

Brown v Gaines

2011 NY Slip Op 33540(U)

December 29, 2011

Supreme Court, Nassau County

Docket Number: 2205/11

Judge: Joel K. Asarch

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU: PART 17

-----X
ARTHUR BROWN,

Plaintiff,

- against -

DECISION AND ORDER

Index No: 2205/11

**ALAN R. GAINES, ESQ., THE LAW OFFICE
OF ALAN R. GAINES, AND GAINES AND
MANNO, ESQS. AND JOSEPH MANNO, ESQ.,**

Motion Sequence No: 001
Original Return Date: 07-15-11

Defendants.
-----X

P R E S E N T :

**HON. JOEL K. ASARCH,
Justice of the Supreme Court.**

The following named papers numbered 1 to 6 were submitted on this Notice of Motion on August 29, 2011:

Papers numbered

Notice of Motion and Affirmation in Support	1-2
Memorandum of Law	3
Affidavit in Opposition	4
Reply Affirmation	5
Memorandum of Law	6

The motion by the defendants, Alan R. Gaines, The Law Office of Alan R. Gaines, Gaines and Manno, Esqs., and Joseph Manno Esq., seeking an Order pursuant to CPLR §3211 (a)(1, 5, and 7), dismissing the Complaint of the *pro se* plaintiff, Arthur Brown¹, with prejudice, is decided as follows:

¹The Court is uncertain if the plaintiff continues to be self-represented, as the opposing papers herein were submitted under the legal back of Richard J. Reisch, Esq.

On or about February 14, 2011, the plaintiff commenced the within action for legal malpractice against defendant attorneys and law firms, Alan R. Gaines, The Law Office of Alan R. Gaines, Gaines and Manno, Esqs., and Joseph Manno Esq., by filing a Summons with Notice with the Nassau County Clerk's office. The plaintiff seeks damages in the sum of \$100,000,000. On June 1, 2011, the plaintiff filed a Supplemental Summons and Complaint with the County Clerk, alleging that in 2006, he retained the defendants to prosecute claims against one Elchonon Kass and to prosecute four other actions. The plaintiff contends that service upon the defendant Kass was not properly made and the matter against defendant Kass was dismissed "as a direct and proximate result of the neglect of Defendants to produce competent witnesses and introduce exhibits" at the traverse hearing (Complaint, paragraph "6"). The plaintiff alleges that the defendants committed malpractice in that they were negligent in their handling of the traverse hearing, that they failed to recommence an action against another defendant, Aaron Feinberg, and that their refusal to release the plaintiff's case files prevented him from successfully prosecuting his remaining actions before the Court. On or about June 2, 2011, the Supplemental Summons and Complaint was served upon the defendants.

It should be noted that in September 2009, the Nassau County Supreme Court (Murphy, J.) joined for trial six actions involving the plaintiff herein. These joined matters are presently pending in this Court. Included in these actions are complaints alleging real estate fraud against defendants Aaron Feinberg ("Feinberg") and Elchanon Kass ("Kass").

As concerns defendant Kass, following a traverse hearing on November 19, 2007 in the action against him under index number 11124/06, the Court (Feinman, J.) determined that service of process was defective and the case against him was dismissed. In 2009, the Court determined that service upon defendant Feinberg in another action was improper and the Court dismissed the

complaint as to Feinberg.

THE UNDERLYING FACTS

The plaintiff owned certain real property located in Atlantic Beach, New York, which was mortgaged with Washington Mutual Bank and the Bank of America as Successor by Merger to Fleet National Bank, NA. According to the plaintiff, he was unable to make mortgage payments. He and Kass then entered into an agreement where Kass would pay the mortgage and property taxes until the plaintiff could repay him. Plaintiff would retain ownership of the property, notwithstanding that he deeded the property to Kass. In the pending actions, it appears as if Kass is claiming a right to the real property and plaintiff is alleging that Kass committed acts of fraud against him. Plaintiff is also alleging that he is a victim of foreclosure rescue fraud and Washington Mutual and/or Bank of America are foreclosing on the mortgage(s) on the Atlantic Beach property.

The plaintiff is also seeking relief pursuant to an alleged lien that he filed against certain Brooklyn real property, owned by Kass and another defendant, based on construction work he performed on that property. He is also seeking an accounting of and a constructive trust over a limited liability company that he formed with defendant Kass [Exhibit C to moving papers, Decision and Order of Hon. Karen V. Murphy, dated September 14, 2009].

The foregoing facts give rise to the six actions that were joined by the Court as aforesaid. According to the Complaint herein, the defendant attorneys were retained by the plaintiff to represent him in the actions filed in the Nassau County Supreme Court, captioned *Arthur Brown v. Elchanon Kass* ("Kass Action"), Index No. 11124/2006 and *Dr. Arthur Brown v. Aaron Feinberg and Elchanon Kass* ("Feinberg Action"), Index No. 9493/2008.

The Kass Action was dismissed pursuant to a traverse hearing held in this Court on

November 19, 2007 before the Hon. Thomas Feinman. The action was recommenced and a new index number was assigned (Index No. 020937/2007). The Court, in a prior decision by the Hon. Karen V. Murphy, determined that service upon defendant Feinberg in the Feinberg action was improper and dismissed the action as to that defendant.

According to the record, in April 2008, the plaintiff submitted a Consent To Change Of Attorney to this Court, substituting Peter J. Pruzan, Esq. for defendant Alan R. Gaines, as attorney of record in the foreclosure matter against Washington Mutual. The plaintiff, in his Affidavit in Opposition, stated that he submitted a similar consent form for the other related matters (no such consents are attached to the opposition papers).

DISCUSSION

Regarding the issue that the plaintiff is time-barred from commencing his malpractice cause of action under CPLR § 214(6), the statute of limitations for legal malpractice is three years from the date the act of malpractice is committed, whether the action is brought as a malpractice action or a breach of contract claim (see *Levin v. Pricewaterhouse Coopers, LLP*, 302 AD2d 287 [1st Dept. 2003]). Generally, the statute of limitations runs from the time of the alleged malpractice, not from the time it was discovered (see *McCoy v. Feinman*, 99 NY2d 295 [2002]).

However, the “continuing representation” doctrine can operate to toll the running of the Statute of Limitations if it is clear that the defendant attorneys continued to represent the plaintiff in the disputed matter. Here, there is nothing in the record that clearly establishes as to when the attorney/client relationship ended, particularly since the evidence indicates that the defendant attorneys continued to represent the plaintiff in the other related actions (see Reply Memorandum of Law, p. 2, ¶ 2, *Stampfel v. Eckhardt*, 143 AD2d, [2nd Dept 1988]). It is noted that this branch of

defendants' argument pursuant to CPLR §3211 (a) (5) is based on the theory that plaintiff's cause of action may not be maintained because of the statute of limitations, and accordingly, defendants' motion cannot be granted under this specific paragraph of the statute.

As to the specific requirements under CPLR §3211 (a) (1), generally, a motion to dismiss pursuant to this section of the statute will be granted only if the documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim (see *Fontanetta v. Doe*, 73 A.D.3d [2nd Dept 2010], quoting Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C3211:10 at 22). In sum, the analysis is two-pronged; the evidence must be documentary and it must resolve all the outstanding factual issues at bar.

For evidence to be considered as documentary, it must be unambiguous, authentic, and undeniable. The term "documentary evidence" as referred to in CPLR 3211(a)(1) typically means judicial records such as judgments and orders or out-of-court documents such as contracts, deeds, wills, and/or mortgages and includes "[a] paper whose content is essentially undeniable and which, assuming the verity of its contents and the validity of its execution, will itself support the ground on which the motion is based" (Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:10, at 20, *Teitler v. Max J. Pollack & Sons*, 288 AD2d 302 [2nd Dept 2001]).

On such a motion, if the documentary evidence submitted by the defendant refutes the plaintiff's factual allegations and conclusively establishes a defense to the asserted claims as a matter of law, the motion may be granted (see *Logatto v. City of New York*, 51 AD3d 984 [2 Dept 2008]). Here, the evidence submitted by the defendants is documentary and not only does it support their arguments, it clearly refutes the plaintiff's claims. The plaintiff claims that he was damaged because the defendant attorneys mishandled the traverse hearing in the Kass Action and that they never

recommended the action against that defendant. However, the evidence clearly indicates that the action was recommended and is still pending before this Court (see Notice of Motion, Exhibits C, D).

In light of the foregoing, to prevail in an action to recover damages for legal malpractice, a plaintiff must establish that the defendant 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 that duty proximately caused the plaintiff to **sustain actual and ascertainable damages** (emphasis added). A plaintiff must also show that he or she would have prevailed in the underlying action or would not have incurred any damages, but for the attorney's negligence (see *Carrasco v. Pena & Kahn*, 48 AD3d 395 [2nd Dept 2008]).

Not only does the documentary evidence indicate that the Kass Action is still active in this Court, the plaintiff has failed to show any actual and ascertainable damages resulting from such alleged failure by defendants caused by their alleged mishandling of the traverse hearing. Accordingly, the defendants' motion as to the alleged act of malpractice in the Kass Action, and under CPLR §3211 (a) (1), is granted.

Moreover, the documentary evidence in the record, the Consent to Change of Attorney, the Letter from Peter J Pruzan, Esq. dated June 2 2008, and the plaintiff's own statements in his Affidavit in Opposition, indicate that the defendants were no longer representing the plaintiff during the time when the six actions were joined in September, 2009, and when the action as to Feinberg was dismissed in September, 2009 (see Affidavit in Opposition, ¶2, Exhibits A and B). To establish a cause of action alleging legal malpractice, a plaintiff must prove, *inter alia*, the existence of an attorney-client relationship (see *Nelson v. Roth*, 69 AD3d 912 [2nd Dept 2010]).

The plaintiff has not demonstrated that there was such a relationship at the time his action against Feinberg was dismissed. Therefore, the defendants were not obligated to perform any legal work on his behalf. In other words, it would have been the new counsel's responsibility to recommence the action against Feinberg. Accordingly, as to the alleged act of malpractice regarding the Feinberg Action, the defendants' motion is granted.

In consideration of the plaintiff's legal malpractice claim where plaintiff alleges that defendants refused to turn over pertinent files regarding his case, it is noted that the plaintiff's claims of resulting damages are prospective: "[W]hen these cases come to trial I will be severely prejudiced in prosecuting them". Again, the plaintiff did not and cannot establish the damages element of his legal malpractice action. Mere speculation about a loss resulting from an attorney's alleged omission is insufficient to sustain a prima facie case of legal malpractice (see *Giambrone v. Bank of New York*, 253 AD2d 786 [2nd Dept 1998]). Furthermore, there are other remedies at law available to plaintiff, if the defendant attorneys are wrongfully withholding client files.

Regarding the defendant's branch of its motion to dismiss pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the Court must determine whether, accepting the facts alleged in the complaint as true and affording the plaintiff the benefit of every possible inference, the facts as alleged fit within any cognizable legal theory (see *Sarva v. Self Help Community Services, Inc.*, 73 AD3d 1155 [2nd Dept 2010]). Based on the foregoing, the plaintiff has not set forth a cognizable cause of action in his complaint and this branch of the defendants' motion is granted.


Accordingly, the defendants' motion is **granted** pursuant to CPLR §3211 (a)(1) and (7). Plaintiff's complaint is dismissed with prejudice.

This constitutes the Decision and Order of the Court.

Submit Judgment on notice.

Dated: Mineola, New York
December 29, 2011

ENTER:



Handwritten signature of Joel K. Asarch in black ink, written over a horizontal line.

JOEL K. ASARCH, J.S.C.

Copies mailed to:

Richard J. Reisch, Esq.
Appearing for Arthur Brown
Plaintiff *Pro Se*

L'Abbate, Balkan, Colavita & Contini, LLP
Attorneys for Defendants

ENTERED
JAN 04 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE