Broden v Feraru
2024 NY Slip Op 35122(U)
November 15, 2024
Supreme Court, Westchester County
Docket Number: Index No. 72079/2023
Judge: Janet C. Malone
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To commence the statutory time period
for appeals as of right (CPLR 5513[a]),
you are advised to serve a copy of this
order, with notice of entry, on all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
---x
RONALD BRODEN,
Plaintiff,

-against-

VICTOR FERARU, ESQ. and
LAW OFFICE OF VICTOR M. FERARU
Defendants.
---x

Index No. 72079/2023

DECISION AND ORDER

Motion Seq. Nos. 1, 2

MALONE, J.

Plaintiff Ronald Broden ("Broden" or "Plaintiff") commenced this action on December 12, 2023 alleging that Defendants Victor Feraru, Esq. ("Feraru" individually) and Law Office of Victor M. Feraru ("Defendants" collectively) committed legal malpractice when they negligently failed to include a cause of action for medical malpractice or professional negligence in the federal action filed against non-party Dr. Boris Rubenstein, a psychiatrist who treated Plaintiff from December 1999 through June 22, 2019, *Ronald Broden v. Boris Rubinstein, M.D*, 21- cv-10411 (VB)(Summons and Complaint (NYSCEF Doc. No. 1).

Now before the Court are two motions: Defendants' pre-answer motion to dismiss Plaintiff's Complaint based on documentary evidence and failure to state a cause of action pursuant CPLR R. 3211 (a)(1)(7), respectively. In support, Defendants submit *inter alia* the Affirmation of Victor M. Feraru, Esq., with Exhibits A – C[1]; Memorandum of Law in Support with Exhibits A-C and in Reply with Exhibits A- G; Affidavit of Victor M. Feraru in Reply with Exhibits A-C (NYSCEF Doc. Nos. 3, 5 -13; 30-33). In opposition, Plaintiff relies on the Affidavit of Ronald Broden, Memorandum of Law in Opposition[2] and Exhibit A (NYSCEF Doc. Nos. 17-18, 21).

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[1] Defendants filed as Exhibit C an Affidavit of Victor M. Feraru, Esq., affirmed pursuant to CPLR 2106, based on his personal knowledge of the facts and which adopts the statements made in the accompanying Memorandum of Law.
[2] Plaintiff filed a Memorandum of Law totaling 26 pages, without first obtaining Court permission to exceed 15 pages in violation of the Part Rules IV.1.c and in excess of the 20-page limit set by 22 NYCRR 202.8-b (e).

Plaintiff's motion filed March 5, 2024 seeks an Order striking Defendants' Reply Memorandum of Law and Reply Affirmation for improperly raising new arguments in reply papers that had not been previously raised or, in the alternative granting Plaintiff leave to file the accompanying attorney's affirmation and Plaintiff's Affidavit, both dated March 5, 2024, as a sur-reply (NYSCEF Doc. No. 34). Plaintiff's motion is supported by the Affidavit of Ronald Broden, Affirmation of Kenneth F. McCallion, Esq. and Exhibits A-E (NYSCEF Doc. Nos. 35-41) and Defendants oppose it with a Notice of Rejection pursuant to 22 NYCRR §202.70.18[3] (NYSCEF Doc. No. 42).

The motions are consolidated for purposes of this decision and upon review of the foregoing papers, the motions are decided as follows:

Plaintiff's Motion

Absent case law in support, Plaintiff moves to strike Defendants' reply for improperly raising new arguments in reply papers that had not previously been raised. However, the proper remedy is not to strike Defendants' reply but for the Court to either not consider those arguments raised or to allow Plaintiff to file a surreply. *Castro v. Durban*, 161 A.D.3d 939, 941 (2018)("Since the plaintiffs did not have the opportunity to oppose the new argument in a surreply, the court should not have granted relief based upon that argument"). Thus, Plaintiff's motion to strike Defendants' reply is denied.

"While unauthorized surreplies containing new arguments generally should not be considered, the Supreme Court has the authority to regulate the motion practice before it, as well as the discretion to determine whether to accept late papers or even surreply papers" *U.S. Bank Tr., N.A. v. Rudick*, 156 A.D.3d 841, 842-43(2d Dept. 2017) citing CPLR 2214[c] and *Gluck v New York City Tr. Auth.*, 118 AD3d 667, 668 (2d Dept. 2014).

As it is within this Court's discretion whether to accept surreply and in the interest of providing Plaintiff a full and fair opportunity to be heard, Plaintiff's motion is granted to the extent that the Court shall consider Plaintiff's surreply in determining Defendants' motion to dismiss.

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[3] 22 NYCRR §202.70 is entitled Rules of the Commercial Division of the Supreme Court and is not applicable to this action.

Defendant's Motion

Civil Practice Law and Rules 3211 states in relevant part that a "party may move for judgment dismissing one or more causes of actions against him on the ground that a defense is based upon documentary evidence" or "the pleading fails to state a cause of action." *See* CPLR 3211(a)(1); (a)(7).

Factual Allegations

Broden alleges that non-party Dr. Rubinstein treated him for almost twenty years, from December 1999 through June 22, 2019 and committed medical malpractice because (1) Dr. Rubenstein failed to charge Broden for his services as a professional courtesy to Broden's father; (2) overprescribed Klonopin knowing that Broden was addicted to alcohol, which caused Broden to also became addicted to Klonopin; and (c) failed to disclose to Broden that he had a possible bipolar disorder (Summons and Complaint [NYSCEF Doc. No. 6] at ¶¶6-53).

Feraru is an attorney licensed to practice law in the State of New York and Defendant Law Office of Victor M. Feraru is Feraru's law office located at 200 Old Country Road, Suite 2 South, Mineola, NY 11501-4242. *Id.* at ¶3.

Defendants committed legal malpractice in the drafting of the complaint and handling of the lawsuit against Dr. Rubinstein by failing to include causes of action for professional negligence and medical malpractice. *Id.* at ¶¶1, 88.

On December 6, 2021, Defendants filed a complaint in federal court against Dr. Boris Rubinstein in the action *Ronald Broden v. Boris Rubinstein, M.D.,* 21- cv-10411 (VB)("federal action"), asserting two causes of action against Dr. Boris Rubinstein: negligence and breach of physician-patient confidentiality. However, since Defendants misspelled Dr. Rubinstein's name in the caption and throughout the complaint, an Amended Complaint needed to be filed, which was done on December 9, 2021. *Id.* at ¶82.

Although Defendants included a negligence cause of action in the federal complaint[4], the language used sounded more like an intentional tort and it was dismissed by the federal court on

[4] The Court is unable to confirm any of the party's contentions regarding the federal action as neither party included a copy of the pleadings and/or the decision which dismissed the negligence cause of action as part of their respective papers.

November 14, 2022 because it was premised on the same factual allegations as breach of physician-patient confidentiality. *Id.* at ¶¶83-84.

Defendants negligently failed to plead the negligent acts committed by Dr. Rubinstein or include a cause of action for medical malpractice in the federal complaint, which were unrelated to the breach of confidentiality cause of action. *Id.* at ¶88.

But for Defendants' negligence and legal malpractice, Plaintiff would have been able to successfully bring additional causes of action against Dr. Rubinstein for professional negligence and medical malpractice. Defendants' professional negligence and legal malpractice as to Plaintiff was a substantial and proximate cause of the damages suffered by Plaintiff, in an amount to be determined at trial. *Id.* at ¶¶90-91.

Documentary Evidence

"A motion to dismiss on the ground that the action is barred by documentary evidence pursuant to CPLR R. 3211(a)(1) may be granted only where the documentary evidence utterly refutes the plaintiff's factual allegations, conclusively establishing a defense as a matter of law" *David v. Henry*, 212 Ad3d 597, 597 (2d Dept. 2023); ***Recine v. Recine,*** 201 A.D.3d 827, 830 (2d Dept. 2022). "In order to be documentary, the evidence must be unambiguous, authentic, and undeniable; thus, affidavits are not considered documentary evidence." *Summer v. Severance*, 85 A.D.3d 1011, 1012 (2d Dept. 2011). "Judicial 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." *Gedney Ass'n, Inc. v. Common Council of City of White Plains*, 209 A.D.3d 1019, 1021 (2d Dept. 2022). "Neither affidavits, deposition testimony, nor letters are considered documentary evidence within the intendment of CPLR 3211 (a) (1)" *Bianco v Law Offs. of Yuri Prakhin,* 189 A.D.3d 1326, 1328 (2d Dept. 2020)

Here, Defendants argue that the client engagement letter shows that Defendants were only hired to pursue the breach of confidentiality claim (NYSCEF Doc. No. 13) and that Defendants did not pursue a medical malpractice cause of action due to Plaintiff's financial constraints and informed Plaintiff that he could seek to pursue medical malpractice through a medical malpractice attorney (Defendants' Memorandum of Law, NYSCEF Doc. No. 10 at pgs. 4-5).

Plaintiff responds that that the Defendants improperly use their Memorandum of Law to make improper unsworn statements; Plaintiff denies Defendants' statements; and that the client engagement letter confirms that Defendants' representation included a negligence claim stemming "from a duty owed to Plaintiff as a patient/client." (Plaintiff's Affidavit in Opposition, NYSCEF Doc. No. 17)

In reply, Defendants submit an email dated September 30, 2021 from Feraru to Broden which purportedly shows that Feraru advised Plaintiff that they were not pursuing a medical malpractice cause of action but pursuing professional negligence due to Dr. Rubenstein's communication with Broden's family. It also advises Plaintiff to consult another attorney should he want to pursue the medical malpractice claim (NYSCEF Doc. No. 28)

In surreply, Plaintiff denies receiving the September 30, 2021 email, states it is a fabrication (NYSCEF Doc. No. 35 at ¶¶2-4) and is at odds with the amended client engagement letter dated November 7, 2021 (NYSCEF Doc. No. 41) and that Defendants confirmed in an email dated December 6, 2021 from Feraru to counsel for Dr. Rubinstein in the federal action that a claim for medical malpractice would be filed (NYSCEF Doc. No. 40).

"When the terms of a written contract are clear and unambiguous, the intent of the parties must be found within the four corners of the contract, giving practical interpretation to the language employed and the parties' reasonable expectations." *Federico v Dolitsky*, 176 AD3d 916, 918 (2d Dept 2019) *citing Patsis v Nicolia*, 120 AD3d 1326, 1327 (2d Dept 2014).

Here, the amended client engagement letter dated November 7, 2021 controls since it states that it "amends the 7/16/21 letter of engagement letter" submitted by Defendants (NYSCEF Doc. No. 41) and it further lays out the scope of representation as follows:

> This office will prosecute a negligence, and potential (should the expert doctor Dr. Lubit) medical malpractice action against Dr. Boris Rubenstein in the United States District Court for the Southern District of New York

(*Id.*).

Thus, Defendants' motion to dismiss based on documentary evidence is denied.

Failure to State a Cause of Action

"On a motion to dismiss a complaint pursuant to CPLR 3211 (a) (7), 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"

McCarthy v. County of Nassau, NY 230 AD3d 485, 488-489 (2d Dept. 2024). "In assessing a motion under CPLR R. 3211(a)(7), a court may freely consider affidavits and other evidence submitted by plaintiff to remedy any defects in the complaint." *Renaud v. Bedford-Carp Construction, Inc.,* 221 AD3d 739, 740 (2d Dept. 2023). The role of the court is only to determine whether the facts, as alleged, fit within any cognizable legal theory. "Whether a plaintiff can ultimately establish [his or her] allegations is not part of the calculus." *EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 (2005).

"To state a cause of action to recover damages for legal malpractice, a plaintiff must allege: (1) that the attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession; and (2) that the attorney's breach of the duty proximately caused the plaintiff actual and ascertainable damages" *Kasoris v. Bodnar & Milone, LLP,* 186 AD3d 1504, 1505 (2d Dept. 2020).

"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 lawyer's negligence" *Janker v. Silver, Forrester & Lesser, P.C.,* 135 A.D.3d 908 (2d Dept 2016).

"Further, …the plaintiff must plead and prove actual, ascertainable damages as a result of an attorney's negligence. Mere speculation about a loss resulting from an attorney's alleged omission is insufficient to sustain a prima facie case of legal malpractice" *Dempster v Liotti, 86 A.D.3d 169, 177* (2d Dept. 2011)(internal citations and quotation marks omitted).

Defendants argue that Plaintiff's allegations are conclusory because Plaintiff has failed to articulate sufficient allegations that but for Defendants' failure to include a medical malpractice cause of action, Plaintiff would have received a more favorable outcome; Plaintiff's medical malpractice action would have been dismissed like the negligence claim in the federal action; and Plaintiff failed to allege actual and ascertainable damages (Defendants' Memorandum of Law, NYSCEF Doc. No. 10)

Plaintiff responds that that the medical malpractice claim is based on facts distinct from the breach of confidentiality claim and would not have been dismissed like the negligence action; and because Plaintiff had a viable cause of action for medical malpractice, the damages are not unduly speculative and Plaintiff is now limited to recovering only damages from the breach of confidentiality cause of action, which is a narrower category of damages**.** (Plaintiff's Memorandum of Law, NYSCEF Doc. No. 18).

Accepting all of Plaintiff's allegations as true and according Plaintiff the benefit of every possible favorable inference, Broden has failed to state a cause of action for legal malpractice.

Although Broden may have sufficiently pled negligence and "but for" causation, Broden fails to plead actual, ascertainable damages. The general allegations that, as a result of the alleged acts of malpractice Plaintiff was deprived of the opportunity to recover additional monetary damages or damaged in an undetermined amount, pending the determination of the court is not sufficient. *Randazzo v. Nelson*, 128 AD3d 935, 937 (2d Dept. 2015)("A plaintiff must plead actual, ascertainable damages resulting from attorney's negligence"); *Bua v. Purcell & Ingrao, P.C.*, 99 A.D.3d 843, 848 (2d Dep't 2012)("Conclusory allegations of damages, or injuries predicated on speculation, cannot suffice for a legal malpractice action, and dismissal is warranted where the allegations in the complaint are merely conclusory and speculative")(internal citations omitted).

Based on the foregoing the Plaintiff has failed to state a cause of action pursuant to CPLR R. 3211 (a) (7), and Defendants' motion is granted.

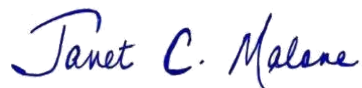
Accordingly, it is hereby

ORDERED, that Defendants' Victor Feraru, Esq. and Law Office of Victor M. Feraru motion to dismiss the Complaint pursuant to CPLR 3211(a)(7) is GRANTED; and it is further

ORDERED, that Complaint is DISMISSED.

This constitutes the Decision and Order of the Court.

Dated: November 15, 2024
White Plains, New York



HON. JANET C. MALONE
Justice of the Supreme Court