

Katsoris v Bodnar & Milone, LLP
2018 NY Slip Op 33895(U)
December 31, 2018
Supreme Court, Westchester County
Docket Number: 52088/2018
Judge: Sam D. Walker
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. SAM D. WALKER, J.S.C.

-----X
LOUIS KATSORIS,

Plaintiff,

Decision & Order
Index No. 52088/2018
Seq # 2

-against-

BODNAR & MILONE, LLP,

Defendant.
-----X

The following papers were read on the defendant's motion to dismiss the complaint:

Notice of Motion/Affirmation/Exhibits A-G	1-9
Affirmation in Opposition/Exhibits 1-11	10-21
Reply Affirmation/Exhibit 1	22-23

Factual and Procedural Background

The plaintiff, Louis Katsoris commenced this action on February 14, 2018, by filing a summons with notice to recover money damages, alleging legal malpractice and breach of fiduciary duty.

The defendant, Bodnar & Milone, LLP now files a motion to dismiss pursuant to CPLR 3211(a)(7) arguing that the allegations asserted by the plaintiff fail to support any claims for malpractice and fail to state a cause of action. The defendant also asserts that the plaintiff has failed to establish that the firm's actions proximately caused his alleged damages and further assert that the cause of action for breach of fiduciary duty must be dismissed because it is duplicative.

In opposition, the plaintiff argues that the complaint pleads causes of action sufficient to sustain the complaint and withstand the motion to dismiss and further argues that the cause of action for breach of fiduciary duty is not duplicative.

Discussion

CPLR 3211(a)(7) provides, in relevant part that:

"[a] party may move for judgment dismissing one or more causes of action asserted against [it] on the ground that:

(7) the pleading fails to state a cause of action..."

(N.Y. Civ. Prac. L. & R. 3211[a] [7]).

Under CPLR 3211(a)(7), initially "[t]he sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law...." (see *Guggenheimer v. Ginzburg*, 43 NY2d 268, 275 [1977]). On a motion to dismiss for failure to state a cause of action, the court must view the challenged pleading in the light most favorable to the non-moving party, and determine whether the facts as alleged fit within any cognizable legal theory (see *Brevtman v Olinville Realty, LLC*, 54 AD3d 703 [2d Dept 2008]; see also *EBC 1, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, [2005]; *Leon v Martinez*, 84 NY2d 83 [1994]).

'A complaint in a legal malpractice action will be dismissed pursuant to CPLR 3211(a)(7) where "it fails to plead specific factual allegations demonstrating that, but for the...defendant's alleged negligence, there would have been a more favorable outcome in the underlying proceeding or that the plaintiff would not have incurred any damages"' (see *Benishai v Epstein*, 116 AD3d 726, 728 [2d Dept 2014]).

An allegation of legal malpractice requires the plaintiff to establish that the defendant failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession, and that the breach of that duty was a proximate cause of actual damages sustained by them (*see Zaidman v Marcel Weisman, LLC*, 106 AD3d 813 [2d Dept 2013]). To establish causation, the plaintiff must show that he would have prevailed in the underlying action or would not have incurred any damages, but for the lawyer's negligence (*see Blanco v Polanco*, 116 AD#D 892 [2d Dept 2014]).

Here, even viewing the allegations in the light most favorable to the plaintiff, the cause of action for legal malpractice failed to plead specific factual allegations demonstrating that, but for the defendant's alleged negligence, there would have been a more favorable outcome in the underlying action or that the plaintiff would not have incurred any damages. The plaintiff states in general and conclusory terms that the defendant's attorney failed to properly protect his rights, interest and assets, to properly advise and adequately prepare and that as a result he lost money. However, the plaintiff does not provide any specify exactly what the attorney did that was incorrect and how exactly she misadvised him. Further, the complaint failed to allege that the settlement was compelled by the mistakes of the defendant (*see Benishai v Epstein*, 116 AD3d @ 728).

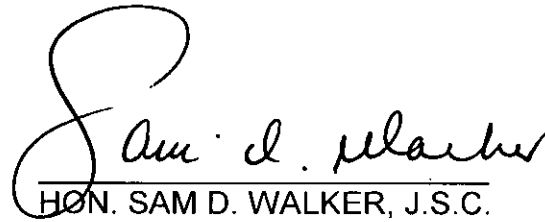
The cause of action sounding in breach of fiduciary duty is also dismissed, since it is based on the same facts underlying the legal malpractice cause of action and did not allege distinct damages (*see Sierra Holdings, LLC v Phillips, Weiner, Quinn, Artura & Cox*, 112 AD3d 909, 910 [2d Dept 2013]; *see also Keness v Feldman, Kramer & Monaco, P.C.*, 105 AD3d 812 [2d Dept 2013]).

Accordingly, it is

ORDERED that the motion to dismiss the complaint is granted.

The foregoing shall constitute the Decision and Order of the Court.

Dated: White Plains, New York
December 31, 2018


HON. SAM D. WALKER, J.S.C.