Cattaneo v Liddle & Robinson, LLP
2006 NY Slip Op 30731(U)
December 15, 2006
Sup Ct, New York County
Docket Number: 114673/06
Judge: Carol R. Edmead
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[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

CORALISA CATTANEO,

Plaintiff,

-against-

LIDDLE & ROBINSON, LLP and DAVID MAREK,

Defendants.

Index No. 114673/06

DECISION/ORDER

EDMEAD, J.S.C.

MEMORANDUM DECISION

Defendants Liddle & Robinson, LLP ("Liddle") and David Marek ("Marek") (collectively "defendants") move for an order pursuant to CPLR 3211(a)(1) and (7), dismissing the verified complaint[1] of plaintiff Coralisa Cattaneo, because it fails to state a cause of action and because certain undisputed documents preclude plaintiff's claims. Defendants further seek sanctions against plaintiff and her counsel under Section 130-1.1 of the New York Court Rules for filing plaintiff's frivolous complaint.

Defendants' Contentions

Plaintiff cannot allege any of the core elements of her claims for legal malpractice or fraud. She cannot allege reliance, causation or that she suffered any damages.

The essence of plaintiff's complaint is that Marek, her attorney, intentionally lied in order to induce her to settle her age and gender discrimination claims against her former employer. Plaintiff agreed to settle her underlying claims for a total of $180,000. to be characterized as follows: $60,000. For "emotional distress" damages; (2) $60,000 as compensatory damages; and

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[1] Although the Complaint is identified as "Verified," there is no verification with the Complaint.

(3) $60,000 as attorneys' fees. Plaintiff contends that Marek orally represented to her, at a mediation, that the emotional distress portion of the settlement was tax-free as opposed to tax-deferred.

Plaintiff's claims regarding Marek's alleged oral statements must fail, however, because of the undisputed written record that exists. Plaintiff concedes that prior to settling: (1) she received and understood an e-mail from Marek stating that "a settlement will be treated like income and taxed accordingly;" and (2) the Settlement Agreement that plaintiff signed makes clear that "[t]he entire $180,000.00 amount shall be reported on appropriate tax forms as to Cattaneo."

Moreover, assuming *arguendo* that Marek had misrepresented the tax consequences of plaintiff's settlement and her claims could survive in the face of the contradictory written record, plaintiff still has no viable claim. Plaintiff does not even allege that she paid the taxes at issue. In fact, due to a recent ruling by the District of Columbia Court of Appeals, it appears likely that plaintiff will not, in fact, have to pay taxes on the portion of the settlement about which she complains.

Finally, plaintiff's claims must be dismissed because she does not allege that *but for* Marek's alleged misrepresentation she could have obtained a better result, or would have rejected the $180,000.00 settlement proposal.

On September 16, 2005, plaintiff asked defendants about the tax treatment of a settlement with Morgan Stanley. She wrote in an e-mail: "By the way, any idea how punitive, compensatory, et al get taxed? Are they taxed like my bonus was, at almost half? That would kinda blow."

Later that same day, Marek told plaintiff, via e-mail that a settlement would be taxed "like income." He wrote: "a settlement would be treated like income - and taxed accordingly (normal withholdings). Not great. But if you agreed to the separation agreement they proposed (the $25,000) it would have been taxed as ordinary income also."

On September 16, plaintiff responded to defendants' e-mail, indicating that she understood a settlement would be taxed. She wrote: "That is good news, actually. I thought it would get taxed like my bonus, 47% = yuck."

At the commencement of the mediation, the parties discussed settlement. Ultimately, the mediator suggested $180,000. At Marek's suggestion, and for plaintiff's benefit, the mediator's proposal characterized the $180,000 settlement as noted above. Marek explained to plaintiff the benefits of structuring the settlement in this fashion. By categorizing $60,000 as emotional distress, Morgan Stanley would pay plaintiff a lump sum in the amount of $60,000, and then issue to her a 1099. This benefitted plaintiff in two ways. First, the emotional distress portion would not be subject to withholdings (as a settlement for wages would be) of items like Medicare and FICA. Second, plaintiff would have use of the entire lump sum from October 2005 until April 2006 (when taxes are due). In addition, the American Jobs Creation Act of 2004, which amended the Internal Revenue Code, allows a taxpayer, in computing adjusted gross income, to deduct the $60,000 attorneys' fees such as those at issue here. Plaintiff agreed to Marek's suggestion.

On the day after the mediation and settlement, plaintiff sent an e-mail to Marek expressing her gratitude and sheer delight with the outcome. She wrote: "A thousand thanks...Hasn't hit me yet...xoxo, C."

On October 31, 2005, plaintiff came to defendants' offices, and picked up the Final Settlement, a letter from Marek indicating that Morgan Stanley had paid Liddle $60,000 pursuant to the parties' fee agreement dated August 19, 2005 and a check from Morgan Stanley made out to plaintiff in the amount of $60,000. Morgan Stanley had already sent plaintiff the remainder of the settlement amount - a check in the amount of $35,184.78 ($60,000 less taxes and withholding). At this meeting, plaintiff gave Marek a bottle of Mouton Rothschild (wine that sells for over $200 a bottle) and reiterated her thanks. Following this meeting, defendants had, essentially, no further contact with plaintiff until she contacted Marek in February 2006.

According to plaintiff, on February 7, 2006, she received a 1099 from Morgan Stanley in the amount of $60,000 for the portion of the settlement allocated as "emotional distress." The next day plaintiff sent Marek an e-mail admitting that she was not confident of her memory of discussions that took place at the mediation. She wrote: "I did not misunderstand the terms of the settlement, did I? We did agree to structure it so that 60k got taxed, 60k I got to keep free/clear, and 60k went to you, correct? I know I was a wreck at the mediation, but please tell me I did not imagine that conversation!" Plaintiff learned from her accountant that there was no such exemption for emotional distress damages.

Plaintiff's Contentions

Plaintiff's complaint asserts two causes of action: (1) legal malpractice; and (2) fraudulent inducement. Plaintiff's complaint succinctly alleges that Marek was negligent. Specifically, plaintiff claimed that she was "ill advised as to the tax treatment of the $60,000 in 'emotional distress' damages." The complaint alleges that Marek explained to plaintiff that the structuring of this offer was for the purpose of allowing plaintiff to keep the $60,000 of

"emotional distress" damages tax-free, so that no taxes would be payable on this portion of the settlement.

Marek assured plaintiff that the only loss she would incur would be Marek's $60,000 fee for legal services rendered and the portion of the $180,000 that would be taxed as ordinary income (i.e., wages). In fact, Marek pointed to the arbitrator's notes where the $60,000 Emotional Damage was written and promised plaintiff, "You are going to get this [$60,000 Emotional Damages payment] free and clear. You will not be taxed on this. The only portion you'll be taxed on is the $60,000 in taxable income."

In reliance upon Marek's express assurances, plaintiff accepted the settlement proposal. Plaintiff was shocked to receive any type of tax form from Morgan Stanley. After her accountant advised her that the emotional damages were taxable, plaintiff contacted Marek who said: "I will look into this matter further when I get back into town. But, don't worry about it... if something happens and you are required to pay taxes the firm will reimburse you."

Furthermore, defendants' citation of the parole evidence rule is inapplicable. Plaintiff and Marek did not enter into a "contract" concerning the taxability of emotional damages, barring the admissibility of subsequent statements made by Marek to plaintiff concerning the taxability of emotional damages. Secondly, Marek's e-mail, which defendants rely upon, merely generalizes the term "settlement" to be treated as income, while at the mediation itself Marek distinguishes between income and emotional damages. Finally, plaintiff's e-mails to her counsel concerning her recollection of the events that transpired at the mediation are of no consequence in this motion because they are not sworn statements, they are a figure of speech, and at best, a material issue of disputed fact not subject to evaluation by the court in this motion.

And, whether plaintiff can show that she would have been successful on the merits of the underlying case is again a material issue of fact not ripe for discussion in this motion. In any case, plaintiff's desire was to net $100,000 in the settlement (which is net of taxes); and Marek knew of that desired outcome when advising plaintiff of the tax treatment of the emotional damages. Thus, Marek's advice was the proximate cause of plaintiff's damages and the incurrence of taxes.

Defendants' Reply

Plaintiff fails to allege that had she rejected the $180,000 mediator-proposed settlement, she would have ultimately achieved a better result - either through litigation or settlement. Plaintiff, however, makes no such allegation (perhaps because she recognized that, given the lack of evidence of discrimination, she cannot now argue that she would have prevailed in her underlying action - let alone done better).

Plaintiff argues in opposition that Marek's purported misrepresentations actually caused her to incur tax liability. Whether plaintiff is ultimately required to pay taxes on the $60,000 portion of the $180,000 settlement allocated to emotional distress is a function of the tax codes and how they are interpreted by the courts, not anything that Marek did.

Analysis

CPLR 3211 [a] [1]: Defense is founded upon documentary evidence

Pursuant to CPLR 3211 [a] [l], a party may move for judgment dismissing one or more causes of action asserted against him on the ground that "a defense is founded upon documentary evidence." Thus, where the "documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law," dismissal is warranted (*Leon v Martinez*, 84 NY2d 83,

88, 614 NYS2d 972, 638 N.E.2d 511 [1994]). The test on a CPLR 3211 [a] [1] motion is whether the documentary evidence submitted "conclusively establishes a defense to the asserted claims as a matter of law" *(Scott v Bell Atlantic Corp.*, 282 AD2d 180, 726 NYS2d 60 [1st Dept 2001] *citing Leon v Martinez*, 84 NY2d 83, 88, *supra*; *IMO Indus., Inc. v Anderson Kill & Olick, P.C.*, 267 AD2d 10, 11, 699 NYS2d 43 [1st Dept 1999]).

Where documentary evidence and undisputed facts negate or dispose of the claims in the complaint or conclusively establish a defense, dismissal may be granted pursuant to CPLR 3211[a][1] (*Biondi v Beekman Hill Housing Apt. Corp.*, 257 AD2d 76, 692 NYS2d 304 [1st Dept 1999]; *Kliebert v McKoan*, 228 AD2d 232, 43 NYS2d 114 [1st Dept 1996]; *Gephardt v Morgan Guaranty Trust Co. of N.Y.*, 191 AD2d 229, 594 NYS2d 248 [1st Dept 1993]; *Juliano v McEntee*, 150 AD2d 524, 541 NYS2d 232 [1st Dept 1989]; *see also Leon v Martinez*, 84 NY2d 83, 88, 614 NYS2d 972, 638 N.E.2d 511 [1994]; *Frank v DaimlerChrysler Corp.*, 292 AD2d 118, 741 NYS2d 9 [1st Dept 2002]).

While pleadings should be liberally construed on a motion to dismiss, claims "flatly contradicted by documentary evidence" must be rejected], *citing Kliebert v McKoan*, 228 AD2d 232, 643 NYS2d 114 [1st Dept], *lv denied* 89 NY2d 802, 653 NYS2d 279, 675 NE2d 1232 [1996]).

CPLR 3211 [a] [7]: Dismiss for Failure to State a Cause of Action

In determining a motion to dismiss, the Court's role is ordinarily limited to determining whether the complaint states a cause of action (*Frank v DaimlerChrysler Corp.*, 292 AD2d 118, 741 NYS2d 9 [1st Dept 2002]). The standard on a motion to dismiss a pleading for failure to

state a cause of action is not whether the party has artfully drafted the pleading, but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained (*see Stendig, Inc. v Thom Rock Realty Co.*, 163 AD2d 46 [1st Dept 1990]; *Leviton Manufacturing Co., Inc. v Blumberg*, 242 AD2d 205, 660 NYS2d 726 [1st Dept 1997] [on a motion for dismissal for failure to state a cause of action, the court must accept factual allegations as true]). When considering a motion to dismiss for failure to state a cause of action, the pleadings must be liberally construed (*see*, CPLR §3026). On a motion to dismiss made pursuant to CPLR § 3211, the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit into any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972, 638 NE2d 511 [1994]). However, in those circumstances where the bare legal conclusions and factual allegations are "flatly contradicted by documentary evidence," they are not presumed to be true or accorded every favorable inference (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81, 692 NYS2d 304 [1st Dept 1999], *affd* 94 NY2d 659, 709 NYS2d 861, 731 NE2d 577 [2000]; *Kliebert v McKoan*, 228 AD2d 232, 643 NYS2d 114 [1st Dept], *lv denied* 89 NY2d 802, 653 NYS2d 279, 675 NE2d 1232 [1996], and the criterion becomes "whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275, 401 NYS2d 182, 372 NE2d 17 [1977]; *see also Leon v Martinez*, 84 NY2d 83, 88, 614 NYS2d 972, 638 NE2d 511 [1994]; *Ark Bryant Park Corp. v Bryant Park Restoration Corp.*, 285 AD2d 143, 150, 730 NYS2d 48 [1st Dept 2001]; *WFB Telecom., Inc. v NYNEX Corp.*, 188 AD2d 257, 259, 590 NYS2d 460 [1st Dept], *lv denied* 81 NY2d 709, 599 NYS2d 804, 616 NE2d 159 [1993] [CPLR 3211 motion granted where

defendant submitted letter from plaintiff's counsel which flatly contradicted plaintiff's current allegations of prima facie tort]

Status of E-Mail Correspondence

E-mail correspondence constitutes admissible documentary evidence. *See Borah, Goldstein, Altschuler, Schwartz, & Nahins, PC v Gayle Lubnitzki a/k/a Gayle Shaul,* 13 Misc.3d 823, 822 N.Y.S.2d 425, 2006 N.Y. Slip Op. 26400, N.Y.City Civ.Ct., September 27, 2006; *Ourusoff v. Hopkins*, Slip Copy, 13 Misc.3d 1235(A), 2006 WL 3290440, 2006 N.Y. Slip Op. 52126(U). Thus, plaintiff's argument that plaintiff's e-mails to her counsel concerning her recollection of the events that transpired at the mediation are of no consequence in this motion because they are not sworn statements, they are a figure of speech, and at best, a material issue of disputed fact not subject to evaluation by the court in this motion, is without merit.

Legal Malpractice

To establish a cause of action to recover damages for legal malpractice, a plaintiff must prove (1) that the defendant attorney failed to exercise that degree of care, skill, and diligence commonly possessed by a member of the legal community, (2) proximate cause, (3) damages, and (4) that the plaintiff would have been successful in the underlying action had the attorney exercised due care (*Prudential Ins. Co. of Am. v Dewey, Ballantine, Bushby, Palmer & Wood,* 170 AD2d 108 [1st Dept 1991], affd 80 NY2d 377 [1992], *rearg denied* 81 NY2d 955 [1993]). To sustain a cause of action for legal malpractice, a party must show that an attorney failed to exercise "the ordinary reasonable skill and knowledge" commonly possessed by a member of the legal profession (*Darby & Darby, P.C. v VSI International, Inc.*, 95 NY2d 308 [2000]). To

establish the elements of proximate cause and actual damages it must be shown that the plaintiff would have had a favorable outcome but for the attorney's negligence (*Davis v Klein*, 88 NY2d 1008 [1996]; *Carmel v Lunney*, 70 NY2d 169 [1987]). An attorney may be liable for his or her: ignorance of the rules of practice; failure to comply with conditions precedent to suit; neglect to prosecute or defend an action; and the failure to conduct adequate legal research *(Shopsin v Siben & Siben*, 268 AD2d 578 [2d Dept 2000]).

A fraud claim asserted within the context of a legal malpractice claim "is sustainable only to the extent that it is premised upon one or more affirmative, intentional misrepresentations-that is, something more egregious than mere 'concealment or failure to disclose [one's] own malpractice' " (*White of Lake George v Bell,* 251 A.D.2d 777, 778, 674 N.Y.S.2d 162 [1998], *appeal dismissed* 92 N.Y.2d 947, 681 N.Y.S.2d 477, 704 N.E.2d 230 [1998], *quoting La Brake v Enzien,* 167 A.D.2d 709, 711, 562 N.Y.S.2d 1009 [1990]). In addition to establishing each element of fraud, plaintiff has the burden of proving that the alleged fraud "caused additional damages, separate and distinct from those generated by the alleged malpractice" (*White of Lake George v Bell, supra* at 778, 674 N.Y.S.2d 162; *see La Brake v Enzien, supra* at 711, 562 N.Y.S.2d 1009).

Here, defendants argue that this legal malpractice claim, premised on defendants' failure to exercise due diligence and alleged misrepresentations as to how the settlement amount would be taxed should be dismissed as speculative. Defendants achieved success for plaintiff, in a settlement agreed to by plaintiff who should "not be heard to complain that th[e] result was not achieved in the precise manner [plaintiff] would have preferred" (*Novak v Fischbein, Olivieri Rozenholc & Badillo,* 151 A.D.2d 296, 299, 542 N.Y.S.2d 568 [1989]; *see also Zarin v Reid &*

Priest, 184 A.D.2d 385, 585 N.Y.S.2d 379 [1992]).

In the instant action, defendants have shown that plaintiff has failed to assert in her complaint, failed to argue in opposition to this motion, and is unable to establish sufficiently to maintain this action that she sustained actual and ascertainable damages as a consequence of defendant's negligence, an indispensable component of plaintiff's legal malpractice cause of action (*see Miszko v Leeds & Morelli,* 3 A.D.3d 726, 727, 769 N.Y.S.2d 923 [2004]; *Ehlinger v Ruberti, Girvin & Ferlazzo,* 304 A.D.2d 925, 926, 758 N.Y.S.2d 195 [2003]; *see also Brodeur v Hayes,* 18 A.D.3d 979, 980, 795 N.Y.S.2d 761 [2005], *lv. dismissed, lv. denied* 5 N.Y.3d 871, 808 N.Y.S.2d 134, 842 N.E.2d 19 [2005].

Again, plaintiff failed to assert in her complaint, failed to argue in opposition to this motion, and is unable to establish sufficiently to maintain this action that but for the alleged malpractice of defendants, she would have obtained a more favorable outcome (*see Parker, Chapin, Flattau & Klimpl v Daelen Corp.,* 59 A.D.2d 375, 379, 399 N.Y.S.2d 222 [1977]). "While the complaint is replete with allegations describing defendants' negligence in the underlying action, it says nothing concerning the merits of plaintiff's [action]. That deficiency warrants dismissal of the complaint for failure to state a cause of action, there being no allegations that but for the alleged malpractice plaintiff[ ] would have prevailed in the underlying action" (*Sonnenschine . Giacomo,* 295 A.D.2d 287 [2002]).

This court further finds that the fraudulent inducement cause of action is duplicative of the legal malpractice cause of action, and is therefore dismissed. *Tortura v Sullivan Papain Block McGrath & Cannavo, P.C.,* 21 AD3d 1082 (2d Dept 2005); *Shivers v Siegel,* 11 AD3d 447

[2004]; *Daniels v Lebit*, 299 AD2d 310 [2002]).

Conclusion

Based on the foregoing, it is hereby

ORDERED that the portion of the motion of defendants Liddle & Robinson, LLP and David Marek, for an order pursuant to CPLR 3211(a)(1) and (7), dismissing the verified complaint of plaintiff Coralisa Cattaneo, because it fails to state a cause of action and because certain undisputed documents preclude plaintiff's claims, is granted. It is further

ORDERED that the portion of the motion of defendants Liddle & Robinson, LLP and David Marek, for an order seeking sanctions against plaintiff and her counsel under Section 130-1.1 of the New York Court Rules for filing plaintiff's frivolous complaint, is denied. It is further

ORDERED that counsel for defendants shall serve a copy of this order with notice of entry within twenty days of entry on counsel for plaintiff.

This constitutes the decision and order of this court.

Dated: New York, NY
December 15, 2006

Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD

FILED
DEC 20 2006
NEW YORK
COUNTY CLERK'S OFFICE