

Maruf v Subin Assoc., LLP
2023 NY Slip Op 35065(U)
December 21, 2023
Supreme Court, Queens County
Docket Number: Index No. 705079/2023
Judge: Allan B. Weiss
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS
Justice

IA Part 2

SULTAN AL MARUF,

Index
Number 705079 2023

Plaintiff,

Motion
Date November 22, 2023

-against-

SUBIN ASSOCIATES, LLP,
ERIC SUBIN,

Motion Seq. No. 1.2 & 3

Defendants.



X

The following numbered papers read on the motions by the plaintiff for a default judgment against the defendant, a separate motion by the defendants to dismiss pursuant to CPLR § 3211 (a) (7), and a separate motion by the plaintiff for a protective order against the defendant.

	Papers Numbered
Notice of Motion - Affidavit - Exhibits	EF 4; 8-15; 20,22-29
Answering Affidavits- Exhibits.....	EF 16-19; 31,32
Reply Affidavits.....	EF 21

Upon the foregoing papers it is ordered that the motions are decided as follows:

In his complaint, the plaintiff alleges legal malpractice, fraud, negligent infliction of emotional distress, intentional infliction of emotional distress, and negligence. The plaintiff moves for a default judgment, the defendant moves for dismissal pursuant to CPLR § 3211 (a) (7), and the plaintiff moves for a protective order.

At the outset, the complaint did not contain sufficient allegations to support a cause of action for negligent infliction of emotional distress, intentional infliction of emotional distress, and negligence as these allegations, are duplicative with the

allegations made in plaintiff's legal malpractice claim and therefore the third, fourth and fifth causes of action are dismissed.

In consideration of a motion to dismiss pursuant to CPLR 3211 (a) (7), the court must accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only if the facts alleged fit within any cognizable legal theory. (*See Leon v Martinez*, 84 NY2d 83 [1994]; *Travelsavers Enterprises, Inc., v Analog Analytics, Inc.*, 149 AD3d 1003 [2d Dept 2017].) An affidavit submitted by the movant will almost never warrant dismissal under CPLR 3211 unless it establishes conclusively that the proponent of the pleading has no cause of action (*See Phillips v. Taco Bell Corp.*, 152 AD3d 806 [2d Dept 2017]; *Bokhour v. GTI Retail Holdings, Inc.*, 94 AD3d 682 [2d Dept 2012].) Dismissal should not be granted unless it has been shown that a material fact as claimed by the proponent to be one is not a fact at all, and unless it can be said that no significant dispute exists regarding it (*See Guggenheimer v. Ginzburg*, 43 NY2d 268 [1977].) However, "a motion to dismiss pursuant to CPLR 3211(a)(7) must be denied 'unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it' " (*Sokol v. Leader*, 74 AD3d 1180, at 1182, [2d Dept 2010]; quoting *Guggenheimer v. Ginzburg*, 43 NY2d at 275.) "Although inartfully pleaded, a claim should not be dismissed when the facts stated are sufficient to make out a cause of action" (*See Lam v Weiss*, 219 AD3d 713 [2d Dept 2023]; quoting *Houtenbos v. Fordune Assn., Inc.*, 200 AD3d 662, at 664 [2d Dept 2021].) "Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a prediscovery CPLR 3211 motion to dismiss" (*Redwood Prop. Holdings, LLC v. Christopher*, 211 AD3d 758, at 759 [2d Dept 2022].)

To state a cause of action to recover damages for legal malpractice, a plaintiff must allege that the attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession and that the attorney's breach of this duty proximately caused plaintiff to sustain actual and ascertainable damages. (*See Lam v Weiss*, 219 AD3d 713 [2d Dept 2023], quoting *Jean-Paul v. Rosenblatt*, 208 AD3d 652, at 653 [2d Dept 2022].) However, "a plaintiff is not obligated to show, on a motion to dismiss, that it actually sustained damages," so long as damages flowing from the alleged negligence may be "reasonably inferred" (*Lam*, 219 AD3d 713, quoting *Randazzo v. Nelson*, 128 AD3d 935, at 937 [2d Dept 2015].) "To establish causation, a plaintiff must show that he or she would have prevailed in the underlying action or would not have incurred any damages but for the attorney's negligence" (*See Mackey Reed Elec., Inc. v. Morrone & Assoc., P.C.*, 125 AD3d 822, at 823 [2d Dept 2015].) "Conclusory allegations of damages or injuries predicated on speculation cannot suffice for a malpractice action, and dismissal is warranted where the allegations in the complaint are merely conclusory and speculative" (*See Lam*, 219 AD3d 713, quoting *Mid City Elec.*

Corp. v. Peckar & Abramson, 214 AD3d 646, at 649,[2d Dept 2023].)

The elements of a cause of action for fraud or fraudulent inducement, require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages (*See Pludeman v Northern Leasing Systems Inc.*, 10 AD3d 386 [2008]; *Qureshi v Vital Trans. Inc.*, 173 AD3d 1076 [2d Dept 2019]; *Ross v. Louise Wise Servs., Inc.*, 8 NY3d 478 [2007].) Whether a party's reliance is justified is often a question of fact not amenable to resolution on a motion to dismiss. (*See ACA Fin.Guar. Corp., v Goldman, Sachs & Co.*, 25 NY3d 1043 [2015].) A fiduciary relationship exists when confidence is reposed on one side and there is resulting superiority and influence on the other. (*See AG Capital Funding Partners, L.P v. State St. Bank & Trust Co.*, 11 NY3d 146 [2008].) Partners owe fiduciary duties to one another, and a general partner owes fiduciary duties to the limited partners. (*See Slocum Realty Corp., v Schlesinger*, 162 AD3d 939 [2d Dept 2018].) Ascertaining the existence of a fiduciary relationship inevitably requires a fact-specific inquiry. (*See Roni LLC, v Arfa*, 18 NY3d 846 [2011].)

In support of the plaintiff's motions, the plaintiff submitted, among other things, copies of the pleadings, a copy of the plaintiff's affidavit, copies of the decisions and orders of the court, by Justice Taylor dismissing the case for failure of the plaintiff's attorney to appear in court when required, by Justice Balter on January 24, 2019 vacating the order of dismissal, and the decision and order of the Appellate Division, 2d Department reinstating the dismissal. In opposition, the defendant submitted, inter alia, his attorney's affirmation, and his own affidavit. It is noted that the affidavit by the defendant, Eric Subin, made no reference to the underlying allegations of legal malpractice, limiting his statement to the issue of the protective order application.

When viewing the plaintiff's complaint, giving it every favorable inference and treating each allegation as true, the plaintiffs have met their burden, in that the complaint demonstrates the meritable cause of action of legal malpractice. (*See Lam v Weiss*, 219 AD3d 713 [2d Dept 2023].) Although inartfully drafted, the plaintiff's complaint sufficiently alleges that the defendant Subin Associates, LP failed to exercise reasonable care and skill resulting in the dismissal of the action commenced by the defendant on behalf of the plaintiff against the owner of the premises for negligence in causing his injuries. These underlying allegations were sufficiently drafted by the defendant herein, so as to demonstrate that the plaintiff had a meritable cause of action against E.B. Management Properties, LLC, for its failure to fix the ceiling in his premises, which then fell upon him causing his injuries. The evidence submitted by the plaintiff, included inter alia the decisions and orders of the Appellate Division, 2d Dept reversing the finding by the lower court which had vacated a default judgment against the plaintiff due to his attorney's neglect. This neglect in failing to appear before the court, was critical, resulting in the dismissal of plaintiff's action against E.B. Management Properties, LLC.

The Appellate Division reinstated the default judgment. It is unquestionably legal malpractice when an attorney fails to do the least an attorney is expected to do, and that is, to show up in court when required to do so. The plaintiff alleged that pursuant to instructions of the defendant he attended to physicians to support the plaintiff's case, and to demonstrate injury and damages. It is clear that the plaintiff is alleging that "but for" the defendant's malpractice, the plaintiff's claims and pursuit of a legal recovery for these damages were all for naught. This court finds the allegations sufficient to defeat the motion to dismiss brought by the defendant. Furthermore, the defendant presented not a scintilla of evidence to show that any action taken on his part was reasonable, or a part of a legal strategy. Nor, has the defendant presented any scintilla of evidence to show that the plaintiff does not have a meritable cause of action. Presumably, every court filing made by the defendant included an attestation by the defendant that the matter was meritable.

CPLR § 3106 (b) provides that where a cause of action is based upon fraud, the circumstances constituting the wrong shall be stated in detail. However, the pleading requirements of CPLR 3016(b) may be met when the facts are sufficient to permit a reasonable inference of the alleged conduct. (*See Pludeman v. Northern Leasing Sys., Inc.*, 10 N.Y.3d 486 [2008].) At this juncture, the allegation of fraud with regard to obtaining financing, is insufficient to make a showing of either actions, or statements made by the defendant upon which the plaintiff relied. However, this cause of action is dismissed without prejudice to amend the complaint in the event the plaintiff is able to present sufficient papers.

Here, assuming the facts alleged to be true and according the plaintiffs the benefit of every favorable inference, (*See Leon*, 84 NY2d 83 [1994]; *Travelsavers Enterprises, Inc.*, 149 AD3d 1003 [2d Dept 2017]), the plaintiffs have set forth in sufficient detail the cognizable causes of action to recover damages for legal malpractice. (*Lam*, 219 AD3d 713.) The matter may now proceed into the discovery stage of this litigation.

At this time, insufficient evidence has been presented to support an application for a protective order. Upon discovery, perhaps the identity and authorization to contact the plaintiff will be surmised and brought to the attention of the court, in the event of any further activities that might qualify as harassment or intimidation.

As the time within which to answer had not yet expired, the motion for a default judgment is denied. The defendant has thirty days from the date the affidavit of service is filed with the court. (CPLR § 308 [2]; General Construction Law § 25-a.)

Accordingly, the plaintiff's motion for a default judgment is denied, the defendant's motion to dismiss pursuant to CPLR § 3211 (a) (7) is denied, and the plaintiff's motion for a protective order is denied.

Dated: December 21, 2023



J.S.C.

