

Mattiucci v Brach Eichler, LLC
2014 NY Slip Op 32324(U)
August 21, 2014
Supreme Court, New York County
Docket Number: 152238/14
Judge: Nancy M. Bannon
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY - PART 42**

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CATHERINE MATTIUCCI

Plaintiff,

DECISION AND ORDER

-against-

INDEX NO.: 152238/14

**BRACH EICHLER, LLC, JAY FREIREICH, ESQ.,
JOHN and JANE DOES I-V and ENTITIES I-V**
Defendants.
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NANCY M. BANNON, J.

INTRODUCTION

In this action seeking damages for legal malpractice, the plaintiff, who agreed to be named sole shareholder, director, and officer of a corporation, complains that the defendant attorneys were negligent in allowing her to do so and, notwithstanding a signed waiver, complains that the defendants had a conflict of interest in simultaneously representing her business partners. The defendants move to dismiss the complaint on the grounds of failure to state a cause of action (CPLR 3211[a][7]) and upon documentary evidence (CPLR 3211[a][1]). The motion is granted.

FACTS

On December 4, 2008, the plaintiff, Catherine Mattiucci, along with her brother Anthony Grimaldi, and a third individual, Steve Hernandez, retained defendant Jay Freireich, an attorney, to represent them regarding the acquisition of a company called EZ Docs, Inc. ("EZ Docs") from Empire Technology Inc., a separate company owned by Grimaldi and Hernandez. EZ Docs is in the business of selling Canon brand office automation equipment. The parties acknowledge that Canon was unwilling to permit Grimaldi or Hernandez to have any ownership interest in a Canon licensed dealership due to their criminal records. Therefore, defendant Freireich prepared an Option to Purchase Stock Agreement which provided that plaintiff owned 100% of the common stock of EZ Docs., and granted the exclusive option to Grimaldi and Hernandez to purchase all of EZ Docs' stock for \$10,000. On March 19, 2009, the plaintiff, Grimaldi, and Hernandez executed a retainer agreement which read in pertinent part:

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

"You do hereby acknowledge that you have requested this office to represent you with respect to your interests and you understand that I represent all three of you in this matter. You understand and are fully aware that, based upon the circumstances of such representation your separate interests may be adverse to the other's interests and that you each have the opportunity to be represented by separate counsel.

Notwithstanding such possible adversity of interest and conflict, you do desire this office to represent you in connection with your interests. You understand that at any time, you may terminate this office's representation of you and retain separate counsel to represent your interests. Further this office may likewise terminate our representation of you in the event we believe it is impossible to represent you due to your adverse interests."

Due to the plaintiff's concerns over her exposure to claims from creditors and taxing authorities as sole shareholder, director, and officer of EZ Docs, Freireich prepared an indemnification agreement. The agreement provided that Grimaldi and Hernandez would indemnify the plaintiff for "any and all liability to make payments under any obligation arising by and through her retention of shares, directorship or acting as officer" of EZ Docs. Defendant Freireich then prepared a Nominee Declaration which provided that the plaintiff acted as nominee for Grimaldi and Hernandez because Canon was not willing to grant any ownership interest in a Canon licensed dealership to Grimaldi or Hernandez.

According to the plaintiff, she was actually a mere employee of the company while Grimaldi and Hernandez were the shareholders, officers, and directors. However, beginning in 2011, she was sued as an officer, director, and shareholder of EZ Docs, Inc. in a number of suits alleging fraud and other causes of action. In addition to incurring legal fees in defending these actions, plaintiff received K-1s from EZ Docs Inc. attributing distributions to her as income which she did not actually receive. In November 2011, Grimaldi and Hernandez terminated the plaintiff's employment and she was unable to collect unemployment insurance benefits due to her documented position as sole shareholder, director, and officer of the company.

On March 13, 2014, plaintiff commenced this action against defendant Freireich, his law firm, Brach Eichler, LLC, and other unnamed parties alleging claims, inter alia, of legal malpractice in regard to Freireich's representation of the plaintiff relating to EZ Docs, Inc., agreements she entered into related to EZ-Docs, Inc., and subsequent lawsuits in which she was named as a defendant. The plaintiff argues that defendants failed to avoid a conflict of interest by representing plaintiff, her brother and Hernandez. She further argues that defendants negligently gave improper advice, failed to protect her, as a client, from harm by exposing her to liability as shareholder and director, and that but for these actions plaintiff would not have suffered damages. The claimed damages include an inability to collect unemployment benefits, taxes expended on funds paid for distribution income she never received, and

attorneys fees incurred in defending actions filed against her in corporate capacities with EZ Docs.

The defendants now move to dismiss the complaint (1) pursuant to CPLR 3211(a)(7) for failure to state a cause of action for malpractice and (2) pursuant to CPLR 3211(a)(1) on the grounds that the documentary evidence provides a complete defense.

DISCUSSION

(1) CPLR 3211(a)(7): Failure to State a Cause of Action

When determining a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211(a)(7), the court must accept the facts as alleged as true, accord the nonmoving party the benefit of every favorable inference, and determine whether the facts as alleged fit within any cognizable legal theory. See Leon v Martinez, 84 NY2d 83 (1994); Jiminez v Shahid, 83 AD3d 900 (2nd Dept. 2011). In regard to legal malpractice claims, the "well established" rules were explained by the First Department in Russo v Feder, Kaszovitz, Isaacson, Weber, Skala & Bass, LLP, 301 AD2d 63, 67 (1st Dept. 2002), as follows:

"[A]n action for legal malpractice action requires proof of the attorneys negligence, a showing that the negligence was the proximate cause of the injury, and evidence of actual damages (Pellegrino v. File, 291 AD2d 60, *lv denied* 98 NY2d 606; Prudential Ins. Co. v Dewey, Ballantine, Bushby Palmer & Wood, 170 AD2d 108, *affd* 80 NY2d 377; Franklin v Winard, 199 AD2d 220). In order to survive dismissal, the complaint must show that but for counsel's alleged malpractice, the plaintiff would not have sustained some ascertainable damages (Pellegrino, supra; Franklin v Winard, supra). A failure to establish proximate cause requires dismissal regardless of whether negligence is established. Notwithstanding counsel's purported negligence, the client must demonstrate his or her own likelihood of success; absent such a showing, counsel's conduct is not the proximate cause of the injury. Nor may speculative damages or conclusory claims of damage be a basis for legal malpractice (Pellegrino, supra). We have previously addressed malpractice claims by frustrated litigants by making clear that the "remedy relies on prima facie proof that [the client] would have succeeded." (Price v Herstic, 240 AD2d 151, 152; Pellegrino, supra at 63)."

Here, the plaintiff has failed to allege facts giving rise to a claim for legal malpractice, in that the complaint fails to establish the requisite elements of negligence, proximate cause or actual damages, as set forth below.

(A) Negligence

The plaintiff alleges that defendants were negligent by simultaneously representing her as well as Grimaldi and Hernandez since "each had competing interests." However, the plaintiff signed a clear and unambiguous retainer letter which states that "based upon the circumstances of such representation [their] separate interests may be adverse to the other's interests and that [they] each have the opportunity to be represented by separate counsel. Notwithstanding such possible adversity of interest and conflict, you do desire this office to represent you in connection with your interests."

The plaintiff further argues that defendants were negligent in that they "breached their duty to protect her from harm by placing her in a nominee position as a shareholder, director, and officer" thereby exposing her to future liability. Again, the clear and unambiguous proof submitted by defendants, documents signed by the plaintiff, belies this assertion. The Nominee Declaration, which the plaintiff, Grimaldi, and Hernandez signed, clearly states that "Canon was and is unwilling to permit the said Anthony Grimaldi and Steven Hernandez to have any ownership interest in a Canon licensed dealership," and therefore, plaintiff was "acting as the nominee for Grimaldi and Hernandez so that EZ Docs could conduct business with Canon. Moreover, the Options to Purchase Stock Agreement which plaintiff also signed states that plaintiff owned all of the common stock shares of EZ Docs, therefore making her the sole shareholder of EZ Docs. That plaintiff now regrets agreeing to this arrangement and signing documents that clearly identified her as the shareholder, director, and officer of the company, this does not constitute negligence on the part of her attorneys. To the extent that the plaintiff is alleging that the defendants are liable for some failed conspiracy they participated in, this does not amount to legal malpractice, which is the only cause of action in the complaint.

(B) Proximate Cause

As stated above, in order to establish proximate cause "plaintiff must demonstrate that but for the attorney's negligence, she would have prevailed in the underlying matter or would not have sustained any ascertainable damages." Brooks v. Lewin, 21 AD3d 731 (1st Dept. 2005); see Russo v Feder, Kaszovitz, Isaacson, Weber, Skala & Bass, LLP, supra. Moreover, failure to establish proximate cause mandates the dismissal of a legal malpractice action regardless of the attorney's negligence. Id. at 697. The plaintiff has failed to show that "but for" defendants' alleged negligence she would not have been the subject of subsequent litigation and incurred legal fees and would not have been denied unemployment insurance benefits. Rather, the proof submitted by both sides demonstrate that plaintiff knowingly agreed to the arrangement where she was named as sole shareholder, director, and officer for EZ Docs. Furthermore, she was thereafter sued for her own alleged fraud and misrepresentations, conduct which gives rise to personal liability, regardless of corporate form.

(C) Damages

It is well settled that "conclusory allegations of damages or injuries predicated on speculation cannot suffice for a malpractice action" Holschauer v Fisher, 5 AD3d 553, 554 (2nd Dept. 2004). The plaintiff has failed to establish actual and ascertainable damages that resulted from defendant's alleged negligence. She concedes that she is "unable to fully ascertain the amount of damages" in regard to her defense of the various actions. In any event, the plaintiff was sued for her own alleged misconduct, actions that cannot be attributed to defendants. Moreover, she cannot be heard to complain of any adverse tax consequences arising from income attributed to her as a result of her own agreement and there is simply no basis, other than rank speculation, to conclude that she would have received any unemployment benefits but for any conduct of the defendants.

(2) CPLR 3211(a)(1): Documentary Evidence

A motion to dismiss upon documentary evidence will be granted if the evidence submitted utterly refutes the factual allegations of the complaint and conclusively establishes a defense as a matter of law. See Goshen v Mutual Life Ins. Co. of N.Y., 98 NY2d 314 (1990); Kopelowitz & Co. v Mann, 83 AD3d 793 (2nd Dept. 2011). "In order for evidence to qualify as 'documentary,' it must be unambiguous, authentic, and undeniable." Granada Condominium III Association v Palomino, 78 AD3d 996 (2nd Dept. 2010); citing Fontanetta v Doe, 73 AD3d 78, 83 (2nd Dept. 2010). Here, the retainer agreements, conflict waiver, signed Options to Purchase Stock Agreement and Nominee Declaration submitted by defendants conclusively establish a defense as a matter of law.

The language in the retainer agreement is clear. Although plaintiff claims to not recollect signing the December 4, 2008 retention letter, her signature on the March 19, 2009 retention letter is indisputable, and the language of said letter is equally clear. By signing the retention letter, plaintiff, Grimaldi, and Hernandez understood "that based upon the circumstances of such representation [their] separate interests may be adverse to the other's interests and that [they] each have the opportunity to be represented by separate counsel. Notwithstanding such possible adversity of interest and conflict, you do desire this office to represent you in connection with your interests."

The plaintiff's assertion that the waiver is limited in scope and does not preclude her malpractice claim is unpersuasive. It is well settled that such waiver provision are binding on the signatory. See Grovick Properties, LLC v 83-10 Astoria Boulevard, LLC, – AD3d –, 2014 WL 3843982 (2nd Dept. Aug. 6, 2014); Centennial Ins. v Apple Builders & Renovators, Inc., 60 AD3d 506 (1st Dept. 2009); Bishop v Maurer, 33 AD3d 497 (1st Dept. 2006). This is because the "plaintiff is responsible for his signature and is bound to read and know what [s]he signed"

Beattie v Brown & Wood, 243 AD2d 395 (1st Dept. 1997). As in Bishop v Maurer, supra at 499, "the complaint is silent as to how the defendants misled plaintiff [and] what defendants failed to explain to [her]." Indeed, the proof submitted by defendants in support of the motion directly contradicts plaintiff's assertion that a conflict of interest existed. The holding in Centennial Ins. v Apple Builders & Renovators, Inc., supra, is particularly apt here. There, the court dismissed a malpractice claim because the client "executed a written waiver in its retainer agreement specifically waiving any conflict of interest that might arise from the firm's representation" and further noted that the plaintiff's "claim that it did not understand the implications of the waiver is unsupported by the clear language of the retainer agreement and the record evidence." The same reasoning applies in this case.

Finally, an "applicable principle in this case is that a [party] cannot benefit from [her] own wrongdoing." Zumpano v Quinn, 6 NY3d 666, 685 (2006). The plaintiff knowingly participated in a scheme to acquire a business with her brother and friend and then, when the arrangement she agreed to resulted, not unexpectedly, in her being named as a defendant in legal actions against the company and being ousted by her partners, turned to her attorneys for relief by claiming they committed malpractice by allowing her to participate in that arrangement, notwithstanding her signed waivers. To allow the action to proceed would be to countenance this scheme, and the court declines to do so. In any event, as discussed above, the plaintiff fails to sufficiently allege the essential elements of a claim of malpractice.

CONCLUSION

The defendants' motion is granted and the complaint is dismissed in its entirety pursuant to CPLR 3211(a)(1) and (a)(7). To the extent the defendants are seeking dismissal on a further ground, the court does not reach those arguments.

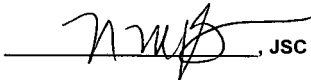
Accordingly, it is

ORDERED that the defendants' motion to dismiss the complaint pursuant to CPLR 3211(a)(1) and (a)(7) is granted and the complaint is dismissed in its entirety, and it is further,

ORDERED that the Clerk shall enter judgment accordingly.

This constitutes the Decision and Order of the court.

Dated: August 21, 2014

 , JSC

HON. NANCY M. BANNON