Denisco v Uysal
2019 NY Slip Op 32156(U)
May 2, 2019
Supreme Court, Queens County
Docket Number: 708495/18
Judge: Allan B. Weiss

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, **ALLAN B. WEISS** IAS PART 2
Justice

MICHAEL DENISCO

Plaintiff,

-against-

MICHAEL D. UYSAL, ESQ., NOAH H. PASSER, ESQ., and THE LAW OFFICE OF MICHAEL D. UYSAL, PLLC

Defendants.

Index No.: 708495/18

Motion Date: 1/16/19

Motion Seq. No.: 2 & 3

The following numbered papers read on this motion by defendants to dismiss the complaint for failure to state a cause of action and based upon documentary evidence; a separate motion by plaintiff for a default judgment against defendants; and a cross motion by defendants for sanctions against plaintiff and his counsel.

	Papers Numbered
Notices of Motion - Affidavits - Exhibits.....	EF 24-36
Notice of Cross Motion - Affidavits - Exhibits...	EF 55-66
Answering Affidavits - Exhibits.....	EF 37-42, 67-69
Reply Affidavits.....	EF 70-77

Upon the foregoing papers it is ordered that the motions and cross motion are joined for the purpose of disposition and are determined as follows:

This legal malpractice action arises out of defendants' alleged negligence in their representation of plaintiff in proceedings concerning his claim for workers' compensation benefits which resulted in a decision disallowing the claim upon a finding that plaintiff's injuries were not sustained in a work-related incident.

Plaintiff's motion for a default judgment is denied. Pursuant to a stipulation of the parties extending defendants' time to answer or move against the complaint, a prior motion by defendants to dismiss the complaint pursuant to CPLR 3211 was made timely. Thereafter, the parties stipulated to adjourn the motion to

November 14, 2018, and then again to December 5, 2018. Although the stipulation adjourning the motion on consent for the second time apparently was faxed to chambers pursuant to this Part's rules on November 13, 2018, the motion was "marked off" at the calendar call on November 14, 2018. Upon learning that same day that the motion had not been adjourned to December 5, 2018, as the parties had agreed to do, defendants immediately re-filed the motion in the e-filed system, noticing it for December 5, 2018. The parties therefore were returned to the same position they would have been in had the contemplated adjournment been effectuated. Under these circumstances, defendants cannot be said to be in default in pleading. The time for defendants to serve an answer remains extended until 10 days after service of notice of entry of this order determining their motion to dismiss. (CPLR 3211[f].)

The cross motion for sanctions is denied. Defendants have not established conduct on the part of plaintiff or his counsel that is frivolous within the meaning of Uniform Rules for Trial Courts (22 NYCRR) § 130-1.1. (*See Lindbergh v SHLO 54, LLC*, 128 AD3d 642 [2d Dept 2015]; *Kaplon-Belo Assoc., Inc. v D'Angelo*, 79 AD3d 931 [2d Dept 2010].)

On defendants' pre-answer motion to dismiss pursuant to CPLR 3211, the complaint must be afforded a liberal construction, with plaintiff's allegations accepted as true and accorded the benefit of every possible favorable inference. (*See Anderson v Armentano*, 139 AD3d 769 [2d Dept 2016]; *Eisner v Cusumano Constr., Inc.*, 132 AD3d 940 [2d Dept 2015].) The sole criterion on a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211(a)(7) is whether from the four corners of the complaint factual allegations are discerned which taken together state any cause of action cognizable at law. (*See Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *Tooma v Grossbarth*, 121 AD3d 1093 [2d Dept 2014]; *Harris v Barbera*, 96 AD3d 904 [2d Dept 2012].) Affidavits submitted by a plaintiff may be considered to remedy any defects in the complaint. (*See Harris*, 96 AD3d at 906; *Kopelowitz & Co., Inc. v Mann*, 83 AD3d 793, 797 [2d Dept 2011].)

Applying these standards, the complaint here sufficiently alleges that defendants failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession and that the breach of this duty proximately caused plaintiff to sustain actual damages to state a cause of action for legal malpractice. (*See Lopez v Lozner & Mastropietro, P.C.*, 166 AD3d 871 [2d Dept 2018]; *Tooma*, 121 AD3d at 1094-1096; *Urias v Daniel P. Buttafucco & Assoc., PLLC*, 120 AD3d 1339 [2d Dept 2014]; *Harris*, 96 AD3d at 906.) While attorneys are free to select among reasonable courses of action in presenting a case without being

liable for malpractice if the strategy chosen does not succeed (*see Healy v Finz & Finz, P.C.*, 82 AD3d 704 [2d Dept 2011]; *Dimond v Kazmierczuk & McGrath*, 15 AD3d 526 [2d Dept 2005]), it cannot be determined at this pleading stage whether the actions and choices made by defendants as to how to proceed at the Workers' Compensation hearing and administrative appeal were a reasonable exercise of the attorneys' judgment. (*See generally Lieberman & Green*, 139 AD3d 815 [2d Dept 2016]; *Tooma*, 121 AD3d at 1095-1096; *Endless Ocean, LLC v Twomey, Latham, Shea, Kelley, Dubin & Quartararo*, 113 AD3d 587, 589 [2d Dept 2014].)

In addition, while defendants correctly assert that an Article 78 review does not lie from a Workers' Compensation Board decision, viewed liberally and together with plaintiff's affidavit, the allegations with regard to defendants' failure to pursue an Article 78 review may be read to encompass a failure to appeal the decision in the proper forum, the Appellate Division, Third Department. (Workers' Compensation Law § 23.)

Dismissal pursuant to CPLR 3211(a)(1) on the ground that a defense is founded on documentary evidence is available only where the documentary evidence relied on utterly refutes the allegations of the complaint and conclusively establishes a defense to plaintiff's claims as a matter of law. (*See 4777 Food Servs. Corp. v Anthony P. Gallo, P.C.*, 150 AD3d 1054 [2d Dept 2017]; *Anderson*, 139 AD3d at 770; *Endless Ocean, LLC*, 113 AD3d at 588.) The retainer agreement submitted by defendants, the New York State Workers' Compensation Board "Notice of Retainer and Appearance," indicates that plaintiff retained defendant The Law Office of Michael D. Uysal, PLLC, to represent him "in all proceedings concerning [his] claim." This document does not utterly refute plaintiff's claim regarding defendants' obligation to represent him on an appeal of his workers' compensation claim. (*See Anderson*, 139 AD3d at 771; *Urias*, 120 AD3d at 1341; *Endless Ocean, LLC*, 113 AD3d at 588; *Harris*, 96 AD3d at 905; *cf. Turner v Irving Finkelstein & Meirowitz, LLP*, 61 AD3d 849 [2d Dept 2009].) The inclusion of a different option on the form retainer to limit representation to an appeal to the Appellate Division does not conclusively establish that the retainer for "all proceedings concerning [the] claim" excludes an appeal, particularly since the directions to the claimant on the form is to "Check One" of the options. (*Id.*)

Nor do the decisions of the Judge at the Workers' Compensation hearing and the Board Panel after administrative review conclusively dispose of plaintiff's malpractice claims. While the decisions may be documentary evidence of the proceedings held by

the Workers' Compensation Board and the rulings made therein, they do not definitively refute as a matter of law the allegations concerning defendants' negligence in failing to conduct discovery, investigate the facts, and interview and present witnesses and other evidence. (*See 4777 Food Servs. Corp.*, 150 AD3d at 1056; *Lieberman*, 139 AD3d at 817; *Tooma*, 121 AD3d at 1094-1095; *Harris*, 96 AD3d at 905.)

Accordingly, defendants' motion to dismiss is denied.

Dated: May 2, 2019

J.S.C.

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COUNTY CLERK
QUEENS COUNTY