

Cusanelli v Deiorio Law Firm LLP

2018 NY Slip Op 31345(U)

May 24, 2018

Supreme Court, Queens County

Docket Number: 710706/17

Judge: Carmen R. Velasquez

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE CARMEN R. VELASQUEZ IAS PART 38
Justice

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THOMAS CUSANELLI,

Index No. 710706/17

Plaintiff,

Motion

Date: December 22, 2017

-against-

M# 1

THE DEIORIO LAW FIRM LLP, THE DEIORIO
LAW GROUP PLLC, MARTINO & WEISS, DOUGLAS
MARTINO, NIRAV SHAH and GLEN WERTHEIMER,

Defendants.

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The following papers numbered EF 20-41 read on this motion by defendant Nirav Shah to dismiss the complaint pursuant to CPLR 3211(a)(1) and (a)(7).

	<u>PAPERS NUMBERED</u>
Notice of Motion - Affidavits - Exhibits.....	EF 20-29
Affirmation in Opposition - Exhibits	EF 38-39
Replying Affirmation	EF 40-41

Upon the foregoing papers it is ordered that this motion by defendant Nirav Shah to dismiss the complaint pursuant to CPLR 3211(a)(1) and (a)(7) is decided as follows:

This is an action to recover damages for legal malpractice. In a prior action in this court, an architectural malpractice claim was commenced against the plaintiff herein, Thomas Cusanelli. Following a bench trial on the issue of damages before Court Attorney Referee Tracy Catapano Fox, a judgment in the sum of \$1,402,734.35 was entered against Cusanelli, as well as his related entities, on September 16, 2015. Cusanelli thereafter commenced the instant legal malpractice action with respect to the representation he received in the architectural malpractice case. Defendant Nirav Shah, one of the attorneys who represented Cusanelli, now moves to dismiss the complaint as against him pursuant to CPLR 3211(a)(1) and 3211(a)(7).

A motion to dismiss pursuant to CPLR 3211(a)(1) will be granted only if the documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim. (*Botach Mgt. Group v Gurash*, 138 AD3d 771, 772 [2d Dept 2016]; *Cives Corp. v George A. Fuller Co., Inc.*, 97 AD3d 713, 714 [2d Dept 2012].) Whether the complaint will later survive a motion for summary judgment plays no part in the determination of a pre-discovery motion to dismiss. (*Palmieri v Biggiani*, 108 AD3d 604, 607 [2d Dept 2013].)

In the matter at hand, the complaint alleges that the judgment entered against the plaintiff in the prior action was caused and/or contributed to by the negligence and malpractice of defendant Shah by failing to properly represent Cusanelli in the earlier action. Defendant Shah asserts that he was a per diem attorney, who only represented the plaintiff in the morning session of the trial and his involvement was very limited. Indeed, he states that the morning session only consisted of direct examination of the plaintiff in that case by his counsel. When the afternoon session commenced, the plaintiff was represented by a different attorney. However, this court cannot conclude, as a matter of law, from the transcript that defendant Shah did not commit legal malpractice. This court cannot determine, simply by looking at the transcript of the bench trial, that defendant Shah did not commit legal malpractice or if any actions he took or failed to take, such as failing to object to certain questions, affected the outcome of the case. (see *Gad v Sherman*, 160 AD3d 622 [2d Dept 2018].)

With respect to the branch of the motion to dismiss for failure to state a cause of action, on a motion to dismiss a pleading pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the nonmoving party the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory. (see *Leon v Martinez*, 84 NY2d 83, 87 [1994]; *Soodoo v LC, LLC*, 116 AD3d 1033 [2d Dept 2014]; *Alan B. Greenfield, M.D., P.C., v Long Beach Imaging Holdings, LLC*, 114 AD3d 888 [2d Dept 2014].) "Whether a plaintiff can ultimately establish its allegations is not part of the calculus." (*Sokol v Leader*, 74 AD3d 1180, 1181 [2d Dept 2010], quoting *EBC I Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005].)


In an action to recover damages for legal malpractice, a plaintiff must demonstrate that the attorney failed to exercise

the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession' and that the attorney's breach of this duty proximately caused plaintiff to sustain actual and ascertainable damages. (*Barnave v Davis*, 108 AD3d 582, 582 [2d Dept 2013].)

Here, the allegations against defendant Shah in the complaint, as set forth above, are sufficient to state a cause of action for legal malpractice.

Accordingly, this motion by defendant Nirav Shah to dismiss the complaint is denied in its entirety.

Dated: May 24, 2018


CARMEN R. VELASQUEZ, J.S.C.

FILED
MAY 30 2018
COUNTY CLERK
QUEENS COUNTY