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

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MICHAEL KATZ,

Plaintiff,

- against -

HOWARD ESSNER, SHEARER & ESSNER, LLP, and ESSNER & KOBIN, LLP,

Defendants.

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Index No.: 154865/2013

Decision and Order
Motion Seq: 001

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

As set forth in the Amended Complaint, plaintiff, Michael Katz ("Plaintiff" or Katz") alleges that on June 3, 2002, Katz retained the services of defendant, Howard Essner ("Essner"), who was then a partner in Shearer & Essner, LLP ("S&E"), to take over his representation prosecuting an action for medical malpractice in Supreme Court, Westchester County, entitled *Michael Katz v. Neurosurgeons of New York, Jack Stern, Westchester Bone & Joint Associates, Neurosurgeons of New York, P.C., and Seth L. Neubardt*, Index No. 3895/2001 (the "Underlying Action").

In the Amended Complaint, Katz alleges that from June 3, 2002 until the settlement of the Underlying Action on June 14, 2010, Essner and S&E "failed to prosecute the action with professional competence or timely performance and engaged in a pattern of delay" and was not prepared to try the case on June 14, 2010, the date the Underlying Action was scheduled to be called for trial. Specifically, Katz alleges, that Essner "never had Katz examined by a physician to assist him in evaluating Katz's injuries or to testify as an expert witness at trial," and "never interviewed anyone connected with the case." Katz alleges that on June 14, 2010, the date that Underlying Action was scheduled to be called to trial, "Katz told Essner emphatically that he wanted to go to trial. Essner replied that he could not go to trial because he did not have an expert witness. Katz asked Essner how he had served an expert witness report on opposing counsel without an expert. Essner said he made the report up himself using Dr. Korn's credentials." Katz alleges that "faced with the prospect of going to trial and receiving nothing because of Essner's and [S&E's] utter neglect of the Action," Katz settled the action "to mitigate the damages" that

"their neglect of the action had caused."

The Amended Complaint alleges the following causes of action against Defendants: violation of New York Judiciary Law 487(1) (first cause of action); violation of Judiciary Law 487(2) (second cause of action); legal malpractice (third cause of action); fraud and deceit (fourth cause of action); and breach of contract (fifth cause of action). Katz has withdrawn the Amended Complaint's sixth cause of action under General Business Law 349.

Defendants Essner, S&E, and E&K now move to dismiss Katz's Amended Complaint pursuant to CPLR §3016, §3211(a)(1), (7) and (8). Defendants also seek sanctions.

Defendants submit the attorney affirmation of A. Michael Furman, Esq., which annexes, among other documents, exhibits from the proceedings in the Underlying Action, including the retainer agreement executed by Essner, a copy of Katz's Expert Witness Information Response dated May 27, 2010 submitted in the Underlying Action,[1] and the transcript of appearance before Justice A. Barone in the Underlying Action which memorializes the parties' settlement. Defendants also submit an affidavit from Essner. Katz opposes.

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.

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,

[1] The Expert Witness Information Response submitted by Essner, on behalf of Katz, in the Underlying Action, states, "Furthermore, it is expected that plaintiff's expert will testify that defendants, their agents, servants and/or employees deviated from the accepted standards of medical practice in connection with the care and treatment rendered to Michael Katz."

324 [2007]) (internal citations omitted). 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]) (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]).

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 Dep't, 2003]) (internal citations omitted) (*see* CPLR § 3211[a][7]).

In addition to bringing the action against Essner and S&E, the Amended Complaint alleges, "[u]pon information and belief," E&K "is a successor in interest to" S&E, the law firm that Katz retained to represent him in the Underlying Action and "is therefore liable to Katz to the same extent as [S&E]." Defendants argue that E&K is not a proper party because E&K was not involved in the litigation, E&K was not legally formed until March 22, 2012, two years after the Underlying Action, E&K was registered as a completely different entity than S&E, and it had no connection to this case. Defendants submit a copy of the NYS Department of State, Division of Corporation, which shows that E&K was formed on March 22, 2012 and registered as a completely different entity than S&E.

The general rule "that a corporation which acquires the assets of another is not responsible for the liabilities of the predecessor" is subject to the following exceptions: "(1) it [the acquiring corporation] expressly or impliedly assumed the predecessor's tort liability, (2) there was a consolidation or merger of seller and purchaser, (3) the purchasing corporation was a mere continuation of the selling corporation, or (4) the transaction is entered into fraudulently to escape such obligations." *Shumacher v. Richards Shear Company, Inc.*, 59 N.Y. 3d 239, 245 [1983].

Successor liability may be based upon the doctrine of a de factor merger:

> A transaction structured as a purchase-of-assets may be deemed to fall within exception as a 'de facto' merger, even if the parties chose not to effect a formal merger, if the following factors are present: (1) continuity of ownership; (2) cessation of ordinary business operations

> and the dissolution of the selling corporation as soon as possible after the transaction; (3) the buyer's assumption of the liabilities ordinarily necessary for the uninterrupted continuation of the seller's business; and (4) continuity of management, personnel, physical location, assets and general business operation. *Matter of New York City Asbestos Litigation*, 15 A.D. 3d 254, 256 [1st Dept 2005].

See also ePlus Group, Inc., v. SNR Denton LLP, 976 N.Y.S. 2d 20, 21 [1st Dept 2013](emphasis added) ("We find that under New York law, *the complaint properly alleges the elements of a de facto merger*, including continuity of ownership (equity partners of Thacher became SNR equity partners), Thacher's cessation of business, and SNR's opening up at the same location with the same people, clients, management and operations. We note that there is no basis to conclude that the law in this State with respect to de facto mergers does not apply to limited partnerships.")

Here, the Amended Complaint fails to state a claim as against E&K. The Amended Complaint alleges in a conclusory fashion that E&K is liable as a "successor in interest." Nowhere in the Amended Complaint does Katz plead successor liability based upon the "de facto merger" doctrine or any other theory of liability.

As for Katz's legal malpractice claim (the third cause of action of the Amended Complaint), "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 therefrom. (*see Tydings v. Greenfield, Stein & Senior*, 2007 NY Slip Op 6734, *2 [1st Dept. 2007]).

A "claim for legal malpractice is viable, despite settlement of the underlying action, if it is alleged that settlement of the action was effectively compelled by the mistakes of counsel." *Bernstein v. Oppenheim & Co., P.C.*, 160 A.D.2d 428, 429-430 [1st Dept 1990]). "However, the First Department also makes clear that an allocution at settlement wherein the client states that she is satisfied with the attorney's performance constitutes documentary evidence that contradicts an allegation of legal malpractice." *Harvey v. Greenberg*, 2009 N.Y. Slip. Op. 32625(U)(NY Ct. 2009) (citing *Katebi v. Fink,* 51 A.D.3d 424, 425 [1st Dept 2008]).

Defendants submit a copy of the transcript of the Proceedings held before Judge Barone on June 14, 2010, at which the following was placed on the record:

THE COURT: Mr. Katz, please raise your right hand. Do you swear to tell the truth, the whole truth and nothing but the truth, so help you god?

MR. KATZ: Yes.

THE COURT: Please listen to the stipulation that the attorneys will place on the record, after which time you be asked some questions.

MR. KATZ: Yes.

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MR. ESSNER: Do you understand that there is a settlement offer of $375,000 in full and final settlement of all claims and actions you may have against Jack Stern, Seth Neubardt, and their related entities, correct?

MR. KATZ: Yes.

MR. ESSNER: You have come here today and are willing to settle this case for the gross sum of $375,000?

MR. KATZ: Yes.

MR. ESSNER: You are making this settlement after careful consideration?

MR. KATZ: Yes.

MR. ESSNER: You do realize that, Mr. Katz, that once the case is settled it is settled forever and there is no coming back to the Court no matter what change in your condition you may experience or what other sequelae from the alleged injury may occur.

MR. KATZ: Yes.

MR. ESSNER: Sir, you have considered the services of your counsel; are you satisfied that you been adequately represented?

MR. KATZ: Yes.

Thus, the transcript shows that on the record before Judge Barone in the Underlying Action, Katz stated the following: he was willing to settle the case for a gross sum of $375,000, that he was making the settlement after careful consideration, that he understood settlement would resolve the dispute in full with prejudice, and that he considered the services of his counsel and was satisfied that he was adequately represented. Therefore, the documentary evidence - Katz's allocution at settlement - flatly contradicts Katz's allegations that he was "forced" to settle the Underlying Action based on Defendants' alleged neglect.

As his first cause of action, Katz asserts a claim against that Defendants for violation of Judiciary Law §487(1) by alleging that Essner "fabricated" "a purported expert's report." Pursuant to Judiciary Law §487(1), "[a]n attorney or counsel who... [i]s guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party... [i]s guilty of a misdemeanor, and in addition to the punishment prescribed therefor by the penal law, he forfeits to the party injured treble damages, to be recovered in a civil action" (Judiciary Law §487[1]). "The deceit need not occur in open court, and 'the statute applies to any oral or written statement related to a proceeding and communicated to a court or party with the intent to deceive.'" (*Redmond v. Edward Bailey, Bailey and Sherman, P.C.*, 2012 Slip Op 31081[U] [N.Y. Sup Ct Queens County 2012]). "An attorney may be found liable under Judiciary Law §487 for a single deceitful or collusive act, and a pattern of legal delinquency need not be shown." (*Id.*)

"Intentional deceit of a party or a court is an essential element of a Section 487. Likewise, a section 487 claim requires a pleading of injury proximately caused by defendants' alleged deceit." *Alliance Network, LLC, v. Sidley Austin*, LLP. 43 Misc. 3d 848, 859 [N.Y. Sup. Ct., N.Y. County 2014). *See also Strumwasser v. Zeiderman*, 102 A.D. 3d 630, 631 [1st Dept 2013] ("[P]laintiff does not allege that the settlement he entered into with his former wife was the proximate result of defendants' alleged deceit."). Here, while Katz alleges that Essner "fabricated" an expert report, Katz fails to allege damages to Katz that were proximately caused by Essner's alleged fabrication. Rather, the Amended Complaint alleges that Katz benefitted from Defendants' actions, as he entered into a settlement resolving the action. Katz's alleged violation of Section 487 claim therefore fails to state a claim and is further flatly contradicted by Katz's settlement.

As for Katz's claim for violation of New York Judiciary Law, Section 487(2) (second cause of action). New York Judiciary Law, Section 487(2), permits a party to recover treble damages against an attorney who "wilfully delays his client's suit

with a view to his own gain; or, wilfully receives any money or allowance for or on account of any money which he has not laid out, or becomes answerable for." The Amended Complaint alleges that Essner and S&E "willfully delayed bringing Katz's Action to trial by adjourning the trial 65 times, and for more than 7 years." It alleges that these delays were for Defendants' "gain" because they concealed from Katz their failure to prepare for trial, their failure to engage an expert witness and their falsification of an expert report, thereby preventing Katz from having the ability to discharge and replace them "with competent counsel who would prepare for and bring the Action to trial." However, as with his claim under Judiciary 487(1), Katz has failed to allege, and documentary contradicts, any claim that such delays by Defendants caused damages to Katz.

Katz's fourth claim is for fraud and deceit. The elements of fraudulent inducement are: (1) a false representation of material fact; (2) known by the utterer to be untrue; (3) made with the intention of inducing reliance and forbearance from further inquiry; (4) that is justifiably relied upon; and (5) results in damages. (*MBIA Ins. Corp. v. Credit Suisse Securities (USA) LLC*, 927 NYS2d 517 [Sup Ct NY, 2011]). CPLR § 3016 requires particularity in the pleading of a fraud cause of action. (CPLR § 3016[b]). In addition, "[t]he courts of this State have consistently held . . . that a cause of action for fraud does not arise when the only alleged fraud relates to a breach of contract," (*Metropolitan Transp. Authority v. Triumph Advertising Productions, Inc.*, 116 A.D.2d 526, 527 [1st Dep't 1986]), and "[a] mere misrepresentation of an intent to perform under the contract is insufficient to sustain a cause of action to recover damages for fraud." (*Gorman v. Fowkes*, 97 A.D.3d 726, 727 [2d Dep't 2012]).

The Amended Complaint alleges, "Upon information and belief, Essner's representation to plaintiff, to induce plaintiff to engage Essner and [S&E], that Essner would try the Action if a satisfactory settlement were not achieved, was knowingly false when made, in that Essner had no intention of trying the Action. Katz justifiably relied to his detriment on Essner's false representation by retaining Essner and [S&E] to represent Katz in the Action." However, Katz's fraud claim is duplicative of the legal malpractice claim since they arise from the same facts. The claim is further belied by the signed retainer agreement, wherein Katz agreed to pay S&E for its legal services for a percentage of the sum recovered "by suit, *settlement* or otherwise . . ." (emphasis added), and by Katz's allocution at settlement.

Katz's fifth claim is for breach of contract. In addition to any malpractice liability, an attorney may also be liable for breach of contract if he or she had made an express contract with the client to achieve a specific result. *Sage Realty Corp. v.*

Proskauer Rose LLP, 251 A.D.2d 35, 39 [1st Dept.1998]. However, a breach of contract claim premised on the attorney's failure to exercise due care or to abide by general professional standards is nothing but a redundant pleading of the malpractice claim and should be dismissed. *Sage Realty*, 251 A.D.2d at 39. *See also Senise v. Mackasek*, 227 A.D. 2d 184, 185 [1st Dept 1996] ("The second cause of action for breach of contract was also properly dismissed since the cause of action, as pleaded, did not rest upon a promise of a particular result or assured result, and only claimed a breach of general professional standards, which is viewed as "a redundant pleading of a malpractice court.").

To the extent that the Amended Complaint alleges that Defendants breached their agreement by failing "to provide competent and diligent legal representation to Katz" in the Underlying Action, a breach of contract claim premised on the attorney's failure to exercise due care or to abide by general professional standards is nothing but a redundant pleading of the malpractice claim and should be dismissed. *Sage Realty*, 251 A.D.2d at 39. Furthermore, to the extent that it is alleged that Defendants "expressly agreed to engage a medical expert who would provide testimony for Katz to prevail in a trial of the [Underlying] Action," such a claim is belied by the retainer agreement executed by Katz which does not contain any express agreement by Defendants to engage a medical expert or any promise of particular result.

As no claims remain, Plaintiff's request for punitive damages is denied.

Wherefore, it is hereby

ORDERED that defendants Howard Essner, Essner & Kobin, LLP, and Essner & Kobin's motion to dismiss the Amended Complaint is granted, and the Amended Complaint is dismissed in its entirety, and the Clerk is directed to enter judgment accordingly.

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

DATED: November 18, 2014

EILEEN A. RAKOWER, J.S.C.