

Puccio v Hoffman, Wachtell & Rao, LLP
2024 NY Slip Op 35505(U)
November 21, 2024
Supreme Court, Westchester County
Docket Number: Index No. 63724/2023
Judge: Janet C. Malone
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER-----X
ANTHONY PUCCIO,

Plaintiff,

Index No. 63724/2023

against

HOFFMAN, WACHTELL & RAO, LLP and
MARC J. WACHTELL,DECISION AND ORDER
Mot. Seq. 1

Defendants.

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MALONE, J.Overview

While performing work on a roof for Absolute Chimney & Home Improvement, LLC, Plaintiff suffered a catastrophic injury that left him a paraplegic. Plaintiff retained Defendant Hoffman, Wachtell & Rao, LLP, which assigned Defendant Marc J. Watchtell, Esq., to pursue his workers' compensation claim before the Workers' Compensation Board. Plaintiff's claim was denied by the Workers' Compensation Law Judge upon a finding that Plaintiff was not an employee of Absolute Chimney & Home Improvement, LLC, which was upheld by the New York State Appellate Division, Third Judicial Department.

On July 13, 2023, Plaintiff filed a Summons with Notice of a legal malpractice action (NYSCEF Doc. No. 1), and on January 26, 2024 filed a Complaint (NYSCEF Doc. No. 6) that alleges in the first and only cause of action, that Defendants' actions "constitute negligence, legal malpractice and a breach of fiduciary duty" (NYSCEF Doc. No. 6 at ¶ 24). As claims of breach of fiduciary duty and common-law negligence are redundant of a claim of legal malpractice (*Garten v. Shearman & Sterling LLP*, 52 A.D.3d 207, 207-208 [1st Dept. 2008]), only the claim for legal malpractice will be addressed herein.

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Defendants' Motion

Defendants' move pre-answer (CPLR R. 3211 [f]) by Notice of Motion (NYSCEF Doc. No 7) filed February 9, 2024, seeking an order dismissing Plaintiff's complaint on the grounds of documentary evidence and failure to state a cause of action under CPLR R. 3211 (a) (1) and (7), respectively (NYSCEF Doc. Nos. 8-12 and 21); and Plaintiff opposes the motion (NYSCEF Doc. Nos. 15-20).

Upon review and consideration of the Affirmation of Lisa L. Shrewsberry, Esq. with Exhibits A -C annexed, the Memorandum of Law in Support, and Memorandum of Law in Reply (NYSCEF Doc. No. 8-12, 21); and opposed by Plaintiff upon the Affirmation of John F. Harwick, Esq., with Exhibits A-G annexed, the Affirmation of Edward Obertubbesing, Esq., and Memorandum of Law in Opposition (NYSCEF Doc, No. 15-20).

The factual and procedural background of this case is taken from the Memorandum of Board Panel Decision (NYSCEF Doc. No. 10) filed on July 20, 2021 by the Administrative Review Division of the Workers' Compensation Board and the Memorandum and Order¹ (NYSCEF Doc. No. 11) decided and entered on December 7, 2023 by the New York State Supreme Court, Appellate Division, Third Judicial Department, *In the Matter of the Claim of Anthony Puccio*, Appellant, v. *Absolute Chimney & Home Improvement, LLC, et. al. (sic)*, Respondents. *(sic)* *Workers' Compensation Board*, Respondent, 222 A.D. 3d 1060 (3rd Dep't 2023). *See Caffrey v North Arrow Abstract & Settlement Servs., Inc.*, 160 A.D.3d 121, 126 (2d Dept. 2018) ("[T]he general rule is not inviolate, as courts may take judicial notice of a record in the same court of either the pending matter or of some other action")

Background

In September 1996, Plaintiff was hired as an employee by Absolute Chimney & Home Improvement, LLC² ("Absolute Chimney"), a domestic limited liability company with a principal place of business located in Yorktown Heights, Westchester County, New York, to do masonry

¹ "In New York, courts may take judicial notice of a record in the same court of either the pending matter or of some other action." *See Matter of Allen v. Strough*, 301 A.D. 2d 11, 18 (2d Dept. 2002) (internal citations omitted).

² Plaintiff is suing Absolute Chimney & Home Improvement, LLC in a separate action.

work associated with cleaning and repairing chimneys. Plaintiff was paid by cash and check until 2000 when Plaintiff began receiving W-2s.

In June 2016, Plaintiff and Absolute Chimney, by its owner Natale Longordo (“Longordo”), entered into a profit-sharing agreement (the “agreement”) to incentivize and encourage Plaintiff to continue working for Absolute Chimney. However, the agreement gave Absolute Chimney the authority to “terminate” Plaintiff, established Plaintiff as an operating manager of Absolute Chimney entitled to 50% of the net profit of Absolute Chimney, but without the authority to hire and fire employees, own the company trucks, write checks, examine Absolute Chimney’s books, records or tax returns, or meet with Absolute Chimney’s accountants for the preparation of tax returns. Plaintiff was, however, allowed to provide customers with work estimates and was given a credit card in his name to purchase materials and supplies for the work he performed on behalf of Absolute Chimney.

Although the State Insurance Fund (SIF) was not aware of the agreement executed in 2016, after it received a letter from Longordo in January 2017 informing it that Absolute Chimney was now an owner operator and no longer had employees in the field; the SIF did not consider Plaintiff an employee of Absolute Chimney for any time after 2016. On September 25, 2019, Plaintiff sustained his injuries and six days later Absolute Chimney terminated Plaintiff because he could not carry out his duties.

In December 2019, Plaintiff retained Defendant Hoffman, Wachtell & Rao, LLP, a domestic Limited Liability Partnership with a principal place of business in White Plains, New York, to pursue his claim for workers’ compensation benefits that listed Absolute Chimney as his employer and his position as foreperson.

Initially, SIF accepted Plaintiff’s claim with liability (Workers’ Compensation Law § 21-a [1]); however, in May 2020, the Workers’ Compensation Board advised Plaintiff that his payments were no longer without prejudice to liability, and that Absolute Chimney was deemed to have responsibility for the claim.

Defendants represented Plaintiff at a hearing held before a Workers’ Compensation Law Judge (WCLJ) on November 5, 2020 and despite witness testimony by Absolute Chimney’s

accountant³, office manager⁴, and the person who prepared the profit-sharing agreement⁵, that Plaintiff was an employee of Absolute Chimney, the WCLJ found their testimony was discredited by Absolute Chimney's tax returns, the audit reports of Absolute Chimney prepared by SIF, Plaintiff's tax returns, and the profit sharing agreement. In the decision filed January 20, 2021⁶, the WCLJ found that Plaintiff was not an employee of Absolute Chimney.

An administrative review of the WCLJ's decision was then undertaken by the Administrative Review Division Workers' Compensation Board on the issue of whether Plaintiff was an employee or owner of Absolute Chimney and entitled to Workers' Compensation Benefits.

In its decision filed July 20, 2021, the Review Board concurred with the WCLJ's January 20, 2021, decision that Plaintiff's claim was disallowed because there was insufficient evidence that Plaintiff was an employee of Absolute Chimney before or at the time of his accident. The Review Board then denied Plaintiff's application for reconsideration and/or full Board review by its decision filed June 29, 2022; denied Plaintiff's application for a rehearing or reopening by its decision filed September 27, 2022; and denied Plaintiff's application for reconsideration and/or full Board review by its decision filed November 8, 2022.

With new counsel, Plaintiff appealed the Review Board's decisions to the Third Judicial Department, which affirmed all four of the Review Board's decisions while noting that:

1. Despite Plaintiff having ample opportunity to do so, Plaintiff did not raise an objection regarding Workers' Compensation Law§ 21-a (3) at the underlying hearing, in his application for administrative review or in his application for reconsideration and/or full Board review. The first time that claimant challenged SIP's compliance with the statute was in his application for a rehearing or reopening.

³ The accountant who prepared the tax returns for absolute and Plaintiff testified that these returns were based upon erroneous information regarding Plaintiff's status and would need to be amended.

⁴ The office manager testified that Plaintiff was an employee of Absolute and she was not involved with payroll.

⁵ The person who prepared the profit-sharing agreement between Absolute and Chimney testified that Longordo made it clear that the Plaintiff was an employee, and the profit-sharing agreement was not intended to be a partnership agreement.

⁶ Neither the Review Board decision nor the Appellate decision provided the names of the witnesses.

2. It was notable that the WCLJ found that Longordo violated Workers' Compensation Law § 114-a⁷.
3. It was deeply troubling that Longordo was potentially deceiving Plaintiff about the existence of insurance protection and coverage.
4. Although a copy of the relevant workers' compensation policy was not included in the record, SIF's underwriter testified that such owners are automatically excluded from coverage thereunder.
5. Plaintiff's brief made only a passing reference to the denial of his respective application for reconsideration and/or full Board review without further substantive arguments, and deemed the challenges to the Board's June 29, 2022 and November 8, 2022 decisions to be abandoned.
6. SIF controverted the claim Longordo terminated the profit-sharing agreement and Absolute's relationship with Plaintiff effective October 1, 2019, when Plaintiff could no longer perform his duties.

Documentary Evidence

"A motion to dismiss a complaint pursuant to CPLR 3211(a)(1) on the ground that a defense is founded on documentary evidence may be granted only if the documentary evidence submitted by the moving party utterly refutes the factual allegations of the complaint and conclusively establishes a defense to the claims as a matter of law." "[T]o 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)(citations and internal quotations marks omitted). "Judicial records, . . . and any other papers, the contents of which are [] 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) (citations and internal quotations marks omitted).

⁷ Workers' Compensation Law § 114-a has three subdivisions, however the Third Department did not specify what section was violated and neither decision before the Court address the specifics of the violation found by the WCLJ against Longordo.

While the decisions referenced herein are documentary evidence and resolve the issue of Plaintiff's employment status with Absolute Chimney at the time of his accident, the decisions do not conclusively establish a defense by Defendants to Plaintiff's legal malpractice claim that Defendants failed to properly and adequately identify and raise significant dispositive issues before the WCLJ and Review Board which, had Defendants done so, would not have resulted in a waiver and would have precluded SIF from controverting Plaintiff's claim, causing him to suffer the loss of wages and to incur medical expenses.

Therefore, Defendants' motion to dismiss the complaint on the grounds of documentary evidence is denied.

Failure to State a Cause of Action

In determining "a motion to dismiss for failure to state a cause of action pursuant to CPLR R. 3211 [a] [7], the "well-settled task [of the court] is to determine whether, accepting as true the factual averments of the complaint, plaintiff can succeed upon any reasonable view of the facts stated." *Aristy-Farer v State of New York*, 29 NY3d 501, 509 [2017] [citations and internal quotation marks omitted]; see *Morgenthau & Latham v Bank of N.Y. Co.*, 305 AD2d 74, 78 [1st Dept 2003]; see also *Held v Kaufman*, 91 NY2d 425, 432 [1998]. "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). Additionally, the court may freely consider affidavits and affirmations submitted by the plaintiff to remedy any defects in the complaint. *Leon v. Martinez*, 84 NY2d 83, 88 (1994); *Gaskin v Harris*, 98 AD3d 941, 942 (2d Dep't 2012) .

To establish causation in a legal malpractice action, a plaintiff must show that he would have prevailed in the underlying action or would not have incurred any damages, but for the lawyer's negligence. *Katsoris v. Bodnar & Milone, LLP*, 186 A.D.3d 1504, 131 N.Y.S.3d 89 (2d Dep't 2020). 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. *Janker v. Silver, Forrester & Lesser, P.C.*, 135 A.D.3d 908, 24 N.Y.S.3d 182 (2d Dep't 2016); *Bua v. Purcell & Ingrao, P.C.*, 99 A.D.3d 843, 952 N.Y.S.2d 592 (2d Dep't 2012).

Here, Defendants argues that Plaintiff's complaint fails to state a cause of action under CPLR 3211(a)(7): That "even accepting the plaintiff's allegations as true, and according plaintiff (*sic*) every favorable inference, the plaintiff has failed to plead specific factual allegations demonstrating that, but for the law firm's alleged negligence, there would have been a more favorable outcome on his worker's compensation claim. Rather, plaintiff merely alleges that the law firm failed to "raise significant dispositive issues" and that the Workers' Compensation Board 'should have been precluded' from denying the claim. Such allegations are entirely vague, and any assertion regarding causation and damage is accordingly entirely speculative and conclusory." *See* Memorandum of Law in Support at NYSCEF Doc. No. 12 at pgs. 2-3, citing *Denisco v. Uysal*, 195 A.D. 3d 989, 146 N.Y.S.3d 813 (2d Dep't 2021) (complaint dismissed where client failed to plead specific factual allegations demonstrating that but for the attorney's negligence he would have received workers' compensation benefits).

Accepting Plaintiff's allegations as true and drawing all favorable inferences from same, Plaintiff asserts that Defendants failed to exercise the ordinary reasonable skill and knowledge possessed by a member of the legal community by not recognizing and addressing significant issues related to the workers' compensation insurance carrier's actions and compliance or noncompliance with provisions of WCL Section 21-a (1)⁸ and failed to properly preserve those issues for administrative and appellate review. Plaintiff further asserts that Defendants also failed to recognize and assert on behalf of Plaintiff that the carrier's actions and compliance or noncompliance required a finding and determination by the Workers' Compensation Board that the carrier had accepted liability in Plaintiff's workers' compensation claim and should have been precluded from subsequently raising issues controverting the claim. Therefore, Plaintiff asserts, as a direct and proximate result of the defendants' malpractice Plaintiff suffered damages in the form

⁸"[I]n any instance in which an employer is unsure of the extent of its liability for a claim for compensation by an injured employee pursuant to this chapter, such employer may initiate compensation payments and payments for prescribed medicine and continue such payments for one year, without prejudice and without admitting liability, in accordance with a notice of temporary payment of compensation, on a form prescribed by the board." WCL § 21-a (1).

of permanent loss of workers' compensation benefits. *See* NYSCEF Doc. No. 9 at ¶¶ 25-26, 30-31; Doc. No. 20 at pg. 7. By including these assertions, Plaintiff has alleged that a more favorable outcome in his workers' compensation claim would have been reached if not for Defendants' negligence.

Accordingly, Defendants' motion to dismiss Plaintiff's complaint on the ground that it fails to state a cause of action is denied, therefore; it is

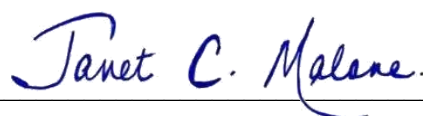
ORDERED, that the pre-answer motion of Defendants' Hoffman, Wachtell & Rao, LLP and Marc J. Wachtell is denied in its entirety; and it is further

ORDERED, that Defendants have 20 days from the date of this Order or no later than December 11, 2014 to file its answer; and it is further

ORDERED, that the parties are to submit a Preliminary Conference Stipulation which can be located at [west-general-civil-preliminary-conf-stip-form.pdf \(nycourts.gov\)](https://www.nycourts.gov/e-filing/e-filing-general-civil-preliminary-conf-stip-form.pdf) no later than **January 10, 2025** or appear on **January 17, 2025** at 4:00 p.m. for a Preliminary Conference with Benjamin M. Wright, Court Attorney Referee via Microsoft Teams [Click here to join the videoconference](#).

This constitutes the decision and order of the court.

Dated: November 21, 2024
White Plains, New York



HON. JANET C. MALONE, J.S.C.

To all Counsel via NYSCEF