

Antell v Goldstein

2020 NY Slip Op 32573(U)

August 6, 2020

Supreme Court, New York County

Docket Number: 161770/2019

Judge: Kathryn E. Freed

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED PART IAS MOTION 2EFM

Justice

-----X

INDEX NO. 161770/2019

CRAIG ANTELL, DO,

Plaintiff,

MOTION SEQ. NO. 001

- v -

STEVEN GOLDSTEIN and GOLDSTEIN & HANDWERKER, LLP,

DECISION + ORDER ON MOTION

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16, 17

were read on this motion to/for DISMISSAL

In this conversion and legal malpractice action commenced by plaintiff Craig Antell, DO ("Antell"), defendants Steven Goldstein ("Goldstein") and Goldstein & Handwerker, LLP ("the firm") (collectively "defendants") move, pursuant to CPLR 3211 (a) (3), (5), and (7), to dismiss the complaint. Plaintiff opposes the motion. After a review of the parties' contentions, as well as the relevant statutes and case law, the motion is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND:

This action arises from defendants' representation of Antell, an osteopath, in the matter of Ulm I Holding Corp. v Craig Antell and CAAM, LLC, Supreme Court, New York County Index Number 653650/13 ("the underlying action"). In the underlying action, the plaintiff landlord sued Antell for breach of a "good guy" guaranty he signed in connection with a commercial lease. Doc. 8. By order entered November 4, 2016, this Court (Hagler, J.) granted the plaintiff landlord

summary judgment against Antell in the amount of \$439,881.85. Doc. 8. By order entered November 30, 2017, the Appellate Division, First Department affirmed Justice Hagler's order stating, inter alia, that:

[The] Supreme Court properly concluded that plaintiff landlord sustained its prima facie burden of showing that Antell breached the "good guy" guaranty he signed in connection with the commercial lease by providing a copy of the guaranty, which was notarized in a form consistent with Real Property Law § 309-a; an affidavit of the notary acknowledging his stamp and signature on the document; and an affidavit of Antell submitted in connection with another proceeding, acknowledging that he had signed the guaranty.

In opposition, Antell failed to submit evidence sufficient to raise a triable issue of fact. He provided only a bald assertion that the signature on the guaranty was a forgery and the unsworn report of an expert that there were differences between the signature on the guaranty and signatures on other documents. Under the circumstances here presented, the unsworn report is not in admissible form and may not be considered in opposition to the summary judgment motion, and Antell did not provide an acceptable excuse for failing to submit an expert report in admissible form (*see Bendik v Dybowski*, 227 AD2d 228, 229 [1st Dept 1996]).

Doc. 8.

Antell subsequently commenced the captioned action against defendants by filing a summons with notice on December 5, 2019. Doc. 1. Defendants then filed a demand for a complaint, and Antell's complaint was filed on June 5, 2020. Doc. 5. In his complaint, Antell asserted claims of legal malpractice and conversion arising from his representation by the defendants in the underlying action. Doc. 5. Antell alleged that defendants committed legal malpractice by failing to oppose plaintiff's motion for summary judgment in the underlying action with the sworn affidavit of a handwriting expert. Doc. 5. Additionally, he alleged that defendants failed to move to renew plaintiff's motion based on an affidavit by a handwriting expert and by failing to use \$3,000 given to defendants by Antell to retain said expert. Doc. 5. Antell further

asserted that defendants committed conversion by keeping the \$3,000 he gave them for the purpose of hiring the expert. Doc. 5.

Defendants thereafter filed the instant motion seeking to dismiss the complaint pursuant to CPLR 3211 (a) (3) (lack of standing), (5) (statute of limitations), and (7) (failure to state a claim). Doc. 9. In support of the motion, defendants argue that Antell fails to state a cause of action for medical malpractice; that the conversion claim is time-barred; and that Antell lacks standing to assert the conversion claim. Doc. 10.

In opposition to the motion, Antell asserts, in essence, that defendants committed malpractice by failing to submit an expert affidavit in opposition to plaintiff's motion for summary judgment in the underlying action. Doc. 16. In so arguing, Antell cites portions of the transcript of the oral argument of the motion, in which Justice Hagler stated, inter alia, that he might have found an issue of fact to have existed if Antell had submitted a sworn report by his handwriting expert. Doc. 6 at 22.¹ He also asserts that defendants committed malpractice by failing to renew the summary judgment motion based on an expert affidavit attesting to the fact that the signature on the guaranty was a forgery. Doc. 16. He further maintains, inter alia, that the action is not time-barred and that defendants misled him into giving them \$3,000 to pay for the expert and then kept the money for themselves. Doc. 16. Additionally, Antell asserts that, if this Court deems his complaint to be insufficient, he should be permitted to amend the same. Doc. 16.

In reply, defendants essentially reiterate the arguments set forth in support of the motion. Doc. 17.

¹ This Court notes, however, that Justice Hagler further stated that, even if a sworn report had been submitted, the expert merely concluded that it was a "possibility" that Antell's signature was forged. Doc. 6 at 22. Thus, it is by no means certain that a sworn affidavit by the expert would have resulted in a denial of the motion for summary judgment against Antell in the underlying action. Further, although Antell claims that, due to a "misunderstanding or miscommunication" between he and Goldstein, defendants did not obtain an expert affidavit prior to the argument of the summary judgment motion (Doc. 5 at par. 14), it is evident from the transcript of the oral argument of the motion that defendants submitted the unsworn report of an expert. Doc. 6 at 22.

LEGAL CONCLUSIONS:

“Regardless of which subsection of CPLR 3211(a) a motion to dismiss is brought under, the court must accept the facts alleged in the pleading as true, accord the [pleader] the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory.” *Ray v Ray*, 108 AD3d 449, 451 (1st Dept 2013); *see Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 (2001); *Leon v Martinez*, 84 NY2d 83, 87-88 (1994).

The Legal Malpractice Claim

A claim for legal malpractice requires that a plaintiff allege facts that, if proven at trial, would demonstrate that the attorney "failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession and that the attorney's breach of this duty proximately caused plaintiff to sustain actual and ascertainable damages" (*Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438, 442 [2007] [internal quotation marks and citation omitted]; *see Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267, 271-272 [1st Dept 2004]).

(*Kaplan v Conway & Conway*, 173 AD3d 452, 452 (1st Dept 2019)).

Antell clearly failed to meet this test, since the complaint is devoid of any mention of a breach by defendants of their duty to him, the standard of care owed to him by the defendants, or proximate cause.² Nor does Antell allege that the defendants were negligent. Doc. 5. Therefore, the legal malpractice claim is dismissed pursuant to CPLR 3211(a)(7). Even assuming, *arguendo*, that the claim was properly pleaded, plaintiff has failed to establish that he would have prevailed

² The closest Antell comes to an allegation regarding the defendants' duty to him is his claim that defendants had "the highest duty to take care of" the \$3,000 he allegedly gave to defendants to pay for the expert, which, if anything, applies to his conversion claim. Doc. 5 at par. 37.

in the underlying action but for the defendants' malpractice (*see U Joon Sung v Park*, 181 AD3d 454 [1st Dept 2020]) given Justice Hagler's finding that the expert report submitted by Antell did not conclusively establish that the signature on the guaranty was a forgery. Doc. 6 at 22.

The Conversion Claim

Defendants correctly assert that Antell's conversion claim is barred by the three-year statute of limitations governing this tort. See CPLR 214(4); *Epiphany Community Nursery Sch. v Levey*, 171 AD3d 1 (1st Dept 2019).

The three-year statute of limitations runs from the date that the conversion takes place (*see Vigilant Ins. Co. of Am. v Housing Auth. of City of El Paso, Tex.*, 87 NY2d 36, 44-45 [1995]). "[I]t is well settled that, where the original possession is lawful, a conversion does not occur until after a demand and refusal to return the property" (*D'Amico v First Union Natl. Bank*, 285 AD2d 166, 172 [1st Dept 2001], *lv denied* 99 NY2d 501 [2002]).

Johnson v Law Off. of Kenneth B. Schwartz, 145 AD3d 608, 612 (1st Dept 2016).

Antell concedes in his complaint that the \$3,000 check was deposited by defendants on December 17, 2015. Doc. 5 at par. 21.³ Although the statute of limitations expired on December 17, 2018, the captioned action was not commenced until December 5, 2019, nearly four full years after the check was deposited. Doc. 1. Thus, the action is time-barred.

The remainder of the parties' arguments are without merit or need not be addressed given the findings above.

Therefore, in light of the foregoing, it is hereby:

³ Although Antell alleges that defendants did not return the \$3,000 and that Goldstein denied ever having received the money, he does not state if or when he asked defendants for the money back. Doc. 5 at pars. 38-39.

ORDERED that the motion to dismiss by defendants Steven Goldstein and Goldstein & Handwerker, LLP is granted and the complaint is dismissed in its entirety; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly in favor of said defendants; and it is further

ORDERED that counsel for the defendants shall serve a copy of this order, with notice of entry, upon counsel for plaintiff, as well as on the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk’s Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk’s Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that this constitutes the decision and order of the court.

8/6/2020
DATE



KATHRYN E. FREED, J.S.C.

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED		
<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED
<input type="checkbox"/>	SETTLE ORDER		
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		

<input type="checkbox"/>	NON-FINAL DISPOSITION		
<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: