

Castellicci v Centone
2017 NY Slip Op 32894(U)
March 22, 2017
Supreme Court, Westchester County
Docket Number: 59496/2016
Judge: Terry J. Ruderman
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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
LAURA CASTELLICCI,

Plaintiff,

-against-

ANTHONY J. CENTONE, ESQ. and
ANTHONY J. CENTONE, P.C.,
Defendants.

-----X
RUDERMAN, J.

DECISION AND ORDER
Sequence No. 1
Index No. 59496/2016

The following papers were considered in connection with the defendants' motion to dismiss and plaintiff's cross-motion for summary judgment:

Papers	Numbered
Notice of motion, affidavit, Exs. A - D	1
Notice of cross-motion, Exs. 1 - 11	2
Affidavit in opposition to cross-motion, Exs. A - E	3
Reply	4

The defendants move for an order pursuant to CPLR 3211 dismissing the complaint. The plaintiff submits written opposition.

The plaintiff hired defendant Anthony J. Centone, an attorney, to represent her in a dispute involving various family-owned businesses. Centone brought at least two actions in Supreme Court, Westchester County, with respect to the plaintiff's claims, but allegedly failed to seek or recover profits which plaintiff claimed were due to her from various business ventures in which she had an interest. (Complaint, par. 12.) In 2012, Centone recovered \$161,000 in one of the actions (Index No. 27384/2009), but retained \$50,000 for a fee, allegedly without plaintiff's consent, and allegedly discontinued the action. Plaintiff claims that defendant Centone failed to prosecute all of her claims, and that he converted the \$50,000.¹

Plaintiff commenced this action by filing a summons with notice on June 10, 2015. The summons listed, as to the nature of the action, "Legal malpractice, breach of contract, and concealment fraud." After a demand for a complaint was served, plaintiff filed a complaint on

¹Defendant Centone was admonished for violation of Rule 1.15 of the Rules of Professional Conduct.

November 5, 2015. The verified complaint asserts causes of action for legal malpractice (first cause of action), breach of contract (second cause of action), and conversion (third cause of action). In the context of the conversion claim, the plaintiff seeks punitive damages.

On the motion, defendants move to dismiss the claims for punitive damages and “concealment fraud” under CPLR 3211(a)(7), for failure to state a cause of action. They also seek to dismiss the claim for conversion based on CPLR 3211 (a)(5), as barred by the statute of limitations. Defendants argue that they last represented the plaintiff on June 12, 2012, and that the statute of limitations for conversion expired on June 12, 2015. They contend that because conversion was not listed in the summons with notice, that cause of action is barred. They further argue that the claim for “concealment fraud” was listed in the summons, but not the complaint, and should be dismissed. Lastly, they contend that punitive damages may not be sought as there is no allegation of morally culpable conduct.

Plaintiff cross-moves for summary judgment.

Analysis

In considering the sufficiency of a pleading subject to a motion to dismiss for failure to state a cause of action under CPLR 3211 (a)(7), the court’s role is to determine whether, accepting as true the factual averments of the complaint, plaintiff can succeed upon any reasonable view of the facts stated. (*Campaign for Fiscal Equity v. State of New York*, 86 N.Y.2d 307, 318 [1995]). On a motion to dismiss a complaint pursuant to CPLR 3211(a)(7) all allegations in the complaint are deemed to be true; all reasonable inferences which can be drawn from the complaint and the allegations therein must be resolved in favor of the plaintiff. (*Sokoloff v. Harriman Estates Dev. Corp.*, 96 N.Y.2d 409, 414 [2001]). When analyzing the complaint in the context of a motion to dismiss, the court must discern whether the facts as alleged fit within any cognizable legal theory. (*Sokoloff v. Harriman Estates Development Corp.*, *supra* at 414; *Leon v. Martinez*, 84 N.Y.2d 83, 88 – 89 [1994].)

On a motion to dismiss a complaint pursuant to CPLR 3211(a)(5) on the ground that the statute of limitations has expired, the moving defendant must establish, *prima facie*, that the time in which to commence the action has expired. (*See Ross v Jamaica Hosp. Med. Ctr.*, 122 A.D.3d 607, 608 [2d Dept. 2015].)

A motion to dismiss based on documentary evidence pursuant to CPLR 3211 (a) (1) may be granted only where the documentary evidence “utterly refutes” the plaintiff’s factual

allegations, resolves all factual issues as a matter of law, and conclusively disposes of the claims at issue. (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 326 [2002]; *Rodeo Family Enters., LLC v Matte*, 99 A.D.3d 781, 782 [2d Dept. 2012].) To be considered "documentary evidence" within the meaning of CPLR 3211(a)(1), the evidence must be unambiguous and of undisputed authenticity. Judicial records, as well as documents reflecting out-of-court transactions, such as mortgages, deeds, leases and contracts, which in context are "essentially undeniable," qualify as "documentary evidence" in the proper case. (*Fontanetta v. John Doe 1*, 73 A.D.3d 78 [2d Dept. 2010].)

With respect to the cause of action for "concealment fraud," although this cause of action was listed on the summons with notice, there is no such cause of action in the complaint. That cause of action is dismissed.

As to the cause of action for conversion, the defendants argue that the cause of action is barred because it was not listed in the summons with notice, and, prior to the complaint being interposed, the statute of limitations expired. Only one published writing has been found relating to this issue, and that case stated that the matter was one of first impression. (*Polo Elec. Corp. v. Aspen Am. Ins. Co.*, 2016 N.Y. Misc. LEXIS 1241, 2016 NY Slip Op 30590[U] (Sup. Ct., N.Y. Co., Kornreich, J., Mar. 9, 2016].) The *Polo* Court held, in essence, that the "new" claim would not be barred if the claim relates-back to the transactions specified in the summons with notice under CPLR 203(f).

The relation-back doctrine permits a plaintiff to interpose a claim or cause of action which would ordinarily be time-barred, where the allegations of the original complaint gave notice of the transactions or occurrences to be proven, and the cause of action would have been timely interposed if asserted in the original complaint. (*Cady v. Springbrook NY, Inc.*, 145 A.D.3d 846 [2d Dept. 2016].) It is clear here that the conversion claim relates back to the original claims of legal malpractice and breach of contract, and thus the conversion claim is not barred by the statute of limitations.

"Punitive damages are permitted when the defendant's wrongdoing is not simply intentional but 'evinces a high degree of moral turpitude and demonstrate[s] such wanton dishonesty as to imply a criminal indifference to civil obligations.'" (*Ross v Louise Wise Servs., Inc.*, 8 N.Y.3d 478, 489, 868 NE2d 189, 836 NYS2d 509 [2007], quoting *Walker v Sheldon*, 10 NY2d 401, 405, 179 NE2d 497, 223 NYS2d 488 [1961].) Here, the allegations that the attorney

retained a fee without providing notice, and that he was admonished for that conduct, do not rise to the high level of moral turpitude for which punitive damages are warranted.

Plaintiff failed to meet her prima facie burden on summary judgment on the issue of liability. "In an action to recover damages 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." (*Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 N.Y.3d 438, 442 [2007] [internal quotation marks omitted].) In any legal malpractice action, a plaintiff has the burden of demonstrating that, but for the attorney's negligent representation, he or she would have prevailed in the underlying action. (*Lyons v. Gandin, Schotsky, Rappaport, Glass & Greene, LLP*, 8 A.D.3d 347 [2d Dept. 2004].) Among the numerous issues of fact which exist, plaintiff has not demonstrated that she would have recovered on the claims which her attorney allegedly failed to pursue. Further, even as to the alleged conversion, plaintiff has not shown, albeit the admonition for unprofessional conduct imposed on the attorney, that he was not entitled to a fee equal to or exceeding the \$50,000 which he retained.

Based upon the foregoing, it is hereby,

ORDERED that defendants' motion is granted only to the extent of dismissing the claims for "concealment fraud" and punitive damages; and it is further

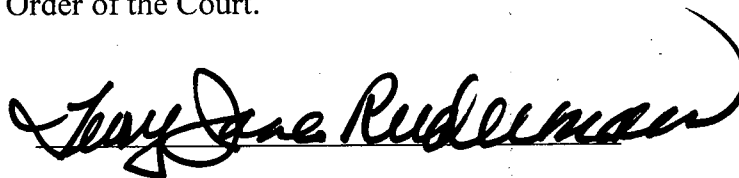
ORDERED that plaintiff's cross-motion for summary judgment is denied; and it is further

ORDERED that all parties appear in the Compliance Part on April 24, 2017, as previously directed in the Compliance Part.

This constitutes the Decision and Order of the Court.

Dated: White Plains, New York

March 22, 2017



HON. TERRY JANE RUDERMAN, J.S.C.