

LaTouche v Terezakis
2013 NY Slip Op 34020(U)
June 28, 2013
Supreme Court, Queens County
Docket Number: 15799/10
Judge: Diccia T. Pineda-Kirwan
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable DICCIA T. PINEDA-KIRWAN
Justice

IA PART 36

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JAUREL LATOUCHE, ET AL,

Index No.: 15799/10
Motion Date *CMP*: 3/1/13
(Rcvd Part 36 1/22/13)
Motion Cal. No. *CMP*: 66&67
Motion Seq. No.: 11&12

Plaintiff(s),
-against-

HARRY TEREZAKIS, ET AL,

Defendant(s).
-----X

ORIGINAL

The following papers numbered 1 to 25 read on this motion by plaintiffs Jaurel LaTouche, Sheila Audige, Garcia Montfleury, Emmanuel Joseph, Vladimir Monel, Kemberlie Joseph and Tracy Monel (collectively referred to as "plaintiffs"), for partial summary judgment against defendants Nicola Cavallo, Esq., also known as Nicolas A. Cavallo, Esq., and/or Nicholas A. Cavallo, Esq. (Cavallo), and James Follander, Esq. (Follander); and by separate notice of motion by Follander for summary judgment dismissing the complaint.

PAPERS	NUMBERED
Notices of Motion-Affidavits-Exhibits.....	1 - 13
Answering Affidavits-Exhibits.....	14 - 22
Reply.....	23 - 25

Upon the foregoing cited papers, it is ordered that the motions are determined as follows:

This is an action to recover money damages that plaintiffs allegedly sustained as a result of allegedly unscrupulous conduct by Cavallo and defendant Harry Terezakis (Terezakis) in signing various promissory notes in their individual capacities, in what has been alleged to be a ponzi scheme. Follander was an employee of Cavallo from 1996 to 2000. Plaintiffs alleged that between 2006 and 2009, Terezakis and Cavallo received various sums of money from plaintiffs and defaulted in payments on those notes. They further alleged various claims against Follander, who supposedly represented them as their attorney. In May 1995 Terezakis was charged with operating a ponzi scheme by the Securities and Exchange Commission, and in December 1998 he was found guilty of fraud.

Plaintiffs made a prior motion for summary judgment against Cavallo, and in a decision dated December 6, 2011, and entered on December 23, 2011, this court denied that motion and concluded that issues of fact existed that precluded summary relief. Plaintiffs again move for partial summary judgment against Cavallo, but the instant motion is procedurally improper because it violates the rule against successive motions for summary judgment (*see B & N Props., LLC v Elmar Assoc., LLC*, 51 AD3d 831 [2008]; *Rocky Point Drive-In, L.P. v Town of Brookhaven*, 37 AD3d 805, 807 [2007]).

Furthermore, “[p]ursuant to the doctrine of law of the case, judicial determinations made during the course of a litigation before final judgment is entered may have preclusive effect provided that the parties had a full and fair opportunity to litigate the initial determination” (*Marcus Dairy, Inc. v Jacene Realty Corp.*, 27 AD3d 427 [2006], *lv dismissed* 7 NY3d 783 [2006]; *see Gould v International Paper Co.*, 223 AD2d 964, 965 [1996], *lv denied* 88 NY2d 808 [1996]). Thus, “the law of the case doctrine precludes reconsideration [of a decided issue] in the course of the same litigation” (*Gould*, 223 AD2d at 965; *see Hampton Val. Farms, Inc. v Flower & Medalie*, 40 AD3d 699, 701 [2007]). In the instant matter, this issue was fully litigated and decided in the court’s prior decision, resulting in a denial of plaintiffs’ prior motion for summary judgment against Cavallo. Therefore, plaintiffs are not entitled to the relief sought on the branch of their motion against Cavallo.

Plaintiffs also move for partial summary judgment on their claims against Follander while Follander has moved for summary judgment dismissing the complaint. Plaintiffs have alleged claims against Follander sounding in legal malpractice, fraud, breach of fiduciary duty, fraudulent misrepresentation, negligent misrepresentation, undue influence and for punitive damages. The record contains, among other things, deposition testimony and affidavits from Follander and plaintiffs.

On this branch of plaintiffs’ motion, the court will initially address Jaurel LaTouche and Kemberlie Joseph’s claims. Based upon the evidence in the record, it is undisputed that Follander did not represent and did not have a relationship or contact with either plaintiff in relation to the transactions at issue (CPLR 3212; *see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Therefore, those claims are dismissed.

Next, the court will turn to plaintiffs’ claims against Follander for breach of fiduciary duty and those sounding in fraud, fraudulent misrepresentation and negligent misrepresentation. Since plaintiffs’ claims for breach of fiduciary duty are duplicative of their claims for legal malpractice and arise out of the same facts which give rise to the legal malpractice claims, they are dismissed as a matter of law (*see Keness v Feldman, Kramer & Monaco, P.C.*, 105 AD3d 812, 813-814 [2013]; *Rosenbaum v Sheresky Aronson Mayefsky & Sloan, LLP*, 100 AD3d 731, 733 [2012]; *Financial Servs. Vehicle Trust v Saad*, 72 AD3d 1019, 1021 [2010]). The claims sounding in fraud, fraudulent misrepresentation and negligent misrepresentation are also dismissed for the same reason (*see Financial Servs. Vehicle Trust v Saad*, 72 AD3d at 1021; *Turner v Irving Finkelstein & Meirowitz, LLP*, 61 AD3d 849, 850 [2009]; *Sitar v Sitar*, 50 AD3d 667, 670 [2008]).

Plaintiffs further allege claims against Follander for undue influence. To support a claim for undue influence,

it must be shown that the influence exercised amounted to a moral coercion, which restrained independent action and destroyed free agency, or which, by importunity which could not be resisted, constrained [an individual] to do that which was against his free will and desire, but which he was unable to refuse or too weak to resist

(*Children's Aid Socy. of City of N.Y. v Loveridge*, 70 NY 387, 394 [1877]; see *Matter of Engelhardt*, 88 AD3d 997, 998 [2011]).

The evidence in the record, including the testimony of plaintiffs and Follander, served to demonstrate that, while Follander acted as plaintiffs' attorney at various closings, he did not have dealings with plaintiffs before or after the closing dates. The evidence has shown that none of Follander's contact with plaintiffs has met the above-stated standard to support their claims for undue influence (see *Engelhardt*, 88 AD3d at 998). No issues of fact have been raised by the parties. Therefore, Follander is entitled to summary judgment dismissing the claims for undue influence.

Plaintiffs allege claims of legal malpractice against Follander as their attorney in the related transactions. The court will first address Emmanuel Joseph's and Tracy Monel's claims. Through the evidence submitted, including Follander's affidavit and the testimony of the parties, the record established that Follander represented Emmanuel Joseph at his closing on May 11, 2007, that he represented Monel at her closing on June 8, 2007, and that he did not perform any work for them, as their attorney, after these closing dates, which were both more than three years prior to the commencement of the action.

Since the applicable statute of limitations for a legal malpractice claim pursuant to CPLR 214(6) is three years from the date that the cause of action accrued, Emmanuel Joseph's and Tracy Monel's claims for legal malpractice are time barred (CPLR 214[6]; see *McCoy v Feinman*, 99 NY2d 295, 301 [2002]; *Pace v Raisman & Assoc., Esqs., LLP*, 95 AD3d 1185, 1188 [2012]). Nothing in the record served to "establish that the statute of limitations was tolled or that Emmanuel Joseph and Monel actually commenced the action within the applicable limitations period" (*Krichmar v Scher*, 82 AD3d 1164, 1165 [2011]; see *Fleyshman v Suckle & Schlesinger, PLLC*, 91 AD3d 591, 592 [2012], *lv denied* 19 NY3d 801 [2012]; *East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.*, 90 AD3d 821, 822 [2011]). Therefore, Emmanuel Joseph's and Monel's claims for legal malpractice are dismissed.

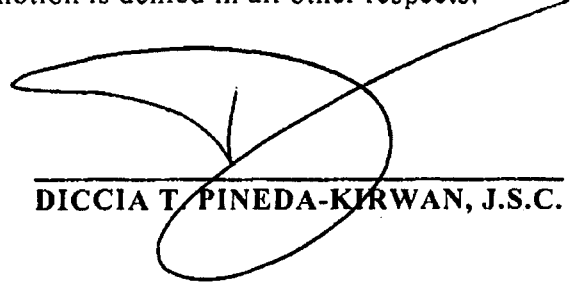
As to the remaining plaintiffs' claims for legal malpractice against Follander, in light of the conflicting expert opinions and evidence submitted by plaintiffs and Follander in support of their respective motions as to Follander's alleged failure to meet the requisite professional standards of care, genuine issues of material fact remain and summary relief is precluded on these claims at this juncture (see *Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]; *Alvarez*, 68 NY2d at 324; *Pittman v Rickard*, 295 AD2d 1003, 1004 [2002]).

Lastly, plaintiffs have alleged claims against Follander for punitive damages. While a claim for punitive damages is not recognized as an independent and separate cause of action because it is merely an element of the claim for damages on an underlying action (see *Rivera v City of New York*, 40 AD3d 334, 344 [2007], *lv dismissed* 16 NY3d 782 [2011]; *APS Food Sys. v Ward Foods*, 70 AD2d 483, 488 [1979]), it may be sought as a part of a tort claim supporting a valid claim for compensatory damages (see *Hubbell v Trans World Life Ins. Co. of N.Y.*, 50 NY2d 899, 901 [1980]; *Prote Contr. Co. v Board of Educ. of City of N.Y.*, 276 AD2d 309, 310 [2000]).

Inasmuch as the cause of action for punitive damages in the complaint in this matter "reiterates and realleges each and every allegation contained in the" prior paragraphs where valid tort claims were asserted, including the claims for legal malpractice against Follander, the Court finds that, while inartfully pleaded, the claim for punitive damages has been properly asserted (*see Prote Contr. Co. v Board of Educ. of City of N.Y.*, 276 AD2d at 310). However, since the issue of whether punitive damages may be awarded is an issue for a jury, after a determination of whether Follander committed legal malpractice, an issue that remains undecided by this Court, then a determination will be made as to whether Follander may be liable for punitive damages based upon findings as to his conduct while representing plaintiffs at that time (*see Nardelli v Stamberg*, 44 NY2d 500, 503 [1978]; *Walker v Sheldon*, 10 NY2d 401, 405 [1961]; *see Nooger v Jay-Dee Fast Delivery*, 251 AD2d 307, 307-308 [2006]; *Pchelka v Loomis-Root, Inc.*, 210 AD2d 889, 889-890 [1994]; *Doe v Roe*, 190 AD2d 463, 475 [1993], *lv dismissed* 82 NY2d 846 [1993]).

Accordingly, plaintiffs' motion for partial summary judgment is denied in its entirety. Follander's motion for summary judgment is granted only to the extent that the claims of LaTouche and Kemberlie Joseph asserted against him are dismissed; the claims sounding in breach of fiduciary duty, fraud, fraudulent misrepresentation, negligent misrepresentation and undue influence asserted against Follander are dismissed; the claims of legal malpractice against Follander that have been asserted by Emmanuel Joseph and Tracy Monel are dismissed; and Follander's motion is denied in all other respects.

Dated: June 28, 2013



 DICCIA T. PINEDA-KIRWAN, J.S.C.

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