

Sportelli v Koblenz

2021 NY Slip Op 33164(U)

November 5, 2021

Supreme Court, Queens County

Docket Number: Index No. 721632/20

Judge: Robert I. Caloras

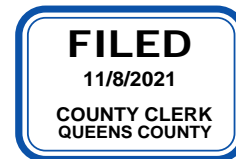
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY
PRESENT: HON. ROBERT I. CALORAS
Justice

PART 36



PASQUALE SPORTELLI,

Index No. 721632/20
Seq. No. 1

Plaintiff,

-against-

JESSICA KOBLENZ,

Defendant.

The following numbered papers EF3-EF12, EF17-EF18 read on this motion by defendant Jessica Koblenz (defendant), to dismiss the first cause of action for fraud/fraudulent inducement as it relates to the claimed need for continuing treatment, the second cause of action for breach of fiduciary duty, and the third cause of action for breach of contract pursuant to CPLR § 3211(a)(7), to dismiss the first cause of action for fraud in record keeping pursuant to CPLR §3211(a)(1) and (7), to dismiss all claims based on deteriorations in cognitive abilities as such damages are not available under any theory pleaded in this action, to dismiss the action pursuant to CPLR 3211 (a)(5), on the basis of res judicata, and to direct the Clerk of the Court to enter judgment on all causes of action in defendant’s favor, without interest, costs or disbursements.

Table with 2 columns: Document Description and Papers Numbered. Includes Notice of Motion - Affidavits - Exhibits, Answering Affidavits - Exhibits, and Reply Affidavits.

Upon the foregoing papers it is ordered that the motion is determined as follows:

This is an action to recover damages for: 1) fraud/fraudulent inducement, 2) breach of fiduciary duty, and 3) breach of contract. Plaintiff Pasquale Sportelli (plaintiff), has alleged that beginning on or about June 6, 2014, plaintiff sought psychological therapeutic assistance from defendant for a memory issue.

In the complaint, plaintiff has alleged that, as part of his treatment, “[p]laintiff entered into an agreement with the [d]efendant for private and confidential therapy sessions to treat a particular issue that he was experiencing. Instead of receiving therapy for the issue, over the course of approximately sixteen (16) months, the [p]laintiff was induced into continuous harmful psychological treatment in what he was led to believe was an environment that would assist the issue he was seeking treatment for. The [d]efendant abused the [p]laintiff’s trust and left the [p]laintiff in a far worse state of mind than when he originally began treatment with the [d]efendant. The [d]efendant’s actions were wrongful and the harm suffered by the [p]laintiff is compensable.” Plaintiff has further alleged that in or around May 2015, he attempted to terminate his relationship with defendant, but defendant would not permit him to do so, which resulted in plaintiff suffering an acute stress reaction on or about July 31, 2015. Plaintiff has alleged that defendant’s various actions proximately caused him to sustain injuries.

Defendant has now moved to, among other things, dismiss the action pursuant to CPLR 3211 (a)(5), on the basis of res judicata. CPLR § 3211 (a)(5) provides that a party may also move to

dismiss “one or more causes of action asserted against him on the ground that ... the cause of action may not be maintained because of... res judicata ...” “[U]nder the transactional approach adopted by New York in res judicata jurisprudence, once 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” (*Grossman v New York Life Ins. Co.*, 90 AD3d 990, 991 [2d Dept 2011] [internal quotes and citation omitted], *lv dismissed* 19 NY3d 991 [2012]; *see Coliseum Towers Assoc. v County of Nassau*, 217 AD2d 387, 389-390 [2d Dept 1996]). “Doctrines such as ... res judicata ... serve to protect the sanctity and finality of judicial orders and judgments. They thus remain inviolate unless they are reversed by appellate processes or are vacated by the court itself ...” (*Countrywide Home Loans, Inc. v Taylor*, 39 Misc3d 597, 599 [Sup Ct, Suffolk County 2013]).

Defendant has argued that the complaint in the instant action is identical to the complaint filed by plaintiff in an earlier action, which prior action was dismissed by the State of New York, Supreme Court, Appellate Division, Second Department, in a decision dated October 21, 2020, and entered on October 21, 2020 (*Sportelli v Koblenz*, 187 AD3d 1088 [2d Dept 2020]). In opposition, plaintiff has argued that the doctrine of res judicata does not apply in this case and that plaintiff is entitled to the protections afforded by CPLR § 205, because the prior action was not terminated by voluntary discontinuance, a failure to obtain personal jurisdiction, a dismissal for neglect to prosecute, or a final judgment on the merits.

In the prior action, the Appellate Division, Second Department, stated, in relevant part, that: “Supreme Court should have granted that branch of the defendant’s ... motion which was to dismiss the action based on the plaintiff’s failure to comply with so much of the July 2018 order as directed him to expeditiously file and serve a signed complaint. The plaintiff failed to offer a reasonable excuse for his failure to comply with the July 2018 order directing him to expeditiously file and serve a signed complaint. The plaintiff did nothing for over six months, and then did so only in response to the defendant’s second motion to dismiss the action. Since the plaintiff’s excuse for his failure to comply with the July 2018 order was not reasonable, the court should have granted that branch of the defendant’s motion which was to dismiss the action ...”

CPLR § 205 (a), provides the following:

“New action by plaintiff. If an action is timely commenced and is terminated in any other manner than by a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff ... may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months after the termination provided that the new action would have been timely commenced at the time of commencement of the prior action and that service upon defendant is effected within such six-month period. Where a dismissal is one for neglect to prosecute the action made pursuant to rule thirty-two hundred sixteen of this chapter or otherwise, the judge shall set forth on the record the

specific conduct constituting the neglect, which conduct shall demonstrate a general pattern of delay in proceeding with the litigation.”

A careful reading of the order of the Appellate Division, Second Department dismissing the prior action has demonstrated that the court’s dismissal of plaintiff’s prior action was not stated therein as “neglect to prosecute.” The Appellate Division, Second Department did not “set forth .. specific conduct constituting the neglect,” which sufficiently demonstrated a “general pattern” of plaintiff’s delays when proceeding with the litigation, especially given the very early stages of the proceedings in the prior action (CPLR § 205 [a], 3216[b]). Furthermore, the provisions of CPLR § 3216, were not satisfied in that, at the very least, issue had not been joined in the prior action. CPLR § 3216, also provides that “[u]nless the order specifies otherwise, the dismissal is not on the merits,” and the order of the Appellate Division, Second Department did not so state, nor did it state that the action was dismissed with prejudice. Therefore, in light of the above, defendant is not entitled to the relief sought on this branch of the motion.

Next, defendant has moved to dismiss the first cause of action for fraud/fraudulent inducement as it relates to the claimed need for continuing treatment pursuant to CPLR § 3211(a)(7), to dismiss the first cause of action for fraud in record keeping pursuant to CPLR §3211(a)(1) and (7), and to dismiss both the second cause of action for breach of fiduciary duty and the third cause of action for breach of contract pursuant to CPLR § 3211(a)(7).

CPLR § 3211(a)(1) provides that “[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that ... a defense is founded upon documentary evidence...” “To successfully move to dismiss a complaint pursuant to CPLR 3211(a)(1), the movant must present documentary evidence that ‘resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff’s claim’” (*AGCS Mar. Ins. Co. v Scottsdale Ins. Co.*, 102 AD3d 899, 900 [2d Dept 2013], quoting *Nevin v Laclede Professional Prods.*, 273 AD2d 453 [2d Dept 2000]; see *Leon v Martinez*, 84 NY2d 83, 88 [1994]; *Bonavita v Govt. Employees Ins. Co.*, 185 AD3d 892, 893 [2d Dept 2020]; *Lakhi Gen. Contractor, Inc. v N.Y. City Sch. Const. Auth.*, 147 AD3d 917 [2d Dept 2017]).

CPLR § 3211 (a)(7) provides that a party may move to dismiss an action on the ground that “the pleading fails to state a cause of action.” “On a motion to dismiss pursuant to CPLR § 3211, the complaint is to be afforded a liberal construction” (*Benitez v Bolla Operating LI Corp.*, 189 AD3d 970 [2d Dept 2020]; CPLR § 3026; see *Gorbatov v Tsirelman*, 155 AD3d 836 [2d Dept 2017]; *Feldman v Finkelstein & Partners, LLP*, 76 AD3d 703, 704 [2d Dept 2010]). “In reviewing a motion pursuant to CPLR § 3211(a)(7) to dismiss the complaint for failure to state a cause of action, the facts as alleged in the complaint must be accepted as true, the plaintiff is accorded the benefit of every possible favorable inference, and the court’s function is to determine only whether the facts as alleged fit within any cognizable legal theory” (*Benitez v Bolla Operating LI Corp.*, 189 AD3d at 970, quoting *Mendelovitz v Cohen*, 37 AD3d 670, 671 [2d Dept 2007]; see *Bianco v Law Offices of Yuri Prakhin*, 189 AD3d 1326 [2d Dept 2020]; *Gorbatov v Tsirelman*, 155 AD3d at 836; *Feldman v Finkelstein & Partners, LLP*, 76 AD3d at 704).

The court will address the branches of defendant’s motion made with regard to the first cause of action. Defendant has argued that the first cause of action for fraud/fraudulent inducement, as it relates to the claimed need for continuing treatment, has failed to state a cause of action and that the

allegations have not been set forth with specificity as required by CPLR § 3016 (b). “The elements of a cause of action [alleging] fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages” (*Garendean Realty Owner, LLC v Lang*, 175 AD3d 653, 653 [2d Dept 2019], quoting *Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]; see *Shahid v Ridgewood Bushwick Senior Citizens Council, Inc.*, 181 AD3d 744, 745 [2d Dept 2020]). “A claim rooted in fraud must be pleaded with the requisite particularity under CPLR 3016(b)” (*Shahid v Ridgewood Bushwick Senior Citizens Council, Inc.*, 181 AD3d at 745, quoting *Eurycleia Partners, LP v. Seward & Kissel, LLP*, 12 NY3d at 559).

In addition to the determination of the Appellate Division, Second Department, discussed above, the record in this matter contains, among other things, copies of the pleadings and a copy of a document entitled “Privacy of Information Policies,” dated June 6, 2014. Upon a careful review of the allegations set forth in the complaint, affording those allegations a liberal construction and accepting them to be true, as well as by giving plaintiff the benefit of every possible favorable inference, the court has determined that plaintiff has sufficiently alleged facts to constitute the elements of a cause of action for fraud/fraudulent inducement as it relates to a claimed need for continuing treatment (CPLR § 3016[b]; see generally *Garendean Realty Owner, LLC v Lang*, 175 AD3d at 653).

Defendant has also argued that to the extent the first cause of action has alleged fraud/fraudulent inducement as to record keeping, plaintiff has failed to state a cause of action and that documentary evidence requires dismissal of this cause of action. However, upon a careful review of the record, the court has determined that defendant’s documentary evidence has not resolved “all factual issues as a matter of law,” nor has defendant’s evidence conclusively disposed of plaintiff’s claim based upon fraud/fraudulent inducement as to record keeping (*AGCS Mar. Ins. Co. v Scottsdale Ins. Co.*, 102 AD3d at 900, quoting *Nevin v Laclede Professional Prods.*, 273 AD2d at 453).

Furthermore, upon a thorough review of the allegations contained in the complaint, when those allegations are afforded a liberal construction, accepted as true, and plaintiff has been given the benefit of every possible favorable inference, the court has determined that plaintiff has sufficiently alleged each of the elements of a cause of action for fraud/fraudulent inducement as to record keeping (see generally *Garendean Realty Owner, LLC v Lang*, 175 AD3d at 653). Although defendant has argued that plaintiff has suffered no actual damages, the court notes that on a motion made pursuant to CPLR § 3211 (a)(7), in general, “[t]he court is limited to ‘an examination of the pleadings to determine whether they state a cause of action’” (*Dolphin Holdings, Ltd. v Gander & White Shipping, Inc.*, 122 AD3d 901, 902 [2d Dept 2014], quoting *Miglino v Bally Total Fitness of Greater N.Y., Inc.*, 20 NY3d 342, 351 [2013]; see *Fedele v Qualified Pers. Residence Trust of Doris Rosen Margett*, 137 AD3d 965, 967 [2d Dept 2016]), and “[w]hether the plaintiff can ultimately establish the allegations ‘is not part of the calculus’” on such a motion (*Aberbach v Biomedical Tissue Servs., Ltd.*, 48 AD3d 716, 717-18 [2d Dept 2008], quoting *EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]; see *Etzion v Etzion*, 62 AD3d 646, 651 [2d Dept 2009]). Therefore, in light of the above determinations, defendant has failed to satisfy her burden as to the first cause of action.

Next, with regard to the second cause of action for breach of fiduciary duty, defendant has argued that it has failed to state a cause of action pursuant to CPLR § 3211(a)(7), because plaintiff has failed to plead, in detail, the circumstances that would constitute a breach and that vague statements and conclusory statements do not comply with the requirements in pleading an action for breach of fiduciary duty. “The elements of a cause of action to recover damages for breach of fiduciary duty are (1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant’s misconduct” (*Litvinoff v Wright*, 150 AD3d 714, 715 [2d Dept 2017], quoting *Rut v Young Adult Inst., Inc.*, 74 AD3d 776, 777 [2d Dept 2010]; see *Bd. of Managers of Brightwater Towers Condominium v FirstService Residential New York, Inc.*, 193 AD3d 672 [2d Dept 2021]). Additionally, “[a] cause of action sounding in breach of fiduciary duty must be pleaded with particularity under CPLR 3016(b)” (*Litvinoff v Wright*, 150 AD3d at 715, quoting *Swartz v Swartz*, 145 AD3d 818, 823 [2d Dept 2016]; see *MC Realty Corp. v City of Yonkers*, 193 AD3d 1018 [2d Dept 2021]; *DeMartino v Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara & Wolf, LLP*, 189 AD3d 774, 775 [2d Dept 2020]).

In this case, upon a careful reading of the allegations contained in the complaint, affording plaintiff’s allegations a liberal construction, accepting the facts alleged to be true, and granting plaintiff the benefit of every possible favorable inference, the court has concluded that, under the particular circumstances in this matter, the complaint has adequately, and with sufficient particularity, alleged facts to constitute the elements of a cause of action for breach of fiduciary duty (CPLR§ 3016[b]; see generally *Litvinoff v Wright*, 150 AD3d at 715). As such, defendant is not entitled to the dismissal of this cause of action.

As to the third cause of action for breach of contract, defendant has argued that plaintiff has failed to state a cause of action pursuant to CPLR § 3211(a)(7), because, among other things, the various provisions of the parties’ agreement were not set forth in the complaint. Despite defendant’s contention that there was “no theft of information and no damage caused to the plaintiff,” on the instant motion, the court is limited to an examination of the pleadings on the instant motion (see *Fedele v Qualified Pers. Residence Trust of Doris Rosen Margett*, 137 AD3d at 967; *Dolphin Holdings, Ltd. v Gander & White Shipping, Inc.*, 122 AD3d at 902; *Etzion v Etzion*, 62 AD3d at 651; *Aberbach v Biomedical Tissue Servs., Ltd.*, 48 AD3d at 717-18).

“The essential elements of a cause of action to recover damages for breach of contract are the existence of a contract, the plaintiff’s performance pursuant to the contract, the defendant’s breach of its contractual obligations, and damages resulting from the breach” (*WMC Realty Corp. v City of Yonkers*, 193 AD3d 1018 [2d Dept 2021]; see *El-Nahal v FA Mgt., Inc.*, 126 AD3d 667, 668 [2d Dept 2015]; *Dee v Rakower*, 112 AD3d 204, 208-09 [2d Dept 2013]). Upon a thorough reading of the allegations contained in the complaint, affording those allegations a liberal construction, accepting the facts alleged therein to be true, and granting plaintiff the benefit of every possible favorable inference, the court has concluded that the complaint has sufficiently alleged the elements of a cause of action for breach of contract (see generally *WMC Realty Corp. v City of Yonkers*, 193 AD3d at 1018). Therefore, defendant is not entitled to the dismissal of this cause of action.

Lastly, to the extent that defendant has moved to dismiss all claims on the basis that, although each of plaintiff’s causes of action include a claim relating to the alleged deterioration of plaintiff’s cognitive abilities, such damages are not available under any theory pleaded in this action. After a

careful examination of the pleadings, the court has concluded that plaintiff has sufficiently alleged pecuniary losses as a result of defendant's action regarding each cause of action stated and, thus, defendant is not entitled to the dismissal of plaintiff's causes of action on this basis (*see generally Cont. Cas. Co. v PricewaterhouseCoopers, LLP*, 15 NY3d 264, 271 [2010]; *Achieve It Sols., LLC v Lewis*, 186 AD3d 49, 56 [2d Dept 2020]; *Glob. Granite Sales Corp. v Sabovic*, 166 AD3d 587, 589 [2d Dept 2018]; *Stein v McDowell*, 74 AD3d 1323, 1326 [2d Dept 2010]; *Scivoli v Levit*, 45 AD3d 667, 668 [2d Dept 2007][fact that recoverable damages for fraud do not include pain and suffering does not justify dismissal of complaint where there is some likelihood that plaintiff may ultimately be able to establish some pecuniary injury]).

In light of the above, defendant is not entitled to have the Clerk of the Court enter judgment on all causes of action in defendant's favor. The parties' remaining contentions have been considered and found to be without merit.

Accordingly, the motion is denied in its entirety.

DATED: November 5, 2021



ROBERT I. CALORAS, J.S.C.

