Bautista v Hach Rose Schirripa & Cheverie LLP
2018 NY Slip Op 34504(U)
July 13, 2018
Supreme Court, Bronx County
Docket Number: Index No. 21446/2018E
Judge: Lucindo Suarez

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART LPM

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JOSE BAUTISTA,

Plaintiff,

- against -

HACH ROSE SCHIRRIPA & CHEVERIE LLP,

Defendants.

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DECISION AND ORDER

Index No. 21446/2018E

PRESENT: Hon. Lucindo Suarez

Upon defendant's notice of motion dated April 20, 2018, and the affirmation, exhibits and memorandum of law submitted in support thereof; plaintiff's affirmation in opposition dated June 11, 2018 and the affidavit and exhibits submitted therewith; defendant's affirmation in reply dated June 25, 2018 and the exhibit and memorandum of law submitted therewith; and due deliberation; the court finds:

This legal malpractice action was commenced February 6, 2018. Paragraphs 8 and 9 of the complaint allege that defendant failed to perform its obligation as counsel, by failing to appear in court on his behalf, leading to *sua sponte* dismissal. Paragraphs 11 and 12 further allege that defendant's failure to pursue a stay, adjournment or other relief on plaintiff's behalf after the dismissal breached defendant's duty of care and that by permitting the time to appeal or otherwise move to lapse, defendant caused plaintiff's loss of the cause of action. The complaint alleges causes of action for legal malpractice, negligence and breach of contract. Defendant moves pursuant to CPLR 3211(a)(1), (5) and (7) to dismiss the complaint. upon the grounds that plaintiff's claims are barred by the statute of limitations, the complaint fails to state a cause of action, documentary evidence provides a complete defense and plaintiff has named the wrong defendant.

The underlying Labor Law action, *Bautista v. 767 5th Partners LLC*, Index No.

308157/2010 (Supreme Court, Bronx County), was commenced October 4, 2010 on plaintiff's behalf by non-party Hach & Rose LLP. The parties appeared for discovery conferences on March 23, 2011, November 29, 2011 and April 16, 2012. On or about December 16, 2014, the defendants moved pursuant to CPLR 3124 to compel plaintiff to comply with their January 18, 2011 notices for deposition and physical examination and their January 30, 2013 demand for prior injuries, treatment and legal file and further moved pursuant to CPLR 3126 to strike plaintiff's pleadings if the discovery demands were not complied with within a specified time. By decision and order dated February 3, 2015, the court (Hon. Betty Owen Stinson, J.S.C.) dismissed the action, finding that it was plaintiff's failure to cooperate with his attorneys that had led to the delays and noncompliance and that it was plaintiff, and not his attorneys, who had failed to obey the court orders. Defendants served a copy of Judge Stinson's order with notice of entry on February 23, 2015 and filed same on February 25, 2015.

> On a pre-answer motion to dismiss,
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> > our analysis of plaintiffs' claims is limited to the four corners of the pleading, the allegations of which we must give a liberal construction and accept as true (*see Leon v Martinez*, 84 NY2d 83, 87-88, 638 NE2d 511, 614 NYS2d 972 [1994]). We must also accord plaintiffs the benefit of every possible favorable inference (*id.*) and bear in mind that "[w]hether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19, 832 NE2d 26, 799 NYS2d 170 [2005]).

Johnson v. Proskauer Rose LLP, 129 A.D.3d 59, 67, 9 N.Y.S.3d 201, 207 (1st Dep't 2015). The court is not constrained by a party's nomenclature in characterizing a cause of action, but looks to the reality, *see De Leon v. Hospital of Albert Einstein College of Medicine*, 164 A.D.2d 743, 566 N.Y.S.2d 213 (1st Dep't 1991), core, *see Deering v. 860 Fifth Ave. Corp.*, 220 A.D.2d 303, 634 N.Y.S.2d 674 (1st Dep't 1995), gravamen, *see People v Credit Suisse Sec. (USA) LLC*, 145 A.D.3d 533, 47 N.Y.S.3d 236 (1st Dep't 2016), and essence, *see Johnson*, *supra*, of the claim.

"In those circumstances where the legal conclusions and factual allegations are flatly contradicted by documentary evidence, they are not presumed to be true or accorded every favorable inference, and the criteria becomes 'whether the proponent of the pleading has a cause of action, not whether he has stated one.'" *Ark Bryant Park Corp. v. Bryant Park Restoration Corp.*, 285 A.D.2d 143, 150, 730 N.Y.S.2d 48, 54 (1st Dep't 2001), *citing Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 372 N.E.2d 17, 401 N.Y.S.2d 182 (1977). In other words, "[i]f the documentary evidence disproves an essential allegation of the complaint, dismissal is warranted even if the allegations, standing alone, could withstand a motion to dismiss for failure to state a cause of action." *JFK Family Ltd. Partnership v. Millbrae Natural Gas Dev. Fund 2005, L.P.*, 21 Misc3d 1102A, 873 N.Y.S.2d 234, 2008 NY Slip Op 51915U at *16 (Sup Ct. Westchester County 2008), *citing Peter F. Gaito Architecture, LLC v. Simone Dev. Corp.*, 46 A.D.3d 530, 846 N.Y.S.2d 368 (2d Dep't 2007). To obtain dismissal pursuant to CPLR 3211(a)(1), the documents submitted must "conclusively establish a defense as a matter of law so as to warrant dismissal." *Constellation Energy Servs. of N.Y., Inc. v. New Water St. Corp.*, 146 A.D.3d 557, 46 N.Y.S.3d 25 (1st Dep't 2017).

The statute of limitations for a malpractice action is three years. *See* CPLR 214(6). This period is measured from the date of the malpractice, not the plaintiff's discovery of it. *See McCoy v. Feinman*, 99 N.Y.2d 295, 785 N.E.2d 714, 755 N.Y.S.2d 693 (2002); *Alizio v. Ruskin Moscou Faltischek, P.C.*, 126 A.D.3d 733, 5 N.Y.S.3d 252 (2d Dep't 2015). It is the act of malpractice, not the accrual of injury, that governs. *See Johnson, supra*. "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' … the key issue … is when plaintiff's actionable injury occurred." *McCoy*, 99 N.Y.2d at 301, 785 N.E.2d at 718, 755 N.Y.S.2d at 697. The underlying

action was dismissed on February 3, 2015. Plaintiff brought this action more than three years later, on February 6, 2018.

The complaint appears to allege that the cause of action for malpractice accrued when the underlying cause of action was irretrievably lost upon the expiration of the time in which to take an appeal from the dismissal. The order, however, was entered upon default, from which no appeal lies. *See* CPLR 5511; *Matter of Deryck V.J. (Deryck T.J.)*, 159 A.D.3d 411, 71 N.Y.S.3d 73 (1st Dep't 2018). Plaintiff's injury accrued immediately upon dismissal; no adjudication of the dismissal was required to determine whether plaintiff had suffered an actionable injury. *See Lincoln Place, LLC v. RVP Consulting, Inc.*, 70 A.D.3d 594, 896 N.Y.S.2d 47 (1st Dep't), *lv denied* 15 N.Y.3d 710, 936 N.E.2d 461, 909 N.Y.S.2d 694 (2010). Nevertheless, defendant declined to address the timeliness of the malpractice claim insofar premised upon the failure to pursue reargument, renewal or reconsideration.

Defendant asserts plaintiff's claim for legal malpractice is wholly contradicted by the order dismissing the underlying action, which explicitly premised dismissal on plaintiff's failures rather than his attorney's. The consequences of a client's non-cooperation with his counsel may not "set up an unfavorable outcome as grounds for recovery in legal malpractice." *Tortorello v. Carlin*, 260 A.D.2d 201, 207, 688 N.Y.S.2d 64, 69 (1st Dep't 1999); *see Pedote v. Kelly*, 124 A.D.3d 855, 3 N.Y.S.3d 56 (2d Dep't 2015). While the order simultaneously makes reference to plaintiff's counsel's absence at the calendar call of the motion, however, whether or to what degree this contributed to the court's decision would require impermissible speculation, given the court's recitation that its determination was based upon its search of the record and a review of the activity, or lack thereof, in the action.

Contrary to plaintiff's argument, defendant's argument is not premised upon the

application of collateral estoppel. A judicial order constitutes documentary evidence within the meaning of CPLR 3211(a)(1). *See Amsterdam Hosp. Group, LLC v. Marshall-Alan Assocs., Inc.*, 120 A.D.3d 431, 992 N.Y.S.2d 2 (1st Dep't 2014). Where the order's holdings flatly contradict the factual allegations and legal conclusions of the complaint, dismissal must eventuate. *See Optical Communications Groups, Inc. v. Rubin, Fiorella & Friedman, LLP*, 145 A.D.3d 469, 43 N.Y.S.3d 22 (1st Dep't 2016). Although the complaint alleges that it was defendant's failure to appear in court that resulted in dismissal, the order stated that dismissal was premised upon plaintiff's failure to cooperate with his attorneys.

To the extent the complaint alleges that it was counsel's failure move to address the dismissal or otherwise restore the action which resulted in irretrievable loss of the cause of action, defendant argues that "after the case was dismissed, and the attorney-client relationship between plaintiff and defendant ended, defendant performed no further legal work for plaintiff." Defendant argues that because the court's order dismissing the action recited that "the court was advised at [oral] argument that the plaintiff's attorney, who was not present, was going to move to withdraw as counsel for the plaintiff," the order demonstrates that had the case not been dismissed *sua sponte*, defendant's representation would have been terminated through a motion to withdraw. Defendant argues that it is thus "clear" that defendant's representation did not continue past the date of dismissal. No motion to withdraw followed. Insofar as representation of plaintiff is concerned, Judge Stinson's order could not constitute documentary evidence, as it was not a holding and merely recited hearsay statements made to the court by an unidentified source. "To qualify as 'documentary,' the paper's content must be 'essentially undeniable and . . ., assuming the verity of [the paper] and the validity of its execution, will itself support the ground on which the motion is based.'" *Amsterdam Hosp. Group, LLC*, 120 A.D.3d at 432, 992

N.Y.S.2d at 4.

Contrary to defendant's reading of Judge Stinson's order, dismissal alone could not signify the end of the attorney-client relationship. Nor court Judge Stinson's order alleviate defendant's obligation to terminate the attorney-client relationship in a manner consistent with CPLR 321, as withdrawal may not be accomplished without appropriate notice to the client. The client must be given notice of an application to be relieved as counsel. *See* 22 NYCRR § 604.1(d)(6). The application must be made "on such notice to the client of the withdrawing attorney, to the attorneys of all other parties in the action or, if a party appears without an attorney, to the party, and to any other person, as the court may direct." CPLR 321(b)(2). An attorney seeking to be relieved must provide the client with reasonable notice, *see Mason v. MTA N.Y. City Tr.*, 38 A.D.3d 258, 832 N.Y.S.2d 153 (1st Dep't 2007), and any purported withdrawal in absence of proof of such notice is ineffective, *see 104-106 Sullivan St. LLC v. Borga*, 29 Misc.3d 135(A) (App Term 1st Dep't 2010). Furthermore, the right to withdraw as counsel is not absolute, *see In re Jamieko A.*, 193 A.D.2d 409, 597 N.Y.S.2d 72 (1st Dep't 1993), and the decision to grant or deny such a request lies in the court's discretion, *see Alvarado-Vargas v. 6422 Holding Corp.*, 85 A.D.3d 829, 925 N.Y.S.2d 176 (2d Dep't 2011); *McCord v. State of New York*, 63 A.D.3d 1120, 881 N.Y.S.2d 320 (2d Dep't 2009).

Regardless of the contents of the retainer agreement between plaintiff and counsel, "what controls is not what a retainer agreement might say, but rather whether a client is 'acutely aware of [the] need for further representation on the specific subject matter underlying the malpractice claim.'" *Johnson*, 129 A.D.3d at 68, 9 N.Y.S.3d at 208. A client's realization of "implicit" withdrawal from representation may negate application of the doctrine of continuous representation, but the client must have some reasonable idea that representation is no longer to

be expected. *See Shumsky v. Eisenstein*, 96 N.Y.2d 164, 726 N.Y.S.2d 365, 750 N.E.2d 67 (2001). Such evidence is lacking here. Accordingly, defendant failed in its burden to demonstrate that Judge Stinson's order conclusively refuted the allegations that the failure to move after dismissal was not negligent.

Defendant asserts plaintiff's failure to state a cause of action because plaintiff was at all times represented by non-party Hach & Rose LLP, not defendant. In the absence of an attorney-client relationship, a legal malpractice claim fails. *See Fortress Credit Corp. v. Dechert LLP*, 89 A.D.3d 615, 934 N.Y.S.2d 119 (1st Dep't 2011), *lv denied* 19 N.Y.3d 805, 949 N.Y.S.2d 343, 972 N.E.2d 508 (2012). "[A]bsent privity, plaintiff must set forth a claim of 'fraud, collusion, malicious acts or other special circumstances' in order to maintain a cause of action." *AG Capital Funding Partners, L.P. v. State St. Bank & Tr. Co.*, 5 N.Y.3d 582, 595, 808 N.Y.S.2d 573, 580, 842 N.E.2d 471, 478 (2005). Despite plaintiff's claim that the relation-back doctrine saves the complaint, plaintiff alleged no facts permitting the naming of an entity other than that with which plaintiff contracted and has not cross-moved for the application of the doctrine. Nevertheless, defendant conceded in reply that the argument was raised "primarily as a notice to the Court and to Plaintiff that a mistake had been made in the Complaint."

As a final matter, the cause of action alleging breach of contract must be dismissed as duplicative of the cause of action for legal malpractice, *see Genet v. Buzin*, 159 A.D.3d 540, 72 N.Y.S.3d 81 (1st Dep't 2018), as must be the cause of action for negligence, *see Palmeri v. Willkie Farr & Gallagher LLP*, 156 A.D.3d 564, 69 N.Y.S.3d 267 (1st Dep't 2017).

Accordingly, it is

ORDERED, that defendant's motion for dismissal of the complaint is granted to the extent of dismissing the causes of action for negligence and breach of contract and dismissing so

much of the legal malpractice cause of action as is predicated upon the dismissal of the underlying action; and it is further

ORDERED, that the Clerk of the Court is directed to enter judgment in favor of defendant dismissing the causes of action for negligence and breach of contract and dismissing so much of the legal malpractice cause of action as is predicated upon the dismissal of the underlying action.

This constitutes the decision and order of the court.

Dated: July 13, 2018

Lucindo Suarez, J.S.C.