SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL R. EDMEAD J.S.C.
Justice

PART 35

Caso, Thomas

-v-

Miranda Sambursky Sloane

INDEX NO. 159192/15

MOTION DATE 10/18/16

MOTION SEQ. NO. 002

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

In this legal malpractice action, plaintiff moves for leave, pursuant to CPLR §2221, to reargue and renew the defendants' motion to dismiss pursuant to CPLR §3211(a)(1) and (7), and upon such leave, withdrawing the Court's May 26, 2016 Decision and Order and denying such motion to dismiss and reinstating the Complaint or granting plaintiff leave to serve an Amended Complaint within 20 days.

By Decision and Order dated May 26, 2016 the Court dismissed the complaint for failure to state a cause of action, as follows:

> "allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not" presumed to be true or accorded every favorable inference (*David v Hack*, 97 AD3d 437, 948 NYS2d 583 [Pt Dept 2012]; *Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81, 692 NYS2d 304 [1st Dept 1999] (extrinsic evidence submitted by defendant including affirmations, exhibits, a settlement agreement from another action, correspondence and a complaint submitted in a previous federal action showed that plaintiff did not have a cause of action), *affd* 94 NY2d 659, 709 NYS2d 861, 731 NE2d 577 [2000]; *Kliebert v McKoan*, 228 AD2d 232, 643 NYS2d 114 [1st Dept], lv denied 89 NY2d 802, 653 NYS2d 279, 675 NE2d 1232 [1996]), and the criterion becomes "whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275, 401 NYS2d 182, 372 NE2d 17 [1977]; *see also Leon v Martinez*, 84 NY2d 83, 88, 614 NYS2d 972, 638 NE2d 511 [1994]; *Ark Bryant Park Corp. v Bryant Park Restoration Corp.*, 285 AD2d 143, 150, 730 NYS2d 48 [1st Dept 2001]; *WFB Telecom. v NYNEX Corp.*, 188 AD2d 257, 259 [1992], lv denied 81 NY2d 709 [1993] (letter from plaintiffs' counsel flatly contradicted plaintiffs' prima facie tort claim)).

Dated: _____ _____, J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

1. CHECK ONE: ..... ☐ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

* * * * *

Accepting the above allegations [in the Complaint] as true, as this court must, it cannot be said that plaintiff failed to "allege" a cause of action for legal malpractice.

However, in light of the numerous documents and transcripts generated in the underlying action, to which plaintiff had full and complete access, the inquiry is whether plaintiff "has" a cause of action for legal malpractice.

* * * * *

. . . based on the uncontroverted submissions, plaintiff does not have a legal malpractice claim against defendants.

* * * * *

Based on the foregoing, it is hereby
ORDERED that the motion by defendants to dismiss this action pursuant to CPLR 3211(a)(1) and (a)(7) on the grounds that a defense is founded upon documentary evidence and the complaint fails to state a cause of action, is granted *solely to the extent that dismissal is granted pursuant to CPLR 3211 (a)(7)*. . . .
(P. 6, 8, 13) (Emphasis added)

Plaintiff argues that the documents defendants previously submitted, consisting of their attorney's affidavit, unauthenticated documents, hearsay reports from defendants' accident investigator, and excerpts from trial and deposition testimony, were not in admissible form and do not qualify as conclusive documentary evidence under CPLR 3211(a)(1) or (7). Therefore, having declined to dismiss the complaint under 3211(a)(1), "*sub silentio*," the Court should not have even considered the same documents to address defendants' 3211(a)(7) motion to dismiss the complaint that the Court already ruled was facially sufficient. Further, the Court overlooked the affirmation of plaintiff's counsel Theodore H. Friedman ("Friedman") describing the departures from professional care. Friedman can take the status as an expert for his own client at this preliminary stage of the litigation, since he will not be a witness at trial. The jury will not confuse Friedman's status as both an advocate and an expert. And, the Court did not mention Friedman's affirmation, the affidavit by eye witness Theodore Arenas about his memory being refreshed by the police reports about the "pivotal" description of the truck, and plaintiff's expert investigator Stephen A. Coulon. Nor did the Court recite the papers it considered as required by CPLR 2219(a) for one ot determine whether such evidence was considered.

In opposition, defendants point out that plaintiff did not submit the underlying papers. Also, the court did not transform defendants' motion to once for summary judgment pursuant to CPLR § 3211(c). After the motion was made, plaintiff sought by letter dated February 23, 2016, discovery to oppose the motion and requested that the Court treat the motion as one for summary judgment. The Court granted discovery, and did not rule on the motion to convert it to summary judgment. Further, unlike a motion under CPLR § 3211(a)(1), a motion under CPLR § 3211(a)(7) may be supported by any form of evidence, and when defendant submits such evidence under (a)(7), "the standard morphs from whether the plaintiff stated a cause of action to whether it has one."

And, the affidavits of Justice Thompson and of plaintiff's own attorney, Friedman, submitted in support of renewal are improper and insufficient to support the Complaint.

Also, plaintiff's failure to cross move to amend the complaint when defendants filed the previous motion constitutes a waiver, and lacks merit in any event since plaintiff failed to submit a proposed amended complaint pursuant to CPLR 3025(b).

In reply, plaintiff argues that the expert affirmation of Justice Thompson establishes defendants' repeated, significant departures from reasonable standards of professional care and practice and that issues of fact exist. Plaintiff submits his proposed amended complaint, with redlines showing changes the departures mentioned by Justice Thompson, and argues that the late submission does not prejudice defendants' defense.

Discussion

A motion to reargue simply states that the Court overlooked or misapprehended the facts or the law. A motion for leave to reargue under CPLR 2221, "is addressed to the sound discretion of the court and may be granted only upon a showing 'that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision'" (*William P. Pahl Equipment Corp. v Kassis*, 182 AD2d 22 [1st Dept 1992] *lv denied and dismissed* 80 NY2d 1005, 592 NYS2d 665 [1992], *rearg. denied* 81 NY2d 782, 594 NYS2d 714 [1993]). Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided (*Pro Brokerage v Home Ins. Co.*, 99 AD2d 971, 472 NYS2d 661 [1st Dept 1984]) or to present arguments different from those originally asserted (*Foley v Roche*, 68 AD2d 558, 418 NYS2d 588; *Pahl Equip. Corp. v Kassis*, 182 AD2d at 27). On reargument the court's attention must be drawn to any controlling fact or applicable principle of law which was misconstrued or overlooked (*see Macklowe v Browning School*,80 AD2d 790, 437 NYS2d 11 [1st Dept 1981)).

A motion for leave to renew pursuant to CPLR 2221 "shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination" and "shall contain reasonable justification for the failure to present such facts on the prior motion." (*American Audio Serv. Bur. Inc. v AT & T Corp.*, 33 AD3d 473, 476, 823 NYS2d 25 [1st Dept 2006]). The motion to renew, when properly made, posits newly discovered facts that were not previously available *or* a sufficient explanation is made why they could not have been offered to the Court originally (*see discussion in Alpert v. Wolf*, 194 Misc. 2d at 133, 751 N.Y.S.2d 707; D. Siegel New York Practice § 254 [3rd ed.1999]). A motion to renew, "is intended to draw the court's attention to new or additional facts which, although in existence at the time of the original motion, were unknown to the party seeking renewal and therefore not brought to the court's attention " (*Beiny v. Wynyard*, 132 A.D.2d 190, 522 N.Y.S.2d 511, *lv. dismissed* 71 N.Y.2d 994, 529 N.Y.S.2d 277, 524 N.E.2d 879)."

"CPLR 2221 does not specify the papers that must be submitted on a motion for reargument, and the decision whether to entertain reargument is committed to the sound discretion of the court (*Rostant v Swersky*, 79 AD3d at 457, *citing William P. Pahl Equip. Corp. v. Kassis*, 182 AD2d 22 at 27)). Therefore, plaintiff's failure to include the underlying papers does not "render the latter procedurally defective," under the circumstances (*see Rostant v Swersky*, 79 AD3d 456, 912 NYS2d 200 [1st Dept 2010]).

The Court rejects plaintiff's contention that it converted the underlying motion to one for summary judgment. No credibility finding or assessment of the merits of the allegations was

made by the Court. And, the allegation that the Court did not recite the documents considered in its decision pursuant to CPLR 2219 is not a basis for reargument or renewal. CPLR 2219(a)'s requirement that an order "recite the papers used on the motion" is "designed to identify those papers which should be included in the record on appeal." (McKinney's CPLR Rule 2219, NY CPLR Rule 2219).[1]

Further, the Court adheres to its determination that Coulon is not an attorney qualified to opine on whether defendants committed malpractice (*see e.g., Gonzalez v. Flushing Hosp. Medical Center*, 44 Misc.3d 1222(A), 3 N.Y.S.3d 285 (Table) [Civil Court, Queens County 2014] (finding *an attorney* admitted to practice in New York unqualified as an expert in legal malpractice action where "his expertise and qualifications to render opinions *regarding legal malpractice actions and/or the professional standards for attorneys handling legal matters* involving insurance coverage issues for medical malpractice cases" unclear; his expert affidavit "fails to state *how long he has practiced, and in what area of law*")). In any event, Coulon is not qualified to opine that plaintiff would have prevailed in the underlying matter but for the purported acts of malpractice. Nor did the Court overlook plaintiff's counsel's affirmation as an "expert affidavit" sufficient to address the "but for" element of plaintiff's claim. Plaintiff's counsel, Friedman, did not submit his affirmation as an expert affidavit to support plaintiff's claim, and plaintiff cites no authority permitting the use of same under the circumstances.

Nevertheless, to the degree plaintiff argues that the Court improperly considered evidence that was not in admissible form to dismiss a complaint that the court ruled was sufficiently stated, reargument is granted.

To sustain a cause of action for legal malpractice, a plaintiff must show "(1) that the attorney was negligent; (2) that such negligence was a proximate cause of plaintiff's losses; and (3) proof of actual damages" (*Xiong Ping Tang v. Marks*, 133 A.D.3d 455, 18 N.Y.S.3d 858 [1st Dept 2015]; *Pannone v. Silberstein*, 118 A.D.3d 413, 990 N.Y.S.2d 164 [1st Dept 2014]). "In order to establish proximate cause, a plaintiff must demonstrate that but for the attorney's negligence, she would have prevailed in the underlying matter or would not have sustained any ascertainable damages" (*Xiong Ping Tang v. Marks, supra; Davis v. Klein*, 88 N.Y.2d 1008, 671 N.E.2d 1268, 648 N.Y.S.2d 871 [1996] " plaintiff must demonstrate that the plaintiff would have succeeded on the merits of the underlying action but for the attorney's negligence")). "[S]peculation on future events [is] insufficient to establish that the defendant lawyer's malpractice, if any, was a proximate cause of any such loss" (id. at 734–735, 800 N.Y.S.2d 695). As stated in *Dweck Law Firm, LLP v. Mann*, 283 A.D.2d 292, 727 N.Y.S.2d 58 [1st Dept 2001]) "[C]onclusory legal argument or allegations contradicted by documentation, do not suffice . . . . Attorneys may select among reasonable courses of action in prosecuting their clients' cases without thereby committing malpractice . . . so that a purported malpractice claim that amounts

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[1] However, for clarification, the Court notes that it considered all papers e-filed in connection with the underlying motion.

The Court notes that according to the underlying motion papers, at Arenas' deposition, held approximately one month after defendants' hired investigator met with Arenas purportedly without the NYPD's notes and records, Arenas was read the NYPD's notes concerning his eyewitness account, and he nevertheless stated that he did not "remember" ever saying that the truck that hit plaintiff had a flat front. (Arenas EBT, dated June 23, 2009).

only to a client's criticism of counsel's strategy may be dismissed."

Contrary to plaintiff's contention, a Court may rely the testimony and documentation when considering a motion brought pursuant to CPLR 3211(a)(7) to determine, under such circumstances, whether plaintiff "has" a cause of action (*see Biondi v. Beekman Hill House Apt. Corp.*, 257 A.D.2d 76, 692 N.Y.S.2d 304 [extrinsic evidence submitted by defendant in a motion addressing the sufficiency of the complaint, including affirmations, exhibits, a settlement agreement from another action, correspondence and a complaint submitted in a previous Federal action showed that plaintiff does not have a cause of action]; *WFB Telecom., Inc. v. NYNEX Corp.*, 188 A.D.2d 257, 259, 590 N.Y.S.2d 460, lv. denied 81 N.Y.2d 709, 599 N.Y.S.2d 804, 616 N.E.2d 159 [dismissing the complaint pursuant to CPLR 3211(a) (7) where defendant submitted letter from plaintiff's counsel which flatly contradicted plaintiff's current allegations of prima facie tort]). Therefore, although plaintiff need not submit any evidence to defend its complaint against a challenge to its facial sufficiency, the Court is permitted to consider the documents to determine whether plaintiff "has" a cause of action pursuant to CPLR 3211(a)(7) (When evidentiary material is considered the criterion on a CPLR 3211(a)(7) motion is whether a plaintiff has a claim, not whether he or she has stated one (*see Weksler v. Weksler*, 81 A.D.3d 401, 918 N.Y.S.2d 11 [1st Dept 2011] *citing Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275, 401 N.Y.S.2d 182, 372 N.E.2d 17 [1977]; *Somma v. Dansker & Aspromonte Associates*, 13 Misc. 3d 1232(A), 831 N.Y.S.2d 356 (Table) [Supreme Court, New York County 2006]).

As to proximate cause, plaintiff alleged that "but for [defendants' various] departures, malpractice, failures to act and negligence . . ., Plaintiffs would have recovered appropriate compensation and damages for said injuries." (¶27). However, allegations consisting of bare legal conclusions flatly contradicted by documentary evidence are not entitled to be presumed to be true or accorded every favorable inference, in the context of a motion brought under CPLR 3211(a)(7) (*WFB Telecommunications, Inc. v. NYNEX Corp., supra*). Inasmuch as the documentation submitted by defendants defeated the conclusory, speculative allegation that "but for" counsel's alleged malpractice, the plaintiff would have prevailed in his underlying personal injury matter, "dismissal of legal malpractice action" is required, "regardless of whether negligence" is sufficiently asserted (*see Russo v. Feder, Kaszovitz, Isaacson, Weber, Skala & Bass, LLP*, 301 A.D.2d 63, 750 N.Y.S.2d 277 [1st Dept 2002]). Therefore, upon reargument, the Court adheres to its earlier determination.

Turning to renewal, plaintiff's application in this regard is denied. Plaintiff's reliance on the affidavit of his own counsel, Friedman, on renewal is misplaced. Even assuming plaintiff may rely on his own counsel as an expert in a legal malpractice matter, there is an insufficient explanation as to why this affirmation in its current form was not submitted with the initial motion. Further, notwithstanding the fact that this Court holds Retired Appellate Division Second Department Justice William Thompson Jr. in the highest regard, plaintiff's explanation for failing to submit this affidavit previously is insufficient. In any event, such affidavit does not support the speculative allegation that plaintiff would have prevailed in the underlying matter but for the purported acts of malpractice.

Plaintiff's remaining contentions are insufficient to warrant a departure from this Court's previous determination.

Conclusion

Based on the foregoing, it is hereby

ORDERED that plaintiff's motion for leave, pursuant to CPLR §2221, to reargue and renew the defendants' motion to dismiss pursuant to CPLR §3211(a)(1) and (7), and upon such leave, withdrawing the Court's May 26, 2016 Decision and Order and denying such motion to dismiss and reinstating the Complaint or granting plaintiff leave to serve an Amended Complaint within 20 days is granted solely as to reargument; and it is further

ORDERED that upon reargument, the Court adheres to its earlier determination; and it is further

ORDERED that plaintiff shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

DATED: 10/25/16

J.S.C.

HON. CAROL R. EDMEAD
J.S.C.

1. CHECK ONE :
2. CHECK AS APPROPRIATE : MOTION IS: ☒ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE :

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