

Brooks v Winston & Strawn LLP

2024 NY Slip Op 33362(U)

September 24, 2024

Supreme Court, New York County

Docket Number: Index No. 159003/2021

Judge: Lisa S. Headley

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. LISA S. HEADLEY **PART** **28M**

Justice

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JEFFREY BROOKS,	INDEX NO.	<u>159003/2021</u>
Plaintiff,	MOTION DATE	<u>10/06/2023, 11/29/2023</u>
- v -	MOTION SEQ. NO.	<u>003 004</u>

WINSTON & STRAWN LLP, TERRY SHARGEL
Defendant.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 69 were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 94, 95, 96, 97, 98, 99, 100 were read on this motion to/for DISMISS.

Before the Court is motion sequence no. 003 filed by defendant, Terry Shargel, as Executrix of the Estate of Gerald Shargel, for an Order to dismiss the plaintiff’s complaint with prejudice, pursuant to *CPLR §3211(a)(1), (3), (5) and (7)*, and to impose sanctions, pursuant to *22 NYCRR 130-1.1* for plaintiff’s frivolous conduct in commencing, pursuing, and refusing to withdraw this frivolous action.

Also, before the Court is motion sequence no. 004 filed by co-defendant, Winston & Strawn LLP, for an Order to dismiss the Complaint pursuant to *CPLR §3211(a)(1), (3) (5) and (7)*. The arguments in support of the motion filed by defendants are similar. In motion seq. 004, the defendant, Winston, distinguishably argues that the complaint should also be dismissed because the alleged legal malpractice occurred before defendant Winston represented the decedent, and the malpractice claims are barred by collateral estoppel. The plaintiff filed opposition papers; the movant-defendants filed a reply.

Background

On September 30, 2021, plaintiff, Jeffrey Brooks, filed this action as the acting personal representative of the decedent, David Brooks, against the decedent’s former attorneys, Gerald L. Shargel, Esq., Law Office of Gerald L. Shargel LLP and Winston & Strawn LLP (collectively, “defendants”) for legal malpractice while representing the decedent, who was subject to federal grand jury investigations in 2006, and subsequently convicted in August 2010, following a trial, for fraud and obstruction to justice, and sentenced to a term of imprisonment, a fine, and a

forfeiture motion judgment and restitution. The decedent died on October 27, 2016, while in federal custody.

Specifically, the plaintiff alleges, *inter alia*, the defendants provided incorrect legal advice, and failed to represent the decedent with reasonable care, skill and diligence ordinarily exercised by attorneys specializing in the areas of law. Plaintiff asserts in the Complaint that the defendants held themselves out as experts in the field of federal grand jury investigations, and white-collar criminal defense, however they breached their fiduciary duty, *inter alia*, by failing to take action that would have exposed unlawful use of an expired grand jury by the Assistant United States Attorney prosecuting the federal criminal case against the decedent. Plaintiff is also seeking monetary damages for defendants' legal malpractice, negligence, breach of fiduciary duty, and breach of contract.

CPLR § 3211(a)(1) and (7)

The movant-defendants move to dismiss, pursuant to *CPLR §3211(a)(1)*, for failure to plead the elements of the cause of action. The movant-defendants argue that the complaint should be dismissed, pursuant to *CPLR §3211(a)(7)*, because the elements of the actions were not properly plead. The movants argue that the complaint should be dismissed pursuant to *CPLR §3211(a)(5)* because the statute of limitations term expired, and the plaintiff's claims are barred by the doctrine of collateral estoppel.

Under *CPLR § 3211(a)(1)*, dismissal is warranted if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law. *Leon v. Martinez*, 84 N.Y.2d 83, 88, 614 N.Y.S.2d 972, 638 N.E.2d 511 (1994). Under *CPLR §3211(a)(7)*, “[i]n considering a motion to dismiss a complaint for failure to state a cause of action ... the pleadings must be liberally construed.” *Dye v. Catholic Med. Ctr. Of Brooklyn & Queens*, 273 A.D.2d 193 (2d Dep’t 2000). “When considering a motion to dismiss for failure to state a cause of action, the pleadings should be afforded a liberal construction and 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’.” *Leon v. Martinez, supra* at 87–88. 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).

“To state a cause of action for legal malpractice arising from negligent representation in a criminal proceeding, plaintiff must allege his innocence or a colorable claim of innocence of the underlying offense for so long as the determination of his guilt of that offense remains undisturbed, no cause of action will lie. This requirement is central to the determination of causation in a cause of action for legal malpractice arising from a criminal proceeding. The client must show that the attorney was the proximate cause of his or her conviction.” *See, Britt v. Legal Aid Soc., Inc.*, 95 N.Y.2d 443, 446 (2000) [internal citations omitted].

Here, the plaintiff's Complaint fails to state a cognizable cause of action for professional malpractice and breach of contract. As it pertains to the legal malpractice claim, “[d]ecisions regarding the evidentiary support for a motion or the legal theory of a case are commonly strategic decisions and a client's disagreement with its attorney's strategy does not support a malpractice claim, even if the strategy had its flaws.” *Brookwood Companies, Inc. v. Alston & Bird LLP*, 146 A.D.3d 662 (1st Dep’t 2017). To survive dismissal, the complaint must show that “but for counsel's alleged malpractice, the plaintiff would not have sustained some actual ascertainable damages.”

Franklin v. Winard, 199 A.D.2d 220 (1st Dep't 1993) [internal citations omitted]. In addition, "it must be established that the attorney failed to exercise that degree of care, skill, and diligence commonly possessed and exercised by a member of the legal community. It must also be established that the attorney's negligence was a proximate cause of the loss sustained, and that the plaintiff incurred damages as a direct result of the attorney's actions." *Hwang v. Bierman*, 206 A.D.2d 360 (2d Dep't 1994) [internal citations omitted].

Furthermore, this Court finds plaintiff's arguments do not prevail, and even if the defendants executed a different strategy, that would not have rendered the decedent a more favorable outcome in the criminal action. The decedent's grievances or disappointment in the outcome of the criminal action handled by the defendants does not constitute legal malpractice. In addition, the defendants argue that the decedent's guilty plea bars this action because the decedent did not have a "colorable claim of innocence." "[W]hen a frustrated litigant complained of counsel's omissions, [p]laintiff's remedy relies on *prima facie* proof that he would have succeeded' [.]'" *Pellegrino v. File*, 291 A.D.2d 60, 63 (1st Dep't 2002). Here, there is no dispute that the decedent pled guilty to certain charges and was found guilty on some charges after a jury trial. (See, *NYSCEF Doc. No. 52*). As such, the Court hereby dismisses the plaintiff's legal malpractice cause of action.

CPLR § 3211(a)(5)

Under *CPLR §3211(a)(5)*, "the cause of action may not be maintained because of arbitration and award, collateral estoppel, discharge in bankruptcy, infancy or other disability of the moving party, payment, release, *res judicata*, statute of limitations, or statute of frauds[.]" *CPLR §3211(a)(5)*. "Statutes of Limitation begin to run when a cause of action accrues." See, *Britt v. Legal Aid Soc., Inc.*, at 446. [internal citations omitted]. As stated above, "to state a cause of action for legal malpractice arising from negligent representation in a criminal proceeding, plaintiff must allege his innocence or a colorable claim of innocence of the underlying offense for so long as the determination of his guilt of that offense remains undisturbed, no cause of action will lie." *Id.*

In support of the motion to dismiss, the movant-defendants argue that the action was filed after the expiration of the statute of limitations. The movants assert that all other pending charges against the decedent, David Brooks, were dismissed on January 19, 2018, however, the Complaint was not filed until September 30, 2021, and the cause of action alleging malpractice is barred by the three-year statute of limitations. The movants also assert that the latest date the malpractice claim expired was on September 20, 2020, because on September 20, 2017, "the Second Circuit issued the Abatement Decision, vacating the Post-Trial Convictions and remanding the case for dismissal of the indictment as to the counts related to the Post-Trial Convictions." (See, *NYSCEF Doc. No. 60*).

In addition, the defendants argue the action is barred due to collateral estoppel and submit that this Court already issued decisions as to the same claims asserted in the instant action. The movant-defendants argue that the prior decisions resolved the grounds for dismissal finding that (a) Plaintiff lacked standing to sue his prior counsel at the time that the actions were commenced; (b) the Complaint is time-barred; and (c) Plaintiff cannot demonstrate the colorable claim of innocence requirement necessary to sustain a criminal malpractice action. In support, the defendants annexed to the motion the following prior decisions as follows:

Exhibit 4: Decision and Order of the Hon. Alexander M. Tisch dated September 19, 2022, in *Jeffrey Brooks v. Paul Scheckman, Esq.*, Index No. 158640/2020 (the "Scheckman Action") (*NYSCEF Doc. No. 25* in the Scheckman Action);

Exhibit 5: Decision and Order of the Hon. William Franc Perry dated September 9, 2022, in Jeffrey Brooks v. Paul Hastings, LLP, Index No. 158998/2021 (the “Paul Hastings Action”) (NYSCEF Doc. No. 27 in the Paul Hastings Action);

Exhibit 6: Decision and Order of the Hon. Richard G. Latin dated October 3, 2022, in Jeffrey Brooks v. Meringolo & Associates, P.C., Index No. 159000/2021 (the “Meringolo Action”) (NYSCEF Doc. No. 37 in the Meringolo Action).

Exhibit 7: Decision and Order of the Hon. Dakota D. Ramseur dated November 17, 2022, in Jeffrey Brooks v. Murphy & Falcon, P.A., Index No. 159001/2021 (the “Murphy Action”) (NYSCEF Doc. No. 43 in the Murphy Action).

Exhibit 8: Decision and Order of the Hon. Mary V. Rosado dated September 27, 2022, in Jeffrey Brooks v. Newman & Greenberg LLP, Index No. 159002/2021 (the “Newman Action”) (NYSCEF Doc. No. 45 in the Newman Action).

Exhibit 9: Decision and Order of the Hon. Lynn R. Kotler dated November 22, 2022, in Jeffrey Brooks v. Levitt & Kaiser, PC, Index No. 159004/2021 (the “Levitt Action”) (NYSCEF Doc. No. 60 in the Levitt Action).

Exhibit 10: Decision and Order of the Hon. Lynn R. Kotler dated November 22, 2022, in Jeffrey Brooks v. Michael S. Sommer, Esq., Index No. 159086/2021 (the “Sommer Action”) (NYSCEF Doc. No. 36 in the Sommer Action).

Exhibit 11: Decision and Order of the Hon. Suzanne J. Adams dated November 28, 2022, in Jeffrey Brooks v. Laurence S. Shtasel Esq., Index No. 655753/2021 (the “Shtasel Action”) (NYSCEF Doc. No. 42 in the Shtasel Action).

Exhibit 12: Decision and Order of the Hon. Arlene Bluth dated August 23, 2022, in Jeffrey Brooks v. Baker & Hostelter, LLP, Index No. 655754/2021 (the “Baker Action”) (NYSCEF Doc. No. 32 in the Baker Action).

Here, the movants have demonstrated that the complaint was filed on September 30, 2021, after the expiration of the statute of limitations to bring this action, and that the claims asserted herein have already been fully litigated. Therefore, this Court finds that the complaint shall be dismissed pursuant to *CPLR §3211(a)(5)*.

CPLR § 3211(a)(3)

Furthermore, the movant-defendants argue that the complaint should be dismissed, pursuant to *CPLR §3211(a)(3)*, because the plaintiff, Jeffrey Brooks, was not authorized to bring this action on behalf of the Estate of David H. Brooks at the time the case was commenced. Here, the movant-defendants contend that the decedent, David Brooks, died on October 27, 2016, and his estate was probated in the Probate Division of the Fifteenth Judicial Circuit in Palm Beach County, Florida. However, by an Order dated November 16, 2020, the Probate Court closed the file administratively and expressly stated “All letters of administration are revoked.” *See, Lewner Aff., Exhibit “2” (Probate Court’s Order dated Nov. 16, 2020)*. Plaintiff commenced this action by filing the summons and complaint on September 30, 2021. (*See, NYSCEF Doc. Nos. 1 and 2*). Thus, the movant-defendants argue that the plaintiff, Jeffrey Brooks, did not have the authority to file this action in 2021, as the personal representative of the Estate of David Brooks since the letters of administration were revoked in 2020, which was 10 months prior to the commencement of this action.

In opposition, the plaintiff argues, *inter alia*, that by an Order dated July 17, 2022, the Florida Probate Court had reopened the decedent’s estate, and granted the petition to restore Jeffrey Brooks to position of personal representative, and the letters of administration were reinstated, *nunc pro tunc*, relating back to the entry of the Order dated November 14, 2020. (*See, NYSCEF*

Doc. No. 64). Therefore, plaintiff contends he is the personal representative of the decedent in this case.

“A personal representative is a person who has received letters to administer the estate of a decedent.” EPTL §1-2.13. In *Greene v. Kevin D. Greene, LLC*, 188 A.D.3d 1012, 137 N.Y.S.3d 468 (2d Dep't 2020), it was held that the grandnephew of decedent, in his capacity as executor of decedent's estate, lacked capacity to subsequently sue a bank on behalf of decedent's estate because his preliminary letters testamentary expired prior to the commencement of the action and grandnephew did not obtain new letters thereafter. *Greene v. Kevin D. Greene, LLC*, 188 A.D.3d 1012, 137 N.Y.S.3d 468 (2d Dep't 2020) [Emphasis added]. “[I]t has been held that, where a timely action has been dismissed due to a lack of representative capacity, said representative is eligible to receive the benefit of CPLR §205(a) if the defect is cured in the subsequent action. See, *Fogarty v. Town of Southold*, 2014 N.Y. Slip Op. 32765[U] [N.Y. Sup Ct, Suffolk County 2014] citing to *George v Mt. Sinai Hosp.*, 47 N.Y.2d 170, 417 NYS2d 231 (1979); see also, *Carrick v. Central Gen. Hosp.*, 51 N.Y.2d 242, 434 N.Y.S.2d 130 (1980); *Snodgrass v. Professional Radiology*, 50 A.D.3d 883, 855 N.Y.S.2d 243 (2d Dep’t 2008).

At the time of the commencement of this action, the individual plaintiff, Jeffrey Brooks, did not have the authority to serve as the personal representative to the decedent, David Brooks because it is undisputed that the letters of administration were revoked prior to the commencement of this action in 2020. Thus, the plaintiff lacked capacity to sue at the time of the filing of the complaint, and although the plaintiff’s revocation to serve as the personal representative was cured, such cure took place in July 2022, which was well after the statute of limitations had expired to assert the legal malpractice cause of action.

Lastly, the movant-defendants’ portion of the motion seeking sanctions against the plaintiff and plaintiff’s counsel is denied, within the Court’s discretion.

Accordingly, it is hereby

ORDERED that movant-defendants’ motions (sequence 003 and 004), pursuant to CPLR §§3211(a)(1), (3), (5) and (a)(7), to dismiss the Plaintiff’s Complaint in this action is GRANTED, and it is further

ORDERED that the defendants’ motion for sanctions against Plaintiff for frivolous conduct is DENIED; and it is further

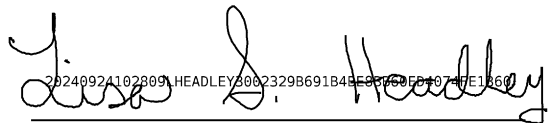
ORDERED that within 30 days of entry, movant-defendants shall serve a copy of this Decision/Order upon the Plaintiff with notice of entry; and it is further

ORDERED that any requested relief sought not expressly addressed herein has nonetheless been considered.

This constitutes the Decision and Order of the Court.

9/24/2024

DATE


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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