

Moore v Kronick

2016 NY Slip Op 33135(U)

October 6, 2016

Supreme Court, Westchester County

Docket Number: 68782/2015

Judge: Lawrence H. Ecker

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER**

-----X
MIYAVA CHAPMAN MOORE,

Plaintiff,

**INDEX NO. 68782/2015
DECISION/ORDER**

-against

**Motion Date: 6/15/16
Motion Seq. 2**

ARNOLD KRONICK, ARNOLD KRONICK LP, AND
JOHN DOES 1-10,

Defendants.
-----X

ECKER, J.

The following papers numbered 1 through 13 were read on the motion of Arnold Kronick and Arnold Kronick, LP (referred to herein as "defendant"), made pursuant to CPLR 3211(a)(1),(5), and (7), seeking an order dismissing Miyava Chapman Moore's ("plaintiff") amended complaint with prejudice, or in the alternative, dismissing her claim for damages related to emotional or mental distress:

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Motion, Affirmation in Support, Exhibits A-C, Memorandum of Law in Support	1 - 6
Affidavit in Opposition, Exhibits 1-3, Memorandum of Law in Opposition	7 - 11
Affirmation in Reply	12
Retainer Agreement ¹	13

¹ This exhibit [Doc. No.41]was permitted to be filed to supplement the record while the instant motion was sub judice, based upon a letter request from defendant's attorneys, dated August 11, 2016 [Doc. No. 35]. However, the court declines to include as part of this record affirmations submitted by each party's attorneys and an affidavit by defendant relative to this document [Doc. Nos. 39, 40, 43].

Upon the foregoing papers, the court determines as follows:

Plaintiff, in her amended complaint [Ex. A], seeks compensatory and punitive damages against defendant, pursuant to five separate causes of action, namely, legal malpractice [first cause of action], breach of fiduciary duty [second cause of action], fraud [third cause of action], deceptive business practices [fourth cause of action], and violation of Judiciary Law § 487 [fifth cause of action]. Defendant moves, pursuant to CPLR 3211(a)(1),(5) and (7), to dismiss each of the five causes of action.

The gravamen of the amended complaint arises from defendant's representation of plaintiff in a partition action brought against her by her brother, Eugene Moore ("Eugene"), regarding a two family residence in Yonkers, New York [*Eugene Moore v Ava Chapman Moore*, West. Co. Index No. 19149/2009 ("the underlying action")]. The facts underlying the partition action are further set forth, *infra*.

On June 5, 2012, the partition action was settled by stipulation of settlement in open court "So Ordered" by the court (Giacomo, J). [Deft.'s Ex. C].

The stipulation of settlement was prefaced by a statement by defendant that is relevant to plaintiff's claims in this action. Specifically, defendant stated,

"Your Honor, it's my understanding that pursuant to the partition provisions in Article 9 of the Real Property Actions and Proceedings Law that upon the commencement of the proceeding by a Plaintiff or petitioner who is a tenant-in-common, that the premises which is the subject of the partition action must thereafter either be divided or sold.

In view of the fact that this is not acreage, that this is not some sort of property that we could then have survey conducted of and then divided as was perhaps the case in olden days, since this is a premises, the alternative here is to grant the application of the Plaintiff in this matter and the Defendant will consent to having the premises listed for sale."

[Deft., Ex. C, page 3, lines 4-17].

Following defendant's statement, both counsel for the parties proceeded to place on the record the terms and conditions to abide until the residence was sold, and the division of net proceeds after the closing. Upon completion of the terms of the stipulation, Justice Giacomo conducted an allocution of the parties, each under oath, confirming each party's understanding of the terms, each party's satisfaction with his/her respective attorney's advice and counsel, and that there were no impediments of any type that would affect his/her agreement to the settlement. [Deft.'s Ex. C, pages 21 - 24]. Justice Giacomo found the parties understood the terms of the settlement and had entered into the settlement freely and voluntarily, upon which he would approve the settlement. [Deft.'s Ex. C, page 24].

The instant action was commenced on October 30, 2015 by the filing of a pro se summons and complaint. On February 4, 2016, represented by counsel, plaintiff filed an Amended Summons and First Amended Complaint [Ex. B]. On March 18, 2016, defendant filed an Answer. On March 24, 2016, defendant filed an Amended Answer.

By Notice of Motion and supporting papers, defendant moves to dismiss the amended complaint pursuant to CPLR 3211 (a)(1),(5), and (7).

On a motion to dismiss pursuant to CPLR 3211(a)(7), the standard is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action. In considering such a motion, the court must accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. *Law Ofcs. of Thomas F Liotti v State of New York*, 139 AD3d 812 [2d Dept 2016]. That is, such a motion to dismiss should be granted only where, even viewing the allegations as true, the plaintiff cannot establish a cause of action. *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409 [2001]; *Leon v Martinez*, 84 NY2d 83, 87 [1994]; *Anderson v Armentano*, 139 AD3d 769 [2d Dept 2016].

A motion to dismiss a complaint based upon documentary evidence may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law. *Goshen v Mutual Life Ins. Co.*, 98 NY2d 314, 326 [2002]; *Pareskh v Cain*, 96 AD3d 812, 815 [2d Dept 2012]; *Shaya B. Pac., LLC v Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 AD3d 34, 37 [2d Dept 2006].

The factual assertions that follow are derived from the amended complaint, as distilled from statements of law and legal conclusions contained therein. The facts are accepted as true for the purpose of this analysis.

Plaintiff and Eugene Moore are brother and sister. She is 76 years old. Plaintiff did not receive her fair share of the proceeds from the sale of their late mother's house due to the conduct of her brother and her other siblings. In 1999, plaintiff wanted to buy the residence, known as 966 Miles Square Road, Yonkers, New York ("the residence") that is now the subject of this dispute. She was not able to obtain a purchase money mortgage in her name alone and asked her brother to obtain the mortgage loan. In order to do so, his name was placed on the deed, together with hers, as tenants in common. She alleges he wanted nothing to do with the residence, that it would be her sole responsibility to maintain and pay the expenses, and that in 2012, when plaintiff's dog bit a neighbor, her brother signed an affidavit confirming he had no interest in the residence "since 2009". Plaintiff purchased the residence for \$300,000, subject to a mortgage of \$260,000. The residence was worth \$500,000 at the time of the partition action.

Plaintiff had rented the second floor apartment in the residence to a woman who became Eugene's girlfriend. When plaintiff raised the rent, the girlfriend refused to pay, causing plaintiff to take her to court. Plaintiff alleges in the course of that proceeding, her brother for the first time, in retaliation, claimed an interest in the residence. The partition action brought by her brother was then filed.

It is upon these basic factual allegations that plaintiff now alleges she had a meritorious defense, and provable counterclaim, for imposition of a constructive trust, and that the equities weighed in her favor, such that her brother's entitlement to partition was not absolute, and that she was not required to sell the house. She alleges that after retaining defendant, he failed to suitably prosecute these claims, did not file an amended answer to her original pro se answer², did not conduct pre-trial disclosure proceedings, failed to adhere to court ordered disclosure deadlines, represented her at the deposition conducted of her by her brother, when she testified as to her defenses to the partition, as now asserted, but did not conduct a deposition of plaintiff's brother.

Plaintiff further alleges that defendant had a conflict of interest because the retainer agreement called for the balance of his fees to be paid from the sale of the residence, that defendant was not forthcoming in providing her with a copy of the retainer agreement, that he deliberately sought to lose the action and colluded with her brother's attorney, and that defendant's misstatement of law, due to his misapprehension of the law, even after having researched the applicable law prior to the June 5, 2012 date, led her to enter into the settlement, all to her detriment, including her seeking psychological services arising from the fact she had agreed to the partition of the residence.³

The court will address each of the five causes of action in the order in which they are pled, and thereupon, determine the applicability of each of the subdivisions of CPLR 3211 upon which defendant relies.

First Cause of Action: Legal Malpractice

"In an action to recover for legal malpractice, a plaintiff 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." *Rudolph v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438, 442 [2007], quoting *McCoy v Feinman*, 99 NY2d 295, 301-302 [2002]. Furthermore, "[t]o establish

² Neither party has submitted copies of the pleadings in the underlying action.

³ The amended complaint states the court has ordered a referee to be appointed to carry out the terms of the settlement, but as of the date of its filing, the sale has not taken place [Amended Compl. ¶ 61].

causation, a plaintiff must show that he or she would have prevailed in the underlying action or would not have incurred any damages, but for the lawyer's negligence" *Rudolph v Shayne, Dachs, Stanisci, Corker & Sauer, supra* at 443. "A claim for legal malpractice is viable, despite settlement of the underlying action, if it is alleged that settlement of the action was effectively compelled by the mistakes of counsel" *Schiller v Bender, Burrows & Rosenthal, LLP*, 116 AD3d 756 [2d Dept 2014], quoting *Tortura v Sullivan Papain Block McGrath & Cannavo, P.C.*, 21 AD3d 1082, 1083 [2d Dept 2005].

The issue is not whether the defense/counterclaims will survive a motion for summary judgment, or whether a prima facie case will be established at trial, but rather whether defendant's conduct, as alleged, is cognizable, both as to the representation made on the record as to the compulsory sale of the property, or the conduct of the litigation until the date of settlement. On these factual allegations viewed in the light most favorable to the plaintiff [see *Leon v Martinez, supra*], her assertion that a constructive trust theory could have been pursued is undeniably a cognizable defense/counterclaim.

The elements of a constructive trust are four-fold: (1) a confidential or fiduciary relation; (2) a promise; (3) a transfer in reliance thereon; and (4) unjust enrichment. *Simonds v Simonds*, 45 NY2d 233 [1978]. Each of these elements are sufficiently alleged herein. That is not to say that the underlying case would survive a motion for summary judgment made subsequent to document exchange and depositions, or be sustained by the trier of fact at trial. Rather, at this stage of this proceeding, there is a cognizable claim relating to constructive trust that plaintiff alleges should have been explained to her, prior to her agreement to settle this case before Justice Giacomo. The court makes no determination, as it may not, regarding issues of the parties' credibility. See *Leon v Martinez, supra*.

While defendant argues there is no unjust enrichment because upon sale, plaintiff's brother's liability under the mortgage note will be satisfied, which is a benefit to him, it does not perforce mean that he will likewise not gain a share of the net proceeds of sale, if any, which if so, according to the pleading, would constitute unjust enrichment to him, as plaintiff alleges he is entitled to no share of the net proceeds. The court finds that the first cause of action may not be dismissed, at this time, upon the ground that there was is no per se cognizable claim for legal malpractice.

Defendant next argues the first cause of action is barred by documentary evidence, and by collateral estoppel, pursuant to CPLR 3211(a)(1) and (a)(5) because the in-court stipulation of settlement, as a document, together with Justice Giacomo's allocution of the parties, precludes re-litigation of the underlying claim. Defendant's argument might have merit if plaintiff was seeking to overturn the stipulation as against her brother, or if this action could be viewed as an end-around that effort. However, when plaintiff alleges that her agreement to settle the underlying case was predicated upon defendant's mis-statement or misapprehension of the law, the defense of collateral estoppel will not avail.

In *N.A. Kerson Company, Inc. v Shayne, Dachs, Weiss, Kolbrenner, Levy and Moe Levine*, 45 NY2d 730, lv. to reargue den. 45 NY2d 839 [1978], the Court, in affirming the dismissal of the legal malpractice claim, on the concurring opinion of Justice Suozzi in the Appellate Division, 59 AD2d 551 [2d Dept 1977], rejected a similar contention that a legal malpractice claim arising out of an alleged ill-advised stipulation of settlement is a collateral attack upon the stipulation. Rather, it must stand or fall on the merits as a separate and distinct claim against the party's attorney. See also, *Silver v Silver*, 62 AD3d 962 [2d Dept 2009]. Hence, the court denies dismissal of the first cause of action based upon collateral estoppel.

A motion to dismiss a complaint based upon documentary evidence may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law. *Goshen v Mutual Life Ins. Co.*, 98 NY2d 314, 326 [2002]; *Endless Ocean, LLC v Twomey, Latham, Shea, Kelley, Dubin & Quartararo*, 113 AD3d 587, 588 [2d Dept 2014]; *Shaya B. Pac., LLC v Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 AD3d 34, 37 [2d Dept 2006]. Here, the documentary evidence does not conclusively establish a defense as a matter of law. To the contrary, the transcript of defendant's in-court statement prefatory to the stipulation of settlement to the effect "that the premises which is the subject of the partition action must thereafter either be divided or sold." (emphasis supplied) [Deft., Ex. C, page 3], may be a potential misstatement of law, depending upon the proofs of the parties, an opportunity plaintiff now asserts she should have been afforded to further develop in the underlying action. Hence, the court finds it is unable to dismiss the first cause of action based upon documentary evidence.

Defendant next argues that pursuant to CPLR 3211(a)(5), the legal malpractice claim is barred by the statute of limitations, which is three years from the date of accrual of the claim. CPLR § 214(6). The stipulation of settlement was entered into on June 5, 2012. This action was filed over three years later on October 30, 2015.

A defendant who moves for dismissal in a legal malpractice action on statute of limitation grounds must make a prima facie showing that the malpractice action was commenced more than three years after the date on which the cause of action accrued. If the defendant makes a prima facie showing, as here, the burden shifts to the plaintiff to raise a triable issue of fact as to whether the statute of limitations was tolled or is otherwise inapplicable. The three-year statute of limitations is tolled for the period following the alleged malpractice until the attorney's continuing representation of the client on a particular matter is completed. The doctrine is not applicable, and the statute is not tolled, based upon the attorney's continuing general representation of the client, rather, "the continuing representation doctrine tolls the Statute of Limitations only where the continuing representation pertains specifically to the matter in which the attorney committed the alleged malpractice. *Shumsky v Eisenstein*, 96 NY2d 164, 168 [2001]

Plaintiff submits documentation that defendant continued to represent plaintiff regarding the residence [Pltf's Ex. 1, 2 and 3], constituting letters from defendant, dated

January 23, 2014, December 5, 2013 and October 21, 2013, providing counsel for plaintiff's brother with a computation of the monthly income and expenses, an obligation undertaken by plaintiff pursuant to the stipulation of settlement. The three letters each list the subject as "Re: 966 Mile Square Road, Yonkers," the subject house of the settled partition action.

Defendant argues that if plaintiff is invoking the continuous representation doctrine, that need to have been pled, and that these letters are not referable to the underlying action. Plaintiff counters there was a toll in the statute due to defendant's continuing to represent her interests, as evidenced by the letters, all of which reference the subject residence by address. On the basis of the three letters, the court concludes defendant continued to represent plaintiff in the underlying action. It appears that the representation continued even beyond the date of the commencement of this action. Thus, the court finds that the statute of limitations defense is not applicable to the legal malpractice cause of action. *Louzoun v Kross Moss and Kroll*, 113 AD3d 600 [2d Dept 2014]; *cf. Farage v Ehrenberg*, 124 AD3d 159 [2d Dept 2014]. Hence, the court denies the motion to dismiss the first cause of action upon statute of limitations grounds.

For the above stated reasons, defendant's motion to dismiss the first cause of action, legal malpractice, upon the pleadings, is denied.

Second Cause of Action: Breach of Fiduciary Duty

Defendant moves to dismiss plaintiff's cause of action for breach of fiduciary duty as duplicative of the legal malpractice action. In her amended complaint, plaintiff alleges defendant operated under a conflict of interest in that the retainer agreement provided he would not be fully paid until plaintiff's residence had been sold, that is in her words, until she had lost the partition action. By this agreement, she argues, defendant's interests were at odds with her interests. This assertion is belied by the retainer agreement [NYSCEF Doc. No. 41], which includes no such language, and as such, provides no inference that defendant had placed himself in a conflict of interest posture.

Plaintiff seeks to distinguish the factual allegations between the two causes of action. She argues that the legal malpractice and breach of fiduciary duty claims rely on different facts, while nevertheless recognizing a claim of breach of fiduciary duty that arises out of the same facts as an asserted legal malpractice cause of action and does not alleges distinct damages will be deemed duplicative of the malpractice claim. *Balanoff v Doscher*, 140 AD3d 995 [2d Dept 2016]; *Miazga v Assaf*, 136 AD3d 1131 [3d Dept 2016]; *Boone v Bender*, 74 AD3d 1111 [2d Dept 2010].

In opposition, plaintiff cites *Ulico v Wilson, Elser, Moskowitz, Edelman & Dicker*, 56 AD3d 1 [1st Dept 2008] to support her claim that defendant's conduct, while her attorney, breached his fiduciary duty to her. In *Ulico*, plaintiff alleged defendant assisted non-party Legion Insurance Company in establishing a competing business, which is

essentially an allegation that defendant was serving two masters at the same time, which is a conflict of interest. There, the Court declined to dismiss a fiduciary duty claim because it was not premised on the same facts and did not seek the same relief as plaintiff's malpractice claim. *Id.* at 8-9.

In adhering to the standard to be applied on the motion to dismiss on the pleadings, the court nonetheless finds that regardless of plaintiff's attempt to establish a claim for damages for emotional distress, which she alleges can flow from breach of fiduciary duty, as a different measure of damages, what has been pled in this complaint, relative to the retainer agreement, or any other allegation in the complaint, does not justify that inference. The claims here are based on the same facts, and identical conduct, as opposed to the facts in *Ulico*, *supra*. *Barouh v Law Ofcs. of Jason L. Abelove*, 131 AD3d 988 [2d Dept 2015].

The court determines the cause of action for breach of fiduciary duty does not lie. Thus, there is no need to address the other grounds for dismissal raised by defendant. The second cause of action for breach of fiduciary duty is dismissed.

Third Cause of Action: Fraud

For like reason, the cause of action for fraud is dismissed. This cause of action is predicated upon the same conduct as alleged relative to the legal malpractice claim. The court does not find persuasive plaintiff's argument that defendant committed acts of a fraudulent nature that are separate and apart from the acts constituting the alleged legal malpractice. That a different measure of damages may apply when a meritorious fraud claim is proved does not justify boot-strapping that theory to a basic negligence claim. The court declines to so find. *Barouh v Law Ofcs. of Jason L. Abelove*, *supra*. Thus, there is no need to address the other grounds for dismissal raised by defendant. The third cause of action for fraud is dismissed.

Fourth Cause of Action: Deceptive Business Practices

Plaintiff alleges by his conduct, defendant has engaged in a deceptive business practice. Article 22-A of the General Business Law prohibits acts or practices in the conduct of any business. GBL § 349(a). As defendant argues, to prevail on a GBL § 349 claim, a plaintiff must plead: "first that the challenged act or practice was consumer-oriented; second that it was misleading in a material way; and third that the plaintiff suffered injury as a result of the deceptive act" *Stutman v Chemical Bank*, 95 NY2d 24 [2000]; *Singh v Queens Ledger Newspaper Grove*, 2 AD3d 703 [2d Dept 2003]. Courts will not apply the statute where the alleged acts arise from a "private contract that is unique to the parties, rather than upon conduct that affects consumers at large." *Biancone v Bossi*, 24 AD3d 582, 583 [2d Dept 2005]; *Colucci v Arisohn*, 2009 WL 2980508, 2009 N.Y. Slip Op. [Sup Ct, NY County 2009, Gische, J.] (GBL § 349 claim fails because the challenged act or practice was not consumer-oriented, but rather, arose out of the attorney-client relationship).

The court recognizes the GBL § 349 cause of action may have been pled in an effort to recover legal fees, and that this statute does allow for private rights of action, separate and apart from the actions authorized to be taken by the Attorney General. However, GBL § 349 was not intended to supplant an action to recover damages for breach of contract between parties to an arm's length contract, here an attorney-client relationship. Rather, the statute was intended to be a consumer protection statute. "The typical violation contemplated by the statute involves an individual consumer who falls victim to misrepresentations made by a seller of consumer goods usually by way of false and misleading advertising." [Internal citations omitted]. *Teller v Bill Hayes, Ltd.*, 213 AD2d 141 [2d Dept 1995].

Thus, plaintiff's amended complaint falls far short of pleading facts, even if accepted as true, or arguing, that the conduct complained of fits within the deceptive business practices rubric. The court determines this cause of action does not lie. The fourth cause of action is dismissed.

Fifth Cause of Action: Judiciary Law § 487

Plaintiff's fifth cause of action alleges a violation of Judiciary § 487. "While legal malpractice deals with negligence or good-faith mistakes, Judiciary Law § 487 deals with attorney deceit." An attempt to deceive the court or parties subjects the attorney to a misdemeanor as well as disgorgement of fees and treble damages under the statute. Ordinary negligence does not rise to this level. *Amalfitano v Rosenberg*, 12 NY3d 8 [2009]

The court finds the pleadings do not sufficiently describe conduct that evinces deceit upon the client or deceit upon the court, which is the essential element of this statute. Accordingly, this cause of action cannot be sustained. The fifth cause of action is dismissed.

The court has considered the additional contentions of the parties not specifically addressed herein. To the extent any relief requested by either party was not addressed by the court, it is hereby denied.

By reason of the foregoing, it is hereby

ORDERED that the motion of Arnold Kronick and Arnold Kronick, LP, defendants, made pursuant to CPLR 3211(a),(1),(5), and (7), as against Ava Chapman Moore, plaintiff, is denied in part, and granted in part; and it is further

ORDERED that the motion to dismiss the first cause of action for legal malpractice, is denied; and it is further

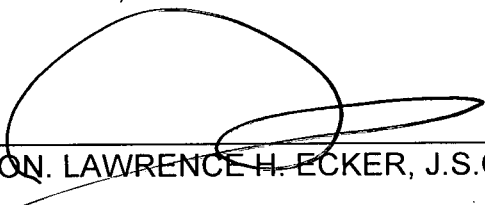
ORDERED the motion to dismiss the second, third, fourth and fifth causes of action is granted and those causes of action are dismissed; and it is further

ORDERED that the parties shall appear in the Compliance Part of the Court, Room 800, on November 17, 2016, at 10:30 a.m., as directed by the order of the Court (Lefkowitz, J.), dated September 19, 2016.

The foregoing constitutes the Decision/Order of the court.

Dated: White Plains, New York
October 6, 2016

ENTER,



HON. LAWRENCE H. ECKER, J.S.C.

Appearances

Richard Pu, Esq.
Attorney for Plaintiff
Via NYSCEF

Voute' Lohrfink Magro & McAndrew, LLP
Attorneys for Defendants
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