

Gilbo v Horowitz

2019 NY Slip Op 30320(U)

February 9, 2019

Supreme Court, New York County

Docket Number: 158727/2017

Judge: Margaret A. Chan

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MARGARET A. CHAN PART IAS MOTION 33EFM

Justice

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NICHOLAS GILBO,

Plaintiff,

- v -

MICHAEL HOROWITZ, THOMAS DILLON, MICHAEL GOLDTSEIN, DILLON, HOROWITZ & GOLDSTEIN LLP, MARK L. BODNER, P.C.

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 129, 130, 131

were read on this motion to/for

DISMISSAL

In this action alleging legal malpractice and legal fraud, and a declaratory judgment to void a retainer agreement and a power of attorney, the moving defendant, Mark L. Bodner, P.C. (Bodner), seeks dismissal of the complaint pursuant to CPLR 3211(a)(1), (5) and (7), and leave to deposit the settlement proceeds into this court pursuant to CPLR § 2601. Plaintiff, who is a lawyer and representing himself, opposes the motion.

On July 21, 2012, plaintiff attended a wedding reception in Brooklyn where he had six vodka and soda drinks in a span of two and one-half hours (NYSCEF # 7 – Hearing tr., p 17). After the reception, he left to meet friends at a nearby lounge. As he walked across Flatbush Avenue, he was struck by a motor vehicle driven by non-party Crandall Glasgow. Plaintiff sustained devastating injuries from this accident and spent nine weeks in a medically induced coma and seven months recuperating in the hospital (NYSCEF # 1 – Verified Complaint at ¶¶ 12-13).

On July 27, 2012, plaintiff's mother enlisted Mark Bodner, Esq. to represent plaintiff (NYSCEF #115 – Bodner aff at ¶ 4). On September 14, 2012, while hospitalized, plaintiff executed a retainer agreement (retainer) with defendant Mark L. Bodner, P.C. and simultaneously executed a power of attorney (POA) authorizing his mother to pursue a personal injury claim related to the accident on his behalf (Complaint at ¶ 18). On September 21, 2012, Bodner settled plaintiff's personal injury case with Glasgow's insurer for the purported policy limit of \$25,000.00 (id. at ¶ 20; Bodner aff at ¶ 8). Bodner avers that plaintiff's mother authorized Bodner to settle the case against the driver, Glasgow (NYSCEF # 115 –

Bodner aff at ¶¶ 8, 11). Bodner attempted to deliver the net proceeds of the settlement to Gilbo, but Gilbo rejected it (*id.* at ¶ 28).

Plaintiff later filed a Notice of Claim against the City of New York, which is stamped received on October 18, 2012 (NYSCEF # 8 Notice of Claim). Bodner was and is not involved in the action against the City. In November 2012, plaintiff contacted co-defendants Dillon, Horowitz & Goldstein LLP and its name-partners (collectively, DHL) regarding his claim against the City and retained DHL on March 13, 2013. The instant case includes DHL as defendants, and the allegations against them were for malpractice, breach of contract, and specific performance. DHL moved to dismiss the complaint. By Order of this court dated July 31, 2018, the malpractice claim was dismissed without prejudice as the matter was not ripe at the time of their motion; the remaining claims were dismissed with prejudice.

In the instant motion to dismiss, plaintiff's allegations are that (1) because he lacked the capacity to enter into agreement, the retainer and the POA should be rescinded; (2) it is malpractice for Bodner to settle plaintiff's personal injury case for the driver's insurance policy limit without litigation or conducting an asset search of Glasgow; and (3) it is legal fraud for Bodner to take his case when Bodner knew or should have known of plaintiff's incapacity to execute the retainer agreement and retaining one-third of the settlement proceeds.

On a motion to dismiss pursuant to CPLR 3211, the court must accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*see Leon v Martinez*, 84 NY2d 83 [1994]; *Mandarin Trading Ltd. v Wildenstein*, 65 AD3d 448 [1st Dept 2009]). However, the court need not accept "conclusory allegations of fact or law not supported by allegations of specific fact" or those that are contradicted by documentary evidence (*Wilson v Tully*, 43 AD2d 229, 234 [1st Dept 1998]).

Rescission/Nullification of the Retainer

Plaintiff seeks a declaratory judgment nullifying the retainer and POA appointing his mother as attorney-in-fact so to restore his case against the driver to the status quo. As plaintiff's mother is not a defendant here, this Decision and Order does not speak to the POA.

Bodner argues that plaintiff's basis for a rescission of the retainer is his incompetency due to his dire medical condition at the time he signed the retainer. Bodner contends that plaintiff's conclusory allegations tending to show Bodner's incapacity are insufficient to state a claim for rescission.

"A party's competence to enter into a contract is presumed, and the party asserting incapacity bears the burden of proof" (*Er-Loom Realty, LLC v Prelosh*

Realty, LLC, 77 AD3d 546, 547 [1st Dept 2010] citing *Feiden v Feiden*, 151 AD2d 889, 890 [3d Dept 1989]). Plaintiff has to show by clear and convincing evidence that his mind was “so affected as to render him wholly and absolutely incompetent to comprehend and understand the nature of the transaction” (*Sears v First Pioneer Farm Credit, ACA*, 46 AD3d 1282, 1284-1285 [3d Dept 2007] quoting *Aldrich v Bailey*, 132 NY 85, 89 [1892]). Plaintiff has to show further “that such incompetency/incapacity existed when he executed the . . . documents” (*Sears*, 132 NY at 89 citing *Feiden*, 151 AD2d at 890).

Plaintiff avers that he “particularly pled for a Declaratory Judgment nullifying the power of attorney (“POA”), that gave his mother the power as agent, and the Bodner P.C. Retainer Agreement he signed while in a heavily medicated medically induced coma (“MIC”), both of which Plaintiff signed on September 14, 2012, only weeks after [he] was gravely injured” (NYSCEF #130 – Gilbo Aff at ¶ 8). Plaintiff does not deny signing the documents, which were notarized the same day. Plaintiff questions whether the notary was present when plaintiff signed since the notary, and Bodner, should have realized that plaintiff was not of sound mind (*id.* at ¶ 16). Bodner provides only his allegations for the knowledge he imputes to the notary and Bodner.

Plaintiff asks this court to take judicial notice of his medical condition as alleged in his complaint because those allegations were undisputed (Gilbo Aff at ¶ 12). This court declines plaintiff’s request. But, this court takes plaintiff’s allegations as true as this court must for the purposes of this motion to dismiss.

Plaintiff, who suffered a traumatic brain injury, among other injuries, was in a medically induced coma for nine weeks after being hospitalized on July 21 (Gilbo Aff at ¶ 10; Complaint at ¶ 12). Nine weeks from July 21 is September 22. Plaintiff signed the documents on September 14, at least one week prior to coming out of the nine-week coma. Plaintiff does not deny signing the documents but claims that “[a]t no time on September 14, 2012, was [he] of sound mind to reasonably understand the nature and significance of the POA and the Bodner P.C. Retainer Agreement.” (Gilbo Aff at ¶ 15). In other words, plaintiff’s contention is that he signed the documents while he was in a medically induced coma, and that is the reason he lacked the capacity to understand what he signed.

Plaintiff’s allegations of his medical condition are significant and serious; they are also conclusory. This court cannot jump to the conclusion plaintiff proffers for his cause of action to rescind the retainer. Bodner’s motion to dismiss plaintiff’s fourth cause of action for a declaratory judgment nullifying the retainer is granted.

The Legal/Constructive Fraud Claim

Plaintiff’s allegations for the legal fraud, or constructive fraud, claim revolve around his alleged incapacity at the time he signed the retainer and POA; he also

takes issue with Bodner's fee that is one-third of the settlement amount. Bodner argues that even if plaintiff lacked the capacity to sign the retainer agreement and the POA, plaintiff still fails to allege any deceitful intent in Bodner's settling the personal injury claim for the insurance policy limit. Bodner adds that retainers that provide contingency fees of one-third of the net recovery to the attorney is the norm.

A cause of action for fraud requires a showing of a misrepresentation of a material fact, which the party making it knows it to be untrue, for the purpose to deceive and induce reliance by the other party, and causing injury (*see Bernstein v Oppenheim & Co., PC*, 160 AD2d 428, 432-433 [1st Dept 1990]). Constructive fraud arises in situations where there is a fiduciary relationship between the parties (*see Gordon v Bialystoker Center and Bikur Cholim, Inc.*, 45 NY2d 692, 698-689 [1978]). In a cause of action for constructive fraud, the burden is shifted "to the party seeking to uphold the transaction to demonstrate the absence of fraud" (*Aoki v Aoki*, 27 NY3d 32, 30 [2016]).

Bodner has shown an absence of fraud here. Simply, there is no deceit or underhandedness in a settlement that is for the insured's policy limit. And retainer agreements containing one-third of the net recovery to the attorney is not fraudulent and is considered commonplace (*see In re Lawrence*, 24 NY3d 320, 339 [2014]; *Belzer v Bollea*, 150 Misc.2d 925, 925, 926 [Sup.Ct., NY Cty 1990]). The branch of Bodner's motion to dismiss the legal fraud claim is granted.

The Legal Malpractice Claim

Bodner argues that the legal malpractice claim is time-barred and there is no continuous representation to toll the three-year statute of limitations (CPLR 214[6]). Bodner argues that its attorney-client relationship ended with the settlement in September 2012 at the earliest or when plaintiff retained DHL in March 2013 at the latest; plaintiff commenced the malpractice claim in September 2018 more than three years after either dates.

Plaintiff makes no allegations of a continuous representation to toll the statute of limitations and none can be discerned from plaintiff's submissions (*see Davis v Cohen & Gresser*, 160 AD3d 484, 486 [1st Dept 2018]). In fact, indicating the absence of a continuous representation is plaintiff's claim for an accounting against DHL was that DHL failed to remit the settlement proceeds to plaintiff (Order of this court dated July 31, 2018). As such, the branch of Bodner's motion to dismiss the malpractice claim is granted.

Depositing the Net Settlement Proceeds into Court

Bodner seeks permission to deposit with the Court the net settlement proceeds belonging to plaintiff. There is no dispute that Bodner's attempt to tender a check representing the net settlement proceeds to plaintiff, plaintiff refused it.

Pursuant to CPLR § 2601, Bodner is granted permission to deposit the check in the amount of \$14,822.84 into this court.

Accordingly, it is ORDERED that the branch of defendant Mark L. Bodner, P.C.'s motion to dismiss plaintiff's fourth cause of action rescind the retainer agreement between them is granted; it is further

ORDERED that the branch of defendant Mark L. Bodner, P.C.'s motion to dismiss plaintiff's fifth cause of action for legal fraud against is granted; it is further

ORDERED that branch of defendant Mark L. Bodner, P.C.'s motion to dismiss plaintiff's sixth cause of action for malpractice is granted; it is further

ORDERED that pursuant to CPLR 2601, defendant Mark L. Bodner, P.C. deposit into court the net proceeds of \$14,822.84 from the Hartford settlement of \$25,000 from the underlying personal injury matter involving non-party driver Crandall Glasgow and that defendant shall be discharged thereby from all further liability to the extent of the money so paid in; and it is further

ORDERED that the complaint is dismissed as against Mark L. Bodner, P.C., and the Clerk of the Court is to enter judgment in favor of Mark L. Bodner, P.C., as written.

2/9/2019

DATE



MARGARET A. CHAN, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE