

Ankney v Gjoni Law, P.C.

2023 NY Slip Op 30734(U)

March 10, 2023

Supreme Court, New York County

Docket Number: Index No. 156246/2022

Judge: Lisa S. Headley

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**SUPREME COURT OF THE STATE OF NEW YORK
 NEW YORK COUNTY**

<p>PRESENT: <u>HON. LISA S. HEADLEY</u></p> <p align="center"><i>Justice</i></p> <p>-----X</p> <p>JONATHAN ANKNEY,</p> <p align="center">Plaintiff,</p> <p align="center">- v -</p> <p>GJONI LAW, P.C, GENCIAN GJONI, HAICKEN LAW, MATTHEW HAICKEN</p> <p align="center">Defendant.</p> <p>-----X</p>	<p>PART 28M</p> <p>INDEX NO. <u>156246/2022</u></p> <p>MOTION DATE <u>09/28/2022, 11/03/2022</u></p> <p>MOTION SEQ. NO. <u>002 004</u></p> <p align="center">DECISION + ORDER ON MOTION</p>
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The following e-filed documents, listed by NYSCEF document number (Motion 002) 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 29, 30, 31, 35

were read on this motion to/for DISMISSAL.

Defendants, Haicken Law, P.C. and Matthew Haicken, Esq. (“Haicken”) filed this motion (seq. 002) to dismiss the action pursuant to *CPLR §3211 (a)(7)* for failure to state a cause of action; pursuant to *CPLR §3211 (a)(1)* for a defense founded upon documentary evidence; pursuant to *CPLR §3013* for failure to specify the allegations in the complaint; pursuant to *CPLR §3211 (a)(4)* for filing an identical action already pending in court; pursuant to *22 NYCRR 130-1.1(a)*, imposing costs, sanctions and reasonable attorney’s fees against plaintiff for engaging in frivolous conduct; and for such other relief as this Court deems just and proper.

Similarly, Defendants filed the motion (seq. no. 004) to dismiss the Amended Complaint pursuant to *CPLR §3211 (a)(7)* for failure to state a cause of action; pursuant to *CPLR §3211 (a)(1)* for a defense founded upon documentary evidence; and for such other relief as this Court deems just and proper.

It should be noted the Motion seq. no. 002 was unopposed, and that opposition memorandum of law to motion seq. no. 004, was erroneously filed under motion seq. 001 (*See, NYSCEF Doc. No. 34*). Here, defendants filed a reply affirmation under motion seq. 004.

Upon the foregoing documents, the motions are decided as follows:

I. Background

On July 27, 2022, plaintiff filed this action against Gjoni Law, P.C., Gencian Gjoni, Esq., Haicken Law, and Matthew Haicken, Esq., (“Defendants”) for alleged legal malpractice arising out of the Defendants’ prosecution of plaintiff’s underlying action to recover for personal injuries sustained when plaintiff’s bicycle collided with a motor vehicle. Plaintiff hired Defendant Matthew Haicken for plaintiff’s personal injury action against the motorist. During discovery in the

underlying action, the motorist alleged that plaintiff was inattentive and was texting on his phone prior to the collision, however plaintiff claims he provided his attorney, Defendant Haicken, with time-stamped evidence that he was not texting at that time. As a result, upon a motion for summary judgment on liability, the Court determined that plaintiff established that the motorist had violated local traffic laws, however, plaintiff failed to establish he was free from comparative negligence in this accident. Therefore, the Court granted plaintiff's summary judgment motion on the issue of liability and ordered a trial on the questions of "[c]omparative fault of the plaintiff, if any."

Plaintiff alleges that after the issuance of the summary judgment order, Defendant Haicken referred the underlying personal injury case to Defendant Gjoni to handle the trial on the issue of comparative liability. Plaintiff asserts, *inter alia*, that he informed Defendant Gjoni that he had phone records that would refute the defense claim that plaintiff was using his phone at the time of the collision.

At the personal injury trial, plaintiff alleges that the attorneys for the motorist presented witnesses and evidence to suggest that plaintiff was texting when the accident occurred in order to prove their affirmative defense of comparative liability. Plaintiff claims that his attorney, Gjoni questioned the driver of the motor vehicle, and challenged his credibility, and then Gjoni rested the plaintiff's case without calling plaintiff or the responding police to testify or offer the phone records or photographic evidence. After deliberation, the jury determined unanimously that plaintiff was negligent and 99% responsible for the accident. Plaintiff also alleges that Gjoni advised plaintiff that he had half an hour to decide whether to accept a \$2,500.00 settlement offer, and Gjoni did not advise plaintiff as to alternative options available to him. Subsequently at the trial on damages, plaintiff alleges, again that his attorney, Gjoni called no medical expert, and the jury unanimously awarded no damages.

II. Defendant Haicken's Motion to Dismiss the Complaint (Seq. No. 002)

In support of the motion to dismiss, Defendant Haicken argues, *inter alia*, that the plaintiff failed to demonstrate that the defendant, as his attorney, failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession, and that the defendant's alleged breach of this duty proximately caused plaintiff to sustain actual and ascertainable damages. Defendant Haicken also argues that the complaint should be dismissed pursuant to *CPLR* §3211(a)(1) because the Haicken Defendants informed plaintiff that the Gjoni Defendants were going to act as trial counsel. In support of the motion, the defendant submits the Retainer Agreement. (See, *NYSCEF Doc. No. 11*). Defendant Haicken states based upon the language in the Retainer Agreement, the plaintiff already consented to separate trial counsel. Defendant Haicken also argues that the complaint should be dismissed pursuant to *CPLR* §3013 because plaintiff failed to assert how the sole act of assigning this matter to trial counsel caused plaintiff to suffer damages. Moreover, plaintiff's complaint failed to plead that, "but for" any of the defendants' acts or omissions, Plaintiff would have achieved different results. The complaint lacks facts to support a showing that a different trial counsel would have achieved a better outcome.

Furthermore, Defendant Haicken argues that the complaint should be dismissed pursuant to *CPLR* §3211(a)(4) because there is an identical action pending in this Court based on a complaint filed by plaintiff's attorney on July 27, 2022, and another complaint filed two days later by plaintiff, *pro se*, on July 29, 2022. Defendant asserts plaintiff's complaint must be dismissed because plaintiff has impermissibly filed two complaints addressed to the very same events. (See, *NYSCEF Doc. No. 16*).

Lastly, defendant Haicken asserts, pursuant to 22 *NYCRR* 130-1.1(a.) the imposition of

costs, sanctions, and reasonable attorney's fees against Plaintiff for engaging in frivolous conduct., including the filing of duplicative complaints in this Court. Moreover, Haicken contends that Mr. Pu also ignored a stipulation of discontinuance after counsels for both parties engaged in numerous conversations. In opposition, the plaintiff does not refute the arguments of duplicate filings, or state the status of those cases.

III. Defendant Haicken's Motion to Dismiss the Complaint (Seq. No. 004)

Defendant moves to dismiss all claims against them because they were a successor counsel. Defendant Haicken argues, *inter alia*, that plaintiff's complaint fails to state a cause of action and failed to demonstrate that the defendant, as his attorney, failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession. Additionally, Defendant Haicken asserts that the complaint should be dismissed pursuant to *CPLR §3211(a)(1)* because the Haicken Defendants informed plaintiff that the Gjoni Defendants were going to act as trial counsel. Defendant Haicken states based upon documentary evidence and the language in the Retainer Agreement, that the plaintiff already consented to separate trial counsel. (See, *NYSCEF Doc. No. 11*). Haicken Defendants had the right to associate with the Gjoni Defendants pursuant to the Retainer Agreement, which plaintiff agreed to at the start of representation.

IV. Plaintiff's Opposition to the Motion (Seq. No. 004 Only)

It should be noted that the plaintiff filed this memorandum in opposition under motion seq. 001, when it references arguments in opposition to motion seq. no. 004. (See, *NYSCEF Doc. 34*). The Court will consider said arguments. In opposition, the plaintiff argues, *inter alia*, that the defendants were negligent in that they only gave the Gjoni defendants three days before trial to prepare, and then on the day of trial, plaintiff's successor attorneys failed to ask for an adjournment to familiarize themselves with the case. In addition, the plaintiff argues that the malpractice claim, and the plaintiff's breach of fiduciary claim are not duplicative in that in the amended complaint, plaintiff seeks \$720,000 for the first cause of action, and \$720,000 for the second cause of action, plus compensation for his pain and mental suffering.

V. Defendant's Reply

In reply to plaintiff's motion, defendant argues that plaintiff failed to address causation on the Haicken Defendants successor, the Gjoni Defendants; plaintiff failed to rebut Haicken's documentary evidence; plaintiff failed to plead that he would have achieved a better outcome at trial; and plaintiff has filed an identical action already pending in court.

VI. Discussion

On a motion brought under *CPLR §3211(a)(7)*, the court must "accept the amended factual allegations as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the amended complaint as alleged fit within any cognizable legal theory." *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994). In order to state a cause of action for legal malpractice, the complaint must set forth three elements: the negligence of the attorney; that the negligence was the proximate cause of the loss sustained; and proof of actual damages." *Bishop v. Maurer*, 33 A.D.3d 497, 498 [1st Dept. 2006].

Dismissal is warranted where "the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery." *Connaughton v. Chipotle Mexican Grill, Inc.*, 29 N.Y.3d 137, 142 (2017). "Accordingly, to recover damages against an attorney arising out of the breach of the attorney's fiduciary duty, plaintiff must establish the "but for" element of malpractice." *Knox v. Aronson, Mayefsky & Sloan, LLP*, 168 A.D.3d 70,76 (2018).

This Court finds that plaintiff's complaint and the amended complaint both fail to assert facts in support of any element of the negligence and breach of fiduciary claims. Plaintiff did not establish or demonstrate the negligence of counsel, proximate cause of their loss, and proof of actual damages. On the contrary, plaintiff relies on allegations and inferences which do not provide for an enforceable right of recovery. *Id* at 29 N.Y.3d 137, 142. Furthermore, plaintiff has failed to demonstrate that he would have not sustained losses "but for" defendant's negligence and has not demonstrated to the court that plaintiff would have achieved a better outcome at trial.

On a motion brought under *CPLR* §3211(a)(1) dismissal is warranted when "documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." Allegations that are "bare legal conclusions" or that are "inherently incredible or flatly contradicted by documentary evidence" are not sufficient to withstand a motion to dismiss." *RTW Retailwinds, Inc. v. Colucci & Umans*, No. 150794/20, 2023 WL 1974320 (N.Y. App. Div. Feb. 14, 2023). Here, as evidenced by *NYSCEF Doc. No. 11*, plaintiff entered into a retainer agreement with the Haicken Defendants, which established that the Haicken Defendants had the right to associate and allow as trial counsel, Defendants Gjoni.

Plaintiff has not demonstrated how the Haicken Defendants, by assigning trial counsel, caused plaintiff's alleged damages. Pursuant to a motion brought under *CPLR* §3013 "statements in pleadings shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense." Here, plaintiff has coupled the defendants in his complaint without ascertainable causation. More specifically, the complaint lacks facts to support a showing that a different trial counsel would have achieved a better outcome.

On a motion brought under *CPLR* §3211(a)(4), the court has broad discretion in considering whether to dismiss an action on the ground that another action is pending between the same parties on the same cause of action. *Whitney v. Whitney*, 57 N.Y.2d 731, 732 (1982). Here, plaintiff's complaints must be dismissed because plaintiff has impermissibly filed two complaints addressed to the very same events. (See, *NYSCEF Doc. No. 16*). Plaintiff's complaints only differ regarding the signature lines as the first complaint was signed by plaintiff's counsel, and the duplicative complaint was signed by *pro se* plaintiff.

Lastly, defendants Haicken Law and Matthew Haicken's motion for an award of attorney fees and the imposition of costs and sanctions for frivolous motion practice is denied in the exercise of the court's discretion. The court has considered the parties' remaining contentions and finds them to be without merit.

Accordingly, it is hereby

ORDERED that the defendant's motion (seq. no 002) for an Order, pursuant to *CPLR* §§3211(a)(7), 3211(a)(1), 3013; 3211(a)(4), to dismiss the complaint is GRANTED, without opposition, and it is further

ORDERED that the defendant's prong of the motion (seq. 002) for an Order for sanctions and attorneys' fees pursuant to 22 *NYCRR* §130-1.1. is DENIED; and it is further

ORDERED that the defendant's motion (seq. 004) for an Order, pursuant to *CPLR* §§3211(a)(7), 3211(a)(1), to dismiss the complaint is GRANTED; and it is further

ORDERED that the action is hereby DISMISSED against the defendants Haicken Law, and Matthew Haicken, Esq.; and it is further

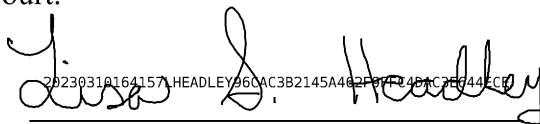
ORDERED that any requested relief sought not expressly addressed herein has nonetheless been considered; and it is further

ORDERED that within 30 days of entry, movant-defendants shall serve a copy of this decision/order upon all parties with notice of entry.

This constitutes the Decision and Order of the Court.

3/10/2023

DATE



LISA S. HEADLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE