SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: SALIANN SCARPULLA
Justice

PART 19

Index Number : 157524/2012
WESTWOOD 46 REALTY LLC
vs.
SIEGERT, ESQ, PAUL W
SEQUENCE NUMBER : 001
DISMISS ACTION

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

decided in accordance with the accompanying Memorandum decision.

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

Dated: 10/18/13

SALIANN SCARPULLA, 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: CIVIL TERM: PART 19

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WESTWOOD 46 REALTY, LLC,

Plaintiff,

Index No.: 157524/2012
Submission Date: 6/11/13

- against-

DECISION AND ORDER

PAUL W. SIEGERT, ESQ.,

Defendant.

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For Plaintiff:
Kase & Druker, Esqs.
1325 Franklin Ave., Suite 25
Garden City, NY 11530

Defendant, *pro se*:
Paul W. Siegert, Esq.
15 East 32nd Street, 3rd Floor
New York, NY 10016

Papers considered in review of this motions to dismiss:

Notice of Motion 1
Aff in Support 2
Aff in Opp 3
Mem of Law 4
Reply Aff 5

HON. SALIANN SCARPULLA, J.:

In this legal malpractice action stemming from a commercial real estate purchase, defendant Paul W. Siegert, Esq. ("Siegert") moves to dismiss pursuant to CPLR 3211(a)(1) and 3211(a)(7) plaintiff Westwood 46 Realty, LLC's ("Westwood") complaint.

From 2007 through 2011, Siegert represented Westwood in a lawsuit before this court (J. Fried), titled *Clever Ideas, Inc. v. Russian Firebird, LLC, et al.*, Index No. 602302/06 (the "CII lawsuit"). The CII lawsuit stemmed from Westwood's purchase in

2006 of the premises known as 365 and 367 West 46th Street, New York, New York (the "premises") from the Eisenreich Family Foundation ("Eisenreich"). Westwood states in the complaint that Eisenreich purchased the premises and restaurant contents in 2005 from Rosemont Realty, LLC ("Rosemont").

Westwood alleges that Rosemont, and/or its principal, William Holt ("Holt") owned and operated a restaurant there known as Russian Firebird LLC, d/b/a Russian Firebird Restaurant ("Firebird"). Westwood further alleges, on information and belief, that in connection with the operation of Firebird, Rosemont granted a security interest in the furniture, fixtures and all personal property used in the restaurant (the "collateral") to Clever Ideas, Inc. ("CII") as collateral for a loan.

Westwood was represented by Seymour Hurwitz, Esq. ("Hurwitz") in connection with the purchase of the premises. Westwood alleges that along with the acquisition of the premises, Westwood was also to acquire the fixtures and contents of the restaurant. Westwood claims that in the contract of sale Eisenreich represented that the fixtures and contents would be delivered free from liens. Westwood states that Hurwitz did not undertake a lien search of the fixtures, and that if he had, he would have learned that CII had a security interest in the fixtures, and Westwood could have taken steps to assure that Eisenreich fulfilled its duty to deliver the fixtures and contents free of CII's lien.

Westwood goes on to allege that in or about 2007, CII commenced the CII lawsuit against Westwood and others to recover its collateral, and/or to obtain payment of the

loan, together with interest and attorneys fees, as provided in its agreement with Firebird. Westwood hired Siegert to defend itself against the lawsuit.

Westwood claims that Siegert negligently advised Westwood that the CII lawsuit was without merit, and that CII could not possibly prevail. Westwood states, that "[a]s defendant well knew, during the course of testimony, plaintiff would be compelled to admit to possession of at least some of the collateral, thereby rendering the plaintiff liable to CII."

Westwood alleges on information and belief that shortly after the commencement of the lawsuit, CII's counsel offered to accept $100,000 in full satisfaction of its claims for $149,000 in damages. As alleged in the complaint, Siegert did not communicate this settlement offer to Westwood. Westwood further alleges that because CII had a recorded lien against the collateral, and because the value of the collateral exceeded the settlement offer, Siegert should have advised Westwood to accept the settlement offer.

After a bench trial in June 2011, Justice Fried issued a memorandum decision in CII's favor. Justice Fried found Valentine's testimony to be unbelievable. He rejected her testimony that no personal property was transferred in the sale of the premises, found that all of the collateral remained inside the premises, and that contrary Valentine's testimony, Westwood maintained possession and control of the collateral in the continued operation of the restaurant.

In addition to its claim of inadequate representation in the CII lawsuit, Westwood alleges that while it was represented by Siegert, Siegert also represented, or had represented, Benjamin Bowen ("Bowen"). Bowen had a personal relationship with Holt, and operated the Firebird, and was aware of the lien when the premises were transferred to Westwood. Westwood alleges, "upon information and belief, [t]hat Bowen misappropriated some of the collateral, and took all of the records which should have been available to defend the action. Westwood alleges that it had a meritorious third-party claim against Bowen, but Siegert did not advise it to make a claim against Bowen because of his conflict of interest, caused by his prior representation of Bowen.

Westwood further alleges that, when CII commenced the lawsuit in 2007, Westwood had a meritorious claim against Eisenreich for breaching the provision of the contract requiring it to transfer the collateral free of liens, and for contribution for whatever amount Westwood was compelled to pay CII. Westwood maintains that Siegert did not advise Westwood to bring an action against Eisenreich, and did not prosecute a claim on Westwood's behalf. Further, Westwood states that the statute of limitations to bring the contract action has expired.

Westwood also asserts that, upon information and belief, it had a meritorious claims against Hurwitz for malpractice for his failure to search for liens on the collateral. Westwood asked Siegert to bring an action against Hurwitz, but Siegert "falsely stated" that Westwood did not have a viable cause of action against Hurwitz. As a result, Westwood maintains, it did not bring an action against Hurwitz.

Finally, Westwood alleges that Siegert demanded excessive fees from it, demanded that Westwood pay some of the fees in cash, without giving a receipt, and that Siegert charged Westwood more than twice the amount of CII's original claim in the lawsuit.

Westfield fails to specifically plead any particular cause of action, but it appears that Westwood is seeking to recover for legal malpractice, as it alleges that in his representation, Siegert failed to exercise the degree of skill commonly exercised by an ordinary member of the legal community; but for Siegert's failure Westwood would not have expended the excessive amounts it did on representation; and it would have been able to obtain recovery for liability from Bowen, Eisenreich and/or Hurwitz.

Siegert now moves to dismiss the complaint pursuant to CPLR 3211(a)(1) and 3211(a)(7). Siegert argues that based on the documentary evidence submitted, there is no legitimate claim against him. Siegert asserts that the factual allegations made by Westwood here are directly contradicted by the representations made to him by Betzabe Valentine ("Valentine"), Westwood's principal, during the course of Siegert's representation of Westwood in the lawsuit. In particular, Siegert submits an affidavit Valentine submitted in opposition to CII's motion for summary judgment in the CII lawsuit, in which she stated that Westwood was not connected to the collateral, and that the premises were empty of collateral when she acquired it. Siegert maintains that Valentine stated that no collateral was transferred to Westwood when it purchased the premises in 2006, that Firebird removed all the collateral when Westwood purchased the

premises, that she went to a storage facility in New Jersey maintained by Firebird where the collateral was stored, and that all of the furnishings, furniture, etc. at the restaurant while Westwood owned and operated came from Valentine's old restaurant or her home.

Steiger asserts that Valentine's statements, which he believed to be true when she made them to him, and to which Valentine swore were true in her affidavit, squarely contradict the allegations made in her complaint herein. In particular, Siegert argues that because Westwood's position in the lawsuit was that it did not have possession of the collateral, there was no reason for Hurwitz to conduct a lien search for security interests in the fixtures, or to take steps to ensure that Eisenreich fulfilled its duty to deliver the fixtures and contents free of CII's lien. There could be no cause of action against Eisenreich for breach of contract os sale of the premises, because Westwood's position was that it did nor purchase the fixtures, just the empty premises. Similarity, Siegert argues that he had no reason to bring a malpractice action against Hurwitz, because there was no need to conduct a lien search when Westwood maintained it did not purchase or possess the collateral.

As to Bowen, Siegert asserts that, based on a Summons and Notice in an action entitled *Chadbourne & Parke LLP v. Benjamin C. Bowen*, Index No. 115444/2005, the law firm Chadbourne and Parke performed legal service for Holt, and on November 4, 2005, Chadbourne and Parke sued Bowen for fraud in connection with nonpayment of its legal bills. Bowen was represented in that matter by the law firm Goldberg, Rimberg & Friedlander, PLLC. Siegert notes, in a footnote, that he recalls that Bowen came to his

office sometime in 2007 in relation to the Chadbourne and Park lawsuit, and that while he was never formally retained by Bowen he did offer him advice about settling the action. Siegert notes that Valentine suggested Bowen confer with him. As to Westwood's allegation that Siegert failed to advise of a meritorious cause of action it could have made against Bowen, Siegert argues that the only possible cause of action that Westwood could have brought against Bowen would be that he took the collateral for which Westwood was being sued, so Westwood could bring a claim over against him. Siegert argues that as Valentine claimed that she did not take the collateral, such a claim was untenable.

Regarding the claim that he committed malpractice in failing to convey CII's settlement offer, Siegert neither admits or denies that such a settlement demand was received by him, but asks, "[a]ssuming that such a settlement demand was made, why should I advise Westwood to accept a demand based upon the 'value of [Russian Firebird] assets' when they were supposedly not in the restaurant and my client was swearing that het actual assets in the restaurant had come from her former restaurant . . .?"

In opposition to Siegert's motion, Westwood argues that Siegert's undisclosed conflict of interest with Bowen constitutes malpractice. In addition, Westwood argues that the documentary evidence submitted by Siegert fails to prove, as a matter of law, that he has a defense to this action. Westwood asserts that even though its position in the lawsuit was that it did not receive the collateral, it would have been entitled to plead in the alternative against Eisenreich, making its claim even though it denied that it was

liable. Westwood also asserts that it could have commenced an action against Hurwitz for failing to inform Westwood of the lien on the property.

In Valentine's affidavit in opposition, she notes that after the conclusion of the CII lawsuit, Westwood brought an action against Eisenreich and a separate action against Hurwitz. The action against Hurwitz in this court, (J. Rakower) is entitled *Westwood 46 Realty LLC v. Seymour Hurwitz Esq.*, Index No. 157512/2012. In a May 16, 2013 decision and order, Justice Rakower found that the complaint is barred by the statue of limitations, and is barred by the doctrine of judicial estoppel. Justice Rakower found that "it is undisputed that in the litigation commenced by Clever Ideas, Inc., [Westwood] took the position that it did not purchase the collateral when buying the Premises and should not be required to pay Clever Ideas Inc., for its interest in those items. By taking that position, [Westwood] would be estopped from now contending that it did in fact purchase the collateral, and that [Hurwitz] was negligent in failing to determine whether another party had a superior right in those items."

Discussion

On a motion to dismiss pursuant to CPLR § 3211(a), the test is not whether the opposing party "has artfully drafted the [pleading], but whether, deeming the [pleading] to allege whatever can be reasonably implied from its statements, a cause of action can be sustained." *Jones Lang Wooton USA v. LeBoeuf, Lamb, Greene & Macrae*, 243 A.D.2d 168, 176 (1st Dep't 1998). Siegert moves to dismiss pursuant to CPLR 3211(a)(1) and (a)(7). . "A CPLR 3211(a)(1) motion 'may be appropriately granted only where the

documentary evidence utterly refutes [the] factual allegations, conclusively establishing a defense as a matter of law.'" *Jesmer v. Retail Magic, Inc.*, 55 A.D.3d 171, 180 (2d Dep't 2008) (quoting *Goshen v. Mutual Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 326 (2002)). "On a motion addressed to the sufficiency of the complaint pursuant to CPLR 3211(a)(7), the facts pleaded are presumed to be true and accorded every favorable inference. However, allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, are not entitled to such consideration." *Franklin v. Winard*, 199 A.D.2d 220, 221 (1st Dep't 1993); *see also Leder v. Spiegel*, 31 A.D.3d 266 (1st Dep't 2006) *affd* 9.N.Y.3d 836 (2007).

"To sustain a cause of action for legal malpractice, a party must show that an attorney failed to exercise the reasonable skill and knowledge commonly possessed by a member of the legal profession." *Arnav Industries, Inc. Retirement Trust v. Brown, Raysman, Millstein, Felder & Steiner, L.L.P.*, 96 N.Y.2d 300, 303-304 (2001) (citations omitted). An action for legal malpractice requires proof of three elements: (1) that the attorney was negligent; (2) that such negligence was a proximate cause of plaintiff's losses; and (3) proof of actual damages. *Barbara King Family Trust v. Voluto Ventures LLC,* 46 A.D.3d 423 (1st Dept. 2007); *Brooks v. Lewin*, 21 A.D.3d 731 (1st Dept. 2005). A plaintiff's failure to establish any one of these elements is fatal to the claim, and warrants dismissal. *See J-Mar Serv. Ctr., Inc. v. Mahoney, Connor & Hussey*, 14 A.D.3d 482, 483 (2d Dept 2005).

Here, Westwood's claims against Siegert are grounded upon its argument that Siegert should have, but did not, give Westwood legal advice based upon the factual assumption that Westwood did indeed possess the CII collateral. However, as in Westwood's previous action against Hurwitz, Westwood is judicially estopped here from asserting any claims against Siegert based upon its current allegation that it possessed the collateral or purchased the collateral as part of the sale from Eisenreich, and that Siegert should have proceeded under that assumption.

In the CII lawsuit, Westwood maintained, and Valentine testified under oath and in a sworn affidavit, that it did not purchase the collateral from Eisenreich, that the collateral was never in Westwood's possession and that the fixtures and furnishings in the Firebird all came from Valentine's prior restaurant and/or her home. Westwood cannot now bring a malpractice action against Siegert based on a claim that Siegert was at fault for not pursuing claims based on a factual premise that Westwood purchased the collateral.

"It is a well-settled principle of law in this State that a party who assumes a certain position in a legal proceeding may not thereafter, simply because his interests have changed, assume a contrary position. Invocation of the doctrine of estopped is required in such circumstances lest a mockery be made of the search for the truth." *Karasik v. Bird*, 104 A.D.2d 758, 758-9 (1st Dep't 1984) (internal citation omitted). Even where, as here, the party did not obtain a favorable judgment in the earlier legal proceeding, "plaintiff relied upon these representations in seeking relief from [this court], and the application of this doctrine in this action is thus essential to avoid a fraud upon the court and a mockery

of the truth-seeking function." *Epic Wholesalers v. J.P. Morgan Chase Bank, N.A.*, 31 Misc. 3d 1237 (Sup. Ct. Kings Co. 2011) (citing *Festinger v. Edrich*, 32 A.D.3d 412, 413 (2d Dep't 2006)). *See also Perkins v. Perkins*, 226 A.D.2d 610 (2d Dep't 1996) (litigant should "not be permitted to play fast and loose with the courts by advocating contrary positions in different legal proceedings").

Westwood's argument that it has a right to argue in the alternative is misplaced. Of course, in an initial pleading, a party may seek alternate claims for relief based on different theories of recovery. However, a party may not rely on inconsistent factual assertions to plead claims against various parties, as it has done here. *Drexel Burnham Lambert Group, Inc. v. Vigilant Ins. Co.*, 157 Misc. 2d 198, 207-208 (Sup. Ct. N.Y. Co. 1993) ("CPLR 3014 and CPLR 3017 permit a plaintiff to request relief in the alternative, but the occurrence of a fact such as a date must be set forth with specificity. Theories as to the basis for legal recovery may be inconsistent, but not facts.") Accordingly, Westwood's complaint against Siegert must be dismissed.

In accordance with the foregoing, it is

ORDERED that defendant Paul W. Siegert, Esq.'s motion to dismiss is granted, and the complaint is dismissed. This constitutes the Decision and Order of the Court.

Dated: New York, New York
October 17, 2013

ENTER:

Saliann Scarpulla, J.S.C.