Israilov v Aizin
2018 NY Slip Op 34004(U)
September 7, 2018
Supreme Court, Kings County
Docket Number: 500372/2018
Judge: Pamela L. Fisher
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At IA Part 94 of the Supreme Court of the State of New York, held in and for the County of Kings, at the courthouse located at 360 Adams Street, Brooklyn, New York 11201 on the 7th[th] day of September 2018

PRESENT: HON. PAMELA L. FISHER, J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS
---X
ZAFAR ISRAILOV, individually and on behalf of PAPER IMPEX USA, INC., and DILNOZA ISROILOVA,

Plaintiff,

- against -

MICHAEL AIZIN,

Defendant.
---X

DECISION/ORDER

Index No: 500372/2018
MS #1

Recitation, as required by CPLR 2219(a), of the papers considered in review of this

Notice of Motion & Affirmation 1
Affirmation in opposition 2
Reply 3
Exhibits...4

Upon the foregoing cited papers, and after oral argument, the Decision/Order on Defendant's motion to dismiss pursuant to CPLR 3211(a)(1) and 3211 (a)(7), is decided as follows:

In this action to recover damages for legal malpractice, defendant, Michael Aizin moves in Seq. No. 1 to dismiss plaintiffs' action pursuant to CPLR 3211(a)(1) and 3211(a)(7). Plaintiffs, Zafar Israilov, individually, and on behalf of Paper Impex USA, Inc., and Dilnoza Isroilova oppose the motion.

BACKGROUND

On March 28, 2014, Michael Aizin ("defendant") was retained by plaintiff Paper Impex USA, Inc. ("Paper Impex"), an Uzbekistan corporation, to obtain an L-1A non-immigrant visa for the benefit of plaintiff, Zafar Israilov ("Israilov"), to manage their subsidiary in the United States. The petition for Israilov's L-1A visa was initially approved for Israilov to work for Paper Impex from November 20, 2014 to August 31, 2015. (Def. Mot. Exh. B) On January 21, 2015, the United States Citizenship and Immigration Services ("USCIS") amended the notice of approval to reflect that

Israilov's L-1A visa was valid from November 20, 2014 until November 19, 2015 (Def. Mot. Exh. C). On July 29, 2015, Paper Impex retained the defendant to render legal services "as may be required in connection with an immigrant petition for Israilov." (Def. Mot. Exh. E). Israilov's wife, Dilnoza Isroilova ("Dilnoza"), was a derivative beneficiary of Israilov's immigrant petition. Defendant filed the immigrant petition (I-485) for adjustment of status ("green card") for Israilov on December 7, 2015. On July 21, 2016, USCIS denied Israilov's petition for a green card because they found that the aggregate period of unauthorized employment or of lapsed or violated status for Israilov exceeded the 180 days maximum under INA 245(k). In their decision USCIS noted that Israilov's last date of admission was August 31, 2015.

Plaintiffs retained new counsel and appealed USCIS' July 21, 2016 decision. USCIS upheld the denial, and in a decision dated October 19, 2016, stated:

> "A review of record indicates the applicant was admitted to the United States on August 18, 2015 as an L-1A until November 19, 2015. The applicant filed a Form I-485 on December 7, 2015. The applicant is required to maintain a valid status from the entire time of their last admission until the filing of a Form I-485. Additionally, the applicant is required to obtain employment authorization from USCIS for the time their Form I-485 is pending with USCIS. The filing of a Form I-485 does not release the applicant from the responsibility to maintain employment authorization. The applicant did not receive an extension of stay as an L-1A beyond November 19, 2015 and did not receive employment authorization from USCIS. The applicant was employed without employment authorization from USCIS for a period greater than 180 days and ineligible for relief under 245(k) of the INA." (Def Mot. Exh. K).

On January 8, 2018, plaintiffs filed a complaint against defendant for legal malpractice. In their complaint, the plaintiffs allege that defendant failed to use ordinary care for an attorney handling plaintiffs' immigrant application by among other things, (i) failing to timely and properly file plaintiffs' immigration application with Immigration Services; (ii) failing to advise plaintiffs as to the dates plaintiffs were authorized to stay in the United States; (iii) failing to advise plaintiffs that they were not authorized to work while their immigration application was pending with USCIS; (iv) failing to obtain employment authorization for plaintiffs; and (v) failing to determine that the immigration application did not contain an application for employment authorization. The plaintiffs claim that as

a direct and proximate result of defendant's professional negligence, plaintiffs became unauthorized to work, suffered significant monetary loss and had to retain new counsel, thereby incurring additional attorney's fees, court costs and expenses.

On March 29, 2018, defendant moved to dismiss plaintiffs' complaint pursuant to CPLR 3211(a)(1) and 3211(a)(7). The defendant claims that as a matter of law, there is a statutory 180 days grace period pursuant to INA 245(k) in which Israilov could file his adjustment petition. The Defendant claims that since Israilov's L-1A visa expired on November 19, 2015, as indicated in the amended USCIS approval notice, and the petition for his green card was filed on December 7, 2015, it was within the 180 days grace period allowed under INA 245(k). The defendant also alleges that when Paper Impex retained him for the L-1A visa for the benefit of Israilov, and again for Israilov's green card petition, he advised Israilov that he could not work in the United States without proper authorization. The defendant further states that even if Israilov was first informed on April 6, 2016 that he was not authorized to work during the pendency of his green card application, April 6, 2016 was still within the 180 days grace period under INA 245(k) and therefore, plaintiff had the last clear chance to stop working before the expiration of the 180-days grace period. He also stated that plaintiffs have not sustained any actual and ascertainable damages since both Israilov and his wife, Dilnoza now have their green cards.

In opposition, the plaintiffs allege that the defendant conceded in his letter dated August 2, 2016 to USCIS that he was at fault for filing of Israilov's adjustment of status application late (Def. Mot. Exh. F). The plaintiffs also allege that but for the defendant's late filing, Israilov and his family would not have been placed in deportation proceedings and would have received their green card timely. The plaintiffs claim that the 180 days grace period under INA 245(k) is not automatic and the defendant should have made a request in writing to the USCIS when he filed the adjustment of status application on December 7, 2015. The plaintiffs further claim that since Israilov's L-1A visa was about to expire, the standard practice was to either seek an extension of the L-1A visa before it expired or file an extension with the application for his green card in order to prevent Israilov from incurring any unlawful presence during the pendency of the green card application.

LAW AND ANALYSIS

A motion to dismiss a complaint pursuant to CPLR 3211 (a)(1) may be granted only if the documentary evidence submitted by the moving party utterly refutes the factual allegations of the complaint and conclusively establishes a defense to the claims as a matter of law (*see Palmieri v Biggiani,* 108 AD3d 604, 605 [2d Dept 2013]; *Goshen v Mutual Life Ins. Co. of N.Y.,* 98 NY2d 314,

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326 [2002]). Here, in support of his motion for dismissal, the defendant submitted copies of the retainer agreements for Israilov's L-1A visa and petition for green card, USCIS initial approval of Israilov's L-1A visa application and the amended approval, copies of USCIS initial denial of Israilov's petition for greencard and the appellate decision, and defendant's affidavit. However, the defendant's documentary submissions did not conclusively establish a defense as a matter of law (*Hershco v Gordon & Gordon*, 155 AD3d 1007, 1008 [2d Dept 2017]; *Randazzo v Nelson*, 128 AD3d 935, 936 [2d Dept 2015]; Endless Ocean, LLC v Twomey, Latham, Shea, Kelley, Dubin & Quartararo, 113 AD3d 587, 588 [2d Dept 2014]; *Harris v. Barbera*, 96 A.D.3d 904, 905–906, 947 N.Y.S.2d 548; *Rietschel v. Maimonides Med. Ctr.*, 83 A.D.3d 810, 811, 921 N.Y.S.2d 290; *Shaya B. Pac., LLC v. Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 A.D.3d 34, 38–39, 827 N.Y.S.2d 231). Accordingly, defendant's motion to dismiss plaintiffs' complaint pursuant to CPLR 3211(a)(1) is denied.

On a motion to dismiss a complaint pursuant to CPLR 3211 (a) (7) for failure to state a cause of action, the court must accept the facts alleged in the pleading as true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*see Goshen v Mutual Life Ins. Co. of N.Y.,* 98 NY2d at 326; *Leon v Martinez*, 84 NY2d 83, 87 [1994]). In an action to recover damages for legal malpractice, a plaintiff must demonstrate that the 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 duty proximately caused the plaintiff to sustain actual and ascertainable damages (*see Bua v. Purcell & Ingrao, P.C.*, et al, 99 AD3d 843 [2d Dept 2012]; *Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438, 442 [2007]; *Bells v Foster*, 83 AD3d 876, 877 [2011]). To establish the element of causation, a plaintiff must show that he or she would have prevailed in the underlying action or would not have incurred any damages but for the attorney's negligence" (*Gioeli v Vlachos*, 89 AD3d 984 [2d Dept 2011]; *Snolis v Clare*, 81 AD3d 923, 925 [2011]). A plaintiff's damages may include "litigation expenses incurred in an attempt to avoid, minimize, or reduce the damage caused by the attorney's wrongful conduct" (*DePinto v. Rosenthal & Curry,* 237 A.D.2d 482, 482, 655 N.Y.S.2d 102 [2d Dept.1997]; *see also Baker v. Dorfman,* 239 F.3d 415, 426 [2d Cir.2000]; 3 Mallen and Smith, Legal Malpractice §§ 20:6, 20:10 [2007]). Further, a party is not obligated to show, on a motion to dismiss, that he or she actually sustained damages. He or she only has to plead allegations from which damages attributable to the attorney's malpractice might be

reasonably inferred (*Lieberman v Green*, 139 AD3d 815, 816 [2d Dept 2016]; *Mackey Reed Elec., Inc. v. Morrone & Assoc., P.C.,* 125 A.D.3d 822, 823, 6 N.Y.S.3d 65; *Fielding v. Kupferman*, 65 A.D.3d 437, 442, 885 N.Y.S.2d 24; *Kempf v. Magida*, 37 A.D.3d 763, 764, 832 N.Y.S.2d 47).

Here, the Plaintiffs allege in their complaint that it was the defendant's duty as an immigration attorney to seek an extension of the L1-A visa or alternately apply for work authorization with the application for Israilov's green card, and it was this failure that led to the denial of the green card application. The plaintiffs also allege that as a direct and proximate result of defendant's professional negligence, plaintiffs suffered significant monetary loss and incurred additional attorney's fees, court costs and expenses. Therefore, the plaintiffs' allegations sufficiently state a legally cognizable cause of action against the defendant sounding in legal malpractice (*see Hershco v Gordon & Gordon*, 155 AD3d 1007, 1008 [2d Dept 2017]; *Guayara v Harry I. Katz, P.C.,* 83 AD3d 661[2d Dept 2011]). Accordingly, defendant's motion to dismiss plaintiffs' complaint pursuant to CPLR 3211(a)(7) is denied.

CONCLUSION

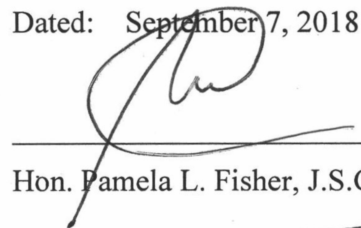
Accordingly, for all the aforesaid reasons, it is

ORDERED, that the defendants' motion to dismiss the plaintiffs' complaint pursuant to CPLR 3211(a)(1), is denied; and it is further

ORDERED, that the defendants' motion to dismiss the plaintiffs' complaint pursuant to CPLR 3211(a)(7), is denied; and it is further

This constitutes the decision and order of this Court.

Dated: September 7, 2018



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