

Kassel v Donohue

2013 NY Slip Op 32015(U)

August 22, 2013

Supreme Court, New York County

Docket Number: 150886/2013

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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DAVID KASSEL,

Index No.:150886/2013

Plaintiff,

- against -

Decision and Order

Motion Seq: 001, 2, 3

JAMES P. DONOHUE, individually and as a
Member of Crystal and Donohue, CRYSTAL
AND DONOHUE, JAMES LYNCH, as an agent
of CITRIN COOPERMAN & CO. LLP,

Defendants.
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HON. EILEEN A. RAKOWER, J.S.C.

This action arises out of Defendants' legal and accounting services rendered on behalf of plaintiff David Kassel in connection with an arbitration.

Presently before the Court is a motion by defendants James Lynch ("Lynch") and Citrin Cooperman and Company ("CC&C") to dismiss the following claims pursuant to CPLR §3211(a)(7) of Plaintiff's Verified Complaint which are asserted against them: malpractice claim, breach of fiduciary, and rescission of the parties' engagement letter (Mot. Seq. #1).

Also before the Court is a motion by defendants James P. Donahue ("Donohue") and Crystal and Donahue ("C&D") to dismiss the following claims asserted against them pursuant to CPLR §3211(a)(1) and (a)(7): legal malpractice and breach of fiduciary (Mot. Seq. #2).

In opposition, Plaintiff withdraws his professional malpractice claim against defendants Lynch and CC&C and his breach of fiduciary claims against all

defendants. Plaintiff cross moves for an Order striking the affirmation of Phillip Toutitou and memorandum of law submitted by Donahue and C&D and seeking leave to serve an Amended Verified Complaint pursuant to CPLR §3025(b) which withdraws certain claims and seeks to add a cause of action for breach of contract as to Lynch and C&D Defendants (Mot. Seq. #3).

Pursuant to CPLR §3025(b), “A party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences at any time at any time by leave of court . . . Leave shall be freely given upon such terms as may be just . . .” “CPLR §3025 allows liberal amendment of pleadings absent demonstrable prejudice” (*Atlantic Mut. Ins. Co. v. Greater New York Mut. Ins. Co.*, 271 A.D.2d 278, 280 [1st Dept. 2000]). Notwithstanding the absence of prejudice, leave to amend a pleading must be denied where the proposed amendment is plainly lacking in merit (see *Bd. of Managers of Gramercy Park Habitat Condo. v. Zucker*, 190 A.D.2d 636 [1st Dept. 1993]).

Here, Plaintiff is entitled to amend his Complaint. There is nothing in the record indicating that any prejudice will result from amendment of the complaint nor is the proposed amendment plainly lacking in merit.

Now, turning Defendants’ motions to dismiss, CPLR §3211 provides, in relevant part:

- (a) a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
 - (1) a defense is founded upon documentary evidence;
 - (7) the pleading fails to state a cause of action.

In determining whether dismissal is warranted for failure to state a cause of action, the court must “accept the facts alleged as true ... and determine simply whether the facts alleged fit within any cognizable legal theory.” (*People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 AD2d 91[1st Dept. 2003]) (internal citations omitted) (see CPLR §3211[a][7]). On a motion to dismiss pursuant to CPLR §3211(a)(1) “the court may grant dismissal when documentary evidence submitted

conclusively establishes a defense to the asserted claims as a matter of law.” (*Beal Sav. Bank v. Sommer*, 8 NY3d 318, 324 [2007]) (internal citations omitted). “When evidentiary material is considered, the criterion is whether the proponent of the pleading *has* a cause of action, not whether he has stated one.” (*Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 [1977]) (emphasis added). A movant is entitled to dismissal under CPLR §3211 when his or her evidentiary submissions flatly contradict the legal conclusions and factual allegations of the complaint. (*Rivietz v. Wolohojian*, 38 A.D.3d 301 [1st Dept. 2007]) (citation omitted).

As alleged in the proposed Amended Complaint, in or about July 2010, Plaintiff retained the legal services of defendant C&D, a New York law firm of which defendant Donohue was a member, in connection with an arbitration pending against Plaintiff’s former employer ISSI Holdings, LLC. The arbitration arose from ISSI’s alleged default on a prior judgment in Plaintiff’s favor in the amount of \$1,822,500. It is alleged that at Donohue’s bequest, Plaintiff executed an engagement letter with the accounting firm of CC&C and Lynch to provide forensic accounting services and expert testimony in connection with the arbitration. Donohue, along with Plaintiff and Lynch, also executed that engagement letter.

As further alleged in the proposed Amended Complaint, Plaintiff became dissatisfied with CC&C and Lynch’s services in the weeks preceding the arbitration, and instructed Donahue to discharge them. It is further alleged that Donahue ignored Plaintiff’s instruction, Donohue and Lynch concealed from Plaintiff the full extent of their involvement in the preparation for arbitration, and Donohue directed Lynch to opine contrary to Plaintiff’s position that the appropriate interest rate applicable to the Default Judgment was 9%, rather than a two percent rate of interest.

The proposed Amended Complaint asserts the following causes of action: legal malpractice as against defendants Donohue and C&D (first cause of action), breach of contract against defendants CC & Lynch (second cause of action), and seeks to set aside the engagement letter of defendants CC & Lynch (third cause of action).

“To sustain a cause of action for legal malpractice, moreover, a party must show that an attorney failed to exercise the reasonable skill and knowledge commonly possessed by a member of the legal profession.” (*Darby & Darby v. VIS Int’l*, 95 N.Y. 3d 308, 313 [2000]). In order to prevail against an attorney on a legal malpractice claim, a plaintiff must first prove that the attorney was negligent, that

such negligence was the proximate cause of the loss sustained, and that actual damages resulted. (*see Tydings v. Greenfield, Stein & Senior*, 2007 NY Slip Op 6734, *2 [1st Dept. 2007]). Here, the four corners the Amended Complaint make out a claim for legal malpractice against defendants Donohue and C&D. The Complaint alleges that defendants Donohue and C&D were negligent in “advocat[ing] for the improper interest rate at the 2011 Arbitration,” “advocating for no acceleration on the default,” and by failing to correct his alleged legal and factually incorrect assertions concerning the default rate when provided an opportunity”, and that but for this negligence, the arbitrators would have awarded 9% statutory interest and accelerate the payment of the amount in default.

The second cause of action of the proposed Amended Complaint alleges breach of contract against defendants CC and Lynch. It alleges that Plaintiff and CC and Lynch entered into a contract with Plaintiff, that pursuant to its terms, CC and Lynch were to provide Plaintiff with biweekly billing for services rendered under the Retainer Agreement, and that they failed to do so thereby depriving Plaintiff of notice of the extent of the services being rendered. It further alleges that CC & Lynch were required to request and receive payment prior to the drafting of an expert report and that they failed to submit the required advance notices for these services. However, despite this alleged breach of the terms of the contract, the Complaint then asserts that “Plaintiff sustained economic damages as a direct and proximate result of the professional malpractice of Defendants CC and Lynch,” and that “but for” this professional negligence, Plaintiff would not have sustained economic damages. This cause of action therefore fails to state a claim because although it asserts the existence of a contract and breach of that contract, it does not allege damages as a result of that breach but rather as a result of Defendants’ “professional negligence,” a claim that Plaintiff has withdrawn.

In the third cause of action of the proposed Amended Complaint, Plaintiff requests that the Court declare the engagement letter executed by and between Lynch, Donohue, and Plaintiff void as a matter of law on the ground certain provisions thereof are purportedly unconscionable and violate public policy. The Amended Complaint asserts, “Numerous provisions of the Engagement Letter of Defendants CC and Lynch were unknown to the Plaintiff at the time he executed the Engagement Letter,” not explained by his lawyer, and are “upon information and belief, void as a matter of law as they are unconscionable and violate public policy.” Those provisions, as identified in the Amended Complaint, relate to provisions in the

Amended Complaint which limited malpractice damages to the amount of the fees the accountant earned, subjected fee disputes arising under the Engagement Letter to arbitration, and providing for attorneys' fees and costs to defendants Lynch and CC, and not Plaintiff, irrespective of which party prevailed in any dispute arising under the Engagement Letter. These provisions, however, are either not implicated (i.e. Plaintiff is not alleging malpractice against defendants Lynch and CC) nor are the provisions void as a matter of law to warrant rescission, and therefore Plaintiff's claim for rescission under the alleged facts fails to state a claim.

Wherefore, it is hereby,


ORDERED that Plaintiff's cross motion for leave to amend his Complaint is granted, and the Amended Verified Complaint in the proposed form annexed to the moving papers shall be deemed served on Defendants upon service of a copy of this Order with notice of entry thereof; and it is further

ORDERED that defendants James Lynch and Citrin Cooperman and Company's motion to dismiss is granted and the Amended Verified Complaint is dismissed as against James Lynch and Citrin Cooperman and Company and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that defendants James P. Donahue and Crystal and Donahue's motion to dismiss is denied and said defendants are directed to serve and file an answer to the amended complaint within twenty days of service of a copy of this Order with notice of entry.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: 8/22/13



HON. EILEEN A. RAKOWER
J.S.C.

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE