Savitsky v LeCrichia
2013 NY Slip Op 32826(U)
October 23, 2013
Supreme Court, New York County
Docket Number: 117786/2009
Judge: Joan A. Madden
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SCANNED ON 11/6/2013

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JOAN A. MADDEN J.S.C. PART 11

Justice

FILED
NOV 06 2013
COUNTY CLERK'S OFFICE
NEW YORK

Index Number : 117786/2009
SAVITSKY, ROBERT
vs.
LECRICHIA, ANTHONY F.
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

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

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). _____

Answering Affidavits — Exhibits _____ No(s). _____

Replying Affidavits _____ No(s). _____

Upon the foregoing papers, it is ordered that this motion is determined in accordance with the annexed decision and order.

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

Dated: October 23, 2013

_____, 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 11

----------X

Robert Savitsky,

Plaintiff

Index No: 117786/2009

-against-

Anthony F. LeCrichia, Esq. (individually) d/b/a Law Office of Anthony LeCrichia, Law Office of Anthony LeCrichia, PC, and Law Office of Anthony LeCrichia, LLC,

Defendants.

----------X

FILED
NOV 06 2013
COUNTY CLERK'S OFFICE
NEW YORK

Joan A. Madden, J.:

Plaintiff moves, pursuant to CPLR 3212, for summary judgment in this action for legal malpractice. Defendants oppose and request that, pursuant to CPLR 3212 (b), the court search the record and dismiss plaintiff's complaint.[1]

Parties' Allegations and Underlying Background

Plaintiff hired Anthony F. LeCrichia (LeCrichia) as his attorney on January 13, 2004, pursuant to a retainer agreement (the Retainer), to represent him in a then-pending action in the United States District Court for the Southern District of New York entitled *Robert Savitsky v Louis Mazzella, Sr., Anne Mazzella, Louis Mazzella, Jr., Claude Castro, Castro & Karten,*

---

[1]When plaintiff's counsel failed to appear for oral argument, the motion was submitted without argument on consent of defendant's counsel.

[* 3]

Timothy Dowd, Louis Mazzella Irrevocable Trust, Fischman & Fischman, A & L Props., Doreen Fischman and CLM Props., Inc., index number 09051-98-RWS (the Underlying Case) (plaintiff affidavit, ¶ 6; plaintiff EBT at 18). On June 28, 1991, plaintiff had obtained a judgment (the Underlying Judgment) in the United States District Court for the Eastern District of Pennsylvania in the amount of $90,000 plus interest from July 1, 1991 against Louis Mazzella, Sr. (Mazzella) (LeCrichia affidavit, exhibit B, item 50). Mazzella owned an insurance company, Colonial Assurance Company (Colonial), which had been placed in liquidation and plaintiff commenced the Underlying Case, asserting claims of fraud and fraudulent conveyance of property.

Hon. Robert W. Sweet dismissed plaintiff's complaint by order dated December 2, 2005 (the December 2005 Order) (2005 WL 3241944). Judge Sweet found that Savitsky had not shown "reliance [or] the elements of a fraud ... [and] failed to establish his damages" (December 2005 Order at *3). On December 21, 2006, the December 2005 Order was affirmed by the United States Court of Appeals for the Second Circuit (the Second Circuit Order) (*Savitsky v Mazzella*, 210 Fed Appx 71 [2006]). The Second Circuit found that Savitsky "failed to establish a genuine issue of material fact as to whether he justifiably relied on Mazzella's deposition ... [and his statements that he

had] were conclusory ... [and that he had] produced no evidence of his reliance ... [and,] rather than relying on Mazzellla's representations, Savitsky investigated them and attempted to show they were false ... [and he had not presented any] evidence that Mazzella owned any interest in the properties, [and] there was no transfer of interest, and thus no fraudulent conveyance" (71 Fed Appx at 73).

In this case, plaintiff asserts that LeCrichia failed to properly plead the allegations of fraud in the Underlying Case (plaintiff affidavit, ¶¶ 17-19). He states that LeCrichia improperly failed to take Mazzella's deposition, failed to present an affidavit of Savitsky's former attorney, failed to negotiate with debtors of the Underlying Judgment and failed to orally argue the appeal of the December 2005 Order (*id.*, ¶¶ 20, 22). He further states that, while the Retainer did not require LeCrichia to perform appellate work, LeCrichia agreed to do so and he presents an email from LeCrichia dated December 27, 2006 (the December 27 email), stating that he would give the Second Circuit Order "more consideration", thereby indicating that LeCrichia was representing him at that time, within three years of the commencement of this action on December 18, 2009 (plaintiff EBT at 25-27).

LeCrichia contends that plaintiff cannot show any damages, since the Underlying Judgment was for $90,000 and plaintiff

ultimately recovered $118,500 as a result of Colonial's liquidation (defendant affidavit, ¶¶ 26-28; plaintiff EBT at 21-23, 27). He asserts that the Retainer shows that he had no obligation to perform appellate work and that, since his alleged malpractice accrued during his work on the Underlying Case, plaintiff's complaint is barred by the three-year statute of limitations (defendant affidavit, ¶¶ 65-70).

LeCrichia states that plaintiff has failed to present an expert to set forth the purported breach of the standard of professional care (*id.*, ¶¶ 39-41). He further states that there was no proof to support plaintiff's fraud claim in the Underlying Case (*id.*, ¶¶ 46-48, 53). Finally, he asserts that the alleged negligence of purportedly inadequate pleadings, failing to seek negotiations, failure to take Mazzella's deposition and failure to orally argue the appeal of the December 2005 Order are, at best, a difference in strategy and a disagreement as to how to litigate the case, rather than malpractice (*id.*, ¶¶ 44-47, 52-57, 61-64) and, accordingly, he requests that the court search the record and dismiss plaintiff's complaint.

Summary Judgment

A party seeking summary judgment must make a prima facie case showing that it is entitled to judgment as a matter of law by proffering sufficient evidence to demonstrate the absence of

any material issue of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If the movant fails to make this showing, the motion must be denied (*id.*). Once the movant meets its burden, then the opposing party must produce evidentiary proof in admissible form sufficient to raise a triable issue of material fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). In deciding the motion, the court must draw all reasonable inferences in favor of the nonmoving party and deny summary judgment if there is any doubt as to the existence of a material issue of fact (*Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 [2007]; *Dauman Displays v Masturzo*, 168 AD2d 204, 205 [1st Dept 1990], *lv dismissed* 77 NY2d 939 [1991]).

However, "[a] motion for summary judgment, irrespective of by whom made, invites a court, even on appeal, to search the record and to award judgment where appropriate" (*Fertico Belgium, S.A. v Phosphate Chems. Export Assn.*, 100 AD2d 165, 171 [1st Dept], *app dismissed* 62 NY2d 802 [1984]; *see also Sage Realty Co., v State of New York*, 5 AD3d 584, 585 [2d Dept 2004]).

Legal Malpractice

"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" (*AmBase Corp. v Davis Polk & Wardwell*, 8 NY3d 428, 434 [2007] [internal citation omitted]; *see also Estate of Nevelson v Carro, Spanbock, Kaster & Cuiffo*, 259 AD2d 282, 283 [1st Dept 1999]). "Proximate cause requires a showing that 'but for' the attorney's negligence, the plaintiff would ... have been successful in the underlying matter" (*Barbara King Family Trust v Voluto Ventures LLC*, 46 AD3d 423, 424 [1st Dept 2007]; *see also Cooper v Kelner & Kelner*, 45 AD3d 323 [1st Dept 2007); *Brooks v Lewin*, 21 AD3d 731, 734-735 [1st Dept 2005], *lv denied* 6 NY3d 713 [2006]).

Damages must constitute "actual harm as a result [of the malpractice,]" rather than "speculative" damages(*Hass & Gottlieb v Sook Hi Lee*, 55 AD3d 433, 433 [1st Dept 2008]; *see also Alter & Alter v Cannella*, 284 AD2d 138, 139 [1st Dept 2001]; *Phillips-Smith Specialty Retail Group II v Parker Chapin Flattau & Klimpl*, 265 AD2d 208, 210 [1st Dept 1999], *lv denied* 94 NY2d 759 [2000]).

An "error of judgment ... [or the] selection of one among several reasonable courses of action does not constitute malpractice" (*Rosner v Paley*, 65 NY2d 736, 738 [1985]; *Rodriguez v Lipsig, Shapey, Manus & Moverman, P.C.*, 81 AD3d 551, 552 [1st Dept 2011]).

"An action to recover damages arising from an attorney's malpractice must be commenced within three years from accrual [and the claim accrues] from the day an actionable injury occurs" (*McCoy v Feinman*, 99 NY2d 295, 301 [2002]). However, there are "tolls on this three-year limitations period under the continuous representation doctrine" (*id.*).

Finally, to sustain a claim for legal malpractice, a "plaintiff [is] required to establish by expert testimony that defendant failed to perform in a professionally competent manner" (*Suppiah v Kalish*, 76 AD3d 829, 832 [1st Dept 2010]; *see also Merlin Biomed Asset Mgt., LLC v Wolf Block Schorr & Solis-Cohen LLP*, 23 AD3d 243 [1st Dept 2005]; *cf. Wo Yee Hing Realty, Corp. v Stern*, 99 AD3d 58, 63 [1st Dept 2012]).

Discussion

Applying the above principles to this case, plaintiff's motion for summary judgment must be denied. He has failed to proffer an expert affidavit "that defendant failed to perform in a professionally competent manner" (*Suppiah*, 76 AD3d at 832). He has also failed to present evidence of "actual harm as a result [of the malpractice,]" rather than mere "speculative" damages (*Hass & Gottlieb*, 55 AD3d at 433). Plaintiff has not presented evidence of the purported fraud in the Underlying Case and he, therefore, has not shown that he "would have succeeded on the

merits of the underlying action 'but for' the attorney's negligence" (*AmBase*, 8 NY3d at 434; *McCoy*, 99 NY2d at 301-302).

The court notes that, while the Retainer did not require LeCrichia to perform appellate work, he "agreed to prosecute [the] appeal of Judge Sweet's order to the Court of Appeals" (LeCrichia affidavit, ¶ 19). The Second Circuit Order was dated December 21, 2006 and the December 27 email indicates that LeCrichia was actually representing plaintiff at that time. Since this action was commenced on December 18, 2009, LeCrichia has not shown that the toll for continuous representation is inapplicable and, consequently, the court declines to dismiss plaintiff's complaint based expiration of the statute of limitations (*McCoy*, 99 NY2d at 306; *G & M Realty, L.P. v Masyr*, 96 AD3d 689, 689 [1st Dept 2012]; *Matter of Merker*, 18 AD3d 332, 332-333 [1st Dept 2005]).

However, plaintiff has failed to proffer evidence of damages as a result of the purported malpractice, since he has not shown that he "would have had an outcome more favorable to him [than the actual result]" (*Alter & Alter*, 284 AD2d at 139; *see also AmBase*, 8 NY3d at 434; *Kaminsky v Herrick, Feinstein LLP*, 59 AD3d 1, 9 [1st Dept 2008], *lv denied* 12 NY3d 715 [2009]).

Further, "an error in judgment ... does not rise to the level of malpractice ... [nor does the] selection of one among

. . . .

several reasonable courses of action" (*Rosner*, 65 NY2d at 738; *Rodriguez*, 81 AD3d at 552; *Mars v Dobrish*, 66 AD3d 403 [1st Dept 2009], *lv dismissed* 14 NY3d 904 [2010]).

Plaintiff has not shown that LeCrichia failed to present evidence in the Underlying Case that would have substantiated plaintiff's fraud claims. Rather, his assertion that LeCrichia should have taken Mazzella's deposition, should have sought to negotiate with debtors of the Underlying Judgment and should have orally argued the appeal of the December 2005 Order amount, at best, to a critique of LeCrichia's manner of prosecuting the Underlying Case, but do not demonstrate that LeCrichia "failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession which [resulted] in actual damages to [him] and that [he] would have succeeded on the merits of the underlying action 'but for' [LeCrichia's] negligence" (*AmBase*, 8 NY3d at 434 [internal citation omitted]; *McCoy*, 99 NY2d at 301-302).

Thus, pursuant to CPLR 3212 (b), upon searching the record, the court dismisses plaintiff's complaint.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment is denied; and it is further

ORDERED that, upon searching the record, pursuant to CPLR 3212 (b), plaintiff's complaint is dismissed in its entirety,

with costs and disbursements to defendants as taxed by the Clerk of the of the Court, upon submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

DATED: October 23, 2013

ENTER:

J.S.C.

FILED
NOV 06 2013
COUNTY CLERK'S OFFICE
NEW YORK