Piola Prop. Mgt., LLC v Abrams, Fensterman, Festerman, Eisman, Formato, Ferrara & Wolf, LLP
2021 NY Slip Op 30843(U)
March 17, 2021
Supreme Court, Kings County
Docket Number: 510823/2020
Judge: Richard Velasquez
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At an IAS Term, Part 66 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 17th day of MARCH, 2021

P R E S E N T:
HON. RICHARD VELASQUEZ, Justice.

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PIOLA PROPERTY MANAGEMENT, LLC and CHRISTIAN MANTUANO,

Plaintiff,

-against-

Index No.: 510823/2020
Decision and Order

ABRAMS, FENSTERMAN, FESTERMAN, EISMAN, FORMATO, FERRARA & WOLF, LLP, SUSAN MAURO, ESQ. AND JOHN CALAHAN, ESQ.

Defendants,

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The following *papers NYSCEF* Doc #'s 4 to 43 read on this motion:

Papers	*NYSCEF DOC NO.'s*
Notice of Motion/Order to Show Cause Affidavits (Affirmations) Annexed	4-19
Opposing Affidavits (Affirmations)	21; 23-42
Reply Affidavits (Affirmations)	44
Memorandum of Law	43

After having heard Oral Argument on DECEMBER 9, 2020 and upon review of the foregoing submissions herein the court finds as follows:

Defendant's ABRAMS, FENSTERMAN, FESTERMAN, EISMAN, FORMATO, FERRARA & WOLF, LLP, SUSAN MAURO, ESQ. AND JOHN CALAHAN, ESQ., move pursuant to CPLR 3211(a)(1)(7)and(8) for an order dismissing plaintiffs complaint and all causes of action therein. (MS#1). Plaintiffs oppose the same.

ANALYSIS

Pursuant to CPLR 3211, the pleading is to be afforded a liberal construction (see, CPLR 3026). We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*Morone v. Morone*, 50 N.Y.2d 481, 484, 429 N.Y.S.2d 592, 413 N.E.2d 1154; *Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 634, 389 N.Y.S.2d 314, 357 N.E.2d 970). In assessing a motion under CPLR 3211(a)(7), however, a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint (*Rovello v. Orofino Realty Co.*, 40 N.Y.2d at 635, 389 N.Y.S.2d 314, 357 N.E.2d 970) and **"the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one"** (*Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275, 401 N.Y.S.2d 182, 372 N.E.2d 17; *Rovello v. Orofino Realty Co.*, 40 N.Y.2d at 636, 389 N.Y.S.2d 314, 357 N.E.2d 970). Further, the court may consider any factual submissions made in opposition to a motion to dismiss a pleading in order to remedy pleading defects (*see Quinones v. Schaap,* 91 A.D.3d 739, 740, 937 N.Y.S.2d 262; *Daub v. Future Tech Enter., Inc.,* 65 A.D.3d at 1005, 885 N.Y.S.2d 115). *Minovici v. Belkin BV*, 109 A.D.3d 520, 521, 971 N.Y.S.2d 103, 106 (2013) "[B]are legal conclusions and factual claims which are flatly contradicted by the evidence are not presumed to be true on such a motion" (*Palazzolo v. Herrick, Feinstein, LLP*, 298 A.D.2d 372, 751 N.Y.S.2d 401). If the documentary proof disproves an essential allegation of the complaint, dismissal pursuant to CPLR 3211(a)(7) is warranted even if the allegations, standing alone, could withstand a motion to dismiss for failure to state a cause of action (see *McGuire v. Sterling Doubleday Enters., LP*, 19 A.D.3d 660, 661, 799 N.Y.S.2d 65). "Whether the complaint will later survive a motion

for summary judgment, or whether the plaintiff will ultimately be able to prove its claims ... plays no part in the determination of a pre-discovery 3211[a][7] motion to dismiss" (*Shaya B. Pac., LLC v. Wilson, Elser, Moskowitz, Edelman & Dicker, LLP,* 38 AD3d 34, 38; *see EBC I, Inc. v. Goldman Sachs & Co.,* 5 NY3d 11, 19). **However, if documentary proof disproves an essential allegation to a claim, dismissal is warranted even if the allegations, standing alone, could withstand a motion to dismiss for failure to state a cause of action.** *Id.* "[B]are legal conclusions and factual claims which are flatly contradicted by the record are not presumed to be true." *Parola, Gross & Marino, P.C. v. Susskind*, 43 AD3d 1020, 1021-22 (2nd Dep't 2007); *O'Donnell, Fox & Gartner v. R-2000 Corp.*, 198 AD2d 154, 154, 604 NYS2d 67 (1st Dep't 1993)

It is also well settled, a malpractice claim must properly plead that "but for" the defendant's negligence, the claimant would have prevailed in the underlying action or would not have sustained any damages. *See Ippolito v. McCormack Damiani Lowe & Mellon*, 265 AD2d 303, 696 NYS2d 203 (2nd Dep't 1999). **Failure to establish proximate cause, or plaintiff's "case within a case," mandates the dismissal of a legal malpractice action.** *See Albanese v. Hametz*, 4 AD3d 379, 380, 771 NYS2d 393 (2nd Dep't 2004); *see also Reibman v. Senie*, 302 AD2d 290, 756 NYS2d 164 (1st Dept. 2003). Proximate cause within a legal malpractice claim cannot be satisfied by unsupported factual allegations or conclusory legal arguments. *N.A. Kerson Co. v. Shayne, Dachs, Weiss, Kolbrenner & Levy*, 59 AD2d 551, 551 (2nd Dep't 1977), *aff'd* 45 NY2d 730 (1977); *Franklin v. Winard*, 199 AD2d 220, 221 (1st Dep't 1993). Rather, "but for" causation must be pled "with sufficient detail." *The Home Ins. Co. v. Liebman, Adolf & Charme*, 257 AD2d 424, 424 (1st Dep't 1999).

In New York, it is well established that where a plaintiff, on his own or through subsequent counsel, has sufficient time and opportunity to adequately protect his rights, any alleged negligence by the predecessor counsel **cannot, as a matter of law, proximately cause that plaintiff's injury**. Put another way, **an attorney cannot be held liable for acts that occur following termination of the attorney-client relationship**. *See Hunt v. Kolken*, 49 AD2d 747, 747, 49 AD2d 747 (2nd Dep't 1975), aff'd, 40 NY2d 949, 390 NYS2d 413 (1976) (an attorney who is discharged "cannot be liable for subsequent events"); *Perks v. Lauto & Garabedian*, 306 AD2d 261, 262 (2nd Dep't 2003) ("subsequent counsel had a sufficient opportunity to protect the plaintiffs' rights, and any negligence by the appellants was not the proximate cause of the plaintiffs' alleged damages"); *Volpe v. Canfield*, 237 AD2d 282, 283 (2nd Dep't 1997) (holding proximate cause of client's loss was default which occurred after attorney had been discharged, and thus attorney was not liable for client's loss); see also *DiGiacomo v. Levine*, 76 AD3d 946 (2nd Dep't 2010); *Mills v. Pappas*, 174 AD2d 780, 782, 570 NYS2d 726 (3rd Dep't 1991), app. dis'd in part, den'd, in part, 78 NY2d 1121, 578 NYS2d 874 (1991), cert. den'd., 504 US 971 (1992) (malpractice claim dismissed as a matter of law, where "all of the acts complained of occurred subsequent to the termination of Pappas' representation of plaintiff and, for this reason alone, are not actionable"); Treasure Lake *Assoc. v. Oppenheim*, 165 F3d 15 (2d Cir 1998) ("[u]nder New York law, no claim for legal malpractice can be maintained based on acts occurring after the attorney-client relationship has ended").

In the present case, the first cause of action for legal malpractice, Plaintiffs allege that the Abrams Firm departed from the standard of care by: (i) failing to respond to

Jorge's discovery demands and Jorge's deficiency letter; (ii) failing to respond to a motion seeking to preclude; (iii) failing to use documentary evidence; and (iv) withholding from the Plaintiffs the existence of a motion. (NYSCEF Doc. No. 6, titled Exhibit "A", ¶¶ 54-67). Plaintiffs allege that but for Abrams' negligence: (i) the motion to preclude would not have been made or would have been denied, and had the motion been denied; (ii) "Plaintiffs would have enjoyed a better financial outcome, would have resolved the cases for a smaller amount, would have succeeded on a defense or would have succeeded on a counterclaim.;" and (iii) Plaintiffs would not have had their Answer stricken and judgment entered against them. (NYSCEF Doc. No. 6, titled Exhibit "A", ¶¶ 70, 73, 74). The second cause of action sounding in breach of fiduciary duty Plaintiffs seek to recover on a claim of breach of fiduciary duty alleging the same exact claims as set forth in the legal malpractice claim stated above, and are duplicative.

The record from the underlying action establishes the following: Plaintiffs' Answer was stricken approximately seven (7) months after the Abrams Firm moved on November 29, 2017 for permission to withdraw as Counsel, and approximately four (4) months after the Abrams Firms was granted permission to withdraw as Plaintiffs' counsel on February 6, 2018. Said order stayed the underlying action until March 21, 2018 when a conference was scheduled. In said Withdrawal Order, Piola was expressly cautioned by the Court in the underlying action, specifically stating, "Piola or Piola's new counsel, and counsel for Jorge shall appear before the undersigned on March 21, 2018 at 9:30 a.m. promptly for a conference in this matter. Should either party fail to appear, such party's pleading shall be stricken for failure to appear." (See Exhibit "G"). On March 29, 2018 the Court in the underlying action lifted the stay. On March 29, 2018

Jorge served a motion to strike, plaintiff failed to oppose this motion. The Court in the underlying action issued the Order Striking Plaintiffs' Answer on June 7, 2018, again four (4) months after Abrams Firm was granted leave to withdraw. (NYSCEF Doc. No. 15, titled Exhibit "J").

Additionally, with regard to plaintiff contentions regarding the Abrams failure to respond to the motion to compel, the record in the underlying action establishes the only motion pending at the time the Abrams Firm moved to withdraw was the Motion to Compel Motion Seq. 3, this motion was adjourned to a return date after the court-imposed stay contained in the Withdrawal Order. (See NYSCEF Doc. No. 9, 10, 11, 12, titled Exhibits "D", "E", "F", and "G"). The Motion to Compel Motion Seq. 3 was adjourned to April 18, 2018 meaning that Plaintiffs had until at least April 11, 2018 to file opposition to the motion (or provide the supplemental interrogatory responses sought by their adversary). (See NYSCEF Doc. No 14, titled Exhibit "I"). Thus, it is undisputed that the Abrams Firm withdrew as Plaintiffs' counsel before any opposition was due on Motion to Compel Rog Responses/Motion Seq. 3.

Plaintiffs' legal malpractice claim fail to plead any facts showing "but for" causation between the Abrams Firms' handling of the Underlying Action and the ultimate striking of Plaintiffs' Answer because: (i) the Abrams Firm withdrew as counsel for Plaintiffs before it took place; (ii) Plaintiffs' alleged damages resulted from Plaintiffs' mishandling of the Underlying Action after the Abrams Firm withdrew; and (ii) the Complaint contains nothing more than speculation and surmise as to how Plaintiffs might have fared in the underlying action. *See Rudolf v. Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438, 442, 835 NYS2d 534 (2007). As such plaintiff's legal

malpractice claim and breach of fiduciary duty claim must be dismissed.

Accordingly, defendants motion to dismiss plaintiff's complaint is hereby granted, for the reasons stated above. (MS#1).

This constitutes the Decision/Order of the court.

Dated: Brooklyn, New York
March 17, 2021

ENTER FORTHWITH:

HON. RICHARD VELASQUEZ