

Inwald Enters., LLC v Humphrey
2019 NY Slip Op 34496(U)
March 19, 2019
Supreme Court, Warren County
Docket Number: Index No. EF2018-65744
Judge: Martin D. Auffredou
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STATE OF NEW YORK
SUPREME COURT COUNTY OF WARREN

INWALD ENTERPRISES, LLC and DR. ROBIN
INWALD, Individually,

Plaintiffs,

-against-

DECISION & ORDER
Index No. EF2018-65744
RJ1 No. 56-1-2018-0525

CHRISTOPHER HUMPHREY, ESQ. and
HUMPHREY LAW, LLC,

Defendants.

APPEARANCES:

Whiteman Osterman & Hanna LLP, Albany (*William S. Nolan*, of counsel), for plaintiffs.

Christopher Humphrey, Nantucket, Massachusetts, pro se, and for Humphrey Law, LLC, defendant.

AUFFREDOU, J.

By notice of motion, defendants, Christopher Humphrey, Esq. and Humphrey Law, LLC (“defendants”), seek an order dismissing plaintiffs’ amended complaint pursuant to CPLR 3211 [a] [7], or, in the alternative, an order dismissing plaintiffs’ causes of action premised upon a breach of fiduciary duty, breach of contract and Judiciary Law § 487, as they are duplicative of plaintiffs’ cause of action premised upon legal malpractice. Plaintiffs oppose such relief upon the basis that the amended complaint and causes of action set forth therein are not duplicative and are properly plead as alternative theories upon which relief may be granted. In their reply, defendants seek, in the alternative, an order staying the instant action pending determination of an associated action presently pending before the Court.

In deciding the motion, the Court has reviewed and considered the following: the affidavit of Christopher Humphrey, sworn to December 20, 2018, in support of said motion; the affidavit of William S. Nolan, Esq., sworn to January 29, 2019, with exhibit and plaintiffs' memorandum of law, dated January 29, 2019, in opposition to the motion; the affidavit of Christopher Humphrey, sworn to January 31, 2019, in further support of defendants' motion and in support of defendants alternative motion for a stay; and the letter of William S. Nolan, Esq., dated February 1, 2019, objecting to defendant's further affidavit and request for alternative relief.

As noted in a prior Decision and Order, dated January 4, 2019, this action was commenced by the filing of a summons and complaint on August 15, 2018. Defendants filed an answer to the initial complaint October 5, 2018. Thereafter, plaintiffs filed an amended complaint on October 25, 2018. It is the amended complaint that defendants now move to dismiss.

Plaintiffs seek damages premised upon the representation of plaintiffs by defendants in two actions presently pending before the Court concerning construction of a residence owned by plaintiffs. The actions were consolidated ("the consolidated action") by letter order entered October 23, 2013. Plaintiffs' amended complaint in this action sets forth various causes of action premised upon legal malpractice, breach of a fiduciary duty, breach of contract and a cause of action premised upon Judiciary Law § 487. It is alleged, *inter alia*, that defendant Christopher Humphrey failed to timely respond to discovery demands, failed to appear at scheduled Court conferences and did not effectively represent plaintiffs in the consolidated action, which resulted in a default judgment being entered against plaintiffs. The default judgment has since been vacated upon motion of plaintiffs and that determination was upheld on appeal (*Inwald Enterprises, LLC v Aloha Energy*, 153 AD3d 1008, 1012 [3d Dept 2017]).

Defendants now move to dismiss the legal malpractice cause of action asserting it is premature as the consolidated action upon which it is based is still pending, and that the breach of fiduciary duty, breach of contract and Judiciary Law § 487 causes of action should be dismissed as duplicative. Defendants also argue, in the alternative, the Court should stay the malpractice action pending final determination of the consolidated action.

As pertinent to the pending motion, the Court notes that defendant, Christopher Humphrey, who is the sole member of Humphrey Law, LLC, was disbarred from the practice of law by decision of the Supreme Court, Appellate Division, Third Department, dated February 8, 2018 (*Matter of Humphrey*, 158 AD3d 933, 934 [3d Dept 2018]).

To begin, the Court notes that defendants have failed to include a copy of the amended complaint in support of the instant motion or to refer to it, providing the docket number on the e-filing system. As such, the motion papers are insufficient (*see*, CPLR 2214 [c] [“[I]n an e-filed action, a party that files papers in connection with a motion need not include copies of papers that were filed previously electronically with the court, but may make reference to them, giving the docket numbers on the e-filing system.”]; *Sheedy v Pataki*, 236 AD2d 92, 97-98 [3d Dept 1997] [“Because a Supreme Court Justice does not retain the papers following his or her disposition of a motion and should not be compelled to retrieve the clerk’s file in connection with its consideration of subsequent motions, Supreme Court properly required plaintiffs to submit to it all papers that were to be considered on the instant motion.”] [internal citations omitted]; *Loeb v Tanenbaum*, 124 AD2d 941, 942 [3d Dept 1986] [“There is no authority for compelling Special Term to consider papers which were not submitted in connection with the motion on which it is ruling; indeed, under CPLR 2214(c), the court may refuse to consider improperly submitted papers.”]).

Further, the Court notes that defendant Christopher Humphrey, having been disbarred, is not able to appear for, nor represent, defendant Humphrey Law, LLC (*Hilton Apothecary v State of New York*, 89 NY2d 1024 [1997]).

However, notwithstanding such procedural issues, the Court notes that as a general principle, in reviewing the sufficiency of a pleading pursuant to CPLR 3211, and more particularly for failure to set forth a cause of action, the Court must liberally construe the pleadings, accept the facts as alleged within the complaint as true, afford plaintiffs the benefit of every possible favorable inference, and determine whether the facts alleged fit within any cognizable legal theory (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *ARB Upstate Communications LLC v R.J. Reuter, L.L.C.*, 93 AD3d 929, 930 [3d Dept 2012]).

In reviewing the allegations set forth in the complaint in light of the applicable standard, the allegations set forth viable causes of action. More particularly, despite the contentions of defendants, the cause of action for legal malpractice need only allege that the actions of the defendants caused damages to plaintiffs. Specifically, a cause of action for legal malpractice requires allegations of the existence of an attorney-client relationship, that the lawyer failed to exercise reasonable skill and knowledge, and that the failure caused the client to sustain actual and ascertainable damages (*Arnold v DeVane*, 123 AD3d 1202 [3d Dept 2014]). These facts are clearly alleged despite the status of the consolidated action. As alleged by plaintiffs, at the very least, they incurred costs and additional legal fees due to the imposition of the default judgment in the consolidated action, i.e. the costs and fees to vacate the judgment and the cost and fees to defend the appeal of the order to vacate the default judgment.

Further, the Court does not, at this juncture, find a sufficient basis to dismiss any cause of

action as duplicative. Specifically, the malpractice action is premised upon allegations of negligence, while the breach of fiduciary duty is premised upon the failure of defendants to have fulfilled their fiduciary obligations to plaintiffs. The breach of contract cause of action is premised upon allegations that defendants failed to contractually provide legal services, and the Judiciary Law § 487 cause of action is premised upon defendants' deception of plaintiffs concerning their misconduct in their representation of plaintiffs.

Defendants' motion for a stay is improperly requested within papers submitted in reply to plaintiffs' opposition. However, notwithstanding this procedural flaw, the Court has broad discretion to grant a stay to avoid the risk of inconsistent adjudication, application of proof and potential waste of judicial resources (*Concord Assoc., L.P. v EPT Concord, LLC*, 101 AD3d 1574 [3d Dept 2012]; *Matter of Tenenbaum*, 81 AD3d 738, 739 [2d Dept 2011]). In this particular action though, as set forth above, defendants' representation of plaintiffs caused plaintiffs additional costs and fees to vacate a default judgment and defend such determination on appeal. Such allegations alone constitute actual and ascertainable damages. Further, the representation of plaintiffs by defendants has concluded and although the damages alleged are somewhat dependent upon the outcome of the consolidated action, they are not strictly dependent upon the outcome. Thus, the Court sees little, if any, necessity, to impose a stay upon the instant action pending resolution of the consolidated action.

Based upon the foregoing, it is hereby

ORDERED that defendants' motion is denied.

The within constitutes the Decision and Order of this Court.

Signed this 19th day of March, 2019, at Lake George, New York.

ENTER.

03/20/2019



HON. MARTIN D. AFFREDOU
JUSTICE OF THE SUPREME COURT



The Court is uploading the Decision and Order to the New York State Courts Electronic Filing System (NYSCEF). Such uploading does not constitute service with notice of entry (*see* 22 NYCRR 202.5-b [h] [2].)

Distribution:

William S. Nolan, Esq.
Christopher Humphrey, Pro Se

Re: Inwald Enterprises, LLC v Christopher Humphrey
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