

Jospehs v AACT Fast Collection Servs. Inc.
2017 NY Slip Op 32793(U)
August 23, 2017
Supreme Court, Kings County
Docket Number: 502491/12
Judge: Carolyn E. Wade
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At Part 84 of the Supreme Court of
the State of New York, held in and
for the County of Kings, at the
Courthouse, located at Civic Center,
Brooklyn, New York on
the *23rd* day of August 2017

PRESENT:
HON. CAROLYN E. WADE,

Justice

-----X
ELYSE JOSEPHS/ADVANCED ACUPUNCTURE
HEALTH, P.C.,

Plaintiff,

Index No. 502491/12

-against-

DECISION and ORDER

AACT FAST COLLECTION SERVICES INC.,
KARINA MITSELMAKHER AKA KARINA PISMICHENKO,
LUBARSKY & TARNOVSKY ATTORNEYS AND
COUNSELORS AT LAW P.C., LEO LUBARKSY, ESQ.,
AND RADA TARNOVSKY, ESQ.

Defendants.

-----X

Recitation, as required by CPLR §2219(a), of the papers considered in the review of
Defendants’ Motion:

<u>Papers</u>	<u>Numbered</u>
Order to Show Cause/Notice of Motion and Affidavits/Affirmations Annexed.....	<u>1</u> _____
Cross-Motion and Affidavits/Affirmations.....	_____
Answering Affidavits/Affirmations.....	<u>2</u> _____
Reply Affidavits/Affirmations.....	<u>3</u> _____
Memoranda of Law.....	_____

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Upon the foregoing cited papers and after oral argument, defendants LUBARSKY and TARNOVSKY ATTORNEYS AND COUNSELORS AT LAW, P.C., LEON LUBARSKY, ESQ., and RADA TARNOVSKY, ESQ. (collectively “Movants”) move for an order pursuant to CPLR §§§ 3211(a)(7), 3016(b) and 3126(3), dismissing ELYSE JOSEPHS/ADVANCED ACUPUNCTURE HEALTH, P.C.’s (“Plaintiff”) Amended Complaint for failure to state a cause of action.

The underlying action was commenced by ELYSE JOSEPHS/ADVANCED ACUPUNCTURE HEALTH, P.C. (“Plaintiff”), an acupuncture office, which claims that the Movants committed legal malpractice, *inter alia*, when representing it in bill collection cases brought against their patients’ insurance companies. The alleged negligent and fraudulent acts took place on or about January 2009 (Exhibit “A” of Movants’ motion). Movants subsequently interposed a Verified Answer, and demanded a Verified Bill of Particulars (Exhibits “B” and “C” of Movants’ motion). On January 20, 2017, Plaintiff responded with a Bill of Particulars, that was not verified (Exhibit “D” of Movants’ motion). The instant motion ensued.

In support, Movants argue that the Amended Complaint is vague, and lacks factual allegations to support Plaintiff’s claims. They also contend that the Bill of Particulars is not verified, and that Plaintiff’s responses are “plainly vague, nonspecific and open-ended.” As a result, Movants argue that the Amended Complaint should be dismissed against them.

Plaintiff, in opposition, contends that the Movants represented them on potentially hundreds of no fault cases; thus, it is unable to answer questions that pertain to a multitude of bills/claims. It asserts that the Movants have specific knowledge regarding the attorneys that

handled each bill, and the results of any adjudications. Plaintiff also cites several paragraphs of its Amended Complaint to illustrate that it stated causes of action.

It notes that it previously filed a complaint with the Grievance Committee for the Second, Eleventh and Thirteenth Judicial Districts regarding the Movant's misconduct. In a letter, dated November 21, 2011, the Committee admonished the law firm for breaching the Rules of Professional Conduct. In particular, it was determined that the firm "violated rule 1.4 of the Rules of Professional Conduct by repeatedly failing to inform [Plaintiff's principal] of developments in [its] cases, including notification of court dates, information regarding material developments in [Plaintiff's principal] cases, ongoing settlement efforts and court decisions" (Exhibit "C" of Plaintiff's opposition).

In rebuttal, Movants aver that their motion should be granted because Plaintiff has not stated a cause of action, and has not verified the Bill of Particulars. They also assert that Plaintiff has neither provided an excuse for failing to verify the Bill of Particulars nor has it satisfied the heightened pleading requirements for fraud and deceit claims pursuant to CPLR §3016(b).

It is well settled that when considering a motion to dismiss pursuant to CPLR §3211(a)(7), the court determines whether the plaintiff stated a cause of action rather than whether the proponent has a cause of action (*Sokol v. Leader*, 74 AD3d 1180 [2nd Dept 2010]). "The court must accept the facts alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Id.*

Moreover, CPLR §3016(b) provides that "where a cause of action or defense is based

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upon misrepresentation, fraud, mistake, wilful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail.” To make a prima facie cause of fraud, the complaint must allege representation of a material fact, falsity, scienter, reliance and injury (*Oko v. Walsh*, 28 AD3d 529 [2nd Dept 2006]).

After an examination of the amended complaint, and consideration of the relevant case law, this court determines that Plaintiff states viable causes of action for all of its claims with the exception of fraud. Notably, Plaintiff alleges, *inter alia*, that Movants failed to do the following: a) timely commence a legal action, b) follow appropriate court procedure, c) apprise it of legal developments, d) obtain fair and adequate compensation, e) prevent dismissal of actions, and f) obtain its consent before concluding negotiations with respect to claims.

However, as to the fraud claim, the amended complaint alleges that Movants “engaged in a course of conduct to deceive and to defraud plaintiff of, *inter alia*, [a] her rightful recovery and/or [b] viable complaint, being untruthful and nefarious in accomplishing their own ends to the prejudice of plaintiff” (*see* paragraph 100 of the amended complaint). It is evident that Plaintiff does not set forth the elements for fraud, and provide the requisite specificity. In fact, Plaintiff’s affirmation in opposition characterizes this action as one sounding in “legal malpractice and negligence.” Consequently, the fraud claim is hereby dismissed.

With respect to Movants’ contentions regarding the unverified Bill of Particulars, this court credits Plaintiff’s argument that the questions that are asked in the demand would be a hardship to answer, as potentially hundreds of no-fault cases and bills are at issue. Plaintiff avers

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that the Movants, rather than itself, have specific knowledge of the cases that they litigated. In view of the fact that the intake part conference has yet to be held, this court determines that Movants' Demand for a Verified Bill of Particulars is premature at this juncture.

Accordingly, based upon the above, Movants' Motion is **GRANTED TO THE EXTENT** that the fraud claim is hereby dismissed. Movants are granted leave to serve a new, tailored Demand for a Verified Bill of Particulars on Plaintiff within sixty (60) days after the compliance conference is held (see *Jordan v. NY City Health & Hosps.*, 244 AD2d 531 [2nd Dept 1997]).

This constitutes the Decision and Order of the court.

**HON. CAROLYN E. WADE
ACTING SUPREME COURT JUSTICE**

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