposing the motion to dismiss previously entered against him on June 21, 2012, is granted to the sole extent of restoring that cause of action. However, plaintiff has failed to show that his first, second, third or fourth causes of action have merit. Further, plaintiff's claims for punitive damages are dismissed as stated above. In deciding this motion, the court has considered plaintiff's pleadings, the plaintiff's papers herein and the defendants' opposition, as well as the defendants' prior motion papers.

In light of the information on the State's website about the name change for defendant law firm, the caption is amended *sua sponte* and shall hereafter read:

STEVEN STEWART a/k/a STEVEN McINTOSH,

Plaintiff,

-against-

DAVID M. BERGER, ESQ. and TENENBAUM & BERGER, LLP.,

Defendants.

The defendants shall serve their answer to the complaint within 30 days. This matter shall appear on the Preliminary Conference Calendar on February 20, 2014. Plaintiff shall serve a copy of this order on the clerk of that part so it will appear on the calendar.

Any relief sought but not addressed herein is hereby denied.


This constitutes the decision and order of the court.

Dated: Brooklyn, New York
January 7, 2014



Hon. Debra Silber, A.J.S.C.

Hon. Debra Silber
Justice Supreme Court


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