

Dedaj v Berisha
2018 NY Slip Op 31346(U)
May 9, 2018
Supreme Court, Queens County
Docket Number: 710872/17
Judge: Timothy J. Dufficy
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ORIGINAL

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. TIMOTHY J. DUFFICY
Justice

PART 35

-----X
PREL DEDAJ, on behalf of himself and as assignee
of ARBEN DEDAJ, and PRIME STEAK, LLC,

Index No.: 710872/17

Mot. Date: 12/11/17

Plaintiff,

Mot. Seq. 1

-against-

ZEB BERISHA , FREDDY MARKU, PETRIT
DEMA, WILLIAM V. DECANDIDO, P.C. and
46-11 BROADWAY,

Defendants,

-----X
The following numbered papers were read on this motion by defendant William V. DeCandido, P.C. (DeCandido) pursuant to CPLR 3211(a)(1), (3) & (7) to dismiss the complaint as asserted against movant.

PAPERS
NUMBERED

Notice of Motion - Affidavits - Exhibits.....	EF 11-22
Answering Affidavits - Exhibits.....	EF 29-39
Reply Affidavits.....	EF 45-48

Upon the foregoing papers it is ordered that the motion is denied.

This action arises out of the sale of the membership interests of defendants Zef Berisha, Freddy Marku and Petri Dema (collectively the defendant members) in plaintiff Prime Steak, LLC (Prime Steak) to Prel Dedaj and Arben Dedaj. It is alleged by THE plaintiffs that they were fraudulently induced to purchase the membership interests by misrepresentations made by the defendant members concerning Prime Steak's lease, assets and liabilities. The sale was memorialized in three documents, each entitled "Membership Interest Purchase Agreement" (purchase agreements) which were prepared by defendant DeCandido.

Plaintiffs Prel Dedaj, individually, and Prel Dedaj as assignee of Arben Dedaj (jointly Dedaj), alleging that defendant DeCandido was retained to represent them, as

well as the defendant members in the transaction, have alleged two causes of action against DeCandido for legal malpractice. Plaintiffs Dedaj assert that but for DeCandido's negligence Prel Dedaj and Arben Dedaj would not have completed the purchase of the membership interest in Prime Steak and sustained money damages as a result. The alleged malpractice included DeCandido's acts or omissions in advising plaintiffs Dedaj regarding his representation of adverse parties, the length of the lease term held by Prime Steak and the need for the landlord's prior written consent to the purchase of the defendant members' interests in Prime Steak under the lease, as well as the lease requirement involving compliance with Alcoholic Beverage Control Law § 110-B, and in drafting terms in the agreements providing for the release and indemnification of the member defendants.

On a motion to dismiss a complaint, pursuant to CPLR 3211(a)(7), for failure to state a cause of action, the facts alleged in the complaint must be accepted as true and a plaintiff must be afforded the benefit of every favorable inference, with the court determining only whether the facts as alleged fit within any cognizable legal theory. (*See Nonnon v City of New York*, 9 NY3d 825, 827 [2007]; *Stewart Title Ins. Co. v Wingate, Kearney & Cullen*, 134 AD3d 924 [2d Dept 2015].) Dismissal is available based upon evidentiary material submitted in support of a motion to dismiss for failure to state a cause of action (CPLR 3211[a][7]) only where the evidence conclusively establishes that the plaintiff has no cause of action. (*See Lawrence v Graubard Miller*, 11 NY3d 588, 595 [2008]; *Rovello v Orofino Realty Co.*, 40 NY2d 633, 636 [1976].) Furthermore, to succeed on a motion to dismiss pursuant to CPLR 3211(a)(1) on the ground that a defense is founded upon documentary evidence, a defendant must present unambiguous documentary evidence which refutes all factual allegations of the complaint and definitively disposes of the plaintiff's claims as a matter of law. (*See Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *Palmieri v Biggiani*, 108 AD3d 604 [2d Dept 2013]; *Melnicke v Brecher*, 65 AD3d 1020 [2d Dept 2009]; *Farber v Breslin*, 47 AD3d 873 [2d Dept 2008].)

Accepting plaintiffs Dedaj's allegations of negligence as true and affording them the benefit of every possible inference, plaintiffs Dedaj have sufficiently stated causes of action for legal malpractice by alleging that DeCandido failed to exercise the ordinary

reasonable skill and knowledge commonly possessed by a member of the legal profession and that DeCandido's breach of the duty to do so proximately caused actual damages to plaintiffs Dedaj. (See *Lieberman v Green*, 139 AD3d 815 [2d Dept 2016]; *Stewart Title Ins. Co.*, 134 AD3d at 924-925.)

The evidence submitted by defendant DeCandido is insufficient to justify dismissal pursuant to CPLR 3211(a)(1) or (7). The affidavit submitted by William V. DeCandido does not constitute documentary evidence and may not be considered on this motion for dismissal. (See *Kappa Dev. Corp. v Queens Coll. Point Holdings, LLC*, 95 AD3d 1178 [2d Dept 2012]; *HSBC Bank, USA v Pugkhem*, 88 AD3d 649, 651 [2d Dept 2011].)

In addition, the letter addressed to the members of Prime Steak with the reference "Scope of Representation and Waiver of Conflict of Interest" relied upon by movant does not unambiguously identify which party or parties to the purchase agreements were represented by defendant DeCandido and the language therein referring to a waiver of a conflict of interest does not conclusively establish movant's claim that he represented only Prime Steak but seems to suggest that parties with opposing interests are being represented by the same counsel. (See e.g. *Grovick Props., LLC v 83-10 Astoria Blvd., LLC*, 120 AD3d 471 [2d Dept 2014].) The lack of specificity in the letter also precludes it from being sufficient to establish as a matter of law DeCandido's defense that plaintiffs Dedaj waived any conflict of interest. (Cf. *Grovick Props. LLC*, 120 AD3d at 473-474.) The "Advice of Counsel" provisions in the purchase agreements, which contain representations made only by the defendant members, add to the ambiguity of the letter and similarly fail to resolve the issue of DeCandido's alleged representation of plaintiffs Dedaj as a matter of law.

Defendant DeCandido has also failed to show that Prel Dedaj lacks standing to bring this action in his capacity as assignee of Arben Dedaj. Moreover, in opposition to this motion, the plaintiffs have submitted a copy of the written assignment on which the allegation in the complaint that Arben Dedaj assigned his claims against the defendants to Prel Dedaj was based. Having been executed prior to the commencement of this action, the assignment is *prima facie* proof of standing to sue. There is nothing in the record to support defendant DeCandido's contention that the assignment of the cause of action

violates Judiciary Law § 489 which, by its terms, is only applicable to an individual when the individual is in the business of the collection and adjustment of claims.

(See *Cardarelli v Scodek Constr. Corp.*, 304 AD2d 894 [3d Dept 2003]; *Traktman v City of New York*, 182 AD2d 814 [2d Dept 1992].) Dismissal of the causes of action against DeCandido, pursuant to CPLR 3211(a)(3), therefore, is not warranted.

Accordingly, based upon the foregoing, it is

ORDERED, that the motion is denied.

Dated: May 9, 2018


TIMOTHY J. DEFFICY, J.S.C.

