

Petito v Law Offs. of Bart J. Eagle PLLC
2018 NY Slip Op 30499(U)
March 23, 2018
Supreme Court, New York County
Docket Number: 153956/2016
Judge: Andrea Masley
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NYSCEF DOC. NO. 36

RECEIVED NYSCEF: 03/28/2018

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 48
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ORAZIO PETITO,

Plaintiff,

Index No. 153956/2016

-against-

LAW OFFICES OF BART J. EAGLE PLLC, BART J.
EAGLE, ESQ., FISCHER PORTER THOMAS &
REINFELD, P.C., and JOEL REINFELD, ESQ.,
Defendants.
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Masley, J.:

In motion sequence number 001, defendants Law Offices of Bart J. Eagle PLLC (Eagle PLLC), Fischer Porter Thomas & Reinfeld, P.C. (FPTR), and Joel Reinfeld, Esq. (collectively, defendants) move, pursuant to CPLR 3211 (a) (1), (a) (2), (a) (5), and (a) (7) to dismiss the complaint.

This action relates to Eagle PLLC's representation of plaintiff in *Antonini v Petito*, Index No. 652070/2010 (the Underlying Action), an action currently pending before this court. Plaintiff alleges that, because of defendants' legal advice, he failed to contribute capital to Bridgeview at Broadway, LLC (Bridgeview), and as a result, he lost his shares in Bridgeview. Plaintiff asserts claims for attorney malpractice and breach of a retainer agreement.

Background

In 2006, plaintiff, Rocco Petito, and Vittorio Antonini formed Bridgeview to acquire and renovate real property located at 146-150 Broadway, Brooklyn, New York. Plaintiff alleges that each member made an initial capital contribution of \$285,000; however, he contributed a total amount of \$570,000. Due to a dispute among the members, in April 2009, Bridgeview's Operating Agreement was amended to reduce

plaintiff's interest to 25% and Rocco Petito's interest to 25%, and increase Antonini's interest to 50%. Plaintiff alleges that defendants helped draft the amendment to the Operating Agreement.

In July 2009, Antonini caused a capital call of \$80,000 to be made in order to make mortgage payments. Plaintiff alleges that he discussed the call with defendants, and they advised plaintiff that he could be sued if he failed to make the contributions. He alleges that defendants also advised him to withhold the contribution as a method of resolving the dispute to his advantage. Plaintiff further alleges that defendants failed, however, to advise him that the amended Operating Agreement permitted Antonini to declare plaintiff in default, resulting in the forfeit of his shares in the Bridgeview. The capital call ended in July 2010 and plaintiff did not contribute. As a result, Antonini filed the Underlying Action on November 19, 2010.

Defendant Eagle PLLC appears to have represented plaintiff as early as March 21, 2007, the date of the first retainer agreement (Defendants' Exhibit C). Eagle PLLC executed other retainer agreements with plaintiff related to his disputes with Antonini on or around November 19, 2007 (Defendants' Exhibit D) and November 23, 2010 (Defendants' Exhibit I). In his affidavit, defendant Reinfeld states that the last work he performed as "of counsel" for Eagle PLLC took place in May 2011, and that he has not been affiliated with defendant FPTR since January 2012. Defendants also submit the affidavit of FPTR's managing member, Arthur L. Porter Jr., in which he states that the last date any attorney at FPTR provided legal services to Eagle PLLC was in May 2011. On May 17, 2013, the court (Oing, J.) granted Bart J. Eagle's motion to withdraw as counsel for plaintiff and Rocco Petito in the Underlying Action.

Discussion

On a motion to dismiss, courts afford the pleadings a liberal construction, “accept[ing] the facts as alleged in the complaint as true, accord[ing] plaintiffs the benefit of every possible favorable inference, and determin[ing] only whether the facts as alleged fit within any cognizable legal theory” (*Leon v Martinez*, 84 NY2d 83, 87–88 [1994]). “Dismissal pursuant to CPLR 3211 (a) (1) is warranted only if the documentary evidence submitted utterly refutes plaintiff’s factual allegations and conclusively establishes a defense to the asserted claims as a matter of law. If the documentary proof disproves an essential allegation of the complaint, dismissal pursuant to CPLR 3211 (a) (1) is warranted even if the allegations, standing alone, could withstand a motion to dismiss for failure to state a cause of action” (*Kolchins v Evolution Mkts., Inc.*, 128 AD3d 47, 58 [1st Dept 2015]).

Statute of Limitations

CPLR 3211 (a) (5) states, in relevant part, that a party may move for judgment dismissing a cause of action on the ground that “the cause of action may not be maintained because of ... statute of limitations[.]” “On a motion to dismiss a cause of action pursuant to CPLR 3211(a) (5) on the ground that it is barred by the statute of limitations, a defendant bears the initial burden of establishing, prima facie, that the time in which to sue has expired” (*Benn v Benn*, 82 AD3d 548, 548 [1st Dept 2011] [internal quotation marks and citation omitted]). Defendants FPTR and Reinfeld have met that burden.

In New York, the statute of limitations is three years for a malpractice claim (CPLR 214 [6]). “A legal malpractice claim accrues when all the facts necessary to the

cause of action have occurred and an injured party can obtain relief in court" (*McCoy v Feinman*, 99 NY2d 295, 301 [2002] [internal quotation marks and citation omitted]). However, if the doctrine of continuous representation applies, a cause of action for legal malpractice that would be ordinarily barred by the statute of limitations may be tolled until the attorney's continuing representation of a client on a particular matter has ended (*Farage v Ehrenberg*, 124 AD3d 159, 164 [2d Dept 2014] [internal citations omitted]; see also *Zorn v Gilbert*, 8 NY3d 933, 933-34 [2007]).

Plaintiff's claim for malpractice against defendants accrued sometime between July 2009 and November 2010. However, the court must examine whether it was tolled due to FPTR and Reinfeld's continuous representation of plaintiff. While plaintiff alleges continuous representation by Eagle PLLC, which ended no later than May 17, 2013, he has made no such allegations with regards to FPTR and Reinfeld. Plaintiff does not assert that he was specifically represented by FPTR or Reinfeld after May 2011, when both defendants affirm their involvement with Eagle PLLC and plaintiff's case ended (see *aff of Arthur L Porter, Jr.*; *aff of Joel Reinfeld*). As a result, the doctrine of continuous representation does not apply to either FPTR or Reinfeld, and the statute of limitations bars any malpractice action against these defendants. The malpractice action against both FPTR and Reinfeld is dismissed with prejudice.

Breach of Contract and Breach of Fiduciary Duty Claims

Defendants also move to dismiss plaintiff's breach of contract claim, as well as the newly asserted breach of fiduciary contract claim, as duplicative of the malpractice claim. "Unless a plaintiff alleges that an attorney defendant breached a promise to achieve a specific result, a claim for breach of contract is insufficient and duplicative of

the malpractice claim" (*Mamoon v Dot Net Inc.*, 135 AD3d 656, 658 [1st Dept 2016] [internal quotation marks and citations omitted]). Here, plaintiff does not allege that defendants breached a promise to achieve a specific result. Thus, plaintiff's breach of contract claim is insufficient and duplicative of the one for malpractice and is dismissed.

Plaintiff argues that his claim for breach of contract is distinct from his malpractice claim, because he alleges that defendants breached the contract by engaging in wrongful billing. Contrary to this assertion, the claim is not distinct. Plaintiff alleges that he "was damaged by defendant's [sic] fees, in view of the negligence and malpractice which attended the fees billed by defendants" (complaint ¶ 58), and "[a]s a result, Plaintiff was injured in Breach of Contract, in an amount to be proven at trial which arises from the wrongful billing conduct, the billings defendants, and because legal fees paid to the defendant may not be collected in the face of malpractice" (complaint ¶ 59). These allegations do not support a separate and distinct claim from the relief sought for the alleged malpractice and arise from the alleged malpractice. There are no allegations detailing the alleged "wrongful billing" practices of the defendants. Further, the allegation contained in paragraph 59 of the complaint that "[t]his claim for damages is different from and does not arise from the same claims as does the claims in legal malpractice" does not make it so.

In his opposition, plaintiff argues that his breach of fiduciary duty claim is not duplicative of the malpractice claim even though a breach of fiduciary duty claim was not alleged as a cause of action in the complaint. Nevertheless, a breach of fiduciary duty claim would also fail. New York courts also generally dismiss breach of fiduciary duty claims against attorneys as duplicative if they are based on the same facts as a

malpractice claim and seek identical relief (see *DiPlacidi v Walsh*, 243 AD2d 335, 335 [1st Dept 1997] [internal citation omitted]). Once again plaintiff argues this claim originates in the attorney's billing practices, and thus, is not duplicative or redundant of the legal malpractice claim. For the reasons stated above, this claim would be dismissed.

Malpractice Claim

Defendants seek dismissal of plaintiff's malpractice claim under CPLR 3211 (a) (1) based on the assertion that the documentary evidence shows that defendants were not negligent in their legal representation of plaintiff, and that any advice given was not the proximate cause of his alleged damages.

"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. To establish 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"

(*Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438, 442 [2007] [internal quotation marks and citations omitted]).

Here, plaintiff alleges that defendants advised "him if he failed to make the contributions, he could be sued for the amounts not paid" (complaint ¶ 29). He further alleges that defendants "advised that plaintiff withhold the contribution as a method of resolving the dispute to his advantage" (*id.*) and that defendants "failed to advise [plaintiff] that provisions of the amended operating agreement ... permitted Antonini to declare [plaintiff] in default, and to obtain forfeiture of plaintiff's 25% share in the LLC (complaint ¶ 30). Plaintiff alleges that based on this advice, he "took the position that no

contribution was required from him" (complaint ¶ 36). He also alleges that defendants failed to exercise the ordinary, reasonable skills and knowledge commonly possessed by a member of the legal profession, that defendants' failure to exercise due care in the advice was the proximate cause of plaintiff's damages, and but for defendants' failures, plaintiff would not have suffered damages.

In response to these allegations, defendants assert that any advice given was not the proximate cause of plaintiff's damages, because the documentary evidence shows that plaintiff was not able to make the additional contribution payments, and this inability to pay was the actual cause of the forfeit of his interest in Bridgeview. In support of their motion, defendants submit plaintiff's affidavit in the Underlying Action and email correspondence to establish plaintiff's inability to pay.

While plaintiff argues that affidavits and emails are not admissible on a CPLR 3211 (a) (1) motion, the Appellate Division, First Department has held otherwise (see *Morgenthau & Latham v Bank of N.Y. Co.*, 305 A.D.2d 74, 80 [1st Dept 2003] [holding that "prior statements or averments of parties or their agents in the course of litigation that refute an essential element of a plaintiff's present claim may constitute documentary evidence within the meaning of 3211 [a][1]"); *Art & Fashion Group Corp. v Cyclops Prod., Inc.*, 120 AD3d 436, 438 [1st Dept 2014] [holding that "[e]mail correspondence can, in a proper case, suffice as documentary evidence for purposes of CPLR 3211 [a] [1]"]). The court will consider this evidence.

"Dismissal is warranted under CPLR 3211 (a) (1) where documentary evidence and undisputed facts negate or dispose of claims in the complaint or conclusively establish a defense" (*Zanett Lombardier, Ltd. v Maslow*, 29 AD3d 495, 495 [1st Dept

2006] [internal citation omitted]). Here, the documentary evidence establishes that the proximate cause of plaintiff's damage was his inability to pay contributions.

In paragraph 29 of plaintiff's affidavit, which was originally submitted to this court in the Underlying Action, plaintiff affirms "due to the unforeseen consequences of the economic downturn, Rocco and I could not make the contributions" (*id.*, exhibit G at ¶ 29). This statement clearly contradicts the allegations of the complaint that it is was defendants' advice that caused plaintiff's damages, i.e. the forfeiture of his shares in the LLC. Plaintiff's argument that his affidavit was drafted and edited by defendants is of no merit. While it may be true that defendants drafted and edited plaintiff's affidavit, plaintiff swore to it and is ultimately responsible for the statements he swore to.

Further, plaintiff's self-serving affidavit submitted in opposition to this motion, in which he affirms that he would have made the contribution but for defendants' advice as he had other assets to liquidate, does not overcome his prior sworn statements and the other documentary evidence presented.

In addition to plaintiff's affidavit, defendants submit email correspondence between plaintiff and Antonini in which plaintiff informs Antonini more than once that he cannot make contributions due to a lack of funds (counsel for defendants' affirmation, exhibit H). This evidence also negates the allegations in the complaint as to proximate cause. Plaintiff again argues that defendants edited the emails; however, this argument is unsupported and conclusory. There is no explanation of how they were allegedly edited nor any offer of evidence that the emails were actually edited. Finally, the court notes that plaintiff does not dispute the content of the evidence submitted, but rather his

counsel only attacks its admissibility and reliability. Thus, the claim for legal malpractice is dismissed.

Personal Jurisdiction

In its Memorandum of Law in Support of Defendants' Motion to Dismiss, defendants' counsel notes that Bart J. Eagle, Esq. was not served with a copy of the complaint or summons. Plaintiff does not respond to this assertion. While it does appear from the docket that Eagle was not personally served by plaintiff, defendants' counsel does not represent Eagle as an individual defendant. Thus, he has no authority to raise claims for dismissal of a complaint due to a lack of service (*see Gray-Joseph v Liu*, 90 AD3d 988, 990 [2d Dept 2011]). These claims are personal in nature and must be interposed by Eagle himself.

Accordingly, it is

ORDERED that defendants Law Offices of Bart J. Eagle PLLC, Fischer Porter Thomas & Reinfeld, P.C., and Joel Reinfeld, Esq.'s motion to dismiss the complaint herein is granted and the complaint is dismissed in its entirety as against these defendants, with costs and disbursements to said defendants as taxed by the Clerk of the Court and the Clerk is directed to enter judgment accordingly in favor of these defendants; and it is further

ORDERED that the action is severed and continued against the remaining defendant Bart J. Eagle, Esq.; and it is further

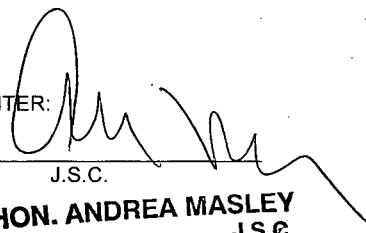
ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

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ORDERED that counsel for the moving parties shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), who are directed to mark the court's records to reflect the change in the caption herein.

Dated: 3/23/18

ENTER: 

J.S.C.
HON. ANDREA MASLEY
J.S.C.