

<b>Singh v Pliskin, Rubano, Baum &amp; Vitulli</b>
2019 NY Slip Op 31567(U)
April 3, 2019
Supreme Court, Queens County
Docket Number: 708080/18
Judge: Carmen R. Velasquez
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SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE CARMEN R. VELASQUEZ IAS PART 38  
Justice

-----x  
ROOPNARINE SINGH a/k/a RUDY SINGH and  
MSN AIR SERVICE, INC.

Index NO. 708080/18

Plaintiffs,

Motion

Date: January 14, 2019

-against-

M# 1

PLISKIN, RUBANO, BAUM & VITULLI  
and JOSEPH D. VITULLI, Individually,

Defendants.

-----x  
The following papers numbered EF 4-25 read on this motion by  
defendants Pliskin, Rubano, Baum & Vitulli, and Joseph D.  
Vitulli, individually to dismiss the complaint of plaintiffs  
Roopnarine Singh a/k/a Rudy Singh (Singh) and MSN Air Service,  
Inc. (MSN) pursuant to CPLR 3211(a)(1) and (a)(7).

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits.....	EF 4-19
Answering Affidavits - Exhibits.....	EF 21-24
Reply Affidavits.....	EF 25

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

Plaintiffs commenced this action sounding in legal  
malpractice in connection with defendants' legal representation  
for approximately seven years in two litigations commenced by  
Singh's former business partner, non-party Edward Radburn  
(Radburn). Singh founded closely-held corporation MSN in 2002 to  
provide cargo handling services to airlines. In August 2006  
Singh took Radburn on as a business partner with claimed  
experience in the airline cargo industry and contacts at major  
airlines, and issued him 45% of the shares in MSN in a  
shareholder's agreement (the Shareholder Agreement), retaining a  
55% majority of shares for himself. Radburn evidently failed to  
follow through on his representations and obligations, and the  
business partnership soon soured.

In 2009, Radburn commenced a dissolution proceeding in Supreme Court, Queens County, captioned *In the Matter of Edward A Radburn v MSN Airservice, Inc.*, index no. 24784/2009 (the Queens Action), seeking to dissolve MSN pursuant to Business Corporation Law (BCL) § 1104-a. The petition therein alleged that Singh falsely represented to Radburn that MSN was solvent, falsely claimed ownership shares of MSN in their entirety, misappropriated MSN funds for personal use, tried to "freeze" Radburn out of MSN's operations, including by refusing access to MSN's business records, and failed to pay certain amounts due to petitioner under the Shareholder Agreement.

Singh retained defendants to represent his and MSN's interests in the lawsuit, and in December 2009 timely elected to exercise his right to purchase Radburn's ownership interest in MSN pursuant to BCL § 1118. By order dated July 23, 2010, the court stayed the Queens Action and directed a hearing to determine the fair value of Radburn's interest without making any determination on the merits of Radburn's allegations. However, Radburn repeatedly failed to appear or participate in the Queens Action, which was adjourned numerous times, although his counsel continued to appear. Ultimately, the court set a final conference down for August 3, 2012 regarding a motion by Radburn's counsel to withdraw from representing Radburn. At the hearing, the court permitted Radburn's counsel's withdrawal based on testimony that he was orally terminated by Radburn, but was unable to obtain written consent to withdraw. The court subsequently marked the Queens Action off the calendar without prejudice to restore upon motion indicating that the matter was ready to proceed.

Radburn commenced a second action on April 28, 2014 in Supreme Court, Nassau County, captioned *Edward Radburn, individually and derivatively on behalf of MSN Air Service, Inc. v Roopnarine Singh a/k/a Rudy Singh*, index no. 601902/2014 (the Nassau Action), asserting causes of action sounding in an accounting, breach of contract, breach of fiduciary duty, and unjust enrichment. The next day, Radburn moved by order to show cause for a preliminary injunction and temporary restraining order restraining Singh from transferring, disposing or encumbering MSN's assets; directing Singh to allow Radburn access to MSN's books and records, and restraining Singh from destroying MSN's books and records. The court granted such relief, and denied a cross motion by Singh, represented by defendants, seeking to dismiss the Nassau Action based on the pendency of the Queens Action, on the ground that the Queens Action involving MSN's dissolution, and the Nassau Action involving money damages against Singh, were distinct claims raised against distinct

parties.

As the Nassau Action proceeded, Singh allegedly began violating discovery orders and refusing to comply with discovery, resulting in a motion to strike the answer, which the court conditionally granted. The court eventually appointed a receiver to run the daily operations of MSN (which bore its costs) and permitted defendants to withdraw as Singh's counsel.

Contemporaneously with the Nassau Action, in September 2014, over two years after the matter was marked off the calendar, defendants moved to dismiss the Queens Action for failure to prosecute and to fix the value of Radburn's interest at \$247,000, which value was attributed by MSN's expert appraiser. By order dated October 27, 2014, the court in the Queens Action granted the branch of respondent MSN's motion to dismiss the dissolution proceeding for failure to prosecute, but did not expressly address the branch of the motion seeking to fix the value of Radburn's shares. Following various motions to reargue and appeals to the Appellate Division, Second Department, the Queens Action was eventually restored to the trial calendar in October 2015 to determine the fair value of Radburn's shares. Defendants remained as counsel for MSN in the Queens Action until January 2016.

In July 2015, Defendants moved to withdraw as counsel in the Nassau Action. In September 2016, Singh (through his new counsel) and Radburn agreed to mediate their dispute in the Queens and Nassau Actions. Singh alleges that he was compelled to settle the dispute for a total of \$750,000, based on Radburn's right to salary and distributions from 2009 through the completion of Singh's purchase of Radburn's shares.

In their complaint herein, plaintiffs allege three causes of action: (1) legal malpractice; (2) breach of fiduciary duty; and (3) breach of contract. They aver that due to defendants' failure to advise Singh that the shareholder agreement was still in effect after the August 3, 2012 hearing in the Queens Action (when it was marked off the calendar) and their delay in pursuing and concluding the right of election in the Queens Action, plaintiffs could not avoid the separate Nassau Action, and were caused to incur additional legal fees and liability to pay settlement sums totaling well above the 2009 appraised value of Radburn's MSN shares (\$247,000).

On a motion to dismiss for failure to state a cause of action under CPLR 3211(a)(7), the court must afford the pleading a liberal construction, accept all facts as alleged in the

pleading to be true, accord the plaintiff the benefit of every favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (see *Leon v Martinez*, 84 NY2d 83, 87 [1994]; *George v Windham*, 169 AD3d 876, 877 [2019]; *Velez v Captain Luna's Marina*, 74 AD3d 1191, 1192 [2010]). While a court is permitted to consider evidentiary material submitted by a defendant in support of a motion to dismiss pursuant to CPLR 3211(a)(7), affidavits submitted by a defendant will almost never warrant dismissal under CPLR 3211 unless they establish conclusively that the plaintiff has no cause of action (see *Bokhour v GTI Retail Holdings, Inc.*, 94 AD3d 682, 683 [2012] [internal quotation marks omitted]; *Sokol v Leader*, 74 AD3d 1180, 1181 [2010]). Moreover, on a motion seeking dismissal "on the ground that ... a defense is founded upon documentary evidence" under CPLR 3211(a)(1), such relief "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 326 [2002]; see *Clarke v Laidlaw Tr., Inc.*, 125 AD3d 920, 921 [2015]; *Attias v Costiera*, 120 AD3d 1281, 1282 [2014]).

In an action for legal malpractice, the plaintiff must allege (1) that the attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession; and (2) that the attorney's breach of this duty proximately caused plaintiff to sustain actual and ascertainable damages (see *Quantum Corporate Funding, Ltd. v Ellis*, 126 AD3d 866, 870 [2015]; *Cervini v Zanoni*, 95 AD3d 919, 920 [2012]; *Snolis v Clare*, 81 AD3d 923, 925 [2011]). An attorney's conduct or inaction is the proximate cause of a plaintiff's damages if "but for" the attorney's negligence the plaintiff would have succeeded on the merits of the underlying action, or would not have sustained actual and ascertainable damages (see *Gorbatov v Tsirelman*, 155 Ad3d 836, 838 [2017]; *Janker v Silver, Forrester & Lesser, P.C.*, 135 AD3d 908, 909 [2016]). Stated otherwise, to establish the element of 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 attorney's negligence (see *Cervini*, 95 AD3d at 920; *Snolis*, 81 AD3d at 925).

In moving to dismiss the complaint pursuant to CPLR 3211(a)(1) and (a)(7), defendants proffer the court documents filed in the underlying actions as documentary evidence, which they maintain conclusively establish that defendant exercised the care, skill, and diligence commonly

possessed by a member of the legal profession. In the first instance, the court finds that defendants fail to present any documentary evidence that conclusively establishes a defense as a matter of law (see *Gad v Sherman*, 160 AD3d 622, 623 [2018] [court hearing transcript failed to utterly refute plaintiff's allegations of legal malpractice]; *Palmieri v Biggiani*, 108 AD3d 604, 607-608 [2013]).

Turning to the branch of the motion seeking dismissal under CPLR 3211(a)(7), defendants argue that no causal link exists between their alleged negligence in the Queens Action and the alleged damages in the Nassau Action because the court therein determined that the two actions were based on distinct parties as well as causes of action, and therefore neither *res judicata* nor collateral estoppel barred the Nassau Action because no final adjudication on the merits was reached in the Queens Action. Defendants also argue that their alleged legal malpractice did not proximately cause plaintiffs' alleged damages in the Nassau Action because the allegations against Singh therein were based on his alleged wrongful conduct in 2009 and earlier, of which he was already placed on notice before the Nassau Action was commenced, due to the prior lawsuit. Defendants further contend that plaintiffs fails to allege that they would have prevailed on the merits of the underlying action (i.e., the Queens Action) because, in the context of a motion for a preliminary injunction in the Nassau Action, the court found that Radburn had a likelihood of success on the merits on his allegations against Singh.

Accepting as true the facts alleged in the complaint and affording plaintiff the benefit of every favorable inference (see *Leon v Martinez*, 84 NY2d 83, 87-88 [2012]), the court finds that defendants fail to sustain their burden with respect to the legal malpractice cause of action. Defendants seemingly conflate what plaintiffs must allege in the underlying Queens Action, in which they claim defendants were negligent, with the events in the Nassau Action, which do not conclusively preclude a properly asserted claim. For example, whether Singh was aware of his alleged wrongdoings in operating MSN does not obviate the making of a determination on whether defendants failed to fully advise plaintiffs of his obligations under the Shareholder Agreement in the Queens Action. Similarly, a finding of likelihood of success on the merits on Singh's purported wrongful conduct does not preclude prevailing on the merits in the business dissolution proceeding, to wit, the finalization of Singh's purchase of Radburn's minority interest in MSN.

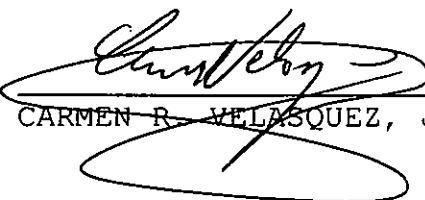
Thus, insofar as plaintiffs have alleged in the complaint,

as amplified by their submissions in opposition to the motion, that defendants fell short of the ordinary reasonable skill and knowledge required in the legal profession and that MSN would have consummated the buy-out of Radburn's interest therein, but for defendants' failures, or that plaintiff would not have sustained damages in the Nassau Action, e.g., the receiver's fees, increased litigation costs and "additional exposure to Radburn's pro rata share," among other things, they have sufficiently alleged a cause of action for legal malpractice in the complaint (see *Aristakesian v Ballon Stoll Bader & Nadler, P.C.*, 165 AD3d 1023, 1024 [2018]; *Gorbatov*, 155 Ad3d 836; see generally *Leon*, 84 NY2d at 87-89).

Finally, the court finds that plaintiffs' causes of action sounding in breach of fiduciary duty and breach of contract are duplicative of the legal malpractice claim and warrant dismissal, insofar as they arise from the same underlying facts and do not allege distinct damages (see *Keness v Feldman, Kramer & Monaco, P.C.*, 105 AD3d 812 [2013]; *Financial Servs. Veh. Trust v Saad*, 72 AD3d 1019, 1020 [2010]).

Accordingly, defendants' motion to dismiss is granted only with respect to the causes of action sounding in breach of fiduciary duty and breach of contract, but denied with respect to the cause of action for legal malpractice, which survive dismissal and await adjudication.

Date: April 3, 2019

  
CARMEN R. VELASQUEZ, J.S.C.

FILED  
APR 19 2019  
COUNTY CLERK  
QUEENS COUNTY