Payne v Rosenberg, Minc, Falkoff & Wolff, LLP
2023 NY Slip Op 30517(U)
February 17, 2023
Supreme Court, New York County
Docket Number: Index No. 151952-2022
Judge: Lynn R. Kotler
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYNN R. KOTLER, J.S.C. PART 8

Kamela Payne

INDEX NO. 151952-2022

MOT. DATE

- v -

ROSENBERG, MINC, FALKOFF AND WOLFF, LLP,

MOT. SEQ. NO. 003

The following papers were read on this motion to/for ______________________
Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits NYSCEF DOC No(s).__________
Notice of Cross-Motion/Answering Affidavits — Exhibits NYSCEF DOC No(s).__________
Replying Affidavits NYSCEF DOC No(s).__________

This is an action for legal malpractice and deceptive business practices. Defendant Rosenberg, Minc, Falkoff and Wolff, LLP now move to dismiss plaintiff Kamela Payne's amended complaint pursuant to CPLR § 3211[a][1], [5] and [7]. Plaintiff opposes the motion but cross-moves for leave to replead any causes of action that are dismissed as a result of defendant's motion. Defendant opposes the cross-motion. For the reasons that follow, the motion is granted in part and the cross-motion is denied.

On a motion to dismiss pursuant to CPLR § 3211, the pleading is to be afforded a liberal construction (*Leon v. Martinez*, 84 NY2d 83, 87-88 [1994]). The court must accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*id.* citing *Morone v. Morone*, 50 NY2d 481 [1980]; *Rovello v. Orofino Realty Co.*, 40 NY2d 633 [1976]).

Under CPLR § 3211(a)(1), "dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Leon v. Martinez, supra* at 88).

In her amended verified complaint, plaintiff alleges the following facts. On March 10, 2015, plaintiff was injured in a slip and fall due to ice at the premises located at 1226 Flatbush Avenue, Brooklyn NY 11226 (the "premises"). Plaintiff retained defendant on or about March 4, 2015 (which is before the alleged accident date) to represent her in a personal injury action arising from the accident for a 33.33% contingency fee. Defendant filed an action on plaintiff's behalf entitled Payne v. Chibs Enterprises Inc., in Supreme Court, Kings County, under Index Number 40991/15. Ultimately, plaintiff obtained a default judgment against non-party Chibs Enterprises Inc. ("Chibs") and after an inquest held on February 1, 2018 before the Honorable Andrew S. Borrok, plaintiff obtained a money judgment against Chibs for $300,000.

Plaintiff points to typical puffery on defendant's website about its success rates in personal injury claims such as "95% success rate"; "Over $1 Billion Won"; "Never A Fee Unless You Win"; "Accident

Dated: 2/17/23

HON. LYNN R. KOTLER, J.S.C.

1. Check one: ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION

2. Check as appropriate: Motion is ☐GRANTED ☐ DENIED ☐ GRANTED IN PART ☒ OTHER

3. Check if appropriate: ☐SETTLE ORDER ☐ SUBMIT ORDER ☐ DO NOT POST

☐FIDUCIARY APPOINTMENT ☐ REFERENCE

victims can lean on an experienced personal injury attorney to help them obtain legal representation and fair compensation;" and "Rosenberg ...will give you the advice necessary to insure [sic] your financial recovery."

Plaintiff also complains that defendant did not move for a default judgment until November 27, 2015, three months after Chibs default, that the default judgment motion was adjourned several times, as well as the inquest. Plaintiff also asserts that defendant failed to take steps to enforce the judgment, beyond sending a check to Chibs to see if it was cashed in July 2019. In September 2019, plaintiff alleges that defendant advised her to contact a collections attorney to enforce the judgment, rather than enforce the judgment as plaintiff expected.

Meanwhile, another nonparty entitled Jean Bernard commenced an action against Chibs in Supreme Court, Kings County under Index Number 523445/17 to recover title to the premises. That action resulted in a default judgment transferring title to the premises from Chibs to Bernard dated December 16, 2019 by the Honorable Peter P. Sweeney. Plaintiff claims that the 12/16/19 Order expunged her judgment because said order directing the Register of the City of New York, Kings County, to expunge any judgments, liens or claims which affect or encumber the premises between the date of recording of the prior deed of 10/25/2007 and the date of the motion.

Parties' arguments

Defendant argues that plaintiff's two causes of action for legal malpractice and violation of GBL § 349 are untimely because the three-year statute of limitations began to run on March 29, 2018 after defendant filed Notice of Entry of plaintiff's judgment against Chibs and this action was commenced almost four years later on March 5, 2022. Defendant further argues that plaintiff's claims fail to state a cause of action. Specifically, defendant asserts that the amended complaint fails to allege that defendant owed a duty to plaintiff to commence enforcement proceedings against Chibs, pointing to the retainer agreement. Defendant next argues that defendant properly named Chibs and not Bernard in the underlying PI action, and that plaintiff has failed to allege proximate cause or damages. As for the deceptive business practices claim, defendant maintains that the amended complaint fails to allege that a reasonable consumer would believe that the defendant would collect any judgment obtained on behalf of a prospective client.

Meanwhile, plaintiff contends that the amended complaint is sufficiently pled. She asserts that the statute of limitations on her claims did not begin to run until at least September 2019 because defendant was still making efforts to collect the judgment on that date. Otherwise, plaintiff's counsel argues that the retainer agreement and website disclaimer are not dispositive, the failure to name Bernard as a party "[i]s [a] [f]actual [q]uestion [n]ot [a] [c]omplete [d]efense", and proximate cause is pled sufficiently. Finally, plaintiff requests leave to replead in the event her claims are dismissed.

Discussion

The court will first consider the legal malpractice claim. To state a claim for legal malpractice, a plaintiff must plead: (1) the existence of an attorney-client relationship; (2) negligence on the part of the attorney or some other conduct in breach of that relationship; (3) that the attorney's conduct was the proximate cause of the injury to the plaintiff; and (4) that plaintiff suffered "actual and ascertainable" damages (*See Rudolf v. Shayne, Dachs, Sanisci, Corker & Sauer*, 8 NY3d 438 [2007]). In the absence of even one of these elements, a cause of action for legal malpractice must fail (*See Argyle Capital Management Corp. v. Lowenthal, Landau, Fischer & Bring, P.C.*, 261 AD2d 282 [1st Dept 1999]). In order to establish negligence in a legal malpractice action, a party must allege that an attorney's conduct "fell below the ordinary and reasonable skill and knowledge commonly possessed by a member of the profession" (*See Bernstein v. Oppenheim & Co., P.C.*, 160 AD2d 428 (1st Dept. 1990). The claim must contain supporting factual allegations regarding the less than ordinary skill and knowledge of the attorney (*Id.*).

As defendant correctly argues, the Retainer utterly refutes the allegation that the Firm would commence post-judgment proceedings against Chibs to collect the money judgment. Specifically, the retainer, which is documentary evidence, provides as follows:

> I, Kamela Payne (hereinafter referred to as "Client"), the undersigned, ... hereby retains Rosenberg, Minc Falkoff & Wolff LLP, ... (hereinafter referred to as the "Firm"), to prosecute a claim for personal injury and damages arising from an accident that happened on March 4, 2015 through the negligence of others. The Client gives the Firm the exclusive right to take all legal steps to enforce this claim through trial, settlement or arbitration; and agrees not to settle this action in any manner without the Firm's written consent. The client further authorizes all checks to be endorsed and deposited into an escrow account pending distribution.

Based on the plain terms of the Retainer, defendant was under no obligation to collect any judgment obtained, but merely agreed to prosecute plaintiff's personal injury claim through trial, settlement or arbitration.

As for the allegation that defendant committed legal malpractice by failing to name Bernard in the underlying personal injury action, that branch of plaintiff's claim survives defendant's motion to dismiss. The court cannot say on this record at this stage of the litigation that defendant's choice was non-actionable strategy as it contends. Defendant's argument that the legal malpractice claim is untimely fails on this motion because the court must accept the facts alleged as true, and based upon the doctrine of continuing representation, plaintiff has established that her cause of action did not begin to run more than three years before this action was commenced.

Accordingly, plaintiff's malpractice claim against the defendant is severed and dismissed except as to her claim that defendant negligently failed to name Bernard in the underlying personal injury action.

The court now turns to the deceptive business practices claim. GBL § 349(a) declares unlawful any "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state." In order to establish a *prima facie* case under Section 349, plaintiff must allege sufficient facts to support three elements: [1] that the challenged act or practice was consumer-oriented; [2] that it was misleading in a material way; and [3] third, that the plaintiff suffered injury as a result of the deceptive act (*Stutman v. Chemical Bank*, 95 NY2d 24 [2000]).

Upon review of the amended complaint, the court finds that plaintiff has failed to allege sufficient facts to support the second and third elements of her GBL § 349 claim. The quotations from defendant's website do not lead the audience to believe that defendant will take all steps to ensure that any judgment obtained will be enforceable. Since there was no deceptive act, plaintiff was not injured thereby. Finally, the consumer-oriented allegedly deceptive acts which led to plaintiff's retention of defendant occurred before March 5, 2019, which is the earliest date the applicable statute of limitations could have begun to run for the claim to be timely. For all these reasons, plaintiff's GBL § 349 claim is severed and dismissed.

Plaintiff's cross-motion for leave to replead is denied. The court cannot discern any facts which plaintiff could allege which would save her claims dismissed in this decision/order.

CONCLUSION

Accordingly, it is hereby

ORDERED that defendant's motion to dismiss is granted to the extent that all but plaintiff's claim that the defendant committed legal malpractice by failing to name Bernard in the underlying personal injury action is severed and dismissed; and it is further

ORDERED that the motion is otherwise denied; and it is further

ORDERED that the parties are hereby directed to submit a proposed Preliminary Conference order on consent on or before March 31, 2023.

Pursuant to the Uniform Civil Rules for the Supreme Court and the County Court § 202.11:

Counsel for all parties shall consult prior to a preliminary or compliance conference about (i) resolution of the case, in whole or in part; (ii) discovery, including discovery of electronically stored information, and any other issues to be discussed at the conference, (iii) the use of alternate dispute resolution to resolve all or some issues in the litigation; and (iv) any voluntary and informal exchange of information that the parties agree would help aid early settlement of the case. Counsel shall make a good faith effort to reach agreement on these matters in advance of the conference.

All sides are directed to meet and confer before the above date and present a proposed preliminary conference order on consent, completing page 1 (and if necessary, the additional directives) of the preliminary conference order form available on the nycourts.gov website at:

https://www.nycourts.gov/LegacyPDFS/courts/1jd/supctmanh/PC-Genl.pdf

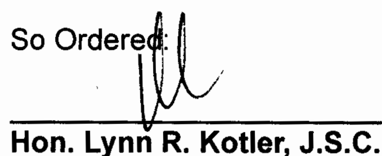
Proposed preliminary conference orders must be filed on NYSCEF.

If all sides do not consent to completing the preliminary conference order outside of court, the parties SHALL submit a joint letter on or before the above date advising as to the status of the meet and confer and what issues, if any, have arisen which prevent the parties from completing a proposed preliminary conference order on consent.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the Decision and Order and Judgment of the court.

Dated: 2/17/23
New York, New York

So Ordered:



Hon. Lynn R. Kotler, J.S.C.