

Industry Model Group LLC v Ferrante Law Firm

2023 NY Slip Op 30790(U)

March 15, 2023

Supreme Court, New York County

Docket Number: Index No. 157329-2021

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

Industry Model Group LLC

INDEX NO. 157329-2021

- v -

MOT. DATE

FERRANTE LAW FIRM

MOT. SEQ. NO. 002

RHIYEN SHARP

INDEX NO. 155297-2022

- v -

MOT. DATE

FERRANTE LAW FIRM et al

MOT. SEQ. NO. 002 and 003

The following papers were read on this motion to/for _____

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits

ECFS DOC No(s). _____

Notice of Cross-Motion/Answering Affidavits — Exhibits

ECFS DOC No(s). _____

Replying Affidavits

ECFS DOC No(s). _____

These related actions arise from alleged legal malpractice. In Action 1, entitled Industry Model Group LLC v. Ferrante Law Firm et al., Index Number 157329/2021, defendant Ferrante Law Firm (the "Firm") moves to dismiss the complaint asserted by plaintiff Industry Model Group LLC d/b/a Industry Model Management ("IMG") pursuant to CPLR 3211 [a][1], [5] and [7]. IMG opposes the motion.

In Action 2, entitled Rhiyen Sharp v. Ferrante Law Firm et al., Index Number 155297/2022, defendants Frank Ferrante, Jr. ("Attorney Ferrante") and the Firm move to dismiss plaintiff Rhiyen Sharp's Amended Complaint pursuant to CPLR 3211 [a][1], [5], [7] and [8] because plaintiff's claims are time-barred, fail to state a cause of action, based on collateral estoppel and separately because defendant Frank Ferrante, Jr. was not properly served with process. Sharp opposes motion sequence 2.

In motion sequence 3 under Action 2, Sharp moves for an order striking defendants' Reply Memo of Law for improperly raising new arguments in reply papers that had not previously been raised, or, in the alternative, granting Sharp leave to file an accompanying attorney's affirmation as a surreply. Defendants do not oppose Sharp's motion to the extent that he seeks leave to submit a surreply but oppose the balance of the motion.

All three motions are hereby consolidated for the court's consideration and disposition in this single decision/order. At the outset, Sharp's motion sequence 3 is granted to the extent that Sharp's

Dated: 3/15/23



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

accompanying papers shall be considered as a surreply in connection with motion sequence 2 under Action 2. The court now turns to the defendants' motions to dismiss.

The following facts are alleged in the plaintiffs' complaints. From approximately February 24, 2017 to August 3, 2018, Sharp was employed by IMG, a boutique modeling agency which seeks to discover new modeling talent and cultivate careers for its models. Meanwhile, the Firm has provided immigration law services to IMG for over 20 years. IMG is suing the Firm due to alleged "instances of legal malpractice, breach of contract and breach of fiduciary duty." IMG complains that it lost an underlying arbitration proceeding between it and Sharp and "but for" the Firm's malpractice, IMG "would have been exposed to far less damages than it ultimately incurred as a result..."

Meanwhile, Sharp claims that during the course of his employment, both he and IMG were represented by the defendants "to obtain and/or transfer an O-1 work visa for [p]laintiff, which was, upon information and belief, necessary for his continued employment with [IMG]." During his employment, Sharp entered into two employment contracts with IMG. Sharp entered into the second contract, dated April 19, 2017, with a three-year term. The April 2017 letter contract was drafted by the Firm and pursuant to which Sharp was to earn "35% of net revenue generated on any bookings related to [IMM]" The April 2017 letter contract was also used to support the application submitted by defendants for plaintiff's O-1 work visa. In June 2017, the Firm also helped plaintiff gain reentry into the United States by drafting a letter advising the Consular Section of the US Embassy in Paris "confirm[ing] that the terms and conditions of Mr. Sharp's employment as outlined in his O-1 petition and confirmed in our Employment Offer of April 19, 2017 remain valid."

On August 3, 2018, IMG terminated plaintiff, allegedly believing that Sharp was an employee at will. IMG complains that the April 2017 letter contract to Sharp "fundamentally altered Sharp's at-will status" unbeknownst to IMG. Further, IMG claims that it was unaware that Sharp was unauthorized to work in the United States and had it known, it would have terminated Sharp sooner.

According to Sharp, his termination was allegedly wrongful and without cause. Allegedly, plaintiff claims that the termination was "based, at least in part, on the secret understanding between defendants and [IMG] that [p]laintiff could still be treated as an at-will employee who could be terminated at any time without cause."

Thereafter, Sharp claims that defendants assisted IMG in having Sharp's O-1 Visa cancelled. Thus, plaintiff was unable to obtain employment and was caused stress, PTSD, the breakdown of his marriage and eviction "with the threat of deportation looming over his head."

Plaintiff commenced an arbitration proceeding against IMG with the American Arbitration Association seeking salary and commissions for the balance of April 2017 letter contract. In connection with that proceeding, Attorney Ferrante provided an undated affirmation which asserted that the April 2017 letter contract was not a contract, and that Sharp was an at will employee.

IMG asserts the following causes of action against the Firm: legal malpractice arising from the April 2017 letter; legal malpractice arising from Sharp's employment status; legal malpractice with respect to the June 2017 letter to USCIS, breach of fiduciary duty and breach of contract. Sharp asserts two causes of action against the Firm and Attorney Ferrante for legal malpractice and "conspiracy to defraud".

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).

The court will first consider the Firm’s motion to dismiss IMG’s complaint. Defendant argues that IMG’s complaint is barred by collateral estoppel, IMG has failed to state a cause of action for legal malpractice and the fourth and fifth causes of action should be dismissed as duplicative. On its first argument, the Firm points to testimony given at the underlying arbitration proceeding, and claims that the Arbitrator has already determined that IMG was bound by the April 2017 letter contract. The doctrine of collateral estoppel prohibits parties from relitigating an issue when “(1) the identical issue was decided in the prior action and is decisive in the present action, and (2) the party to be precluded from relitigating the issue had a full and fair opportunity to contest the prior issue” (*Kaufman v. Eli Lilly & Co., v* [1985]). As IMG correctly argues, however, the issue of whether IMG is bound by the April 2017 letter contract is not the crux of IMG’s legal malpractice claim against the Firm. Rather, IMG contends that it would not have entered into the April 2017 letter contract but for the Firm’s negligent legal advice and representation. Therefore, collateral estoppel does not bar the IMG’s legal malpractice claim arising from the April 2017 letter contract.

The Firm’s argument that IMG has failed to state a cause of action for legal malpractice also fails. There are three elements to a legal malpractice claim: (1) the defendant failed to exercise that degree of care, skill, and diligence commonly possessed and exercised by an ordinary member of the legal community, (2) such negligence was the proximate cause of the actual damages sustained by the plaintiff, and (3) but for the defendant’s negligence, the plaintiff would have been successful in the underlying action (*Cummings v. Donovan*, 36 AD3d 648 [2d Dept 2007]). The first cause of action is sufficiently stated because IMG alleges that the April 2017 letter contract transformed Sharp from an employee at will to an employee with an 3-year employment contract, unbeknownst to IMG, that IMG’s damages in the underlying arbitration were greatly enhanced as a result and that if the April 2017 letter contract had not been drafted as such, IMG could have properly terminated Sharp.

The second cause of action is also sufficiently alleged, because IMG claims it was improperly advised as to Sharp’s immigration status and but for such improper advice, it would not have hired and/or retained Sharp.

The court agrees, however, that the third cause of action is insufficient. Absent from IMG’s complaint are facts which would substantiate the but-for element of a legal malpractice claim. Therefore, the third cause of action is severed and dismissed with leave to replead within 30 days.

Finally, the fourth and fifth causes of action are indeed duplicative of IMG’s legal malpractice claims, as they arise out of the same conduct alleged in the first two causes of action and assert the same allegations (*see i.e. Mackey Reed Elec., Inc. v. Morrone & Associates, P.C.*, 125 AD3d 822 [2d Dept 2015]). Accordingly, these claims are also severed and dismissed.

The court now turns to The Firm and Attorney Ferrante’s motion to dismiss Sharp’s complaint. Defendants argue that Sharp’s legal malpractice claim is time-barred, is precluded by the doctrine of collateral estoppel and Sharp has not pleaded any recoverable damages. As for the conspiracy to defraud cause of action, defendants assert the same collateral estoppel argument and otherwise maintain that the claim is duplicative, time barred and that Sharp is not entitled to damages for emotional distress or punitive damages. Finally, Ferrante argues that he was not properly served with process. Defendants withdraw the service argument on reply.

Defendants point out that Sharp’s attorney, who represents him in this action, stated on the record at the underlying arbitration proceeding the following:

And they cannot rebut the fact that the law firm – there is no attorney-client relationship between Mr. Sharp and this law firm. The relationship was strictly between the law firm and the respondent. Mr. Sharp testified to that. It's not been rebutted, nor is – nor can it be rebutted.

Further, Sharp testified that the defendants did not represent him. Specifically, Sharp testified as follows:

Q. Okay. Now, did you draft this agreement?

A. No. It was drafted by the immigration lawyers for the Industry Model Group, paid for and completely organized by them. I had no part in or communications with the immigration firm at all in the process.

Q. Were you represented by a lawyer with regard to this contract?

A. No, I was not.

Here, defendants have successfully asserted the doctrine of collateral estoppel against Sharp from relitigating the issue of whether he was represented by the Firm or Attorney Ferrante. Indeed, Sharp has taken a position in this litigation which is diametrically opposed to the representations he made in the underlying arbitration. His and his attorney's representations that neither the Firm nor Attorney Ferrante represented him during the course of his employment with IMG are fatal to his legal malpractice claim, where Sharp has otherwise failed to allege sufficient facts which would establish the existence of an attorney/client relationship. In opposition to the motion, Sharp does not contest this issue. Accordingly, defendants' motion to dismiss the first cause of action for legal malpractice is granted and the first cause of action is severed and dismissed.

The second cause of action is for conspiracy to defraud. As amplified by Sharp's arguments in opposition to the motion, Sharp's legal theory is that "defendants and [IMG] had an agreement between them to defraud plaintiff by inducing him to commit to employment at [IMG] for a three-year period by signing [the April 2017 letter contract], which recited that the employment agreement would be for a three-year term at an enhanced commission rate that was tied to the gross revenues from all the models working at [IMG], rather than tying it to only the revenues received from models that Plaintiff himself brought into [IMG]. However, defendants and [IMG] had a secret understanding between them that [IMG] would be free to terminate Plaintiff at any time without cause, regardless of the three-year term in [the April 2017 letter contract], and they further had the secret understanding that the only commission that Plaintiff would be entitled to were those that were linked to the revenues generated by the models that Plaintiff himself brought with him or introduced to [IMG]."

The court also agrees with defendants that Sharp's allegations fail to state a claim for fraud. To state a claim for conspiracy to defraud, plaintiff must allege the existence of the underlying fraud, actual knowledge, and substantial assistance on the part of the defendants (*see i.e. William Doyle Galleries, Inc. v Stettner*, 167 AD3d 501 [1st Dept 2018]). There are five elements to fraud: "a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages" (*Eurycleia Partners, LP v. Seward & Kissel, LLP*, 12 NY3d 553 [2009]). Here, the underlying fraud claim is duplicative of a breach of contract claim insofar as Sharp alleges IMG did not intend to be bound by the April 2017 letter contract, and Sharp has already litigated his breach of contract claim against IMG (*see i.e. Manas v. VMS Associates, LLC*, 53 AD3d 451 [1st Dept 2008]). Therefore, the second cause of action must also be dismissed. Accordingly, defendants' motion to dismiss Sharp's complaint is granted in its entirety. The parties' remaining arguments are denied as moot in light of this result.

CONCLUSION

In accordance herewith, it is hereby **ORDERED** that motion sequence 3 under Action 2, entitled Rhiyen Sharp v. Ferrante Law Firm et al., Index Number 155297/2022, is granted to the extent that Sharp's accompanying papers shall be considered as a surreply in connection with motion sequence 2 under Action 2; and it is further

ORDERED that the Firm's motion sequence 2 to dismiss IMG's complaint in Action 1, entitled Industry Model Group LLC v. Ferrante Law Firm et al., Index Number 157329/2021, is granted to the extent that the third cause of action is dismissed with leave to replead in 30 days and the fourth and fifth causes of action are severed and dismissed; and it is further

ORDERED that the Firm's motion sequence 2 to dismiss IMG's complaint in Action 1 is otherwise denied; and it is further

ORDERED that defendants' motion sequence 2 to dismiss Sharp's complaint in Action 2, entitled Rhiyen Sharp v. Ferrante Law Firm et al., Index Number 155297/2022, is granted, Sharp's complaint is dismissed and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the Firm shall file and serve an answer to IMG's complaint within 20 days after IMG's time to replead the third cause of action has expired; and it is further

ORDERED that on or before June 16, 2023, the parties to Action 1 shall meet and confer and complete a preliminary conference order on consent and submit same to the court to be so ordered. 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 rejected and this constitutes the decision and order of the court.

Dated:

3/15/23
New York, New York

So Ordered:



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