

Ginsburg & Misk LLP v Eshaghpour

2025 NY Slip Op 32419(U)

July 9, 2025

Supreme Court, New York County

Docket Number: Index No. 161655/2024

Judge: Mary V. Rosado

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. MARY V. ROSADO PART **33M**

Justice

-----X

GINSBURG & MISK LLP,

Plaintiff,

- v -

ROBIN ESHAGHPOUR, 245-02 OWNER LLC

Defendant.

-----X

INDEX NO. 161655/2024

MOTION DATE 03/17/2025

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 24

were read on this motion to/for DISMISS.

Upon the foregoing documents, and after a final submission date of May 9, 2025, Plaintiff Ginsburg & Misk LLP’s (“Plaintiff”) motion to dismiss Defendants Robin Eshaghpour (“Eshaghpour”) and 245-02 Owner LLC’s (“245-02 Owner”) (collectively “Defendants”) legal malpractice counterclaim pursuant to CPLR 3211(a)(1) and (a)(7) is granted in part and denied in part.

I. Background

From 2019 until July 2024, Plaintiff represented 245-02 Owner in a prior real estate dispute captioned *245-02 Owner LLC v. CVS Albany L.L.C.*, Index No. 719630/2018 (the “Underlying Action”).¹ The Underlying Action proceeded to trial on June 24, 2024, and settled on July 16, 2024 at the close of 245-02 Owner’s case in chief. Plaintiff alleges that Defendants failed to pay \$114,190.00 in legal fees and \$60,089.86 for expert witness fees, and now sues to recover those

¹ The law firm Borah, Goldstein, Altschuler, Nahins & Goidel, P.C. initiated the Underlying Action on December 21, 2018. On December 23, 2019, Plaintiff assumed representation of 245-02 Owner pursuant to a consent to change attorney, which was filed on the Underlying Action’s NYSCEF Docket as NYSCEF Doc. 83.

fees. In turn, Defendants assert a counterclaim for legal malpractice, alleging they were forced into a less favorable settlement due to Plaintiff's malpractice. Specifically, Defendants allege Plaintiff failed to prepare witnesses for trial, failed to retain and identify experts before trial, failed to obtain certain records for use at trial, failed to advise of the items of proof required to prove damages at trial, and failed to "ensure the matter was assigned to the commercial division." Plaintiff moves to dismiss the counterclaim pursuant to CPLR 3211(a)(1) and (a)(7), which Defendants oppose.

II. Discussion

A. Standard

When reviewing a pre-answer motion to dismiss for failure to state a claim, the Court must give the Plaintiff the benefit of all favorable inferences which may be drawn from the pleadings and determines only whether the alleged facts fit within any cognizable legal theory (*Sassi v Mobile Life Support Services, Inc.*, 37 NY3d 236, 239 [2021]). All factual allegations must be accepted as true (*Allianz Underwriters Ins. Co. v Landmark Ins. Co.*, 13 AD3d 172, 174 [1st Dept 2004]). A motion to dismiss for failure to state a claim will be granted if the factual allegations do not allow for an enforceable right of recovery (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 142 [2017]). A motion to dismiss based on documentary evidence is appropriately granted only when the documentary evidence utterly refutes the plaintiff's factual allegations, conclusively establishing a defense as a matter of law (*Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314 [2002]). The documentary evidence must be unambiguous, of undisputed authenticity, and its contents must be essentially undeniable (*VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC*, 171 AD3d 189, 193 [1st Dept 2019]).

To successfully allege legal malpractice, it must be shown “(1) the attorney was negligent; (2) the attorney’s negligence was a proximate cause of plaintiff’s losses; and (3) plaintiff suffered actual damages” (*RTW Retailwinds, Inc. v Colucci & Umans*, 213 AD3d 509, 510 [1st Dept 2023]).

B. Failure to Have Case Assigned to Commercial Division

Defendants’ allegations of legal malpractice grounded in the failure to have the Underlying Action assigned to the Commercial Division are dismissed. The NYSCEF docket in the Underlying Action shows Plaintiff was not the attorney of record who filed the request for judicial intervention, which would have requested assignment to the Commercial Division. Plaintiff assumed representation after there had already been motion practice on a preliminary injunction, and preliminary and compliance conferences. Plaintiff cannot be held responsible for the case not being assigned to the Commercial Division. Nor is there any support for the claim that an attorneys’ failure to have a commercial lease dispute referred to the Commercial Division constitutes malpractice. Nor are there any damages arising from the case proceeding in a General IAS part as opposed to the Commercial Division. Therefore, the allegations of malpractice based on the failure to have the Underlying Action assigned to the Commercial Division are dismissed.

C. Failure to Retain & Identify Experts Prior to Trial, Failure to Obtain Documents, and Failure to Prepare Witnesses

Plaintiff’s motion to dismiss Defendants’ allegations of malpractice grounded in Plaintiff’s alleged failure to (1) adequately retain and identify experts prior to trial; (2) to obtain certain documents, and (3) to prepare witnesses for trial is denied. Plaintiff’s two arguments for dismissal are: (1) that Defendants voluntarily entered a settlement of the Underlying Action, and (2) Defendants’ malpractice claim is a non-actionable disagreement with Plaintiff’s legal strategy.

As to Plaintiff’s first argument, it is well established that “a claim for legal malpractice is viable, despite a settlement of the underlying action, if it is alleged that settlement of the action

was compelled by the mistakes of counsel” (*Garnett v Fox, Horan & Camerini, LLP*, 82 AD3d 435, 435 [1st Dept 2011] quoting *Bernstein v Oppenheim & Co., P.C.*, 160 AD2d 428, 430 [1990]). The record establishes that a motion for summary judgment filed by Plaintiff on behalf of Defendant was denied at least in part due to Plaintiff’s failure to authenticate properly certain exhibits in support of the motion for summary judgment. Moreover, the trial court in the Underlying Action issued an order precluding Glenn Adams (“Mr. Adams”), a general contractor retained by Plaintiff to opine on 245-02 Owner’s damages, from testifying based on insufficient pre-trial disclosures. The trial court also limited the testimony of Stephanie Nussbaum, a liability expert retained by Plaintiff. Finally, accepting the facts alleged as true, Plaintiff failed to subpoena Department of Building Records, resulting in certain records in support of 245-02 Owner’s case being deemed inadmissible. According to the uncontroverted affidavit of Mr. Eshaghpour, Plaintiff failed to prepare either himself or his expert, Ms. Nussbaum, resulting in muddled testimony and damaging the presentation of 245-02 Owner’s case. At the motion to dismiss stage, where the Court is obliged to accept the allegations as true, there is a sufficient showing that Plaintiff’s alleged mistakes may have compelled Defendants to accept a less favorable settlement.

Likewise, Defendants’ second argument, which claims the malpractice counterclaim is simply a disagreement with Plaintiff’s reasonable legal strategy, does not require dismissal at the pleading stage (*see Springs v L&D Law P.C.*, 234 AD3d 422, 424 [1st Dept 2025]). At this juncture, without a more complete record, the Court cannot find as a matter of law that Plaintiff’s alleged failure to advise Defendants to compile certain pertinent documents in their possession, failure to subpoena certain Department of Buildings Records and failure to sufficiently make certain pre-trial disclosures was a reasonable trial strategy (*see, e.g. Macquarie Capital (USA) Inc. v Morrison & Foerster LLP*, 157 AD3d 456, 456-57 [1st Dept 2018]; *Escape Airports (USA), Inc.*

v Kent, Beatty & Gordon, LLP, 79 AD3d 437, 439 [1st Dept 2010] [counsel cannot shift to client legal responsibility for which it was hired due to counsel's superior knowledge]).

Simply put, given the legal standard on a motion to dismiss, and given the lack of documentary evidence refuting Defendants' allegations, the Court denies Plaintiff's motion to dismiss the counterclaim alleging legal malpractice. The motion is granted solely to the extent that allegations of malpractice arising from a failure to have the Underlying Action assigned to the Commercial Division are dismissed.

Accordingly, it is hereby,

ORDERED that Plaintiff Ginsburg & Misk LLP's motion to dismiss Defendants Robin Eshaghpour and 245-02 Owner LLC's legal malpractice counterclaim is granted in part and denied in part; and it is further

ORDERED that the motion is granted solely to the extent that allegations of malpractice arising from the alleged failure to have the Underlying Action assigned to the Commercial Division are dismissed, and the remainder of Plaintiff's motion is denied; and it is further

ORDERED that within twenty days of entry of this Decision and Order, Plaintiff shall serve a reply to Defendants' Counterclaim; and it is further

ORDERED that the parties shall meet and confer immediately and submit a proposed preliminary conference order to this Court via e-mail at SFC-Part33-Clerk@nycourts.gov, but in no event shall the proposed conference order be submitted any later than August 20, 2025;² and it is further

² This date is for submission of a proposed order only – it is not to appear for a conference. Parties shall contact the Court to be scheduled for an in-person conference should any discovery disputes requiring Court intervention arise.

ORDERED that within ten days of entry, counsel for Defendants shall serve a copy of this Decision and Order, with notice of entry, on all parties via NYSCEF.

This constitutes the Decision and Order of the Court.

<u>7/9/2025</u> DATE					<u>Mary V Rosado JSC</u> HON. MARY V. ROSADO, J.S.C.			
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE