

Cruz v Arcia

2018 NY Slip Op 34538(U)

December 20, 2018

Supreme Court, Queens County

Docket Number: Index No. 702967/18

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

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BLANCA MARLEN CRUZ,
Plaintiff,
-against-

Index No.:702967/18
Motion Date: 8/7/18
Mot. Seq. No.: 1 & 2

ELROY ABEL ARCIA, LAW OFFICES OF
ARCIA & ASSOCIATES, P.C., LAW OFFICE
OF E. ABEL ARCIA, THOMAS AQUINAS
CULHANE, and CALANO & CULHANE, LLP,
Defendants,

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The following numbered papers read on this motion by defendants for an order dismissing plaintiff's complaint, dated Febraruy 27, 2018, pursuant to CPLR 3211(a)(1) and 3211(a)(7).

PAPERS
NUMBERED

Notices of Motion-Affirmation-Exhibits.....	EF 11-20;21-31
Affirmation's in Opposition.....	EF 32-40;41-50;51
Reply's Affirmation.....	EF 41-50;53;54

Upon the foregoing papers it is ordered that this motion is decided as follows:

Plaintiff brought a claim for legal malpractice against her former attorneys, who were representing her in an underlying personal injury action. Plaintiff was allegedly injured, on January 23, 2015, while a passenger on a Nassau Inter-County Express bus, when the bus stopped abruptly causing the plaintiff to fall. The bus was owned by the County of Nassau and operated by Transdev Services, Inc. Pursuant to General Municipal Law §50-e, the filing of the Notice of Claim, with Nassau County by April 23, 2015, was a prerequisite to the plaintiff's bringing the underlying personal injury action.

On January 29, 2015, plaintiff retained the law firm of Arcia & Associates to represent her. Arcia & Associates failed to file a Notice of Claim against Nassau County, although they did file one against Transdev Services, Inc. On April 24, 2015, the plaintiff and the Arcia law firm parted ways and, in November 2015, the plaintiff hired Thomas Aquinas Culhane of the law firm of Calano & Culhane to handle the matter. On or about March 23, 2016, the plaintiff's second law firm, Calano & Culhane, petitioned the Court for leave to file a late Notice of Claim, eleven months after it was originally due. The petition was denied. Defendants now move to dismiss this legal malpractice action, pursuant to CPLR 3211(a)(1) and 3211 (a)(7).

"A cause of action to recover damages for legal malpractice requires proof of three elements: (1) that the defendant failed to exercise that degree of care, skill and diligence commonly possessed and exercised by an ordinary member of the legal community, (2) that such negligence was the proximate cause of the actual damages sustained by the plaintiff, and (3) that, but for the defendant's negligence, the plaintiff would have been successful in the underlying action(see *Simmons v. Edelstein*, 32 AD3d 464, 820 NYS2d 614)" (*Cummings v Donovan*, 36 AD3d 648 [2d Dept 2007]).

Defendants Thomas Aquinas Culhane and Calano & Culhane seek to dismiss plaintiff's complaint against them, claiming that they could not have proximately caused any of the plaintiff's damages. Plaintiff opposes and defendant Arcia law firm partially opposes claiming it is not clear, as a matter of law, that Calano & Culhane were not the proximate cause of the plaintiff's damages. They argue that the defendant Culhane law firm made a number of errors that were a proximate cause of the denial of the petition to file a late notice of claim. First of all, the defendants brought their petition to file a late Notice of Claim four months after they were retained to represent the plaintiff. Therefore, eleven months had passed since the initial deadline to file the Notice of Claim. In addition, it is argued that defendant Culhane omitted and incorrectly stated relevant information in the petition. Counsel affirmed in the petition that a Notice of Claim was never filed by predecessor counsel. The Arcia defendants claim this is controverted by documentary evidence, which shows that although a Notice of Claim was not filed against the County of Nassau, it was filed against Transdev Service, Inc., who is represented by the same counsel as the County of Nassau. Defendant, Arcia argues further that

defendant Culhane should have made the argument in the petition that since counsel for Transdev Service Inc. was put on notice of the claim, the County of Nassau had actual knowledge of the essential facts constituting the claim within ninety (90) days after the claim arose and, as a result, there was minimal prejudice to Nassau County. Defendant, Arcia argues that had defendant Culhane asked them for their file in this matter, or called about the status of the case, they would have been made aware that a Notice of Claim had been filed against Transdev Service Inc. and, therefore, would have had a stronger, more accurate argument in their petition for late filing.

It is defendant Culhane's position, however, that their predecessor law firm's failure to file the Notice of Claim against the County of Nassau, was the proximate cause of plaintiff's damages. The Culhane defendants argue that the allegations against them are conclusory and insufficient to state a claim for legal malpractice and defendant's decision not to file a motion to renew or reargue cannot be the basis for a legal malpractice claim.

Defendants Eloy Abel Arcia and the Law Offices of Arcia & Associates, PC, also seek to dismiss plaintiff's complaint, pursuant to CPLR 3211, as to the Arcia defendants. They state that they served a Notice of Claim upon Transdev, Service Inc. and the following day were no longer representing the plaintiff in the underlying case. They argue that a late Notice of Claim is permitted by statute and successor counsel and the plaintiff erred by not including in the petition that a Notice of Claim had been filed against Transdeev Services, Inc. Arcia defendants claim further that this omission, as well as the additional delay in filing the petition, caused the denial of the petition to file a late Notice of Claim.

Plaintiff and defendant Culhane oppose, claiming there is a valid claim of legal malpractice against the moving defendants and that they were the proximate cause of the failure to file a Notice of Claim against the County of Nassau.

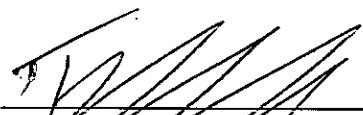
"On a CPLR 3211(a)(7) motion to dismiss, the facts alleged in the complaint must be accepted as true, and the court may freely consider additional facts contained in affidavits submitted by the plaintiff to remedy any defects in the complaint (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *Rovello v. Orofino Realty Co.*, 40 NY2d 633, 635 [1976]). Additionally, the plaintiff must be afforded the benefit of every possible favorable inference, as the court's function is limited to determining whether the facts

alleged fit within any cognizable legal theory (*see Goldfarb v Schwartz*, 26 AD3d 462, 463 [2006]; *see also AG Capital Funding Partners, LP. v State St. Bank & Trust Co.*, 5NY3d 582, 591 [2005]; *Leon v. Martinez, supra* at 87-88). “Whether 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 [2005])”(*International Oil Field Supply Services Corp. v Fadeyi*, 35 AD3d 372 [2d Dept 2006]). “Upon a motion to dismiss for failure to state a cause of action under CPLR 3211(a)(7), the court must determine whether from the four corners of the pleading ‘factual allegations are discerned which taken together manifest any cause of action cognizable at law’”(*Salvatore v Kumar*, 45 AD3d 560 [2d Dept 2007]). The the plaintiff must be accorded the benefit of every possible favorable inference at this juncture

Accordingly, it is

ORDERED, the defendants motion’s to dismiss plaintiff’s complaint is denied.

Dated: December 20, 2018


TIMOTHY J. DUFFICY, J.S.C.

