

Pritsker v Zamansky, LLC

2018 NY Slip Op 33980(U)

November 19, 2018

Supreme Court, New York County

Docket Number: 150595/2017

Judge: Frank P. Nervo

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This opinion is uncorrected and not selected for official publication.

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

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ROBERT PRITISKER,

Plaintiff,

-against-

ZAMANSKY, LLC and JACOB ZAMANSKY,

Defendants.

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DECISION AND ORDER

Index Number

150595/2017

FRANK P. NERVO, J:

Motion sequences 001 and 002 are consolidated for disposition in the following decision and order.

In motion sequence 001, defendants move to dismiss the amended complaint on the grounds of documentary evidence and failure to state a cause of action. (CPLR 3211 (a) (1), (a) (7) and (a) (8).

In motion sequence 002, plaintiff moves to serve and file a second amended complaint. (CPLR 3025)

The court has read and considered defendants' notice of motion to dismiss, affidavit in support of the motion, the affirmation in support of the motion, plaintiff's memorandum of law in opposition to the motion and the memorandums of law in support of the motion and in opposition and in reply, plaintiff's notice of motion to amend his complaint for a second time, the affidavit in support of the motion the affirmation and memorandum of law in opposition to the motion and plaintiff's memorandum of law in reply. On reading and filing those documents, it is

ORDERED that the branch of defendants' motion to dismiss the complaint pursuant to CPLR 3211(a)(7) and (a) (1) is granted with costs; and it is further

ORDERED that the branch of defendants' motion to dismiss the complaint pursuant to CPLR 3211(a)(8) is denied as academic; and it is further

ORDERED that motion to amend his complaint pursuant to CPLR 3025 is denied, with costs; and it is further

ORDERED that the Clerk shall enter judgment in favor of defendants dismissing the complaint with costs as taxed by the Clerk on submission of a bill of costs; and it is further

ORDERED that unless otherwise directed by the Clerk, the proposed judgment shall be submitted to the Clerk and not directly to the courtroom or chambers.

Defendants demonstrate that the complaint fails to state a cause of action for legal malpractice or the other causes of action plaintiff asserts in his amended complaint, breach of fiduciary duty and negligence.

In granting the motion to dismiss for failure to state a cause of action, the court has considered the complaint in a light most favorable to plaintiff, treating all the allegations as true and examined it to determine whether from its four corners there are factual allegations that it asserts any cause of action cognizable at law. (see *Guggenheimer v. Ginzberg*, 43 NY2d 268, 275) Further, even considering the memorandum of law plaintiff submits in opposition, the complaint fails to show that plaintiff even possesses a cause of action. (*id*)

Viewing the complaint in its most favorable light and according plaintiff every favorable inference from the facts he alleges, and assuming that defendants gave plaintiff improper advice by failing to pursue a contract action against AGLIC, the entity plaintiff alleges should have been sued, the complaint fails to allege facts that would allow the court to determine that such an action would have been successful. (*Wagner v. Caruso*, 14 NY3d 874; *Cohen v. Kachroo*, 115 AD3d 512) Plaintiff's conclusory allegation that defendants' malpractice proximately caused his damages is insufficient to overcome this deficiency. (*Wald v. Berwitz*, 62 AD3d 786,787)

While the court has not converted this motion into one for summary judgment, it will consider the document plaintiff submits in opposition to the motion, his memorandum of law in order to determine whether despite his pleading defect, he has a cause of action. (see *Guggenheimer v. Ginzburg*, *id.* at 275; *Basis Yield Alpha Fund (Master) v. Goldman Sachs Group, Inc.* 115 AD3d 128,135) The memorandum of law demonstrates that plaintiff cannot establish that his action against AGLIC would have been successful. At page 26 of his memorandum of law, plaintiff disputes the necessity of showing success in an action against AGLIC. He refers to any such proof as "an empty boast." This is an apparent concession that he has no cause of action. Therefore, dismissal is required under CPLR 3211(a)(7).

The branch of defendants' motion to dismiss the complaint pursuant to 3211 (a)(1) is also granted. Defendants submit the arbitration decision denying his claim against the non-AGLIC parties. The decision shows that plaintiff made all his own investment decisions. That decision has never been reversed and conclusively shows that plaintiff himself caused his own alleged injury. This decision conclusively and unequivocally establishes defendants' defense as a matter of law. (*Warshaw Bernstein Cohen Schlesinger & Kuh, LLP v. Longmire*, 106 AD3d 536, 537) Similarly, the Second Circuit decision, albeit in *dicta*, that defendants submit shows that plaintiff himself made his own investment choices and so was not influenced by AGLIC in any manner. In addition to the decisions, the retainer agreement between plaintiff and defendants shows that defendants representation was limited to an arbitration between plaintiff and two other parties. Plaintiff agreed that defendants would not pursue a claim against any other

party or entity. The retainer agreement precludes an action against defendants for failure to sue AGLIC. (see *Hallman v. Kantor*, 72 AD3d 895)

Plaintiff's causes of action for negligence and breach of fiduciary duty are dismissed because they are duplicative of the legal malpractice action (*Cohen v. Kachroo*, *id.* at 513), and because, as with the deficiency in the legal malpractice pleading, they fail to plead the facts necessary to support them.

The branch of the motion to dismiss for failure to serve a supplemental summons is denied as academic in light of the above dismissal.

Plaintiff's motion to amend his complaint for a second time is denied.

The court rejects defendants' argument that they would be prejudiced by an amendment. They have not answered the complaint and so cannot be harmed by an additional one. However, plaintiff has not presented any meritorious argument that would permit the court to exercise its discretion by permitting the new complaint.

Plaintiff fails to provide an affidavit showing any merit to the newly asserted claims and fails to show why he could not have asserted the in his initial complaint or in his first amended complaint. While he asserts that his complaint is based on newly discovered material, that material had been available on the Internet at the time of his first two pleadings.

While he adds an allegation that his claim would have succeeded had it been asserted against AGLIC, he offers no facts to support this conclusory statement. Further, he does not demonstrate any merit to his breach of contract or fraudulent inducement allegations. He does not show that defendants promised him a particular result in the arbitration proceeding (see *Saveca v. Reilly*, 111 AD2d 493, 494-495), or that they communicated any misleading statements to him. This precludes his new claims. Plaintiff was made well aware of the extent of defendants' representation. He does not show that defendants failed to act within the scope of the retainer agreement. He does not allege any facts to show either fraudulent conduct, a material misrepresentation, by defendants or his justifiable reliance on such conduct. (see *Braddock v. Braddock*, 60 AD3d 84, 86) Moreover, as noted, the additional claims are mere duplications of the legal malpractice allegation.

In sum, the proposed second amended complaint does nothing to cure the defects in the amended complaint and so the court will not grant leave to serve and file it.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

Dated: November ¹⁹, 2018

ENTER:


HON. FRANK P. NERVO
JSC