

**Law Offs. of Clifford J. Petroske, P.C. v Sobel**

2015 NY Slip Op 30917(U)

May 18, 2015

Supreme Court, Suffolk County

Docket Number: 11-5434

Judge: Joseph C. Pastoressa

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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 34 - SUFFOLK COUNTY

**COPY**

**PRESENT:**

Hon. JOSEPH C. PASTORESSA  
Justice of the Supreme Court

Mot. Seq. # 001 - MD  
# 002 - MG

<p>LAW OFFICES OF CLIFFORD J. PETROSKE, P.C.,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">- against -</p> <p>GAIL SOBEL, a/k/a GAIL SOLOMON,</p> <p style="text-align: center;">Defendant.</p>	X	<p>CLIFFORD J. PETROSKE, P.C. Attorney for Plaintiff 4875 Sunrise Highway, Suite 201 Bohemia, New York 11716</p> <p>JEFFREY L. SOLOMON, ESQ. Attorney for Defendant 180 Froehlich Farm Boulevard Woodbury, New York 11797</p> <p>L'ABBATE, BALKAN, COLAVITA &amp; CONTINI, L.L.P. Attorney for Plaintiff on the Counterclaim 1001 Franklin Avenue, Room 300 Garden City, New York 11530</p>
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Upon the following papers numbered 1 to 40 read on these motions to dismiss or alternatively for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 23 ; Notice of Cross Motion and supporting papers \_\_\_\_ ; Answering Affidavits and supporting papers 26 - 38 ; Replying Affidavits and supporting papers 39 - 40 ; Other memorandum of law 24 - 25 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that these motions are hereby consolidated for purposes of this determination; and it is further

**ORDERED** that the motion (#001) by the plaintiff Law Offices of Clifford Petroske, P.C. for an order pursuant to CPLR 3211(a)(1) and (a)(7), dismissing the defendant's counterclaims, or in the alternative, pursuant to CPLR 3212(c) granting summary judgment dismissing said counterclaims, is denied as academic and duplicative of Motion #002 as indicated in a letter from counsel for the plaintiff dated September 12, 2014 purporting to withdraw said motion; and it is further

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**ORDERED** that the motion (#002) by the plaintiff Law Offices of Clifford Petroske, P.C. for an order pursuant to CPLR 3211(a)(1) and (a)(7), dismissing the defendant's counterclaims, or in the alternative, pursuant to CPLR 3212(c) granting summary judgment dismissing said counterclaims, is granted.

The plaintiff's motion (#001) is an exact copy of motion #002, with a different return date. Although the prior motion has been assigned a separate motion sequence number, it is determined that the plaintiff has submitted only one motion, that the motion (#001) is superfluous, that it has been withdrawn by the movant, and that it need not be considered herein. Accordingly, the motion (#001) is denied as academic.

This action was commenced to recover legal fees accrued during a relatively short period of time wherein the plaintiff represented the defendant in a number of matters. It is undisputed that the defendant retained the plaintiff on October 12, 2010 to represent her in connection with pending motion practice in an ongoing child support and visitation matter entitled *Lew v Sobel*, Supreme Court, Nassau County, Index No. 03-08596 (Lew Action), and a related sanctions hearing scheduled for October 19, 2010. The latter hearing was scheduled to determine whether sanctions would be imposed on the defendant for her alleged conduct during a court appearance in the Lew Action on September 22, 2010, where she appeared on her own behalf. After the hearing, the defendant was sanctioned in the amount of \$2,000. In November and December, the plaintiff was retained, among other things, to handle appeals of certain orders of the trial court. On or about January 13, 2011, the plaintiff moved by order to show cause in both the Supreme Court and Appellate Division to be relieved as counsel for the defendant based on the defendant's failure to pay fees and the deterioration of the attorney-client relationship. The application to the the Supreme Court was granted on February 3, 2011, the application to the Appellate Division was granted on February 16, 2011.

This action was commenced by the filing of a summons and complaint on March 16, 2011. In her answer dated April 8, 2011, the defendant sets forth counterclaims for legal malpractice, breach of implied duty of good faith and fair dealing, breach of contract, and fraudulent inducement. The plaintiff now moves for an order dismissing the defendant's counterclaims pursuant to CPLR 3211(a)(1) and (a)(7), or in the alternative, pursuant to CPLR 3212(c) granting it summary judgment regarding said counterclaims.

For reasons that will become obvious, the Court will address the second branch of the plaintiff's motion seeking to dismiss the defendant's counterclaims for failure to state a cause of action. 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). 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). In examining the sufficiency of the pleading, the Court

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The notice of motion erroneously indicates that the motion to dismiss is made pursuant to CPLR 3211(a)(1) and (a)(2). However, the supporting papers make it clear that the second branch of the motion is for failure to state a cause of action.

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must accept the facts alleged therein as true and interpret them in the light most favorable to the plaintiff (Pacific Carlton Dev. Corp. v 752 Pacific, LLC, 62 AD3d 677]; Gjonlekaj v Sot, 308 AD2d 471).

However, “conclusory averments of wrongdoing are insufficient to sustain a complaint unless supported by allegations of ultimate facts” (Muka v Greene County, 101 AD2d 965; see DiMauro v Metropolitan Suburban Bus Auth., 105 AD2d 236). Thus, “factual allegations which are flatly contradicted by the record are not presumed to be true, and ‘[i]f the documentary proof disproves an essential allegation of the complaint, dismissal pursuant to CPLR 3211 (a)(7) is warranted even if the allegations, standing alone, could withstand a motion to dismiss for failure to state a cause of action’” (Deutsche Bank Natl. Trust Co. v Sinclair, 68 AD3d 914, quoting Peter F. Gaito Architecture, LLC v Simone Dev. Corp., 46 AD3d 530).

To establish a cause of action to recover damages for legal malpractice, a plaintiff must prove (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 (Tortura v Sullivan Papain Block McGrath & Cannavo, P.C., 21 AD3d 1082; Ippolito v McCormack, Damiani, Lowe & Mellon, 265 AD2d 303).

In the second branch of its motion, the plaintiff contends that the second, third and fourth counterclaim for breach of implied duty of good faith and fair dealing, breach of contract, and fraudulent inducement respectively, are duplicative of the first cause of action for legal malpractice and should be dismissed. Where a cause of action is based on the same alleged conduct and seeks the same damages as a legal malpractice claim it is properly dismissed as duplicative of the malpractice cause of action (Financial Servs. Veh. Trust v Saad, 72 AD3d 1019; see also Betz v Blatt, 116 AD3d 813). The defendant does not address the contentions herein in its opposition to the motion. New York Courts have held that the failure to address arguments proffered by a movant or appellant is equivalent to a concession of the issue (see McNamee Constr. Corp. v City of New Rochelle, 29 AD3d 544; Welden v Rivera, 301 AD2d 934). Regardless, a review of the counterclaims herein reveals that said counterclaims are duplicative of the first cause of action for legal malpractice. Accordingly, the defendant’s second, third and fourth counterclaim are dismissed.

Turning to the issue of whether the defendant has pled a cognizable counterclaim for legal malpractice herein, it is appropriate to set forth some background information regarding the Lew Action and the information in the parties’ submissions. At the time that the plaintiff was retained to represent the defendant, she had been involved in hotly contested litigation for approximately seven years with the father of her children (Dr. Lew), to whom she had never been married. She had a number of prior attorneys who either withdrew as counsel or were disqualified, including her husband, who represents her in this action. Immediately prior to retaining the plaintiff, the defendant was self-represented, and the matter had progressed to the point that the trial court was poised to render decisions on a number of dispositive motions made by her prior counsel or Dr. Lew’s counsel.

In her answer, the defendant sets forth approximately 65 numbered paragraphs under the heading “Facts Common to Defendant’s Counterclaims.” A review of the pleading indicates that the vast majority of the defendant’s factual allegations do not implicate a cause of action for legal malpractice

but are actually defenses to, or issues to be resolved in, the plaintiff's action to recover its legal fees. In addition, a number of said allegations are disproved by the documentary proof submitted by the plaintiff in support of its motion. The gravamen of the remaining allegations is that the plaintiff failed to make motions to have Dr. Lew, as the "monied party," pay her counsel fees in the Lew Action and to transfer the matter to Family Court, that the plaintiff failed to subpoena witnesses to the sanctions hearing and to obtain a confidentiality agreement regarding her medical records which the plaintiff had subpoenaed to court for said hearing, that the plaintiff caused the attorneys representing the defendant herein in a related CPLR article 78 proceeding to withdraw said proceeding, and that the plaintiff failed to adequately represent the defendant herein at a debtor's deposition held in an action to enforce a judgment obtained by Dr. Lew against her.

A review of the defendant's counterclaim for legal malpractice reveals that the allegations that the plaintiff failed to move to have Dr. Lew pay her counsel fees and/or to transfer the matter to Family Court, and that the plaintiff improperly prepared her defense in the subject sanctions hearing fail to state a cause of action. It is well settled that the plaintiff is required to prove that, "but for" the attorney's negligence, the plaintiff would have prevailed on the underlying cause of action (see AmBase Corp. v Davis Polk & Wardwell, 8 NY3d 428; Snolis v Clare, 81 AD3d 923). Here, the defendant has failed to plead that she would have been successful in these matters had the plaintiff acted differently. Failure to plead that she would have prevailed on these issues but for the plaintiff's alleged errors requires a dismissal of these allegations of the counterclaim for legal malpractice (Kennedy v Fischer, 78 AD3d 1016; Kuzmin v Nevsky, 74 AD3d 896).

In her answer, the defendant alleges that the plaintiff's failure to obtain a confidentiality order regarding her medical records permitted Dr. Lew's counsel to photocopy said records which "may be used [in the Lew Action], in other matters [with Dr. Lew], and will cause damage" to the defendant. In order to establish a prima facie case of legal malpractice, a party must demonstrate that the breach of the attorney's duty proximately caused the party actual and ascertainable damages (see Leder v Spiegel, 9 NY3d 836; Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer, 8 NY3d 438). Here, the defendant's failure to plead actual, and ascertainable damages as a result of the plaintiff's alleged negligence warrants dismissal of this allegation of the counterclaim for legal malpractice (Citidress II Corp. v Tokayer, 105 AD3d 798; Dempster v Liotti, 86 AD3d 169).

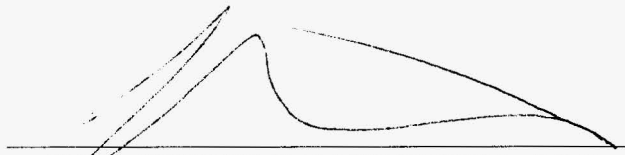
The defendant further alleges that she caused two other attorneys, including her husband, to prepare a CPLR article 78 proceeding to, among other things, transfer the Lew Action to an adjacent county "because of the impossibility of getting a fair trial in Nassau County," and that the plaintiff was aware of said endeavor and did not object or make any statements whether said proceeding was advisable. She additionally alleges that the plaintiff "pressured" her to cause said proceeding to be withdrawn, "and instructed her attorneys to so withdraw the proceeding," and that, as a consequence, she had to cause a second CPLR article 78 proceeding to be prepared "to try to get the [Lew Action] transferred to an adjacent county." Here, the defendant has failed to plead that she would have been successful in the subject proceeding but for the plaintiff's alleged error (Kennedy v Fischer, supra; Kuzmin v Nevsky, supra). In addition, it is determined that as a matter of law the plaintiff cannot be held negligent for the decision of the defendant's attorneys in the CPLR article 78 proceeding to withdraw the matter. Accordingly, this allegation of the counterclaim for legal malpractice is dismissed.

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Lastly, the defendant alleges that the plaintiff's associate failed to adequately represent her at a debtor's deposition held in an action to enforce a judgment obtained by Dr. Lew against her. Here, the defendant's failure to plead that she would have prevailed in said action but for the plaintiff's alleged errors (citations omitted) and to plead actual, and ascertainable damages as a result of the plaintiff's alleged negligence warrants dismissal of this allegation of the counterclaim for legal malpractice (Citidress II Corp. v Tokayer, supra; Dempster v Liotti, supra). Accordingly, the defendant's counterclaim for legal malpractice is dismissed.

That branch of the plaintiff's motion for summary judgment dismissing the defendant's counterclaims is denied as academic. Accordingly, the plaintiff's motion is granted to the extent that the first, second, third and fourth counterclaims in the defendant's answer are dismissed for failure to state causes of action.

Dated: May 18, 2015

  
**HON. JOSEPH C. PASTORELLA, J.S.C.**

FINAL DISPOSITION     NON-FINAL DISPOSITION