

Gilbo v Horowitz

2018 NY Slip Op 31844(U)

July 31, 2018

Supreme Court, New York County

Docket Number: 158727/2017

Judge: Margaret A. Chan

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. MARGARET A. CHAN

PART

IAS MOTION 33EFM

Justice

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INDEX NO. 158727/2017

NICHOLAS GILBO,

MOTION DATE _____

Plaintiff,

MOTION SEQ. NO. 001

- v -

MICHAEL HOROWITZ, THOMAS DILLON, MICHAEL
GOLDTSEIN, DILLON, HOROWITZ & GOLDSTEIN LLP, MARK L.
BODNER, P.C.

**INTERIM
DECISION AND ORDER**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 96, 97 were read on this motion to dismiss.

Upon the foregoing documents, the motion to dismiss is granted.

In this action alleging legal malpractice, breach of contract, and specific performance, the moving defendants, Michael Horowitz, Thomas Dillon, and Michael Goldstein, and their law firm, seek dismissal of the complaint pursuant to CPLR 3211(a)(1) and (7), which plaintiff opposes.

Plaintiff is an attorney and represents himself in this matter. In the underlying personal injury action, plaintiff suffered devastating injuries when he was struck by a motor vehicle driven by non-party Crandall Glasgow as he walked across Flatbush Avenue in Brooklyn, New York, on July 21, 2012. Plaintiff alleges that he suffered a traumatic brain injury, fracture of the left humerus and the neck vertebrae, and a severed brachial plexus of the left arm, among other injuries (NYSCEF Doc. No. 1 – Verified Complaint at ¶ 11). Plaintiff spent nine weeks in a medically induced coma and seven months recuperating in the hospital (*id.* at ¶¶ 12-13).

On September 14, 2012, while hospitalized, plaintiff executed a retainer agreement with defendant Mark L. Bodner, P.C. (Bodner) and simultaneously executed a Power of Attorney authorizing his mother to pursue a personal injury claim related to the accident on his behalf (*id.* at ¶ 18). Bodner negotiated a settlement with Glasgow’s insurer on September 21, 2012, for the purported limit of the policy – \$25,000.00 (*id.* at ¶ 20). Bodner attempted to deliver the net proceeds of that settlement to Gilbo, but Gilbo refused it (*id.* at ¶ 28). Bodner later filed a

Notice of Claim against the City of New York, which is stamped received on October 18, 2012 (NYSCEF Doc. No. 8 – Notice of Claim).

For his claim against the City of New York, Gilbo contacted another attorney, non-party Sherwin Suss, who was then of counsel to defendant Dillon, Horowitz & Goldstein, LLP (DHG), in November 2012 (*id.* at ¶ 29). Plaintiff executed a retainer agreement with DHG on March 13, 2013 (NYSCEF Doc. No. 18 – Retainer). Despite the retainer, plaintiff appeared self-represented at a GML §50h hearing held with the City of New York on October 16, 2013 (NYSCEF Doc. No. 7). DHG commenced an action on plaintiff's behalf against the City of New York in Kings County Supreme Court under the Index no. 506293/2013 (the Kings County action).

DHG characterized its retainer agreement as one to “investigate the viability of Plaintiff's potential cause of action against the City” (NYSCEF Doc. No. 30 – Dillon Aff at ¶ 13). DHG made a FOIL request, conducted a site visit with plaintiff, and timely filed the Kings County action to preserve plaintiff's claim against the City (*id.*). In November 2014, Suss stopped working for DHG. Three years later, DHG moved to be relieved as counsel in the Kings County action, which was granted on December 1, 2017. Court records reflect that Gilbo represents himself in that Kings County action.

Turning to the instant case, the moving defendants seek to dismiss plaintiff's four causes of action against them: the first cause of action for breach of contract; the second cause of action for specific performance for DHG's failure to prosecute the Kings County action; the third cause of action for legal malpractice; and the seventh cause of action for an accounting¹.

On a motion to dismiss, the court must accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*see Leon v Martinez*, 84 NY2d 83 [1994]; *Mandarin Trading Ltd. v Wildenstein*, 65 AD3d 448 [1st Dept 2009]). However, the court need not accept “conclusory allegations of fact or law not supported by allegations of specific fact” or those that are contradicted by documentary evidence (*Wilson v Tully*, 43 AD2d 229, 234 [1st Dept 1998]).

The substance of plaintiff's breach of contract claim arises from his retainer agreement with DHG. Plaintiff asserts the firm performed no work in that action for three years, causing him damages. These claims are duplicative of the facts alleged in plaintiff's claim for legal malpractice. As the claims are the same and seek the same relief, the breach of contract must be dismissed (*see Schulte Roth & Zabel, LLP v Kassover*, 80 AD3d 500, 500 [1st Dept 2011]; *Nevelson v Carro*,

¹ There are three other causes of action against Bodner which are not the subject of this motion and thus, are not addressed herein.

Spanbock, Kaster & Cuiffo, 290 AD2d 399, 400 [1st Dept 2002]; *Sonnenschine v Giacomo*, 295 AD2d 287 [1st Dept 2002]).

DHG argues that the legal malpractice claim also fails because the complaint fails to articulate that its conduct was the “but for” cause of any alleged damages. It also argues that there are no damages as the Kings County action is pending. This court concurs on both arguments.

Recovery for legal malpractice requires proof of three elements: (1) attorney negligence; (2) the negligence was the ‘proximate cause’ of the actual loss sustained; and (3) quantifiable damages (*Cosmetics Plus Group, Ltd. v Traub*, 105 AD3d 134, 960 NYS2d 388 [1st Dept 2013]). There is no dispute that the Kings County action remains pending. As such, no adverse decision exists that would suggest that “but for” defendants’ alleged negligence, plaintiff would have had a more favorable outcome. Plaintiff, at this juncture, has not sustained any actual damages attributable to the alleged malpractice; plaintiff’s claim is not ripe. Consequently, his claim for legal malpractice is dismissed with leave to replead (*see Flintlock Const. Services, LLP v Rubin, Fiorella & Friedman LLP*, 110 AD3d 426, 427 [1st Dept 2013]; *Parametric Capital Mgt., LLC v Lacher*, 15 AD3d 301, 302 [1st Dept 2005]; *Kahan Jewelry Corp. v Rosenfeld*, 295 AD2d 261 [1st Dept 2002]).

Plaintiff withdraws his claim for specific performance (second cause of action) in his opposition (NYCSEF Doc No. 43 – Plaintiff’s Opposition ¶ 17). In any event, that cause of action is not cognizable. A judge of the Kings County Supreme Court permitted DHG to be relieved in that action. Thus, this court could not make an award of specific performance in contravention of another court’s determination to relieve DHG. Plaintiff’s cause of action for specific performance is permitted to be withdrawn.

On the claim for an accounting, plaintiff’s complaint asserts that DHG was provided a settlement check from the claim that was resolved with non-party Glasgow under defendant Bodner’s representation and points to a letter authored by Bodner stating that a settlement check was mailed to DHG on November 24, 2013 (NYCSEF Doc No. 55, p 2). DHG denied receiving such a check and submitted affidavits from Suss and Dillon indicating the same (NYCSEF Doc No. 29 – Suss Aff at ¶ 39; NYCSEF Doc No. 30 – Dillon Aff at ¶¶ 34-37). An affidavit by Bodner in support of this motion, dated February 16, 2018, indicates that the settlement funds remain in Bodner’s escrow account (NYCSEF Doc No. 97 – Bodner Aff at ¶32).

There is no need for an accounting of the settlement funds by DHG. Co-defendant Bodner affirms that it possesses these funds. And, since Bodner was the attorney of record in the settlement of the underlying personal injury case against Glasgow, Bodner would be the responsible party to provide an accounting of the

proceeds from the settlement. Hence, the seventh cause of action for an accounting is dismissed against the moving defendants.

Finally, the complaint does not allege any causes of action as against the individual defendants. Thus, the action against Michael Horowitz, Thomas Dillon, and Michael Goldstein is dismissed.

Accordingly, it is hereby

ORDERED that the moving defendants' motion to dismiss is granted to the extent that: the first cause of action for breach of contract is dismissed; the second cause of action for specific performance is withdrawn; the third cause of action for legal malpractice is dismissed without prejudice; and the seventh cause of action for an accounting is dismissed; and it is further

ORDERED, the action is dismissed as against defendants Michael Horowitz; Thomas Dillon; Michael Goldstein; and Dillon, Horowitz and Goldstein LLP. The clerk is directed to enter judgment in their favor as written.


This constitutes the interim decision and order of the court.

7/31/2018
DATE

CHECK ONE: CASE DISPOSED GRANTED DENIED

APPLICATION: SETTLE ORDER

CHECK IF APPROPRIATE: INCLUDES TRANSFER/REASSIGN


MARGARETA CHAN

NON-FINAL DISPOSITION OTHER

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT REFERENCE