Gonzalez-Blanco v Bank of Am., N.A.
2012 NY Slip Op 33480(U)
April 4, 2012
Sup Ct, Bronx County
Docket Number: 251032/2011
Judge: Mary Ann Brigantti-Hughes
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.

[* 1]
FILED May 01 2012 Bronx County Clerk

SUPREME COURT OF THE STATE OF NEW YORK Index No.: 251032/2011
COUNTY OF BRONX
PART 15

RECEIVED
BRONX
MAY - 1 2012

Maria M. Gonzalez-Blanco,

Plaintiff,

-against-

Bank of America, N.A. and their attorneys,

Defendants.

DECISION/ ORDER
Present:
Hon. Mary Ann Brigantti-Hughes
Justice, Supreme Court

Papers	**Numbered**
Notice of Motion and Affidavits Annexed	
Order to Show Cause and Affidavits Annexed.....	
Defendant Answering Affidavits and Cross Motion.....	
Replying Affidavits	
Exhibits: as annexed to the moving papers	
Other:	

Upon the foregoing papers, the Decision/Order on this Motion is as follows:

Plaintiff commenced this action to recover for damages allegedly as a result of defendant's failure to vacate a default judgment entered against her in a prior action filed in the Civil Court of the City of New York, County of Bronx, bearing the caption *Bank of America vs. Maria Gonzalez - Blanco et al.*, Index No: 34301/2005. By decision dated November 10, 2005, the default judgment entered against Maria Gonzalez-Blanco was vacated on the condition that she filed an answer to Bank of America's complaint within twenty days; otherwise the judgment was to continue in full force an effect. Thereafter, on April 24, 2006 the initial civil court action against the plaintiff (defendant in Civil Court action) was discontinued without prejudice.

In the instant action which was filed on June 14, 2011, plaintiff alleges that on or

FILED May 01 2012 Bronx County Clerk

about August 17, 2007, she was offered a position at Robeco Corporation but a background check revealed that a judgment was entered against the plaintiff by Bank of America and as a result, plaintiff was not offered a position. Plaintiff now claims that as a result of defendant's failure to vacate the prior default judgment, her employment opportunities were adversely affected, that defendant had defamed her with the credit report agencies and that the Bank of America's attorney committed malpractice.

Defendant now moves to dismiss the complaint pursuant to CPLR 3211 (a) (1), (5) and (7), based on the statute of limitation, documentary evidence and failure to state a cause of action upon which relief can be granted.

On a motion to dismiss a complaint pursuant to CPLR § 3211(a)(7) for failure to state a cause of action, "the court must determine whether, accepting as true the factual averments of the complaint and according the plaintiff the benefits of all favorable inferences which may be drawn therefrom, the plaintiff can succeed upon any reasonable view of the facts stated."*Richbell Info. Services, Inc. v. Jupiter Partners, L.P.*, 309 A.D.2d 288, 289, 765 N.Y.S.2d 575 (1st Dept.2003), *quoting 511 W. 232nd Owners Corp. v. Jennifer Realty Corp.*, 98 N.Y.2d 144, 151–152, 746 N.Y.S.2d 131, 773 N.E.2d 496 (2002). The complaint is to be liberally construed, and the plaintiff accorded the benefit of every possible favorable inference. *Leon v. Martinez,* 84 N.Y.2d 83, 87–88, 614 N.Y.S.2d 972, 638 N.E.2d 511 (1994). The court's function on such a motion is to determine whether the plaintiff's allegations fit within any cognizable legal theory, that is whether the plaintiff has a cause of

FILED May 01 2012 Bronx County Clerk

action, and not whether he or she has stated one. *Fast Track Funding Corp. v. Perrone,* 19 A.D.3d 362, 796 N.Y.S.2d 164 (2d Dept. 2005). On the other hand, while factual allegations contained in a complaint should be accorded "favorable inference," bare legal conclusions and inherently incredible facts are not entitled to preferential consideration. *Sud v. Sud,* 211 A.D.2d 423, 424, 621 N.Y.S.2d 37 (1st Dept. 1995). Here, the complaint avers claims purportedly under theories of negligence, defamation/libel and legal malpractice based upon the same factual allegations. This Court notes that plaintiff has specifically stated that she is not seeking relief for violation of the Fair Credit Report Act and as a result, this Court will not address defendant's argument seeking dismissal for said alleged cause of action.

It is well-established law that a pleading, although inartfully drawn, should not be dismissed, so long as it sets forth a cause of action. *McLaughlin v. Thaima Realty Corp.,* 161 A.D.2d 383, 555 N.Y.S.2d 125 (1st Dept.1990). The form of the complaint and the label attached by the pleader are not controlling, and it is enough that the pleader state the facts making out a cause of action. *Van Gaasbeck v. Webatuck Central School Dist. No. 1,* 21 N.Y.2d 239, 287 N.Y.S.2d 77, 234 N.E.2d 243 (1967); *Kraft v. Sheridan,* 134 A.D.2d 217, 521 N.Y.S.2d 238 (1st Dept.1987). Thus, it is not necessary that the cause of action have a particular name since the law will find a remedy if there has been a wrong, and even if the cause of action is labeled incorrectly, it will not be dismissed if the facts alleged constitute a cognizable cause of action. *Klein v. Martin,* 221 A.D.2d 261, 634 N.Y.S.2d 74 (1st Dept. 1995). The test is simply whether the pleading gives notice of the transactions relied on and

FILED May 01 2012 Bronx County Clerk

the material elements of the cause of action. *Id.* "When determining a motion to dismiss pursuant to CPLR 3211(a)(7), the pleading must be afforded a liberal construction (*see* CPLR 3026; *Leon v. Martinez,* 84 N.Y.2d 83, 87 [1994]), the facts as alleged in the complaint are accepted as true, the plaintiff is accorded the benefit of every favorable inference, and the court must determine only whether the facts as alleged fit within any cognizable legal theory (*see Leon v. Martinez,* 84 N.Y.2d at 87–88; *Cayuga Partners v. 150 Grand,* 305 A.D.2d 527 [2003]). In assessing a motion under CPLR 3211(a)(7) ... a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint, 'and if the court does so, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one' (*Leon v. Martinez,* 84 N.Y.2d at 88)" (*Uzzle v. Nunzie Court Homeowners Assn, Inc.,* 70 AD3d 928 [2010]). Applying this requirement liberally to the present case, this Court finds that plaintiff has stated a cause of action in negligence and defamation/libel; however, plaintiff failed to state a cause of action of legal malpractice against Bank of America's attorney.

At the outset, the elements of a legal malpractice claim, arising out of the negligent conduct of litigation, are the existence of an attorney-client relationship, negligence on the part of the attorney or some other conduct in breach of that relationship, proof that the attorney's conduct was the proximate cause of the injury to the plaintiff, and proof that but for the alleged malpractice the plaintiff would have been successful in the underlying action. Here, a legal malpractice cannot survive as the attorneys did not represent the plaintiff in the

FILED May 01 2012 Bronx County Clerk

Civil Court action and as a result there was no attorney-client relationship.

In terms of plaintiff's cause of action of defamation/libel and affording plaintiff's allegations every favorable inference, the court finds that she stated a *prima facie* case for defamation/libel against the defendant. The elements of defamation are: the publishing of a false statement to a third party; without authorization or privilege; and special harm *or* defamation *per se* (*Dillon v. City of New York,* 261 A.D.2d 34, 704 N.Y.S.2d 1 [1st Dept. 1999]). Here, the allegations that defendant informed the credit report agencies that plaintiff had a judgment entered against her when that judgment was vacated and that the plaintiff suffered injury (resulting from her unavailability to be offered the job as a result of the judgment), sufficiently state the elements of a defamation claim (*Dillon v. City of New York,* 261 A.D.2d 34, 704 N.Y.S.2d 1). Furthermore, the complaint can be read to assert claim of negligence. Negligence is the failure to employ reasonable care, that is, the care which a reasonably prudent person should use under the circumstances of a particular case. Negligence is the failure to exercise the care required by law for the protection of others against unreasonable risk. Otherwise stated, negligence is an unintentional breach of a legal duty causing damage which is reasonably foreseeable, and without which the damage would not have occurred. Although a duty to use care may arise by virtue of a contract, basically negligence is the breach of a non contractual duty to use due care. In the instant action, plaintiff alleges that defendant negligently communicated false information to the credit report agencies which cause plaintiff to suffer damages. Taking such allegations as true, and

FILED May 01 2012 Bronx County Clerk

according plaintiff the benefit of every possible favorable inference, this court finds the complaint states a legally cognizable cause of action to recover damages for alleged negligence.

This Court now turns to defendant's motion to dismiss the complaint asserted against them based upon the expiration of the applicable statute of limitations. As previously discussed, this Court found two cognizable causes of action, negligence and defamation/libel. A defendant who seeks dismissal of a complaint pursuant to CPLR 3211(a)(5) on the ground that it is barred by the statute of limitations bears the initial burden of proving, prima facie, that the time in which to sue has expired (*see Duran v. Mendez,* 277 A.D.2d 348 [2000]; *Savarese v. Shatz,* 273 A.D.2d 219, 220 [2000]; *Assad v. City of New York,* 238 A.D.2d 456 [1997]; *Siegel v. Wank,* 183 A.D.2d 158, 159 [1992])" (*Gravel v. Cicola,* 297 A.D.2d 620, 620–621 [2002]). Here, plaintiff's cause of action for negligence is subject to the three-year statute of limitations set forth in CPLR 214(4) (*see Lucchesi v. Perfetto,* 72 AD3d 909, 911 [2d Dept 2010]). Thus, since such claim accrued on the date of the injury, which in this case, was the date when plaintiff learned of the credit report inaccuracies, September 2007, and plaintiff did not commence this action until June 14, 2011, the claim is time-barred and must be dismissed (*see* CPLR 3211[a][5]). As to plaintiff's cause of action for defamation/libel, the statute of limitations for a cause of action for defamation, libel, slander and intentional infliction of emotional distress claims are barred by the one-year statute of limitations [CPLR 214 (3)]. In this court's view, defendant has met their burden of establishing plaintiff's time

FILED May 01 2012 Bronx County Clerk

had elapsed as of the time of commencement. Here, even as amplified by the plaintiff's affidavit, and according every possible inference favorable to the plaintiff, plaintiff failed to overcome the prima facie showing and as a result, plaintiff's complaint is dismissed in its entirety.

This constitutes the decision and order of this Court.

Dated: Bronx, New York
April 4, 2012

HON. Mary Ann Brigantti-Hughes
Justice, Supreme Court