

Carter Ledyard & Milburn LLP v Vaccaro

2013 NY Slip Op 34215(U)

February 27, 2013

Supreme Court, New York County

Docket Number: 150370/2013

Judge: Carol R. Edmead

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PRESENT: Hon. HON. CAROL BRIDGES
Justice

PART 35

Index Number : 150370/2013
CARTER LEDYARD & MILBURN LLP
vs.
VACCARO, ANTHONY F.
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT LIEU COMPLAINT

INDEX NO. _____
MOTION DATE 2/25/13
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to for Summary judgment

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause - Affidavits - Exhibits...	_____
Answering Affidavits - Exhibits _____	_____
Replying Affidavits _____	_____
Cross-Motion: <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	

Upon the foregoing papers

In this action to recover monies owed for legal services provided to plaintiff in an underlying, pending litigation, plaintiff Carter Ledyard & Milburn, LLP ("plaintiff") moves pursuant to CPLR 3213 for summary judgment in lieu of complaint based on two notes executed by defendants and a check signed by, Anthony F. Vaccaro and JAV Consulting, Inc. ("JAV") (collectively, "defendants").

"To establish prima facie entitlement to summary judgment in lieu of complaint, a plaintiff must show the existence of a promissory note executed by the defendant containing an unequivocal and unconditional obligation to repay and the failure of the defendant to pay in accordance with the note's terms" (*Zyskind v. FaceCake Marketing Technologies, Inc.*, 101 A.D.3d 550, 956 N.Y.S.2d 45 [1st Dept. 2012] *citing Gullery v. Imburgio*, 74 A.D.3d 1022, 905 N.Y.S.2d 221 [2d Dept 2010]). "Once the plaintiff submits evidence establishing these elements, the burden shifts to the defendant to submit evidence establishing the existence of a triable issue with respect to a bona fide defense" (*Zyskind, supra, citing Pennsylvania Higher Educ. Assistance Agency v. Musheyev*, 68 A.D.3d 736, 888 N.Y.S.2d 911 [2d Dept 2009]).

Here, plaintiff established defendants' execution of the notes and default in payment, and thus, plaintiff made out a prima facie case (*see Alard, L.L.C. v. Weiss*, 1 A.D.3d 131, 767 N.Y.S.2d 11 [1st Dept. 2003] *citing Seaman-Andwall Corp. v. Wright Mach. Corp.*, 31 A.D.2d 136, 137, 295 N.Y.S.2d 752, *affd.* 29 N.Y.2d 617, 324 N.Y.S.2d 410, 273 N.E.2d 138, *Couch*

Dated: _____ ENTER: _____ J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
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 SUBMIT ORDER SETTLE ORDER/JUDG.

White L.L.P. v. Kelly, 286 A.D.2d 526, 729 N.Y.S.2d 206 [3d Dept. 2001]). It is undisputed that defendants executed two promissory notes dated November 13, 2012, one for \$20,000 and the other for \$30,000, in which defendant “unconditionally” agreed to pay such sums by December 31, 2012. The notes also required defendants to pay all costs and expenses of any action to collect on the notes.

Plaintiff also established that on November 13, 2012, defendants also delivered a check dated the same date for \$40,000 drawn against JAV’s account. This check was returned for insufficient funds and has not been replaced despite plaintiff’s demands. Both the notes, and the check, constitute instruments for the payment of money only sufficient to support a motion under CPLR 3213 (*First Inter-County Bank of N.Y. v DeFilippis*, 160 A.D.2d 288, 553 N.Y.S.2d 384 [1st Dept. 1990] (“A check is an ‘instrument for the payment of money only’, and due execution of the check and the circumstances under which it was given were sufficiently set forth in the moving papers”)). Thus, plaintiff established its entitlement to \$50,000.00 under the notes, and \$40,000.00 based on the returned check, totaling \$90,000.00.

“Where an action is commenced by a motion for summary judgment in lieu of complaint (CPLR 3213), the defendant is obligated to set forth in his opposition papers any defenses he may have on the merits *and to lay bare his evidentiary proof* supporting any such defenses” (*Alfred E. Mann Living Trust v. ETIRC Aviation S.a.r.l.*, 78 A.D.3d 137, 910 N.Y.S.2d 418 [1st Dept. 2010] *citing Thompson v. Olsen*, 177 A.D.2d 449, 576 N.Y.S.2d 545 [1991] (emphasis added)).

Here, defendants’ claim of legal malpractice in defense of this action is premised on plaintiff’s alleged failure to conduct “paper discovery” and “depositions” and that the underlying “case is a mess.” In support, defendants submit a photograph of “three copies of the original Order to Show Cause and correspondence from an attorney/trustee.” According to plaintiff, because of the lack of such discovery, he was “prejudiced in approach to the trial” in the pending litigation. He learned of the lack of discovery from his new counsel in the pending litigation. To succeed on a claim for legal malpractice, the plaintiff must show: (1) the negligence of the attorney; (2) that the attorney’s negligence was a proximate cause of the loss sustained; and (3) that the plaintiff was damaged as a result of the attorney’s actions (*Tydings v Greenfield, Stein & Senior, LLP*, 43 A.D.3d 680, 682 [1st Dept 2007]; *Bishop v Maurer*, 33 A.D.3d 497, 498 [1st Dept 2006], *affd* 9 N.Y.3d 910 [2007]; *Leder v Spiegel*, 31 A.D.3d 266, 267 [1st Dept 2006], *affd* 9 N.Y.3d 836 [2007], *cert denied* 128 S.Ct. 1696 [2008]).

In order to prove proximate causation, the plaintiff must establish a “case within a case” – that “but for” the alleged negligence, the plaintiff would have prevailed in the underlying action, or would not have sustained any “ascertainable damages” (*Brooks v Lewin*, 21 AD3d 731, 734 [1st Dept 2005], *lv denied* 6 NY3d 713 [2006]).

Plaintiff’s claim of lack of discovery and the photographs he submits in support are insufficient to support a legal malpractice defense to plaintiff’s claims. Indeed, there is no evidence before the Court of legal malpractice committed by plaintiff (*cf. Couch White L.L.P. v. Kelly*, 286 A.D.2d 526, 729 N.Y.S.2d 206 [3d Dept 2001] (“The record contains documentary evidence, a letter in December 1993 to the firm from opposing counsel in defendant’s case during the time the firm was representing defendant, advising of possible legal malpractice by the firm during the course of their representation of defendant”)). Therefore, as defendant failed to present a defense to plaintiff’s summary judgment motion, summary judgment in plaintiff’s favor is warranted.

Based on the foregoing, it is hereby


ORDERED that plaintiff's motion pursuant to CPLR 3213 for summary judgment *in lieu* of complaint against defendants Anthony F. Vacarro and JAV Consulting Inc., jointly and severally, in an amount totaling \$90,000, plus interest thereon, plus all costs and expenses, is granted; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of plaintiff Carter Ledyard & Milburn, LLP, and against defendants Anthony F. Vacarro and JAV Consulting Inc., jointly and severally, in the amount of \$90,000, plus interest at the statutory rate from the date of the commencement of the action, together with costs upon a submission of an appropriate bill of costs, and that plaintiff have execution therefor; and it is further

ORDERED that plaintiff serve a copy of this order with notice of entry upon defendant within 20 days of entry.

This constitutes the decision and order of the court.

Dated 2/27/13

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