Cavlak v Helbraun
2013 NY Slip Op 32704(U)
October 25, 2013
Supreme Court, New York County
Docket Number: 103896/2012
Judge: Richard F. Braun

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. RICHARD F. BRAUN J.S.C. PART 23
Justice

Index Number : 103896/2012
CAVLAK, ASLI
vs.
HELBRAUN, DAVID, et al
SEQUENCE NUMBER : 002
DISMISS

INDEX NO.
MOTION DATE 8/22/13
MOTION SEQ. NO.

The following papers, numbered 1 to 3, were read on this motion to/for dismiss

Notice of Motion/~~Order to Show Cause~~ — Affidavits — Exhibits | No(s). 1
Answering Affidavits — Exhibits | No(s). 2
Replying Affidavits | No(s). 3

Upon the foregoing papers, it is ordered that this motion is granted to the extent of dismissing the negligence, Judiciary Law §487, breach of fiduciary duty, and breach of contract causes of action, and the remaining claim is severed and shall continue.

This constitutes the decision and order of this Court. See separate Opinion.

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

Dated: New York, New York, October 25, 2013 ENTER: , J.S.C.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 23

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ASLI CAVLAK,

Index No. 103896/12

Plaintiff,

OPINION

-against-

DAVID HELBRAUN and MELISSA WEINBERG,

Defendants.

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RICHARD F. BRAUN, J.:

This is an action sounding in negligence, legal malpractice, violation of Judiciary Law § 487, breach of fiduciary duty, and breach of contract, all arising out of the review by defendant David Helbraun (defendant) of plaintiff's lease for plaintiff's storefront take-out window bakery/café and giving of advice in relation thereto. Plaintiff contends that she was not properly advised by defendant of the need for an available employee bathroom under the New York City Health Code. After receiving a number of citations for New York City Health Code violations, including one for the lack of an available employee bathroom, plaintiff maintains that she was forced to end the operation of her business, which caused her to lose her investment in the business. Defendant contends that the complaint should be dismissed, pursuant to CPLR 3211 (a) (1) and (7), based on the documentary evidence that he submitted and because plaintiff has failed to state a cause of action.*

To succeed on a CPLR 3211 (a) (1) motion to dismiss, the documents upon which the movant relies must definitively defeat the cause(s) of action of the opposing party (*see AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 590-591 [2005]; *Scott v Bell Atl.*

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* While defendant's initial motion papers only addressed the legal malpractice theory raised in the first cause of action, plaintiff addressed the other claims in her papers in opposition to the motion, which allowed defendant to respond thereto in reply (*see Nassau County v Metropolitan Transp. Auth.*, 99 AD3d 617, 618 [1st Dept 2012]; *Matter of Fluellen v Hanley*, 45 AD3d 350, 351 [1st Dept 2007]; *Merchants Bank of N.Y. v Gold Lane Corp.*, 28 AD3d 266, 267 [1st Dept 2006]).

Corp., 282 AD2d 180, 183 [1st Dept 2001]). On a motion pursuant to CPLR 3211 (a) (7), a complaint must be liberally construed, the factual allegations therein must be accepted as true, the plaintiff must be given the benefit of all favorable inferences therefrom, and the court must decide only whether the facts alleged fall under any recognized legal theory (*Miglino v Bally Total Fitness of Greater N.Y., Inc.*, 20 NY3d 342, 351 [2013]; *DeMicco Bros., Inc. v Consolidated Edison Co. of N.Y., Inc.*, 8 AD3d 99, 99-100 [1st Dept 2004]).

As to the CPLR 3211 (a) (1) branch of the motion, defendant cities to no documents that definitively defeat plaintiff's causes of action. Furthermore, he relies, in part, on allegations outside the documentary evidence. That was improper (*see Correa v Orient-Express Hotels, Inc.*, 84 AD3d 651 [1st Dept 2011]; *Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267, 271 [1st Dept 2004]; *Berger v Temple Beth-El of Great Neck*, 303 AD2d 346, 347 [2nd Dept 2003]).

"An action for legal malpractice requires proof of three elements: the negligence of the attorney; that the negligence was the proximate cause of the loss sustained; and proof of actual damages" (*Schwartz v Olshan Grundman Frome & Rosenzweig*, 302 AD2d 193, 198 [1st Dept 2003]). "[W]hether the pleading was sufficient to state a cause of action for legal malpractice posed a question of law which could be determined on a motion to dismiss." (*Rosner v Paley*, 65 NY2d 736, 738 [1985].) Plaintiff has stated a cause of action for legal malpractice sufficient to withstand a motion to dismiss, insofar as she alleges that she was not properly apprised of the implications of a lack of an employee bathroom for the premises, which ultimately caused her to lose her business and her investment therein. Plaintiff effectively pleads that she was erroneously advised that a bathroom for employees was not required. Defendant contends that under then NYCHC § 81.29 (a) (now modified in § 81.22 [a]) a bathroom for employee use need not be in the actual store, but that

some facilities must be available for employee use. Even assuming that bathrooms in nearby restaurants could serve that function, bathrooms in those restaurants were not available at the time of the New York City Department of Health inspection because the restaurants were not open and thus seemingly would not ordinarily be available during plaintiff's prime morning hours. Had plaintiff not been advised that a bathroom for employees was not required, as alleged, she would not have faced this dilemma.

While defendant asserts that the violation could have been challenged and cured, that would involve a determination on proximate cause beyond the face of the pleading (*cf. Bernardi v Spyratos*, 79 AD3d 684, 688 [2nd Dept 2010] [where the determination on causation was on a motion for summary judgment]). Indeed, plaintiff maintains that she obtained documents showing that she was authorized to use the bathroom in the restaurant next door and presented them at a hearing, apparently to no avail.

Failure to exhaust administrative remedies is not a defense to a legal malpractice claim, but rather generally bars a judicial challenge to an administrative action (*see Watergate II Apts. v Buffalo Sewer Auth.*, 46 NY2d 52, 57 [1978]). While a failure to exhaust administrative remedies could be a factor in determining whether an attorney's negligence was a proximate cause of a plaintiff's damages (*cf. Catuzza v Rodriguez*, 93 AD3d 1214, 1214-1215 [4th Dept 2012] [the defendants-attorneys in a legal malpractice action failed to establish as a matter of law that the plaintiff employee's complaint against the county would have been dismissed on the ground that he failed to exhaust his administrative remedies]), that too goes beyond the issue of the sufficiency of the pleading.

"A cause of action for violation of the Judiciary Law [§ 487] related to attorney misconduct is not duplicative of causes of action alleging legal malpractice, since the statutory claim requires

an intent to deceive, whereas a legal malpractice claim is based on negligent conduct." (*Sabalza v Salgado*, 85 AD3d 436, 438 [1st Dept 2011].) Although plaintiff does allege misstatements by defendant in his letter to the Departmental Disciplinary Committee, plaintiff did not plead an intent to deceive by defendant in support of her Judiciary Law § 487 claim for damages arising from the loss of her business (*see Agostini v Sobol*, 304 AD2d 395, 396 [1st Dept 2003]) or otherwise adequately allege in support of that claim (*see Estate of Steinberg v Harmon*, 259 AD2d 318 [1st Dept 1999] [a claim pursuant to section 487 was dismissed where there were no allegations showing "a chronic, extreme pattern of legal delinquency"]). Thus, that claim must be dismissed.

To the extent that the first cause of action can be read to separately plead a cause of action in negligence against her attorney, that is duplicative of the legal malpractice theory (*Cusack v Greenberg Traurig, LLP*, 109 AD3d 747 [1st Dept 3013]). Likewise, the second cause of action for breach of fiduciary duty and third cause of action for breach of contract are duplicative of the legal malpractice cause of action, and should be dismissed (*Lusk v Weinstein*, 85 AD3d 445 [1st Dept 2011]; *Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d at 271).

Accordingly, the motion has been granted, by separate decision and order of this date, to the extent of dismissing so much of the first cause of action as alleges claims sounding in negligence and violation of Judiciary Law § 487, as well as the second and third causes of action for breach of fiduciary duty and breach of contract respectively. The legal malpractice claim has been severed and shall continue.

Dated: New York, New York
October 25, 2013

Richard F. Braun

RICHARD F. BRAUN, J.S.C.