

Emamian v Beldock Levine & Hoffman LLP

2025 NY Slip Op 30238(U)

January 21, 2025

Supreme Court, New York County

Docket Number: Index No. 161853/2023

Judge: Paul A. Goetz

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. PAUL A. GOETZ PART 47

Justice

-----X

EFFAT S EMAMIAN,

Plaintiff,

- v -

BELDOCK LEVINE & HOFFMAN LLP, JONATHAN C
MOORE

Defendants.

-----X

INDEX NO. 161853/2023

MOTION DATE 10/16/2024

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21

were read on this motion to/for DISMISS.

In this legal malpractice action, defendants move pre-answer pursuant to CPLR § 3211 §§ (a)(1), (5), and (7), to dismiss the complaint as against them. Defendants argue that the claims are time barred, that plaintiff has failed to state a cause of action on which relief can be sought, and that the documentary evidence submitted resolves all factual issues as a matter of law.

BACKGROUND

On May 18, 2007, plaintiff commenced an action against Rockefeller University, entitled *Emamian v. Rockefeller University*, 1:09-cv-033919 (PGG) (SDA) (the “Rockefeller Action”) in the United States District Court for the Southern District of New York (“SDNY”) (NYSCEF Doc No 1 at ¶ 2). On July 6, 2016, plaintiff and defendants entered into an Attorney-Client Retainer Agreement to represent plaintiff in the Rockefeller Action (*id.* at ¶ 16). On February 28, 2018, after trial, the jury returned a verdict in plaintiff’s favor on her NYCHRL claim and awarded Plaintiff \$250,000 in back pay from 2007-2010 and \$2,000,000 in emotional distress damages (the emotional distress damages award was later reduced to \$200,000) (*id.* at ¶ 32 – 34). On

December 12, 2018, the Clerk entered the Judgment reflecting an award of \$250,000 in backpay and \$200,000 for physical, mental and/or emotional damages, but the order did not award plaintiff pre-verdict, pre-judgment interest (NYSCEF Doc No 9).

Following cross-appeals, on October 29, 2021 plaintiff filed a motion in the Rockefeller Action for an award of attorneys' fees and costs and pre- and post-judgment interest (NYSCEF Doc No 10). The motion was referred to a Magistrate Judge for a Report and Recommendation, which was issued on February 9, 2022 (*id.*). Based upon that report, plaintiff moved in the underlying action to adjust the December 12, 2018 judgment to include pre- and post-judgment interest, and an award of attorneys' fees and costs. Ultimately, the SDNY determined that plaintiff was entitled to post-verdict, pre-judgment interest, on both the back pay, and emotional distress damages, but she was not entitled to pre-verdict, pre-judgment interest.

The SDNY determined that the key distinction between these types of interest is that, post-verdict, pre-judgment interest, pursuant to CPLR § 5002, "requires the clerk of the court to add to a judgment in any action interest from the date of the verdict to entry of judgment" (*id.* at 10; [quoting *Lee v Joseph E. Seagram & Sons, Inc.*, 592 F2d 39, 42 [2d Cir 1979]]). Thus, the clerk failing to do so represents a "clerical error", which pursuant to FRCP Rule 60, "The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment."

However, the SDNY determined that as for pre-verdict, pre-judgment interest, "the judgment's failure to address pre-judgment interest cannot be regarded as a clerical error" (NYSCEF Doc No 10 at 21). The SDNY again citing *Lee* determined that the proper procedural course to correct this error is a motion pursuant to FRCP Rule 59(e) to alter or amend a judgment. However, Rule FRCP 59(e) states "[a] motion to alter or amend a judgment must be

filed no later than 28 days after the entry of the judgment,” and therefore, plaintiff’s motion in the Rockefeller action was untimely (*id.* at 22).

Plaintiff’s complaint, alleges that defendants: (1) failed to present evidence during trial establishing plaintiff’s economic damages caused by discrimination; (2) failed to request that the SDNY include a punitive damages charge to the jury; (3) failed to properly object to the SDNY’s decision to exclude a jury instruction on punitive damages; (4) failed to properly object to the SDNY’s jury instruction on back-pay damages; (5) failed to timely file an appropriate application with the SDNY for pre-judgment interest on the sum recovered; (6) acted contrary to plaintiff’s instructions and in furtherance of defendants’ self-interest; and (7) refused to deduct plaintiff’s out-of-pocket attorneys’ fees and expenses before calculating defendants’ claimed fee in the Rockefeller Action.

Plaintiff further asserts causes of action for Breach of Fiduciary Duty, and Breach of Contract.

DISCUSSION

Statute of Limitations

Defendants argue that the statute of limitations has run on plaintiff’s legal malpractice causes of action. Plaintiff argues that the statute of limitations has been tolled by the continuous representation doctrine. Pursuant to CPLR § 214(6), the statute of limitations on a legal malpractice action is three years (*Gerschel v Christensen*, 143 AD3d 555, 556 [1st Dept 2016]).

However, “a plaintiff may be able to avoid dismissal by asserting that the statute of limitations is tolled by the continuous representation doctrine, or at least showing that there is an issue of fact as to its application” (*Sendar Dev. Co., LLC v CMA Design Studio P.C.*, 68 AD3d 500, 503 [1st Dept 2009]). “The doctrine applies when a plaintiff shows that he or she relied

upon an uninterrupted course of services related to the particular duty breached” (*id.*). “[A] person [is not] expected to jeopardize his pending case or his relationship with the attorney handling that case during the period that the attorney continues to represent the person” (*Shumsky v Eisenstein*, 96 NY2d 164, 167 [2001]). Accordingly, “[a]pplication of the continuous representation or treatment doctrine is ... generally limited to the course of representation concerning a specific legal matter” (*id.* at 168).

Here, while the majority of plaintiff’s malpractice claims arise from alleged acts in 2019, defendants continued to represent plaintiff in the underlying matter until July of 2023 (NYSCEF Doc No 7). Indeed, the Southern District’s July 11, 2023 decision and order was the final determination on plaintiff’s request for pre-verdict, pre-judgment interest, and “to avoid unnecessary malpractice lawsuits ... [attorneys in the underlying action must be] given the opportunity to rectify their clients’ unfavorable result” (*Grace v Law*, 24 NY3d 203, 210 [2014]). Therefore, under the continuous representation doctrine, plaintiff had three years from the July 11, 2023 decision to commence this action; consequently her legal malpractice claims are timely.

Accordingly, the legal malpractice claims will not be dismissed on statute of limitations grounds.

Documentary Evidence

“A motion pursuant to CPLR 3211(a)(1) to dismiss the complaint on the ground that the action is barred by documentary evidence may be granted only where the documentary evidence utterly refutes the plaintiff’s factual allegations, thereby conclusively establishing a defense as a matter of law” (*Phillips v Taco Bell Corp.*, 152 AD3d 806, 806 [2d Dept 2017]). “To constitute documentary evidence, the evidence must be unambiguous, authentic, and undeniable, such as judicial records and documents reflecting out-of-court transactions such as mortgages, deeds,

contracts, and any other papers, the contents of which are essentially undeniable (*id.* at 807 [internal citations and quotation marks omitted]). “[E]mails can qualify as documentary evidence if they meet the essentially undeniable test” (*Amsterdam Hosp. Group, LLC v Marshall-Alan Assoc., Inc.*, 120 AD3d 431, 433 [1st Dept 2014]).

Failure to State a Claim

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, [courts] 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*, 42 NY3d 321 [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]). “Conclusory allegations of damages or injuries predicated on speculation cannot suffice for a malpractice action, and dismissal is warranted where the allegations in the complaint are merely conclusory and speculative” (*Katsoris v Bodnar & Milone, LLP*, 186 AD3d 1504, 1506 [2d Dept 2020]). “In order to survive a motion to dismiss, a

plaintiff's complaint in an action for legal malpractice must show that but for counsel's alleged malpractice, the plaintiff would not have sustained some actual ascertainable damages”

(*Gopstein v Bellinson Law, LLC*, 227 AD3d 465, 466 [1st Dept 2024]).

Here, plaintiff's malpractice allegations fall into three categories. First, plaintiff alleges that but for the negligence of defendants, she would have received a more favorable sum of damages at trial. She argues that defendants failed to present evidence of economic damages at trial, and failed to properly argue for, or object to jury instructions on punitive and back-pay damages. A cause of action for legal malpractice cannot be sustained for these allegations because plaintiff's complaint “lack[s] any factual allegations to support h[er] conclusion that [s]he would have succeeded in achieving a better result in the ... action but for [defendant]'s negligence” (*id.* at 466).

However, plaintiff has stated a cause of action upon which relief can be sought as to her second category, for failing to move to amend the judgment to include pre-judgment interest. As the Southern District, determined in the July 11, 2023 decision and order:

[under *Lee*] Rule 59¹, and not Rule 60², governs where a plaintiff is “entitled to pre-judgment interest from some date [under] [CPLR §§]5001(b), (c).” In so holding, the [Lee] court noted that “it was the failure of plaintiffs to bring this statutory entitlement to the attention of the court until almost two years after the entry of the judgment that created the problem, not any clerical oversight or error.”

(NYSCEF Doc No 10 at 22).

While, this determination alone, cannot and does not establish defendants' liability, at this early stage of litigation, and “accord[ing] [] plaintiff the benefit of every reasonable

¹ FRCP Rule 59(e) states “Motion to Alter or Amend a Judgment. A motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment.”

² FRCP Rule 60(a) states “Corrections Based on Clerical Mistakes; Oversights and Omissions. The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with or without notice.”

inference” on a motion to dismiss pursuant to CPLR § 3211(a)(7), plaintiff has stated a cause of action for legal malpractice (*Bangladesh*, 226 AD3d at 85-86). Here, unlike the first category plaintiff can establish “actual, ascertainable damages” that would have been collected “but for” defendants’ alleged negligence (*Katsoris*, 186 AD3d at 1506).

Plaintiff’s final category of legal malpractice allegations pertain to defendants allegedly transferring the jury award to defendants and failing to deduct “out of pocket” costs and expenses paid by plaintiff before assessing their fee. Plaintiff fails to detail how defendants allegedly miscalculated the fee and thus an action cannot be maintained on these grounds.

Breach of Fiduciary Duty / Breach of Contract

Defendants argue that plaintiff’s breach of fiduciary duty and breach of contract claims must also be dismissed as duplicative of her legal malpractice claims. Indeed, the complaint lists the same allegations for these causes of action as it does for the legal malpractice claims. When, “causes of action alleging breach of fiduciary duty and [contract] are duplicative of the legal malpractice cause of action, they arise from the same facts as those underlying the legal malpractice cause of action, and do not allege distinct damages” and must be dismissed (*Mackey Reed Elec., Inc. v Morrone & Assoc., P.C.*, 125 AD3d 822, 823 [2d Dept 2015]).

Plaintiff argues in her opposition to this motion that she should be allowed to replead these causes of action pursuant to CPLR § 3211(e) to distinguish the alleged acts that support causes of action for breach of contract and fiduciary duty. While, plaintiff’s allegations that defendants failed to properly deduct plaintiff’s out of pocket costs from their fee was not sufficiently plead under a legal malpractice theory, these allegations could support a breach of contract claim. Considering the strong “policy preference for the determination of actions on the merits” (*Goldstein v. New York State Urban Dev. Corp.*, 13 NY3d 511 [2009]), plaintiff will be

permitted to replead her breach of contract cause of action to properly distinguish the claim and her legal malpractice claim.

Accordingly, it is,

ORDERED that defendants' motion to dismiss is granted in part, insofar as the legal malpractice claims arising out of acts set forth in paragraph 52 of the Complaint as (i), (ii), (iii), (iv), (vi), and (vii) (Complaint, NYSCEF Doc No 1 ¶ 52) are dismissed; and it is further

ORDERED that defendants' motion to dismiss the legal malpractice claim arising from the act set forth in the paragraph 52 of the Complaint as (v) (NYSCEF Doc No 1 ¶ 52) is denied; and it is further

ORDERED that defendants' motion to dismiss the breach of fiduciary duty claim is granted; and it is further

ORDERED that plaintiff will be given leave to replead the complaint, in part, as follows: leave is granted to amend the third cause of action, but leave is denied with respect to the second cause of action; and it is further

ORDERED that, within 20 days from entry of this order, plaintiff shall serve a copy of this order with notice of entry and the amended complaint in conformity herewith; and it is further

ORDERED that the defendant shall answer the amended complaint or otherwise respond thereto within 20 days from the date of service.


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<u>1/21/2025</u>					
DATE				PAUL A. GOETZ, J.S.C.	
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/>
				REFERENCE	