

Kaufman v Tratner, Molloy & Goodstein, LLP
2018 NY Slip Op 33121(U)
November 26, 2018
Supreme Court, Kings County
Docket Number: 522264/17
Judge: Lawrence S. Knipel
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At an IAS Term, ~~ADMIN~~ ^{JUDGE} of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 26th day of November, 2018.

P R E S E N T:

HON. LAWRENCE KNIPEL,
Justice.

ELI KAUFMAN,

Plaintiff,

- against -

TRATNER, MOLLOY & GOODSTEIN, LLP,
TRATNER, MOLLOY & GOODSTEIN, n/k/a
TRATNER & MOLLOY, LLP, TRATNER & MOLLOY, LLP,
a Dissolved Partnership, LOUIS TRATNER, and
DOV TRATNER, as Executor of the Estate of
LOUIS TRATNER, Deceased,

Defendants.

DECISION AND ORDER

Index No. 522264/17

Mot. Seq. No. 1

2018 DEC -3 AM 8:05
KINGS COUNTY CLERK
FILED

The following e-filed papers read herein:

NYSCEF No.

Notice of Motion, Affirmations, and Exhibits Annexed _____
Affirmation in Opposition and Exhibits Annexed _____
Affirmation in Reply _____

6-11 _____
15-23 _____
24 _____

In this action, inter alia, to recover damages for legal malpractice, defendants Tratner, Molloy & Goodstein, LLP, Tratner, Molloy & Goodstein, n/k/a Tratner & Molloy, LLP, Tratner & Molloy, LLP, a dissolved partnership, Louis Tratner, and Dov Tratner, as executor of the estate of Louis Tratner, deceased (collectively, the defendants), move, pre-answer, for an order (1) dismissing the verified complaint, dated Dec. 20, 2017 (the complaint), on the grounds of (a) res judicata, (b) failure to state a cause of action, and (c) "misapplication of

CPLR § 205," and (2) awarding costs and sanctions for the alleged frivolous filing of the instant lawsuit under 22 NYCRR 130-1.1.

Background

On Aug. 18, 2015, plaintiff Eli Kaufman (the plaintiff) commenced an earlier legal malpractice action against the same defendants named in this action (*see Kaufman v Tratner, Molloy & Goodstein, LLP, et al.*, index No. 510204/15 [Sup Ct, Kings County]) (the prior action). Eventually, the prior action was dismissed on the ground that (1) the Amended Verified Complaint, dated Nov. 3, 2015 (the prior complaint), failed to state a cause of action, or, in the alternative (2) the plaintiff's claims were barred by documentary evidence (*see Decision/Order, dated Mar. 27, 2017 and entered May 16, 2017 [Spodek, J.]*) (the prior order).

On Nov. 15, 2017, the plaintiff commenced this action, again seeking to recover damages for legal malpractice, breach of a fiduciary duty, and breach of contract. The plaintiff's allegations in this action are identical to those he advanced in his prior complaint.

Discussion

(1)

"As a general rule, a dismissal for failure to state a cause of action is not on the merits and, thus, will not be given res judicata effect" (*Pereira v St. Joseph's Cemetery*, 78 AD3d 1141, 1142 [2d Dept 2010]). Inasmuch as the dismissal of the prior action was not on the

merits,¹ the branch of the defendants' motion which is for an order, in effect, under CPLR 3211 (a) (5) dismissing the complaint as barred by the doctrine of res judicata is denied (see *Hock v Cohen*, 125 AD3d 722, 723 [2d Dept 2015]; *Rechais v McGivans*, 119 AD3d 666, 667 [2d Dept 2014]).

(2)

"In determining a motion to dismiss a complaint pursuant to CPLR 3211 (a) (7), the court must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Sierra Holdings, LLC v Phillips, Weiner, Quinn, Artura & Cox*, 112 AD3d 909, 910 [2d Dept 2013] [internal quotation marks omitted]). To recover damages for legal malpractice, a plaintiff must establish that "an 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 professional duty caused the plaintiff actual damages" (*McCoy v Feinman*, 99 NY2d 295, 301-302 [2002] [internal quotation

¹ The prior order (at page 4) held, in the alternative, that:

Assuming arguendo that the Court found there was a valid cause of action, the complaint would be dismissed based upon documentary evidence. The Defendants showed that the unauthenticated *email* sent to the Plaintiff was from a non-party and that the Plaintiff based his case on this email. As the defendants have used documentary evidence to disprove Plaintiff's claims, the complaint must be dismissed" (emphasis added).

It is well-established, however, that "letters, emails, and affidavits fail to meet the requirements for documentary evidence" (*Prott v Lewin & Baglio, LLP*, 150 AD3d 908, 909 [2d Dept 2017]; *25-01 Newkirk Ave., LLC v Everest Nat. Ins. Co.*, 127 AD3d 850, 851 [2d Dept 2015]).

marks omitted]). “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” (*Tortura v Sullivan Papain Block McGrath & Cannavo, P.C.*, 21 AD3d 1082, 1083 [2d Dept 2005] [internal quotation marks omitted], *lv denied* 6 NY3d 701 [2005]).

Here, construing the complaint liberally, accepting the facts alleged in the complaint as true, and according the plaintiff the benefit of every possible favorable inference, the complaint pleads specific factual allegations demonstrating that, but for the defendant law firm’s negligence, there would have been a more favorable outcome in the underlying foreclosure action. Accordingly, the branch of the defendants’ motion which is for an order under CPLR 3211 (a) (7) dismissing the legal malpractice claim for failure to state a cause of action is denied (*see Hershco v Gordon & Gordon*, 155 AD3d 1007, 1009 [2d Dept 2017]). Conversely, the remaining causes of action for breach of fiduciary duty and breach of contract are duplicative of the legal malpractice claim because they arose from the same operative facts and do not seek distinct and different damages (*see Panos v Eisen*, 160 AD3d 759, 760 [2d Dept 2018]; *Kliger-Weiss Infosystems, Inc. v Ruskin Moscou Faltischek, P.C.*, 159 AD3d 683, 685 [2d Dept 2018]).

(3)

CPLR 205 (a) provides that “[i]f an action is timely commenced and is terminated in any other manner than by a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff . . . may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months after the termination provided that the new action would have been timely commenced at the time of commencement of the prior action and that service upon defendant is effected within such six-month period.”

The six-month period in CPLR 205 (a) is not a limitations period but a tolling provision, which has no application where, as here, the statute of limitations had not expired at the time the instant action was commenced (*see Bachir v Lloyds of London*, 157 AD3d 847, 848 [2d Dept 2018]).

Conclusion

Accordingly, it is

ORDERED that the defendant’s motion to dismiss the plaintiff’s complaint is *granted to the extent* that the plaintiff’s breach of a fiduciary duty and breach of contract claims (the second and third causes of action, respectively) are dismissed, and the defendant’s motion is otherwise denied; and it is further

ORDERED that the plaintiff's counsel shall electronically serve a copy of this decision and order with notice of entry on the defendants' counsel and shall electronically file an affidavit of said service with the Kings County Clerk; and it is further

ORDERED that under CPLR 3211 (f) the defendants shall have ten days after electronic service of notice of entry of this decision and order within which to interpose their answer to the cause of action which is for legal malpractice.

This constitutes the Decision and Order of the Court.

ENTER FORTHWITH,

J. S. C.

2018 DEC -3 AM 8:05

KINGS COUNTY CLERK
FILED