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

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DANIEL G. HICKEY, JR.,

Plaintiff,

-against-

STEVEN E. KAUFMAN, P.C., STEVEN E. KAUFMAN, ANDREW H. KAUFMAN, SPIEGEL, BROWN, FICHERA & COTE, LLP and DONALD D. BROWN, JR.,

Defendants.

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Index No. 153640/13

Mot. Seq. Nos.: 004, 005

DECISION/ORDER

SHLOMO S. HAGLER, J.S.C.:

Motion Sequence Numbers 004 and 005 are consolidated for disposition.

This legal malpractice action arises out of defendants' representation of plaintiff during the course of an investigation by the New York State Attorney General's Office ("AG") of Majestic Capital Ltd., f/k/a CRM Holdings ("CRM/Majestic"). In Motion Sequence Number 004, defendants Steven E. Kaufman, P.C., Steven E. Kaufman, and Andrew H. Kaufman (collectively, "the Kaufman defendants") move, pursuant to CPLR 3211 (a) (1) and (a) (7), to dismiss the Amended Complaint.[1] In Motion Sequence Number 005, defendants Spiegel, Brown, Fichera & Cote, LLP, and

[1]By Decision/Order, dated October 7, 2015 (the "Prior Order"), this Court granted plaintiff's motion for leave to amend his complaint.

Donald D. Brown Jr. ("Brown"; collectively, the "Brown defendants") move, pursuant to CPLR 2221 (d), for leave to reargue the Prior Order to the extent it denied the Brown defendants' motion to dismiss, and upon reargument, for an Order dismissing the action against the Brown defendants; or in the alternative, for an Order pursuant to CPLR 3211(a)(1) and (a)(7) dismissing plaintiff's Amended Complaint.

BACKGROUND FACTS

In March 2009, Hickey negotiated terms of a separation agreement with CRM/Majestic, where he had been CEO. Brown represented Hickey to memorialize the agreement, which provided that he would receive a total of $3,300,000, divided into three payments: $1,500,000 six months after Hickey's resignation; $1,500,000 one year after his resignation; and $300,000 thirty months after his resignation. The agreement was executed on March 13, 2009.

At about the same time, Hickey discovered that the AG was investigating possible violations of the Martin Act by CRM/Majestic and a number of its employees and officers, including Hickey. CRM/Majestic retained outside counsel, the Kaufman defendants, for the company and for the individual board members and officers who were under investigation. While Hickey formally acknowledged the Kaufman defendants' representation on November 4, 2009, he continued to have Brown represent him.

Brown worked closely with the Kaufman defendants.

The AG told Brown that it wanted to have Hickey's separation payments placed into an AG escrow account, because Hickey was a subject of the investigation and the AG wanted to prevent Hickey from receiving the payments if he acted improperly. The escrow account would also enable the AG to be certain that there would be funds for a potential settlement or enforcement action. CRM/Majestic did not make any of the separation payments, and did not place any of the funds into escrow until May 2010.[2]

After being served with a "Notice of Imminent Enforcement Action" on December 8, 2009, CRM/Majestic engaged in settlement negotiations. Allegedly, defendants were not included in those negotiations. The Kaufman defendants were informed that the AG demanded that Hickey waive his rights to the separation payments or face indictment, and CRM/Majestic would deposit the $3,300,000 due to Hickey with the AG as part of the settlement. Brown sent an email to CRM/Majestic objecting to Hickey being forced to give up the payments. On March 21, 2011, well over a year after the AG's demand, Hickey formally waived his rights to the separation payments, pursuant to a memorandum of understanding between CRM/Majestic and the AG, which was to settle all criminal and civil claims. No settlement actually took place, which meant that Hickey's waiver was null and void. The AG also never

[2]The Escrow Agreement is dated May__, 2010.

formally filed any charges against Hickey.

During the course of negotiations regarding the Escrow Agreement, Hickey voiced concern about potentially being liable for taxes on the payments without access to funds to pay that liability. A number of drafts of an escrow agreement were proposed. Initially, the drafts stated that the funds in escrow would be disbursed to Hickey in the event that the AG did not move forward with a proceeding against Hickey.

In May 2010, CRM/Majestic's assistant general counsel sent a revised draft of the escrow agreement to Steven Kaufman. This version indicated that if the AG decided to disburse the funds, they would be disbursed to CRM/Majestic rather than to Hickey, as the prior version had provided. Steven Kaufman made minor revisions and sent a draft back to CRM/Majestic's assistant general counsel and outside counsel the next day. Hickey signed the final draft shortly thereafter, allegedly without anyone telling him about the change in the disbursement provision. Outside counsel sent the Escrow Agreement signed by Hickey to the AG, who countersigned immediately.

On April 29, 2011, CRM/Majestic filed for bankruptcy. The separation funds were still in escrow with the AG. Plaintiff hired his current counsel, who filed a proof of claim to the funds with the bankruptcy court, and notified the AG that they would be moving to have the escrow funds deposited with the

Bankruptcy Court. The AG deposited the funds with the Bankruptcy Court after motion practice and court order.

Plaintiff commenced an adversary proceeding in the Bankruptcy Court against CRM/Majestic. After the Bankruptcy Court denied CRM/Majestic's motion to dismiss, the parties agreed to mediation, and settled on a payment of $825,000 to Hickey.

Hickey commenced this malpractice action in April 2013. This Court denied defendants' prior motions to dismiss as moot, and granted plaintiff's motion to amend his complaint. Defendants now seek to dismiss the Amended Complaint, and the Brown defendants also seek to reargue the prior motion.

DISCUSSION

Motion to Dismiss

On a motion to dismiss for failure to state a cause of action (CPLR 3211 [a] [7]), the court must accept each and every allegation as true and liberally construe the allegations in the light most favorable to the pleading party. "We . . . determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). A motion to dismiss must be denied, "if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002] [internal quotation marks and citations omitted]). On the other hand,

while factual allegations contained in a complaint should be accorded a favorable inference, bare legal conclusions and inherently incredible facts are not entitled to preferential consideration (*Beattie v Brown & Wood*, 243 AD2d 395, 395 [1st Dept 1997]). Where a defendant has submitted evidentiary material in support of a motion to dismiss a complaint pursuant to CPLR 3211(a)(7)...the criterion is whether the [plaintiff] has a cause of action, not whether he has stated one...." (*Leon v Martinez*, 84 NY2d at 88 *quoting Guggenheimer v Ginzburg*, 43 NY2d 268, 275).

"Under CPLR 3211(a)(1), a dismissal is warranted only if the documentary evidence establishes a defense as to the asserted claims as a matter of law" (*Leon v Martinez*, 84 NY2d at 88).

Motion Sequence Number 004

In Motion Sequence Number 004, the Kaufman defendants move to dismiss the Amended Complaint, which seeks damages for legal malpractice. The Kaufman defendants maintain that the Amended Complaint fails to state a cause of action against them on grounds that (1) plaintiff cannot establish that the Kaufman defendants breached New York's standard of care for an attorney; and (2) plaintiff cannot establish "but for" proximate causation of actual ascertainable damages. Plaintiff opposes the motion, asserting that he adequately pled both that the Kaufman defendants breached the New York standard of care for an

attorney, and "but for" causation.

Standard of Care

The Kaufman defendants argue that the judgment-call doctrine protects them from a claim of malpractice when they exercised their professional judgment by selecting "one among several reasonable courses of action" (*Rosner v Paley*, 65 NY2d 736, 738 [1985]); *see Pere v St. Onge*, 15 AD3d 465, 466 [2d Dept 2005]; *Dweck Law Firm v Mann*, 283 AD2d 292 [1st Dept 2001]). The Kaufman defendants contend that plaintiff was advised of the risks of failing to cooperate with the AG, and that the AG was unambiguously clear that his failure to cooperate expeditiously would result in his immediately having civil fraud charges brought against him. The Kaufman defendants maintain that plaintiff knowingly decided to enter into the agreement to avoid further investigation and indictment.

The Kaufman defendants rely heavily on *Tantleff v Kestenbaum & Mark* (131 AD3d 955 [2d Dept 2015]). However, *Tantleff* was before the court on a summary judgment motion, not a motion to dismiss pursuant to CPLR 3211. Therefore the standards for relief are different and the cases are not analogous.[3] Furthermore, there is no indication in *Tantleff* that the plaintiff had sought various protections that were initially

[3]The Kaufman defendants also rely on *Pere v St. Onge* (15 AD3d 465 [2d Dept 2005]) which was likewise before the court on a summary judgment motion.

provided in earlier drafts of an agreement but then omitted in later drafts.[4] Thus, at this stage of the litigation, it is premature to conclude that plaintiff has failed to state a cause of action based upon the judgment-call doctrine.

"But For" Causation

In order to state a cause of action for legal malpractice, a plaintiff must set forth facts to support his assertion that the attorney's negligence was a proximate cause of the loss sustained, that the attorney's actions or inactions resulted directly in actual damages to the plaintiff and that the plaintiff would not have sustained the damages but for the attorney's negligence (*Garnett v Fox, Horan & Camerini*, LLP, 82 AD3d 435, 435-436 [1st Dept 2011]; Cannistra *v O'Connor, McGuinness, Conte, Doyle, Oleson & Collins*, 286 AD2d 314, 315-316 [2d Dept 2001]; *Lavanant v General Acc. Ins. Co. of Am.*, 212 AD2d 450, 451 [1st Dept 1995]).

According to the Kaufman defendants,

> "the proximate cause of any purported loss was (1) Hickey's decision to execute the Escrow Agreement and avoid criminal and/or civil indictment by the AG; (2) Majestic's decision to withhold payment from Hickey because of the AG's investigation; (3) Plaintiff's review, agreement, and execution of the Escrow

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[4] *Tantleff* also relied on evidence that the recommendation made by the law firm defendants, was made after extensive discussion with the Tantleff plaintiffs (131 AD3d at 958). Here, plaintiff claims he "did not have 'numerous' conversations with the [d]efendants about the specific terms of the Escrow Agreement before [he] signed it" (Plaintiff's Affidavit at ¶ 8).

> Agreement[; and] (4) Hickey's informed decision as a sophisticated businessperson to forego indictment" (Kaufman defendants' Memorandum of Law at 10).

Notably absent from the Kaufman defendants' recitation is plaintiff's position that his loss was caused by the failure of his attorneys to "make sure" that the Escrow Agreement was clear that the escrowed funds were plaintiff's property, and that upon termination of the Escrow Agreement, the funds were to be distributed to him, not to CRM/Majestic. Further, according to plaintiff, his attorneys never made it clear to him that there was ambiguity in the Escrow Agreement itself which would enable CRM/Majestic to collect those funds (Amended Complaint, ¶¶ 32-33, 41, 56-57; Plaintiff's Affidavit, ¶¶ 4-7).

The fact that plaintiff agreed to cooperate with the AG does not alter the fact that plaintiff alleges that he was advised by his attorneys that if the AG did not proceed, the funds would be returned to him. Additionally, plaintiff points out that the Escrow Agreement did not include any provision that would have prevented the AG from prosecuting plaintiff after the Escrow Agreement was signed (Plaintiff's Memorandum of Law at 14). Therefore, the Kaufman defendants' argument that plaintiff entered into the Escrow Agreement to avoid prosecution without any accompanying protections or privileges as set forth above, is legally insufficient.

Contrary to the Kaufman defendants' assertion, the fact that

CRM/Majestic decided to withhold payment to Hickey prior to the signing of the Escrow Agreement, is also not determinative. CRM/Majestic placed the funds in escrow with the AG. According to the Amended Complaint, which is supported by early drafts of the Escrow Agreement, those funds were supposed to be transferred to Hickey if the AG discontinued its investigation. There is no documentary evidence utterly refuting plaintiff's assertion that it was Hickey's understanding, communicated among him and his attorneys, that Hickey was supposed to retain his interest in those funds.

The Kaufman defendants' argument that plaintiff was bound by the terms of the Escrow Agreement is also unpersuasive. While plaintiff is bound by the terms of the Escrow Agreement with respect to the other parties to that agreement, the rule does not protect an attorney from a malpractice action when the plaintiff was being guided by that attorney (*Bishop v Maurer*, 9 NY3d 910, 911 [2007]["the conclusiveness of the underlying agreement does not absolutely preclude an action for professional malpractice against an attorney for negligently giving to a client an incorrect explanation of the contents of a legal document"]). Furthermore, the Escrow Agreement as a whole is ambiguous, because in different sections it seems to ascribe the ownership of the funds to different parties.

The Kaufman defendants have not demonstrated that the

Amended Complaint fails to state a cause of action, and have also not met their burden of demonstrating that there is documentary evidence which utterly refutes plaintiff's claim (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]).

Motion Sequence Number 005

In Motion Sequence Number 005, in addition to seeking an order, pursuant to CPLR 3211 (a) (1) and (a) (7) dismissing the action, the Brown defendants seek leave to reargue this Court's denial of its prior motion to dismiss.

Motion to Reargue

The motion for leave to reargue is denied. After the earlier motion was made, plaintiff has filed an Amended Complaint. Therefore, the prior complaint is no longer under consideration, and any motion to dismiss must address the Amended Complaint.

Motion to Dismiss

The Brown defendants set forth similar arguments to those of the Kaufman defendants.[5] They emphasize, in addition, that much of what plaintiff contends is speculative, and, therefore, they

[5]For example, plaintiff argues that the Brown defendants' assertion that plaintiff entered into the Escrow Agreement to avoid prosecution is belied by an email, dated August 5, 2010, from plaintiff to Brown, dated after the execution of the Escrow Agreement, wherein plaintiff inquires as to whether the AG is proceeding civilly or criminally, and whether there was time to settle if an indictment is imminent (Plaintiff's Attorney's Affirmation in Opposition, Motion Sequence Number 005, Exhibit "19").

conclude that the Amended Complaint fails to state a cause of action. However, the Brown defendants in turn speculate about what the AG might have been willing or unwilling to do, and present it as fact. At this juncture, neither party is required to demonstrate facts; the Amended Complaint need only allege facts that would support the cause of action for legal malpractice.[6] Whether or not plaintiff will be able to prove his case is not subject to review at this time (*See Garnett v Fox, Horan & Camerini,* LLP, 82 AD3d at 436 ["At this stage (on a CPLR 3211(a)(7) motion], plaintiff does not have to show a 'likelihood of success,' [b]ut is required only to plead facts from which it could reasonably be inferred that defendant's negligence caused [plaintiff's] loss" (internal quotation mark and citation omitted)]. Consequently, the Brown defendants' arguments are unpersuasive.[7]

CONCLUSION

Accordingly, it is

ORDERED, that the motion of defendants Steven E. Kaufman,

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[6]Neither the Kaufman defendants nor the Brown defendants present any evidence from the AG directly to demonstrate that the AG would not prosecute plaintiff or would drop the charges against him if plaintiff agreed to place the subject monies into escrow (Tr. Oral Argument at 32-33).

[7]As with the Kaufman defendants, the Brown defendants have also not met their burden demonstrating that there is documentary evidence which utterly refutes plaintiff's claim (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d at 326).

P.C., Steven E. Kaufman and Andrew H. Kaufman (Motion Sequence Number 004) to dismiss the Amended Complaint pursuant to CPLR 3211 (a)(1) and (a)(7) is denied; and it is further

ORDERED, that the motion of defendants Spiegel, Brown, Fichera & Cote, LLP and Donald D. Brown, Jr. (Motion Sequence Number 005) for leave to reargue the Court's October 7, 2015 Decision/Order, and upon the grant of reargument for an Order dismissing the action against the Brown defendants in its entirety, or in the alternate, for an Order pursuant to CPLR 3211(a)(1) and (a)(7) dismissing plaintiff's Amended Complaint, is denied.

Dated: February 1, 2017

ENTER:

J.S.C.

SHLOMO HAGLER
J.S.C.