

Jarmuth v Wagner

2019 NY Slip Op 31649(U)

June 10, 2019

Supreme Court, New York County

Docket Number: 155922/2018

Judge: Andrew Borrok

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ANDREW BORROK PART IAS MOTION 53EFM

Justice

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SANDRA JARMUTH,

Plaintiff,

- v -

STEVEN WAGNER, BONNIE BERKOW, LAW OFFICES OF
WAGNER BERKOW LLP, 36 EAST 69TH CORP.

Defendant.

INDEX NO. 155922/2018
MOTION DATE 10/05/2018
MOTION SEQ. NO. 001

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36
were read on this motion to/for DISMISS

Upon the foregoing documents and for the reasons set forth on the record (6/10/2019), Steven Wagner, Bonnie Berkow and the Law Offices of Wagner Berkow LLP's (collectively the **Defendants**) motion to dismiss is granted.

This action arises from certain work performed pursuant to a certain Alteration Agreement (the **Alteration Agreement**), dated January 2004, by and between Sandra Nunnerly and the Board of Directors for 36 East 69th Corp. (the **Board**). Notably, Section 3(d) of the Alteration Agreement provides:

I undertake to indemnify you, your Managing Agent and tenants or occupants of the building for any damages suffered to person or property as a result of the work performed hereunder, whether or not caused by negligence, and to reimburse you and your Managing Agent for any expenses (including, without limitation, attorneys' fees and disbursements) incurred as a result of such work. (NYSCEF Doc. No. 2).

When Ms. Nunnerley performed the work contemplated by the Alteration Agreement, damage was incurred by Virginia Witbeck. Ms. Witbeck brought a lawsuit (the **Underlying Lawsuit**) captioned *Virginia Witbeck v. Sandra Nunnerley et al.*, Index No. 115086/2005 as against Ms. Nunnerley, 36 East 39th Corp (the **Co-op**), Alexander Wolfe and Company, Inc. and TDC Construction Inc (*id.*, ¶ 17). The Underlying Lawsuit was settled for \$15,000 and the attorneys' fees incurred were allegedly in excess of \$150,000 (*id.*, ¶ 25). Significantly, at no time has the Co-op made a demand that Ms. Nunnerly reimburse the Board for its \$150,000 legal bill. Nor has Ms. Jarmuth requested that the Board make any such demand. Instead, Ms. Jarmuth commenced this action individually and derivatively on behalf of the Co-op for legal malpractice, breach of contract and tort for breach of ethics concerning the Defendants' representation of the Co-op in the Underlying Lawsuit.

Dismissal under CPLR § 3211 requires that a court take "the allegations asserted within a plaintiff's complaint as true and accord plaintiff the benefit of every possible inference, determining only whether the facts as alleged fit within any cognizable legal theory" (*Samiento v World Yacht Inc.*, 10 NY3d 70, 79 [2008]). Allegations that consist of bare legal conclusions, or factual claims inherently incredible or flatly contradicted by documentary evidence are not entitled to the same consideration (*Caniglia v Chicago Tribune-New York News Syndicate*, 204 AD2d 233, 233-234 [1st Dept 1994]).

A. First Cause of Action (Legal Malpractice)

Ms. Jarmuth's first cause of action is for legal malpractice by the Defendants in failing to adequately defend the Co-op and pursue the counterclaim against Ms. Nunnerley (NYSCEF Doc.

No. 1, ¶¶ 34-52). The Defendants argue that the claim for legal malpractice should be dismissed, in part, because there was no attorney client relationship between Ms. Jarmuth and the Defendants. Ms. Jarmuth asserts that she has standing to bring her claim. A claim for legal malpractice requires three elements: (1) negligence of the attorney, (2) that the negligence was the proximate cause of the loss sustained and (3) actual damages (*Leder v Spiegel*, 31 AD3d 266, 267 [1st Dept 2006]).

To the extent the claim is asserted by Ms. Jarmuth individually against the Defendants, Ms. Jarmuth has no standing as an unrelated third party (*see Green v Fischbein, Olivieri, Rozenholz & Badillo*, 135 AD2d 415, 418 [1st Dept 1987] [holding that “[u]nder New York law an attorney generally cannot be held liable to third parties for actions taken in furtherance of his role as counsel unless it is shown that he ‘did something either tortious in character or beyond the scope of his honorable employment.’”]). To the extent that the claim against the Defendants is made derivatively on behalf of the Co-op, Ms. Jarmuth has not complied with BCL § 626(c) which requires that shareholder derivative actions “set forth with particularity the efforts of the plaintiff to secure the initiation of such action by the board or the reasons for not making such effort.” While Ms. Jarmuth has pled that she serviced a notice on members of the Board regarding “legal malpractice by the Wagner Berkow attorneys with regard to advice given and the action taken as it pertained to a certain litigation brought by Virginia Witbeck against Sandra Nunnerley 36 East 69th Owners Corp. and TD Construction Inc.” (NYSCEF Doc. No 1, ¶ 3), there is no evidence that the Board made a demand for reimbursement from Ms. Nunnerley or that Ms. Jarmuth demanded that the Board should do so, accordingly, Ms. Jarmuth’s first cause of action for legal malpractice is dismissed without prejudice. For the avoidance of doubt, should Ms. Jarmuth

demand that the Board seek reimbursement from Ms. Nunnerley, and should the Board refuse to seek reimbursement from Ms. Nunnerley, Ms. Jarmuth is not precluded from seeking alternative derivative relief.

B. Second Cause of Action (Breach of Contract)

Ms. Jarmuth's second cause of action is for breach of contract regarding the contract for legal services between the Co-op and the Defendants (NYSCEF Doc. No. 1, ¶¶ 53-58). The Defendants argue that the claim for breach of contract should be dismissed as duplicative of the claim for legal malpractice and because there is no allegation that the Defendants breached a promise to achieve a specific result (*see Mamoon v Dot Net Inc.*, 135 AD3d 656, 658 [1st Dept 2016] [dismissing a claim for breach of contract for legal services because the plaintiff failed to allege that the defendants breached a promise to achieve a specific result]). Ms. Jarmuth does not raise any argument in opposition to the Defendants' position and inasmuch as she does not allege that the Defendants promised to achieve a specific result and then breached said promise (NYSCEF Doc. No. 1, ¶¶ 53-58), Ms. Jarmuth's second cause of action for breach of contract is dismissed.

C. Third Cause of Action (Tort for Breach of Ethics Due to a Conflict of Interest)

The Defendants argue that Ms. Jarmuth's third cause of action should be dismissed because it fails to state a cause of action. This court agrees because the "violation of a disciplinary rule does not, without more, generate a cause of action" (*Schwartz v Olshan Grundman Frome & Rosenzweig*, 302 AD2d 193, 199 [1st Dept 2003]). In any event, Ms. Jarmuth also fails to make

any argument in opposition to this branch of the Defendants' motion to dismiss. As a result, Ms. Jarmuth's third cause of action in tort for breach of ethics is dismissed.

Accordingly, it is

ORDERED that defendants' motion to dismiss is granted.

6/10/2019
DATE

CHECK ONE: CASE DISPOSED DENIED

APPLICATION: GRANTED NON-FINAL DISPOSITION

CHECK IF APPROPRIATE: SETTLE ORDER GRANTED IN PART OTHER

INCLUDES TRANSFER/REASSIGN SUBMIT ORDER FIDUCIARY APPOINTMENT REFERENCE

ANDREW BORROK, J.S.C.