

Femic v Kouvaros

2018 NY Slip Op 34064(U)

September 28, 2018

Supreme Court, Queens County

Docket Number: 701285/2017

Judge: Marguerite A. Grays

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE MARGUERITE A. GRAYS**
Justice

IAS PART 4

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SASA FEMIC, INDIVIDUALLY, AND OBO
PLAZA PATISSERIE, INC., D/B/A PLAZA
KITCHEN AND BAR.

Plaintiff(s),

-against-

CHRISTOS KOUVAROS AND ANASTASIA
KOUVAROS AND JOHN PITTAS.

Defendant(s).

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Motion
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Motion
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-----x
The following papers numbered 1-7 read on this motion by defendant John Pittas for an Order pursuant to CPLR §3211(a)(1), (5), and (7).

	PAPERS NUMBERED
Notice of Motion - Affid.-Exhibits.....	1- 4
Answering Affidavits - Exhibits	5-6
Reply Affidavits - Exhibits	7

Upon the foregoing papers it is ordered that this motion by defendant Pittas is determined as follows:

Plaintiff filed a Second Amended Complaint on March 14, 2017, alleging an Eleventh cause of action against movant defendant Pittas for professional malpractice in connection with plaintiff's alleged purchase of ownership interest in a restaurant partially owned by defendant Christos Kouvaros.

Defendant Pittas moves herein to dismiss the second amended complaint against him. Plaintiff submitted a memorandum of law in opposition to the motion.

The branch of defendant Pittas' motion to dismiss the complaint pursuant to CPLR §3211(a)(7), is denied. On a motion to dismiss pursuant to CPLR §3211, the Court's role is to determine whether a plaintiff's pleadings state a cause of action, not whether the

plaintiff has a cause of action (*Romanello v. Intesa Sanpaolo, S.P.A.*, 22 NY3d 881; *Guggenheimer v. Ginzburg*, 43 NY2d 268). The pleadings are afforded a liberal construction and the Court accepts facts as alleged in the complaint as true, accords plaintiff the benefit of every possible favorable inference, and determines only whether the facts as alleged fit within any cognizable legal theory (*Morone v. Morone*, 50 NY2d 481; *Rovello v. Orofino Realty Co.*, 40 NY2d 633; *A.O. Fox Memorial Hospital v. American Tobacco, Inc.*, 302 AD2d 413 [2003]; *Hornstein v. Wolf*, 109 AD2d 129 [1985]).

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 plaintiff to sustain actual and ascertainable damages (*Gall v. Colon-Sylvain*, 151 AD3d 698 [2017]; *Betz v. Blatt*, 160 AD3d 696 [2018]; *Duque v. Perez*, 95 AD3d 937 [2012]; *Dempster v. Liotti*, 86 AD3d 169 [2011]). As to the first prong, an attorney may be liable for ignorance of the rules of practice, for failure to comply with conditions precedent to suit, for neglect to prosecute or defend an action, or for failure to conduct adequate legal research (*Dempster v. Liotti*, 86 AD3d 169 [2011]). However, even if a plaintiff establishes the first prong, the plaintiff must still demonstrate that he or she would have succeeded on the merits of the action and not incurred any damages but for the attorney's negligence (*Dempster v. Liotti*, 86 AD3d 169 [2011]). Further, as to the second prong, the plaintiff must plead and prove actual, ascertainable damages as a result of an attorney's negligence. Conclusory allegations of damages or injuries resulting from an attorney's alleged omission that predicated on mere speculation cannot suffice for a malpractice action/are insufficient to sustain a prima facie case of legal malpractice (*Dempster v. Liotti*, 86 AD3d 169 [2011]).

Here, plaintiff's Second Amended Complaint alleged, *inter alia*, that the legal services provided by defendant Pittas were deficient, inadequate, and not competent, and fell below the standard of care exercised by attorneys. The pleadings further allege that as a direct and proximate result of Pittas' failures, plaintiff suffered monetary damages sued for herein. Thus, giving the most favorable intendment to plaintiff, the Court finds that plaintiff's second amended complaint adequately alleges for pleading survival purposes, a legally cognizable cause of action for legal malpractice.

The branch of defendant Pittas' motion to dismiss the second amended complaint pursuant to CPLR §3211(a)(1), is granted. A motion to dismiss pursuant to CPLR §3211(a)(1) on the ground that the action is barred by documentary evidence is appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, resolves all factual issues as a matter of law, and conclusively disposes of a plaintiff's claims (*Trade Source, Inc. v. Westchester Wood Works, Inc.*, 290 AD2d 437 [2002]; *Goshen v.*

Mutual Life Ins. Co. of New York, 98 NY2d 314 (2002); *511 W 232nd Owners Corp. v. Jennifer Realty Co.*, 98 NY2d 144 (2002); *Martin v. New York Hospital and Medical Center of Queens*, 34 AD3d 650 [2006]; *M. Fund, Inc. v. Carter*, 31 AD3d 620 [2006]). A Court need not accept a complaint containing factual claims that are flatly contradicted by documentary evidence (*Well v. Rambam*, 300 AD2d 580).

Defendant Pittas met his burden by submitting sufficient evidence conclusively demonstrating that he did not represent plaintiff in connection with the subject transaction and closing, and no attorney-client relationship existed. In support of his motion, defendant Pittas submitted an invoice billed to Mr. Maminakis, the sellor of the shares to plaintiff, for, *inter alia*, Pittas' services at the closing, and, more telling, a statement signed by plaintiff acknowledging plaintiff's understanding that Pittas was the attorney for the seller, Maminakis, and that plaintiff had been given the opportunity to obtain his own attorney but was proceeding with the purchase of the shares without an attorney. The statement was dated April 15, 2014 but also contained the date April 16, 2014 at the bottom next to plaintiff's signature.

In opposition to defendant's showing, plaintiff claims that he is not fluent in English and did not understand the content of the document. However, a party who signs a document without any valid excuse for not having read it is conclusively bound by its terms (*Ferrarella v. Godt*, 131 AD3d 563 [2015]). A party will not be excused from his failure to read and understand the contents of a document he or she signed (*Shklovskiy v. Khan*, 273 AD2d 371 [2000]). A party who signs a document without any valid excuse for having failed to read it is conclusively bound by its terms. Persons who are illiterate in the English language are not automatically excused from complying with the terms of a document which they sign simply because they could not read it; such persons must make a reasonable effort to have the document read to them (*Shklovskiy v. Khan*, 273 AD2d 371 [2000]).

Inasmuch as the document submitted by defendant Pittas conclusively resolves the cause of action set forth in the complaint against Pittas, and as a court need not accept a complaint containing factual claims that are flatly contradicted by documentary evidence (*Well v. Rambam*, 300 AD2d 580 [2202]), the complaint is dismissed as against defendant Pittas.

Based on the above, the Court need not make a determination on the branch of defendant Pittas' motion to dismiss plaintiff's Second Amended Complaint pursuant to CPLR §3211(a)(5), upon the ground that the action is time-barred as against Pittas under the applicable statute of limitations for a cause of action sounding in legal malpractice.

Plaintiff's Second Amended Complaint is accordingly dismissed as against defendant Pittas.

Dated: September 28, 2018



MARGUERITE A. GRAYS
J.S.C.

FILED
OCT 17 2018
COUNTY CLERK
QUEENS COUNTY