

<b>Pritsker v Zamansky LLC</b>
2019 NY Slip Op 34574(U)
December 16, 2019
Supreme Court, New York County
Docket Number: Index No. 150595/2017
Judge: Frank P. Nervo
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SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF NEW YORK

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ROBERT PRITSLER,

DECISION AND ORDER

Plaintiff,

Index Number

-against-

150595/2017

ZAMANSKY LLC, and JACOB ZAMANSKY

Defendants.

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FRANK P. NERVO, J.S.C.

Plaintiff, pro se, moves to vacate this Court's November 19, 2018 Decision and Order, which, after consolidating motion sequences 001 and 002, dismissed the amended complaint pursuant to CPLR § 3211(a)(1), (a)(7), and (a)(8) and denied plaintiff's motion to file a second amended complaint. Plaintiff also seeks to vacate this Court's January 15, 2019 Decision and Order denying reargument. Defendants oppose.

CPLR 5015(a)(3) provides for relief from an order based on fraud, misrepresentation or other misconduct of an adverse party. However, where a movant's claim of fraud is of "dubious merit," such claim is defeated by the policy favoring a judgment's finality; vacatur under these circumstances is an abuse of discretion (*Greenwich Sav. Bank v. JAJ Carpet Mart, Inc.*, (126 AD2d 451, 453 [1st Dept 1987]; *Shomron v. Fuks*, 157 AD3d 685 [1st Dept 2017]). Vacatur based on unsupported allegations of fraud detracts from the public policy favoring finality (*Matinzi v. Joy*, 96 AD2d 780 [1st Dept 1983]).

Although CPLR § 5015(a)(3) does not contain a timeliness provision, as CPLR § 5015(a)(1) does, a movant's time to so move is not unlimited, as plaintiff contends. The Court's timeliness inquiry begins when the movant "could with reasonable diligence have discovered" the fraud upon which the vacatur motion is based (*Trepul v. Frank*, 44 NY2d 723 [1978]).

Here, movant's assertion of fraud is dubious and his claim that this fraud forms a basis for vacatur misguided. Plaintiff contends, in essence, that defendants' recitation of the underlying FINRA matter in their memorandum of law was purposefully incorrect and directed to mislead the Court. Plaintiff further contends that this incorrect recitation formed the sole basis for the Court's decision. The Court, as reiterated in its decision denying reargument, found, as a matter of law, negligence and breach of fiduciary duty claims are duplicative of a legal malpractice claim and cannot continue (NYSCEF Doc 98). Plaintiff's claim of the alleged fraud by defendants is wholly irrelevant to this determination. Likewise, plaintiff's claim that an improper standard was applied to his motion seeking leave to amend his pleading is unrelated to the

purported fraud in defendants' memorandum on the underlying motion. Furthermore, plaintiff's arguments related to fraud are identical to those raised in his motion and motion to amend, and were previously rejected by the Court. A rehash of arguments rejected by the Court twice before is not a proper ground for vacatur.

The doctrines of res judicata and collateral estoppel prescribe finality to litigation where the parties have had a fair opportunity to litigate the matter previously and the Court has rendered a final decision (*O'Brien v. City of Syracuse*, 54 NY2d 353, 357 [1981] "[O]nce a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy"; *Israel v. Wood Dolson Co.*, 1 NY2d 116, 120 [1956]; *Schwartz v. Public Adm'r of Bronx County*, 24 NY2d 65 [1969] ). This is precisely the case at bar. As such, plaintiff cannot relitigate these same issues by stylizing his motion as one for vacatur predicated on fraud.

Notwithstanding the denial on merits, movant's motion is untimely and the Court, as an alternative holding, denies his motion on that basis. To the extent the allegations of fraud were not raised in prior motions, it could have been discovered with reasonable diligence well before plaintiff moved to vacate the Court's November 2018 and January 2019 orders. Plaintiff was a party to the FINRA proceedings, was in possession of the determination from those proceedings, and had knowledge of the outcome. With minimal effort plaintiff could have discovered the alleged discrepancy between defendants' recitation of the FINRA proceedings submitted in their opposition to his motions, and the FINRA determination including the phrase plaintiff contends was intentionally omitted from defendants' opposition papers. Plaintiff fails to explain with any particularity how defendants frustrated his ability to make this discovery.

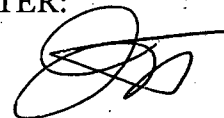
Accordingly, it is

ORDERED that the motion is denied in its entirety.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

Dated December 16, 2019

ENTER:



J.S.C.  
HON. FRANK P. NERVO