

Paul v Littman Krooks, LLP

2012 NY Slip Op 33350(U)

July 27, 2012

Supreme Court, New York County

Docket Number: 150545/2011

Judge: Ellen M. Coin

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. ELLEN M. COIN
Justice

PART 63

Index Number : 150545/2011
PAUL, BRUCE
vs.
LITTMAN KROOKS, LLP.
SEQUENCE NUMBER : 001
DISMISS ACTION

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

**MOTION IS DECIDED IN ACCORDANCE
WITH THE ANNEXED DECISION
AND ORDER.**

This constitutes the decision and order of the Court.

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

Dated: 7/27/12

EW
HON. ELLEN M. COIN, 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

-----X

BRUCE PAUL and DAVID PAUL, as TRUSTEE
OF THE BRUCE PAUL 2008 SUPPLEMENTAL
NEEDS TRUST,

Index No. 150545/2011
Subm. Date: July 18, 2012
Sequence No.: 001

Plaintiffs,

DECISION AND ORDER

-against-

LITTMAN KROOKS, LLP,

Defendant.

-----X

For Plaintiffs :
Tolmage, Peskin, Harris & Falick
By Stephan H. Peskin, Esq.
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212-964-1390

For Defendant:
Abrahm, Gorelick, Friedman & Jacobson, P.C.
By Barry Jacobs, Esq.
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Papers considered in review of this motion to dismiss:

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Affirm. in Opp.....	<u>2</u>
Affirm. in Reply.....	<u>3</u>

ELLEN M. COIN, J.:

In this action alleging, *inter alia*, attorney malpractice, the defendant law firm moves pursuant to CPLR §3211(a)(1) and (7) for an order dismissing the complaint.

Essentially, the complaint alleges that defendant failed to do timely and effectively what it was retained to do: to create a Special Needs Trust (the “SNT”) for plaintiff Bruce Paul to enable him to qualify for and receive Medicaid coverage for his prolonged stay in a nursing home.

The complaint alleges five causes of action: for breach of contract, malpractice, for indemnification and contribution, for legal fees expended in defending the claim of the nursing home, and for a declaratory judgment that the law firm’s fees were excessive.

The first 14 paragraphs of the complaint set out the factual allegations. The First Cause of Action for breach of contract adds only two further allegations: (1) that defendants [sic] breached their contract to provide reasonable legal services to plaintiffs and to timely draft and file an effective and appropriate SNT (para. SIXTEENTH), and (2) that defendant's negligence, carelessness and lack of professionalism damaged plaintiffs (para. SEVENTEENTH).

Plaintiffs' Second Cause of Action for legal malpractice and negligence adds only three allegations: (1) that plaintiff Bruce Paul was a "reasonable" candidate for protection of his non-exempt assets via a SNT so that he could qualify for Medicaid (para. NINETEENTH); (2) that defendants failed to provide legal representation up to the customary standard of care (para. TWENTIETH); and (3) that plaintiffs have suffered irreparable harm (para. TWENTY FIRST).

Plaintiffs' breach of contract claim and their legal malpractice claim both arise from the same facts. Although the claim for legal malpractice alleges "irreparable harm", plaintiffs' demand for relief, as with their breach of contract claim, is for the same monetary damages. Thus, the First Cause of Action for breach of contract is duplicative of the Second Cause for malpractice. (*Thompson v Baier*, 84 AD3d 1062, 1063-64 [2d Dept 2011]; *Weissman v Kessler*, 78 AD3d 465, 466 [1st Dept 2010]; *Tortura v Sullivan Papain Block McGrath & Cannavo, P.C.*, 21 AD3d 1082 [1st Dept 2005]).

Significantly, the complaint does not allege that any of the firm's retainer agreements with plaintiffs promised a particular result. It is well settled that a breach of contract claim against an attorney based on a retainer agreement may only be sustained where the attorney makes an express promise in the agreement to obtain a specific result and fails to do so. (*Pacesetter Communications Corp. v Solin & Breindel, P.C.*, 150 AD2d 232, 236 [1st Dept 1989]).

Thus, the First Cause of Action for breach of contract must be dismissed.

A cause of action for legal malpractice must allege (1) the negligence of the attorney; (2) that the negligence was the proximate cause of the loss sustained; and (3) proof of actual damages. (*Between the Bread Realty Corp. v Salans Hertzfeld Heilbronn Christy & Viener*, 290 AD2d 380 [1st Dept 2002]).

On a motion to dismiss pursuant to CPLR §3211(a)(7) for failure to state a cause of action, the court must accept the facts alleged in the pleading as true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory. (*See Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *Leon v Martinez*, 84 NY2d 83, 87 [1994]).

While the allegations in the instant complaint are not detailed, they set out facts alleging the firm's negligence: that the defendant failed to draft a SNT in a professional and skilled manner (Compl., para.13), and that the firm failed to file and obtain Court approval of a SNT in a timely manner so as to permit plaintiff Bruce Paul to obtain benefits at the earliest possible time (Compl., para. 14). The Court notes that in response to the motion, plaintiff has submitted its attorney's affirmation setting forth detailed factual allegations as to defendant's alleged negligence.¹ Thus, the affirmation in opposition points to defendant's failure to include Bruce Paul's residence in the SNT; and the deficiencies in the petitions defendant submitted to the Surrogate's Court in applying for the SNT that led to (1) that Court's rejection of the petitions and consequent delay in approval of the

¹On a CPLR 3211 motion a plaintiff's affidavit "may be used freely to preserve inartfully pleaded, but potentially meritorious, claims" (*Rovello v Orofino Realty Co., Inc.*, 40 NY2d 633, 635 [1976]). While an attorney's affirmation may not substitute for his client's sworn testimony in affidavit form, the Lopatto Affirmation refers to notations in the Surrogate's Court file in the underlying matter, of which plaintiffs would not have personal, first-hand knowledge. Moreover, defendant does not object to the Lopatto Affirmation's assertion of facts, but merely responds to it. Thus, the Court will consider his affirmation in determining this motion.

petition for the SNT and (2) the N.Y. State Agency's approval of a later effective date for Bruce Paul's eligibility for Medicaid.

Similarly, plaintiffs have alleged facts sufficient to support their claim that defendant's negligence was the proximate cause of their damages. The point of establishing a SNT was to provide Medicaid coverage for his catastrophic illness and to legitimately insulate his assets. Plaintiffs allege that defendant's negligence and the resultant delay caused the failure of Medicaid to pay for a significant portion of his nursing home expenses and plaintiff Bruce Paul's having to pay a portion of such expenses. Thus, plaintiffs have alleged both proximate cause and actual damage. Accordingly, the motion to dismiss the Second Cause of Action for malpractice is denied.

Plaintiffs have voluntarily withdrawn their Third Count for indemnification and contribution. Plaintiffs' Fourth Cause of Action seeks to recover attorney fees expended and to be expended to defend the suit against them by plaintiff Bruce Paul's nursing home and to file unsuccessfully for protection under Chapter 13 of the Bankruptcy Code. Plaintiff Bruce Paul has withdrawn his claim under this count. At any rate, this count does not allege any separate basis for recovery, only additional damages. Thus, the Fourth Cause of Action must be dismissed for failure to state a claim.

Plaintiffs' Fifth Cause of Action is for a declaratory judgment that defendant charged excessive fees for its services. As defendant notes, a declaratory judgment action seeks a judicial declaration rather than money damages. (*Lang v Hanover Ins. Co.*, 3 NY3d 350, 355 [2004]). However, plaintiffs do not seek money damages on this cause of action, but rather a declaration that the fees billed by defendant were excessive in light of the standards articulated in Rules of Professional Conduct 1.5(a). This cause is separate and apart from their claim for damages under the Second Cause of Action. Accordingly, the motion to dismiss it is denied.

In accordance with the foregoing, it is

ORDERED that the Third Cause of Action of the complaint is withdrawn and dismissed without prejudice; and it is further

ORDERED that the motion to dismiss is granted to the extent that the First and Fourth Causes of Action of the complaint are dismissed; and it is further

ORDERED that the motion to dismiss the Second Cause of Action of the complaint is denied; and it is further

ORDERED that defendant is directed to serve its answer to the complaint within 20 days from the date of this order; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 311, 71 Thomas Street, on September 5, 2012 at 2:00 PM.

Date: 7/27/12

ENTER:

eu
Ellen M. Coin, A.J.S.C.