

Albano v Dersovitz

2011 NY Slip Op 33380(U)

December 12, 2011

Sup Ct, Nassau County

Docket Number: 023368/2010

Judge: Ira B. Warshawsky

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SHORT FORM ORDER

**SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU**

PRESENT:

**HON. IRA B. WARSHAWSKY,
Justice.**

TRIAL/IAS PART 7

MICHAEL ALBANO,

Plaintiff,

INDEX NO.: 023368/2010
MOTION DATE: 10/12/2011
SEQUENCE NO.: 002, 004

- against -

RONI DERSOVITZ, MARC A. BERNSTEIN,
BERNSTEIN, BERNSTEIN LLP, RDLF FINANCIAL
SERVICES LLC, RD LEGAL FUNDING, LLC, RD
LEGAL HOLDINGS, LLC, RD LEGAL CAPITAL,
LLC, RD FINANCIAL SERVICES, LLC, REISMAN
PEIREZ & REISMAN, LLP., JEROME REISMAN and
JOSEPH CAPOBIANCO,

Defendants.

The following documents were read on this Motion:

- Motion 002 to Dismiss Complaint against Reisman Peirez & Reisman, LLP
Jerome Reisman, and Joseph Capobianco and for Sanctions 1.
- Affirmation of George L. Santangelo, Esq. in Opposition to Motion 2.
- Affidavit of Michael Albano in Opposition to Motions 002, and 004 3.
- Exhibits A — R
- Reply Affirmation of Gregg M. Kligman, Esq. in Further Support 4.
- Motion 004 on behalf of Dersovitz, RDLF Financial Services, LLC,
RD Legal Funding, LLC, RD Legal Holdings, LLC, RD Legal Capital, LLC
to Dismiss Sixth Claim asserted in Complaint 5.
- Affidavit of Michael Albano in Opposition to Motion 6.
- Reply Affirmation of Irena Leigh Norton, Esq. 7.

PRELIMINARY STATEMENT

Motion Sequence # 2 seeks dismissal of the complaint against Reisman, Peirez & Reisman, Jerome Reisman, and Joseph Capobianco (“RPR defendants”) pursuant to CPLR § 3212 (b), or, alternatively, pursuant to CPLR § 3211 (a)(1), and (a)(7), and awarding sanctions pursuant to CPLR § 8303-a and NYCRR § 130-1.1. Movants contend that the action is untimely; that they never represented plaintiff, and are therefore not subject to allegations of negligence; and that the claims of violation of Judiciary Law § 487 are based on conclusory allegations which are insufficient to sustain the claims, and are disproved by documentary evidence.

In Motion Sequence # 4, defendants Roni Dersovitz, RDLF Financial Services, LLC, RD Legal Funding, LLC, RD Legal Holdings, LLC and RD Legal Capital (“RD defendants”) move to dismiss plaintiff’s Sixth claim in the complaint, and for the imposition of sanctions against plaintiff.

BACKGROUND

Albano seeks damages from the RPR defendants as a result of their representation of RDLF Financial Services (“RDLF”) and its principal, Roni Devoritz (“Devoritz”), in an action against Albano in Supreme Court New York County. In October 2006, RDLF brought an action against Marc A. Bernstein, Bernstein & Bernstein, LLP, and North Fork Bank. (New York County Index No. 119185/2006). On or about June 27, 2008 RDLF entered into a stipulation of settlement (the “Settlement”), whereby Bernstein agreed to pay RDLF \$851,390.09, and simultaneously executed a separate agreement with Dersovitz, in which he agreed to pay Dersovitz an additional sum of \$2,730,792.84. Two months later, Bernstein defaulted on the settlement.

RDLF and Dersovitz were successful in obtaining judgments in the amounts of \$891,210.41 and \$2,921,349.81 respectively, against Bernstein and Bernstein & Bernstein, LLP. In an action entitled *RDLF Financial Services, LLC and Roni Dersovitz v. Marc A. Bernstein, Michael Albano and Houston Acquisition*, New York County Index No.

101391/2009, RDLF and Dersovitz initially obtained a temporary restraining order prohibiting the transfer by Houston Acquisition LLC of title to two commercial properties, located at 331 Houston Street, New York, NY, and 163 Ridge Street, New York, NY. The temporary restraining order was lifted by Order of Hon. Eileen Bransten, J.S.C. dated March 3, 2009. By motion dated March 2, 2009 defendants moved for summary judgment dismissing the complaint and for the imposition of sanctions against plaintiffs.

The action claimed that Albano and Bernstein were the sole members of Houston Acquisition, LLC ("Houston") and that, during the pendency of the prior action, Houston conveyed title to the premises to Albano without consideration, and that such transfer was for the purpose of avoiding Bernstein's obligations to plaintiffs, in violation of the Debtor and Creditor Law.

The Court granted the motion, determining that plaintiff's complaint failed to allege a violation of the Debtor and Creditor Law, in that membership interest in a limited liability company is personal property, and does not grant a member interest in a specific parcel of real property. The Court also dismissed the claim of a conspiracy to defraud, since neither of the defendants had an interest in the real property, they did not state a cause of action under the Debtor and Creditor Law, and therefore could not be liable for a conspiracy to defraud by conveying the real property from the limited liability company to Albano. Similarly, plaintiffs failed to show entitlement to an injunction against transfer for the same reasons.

In this action, Albano claims that Dersovitz and RDLF, while represented by the RPR defendants, sought to enforce the judgment against Bernstein by falsely claiming that the property was owned by Bernstein, when they knew that it was owned by Albano, and that Bernstein had no interest in the property. The complaint alleges that the defendants were negligent in failing to investigate the claims against Bernstein and Albano before bringing the action, and that Albano was damaged by the negligence of the defendants.

The complaint also alleges that the RPR defendants violated Judiciary Law § 487 in

that they, along with Dersovitz, "agreed to deceit and collusion with intent to deceive the Courts of the state of New York in a case pending in the courts. (RDLF Financial Services, LLC and Dersovitz against Albano and Bernstein, Sup. Ct. NY Co., #101091/09". This is the action in which Dersovitz and RDLF, represented by the RPR defendants, sought to seize the property which had been transferred from Houston to Albano.

With respect to the RD defendants, the complaint alleges a violation of § 487 for their conduct in the New York County Action. The RD defendants move for dismissal of the complaint on the ground that it is based upon conclusory allegations insufficient to state a claim, and which claims are substantively disproved by documentation in support of the motion to dismiss.

DISCUSSION

The RPR defendants move for dismissal pursuant to CPLR § 3211 (a)(1), (a)(5) and (a)(7), which, respectively, provide for dismissal based upon documentary evidence; the cause of action is barred because of arbitration and award; collateral estoppel, discharge in bankruptcy, infancy or other disability of the moving party, payment, release, res judicata, statute of limitations, or statute of frauds; and that the pleading fails to state a cause of action. The motion is granted.

Plaintiff's claim based on professional negligence against the RPR defendants fails to state a claim upon which relief can be granted. Essential to a claim of professional negligence is the existence of an attorney-client relationship. An attorney is not liable to a person other than his or her client for the negligent performance of legal work. (*Viscardi v. Lerner*, 125 A.D.2d 662 [2d Dept.1986]). Albano was never a client of the RPR defendants, they never had a duty to him, and there can be no finding of negligence in the absence of a duty.

Plaintiff also claims a violation of Judiciary Law § 487, which provides in part that an attorney or counselor who is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party . . . Is guilty of a misdemeanor,

and in addition to the punishment prescribed therefor by the penal law, he forfeits to the party injured treble damages, to be recovered in a civil action. CPLR § 3016 (b) provides that “(w)here a cause of action or defense is based upon misrepresentation, fraud . . . , the circumstances constituting the wrong shall be stated in detail. Plaintiff has failed to do so.

¶ 55 of the complaint states as follows:

Dersovitz, RPR, Reisman and Capobianco violated § 487 in at least the following ways:

- a) Dersovitz, RPR, Reisman and Capobianco presented false and fraudulent documents to the Court, to wit, a changed, altered and/or forged document falsely supporting the claim that Bernstein owned the real property which Dersovitz, RPR, Reismen and Capobianco knew was owned by Albano.
- b) Dersovitz, RPR, Reisman and Capobianco filed false documents supporting the claims against Bernstein.
- c) Dersovitz, RPR, Reisman and Capobianco failed to disclose to the Court that the claims against Bernstein were fraudulent.

The foregoing is wholly lacking in details as to what documents were altered, forged or false, or in what manner the claims against Bernstein were fraudulent. Certainly, the judgment against Bernstein is not fraudulent. (Exh. “B” to Motion Seq. 2). Nor is there the slightest evidence that the deed from Michael Albano and his sister, Theresa Albano to Houston Acquisition was altered, forged or fraudulent. The same is true with respect to the deed from Houston, a limited liability company in which Bernstein held a membership interest, to Albano.

It is abundantly clear from the May 10, 2010 decision of Hon. Eileen Bransten (Exh. “F” to Motion) that it was the legal effect of the transactions which were at issue, not the validity of the documents. The determination of the Court was simply that

Bernstein, as a member of the limited liability company which owned the properties, did not have a direct interest in any particular property, and therefore, the transfer of title at a time when Bernstein was indebted to RDLF Financial and Dersovitz, did not constitute a violation of the Debtor and Creditor Law.

The allegations of the complaint with respect to a violation of Judiciary Law § 487 fail to state a claim upon which relief can be granted, are belied by the documentary evidence in the form of deeds between and among the Albanos and Houston Acquisition, and are belied by the determination of Justice Bransten which, among other findings, determined that the claims by the plaintiffs were not frivolous, much less fraudulent.

Motions by the RPR defendants and the RD defendants to dismiss that portion of the complaint which alleges a violation of Judiciary Law § 487 is granted.

Both movants seek the imposition of sanctions upon Michael Albano for the initiating of a frivolous action. The Court determines that this action is not one of the enumerated actions in CPLR § 8303-a for which costs and reasonable attorney's fees are available in the event of the commencement of a frivolous action. The application for sanctions for filing a frivolous action is denied.

This constitutes the Decision and Order of the Court.

Dated: December 12, 1011


J.S.C.

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