

Lerner v Benowich

2024 NY Slip Op 34864(U)

September 25, 2024

Supreme Court, Suffolk County

Docket Number: Index No. 619378/2023

Judge: Vincent J. Martorana

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Short Form Order

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Supreme Court of the State of New York
IAS Part 23 - County of Suffolk

PRESENT: Hon. Vincent J. Martorana

RANDOLPH D. LERNER and 341 TOWN LANE
LLC,

Plaintiffs,

- against-

LEONARD BENOWICH and BENOWICH LAW
LLP,

Defendants.

ORIG. RETURN DATE: 01/04/24
ADJOURNED DATE: 04/11/24
MOTION SEQ. NO.: 001 - MotD

PLTF'S/PET'S ATTY:

Glavin PLLC
156 West 56th Street, Suite 2004
New York, New York 10019

Sher Tremonte LLP
90 Broad Street, 23rd Floor
New York, New York 10004

DEFT'S/RESP'S. ATTY:

L'Abbate, Balkan, Colavita
& Contini, LLP
3 Huntington Quadrangle, Suite 102-s
Melville, New York 11747

Upon efiled documents numbered 27, 32-45, 48-51, 53; it is

ORDERED that the portion of Defendants' motion seeking dismissal of Plaintiffs' complaint pursuant to CPLR§3211(a)(7) is granted and dismissal under CPLR§3211(a)(1) is denied.

The within action was commenced on August 3, 2023, seeking damages against an attorney and his law firm for alleged violation of Judiciary Law §487. Plaintiffs assert that Defendant Leonard Benowich ("Benowich") deliberately concealed critical evidence that should have been produced in response to discovery demands in the matter titled Peconic Land Trust Inc v 341 Town Lane LLC, filed under index number 615311/2019 ("PLT action"). The PLT action arose from an agricultural conservation easement that was allegedly violated by the cutting of trees without getting permission from the Peconic Land Trust. Plaintiffs also assert that the PLT action filed by Benowich lacked merit because the grantor of the easement had made Benowich aware of his belief that the cutting of trees, as it had occurred, was not actually prohibited by the easement. Plaintiffs also cite a media campaign surrounding the issues in the PLT action and the involvement of several prominent community members. Peconic Land Trust sought and obtained both temporary and preliminary injunctive relief in the PLT action. Plaintiff herein alleges that injunctive relief was largely granted because Benowich concealed materials that would have revealed the beliefs of the

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grantor of the easement. Plaintiffs herein claim that Benowich agreed to produce discovery in the PLT action by September 17, 2020 and that he intentionally failed to do so; providing only some of the requested materials and holding back others. Plaintiffs further allege in the complaint, that they received documents in the PLT action from a non-party in response to a subpoena, and that those same documents were in the possession of Benowich and he failed to produce them until repeatedly challenged. The document Plaintiffs herein consider to be most critical in the PLT action, was ultimately produced on August 4, 2021. Plaintiffs claim that Defendants violated discovery rules and the Code of Professional Responsibility in the PLT action, as well as Judiciary Law §487. They allege “collusion, wrongdoing, and deceit.” Plaintiffs assert that the within action does not simply involve a “petty or routine discovery dispute, but rather a deliberate scheme to bury important information.” They seek compensatory and punitive damages for alleged willful misconduct. Defendants seeks dismissal of the within action, pre-answer, pursuant to CPLR §3211 (a)(1) and (7).

Defendants’ counsel asserts that the first set of document demands served upon Benowich in the PLT action, were served in February 2020 and that “Benowich served PLT’s rolling document productions starting in September 2020, followed by supplemental document productions on July 23, 2021, August 4, 2021, and October 6, 2021” (internal references to exhibits omitted). Copies of correspondence between the parties and copies of discovery demands and responses are annexed to Defendants’ counsel’s affirmation. The documents central to the controversy were electronically stored. A copy of the project proposal for the contractor retained to retrieve the electronically stored information (“ESI”) is also annexed to Defendants’ motion, along with an email from that contractor, BIA, dated January 18, 2023. The email seems to outline the efforts initially made to retrieve documents, and the corrective actions taken after BIA was made aware that some documents had been omitted. The email indicates corruption in the dataset, and corrective actions taken.

Defendants’ counsel further asserts that “Benowich became aware for the first time in or about September 2021 that a file corruption had prevented BIA from capturing all responsive documents.” Counsel avers that BIA’s forensic technician worked to recover additional documents, which yielded more than 5000 documents for further review, and a supplemental discovery response containing 409 documents.

Defendants submit no affidavit in support of their motion and they offer no evidentiary foundation for the documents provided. Defendants’ counsel argues that Plaintiffs fail to allege facts sufficient to state a claim under Judiciary Law §487 because client advocacy is not actionable, because Plaintiffs have failed to allege facts sufficient to establish a chronic or extreme pattern of intentional deceit, and Plaintiffs fail to allege pecuniary damages other than those that are compensable from the undertaking posted for the preliminary injunction.

Plaintiffs argue in opposition, that it is highly likely that temporary and preliminary injunctive relief, granted by orders of Justice Joseph Farneti and Justice William G. Ford, respectively, would not have been awarded absent Benowich’s alleged deception. Plaintiffs further state that “Benowich’s sustained and repeated pattern of lies, misconduct, and deception [are] the basis for their § 487 claim, thereby meeting the pleading standard.”

Plaintiffs reference the production of specific emails that were not provided until long after

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the injunction motions were decided, along with redactions made to emails that were produced earlier, as depriving Plaintiffs of information in the PLT action that was critical to their defense. Redacted language in an August 31, 2019 email from John Halsey of Peconic Land Trust to Job Potter, easement grantor, included references to affidavits that did not accompany production of the redacted email. Plaintiffs assert that such omissions were intentional and strategic. The omission resulted in the Defendant in that action (Plaintiff here) having no knowledge that any documents containing the opinion of the easement grantor existed. The grantor's memo that is central to Plaintiffs' arguments was not produced until August 4, 2021. However it is noted that the motion which resulted in Justice Ford's preliminary injunction order, dated October 22, 2022, was fully briefed long before the preliminary conference order issued on December 5, 2019.

No party with personal knowledge has attested to exactly when Benowich became aware of the data corruption. Nor has any party with personal knowledge has attested to when Benowich first became aware that there were material documents that had not been produced.

Plaintiffs argue that the documentary evidence presented does not qualify as the type of evidence that may be the basis for a CPLR§3211(a)(1) dismissal and that, even if it did, such documents do not conclusively dispose of Plaintiffs' claims. Plaintiffs also assert that the claim against Defendants is properly pled. Plaintiffs assert that Benowich knowingly made material misrepresentations to the court, that he deliberately withheld responsive discovery materials in order to conceal his misrepresentations, and that his conduct was designed to avoid detection that he had suppressed certain materials. Plaintiffs assert that if they had not subpoenaed Mr Potter and learned of the existence of a memo he had created, that the omitted discovery would never have come to light. Plaintiffs argue that Benowich was crafting and outlining legal positions which he knew to be false, presenting them to the court, and actively working to conceal the documents that would undermine his arguments.

Plaintiffs claim that Justice Ford would not have granted a preliminary injunction in the PLT action if the Defendants in that case (who are the Plaintiffs in this action) had access to the documents here at issue (which they refer to as the Potter Materials and Potter Memo) and had been able to present them in their defense. Plaintiffs further argue that the statute does not require them to establish pecuniary harm and that the PLT action bond amount does not govern recovery under the claims alleged.

In reply, Defendants argue that Plaintiffs put too much reliance on the Potter Memo, that it isn't dispositive of anything and that, even if the legal arguments advanced by Benowich in the PLT action were lacking in merit, that making the arguments does not constitute a Judiciary Law §487 violation. They assert that Benowich was entitled to assert his client's interpretation of the easement, rather than the interpretation attributed to Potter.

In considering a party's motion to dismiss for failure to state a cause of action pursuant to CPLR 3211(a) (7), the pleadings must be given a liberal construction, the allegations must be accepted as true and the stated claims must be given every possible favorable inference in determining whether or not they fit into any cognizable legal theory (*Chanko v. Am. Broad. Companies Inc.*, 27 NY3d 46, 29 NYS3d 879 [2016]; *Goshen v. Mut. Life Ins. Co. of New York*, 98 NY2d 314, 746 NYS2d 858 [2002]; *Leon v Martinez*, 84 NY2d 83, 614 NYS2d 972 [1994]).

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Bare legal conclusions are not presumed to be true and do not receive the benefit of such favorable inference (*Grant v. DiFeo*, 165 AD3d 897, 86 NYS3d 575 [2d Dept. 2018]; *TMCC, Inc. v. Jennifer Convertibles, Inc.*, 176 AD3d 1135, 111 NYS3d 102 [2d Dept. 2019]).

Affidavits submitted by a plaintiff to remedy any defects in the complaint may be considered (*Chanko v. Am. Broad. Companies Inc.*, *supra*; *Leon v Martinez*, *supra*). However, if evidentiary material submitted by the defendant movant is considered, “the criterion then becomes ‘whether the proponent of the pleading has a cause of action, not whether he has stated one’” (*Sokol v. Leader*, 74 AD3d 1180, 1180–82, 904 NYS2d 153 [2d Dept. 2010] (quoting *Guggenheimer v Ginzburg*, 43 NY2d at 275); *Porat v. Rybina*, 177 AD3d 632, 111 NYS3d 625 [2d Dept. 2019]; *see also Williams v. Silverstone*, 215 AD3d 787, 788, 185 NYS3d 699 [2d Dept. 2023]). In considering evidentiary material in support of a motion to dismiss for failure to state a cause of action, whether or not plaintiff might ultimately survive a summary judgment motion or prevail on the merits is not part of the analysis (*Doe v. Ascend Charter Sch.*, 181 AD3d 648, 121 NYS3d 285 [2d Dept. 2020]; *Neuman v. Echevarria*, 171 AD3d 767, 97 NYS3d 203 [2d Dept. 2019]; *Sokol v. Leader*, *supra*). Although it is rare, dismissal under CPLR 3211 (a) (7) may be granted based upon an affidavit if such affidavit conclusively establishes that the claimant has no cause of action (*Sokol v. Leader*, *supra*; *Porat v. Rybina*, *supra*). Dismissal may be appropriate where a material fact alleged is conclusively determined not to be a material fact; however, dismissal should not eventuate unless there is no significant dispute (*Doe v. Ascend Charter Sch.*, *supra*; *McMahan v. McMahan*, 131 AD3d 593, 15 NYS3d 190 [2d Dept. 2015]; *Guggenheimer v. Ginzburg*, 43 NY2d 268, 401 NYS2d 182[1977]; *TMCC, Inc. v. Jennifer Convertibles, Inc.*, 176 AD3d 1135, 111 NYS3d 102 [2d Dept. 2019]).

For dismissal to be granted pursuant to CPLR §3211 (a) (1), a defendant must submit documentary evidence of undisputed and unambiguous authenticity “that resolves all factual issues as a matter of law and conclusively disposes of the plaintiff’s claim” (*Hohwald v Farm Family Casualty Insurance Company*, 155 AD3d 1009, 66 NYS3d 316 [2d Dept 2017], quoting *Botach Mgt. Group v Gurash*, 138 AD3d 771, 772, 31 NYS3d 80 [2d Dept 2016]; *see also Palero Food Corp. v Zucker*, 186 AD3d 493, 129 NYS3d 104 [2d Dept 2020]; *Grant v DiFeo*, 165 AD3d 897, 86 NYS3d 575 [2d Dept 2018]). The documentary evidence offered must be unambiguous and authentic, must entirely refute the plaintiffs’ factual allegations, and must conclusively establish a defense as a matter of law (*S & J Serv. Ctr., Inc. v Commerce Commercial Grp., Inc.*, 178 AD3d 977, 112 NYS3d 584 [2d Dept 2019]; *Porat v Rybina*, 177 AD3d 632, 633, 111 NYS3d 625 [2d Dept 2019]). The evidence submitted upon such motion must be documentary; affidavits, letters and deposition testimony do not qualify (*S&J Serv. Ctr.*, *supra*; *Porat v Rybina*, *supra*; *Granada Condo. III Assn. v Palomino*, 78 AD3d 996, 913 NYS2d 668 [2d Dept 2010]). “[J]udicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are ‘essentially undeniable,’ would qualify as ‘documentary evidence’ in the proper case” (*Fontanetta v Doe*, 73 AD3d 78, 84–85, 898 NYS2d 569, 574 [2d Dept 2010]; *see also S&J Serv. Ctr.*, *supra*).

Plaintiffs’ sole claim is violation of Judiciary Law §487. Judiciary Law §487(1) provides that “an attorney “who [i]s guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party” is guilty of a misdemeanor and may be liable to the injured party for treble damages in a civil action” (*Bill Birds, Inc. v. Stein L. Firm, P.C.*, 35 NY3d

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173, 178, 126 NYS3d 50 [2020]; *Oberlander v. Moore*, 191 AD3d 1009, 142 NYS3d 593 [2021]). A claim under Judiciary Law requires evidence that an attorney intended to deceive the court or a party, that such deception occurred in the context of a court proceeding and that such deception proximately caused Plaintiff's damages (Judiciary Law 487; *Barouh v Law Offs. of Jason L. Abelove*, 131 AD3d 988, 17 NYS3d 144 [2d Dept. 2015]; *Tawil v. Wasser*, 21 AD3d 948, 801 NYS2d 619 [2d Dept. 2005]; *Dupree v. Voorhees*, 102 AD3d 912, 959 NYS2d 235, 236 [2d Dept. 2013]; *Schiller v. Bender, Burrows & Rosenthal, LLP*, 116 AD3d 756, 983 NYS2d 594 [2d Dept. 2014]; *Lawrence Ripak Co. v. Gdanski*, 143 AD3d 862, 39 NYS3d 223, 224 [2d Dept. 2016]; *O'Connell v. Kerson*, 291 AD2d 386, 736 NYS2d 895 [2d Dept. 2002]). Untrue or misleading advice that occurs outside the context of an action pending in court is not actionable under Judiciary Law §487(1), as in such instance there is no court or party to be deceived (*Bill Birds, Inc. v. Stein L. Firm, P.C.*, *supra*). Furthermore, liability under the statute does not extend to negligent acts or malpractice that arises from a lack of competency (*Bill Birds, Inc. v. Stein L. Firm, P.C.*, *supra*). Additionally, "[r]elief pursuant to Judiciary Law § 487 is not lightly given, and requires a showing of egregious conduct or a chronic and extreme pattern of behavior on the part of the defendant attorneys" (*Grasso v. Guarino*, 227 AD3d 872, 873, 211 NYS3d 462, 465 [2d Dept. 2024] (*quoting (omitting internal quotations) Kaufman v. Moritt Hock & Hamroff, LLP*, 192 AD3d 1092, 1093, 141 NYS3d 371)). "Section 487 "guards against false statements by lawyers during litigation, rising to the level of intentional deceit or collusion; it was not designed to curtail attorneys' expressions of views concerning what the law is or should be, nor does it include merely poor lawyering, negligent legal research or the giving of questionable legal advice" (*Urias v. Daniel P. Buttafuoco & Assocs., PLLC*, 41 NY3d 560, 570, 214 NYS3d 680 [2024])(*quoting Bill Birds*, 35 NY3d at 180 n 3, 126 NYS3d 50). "The statute does not encompass the filing of a pleading or brief containing nonmeritorious legal arguments" (*Id.*)

Defendants seek dismissal pursuant to CPLR §§3211(a)(1) and (7). Dismissal based upon documentary evidence is denied. The documents relied upon lack evidentiary foundation. The court does not reach the question of whether or not the documents presented qualify as the type of documents upon which a CPLR§3211(a)(1) dismissal may be predicated. The portion of Defendants' motion which seeks dismissal based upon failure to state a cause of action relying upon establishing that a material fact alleged in the complaint is not a fact, is denied. This argument is predicated upon the assertion that Defendants did not deliberately obstruct discovery, and the support for this assertion is non-evidentiary. There is no denial by any party with personal knowledge and there is no evidentiary foundation for the documents submitted. The court now considers the portion of Defendants' motion that seeks dismissal based upon failure to state a cause of action, based upon how the claim is actually stated.

Plaintiffs' allegations, although framed in the context of neighborhood politics, ulterior motives, interpersonal discord, and local media campaigns, essentially boil down to a discovery dispute. Plaintiff has not alleged a chronic and extreme pattern of behavior or egregious conduct. Defendants may or may not have acted appropriately with respect to disclosure in the PLT action. Assuming the assertions about data corruption to be true, it certainly would have been helpful if Defendants had been forthcoming about this situation. It is the impression of the court that the entire discovery production came under scrutiny due to the way documents were produced and the secrecy surrounding the "rolling" disclosure. Although Plaintiff argues that the position advanced in briefs in the PLT action were non-meritorious, neither this assertion, nor allegations of discovery related

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misconduct, may form the basis of a Judiciary Law §487 claim. Where appropriate, the CPLR provides avenues for addressing discovery disputes in the context of the litigation in which they occur. However, it is the court's understanding that much progress has been made with respect to discovery in the PLT action.

Based upon the foregoing, the court finds that Plaintiffs have failed to state a cause of action under Judiciary Law §487. Additionally, Plaintiffs have not established that they have a cause of action under the statute. Accordingly, the portion of Defendants' motion seeking dismissal pursuant to CPLR§3211(a)(7) is granted, and Plaintiffs' complaint is dismissed in its entirety.

Dated: September 25, 2024
Riverhead, New York



VINCENT J. MARTORANA, J.S.C.

CHECK ONE: FINAL DISPOSITION NON-FINAL DISPOSITION