Notaro v Greenberg Traurig, LLP
2012 NY Slip Op 33296(U)
January 31, 2012
Sup Ct, NY County
Docket Number: 107159/11
Judge: Melvin L. Schweitzer
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: MELVIN L. SCHWEITZER Justice PART 45

Index Number : 107159/2011
NOTARO, JR., PHILIP
vs.
GREENBERG TRAURIG, LLP
SEQUENCE NUMBER : 001
DISM ACTION/INCONVENIENT FORUM

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). _____
Answering Affidavits — Exhibits _____ No(s). _____
Replying Affidavits _____ No(s). _____

Upon the foregoing papers, it is ordered that this motion ~~is~~ by defendant to dismiss the complaint is GRANTED in part and DENIED in part per the attached Decision and Order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: January 31, 2012

MELVIN L. SCHWEITZER J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☑ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 45

PHILIP NOTARO, JR.,

Plaintiff,

-against-

GREENBERG TRAURIG, LLP,

Defendant.

Index No. 107159/11

DECISION AND ORDER

Motion Sequence No. 001

MELVIN L. SCHWEITZER, J.:

In this action seeking damages for breach of contract and legal malpractice, defendant Greenberg Traurig, LLP (GT) moves, pursuant to CPLR 3211 (a) (1) and (7), to dismiss the complaint in its entirety, with prejudice. Plaintiff Philip Notaro, Jr. (Notaro) opposes, and requests leave to file an amended complaint if the motion to dismiss is granted.

Facts

Notaro retained GT in October 2007 to represent him individually and as president and a member of Dependable Air Freight and Forwarding (Dependable), and derivatively on behalf of Dependable. Notaro sought to have GT represent him against Steven Moses (Moses), an equal co-owner of Dependable. He also sought to raise claims against Richard Sapienza (Sapienza), Improved Packing and Consolidation Corp. (Impac) and Integrated Distribution Service Group Limited (IDS). GT represented Notaro from October 2007 until September 2009, when the New Jersey court, in which the litigation was pending, granted GT's unopposed motion to withdraw.

The retainer agreement (Retainer Agreement) signed by the parties provided that Notaro would pay a $5000 retainer for pre-litigation services, which would involve GT's analysis of the "potential claims, recovery, remedies and cost of pursuing a litigation." Ex. A, ¶ 1. If Notaro

then decided to proceed with a lawsuit, he would pay an additional $25,000 retainer. The hourly rates of the firm's services were set forth as well, and the Retainer Agreement provided that it "shall control all obligations set forth herein except as may subsequently be agreed upon in writing." Ex. A, ¶ 11.

Notaro contends that GT promised him that the costs of litigation would be between $250,000 and $500,000, and that GT breached its contract by charging him over $800,000. Complaint ¶ 6. He further maintains that GT breached the contract by promising him that he would succeed in the underlying action; however, that action was later dismissed on summary judgment. *Id.* Finally, he alleges that GT breached the contract by engaging in a "pattern of excessive, fraudulent billing." *Id.*

Notaro avers that GT committed legal malpractice in withdrawing from representation of Notaro under false pretenses, in negligently negotiating and preparing a faulty, defective settlement agreement with one of the adversaries in the underlying action, and in drafting a complaint and amended complaint that could not be sustained as a matter of law. He further asserts that GT committed legal malpractice in advising him in connection with his deposition in the underlying action, which resulted in monetary sanctions of $20,000 against Notaro. Additionally, Notaro alleges that GT negligently defended claims brought against him in Passaic County instead of moving earlier to consolidate all issues and claims before a single court, which resulted in "unfavorable results and a waste of legal resources" (Complaint ¶ 13); GT rested its motion to withdraw on falsehoods that tainted the Court against him (Complaint ¶ 14); GT misled Notaro into believing that he could continue to draw $5000 per week as agreed upon compensation at issue in the underlying case (Complaint ¶ 15); GT failed to oppose the

adversary's motion to file a second amended complaint, and advised Notaro to pay the sum of $64,310 into GT's trust account, which money was ultimately lost to the adversary (Complaint ¶ 16); GT failed and refused to move to enjoin the adversary from releasing $7 million balance due under a December 2006 agreement between the parties in the underlying action; and GT caused Notaro to incur nearly $200,000 in additional fees and expenses for new, substitute counsel to represent his interests in the underlying action after GT withdrew from representing Notaro. Complaint ¶ 18. Notaro seeks damages in excess of $4 million.

GT seeks to dismiss the complaint, saying that Notaro failed to allege that GT acted negligently and that such negligence caused his injury. Rather, according to GT, the complaint is a list of disagreements over the results of conduct by GT, none of which caused the ultimate dismissal of Notaro's claims in the underlying action. With respect to the breach of contract claim, GT relies on the Retainer Agreement, which does not contain any terms that Notaro alleges were breached. The Retainer Agreement did not include a cap on expenditures, nor did it promise any result. Additionally, Notaro fails to allege any facts to support his claim for "fraudulent" and "excessive" overbilling, but makes only a conclusory allegation.

Notaro opposes the motion, contending that GT's attorney's supporting affidavit should not be considered because it is the attorney's subjective, opinion-laden interpretation of the exhibits attached to the affidavit. Notaro maintains that affidavit is not based upon personal knowledge, and that the exhibits are not certified or otherwise authenticated. Additionally, he argues that the affidavit is testimonial in nature, which is improper on a CPLR 3211 motion. Further, Notaro asserts that GT omits the record establishing its misconduct.

Discussion

On a motion to dismiss, pursuant to CPLR 3211, the court must view the allegations in the complaint in the light most favorable to the plaintiff. Additionally, any reasonable inferences in favor of the plaintiff must be drawn from those facts. *Leon v Martinez*, 84 NY2d 83, 87-88 (1994); *Ladenberg Thalmann & Co. v Tim's Amusements*, 275 AD2d 243, 246 (1st Dept 2000).

Breach of Contract

Plaintiff bases his breach of contract claim on, basically, two claims. First, that GT exceeded the promised cap on the amount that the litigation would cost, and second, that GT assured Notaro that he would realize at least $1 million as a result of his suit. Neither of those promises were contained in the Retainer Agreement. However, Notaro maintains that after performing the initial review of the matter (referred to as Phase I in the Retainer Agreement), Notaro met with GT, and in explaining the results of its initial investigation, GT concluded that Notaro had a strong case, would realize the aforementioned recovery, and that the litigation would cost between $250,000-$500,000. Notaro avers that those later-made promises arose from Phase I of the Retainer Agreement, and that the Retainer Agreement envisioned an analysis of the strength of Notaro's case. Thus, while the results of Phase I could not have been included in the Retainer Agreement, Notaro asserts that the promises and assurances that he received before proceeding to Phase II, litigation, were part of GT's contractual terms, and that GT must be held accountable for any violation of those promises.

Notaro and GT entered into a Retainer Agreement at the outset of their relationship. That agreement stated that during Phase I, GT would review and analyze the documents Notaro would provide, and discuss its assessment of his potential claims, recovery, remedies, and costs of

pursuing litigation. Phase II would encompass pursuing litigation, with all that entails, should Notaro choose to proceed. The Retainer Agreement set forth the hourly fees for service, and a fee schedule was appended to the agreement. The Retainer Agreement does not contain any cap to the amount that litigation could cost, nor does it promise any specific result. It provides that it "shall control all obligations set forth herein except as may subsequently be agreed upon in writing." Ex. A, ¶ 11.

Notaro maintains that, at the end of Phase I, GT told him that he would win his case, and that the fees would total no more than $250,000-$500,000. However, such a promise, in order to be enforceable under the terms of the Retainer Agreement, would have to be agreed upon in writing. *Backer v Lewit*, 180 AD2d 134, 137 (1st Dept 1992) ("[w]here a contract is reduced to writing it is presumed to embody the final and entire agreement of the parties [internal quotation marks and citation omitted]"); *Pacesetter Communications Corp. v Solin & Breindel*, 150 AD2d 232, 236 (1st Dept 1989) (a "breach of contract claim against an attorney based on a retainer agreement may be sustained only where the attorney makes an express promise in the agreement to obtain a specific result and fails to do so"). Since neither the result nor the cap on expenditures was agreed upon in writing, Notaro cannot demonstrate a breach of contract. While Notaro relies, in part, upon an e-mail that he later sent to GT, complaining that his bills exceeded the cap that it had promised, that is not a writing in which GT agreed not to bill more than $500,000. Thus, it does not serve to support a breach of contract claim.

Legal Malpractice

Keeping in mind that the job of the court is to determine whether the plaintiff has a cause of action, not whether he has stated one, it is incumbent on the court to ascertain whether the

facts presented can support a cause of action for legal malpractice, even if the complaint is inartfully drawn.

Here, the complaint as well as plaintiff's affidavit, do not clearly state on what basis plaintiff seeks to charge GT with legal malpractice. The facts recite a series of dissatisfactions, but do not address how those fit within a cognizable claim, supporting the elements of legal malpractice. Nonetheless, the court will view the facts most favorably to plaintiff, as required, and analyze whether the facts alleged can support a claim for legal malpractice.

In order to properly allege a cause of action for legal malpractice, a plaintiff must set forth facts demonstrating the attorney's negligence, and supporting the conclusion that, but for that negligence, the plaintiff would have either succeeded in an underlying case, or would not have sustained some damages that accrued as a result of the attorney's actions. *See O'Callaghan v Brunelle*, 84 AD3d 581, 582 (1st Dept 2011).

GT contends that plaintiff cannot demonstrate the but for causation necessary, because plaintiff acknowledges that his claims in the underlying action were unsustainable as a matter of law. However, this does not relieve GT of any potential responsibility. Notaro alleges that it was GT's faulty drafting of the complaint and handling of the underlying action that made it unsustainable - not that it was inherently unsustainable. Further, if it were inherently unsustainable, it raises the question of whether GT offered inappropriate advice regarding the advisability of pursuing the underlying action. If the action had no merit, and GT recommended going forward, then any expense that Notaro suffered as a result could qualify as damages that he would not have incurred but for GT's actions.

At this stage of the litigation, Notaro need not demonstrate that he can prove his claims; he need only offer factual allegations to support the claims. He has stated in his complaint and his affidavit that the underlying complaint, as drafted, was unsustainable as a matter of law. He further alleges that GT told him that he had a winning case. If, in fact, he can prove that GT told him that he had a winning case, and the complaint as drafted was unsustainable, there is enough to proceed with this action at this juncture, since either GT was correct that it was a winning case, but GT did not handle it appropriately, or GT gave him faulty advice in saying that it was a winning case, thus causing Notaro to incur hundreds of thousands of dollars in attorneys' fees.

With respect to Notaro's list of grievances regarding GT's representation of him, for the most part, Notaro makes only conclusory assertions, without factual allegations to support them. *See Gamiel v Curtis & Riess-Curtis, P.C.*, 44 AD3d 327 (1st Dept 2007). For example, Notaro claims that the sanctions imposed on him, arising from his deposition, resulted from bad legal advice. GT asserts that since the sanctions were imposed on Notaro, and not on GT, it demonstrates that GT was not responsible for the events that gave rise to the sanctions. That reasoning is faulty, because it is possible that GT gave Notaro advice on how to behave at depositions, and that by following that advice, Notaro behaved in a manner that led to sanctions being imposed. However, Notaro has failed to offer any factual allegations, other than conclusory assertions, to support this claim. Notaro does not say what advice GT gave that he followed to his detriment. He does not even specify on what basis the sanctions were imposed. Thus, Notaro cannot rely on the imposition of sanctions to support his claim for legal malpractice.

Similarly, Notaro's contention that GT's withdrawal as counsel forced Notaro to incur additional legal expenses is alleged in conclusory terms, and does not offer any factual basis to support any contention that such expenses would not have been incurred regardless, or that there was anything improper about GT's withdrawal as counsel.

Notaro's assertions with respect to the allegedly improperly prepared settlement agreement, GT's failure to consolidate the New Jersey actions sooner, failure to oppose a motion to amend a complaint in another action, advising and insisting on Notaro paying money into GT's trust account, and failure to move to enjoin distribution of money due under an agreement are likewise defective, in that Notaro does not offer any factual support for his conclusory assertions.

Consequently, as the complaint now stands, the only claim that is supported by factual allegations is the claim for legal malpractice based upon GT's failure to either handle the case appropriately, or failure to advise Notaro that it was not worth pursuing. However, since the complaint contains only two causes of action, one for breach of contract, which is dismissed, and one for legal malpractice, which is not dismissed, the fact that there are many allegations which are insufficient to support the malpractice claim does not affect the outcome of this motion.

Conclusion

Accordingly, it is

ORDERED that the motion of Greenberg Traurig, LLP to dismiss the complaint is granted only to the extent that the first cause of action is dismissed, and is otherwise denied; and it is further

ORDERED that defendant is directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 218, 60 Centre Street, on 3/21/12, 2012, at Noon ~~AM~~/PM.

Dated: ~~February~~ January 31, 2012

ENTER:

J.S.C.
MELVIN L. SCHWEITZER
J.S.C.