Brooklyn Med. Eye Assoc., LLC. v Rivkin Radler, L.L.P.
2018 NY Slip Op 32913(U)
November 13, 2018
Supreme Court, Kings County
Docket Number: 505978/18
Judge: Leon Ruchelsman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: PART COMMERCIAL 8
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BROOKLYN MEDICAL EYE ASSOCIATES, LLC.,
Plaintiff,

Decision and order

- against -

Index No. 505978/18

mS #2

RIVKIN RADLER, L.L.P., HARVEY'S EPSTEIN, CHRIS KUTNER, TAMIKA HARDY, CHERYL F. KORMAN AND MERRIL S. BISCONE,
Defendants,

November 13, 2018
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PRESENT: HON. LEON RUCHELSMAN

The defendants have moved seeking to dismiss the complaint pursuant to CPLR 3211. The plaintiff opposes the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

At the end of 2012 an entity called Craniofacial Surgery P.C., owned by Dr. Dominick Golio entered into a purchase agreement to buy Brooklyn Medical Eye Associates, LLC [hereinafter 'BMEA'] owned by Dr. George Hyman. Dr. Golio executed a personal guaranty guaranteeing all the payments due to Dr. Hyman. Pursuant to a promissory note the first payment due to Hyman was not made and thereafter Dr. Hyman sued Dr. Golio in Nassau County and Dr. Golio was represented by defendant Rivkin Radler LLP in that action. Dr. Hyman moved seeking summary judgement in lieu of a complaint, however, such motion was denied on the grounds there were questions whether Dr. Hyman failed to transfer patients to BMEA pursuant to the agreement. Likewise, a

motion to reargue was similarly denied. In a decision and order dated October 30, 2015 the Appellate Division reversed that determination holding that "the plaintiff established, upon reargument, his prima facie entitlement to judgement as a matter of law by proving the existence of a guaranty, the underlying debt, and the guarantor's failure to perform under the guaranty" (id). The Appellate Division rejected the argument any unfulfilled obligations absolved the guarantor stating that "by the plain language of the guaranty, the defendant was precluded from raising any defenses or counterclaims relating to the underlying debt" (id). Following that decision a judgement was entered against Dr. Golio. Indeed, concerning the alleged breaches committed by Dr. Hyman regarding transferring patients and other alleged improprieties, Dr. Golio commenced an action against Dr. Hyman in an action entitled Craniofacial Surgery P.C., Brooklyn Medical Eye Associates, LLC v. George F. Hyman M.D., Index Number 652453/2017 currently pending in Kings County. Further, Dr. Golio sued Rivkin Radler alleging malpractice, breach of contract and other causes of action. Rivkin Radler has now filed the instant motion seeking to dismiss the complaint on the grounds it fails to state any cause of action.

Conclusions of Law

"[A] motion to dismiss made pursuant to CPLR §3211[a][7] will fail if, taking all facts alleged as true and according them every possible inference favorable to the plaintiff, the complaint states in some recognizable form any cause of action known to our law" (see, e.g. AG Capital Funding Partners, LP v. State St. Bank and Trust Co., 5 NY3d 582, 808 NYS2d 573 [2005], Leon v. Martinez, 84 NY2d 83, 614 NYS2d 972, [1994], Hayes v. Wilson, 25 AD3d 586, 807 NYS2d 567 [2d Dept., 2006], Marchionni v. Drexler, 22 AD3d 814, 803 NYS2d 196 [2d Dept., 2005]. Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a pre-discovery CPLR §3211 motion to dismiss (see, EBC I, Inc. v. Goldman Sachs & Co., 5 NY3d 11, 799 NYS2d 170 [2005]).

To succeed on a claim for legal malpractice it must be shown that the attorney failed to act with the "ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession" (Darby & Darby, P.C. v. VSI International, Inc., 95 NY2d 308, 716 NYS2d 378 [2000]). Those terms cannot be defined with precision but are rather fact specific and must be judged against the actual representation afforded the client in each particular case. Moreover, the client must further establish that the malpractice was a proximate cause of any loss sustained

and the client must also demonstrate 'actual damages' (Prudential Insurance Company v. Dewey Ballantine, Bushby, Palmer & Wood, 170 AD2d 108, 573 NYS2d 981 [1st Dept., 1991]). The claim cannot be based upon an attorney's choosing of a reasonable, yet unsuccessful, strategy or course of action (Palazzolo v. Herrick, Feinstein, LLP, 298 AD2d 372, 751 NYS2d 401 [2d Dept., 2002]). Moreover, in Lindenman v. Kreitzer, 7 AD3d 30, 775 NYS2d 4 [1st Dept., 2004], the court held "A plaintiff's burden of proof in a legal malpractice action is a heavy one. The plaintiff must prove first the hypothetical outcome of the underlying litigation and, then, the attorney's liability for malpractice in connection with that litigation".

Golio alleges the defendants failed to advise him of certain provisions of the purchase agreement "which, if exercised, would have required Dr. Hyman to defend DR. GOLIO in the Nassau County Action" (see, Affirmation in Opposition, ¶ 167). However, Golio is currently pursuing those very claims against Hyman in the 2017 action. Thus, any failure on the part of the defendants concerning the retainer agreement did not harm Golio in any significant way. Consequently, the motion seeking to dismiss the fifth cause of action is granted.

Concerning the malpractice claims related to the appellate arguments that were not raised before the Appellate Division, the third cause of action contends the defendants engaged in

incompetent appellate representation. Specifically, the complaint alleges the defendants failed to inform the Appellate Division that Hyman was soliciting BMEA patients which constituted a breach of the purchase agreement and that consequently Golio was entitled to a set-off of the amount due. However, similar and related arguments were presented at the trial level. Thus, the first decision of Judge Bucaria states that "in opposition to the motion, Dr. Golio alleges that the LLC purchase agreement required Dr. Hyman to transfer care of Brooklyn Medical's patients to Dr. Golio. Dr. Golio alleges that, rather than transferring the patients, Dr. Hyman continued to treat them himself" (see, Decision dated August 21, 2014). Indeed, in arguing affirmance of that determination the defendants asserted that "Dr. Golio's obligation to make payments pursuant to the guaranty was never triggered because the plaintiff failed to satisfy his obligations under the Purchase Agreement…by tendering admissible evidence proving that he did, in fact, transfer the good will of the business as required under the Purchase Agreement" (see, Brief for Defendant-Respondent, dated June 5, 2015, page 16). The crux of plaintiff's malpractice claim in this regard is that the defendants failed to argue that additionally Dr. Hyman was actively soliciting BMEA's patients in further violation of the purchase agreement. Stated simply, the plaintiff argues the defendant failed to argue

additional breaches of the agreement by Hyman. However, the Appellate Division rejected the allegation Hyman's failure to deliver the patient lists exempted Golio from making payment under the guaranty. This was based upon the legal principle, expressed by the Appellate Division, that the guaranty "is a separate undertaking and a self-standing document…and properly served as the predicate for the plaintiff's motion for summary judgement in lieu of complaint" (supra). The Appellate Division further explained that "by its plain terms, and its broad, sweeping, and unequivocal language, the defendant's guaranty forecloses any challenge to the enforceability and validity of the promissory note made by nonparty Craniofacial Surgery P.C." and that "by the plain language of the guaranty, the defendant was precluded from raising any defenses or counterclaims relating to the underlying debt" (supra). Thus, the Appellate Division has unequivocally explained that there are no defenses that would have excused Golio from making payments under the guaranty. Thus, Golio has failed to present any basis that the defendant's failure to present this specific argument would have resulted in a different conclusion. On the contrary, it is clear that no argument would have prevailed absolving Golio of his obligations under the guaranty. Golio argues that §9.2 of the purchase agreement, a set-off provision would have surely entitled Golio to offset the amount owed due to Hyman's breaches. However,

Hyman's breaches of which the Appellate Division was aware and of which arguments were presented were also sufficient to violate the restrictive covenants. Nevertheless, the Appellate Division ruled that no defenses to the guaranty were available. This position likewise governs the actual solicitation allegedly committed by Hyman. Consequently, the third cause of action is hereby dismissed.

Next, the second and fourth causes of action present allegations defendants conduct regarding the motion to intervene constituted malpractice. Specifically, the complaint alleges the defendants failed to file a motion to intervene in the action between Hyman and Golia on behalf of the corporate entities Craniofacial Surgery P.C. and BMEA, by alleging the paperwork was incomplete in an effort to charge additional fees. However, even if true, Golio and those entities were not forever foreclosed from pursuing these claims. In fact, the 2017 action filed pursues these very claims against Hyman. Thus, the corporate entities and Golio were not harmed by the defendants conduct, even taking all the allegations of the complaint as true. The plaintiff argues that "the defendants are confused" (supra, at ¶ 91) by arguing no damages are present because the plaintiff is currently pursuing claims against Hyman since "Hyman has nothing to do with the Defendant's fraud. Any action against Dr. Hyman is separate and distinct from this action-which is based on

Defendant's fraud-not Dr. Hyman's conduct" [emphasis in original] (id at ¶ 91). While that is of course true, it is well settled that to succeed upon a claim of fraud damages must be presented. As the Court of Appeals recently affirmed, "if the fraud causes no loss, then the plaintiff has suffered no damages" (Ambac Assurance Corporation v. Countrywide Home Loans Inc., 31 NY3d 569, 81 NYS3d 816 [2018]). Therefore, even assuming the defendants fraudulently failed to file the motion to intervene in pursuing claims against Hyman, those claims are currently being pursued. Thus, the fraud, if any, committed by the defendants did not cause any material loss since the consequences of that fraud has not foreclosed further pursuit of the claims. Indeed, as noted, the claims are being pursued in the 2017 lawsuit. Therefore, the motion seeking to dismiss the second and fourth causes of action is granted.

Concerning the first cause of action, namely excessive fees charged, the defendants seek dismissal since they argue the matter of fees is being addressed in another lawsuit. First, there has already been a denial of a motion to consolidate that action with this action. Moreover, in that lawsuit it is alleged the plaintiff owes the defendant $50,000. There is no evidence presented whether that sum is separate and distinct from the disputed sum in this case or part of the same sum. To the extent they are different, they have nothing in common save common

parties. If they are the same then obviously neither party can recover twice and an inconsistent result will not be permitted to exist. Thus, there is no basis to dismiss this cause of action at this time. Therefore, the parties are directed to proceed with discovery and following discovery any party may make any motion. Thus, the motion seeking to dismiss the fee dispute claim is denied without prejudice.

Since the substantive causes of action have been dismissed the negligence action is likewise dismissed. Lastly, the cause of action for intentional infliction of emotional distress is not applicable given the facts of this case and is dismissed. Therefore, all the causes of action of the complaint are dismissed except the fee dispute cause of action.

So ordered.

ENTER:

DATED: November 13, 2018
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC

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