

Pasquale v Heppt

2013 NY Slip Op 31560(U)

July 15, 2013

Supreme Court, New York County

Docket Number: 112890/2011

Judge: Doris Ling-Cohan

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

JUSTICE DORIS LING-COHAN
PRESENT: _____
Justice

PART 36

Index Number : 112890/2011
DE PASQUALE, VINCENT
vs
HEPPT, JOSEPH M.
Sequence Number : 002
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to 7, were read on this motion to ~~for~~ dismiss

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1, 2, 3
Answering Affidavits — Exhibits _____ | No(s). 4, 5, 6
Replying Affidavits _____ | No(s). 7

Upon the foregoing papers, it is ordered that this motion is *decided in accordance with the attached memorandum decision dated 7/15/13.*

on or before NOI ~~10/3/13~~ 10/7/13
cc

10/3/13, 10 AM - only if NOI not filed or discovery over.

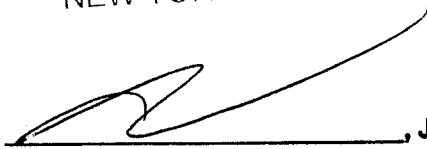
MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED

JUL 17 2013

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 7/15/13

 _____, J.S.C.

JUSTICE DORIS LING-COHAN

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

FILED

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 36

JUL 17 2013

-----X
VINCENT DE PASQUALE AND LILLIAN DE
PASQUALE,

COUNTY CLERK'S OFFICE
NEW YORK

Plaintiffs,

Index No. 112890/11

-against-

Motion Seq. No.: 002

JOSEPH M. HEPPT, ESQ.,

Defendant.

-----X
Ling-Cohan, J.:

In motion sequence 002, defendant Joseph M. Heppt, Esq. moves, pursuant to CPLR 3211 (a) (1) and (7), to dismiss the plaintiffs' complaint against him, prior to the filing of an answer.

This action arises out of the defendant's legal representation of plaintiff Lillian De Pasquale (Lillian) in an underlying action involving the disputed estate of her late husband, Joseph De Pasquale (Joseph), as well as the legal representation of plaintiff Vincent De Pasquale (Vincent), son of Lillian, for employment and contract claims in a separate matter.

The following factual allegations are set forth in the complaint, and for the purposes of this motion are accepted as true.

Lillian was the executrix of Joseph's estate. In 2005, Daniel De Pasquale (Daniel), brother of Joseph, commenced an action against Lillian in Supreme Court, Queens County (the

Estate Action). In March 2009, Lillian agreed to settle the Estate Action with Daniel, and the settlement was entered into on the record before the court. In April 2009, Lillian and Vincent engaged the legal services of defendant, and allegedly paid him a retainer of \$5,000 each, for a total of \$10,000. Lillian allegedly retained defendant, after a settlement was reached in the Estate Action, which was entered on the record, to complete the settlement of the Estate Action, while Vincent allegedly retained defendant to research and litigate claims relating to employment and contractual issues in a separate matter.

In regard to the Estate Action, the complaint alleges that defendant was unable to achieve a negotiated disposition with opposing counsel, and, therefore, recommended that Lillian file an order to show cause, requesting that the court vacate the settlement entered into on the record. Defendant advised Lillian that the motion was "an uphill battle." Defendant told Lillian, however, that this was her only option other than paying the full amount of the settlement. Lillian agreed to this strategy. As the order to show cause was pending, opposing counsel moved to enforce the settlement agreement, and a judgment was entered against Lillian. To aid in levying execution against Lillian's bank accounts, opposing counsel enlisted the services of the New York City Marshal's Office.

After judgment was entered, the Honorable Orin R Kitzes, Justice of the Supreme Court, Queens County, denied Lillian's

order to show cause to vacate the settlement, and stated in his decision that the proper procedure was to bring a plenary action. Lillian alleges that she had to pay post-judgment statutory interest on the judgment, as well as statutory poundage to the Marshal, as a result of defendant's act of filing an order to show cause, rather than filing a plenary action. Lillian alleges claims of legal malpractice and breach of contract.

In regard to Vincent's claims, the complaint alleges that defendant was paid to research Vincent's alleged contract and employment claims, in a separate matter, and that defendant failed to do so, despite retaining Vincent's payment of \$5,000. Vincent alleges claims of legal malpractice, breach of contract, and a claim that sounds in unjust enrichment.

Analysis

Lillian's Claims

Defendant moves to dismiss Lillian's claims for legal malpractice and breach of contract on the grounds that the presented documentary evidence belies them, and that they fail to state a claim.

A CPLR 3211 (a) (1) motion to dismiss will be granted where the documentary evidence "conclusively establishes a defense to the asserted claims," disposing of the claims in the complaint as a matter of law (*Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267, 271 [1st Dept 2004] [internal

quotes and citations omitted)). "[T]o be considered 'documentary,' evidence must be unambiguous and of undisputed authenticity" (*Fontanetta v John Doe 1*, 73 AD3d 78, 86 [2d Dept 2010] [citations omitted]). In support of his motion, defendant submits three decisions by Justice Kitzes issued in the Estate Action. These decisions are unambiguous and their authenticity is not disputed, deeming them sufficient documentary evidence.

"In order to sustain a claim for legal malpractice, a plaintiff must establish both that the defendant attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession which results in actual damages to a plaintiff, and that the plaintiff would have succeeded on the merits of the underlying action "but for" the attorney's negligence"

(*Leder v Spiegel*, 9 NY3d 836, 837 [2007], cert denied 552 US 1257 [2008], quoting *AmBase Corp. v Davis Polk & Wardwell*, 8 NY3d 428, 434 [2007]). In regard to Lillian's claim for legal malpractice, the documentary evidence presented by defendant establishes that filing an order to show cause instead of a plenary action was not the proximate cause of Lillian's damages. Regardless of whether defendant filed a plenary action or not, the settlement payment was due June 8, 2009. After payment was not made on that date, as stated by Justice Kitzes, the plaintiff in the Estate Action engaged the services of the Marshal after taking "various actions to compel [Lillian] to appear for depositions to determine her assets and for those assets to not be dissipated" (Furman affirmation in support of motion to dismiss, exhibit E). Thus, it was not the filing of an order to show cause versus a plenary

action, which caused the poundage owed to the Marshal, rather, it was Lillian's failure to timely pay the settlement amount, and the actions of Lillian afterwards, which caused the poundage and interest to accrue. It is noted that "[s]tipulations of settlement are favored by the courts and not lightly cast aside...This is all the more so in the case of 'open court' stipulations...within CPLR 2104, where strict enforcement not only serves the interest of efficient dispute resolution but also is essential to the management of court calendars and integrity of the litigation process. Only where there is cause sufficient to invalidate a contract, such as fraud, collusion, mistake or accident, will a party be relieved from the consequences of a stipulation made during litigation...". *Hallock v. State of New York*, 64 NY2d 224, 230 (1984) (citations omitted). Thus, Lillian's claim for legal malpractice is dismissed.

Lillian's claim for breach of contract is also dismissed, as duplicative of the legal malpractice claim, as it is based on the same facts and seeks the same relief (*Citidress II Corp. v Tokayer*, 105 AD3d 798, 799 [2d Dept 2013]; see also *Natural Organics, Inc. v Anderson Kill & Olick, P.C.*, 67 AD3d 541, 542 [1st Dept 2009]).

Vincent's Claims

Vincent's claim for legal malpractice is dismissed for failure to state a claim. As stated above, to state a cause of action for legal malpractice, a plaintiff must allege that the

attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession, causing actual damages, and "that the plaintiff would have succeeded on the merits of the underlying action "but for" the attorney's negligence'" (*Leder v Spiegel*, 9 NY3d at 837).

"Speculative contentions about what might have happened had defendant attorney" litigated the claims differently are not sufficient to support a claim for legal malpractice (*Citidress II Corp. v Tokayer*, 105 AD3d at 798-799; see also *Keness v Feldman, Kramer & Monaco, P.C.*, 105 AD3d 812, 813 [2d Dept 2013]). Here, Vincent fails to plead specific factual allegations demonstrating that, but for the defendant's alleged act of failing to perform the legal work, he would have prevailed in an underlying action.

Vincent also claims that defendant contracted to complete legal work for him and never did. The elements of a cause of action for breach of contract are: (1) formation of a contract between plaintiff and defendant; (2) performance by plaintiff; (3) defendant's failure to perform; and (4) resulting damage (see *Noise In The Attic Prods., Inc. v London Records*, 10 AD3d 303 [1st Dept 2004]; *Flomenbaum v New York Univ.*, 71 AD3d 80 [1st Dept 2009]). Vincent has properly pled a cause of action for breach of contract insofar as he alleges that he entered into an agreement with defendant for legal representation, he paid defendant a retainer, and defendant failed to perform any legal work, damaging Vincent.

Defendant argues that retainer agreement that he presents as documentary evidence shows that the retainer fees paid could have been applied towards either the Estate Action or researching Vincent's claims, and that nowhere does the agreement state a certain amount must be applied to the specific claims of each client. As the retainer agreement submitted is unsigned by Lillian and Vincent, and its authenticity is questioned by plaintiffs, the court cannot consider it as documentary evidence on a CPLR 3211 (a) (1) motion (*Fontanetta v John Doe 1*, 73 AD3d at 86). Thus, defendant's motion to dismiss this claim is denied.

Vincent also brings a claim sounding in unjust enrichment, alleging that he paid defendant money to perform legal work, and defendant performed no work, even though he retained Vincent's money. This claim is duplicative of the breach of contract claim, as he does not allege a duty independent of the contract (*Hoeffner v Orrick, Herrington & Sutcliffe LLP*, 61 AD3d 614, 615 [1st Dept 2009]).

Accordingly, it is

ORDERED that defendant Joseph M. Heppt, Esq.'s motion to dismiss is granted to the extent that plaintiff Lillian De Pasquale's first and second causes of action are dismissed, and plaintiff Vincent De Pasquale's first and second causes of actions are dismissed, but is otherwise denied; and it is further

ORDERED that defendant is directed to serve an answer to

plaintiff Vincent De Pasquale's third cause of action in the complaint (breach of contract), within 30 days after service of a copy of this order with notice of entry; and it is further

ORDERED that discovery shall be completed expeditiously, as follows: (1) documentary discovery demanded and exchanged, on or before September 2, 2013; and (2) depositions are to be completed on or before September 30, 2013¹; and it is further

ORDERED that counsel are directed to appear for a discovery conference, on any remaining discovery issues, in Room 428, 60 Centre Street, on Thursday, October 3, 2013, at 10 AM; and it is further

ORDERED that a note of issue shall be filed by October 07, 2013; and it is further

ORDERED that within 20 days of entry of this order, both sides shall serve a copy upon the other party, with notice of entry.

Dated: July 15, 2013

FILED

JUL 17 2013

COUNTY CLERK'S OFFICE
NEW YORK
[Signature]
Ling-Cohan, J.S.C.

J:\Dismiss\de pasquale v. heppt.wpd

¹ It is noted that, by order of this court dated April 15, 2013, this court stayed depositions, pending a decision on the within motion, with the completion of depositions to be within 30 days of a decision; the court is providing the parties an extension of time to complete depositions, as a courtesy.