

Dimino v Jonathan C. Reiter Law Firm, PLLC

2024 NY Slip Op 33829(U)

October 8, 2024

Supreme Court, New York County

Docket Number: Index No. 805092/2024

Judge: Paul A. Goetz

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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. PAUL A. GOETZ PART 47

Justice

-----X

NANCY DIMINO, SABRINA DIMINO,
Plaintiffs,

- v -

JONATHAN C. REITER LAW FIRM, PLLC F/K/A LAW FIRM
OF BRODER & REITER, JONATHAN C. REITER, MERYL I.
SCHWARTZ

Defendants.

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INDEX NO. 805092/2024

MOTION DATE 06/06/2024

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20

were read on this motion to/for DISMISS.

In this legal malpractice action, defendants move pre-answer to dismiss the complaint pursuant to CPLR § 3211(a)(7) arguing that plaintiffs have failed to state a cause of action on which relief can be sought. Plaintiffs oppose arguing that their verified complaint is sufficient, and defendants have failed to meet their burden warranting pre-answer dismissal.

BACKGROUND

Plaintiffs, Nancy Dimino and Sabrina Dimino are the widow and daughter respectively of Stephen Dimino, who died in the World Trade Center on September 11, 2001 (NYSCEF Doc No 1 ¶ 5-6). Plaintiffs initially retained defendants in 2002 to assist them in obtaining compensation from the 9/11 Victim’s Compensation Fund (“VCF”) and subsequently, as relevant to this lawsuit, from the later-created United States Victims of State Sponsored Terrorism Fund (the “Fund”) (*id.* at ¶ 1, 14). Created by Congress in 2015, compensation from the Fund was to be paid to victims of state sponsors of terrorism, including but not limited to, the Islamic Republic of Iran (“Iran”) (*id.*).

In 2015, Congress enacted the Justice for United States Victims of State Sponsored Terrorism Act (34 USC § 20144) which establishes the Fund to provide compensation to certain people who are injured in or by acts of international state-sponsored terrorism, and who obtain a judgment issued by a United States district court under state or federal law against a foreign state that was designated as a state sponsor of terrorism (*id.* at ¶ 19). When the Fund was first created it excluded anyone who had previously received compensation from the VCF, however in 2019, Congress expanded the definition of eligible claimants to include those previously excluded spouses and surviving dependents of 9/11 decedents such as the Diminos (*id.* at 19 – 20). Congress set February 19, 2020, as the deadline for newly eligible claimants to file claims seeking compensation from the Fund (NYSCEF Doc No 1 at ¶ 23).

In the federal Southern District of New York case, *In re: Terrorist Attacks on September 11, 2001*, a liability default judgment was entered against Iran, allowing victims and families of terrorist attacks to receive compensation from the Fund if they obtain a default judgment against Iran (*id.* at ¶ 15 – 18). Plaintiffs allege that defendants failed to acquire a default judgement against Iran and submit them as part of their claims to the Fund prior to the February 19, 2020 deadline (*id.* at ¶ 29). Because of this alleged failure, plaintiffs allege that on May 8, 2020 they received notice that their claims were denied (*id.* at ¶ 39). Plaintiffs further allege that the defendants failed to initially add Sabrina as a plaintiff when seeking the default judgment leading to further delays (*id.* at ¶ 45). While plaintiffs did eventually receive compensation from the Fund, they further allege that defendants failed to seek an award for economic loss which would have increased the amount they eventually received up to the \$35 million per family cap (*id.* at ¶ 50).

DISCUSSION

Failure to State a Claim

Defendants argue that the complaint is deficient and must be dismissed because it does not establish that the plaintiffs' rights are not still viable with successor counsel. They argue that plaintiffs do not allege that their claims were denied with no opportunity to recover. Plaintiffs argue that their complaint is sufficient and that this motion was brought prematurely.

When reviewing a “motion to dismiss for failure to state a cause of action pursuant to CPLR 3211(a)(7), [courts] must accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every reasonable inference, and determine only whether the facts, as alleged fit within any cognizable legal theory” (*Bangladesh Bank v Rizal Commercial Banking Corp.*, 226 AD3d 60, 85-86 [1st Dept 2024] [internal quotations omitted]). “In making this determination, we are not authorized to assess the merits of the complaint or any of its factual allegations” (*id.* at 86 [internal quotations omitted]). Further “[i]n assessing a motion under CPLR 3211(a)(7), ... the criterion is whether the proponent of the pleading has a cause of action, not whether [they have] stated one” (*Eccles v Shamrock Capital Advisors, LLC*, 2024 NY Slip Op 02841 [Ct App May 23, 2024] [internal quotations omitted]).

“In an action to recover damages for legal malpractice, a plaintiff must demonstrate 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” (*Aur v Manhattan Greenpoint Ltd.*, 132 AD3d 595, 595 [1st Dept 2015]). “[P]rior to commencing a legal malpractice action, a party who is likely to succeed on appeal of the underlying action should be required to press an appeal. However, if the client is not likely to succeed, he or she may bring a legal malpractice action

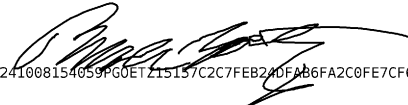
without first pursuing an appeal” (*Grace v Law*, 24 NY3d 203, 210 [2014]). But, “at this preliminary stage of the litigation, the defendants have [the burden to] demonstrate that the plaintiff’s subsequent attorney had a sufficient opportunity to correct their alleged error in failing to amend the petition, such that they did not proximately cause any damages flowing from that error” (*Gobindram v Ruskin Moscou Faltischek, P.C.*, 175 AD3d 586, 591 [2d Dept 2019]).

Here, accepting the facts in the complaint as true and granting “the plaintiff[s] the benefit of every reasonable inference, and determine[ing] only whether the facts, as alleged fit within any cognizable legal theory” (*Bangladesh*, 226 AD3d at 85-86) as a court must on a motion to dismiss pursuant to CPLR § 3211(a)(7), plaintiffs have stated a cause of action for legal malpractice.

Accordingly it is

ORDERED that the defendant’s motion to dismiss is denied; and it is further

ORDERED that defendants are directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry.


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10/8/2024
DATE

PAUL A. GOETZ, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	