

Pergament v Neil H. Greenberg & Assoc., P.C.
2021 NY Slip Op 34325(U)
September 9, 2021
Supreme Court, Nassau County
Docket Number: Index No. 602561/20
Judge: David J. Gugerty
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T : HON. DAVID J. GUGERTY, J.S.C.

-----X TRIAL/IAS PART 24
MARC A. PERGAMENT, ESQ. AS CHAPTER 7 TRUSTEE
OF THE ESTATE OF MELISSA GACE BRYANT,

Plaintiff,

- against -

NEIL H. GREENBERG & ASSOCIATES, P.C.,
and NEIL H. GREENBERG, ESQ.,

Defendants.

Index No. 602561/20
Mot. Seqs. 001, 002
Submit Date 3/26/21

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The following papers were read on these motions:

NYSCEF Numbered

Notice of Motion, Affirmation, and Exhibits (001)	12-29
Notice of Cross-Motion, Affirmation and Exhibits (002)	31-97
Affirmation in Reply (001)	104
Affirmation in Reply (002)	105

Defendants move by notice of motion to dismiss in lieu of answer for an order pursuant to CPLR §3211 dismissing the complaint. Plaintiff has cross-moved for summary judgment pursuant to CPLR §3212, and for an order consolidating the instant action with a related action entitled *Marc Pergament, Esq. as Chapter 7 Trustee of the Estate of Melissa Gace Bryant v. Government Employees Insurance Company ("Geico"), Picciano & Scahill, LLP and Gilbert J. Hardy, Esq.* (hereinafter "First Action") **filed under Index #609083/2018 in this court.**

The instant action was commenced by the Bankruptcy Trustee for a former client of defendants and contains causes of action for negligence and legal malpractice stemming from the commencement of a bankruptcy action that was filed after a judgment was rendered against Melissa Gace Bryant (hereinafter "Bryant") in an underlying personal injury action.

Bryant was represented by Picciano & Scahill, LLP by Gilbert J. Hardy, Esq. (hereinafter referred to collectively as "PSLLP"), the defendants in the First Action, during the course of prior proceedings involving claims arising from a motor vehicle accident in which she was involved on December 7, 2009. Bryant was a defendant in the matter entitled *Anna Bedard v. Melissa Gace*, Nassau County Supreme Court Index No. 17555/2011 (hereinafter the "Underlying Action"). On July 8, 2016, the jury in the Underlying Action returned an aggregate

verdict against Bryant of \$1,945,000.00 which totaled \$2,303,555.77 after adding interest and costs. With insurance carrier GEICO tendering the policy limit of \$300,000.00 and another \$1,109.70 in interest, there remained a judgment as against Bryant in the amount of \$2,002,446.07 (hereinafter the “Judgment”).

Thereafter, the plaintiff in the Underlying Action (hereinafter “Bedard”), by counsel, extended an offer for Bedard to accept a full assignment of rights to pursue an action for bad faith, malpractice, etc. as against PSLLP and/or GEICO and in exchange Bedard would waive her rights to collect on the Judgment. PSLLP conveyed the offer to Bryant and advised Bryant to consult with outside counsel. On January 30, 2017, PSLLP provided Bryant with contact information for two attorneys they recommended, and Bryant ultimately met with and retained defendants herein, one of the two attorneys recommended by PSLLP. Defendants herein advised Bryant to reject the offer and file for bankruptcy, and referred her to a bankruptcy attorney. GEICO by PSLLP moved in the Underlying Action to set aside the verdict, and Bedard cross-moved to disqualify PSLLP as counsel to Bryant. By Decision and Order on Motion dated February 28, 2017, The Honorable Julianne T. Capetola denied the motion to set aside the verdict, and disqualified PSLLP as counsel for Bryant. Bryant ultimately filed for bankruptcy.

“‘When a party moves to dismiss a complaint pursuant to CPLR 3211(a)(7), the standard is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action’ ” (*Bokhour v. GTI Retail Holdings, Inc.*, 94 A.D.3d 682, 682 [2012], quoting *Sokol v. Leader*, 74 A.D.3d 1180, 1180–1181 [2010]; see *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 [1975]). “‘In considering such a motion, the court must 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’” (*Bokhour v. GTI Retail Holdings, Inc.*, 94 A.D.3d at 682, quoting *Sokol v. Leader*, 74 A.D.3d at 1181 [internal quotation marks omitted]; see *Nonnon v. City of New York*, 9 N.Y.3d 825, 827 [2007]; *Leon v. Martinez*, 84 N.Y.2d at 87–88). “Whether a plaintiff can ultimately establish its allegations is not part of the calculus” (*Bokhour v. GTI Retail Holdings, Inc.*, 94 A.D.3d at 682, [internal quotation marks omitted]; see *EBC I, Inc. v. Goldman, Sachs & Co.*, 5 N.Y.3d 11, 19 [2005]; *Sokol v. Leader*, 74 A.D.3d at 1181).

The underlying complaint contains causes of action for negligence and legal malpractice alleging, in sum, that defendants had a preexisting relationship with PSLLP such that their representation of Bryant at the outset was improper, that they committed malpractice in advising Bryant to file for bankruptcy when she had the opportunity to accept Bedard’s offer and assign her rights and avoid the effect of the Judgment, and that defendants were negligent in failing to fully and completely review the Underlying Action and/or portions of the PSLLP file prior to advising Bryant to file for bankruptcy.

Defendants argue that the complaint must be dismissed inasmuch as plaintiff’s allegations in the First Action, specifically that PSLLP initially advised Bryant to file for bankruptcy, causes the instant action to fail due to lack of proximate cause. Defendants state that, if, as alleged in the First Action, but for the advice of PSLLP Bryant would not have filed for

bankruptcy, it cannot be stated herein that but for the advice of defendants Bryant would not have filed for bankruptcy.

In order to establish a cause of action to recover damages for legal malpractice, plaintiff must demonstrate that the attorney was negligent, that such negligence was a proximate cause of plaintiff's losses, and proof of actual damages. *Brooks v. Lewin*, 21 A.D.3d 731 (1st Dept. 2005). Plaintiff must demonstrate that, but for the attorney's negligence, plaintiff would have prevailed in the matter in question or would not have sustained any ascertainable damages. *Reibman v. Senie*, 302 A.D.2d 290 (1st Dept. 2003).

Defendants have failed to meet their burden. The allegations contained in the complaint allege that Bryant could have avoided filing for bankruptcy by accepting Bedard's offer, that the advice provided by defendants was at least one proximate cause of her losses, and that Bryant sustained actual calculable damages. Plaintiff has set forth the elements of causes of action for negligence and legal malpractice. The documentary evidence submitted by defendants does not utterly refute the allegations contained in the complaint and there exists triable issues of fact such that dismissal is not warranted.

Plaintiff cross-moved for summary judgment. It is well settled that in a motion for summary judgment the moving party bears the burden of making a *prima facie* showing that he or she is entitled to summary judgment as a matter of law, submitting sufficient evidence to demonstrate the absence of a material issue of fact. (See, *Sillman v. Twentieth Century Fox Film Corp.*, 3 NY2d 395 [1957]; *Friends of Animals, Inc. v. Associates Fur Mfrs.*, 46 NY2d 1065 [1979]; *Zuckerman v. City of New York*, 49 NY2d 557 [1980]; *Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]).

The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. (See, *Winegard v. New York University Medical Center*, 64 NY2d 851 [1985]). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. (See, *Zuckerman v. City of New York*, *supra*.) The primary purpose of a summary judgment motion is issue finding not issue determination (*Garcia v. J.C. Duggan, Inc.*, 180 AD2d 570 [1st Dept. 1992]); and, it should only be granted when there are no triable issues of fact. (See also, *Andre v Pomeroy*, 35 NY2d 361 [1974]).

Based upon this court's review of the relevant submissions and affidavits associated therewith, plaintiff has failed to demonstrate the absence of a material issue of fact such that summary judgment would be warranted on the underlying causes of action.

Plaintiff's cross-motion also seeks consolidation of the instant action with the First Action.

In the First Action action, plaintiff herein alleges bad faith, breach of implied warranty, and punitive damages as against GEICO, defendant in the First Action, and legal malpractice as against Picciano & Scahill, LLP and Gilbert J. Hardy, Esq., defendants therein. The allegations contained in the complaint therein pertain to the representation of Bryant by the defendants therein against claims arising from a motor vehicle accident in which she was involved on December 7, 2009, in which she was a defendant in the matter entitled Anna Bedard v. Melissa Gace, Nassau County Supreme Court Index No. 17555/2011 (hereinafter the "Underlying Action").

Pursuant to CPLR §602(a), "When actions involving a common question of law or fact are pending before a court, the court, upon motion, may order a joint trial of any or all the matters in issue, may order the actions consolidated, and may make such other orders concerning proceedings therein as may tend to avoid unnecessary costs or delay".

While Defendants argue that the questions of law are not fully in line to the extent that the causes of action in the First Action allege bad faith, breach of implied warranty and punitive damages pertaining to actions that occurred during the pendency of the Underlying Action and prior to defendants' representation of Bryant, defendants' review of the Underlying Action and PSLLP's file pertaining thereto is at issue in the instant matter. The two actions involve the same underlying set of facts and circumstances, and defendants have failed to show that they will be substantially prejudiced by consolidation such that in the interest of judicial economy that branch of the motion must be granted. *Cantamessa v. Greenburg Central School Dist. No. 7*, 79 A.D.2d 670 (2d. Dept. 1980).

Accordingly, it is hereby:

ORDERED, that defendant's motion (001) is hereby denied; and it is further

ORDERED, that the branch of plaintiff's motion (002) seeking summary judgment is denied; and it is further

ORDERED, that the branch of plaintiff's motion seeking consolidation of the instant action with the matter filed as *Marc Pergament, Esq. as Chapter 7 Trustee of the Estate of Melissa Gace Bryant v. Government Employees Insurance Company ("Geico"), Picciano & Scahill, LLP and Gilbert J. Hardy, Esq.* (hereinafter "First Action") filed under Index #609803/2018 is hereby granted and the new caption shall read as follows:

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MARC A. PERGMENT, ESQ. AS CHAPTER 7
TRUSTEE OF THE ESTATE OF MELISSA GACE BRYANT,
Plaintiff(s),

Index No. 609083/2018

-against-

GOVERNMENT EMPLOYEE INSURANCE COMPANY
("GEICO"), PICCIANO & SCAHILL, LLP, GILBERT J.
HARDY, ESQ., NEIL H. GREENBERG & ASSOCIATES,
PC, and NEIL H. GREENBERG, ESQ.
Defendants,

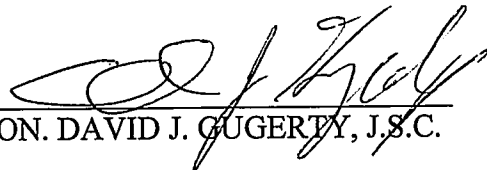
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All applications not specifically addressed herein are denied.

Counsel shall appear for a conference via Microsoft Teams on November 16, 2021 at
10:30 a.m.

This constitutes the decision and order of this court.

Dated: September 9, 2021
Mineola, New York

ENTER:


HON. DAVID J. GUGERTY, J.S.C.