

InMark Media, LLC v Law Off. of Richard St. Paul, Esq. PLLC
2024 NY Slip Op 35242(U)
May 16, 2024
Supreme Court, Westchester County
Docket Number: Index No. 61910/2022
Judge: William J. Giacomo
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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, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. WILLIAM J. GIACOMO, J.S.C.**

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INMARK MEDIA, LLC and FRANCO CABRAL,

Plaintiffs,

Index No. 61910/2022

– against –

Motion Seq. 005

LAW OFFICE OF RICHARD ST. PAUL, ESQ. PLLC and
RICHARD ST. PAUL,

DECISION & ORDER

Defendants.
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In this action alleging legal malpractice, defendants Law Office of Richard St. Paul, Esq., PLLC and Richard St. Paul (defendants), acting pro se, move, pre answer, pursuant to 3211 (a) (7), to dismiss plaintiffs InMark Media, LLC and Franco Cabral's (plaintiffs) amended complaint.

Papers Considered

NYSCEF DOC NO. 76-81

1. Notice of Motion/Affirmation in Support by Richard St. Paul, Esq./ Exhibit A/Memorandum of Law
2. Memorandum of Law in Opposition
3. Memorandum of Law in Reply

FACTUAL AND PROCEDURAL BACKGROUND

The Court assumes the familiarity with the record. The pertinent background is taken from this Court's recent decision on the matter in motion sequence 004 and is set forth as follows:

Plaintiffs commenced this action by filing a summons and verified complaint on June 24, 2022. Therein, plaintiffs allege causes of action for legal malpractice, breach of contract, breach of fiduciary duty and breach of New York Judiciary Law § 487 against defendants, who were retained to represent them in an action commenced by Northeast Advertising Corp. d/b/a AdCorp Media Group and AdCorp Latino, LLC (hereinafter underlying action"). In the complaint, plaintiffs allege that, throughout the underlying action, defendants, as counsel for plaintiffs in the

[1]

underlying action, repeatedly: (i) failed to adhere to court-ordered deadlines; (ii) failed to appear at mandatory court conferences on more than one occasion and (iii) failed to respond to discovery on plaintiffs' behalf. As a result, plaintiffs allege that they were subject to discovery sanctions and a Decision and Order dismissing the counterclaims and ten (10) of the sixteen (16) affirmative defenses.

Specifically, the record indicates that the plaintiffs in the underlying action had moved to dismiss defendants' counterclaims; striking defendants' second, third, fourth, sixth, eighth, tenth, eleventh, twelfth, thirteenth and fifteenth affirmative defenses. By decision and order dated January 16, 2018, Judge Everett had deemed the motion submitted without opposition, due to defendants' late submission of opposition without any explanation. In the decision dismissing the counterclaims and ten out of the 16 affirmative defenses, the Court was "troubled by, what appears to be, a pattern of disregard for the CPLR motion practice rules."

Plaintiffs in the underlying action further moved for sanctions against plaintiffs herein for discovery misconduct, including for failing to appear at court conferences and for failing to timely respond to discovery demands. By decision and order dated May 30, 2018, Judge Lefkowitz held the following:

"Accordingly, in light of defendants' failure to obey court orders, including specifically the December 14, 2017 Order directing disclosure, despite ample opportunity, this court finds that the appropriate penalty is as follows: defendants are hereby precluded from offering at trial or otherwise any testimony or evidence in support of defendants' six remaining affirmative defenses other than that which has been disclosed or produced as of January 5, 2018; and plaintiffs are entitled to a charge at trial instructing the fact-finder that the documents and other evidence defendants failed to serve would not support defendants' affirmative defenses and would support plaintiffs' claims."

According to plaintiffs, defendants never informed them that outstanding discovery was owed or informed them of the result of Judge Lefkowitz's decision.

By decision and order dated June 27, 2019, this Court disqualified defendants from acting as counsel to plaintiffs in the underlying action. The action was stayed until August 12, 2019 to allow plaintiffs to obtain new counsel. The complaint alleges that defendants advised plaintiffs that they were appealing the disqualification order, seeking an extension of time for plaintiffs' to retain new counsel and appearing at compliance conference scheduled September 10, 2019. In brief, plaintiffs were ultimately held in default and advised to appear at the default conference. Defendants allegedly advised plaintiffs that they did not need to appear at the default conference.

The plaintiffs in the underlying action then moved for a default judgment against plaintiffs. Plaintiffs immediately retained new counsel, purportedly, at a considerable cost.

In sum, plaintiffs allege in the complaint that they were required to retain new counsel and incur substantial legal fees to vacate the default in the sum of \$14,113.22, which they allege would not have occurred but for defendants' legal malpractice, and that defendants have not returned legal fees paid to them in the underlying action in the amount of \$90,000.00. In the underlying action, plaintiffs also sought \$2,000,000.00 in the complaint, which plaintiffs allege is the amount requested on the counterclaims which were dismissed.

In motion sequence 004, defendants moved to dismiss the complaint.

While this motion was pending, plaintiffs filed an amended complaint. Therein, plaintiffs alleged the same causes of action minus the one alleging breach of fiduciary duty and seek damages for the legal fees incurred to vacate the default judgment in the sum of \$14,113.22, legal fees paid to defendants in the sum of \$90,000.00, as well as punitive and treble damages. Further, plaintiffs now seek \$100,000.00, which they assert is the amount they agreed to pay AdCorp to settle the underlying action. Plaintiffs claim that they had no choice but to settle the underlying action, allegedly due to the previous preclusion order and order dismissing the counterclaims and 10 out of the 16 affirmative defenses. Plaintiffs no longer seek \$2,000,000.00 in damages based upon the dismissed of their counterclaims in the underlying action.

After filing the amended complaint, plaintiffs filed opposition to defendants' motion to dismiss arguing that the motion is now moot in light of the amended complaint. Defendants did not file a reply to plaintiffs' opposition to the present motion, nor did they address the new allegations in the amended complaint.

As a result, by decision and order dated March 8, 2024, this Court denied defendants' motion to dismiss as moot.

Instant Motion

Defendants now move to dismiss the amended complaint pursuant to CPLR 3211 (a) (7). In essence, defendants argue that no specific allegations are pled to demonstrate that plaintiffs would have prevailed on the merits of the underlying action but for defendants' conduct. Defendants add that, for example, they were successful in achieving dismissal of two causes of action in a preanswer motion to dismiss. Defendants allege that the claim for breach of contract should be dismissed as duplicative of the one for legal malpractice. Lastly, defendants claim that

the Judiciary Law § 487 claim should be dismissed as the amended complaint fails to allege with particularity that defendants had any intent to deceive plaintiffs.

In opposition, plaintiffs argue that the amended complaint sufficiently pleads all three causes of action.

DISCUSSION

Dismissal

“Upon a motion to dismiss pursuant to CPLR 3211 (a) (7) for failure to state a cause of action, the sole criterion is whether the subject pleading states a cause of action, and if, from the four corners of the complaint, factual allegations are discerned which, taken together, manifest any cause of action cognizable at law, then the motion will fail.” *Esposito v Noto*, 90 AD3d 825, 825 (2d Dept 2011) (internal quotation marks and citations omitted). The court must afford the pleading a liberal construction, accept the facts alleged in the pleading as true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory. *Id.* “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.” *Endless Ocean, LLC v Twomey, Latham, Shea, Kelley, Dubin & Quartararo*, 113 AD3d 587, 589 (2d Dept 2014).

Legal Malpractice

“A cause of action to recover damages for legal malpractice requires proof of three elements: (1) that the defendant failed to exercise that degree of care, skill, and diligence commonly possessed and exercised by an ordinary member of the legal community, (2) that such negligence was the proximate cause of the actual damages sustained by the plaintiff, and (3) that, but for the defendant’s negligence, the plaintiff would have been successful in the underlying action.” *4777 Food Servs. Corp. v Anthony P. Gallo, P.C.*, 150 AD3d 1054, 1055 (2d Dept 2017). Specifically with respect to causation, plaintiffs must show that they “would have prevailed in the underlying action or would not have incurred any damages, but for the lawyer’s negligence.” *Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438, 442 (2007). Damages in a legal malpractice action are “designed to make the injured client whole” and include “litigation expenses incurred in an attempt to avoid, minimize, or reduce the damage caused by the attorney’s wrongful conduct.” *Id.* at 443 (internal quotation marks and citations omitted). Nonetheless, “plaintiffs are not obligated to show, at this stage of the pleadings, that

they actually sustained damages. They need only plead allegations from which damages attributable to the defendant's malpractice might be reasonably inferred." *Kempf v Magida*, 37 AD3d 763, 764 (2d Dept 2007).

According to defendants, the amended complaint fails to plead that plaintiffs would have succeeded on the merits of the underlying action but for defendants' negligence. However, settlement of the underlying action does not necessarily preclude a claim for legal malpractice. Courts have held that "[a] claim for legal malpractice is viable, despite settlement of the underlying action, if it is alleged that settlement of the action was effectively compelled by the mistakes of counsel." *Katsoris v Bodnar & Milone, LLP*, 186 AD3d 1504, 1505 (2d Dept 2020) (internal quotation marks omitted).

The amended complaint alleges that defendants' malpractice includes failing to comply with discovery and court-ordered deadlines, which resulted in Court orders precluding plaintiffs from introducing evidence in support of their remaining affirmative defenses and granting the underlying plaintiffs a negative inference jury charge and granting, without opposition, the dismissal of the counterclaims and many of the affirmative defenses. According to plaintiffs, defendants' negligence effectively forced them to compromise the underlying action via entering into a settlement agreement.

The Court finds that plaintiffs have sufficiently pled that defendants were negligent and that their negligence was the proximate cause of damages. Defendants were retained to provide legal representation which includes protecting plaintiffs' interests and having a full and fair opportunity to defend themselves at trial. Here, as a direct result of defendants' failure to attend court conferences, produce discovery and meet court-ordered deadlines, plaintiffs were effectively precluded from defending their position at trial. Faced with a negative inference charge and inability to present evidence in support of their remaining affirmative defenses, all due to defendants' mistakes, plaintiffs were effectively compelled to settle. *See e.g. Wolstencroft v Sassower*, 124 AD2d 582, 582 (2d Dept 1986) (internal citation omitted) ("The plaintiff's complaint states a valid cause of action to recover damages for legal malpractice in that it alleges that the defendant neglected to defend a British action which was the proximate cause of the additional expense of litigating in Great Britain as well as in New York. Furthermore, the claim is viable despite the plaintiff's settlement of the underlying matrimonial action because it is alleged that the settlement of that action was effectively compelled by the mistakes of the

defendant, the plaintiff's former counsel"); *See also 4777 Food Servs. Corp. v Anthony P. Gallo, P.C.* 150 AD3d at 1054-1055 (Legal malpractice claim sufficiently plead where lawyer did not respond to discovery demands, resulting in preclusion, despite lawyer's arguments that even if demands had been responded to, damages were speculative).

Further, alternatively, plaintiffs have alleged that specifically due to the defendants' failure to comply with discovery requests and appear at court conferences, the underlying plaintiffs brought the motion for sanctions. This resulted in plaintiffs having increased legal expenses due to defending themselves in this motion and the subsequent alleged appeal of this motion. The amended complaint further alleges that plaintiffs were forced to incur considerable expenses in immediately hiring new counsel due to an impending default judgment motion, which stemmed from defendants' negligence. *See e.g. Board of Mgrs. of Bay Club v Borah, Goldstein, Schwartz, Altschuler & Nahins, P.C.*, 97 AD3d 612, 613-614 (2d Dept 2012) ("the complaint adequately stated a cause of action to recover damages for legal malpractice by alleging that during its representation of the plaintiff in an underlying lien foreclosure action, the defendant negligently filed an unverified notice of lien . . . that such negligence proximately caused the plaintiff to incur increased legal expenses by having to defend the validity of the lien against challenges by the defendant in the underlying action").

Accordingly, plaintiffs stated a cause of action to recover damages for legal malpractice, and the branch of defendants' motion seeking to dismiss this claim is denied.

Breach of Contract

In order to recover damages for breach of contract, plaintiff must demonstrate the existence of a contract, the plaintiff's performance pursuant to the contract, the defendant's breach of its contractual obligations, and damages resulting from the breach. *Investment Retrievers, Inc. v Fox*, 150 AD3d 1090 (2d Dept. 2017). In this cause of action, plaintiffs allege that defendants breached their retainer agreement with plaintiffs by failing to provide plaintiffs with proper and diligent legal services that they were entitled to. As a result of the breach, plaintiffs sustained damages in the form of legal fees paid to defendants and legal fees paid to correct defendants' wrongful conduct.

Courts routinely dismiss claims for breach of contract as duplicative of the legal malpractice cause of action when the causes of action "arose from the same operative facts and did not seek distinct and different damages." *Kliger-Weiss Infosystems, Inc. v Ruskin Moscou*

Faltischek, P.C., 159 AD3d 683, 684 (2d Dept 2018). However, “[a] cause of action to recover damages for breach of contract may be maintained against an attorney where there is a promise to perform and no subsequent performance, and such is not duplicative of a legal malpractice cause of action.” *Reidy v Martin*, 77 AD3d 903, 903 (2d Dept 2010) (plaintiff alleged that he paid the attorney a sum of money to make motions to vacate pleas . . . and that the attorney failed to do so”).

Here, the amended complaint sets forth that defendants were paid for legal services that they never performed, such as attending court hearings. As a result, plaintiffs alleged that they paid for, but did not receive, defendants’ legal services. Accordingly, viewing the amended complaint in the light most favorable to plaintiffs, they have sufficiently alleged a claim for breach of contract.

Judiciary Law 487

Judiciary Law § 487 provides for a cause of action alleging attorney misconduct and states, in pertinent part: “an attorney . . . who is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party . . . forfeits to the party injured treble damages, to be recovered in a civil action.” *See* Judiciary Law § 487 (1). “Allegations regarding an act of deceit or intent to deceive [under Judiciary Law § 487] must be stated with particularity; the claim will be dismissed if the allegations as to scienter are conclusory and factually insufficient.” *Facebook, Inc. v DLA Piper LLP (US)*, 134 AD3d 610, 615 (1st Dept 2015).

The amended complaint alleges that defendants concealed various court decisions, outcomes, lack of appearances and the failure to comply with discovery. The amended complaint also alleges that, after defendants were disqualified as counsel, they failed to request additional time for plaintiffs to seek new counsel and did not appear at the compliance conference, resulting in a default conference being scheduled and a motion for default judgment brought against plaintiffs. Nevertheless, even where, like here, there is a pattern of legal delinquency, an intent to deceive must be alleged. *See Dupree v Voorhees*, 102 AD3d 912, 913 (2d Dept 2013) (internal quotation marks and citations omitted) (“[t]o the limited extent that decisions of this Court have recognized an alternative predicate for liability under Judiciary Law § 487 based upon an attorney’s chronic, extreme pattern of legal delinquency, they should not be followed, as the only liability standard recognized in Judiciary Law § 487 is that of an intent to

deceive”); *see also Zappin v Comfort*, 2022 US Dist Lexis 156614, *45 (SD NY 2022) (internal quotation marks omitted) (“even egregious misconduct will not rise to the level of a violation of [Section] 487 if there is no pattern of intentional deceit or wrongdoing”).

Here, the amended complaint failed to allege with particularity that defendants intended to deceive plaintiffs. Accordingly, the third cause of action alleging a violation of Judiciary Law § 487 is dismissed.

All other arguments raised on this motion and evidence submitted by the parties in connection thereto have been considered by this court notwithstanding the specific absence of reference thereto.

CONCLUSION

Accordingly, it is hereby

ORDERED that the defendants’ motion to dismiss the complaint, pursuant to CPLR 3211 3211 (a) (7) is partially granted, to the extent that the third cause of action is dismissed, and the motion is otherwise DENIED; and it is further

ORDERED that the defendants shall serve their answer within ten days of service of this order with notice of entry (*see* CPLR 3211[f]).

The parties are directed to appear for a Preliminary Conference on a future date and time to be selected by the Preliminary Conference Part.

Dated: White Plains, New York
May 16, 2024



HON. WILLIAM J. GIACOMO, J.S.C.