

Buongiovanni v Hasin
2015 NY Slip Op 32882(U)
March 26, 2015
Supreme Court, Rockland County
Docket Number: 033080/2014
Judge: William A. Kelly
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

PRESENT:

HON. WILLIAM A. KELLY
SUPREME COURT JUSTICE

-----X
CYNTHIA BUONGIOVANNI,

Plaintiff,

Index No. 033080/2014

-against-

DECISION & ORDER

DAVID V. HASIN, ESQ. and THE LAW OFFICE
OF DAVID V. HASIN,

Defendants.
-----X

The following papers were read on the motion of defendants for an Order, pursuant to CPLR Rule 3211(a)(5) & (7), dismissing plaintiff's complaint and on the cross motion of the plaintiff for summary judgment:

- Notice of Motion - Affirmation - Affidavit - Memorandum of Law 1-4
- Notice of Cross Motion - Affirmation - Affidavit -
- Memorandum of Law 5-8
- Reply Affirmation - Memorandum of Law 9-10

Upon the foregoing papers it is hereby ORDERED that the said motions are granted to the extent set forth herein.

“In the context of a motion to dismiss pursuant to CPLR 3211, the court must afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference” EBC I, Inc. v. Goldman Sachs & Co., 5 N.Y.3d 11, 19 (2005) (citing Goshen v Mutual Life Ins. Co. of N.Y., 98 N.Y.2d 314, 326 (2002)). Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss. Id.

“Initially, 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 (citations omitted).” Guggenheimer v Ginzburg, 43 N.Y.2d 268, 275 (1977). “When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one, and, 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, again dismissal should not eventuate (citations omitted).” Id.

The instant action is based upon the defendant’s representation of plaintiff in a divorce action. The defendant undertook representation of the plaintiff in April of 2010. After obtaining *pendente lite* relief for the plaintiff, the defendant’s motion to be relieved as counsel was granted on October 19, 2011.

The individual defendant has moved for dismissal based upon lack of personal service. The defendant admits that his secretary did in fact accept service at his place of business, but claims that he did not receive a copy in the mail as

required by CPLR §308(2). The mere denial of receipt of the summons is insufficient to rebut the presumption of proper service created by the process server's affidavit. Roberts v. Anka, 45 A.D.3d 752 (2nd Dep't 2007); Sime v. Ludhar, 37 A.D.3d 817 (2nd Dep't 2007); General Motors Acceptance Corporation v Grade A Auto Body, Inc., 21 AD3d 447 (2nd Dept 2005). To overcome this *prima facie* evidence, the defendant must set forth facts substantiating the claimed deficiency in service. Sando Realty Corp. v Aris, 209 AD2d 682 (2nd Dept 1994). Here, the defendant fails to effectively controvert the affidavit of service or demonstrate the existence of a valid jurisdictional defense.

Accordingly, the individual defendant's motion to dismiss for lack of personal jurisdiction is denied.

Based upon the individual defendant's failure to answer the complaint, the plaintiff has sought a default judgment. However, the individual defendant did appear in the action. Additionally, "in view of the strong public policy that actions be resolved on their merits, the relatively brief delay involved, the defendants' lack of wilfulness, and the absence of prejudice to the plaintiff," as a matter of the Court's discretion, the motion for a default is denied. New York University Hosp. Rusk Institute v. Illinois National Insurance Co., 31 A.D.3d 511 (2nd Dep't 2006). Accordingly, the individual defendant shall serve an answer within 30 days of the date of this Order.

An action alleging professional negligence 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."

Rudolf v. Shayne, Dachs, Stanisci, Corker & Sauer, 8 N.Y.3d 438, 442 (2007)(quoting McCoy v. Feinman, 99 N.Y.2d 295 (2002)). See also Tooma v. Grossbarth, 121 A.D.3d 1093 (2nd Dep’t 2014); Katz v. Hertzfeld & Rubin, 48 A.D.3d 640 (2nd Dep’t 2008).

The defendants contend that the plaintiff failed to establish that the alleged malpractice proximately caused the plaintiffs injury. In particular, the defendants assert that any deficiencies in its representation could have been cured by successor counsel who negotiated the final settlement of the action.

However, unlike cases where “control of the outcome of the litigation was wholly in the hands of successor counsel,” viewing the allegations in the light most favorable to the plaintiff, the complaint adequately alleged that the plaintiff was permanently damaged by the actions of the defendants and the ultimate outcome of the litigation was adversely affected. Tooma v. Grossbarth, 121 A.D.3d 1093 (2nd Dep’t 2014). Unlike the situation presented in Katz v. Hertzfeld & Rubin, 48 A.D.3d 640 (2nd Dep’t 2008) and Ramcharan v. Pariser, 20 A.D.3d 556 (2nd Dep’t 2005), at this point in the litigation, the Court cannot conclude as a matter of law that successor counsel had an adequate opportunity to correct the alleged inadequacies in the defendant’s representation.

Accordingly, the motion to dismiss the first cause of action is denied.

The second cause of action alleges breach of contract based upon the same facts underlying the malpractice claim. Because the contract cause of action is based upon the same facts, it must be dismissed as duplicative. Biberaj v. Accocella, 120 A.D.3d 1285 (2nd Dep’t 2014).

The third cause of action alleges both intentional and negligent infliction of emotional distress. An action based on an intentional tort must be commenced with

one year of the accrual of the action. CPLR §215. In this case, the action accrued, at the latest, on October 19, 2011, the date the defendant was relieved as counsel. The instant action was not commenced until November of 2014, more than one year after accrual.

A “cause of action to recover damages for negligent infliction of emotional distress generally must be premised upon conduct that unreasonably endangers a plaintiff’s safety or causes the plaintiff to fear for his or her safety.” Daviovici v. Fritson, 49 A.D.3d 488 (2nd Dep’t 2008); Losquandro v. Withrop University Hosp., 216 A.D.2d 533 (2nd Dep’t 1995); Glendora v. Gallicano, 206 A.D.2d 456 (2nd Dep’t 1994). In this case, the complaint fails to set forth a *prima facie* case of negligent infliction of emotional distress.

Accordingly, the third cause of action must be dismissed.

The fourth cause of action alleges a violation of Judiciary Law §487. A violation of §487 requires “deceit or collusion” or willful delay for personal gain. The allegations in the complaint to not allege facts that would satisfy the requirements of Judiciary Law §487. While the complaint set forth numerous instances of malfeasance or nonfeasance, the complaint does not set forth any facts from which an intent to deceive could be inferred. See Sun Graphics Corp. v. Levy, Davis & Maher, LLP, 94 A.D.3d 669 (1st Dep’t 2012); Moorman v. Perini & Hoerger, 65 A.D.3d 1106 (2nd Dep’t 2009); Agostini v. Sobol, 304 A.D.2d 395 (1st Dep’t 2003). Accordingly, the fourth cause of action is denied.

This Decision shall constitute the Order of the Court.

E N T E R

Dated: New City, New York
March 26, 2015



HON. WILLIAM A. KELLY
J.S.C.