Lago v Gucciardo Law Firm
2020 NY Slip Op 31716(U)
June 3, 2020
Supreme Court, New York County
Docket Number: 157977/2018
Judge: Barbara Jaffe

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE **PART** IAS MOTION 12EFM

Justice

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JOSE LAGO,

Plaintiff,

- v -

THE GUCCIARDO LAW FIRM, CHARLES GUCCIARDO,

Defendants.

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INDEX NO. 157977/2018

MOTION DATE

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 20-34, 36, 38, 40-56 were read on this motion for summary judgment.

In this action for legal malpractice, defendants firm and its principal Charles Gucciardo, move pursuant to CPLR 3212 for an order granting them summary dismissal of the complaint, or in the alternative, leave to amend their answer to assert the affirmative defense of plaintiff's failure to join necessary and indispensable parties. Plaintiff opposes.

I. BACKGROUND

A. The complaint (NYSCEF 22)

In advancing causes of action against defendants for legal malpractice and breach of contract, plaintiff alleges in his complaint, in pertinent part, that on October 9, 2015, he "retained" defendants to represent him and advise him as to whether he had "any legal claims to compensate" him for an accident he had while working as a laborer on August 25, 2015 for a subcontractor at a New York City-owned construction site. Defendants advised him that there was no basis for filing a lawsuit and referred him to a Workers' Compensation attorney. Thus,

plaintiff alleges, defendants failed to advise him that he had causes of action against City for its failure to provide a safe place to work in violation of Labor Law §§ 200, 240, and 241(6), in that it caused and permitted "the improper hoisting of construction materials, which resulted in a sewer pipe" striking the ladder on which he stood, causing him to fall some eight feet to the bottom of the trench in which the ladder had been placed, injuring him. "'But for' those failures, plaintiff claims, he "would have had a viable and valuable personal injury action against The City of New York." Based on these allegations, plaintiff claims that defendants may be held liable for legal malpractice.

In support of his cause of action for breach of contract, plaintiff alleges in his complaint that "[w]hen Defendants agreed to be retained by [him] to represent her [sic] interests, a contractual relationship was formed," and that "in consideration of legal fees, [defendants] agreed to provide specific competent and professional legal services consistent with the accepted legal norms of the profession, to engage in certain actions, undertake necessary investigation and acts, [and] make truthful notifications to the court." He also alleges that defendants "failed to properly represent [him] as set forth above and [their] failures were a substantial factor in causing financial harm to [him] by denying his [sic] compensation in the underlying construction accident."

B. Plaintiff's deposition (NYSCEF 24)

At his deposition, plaintiff testified that:

(1) he had an initial 15 to 20-minute consultation on October 9, 2015 with defendant firm regarding personal injuries he claims to have sustained as a result of a fall;

(2) he did not enter into a retainer or engagement letter with the firm;

(3) on the same day as the initial consultation, he was advised that the firm did not believe he had

a valid claim for the personal injuries he had sustained beyond a claim for Workers' Compensation;

(4) he never again communicated with anyone from the firm;

(5) the firm never performed any legal services on his behalf;

(6) the firm never sent him any bills or invoices; and

(7) he did not believe that the firm was representing him in any manner after the consultation.

C. Defendant Gucciardo's deposition (NYSCEF 46)

Gucciardo testified, in pertinent part, that he had rejected plaintiff's case given the length of time it takes to collect on a settlement with City and that the case was not sufficiently substantial to warrant the wait. He stated that when the firm turns down a case, a rejection letter is printed and handed or mailed to the potential client, and that a file for such rejection letters contains one addressed to plaintiff indicating thereon that it had been delivered to him by hand. (NYSCEF 25).

II. CONTENTIONS

A. Defendants (NYSCEF 20-34)

Relying on plaintiff's deposition, defendants deny that there was an attorney-client relationship between them and plaintiff and maintain that even though an initial consultation may give rise to an attorney-client relationship, no such relationship arose here absent an explicit undertaking by them to perform a specific task on plaintiff's behalf.

Moreover, defendants allege that several months following his brief consultation with them, plaintiff retained two successive attorneys, each of whom could have, but did not, obtain leave to file a late notice of claim with City, thereby severing the causal connection between defendants' alleged negligence and plaintiff's loss of a potential claim against City. (NYSCEF

28, 31).

Defendants also argue that as plaintiff's causes of action for legal malpractice and breach of contract rely on the same allegations and damages, the cause of action for breach of contract is duplicative of that for legal malpractice and should be dismissed, and that absent expert evidence to support his claim, plaintiff fails to establish negligence or that he would have prevailed in an action against City.

In the alternative and in the event that summary judgment is not granted, defendants seek leave to file and serve an amended answer, asserting therein as an affirmative defense plaintiff's failure to join as necessary and proper parties the two attorneys who had unsuccessfully sought leave to file and serve City with a late notice of claim, and that they be permitted to renew their application following the completion of discovery with respect to those parties.

B. Plaintiff (NYSCEF 44-52)

In opposition, plaintiff argues that defendants' denial of an attorney-client relationship with him "overlooks that the complaint alleges that [he] met with [the firm] for a preliminary consultation with a prospective client for possible retention . . . [and that t]his encounter creates a fiduciary duty upon [the firm]." He maintains that a claim against City was viable given its status as premises owner which has, pursuant to the Labor Law, a nondelegable duty to provide a safe workplace. Thus, plaintiff asserts, City violated the Labor Law by failing to provide him with "adequate support" for him while he was on the ladder, which resulted in the sewer pipe striking the ladder, causing his ensuing fall and injuries.

Plaintiff perceives from Gucciardo's deposition a need to depose the firm attorney who had given him the reason for rejecting the case, the Workers' Compensation attorney who was present at the consultation, the firm paralegal who had prepared the rejection letter, and the firm

IT employee who is familiar with the program that generated it. In addition, plaintiff asserts a need to discover "the arrangement" between defendants and the Workers' Compensation attorney in order to discern whether defendants may be liable for his failure to advise him of his claim against City.

Plaintiff disputes Gucciardo's explanation of why the firm had rejected his case. According to plaintiff's counsel, "anyone" who has sued City "knows" that City "pays within 90 days of settlement." Thus, he argues, while defendants are free to accept or reject any case for any reason, he believes that Gucciardo's reasons are invalid and wants to explore the firm's two cases against City since plaintiff's consultation with it.

In opposing defendants' request for the alternative relief of leave to amend their answer to allege a failure to name necessary parties, plaintiff argues that there is no legal basis to do so absent a statement as to how present counsel "failed to properly petition the court" in seeking to file the late notice of claim, and that defendants offer no expert evidence in support thereof. Counsel denies that he and the other attorney prejudiced plaintiff's rights and that their conduct proximately caused plaintiff's damages, and argues that as the determination of whether to grant leave to file late notice is discretionary, defendants' argument that but for their errors, plaintiff would have obtained leave to file a late notice of claim is too speculative to sustain a *prima facie* case of legal malpractice as against either of them. Consequently, plaintiff denies that the procedural errors allegedly committed by present counsel and the other attorney constitute intervening causes sufficient to break the causal chain between defendants' initial failure to advise plaintiff of the viable cause of action against City and his loss of a potential action against it. Plaintiff also maintains that the addition of his attorney or his firm as a party-defendant will interfere with his choice of counsel.

Plaintiff offers the affirmation of an expert who, based on plaintiff's description of the accident given at his deposition, opines that a cause of action against City as owner of the construction site is "implicate[d]" under the Labor Law. Given the 90-day period from the time of the accident within which plaintiff had to file a notice of claim with City, the expert also maintains that, "[b]y meeting with [plaintiff] to determine whether to take him as a client, a fiduciary duty existed which required [defendants] to not give false recommendations or false advice where it was reasonably foreseeable that the client would rely on the recommendation or advice." Thus, the expert asserts, having been told by defendants that he had no case and having relied on that advice, plaintiff was caused "not to proceed further pursuing his claim," and concludes that given the breach of its fiduciary responsibility toward plaintiff, the firm is liable for plaintiff's failure to file a timely notice of claim and for the consequent foreclosure of a cause of action against City. (NYSCEF 48).

Although defendants argue that he needs expert evidence to support his claims, plaintiff observes that they offer none in support of their motion.

C. Defendants' reply (NYSCEF 56)

Defendants observe that notwithstanding plaintiff's allegation that a fiduciary duty arose at the consultation between the parties, such a duty does not an attorney-client relationship create, nor does it constitute an element of a cause of action for legal malpractice. And, having failed to produce any documentation demonstrating City's ownership of the premises where the accident occurred, plaintiff cannot demonstrate that he would have prevailed on a claim against City but for defendants' alleged malpractice.

As plaintiff's expert offers no opinion as to whether they may be held liable for legal malpractice and in light of his unsubstantiated allegation that City owned the construction site,

defendants assert that the expert's opinion should be rejected and that in any event, it raises no material question of fact. Moreover, they maintain, the expert's opinions and conclusions on issues of law invade the court's province, and he does not address whether the conduct of present counsel and the other attorney served to break the causal connection between the allegedly negligent actions of defendants and plaintiff's alleged loss of a claim against City.

Defendants also claim that plaintiff mischaracterizes Gucciardo's testimony. While he testified about his office policies, he repeatedly advised plaintiff's counsel that he had never met plaintiff. In any event, defendants assert, these issues are not only irrelevant to the questions of law presented on the instant motion but constitute a desperate attempt by plaintiff to distract from his failure to demonstrate the required elements of a claim for legal malpractice. Also, defendants observe, Gucciardo testified that the firm received no referral fee from the Workers' Compensation firm, and that even had it, plaintiff cites no authority for the proposition that an attorney who receives a fee for referring a client to another attorney may be held liable for the failures of the referee.

According to defendants, the additional discovery sought by plaintiff is unwarranted. They take issue with plaintiff's claim in that regard, contending that plaintiff disingenuously seeks to embark on a fishing expedition and claims that the timing of his opposition to this motion reveals no prior attempt to depose anyone other than Gucciardo. They allege that the testimony of the two employees would only concern the generation of the rejection letter and its delivery to plaintiff's counsel, which is irrelevant to the legal issues on this motion. In any event, defendants deny that the letter is necessary to warrant summary judgment in their favor.

III. ANALYSIS

To prevail on a motion for summary judgment, the movant must establish, *prima facie*,

its entitlement to judgment as a matter of law, providing sufficient evidence demonstrating the absence of any triable issues of fact. (*Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014]). If this burden is met, the opponent must offer evidence in admissible form demonstrating the existence of factual issues requiring a trial; "conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient." (*Justinian Capital SPC v WestLB AG*, 28 NY3d 160, 168 [2016], quoting *Gilbert Frank Corp. v Fed. Ins. Co.*, 70 NY2d 966, 967 [1988]). In deciding the motion, the evidence must be viewed in the "light most favorable to the opponent of the motion and [the court] must give that party the benefit of every favorable inference." (*O'Brien v Port Authority of New York and New Jersey*, 29 NY3d 27, 37 [2017]).

To establish a claim for legal malpractice, a party must show 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 party to sustain actual and ascertainable damages. (*Rudolph v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438 [2007]). To establish proximate cause, a plaintiff must demonstrate that but for the attorney's negligence, the plaintiff would have prevailed in the underlying matter or would not have sustained ascertainable damages. (*Nomura Asset Cap. Corp. v Cadwalader, Wickersham & Taft LLP*, 26 NY3d 40 [2015]).

In *Heine v Colton, Hartnick, Yamin & Sheresky*, the court addressed whether there existed an attorney-client privilege between the parties and observed that "[g]iven the varying contexts in which the existence of an attorney-client relationship is relevant, including issues of privileged communications, disqualification in the face of conflicts of interest and legal malpractice actions, it is clear that the requirements for establishing such a relationship will

vary." (786 F Supp 360, 366-68 [SD NY 1992]). Thus, in determining whether a privilege exists, the court stated that "'it is the *act* of directly rendering legal advice, services, or assistance that forms the touchstone of the attorney-client relationship.'" (*Id.*, quoting *Brandman v Cross & Brown Co.,* 125 Misc 2d 185, 187 [Sup Ct, Kings Co 1984] [emphasis in original]). In *Brandman*, the court held that the privilege attaches when an attorney is consulted in confidence for the purpose of obtaining legal services, citing CPLR 4503. (125 Misc 2d 185).

By contrast, in an action for legal malpractice, where there is no issue of privilege, the court in *Heine* held that the absence of a fee arrangement constitutes a "general indication that no attorney-client relationship exists," and that "a constructive agreement or quasi contract of legal representation will not be implied absent proof of unjust enrichment. (786 F Supp at 366). Thus, in addressing the plaintiff's claim that he had an attorney-client relationship with the defendant, the court in *Heine* held that he was required to plead facts sufficient not only to yield an inference that he had contacted the defendant for the purpose of establishing an ongoing relationship but also "that a contract of legal representation was agreed to." (*Id.*).

The court in *Heine* also acknowledged that a fiduciary duty may be owed in the absence of an attorney-client relationship and held that such a duty existed in that case, relying on the plaintiff's bountiful evidence that the defendants had previously acted as his attorneys and "could reasonably have foreseen that [the plaintiff] would rely on his position as an attorney." (*Id.*; *see Bank Hapaolim, BM v WestLB AG*, 82 AD3d 433 [1st Dept 2011] [although defendants' initial consultation did not lead to counsel's retention, defendants' description of matters, coupled with circumstances surrounding meeting, gave rise to reasonable inference that confidences revealed, which establishes fiduciary relationship of loyalty with respect to those communications]).

Here, defendants prove, based on plaintiff's deposition, that there was no retainer agreement or contract with plaintiff, that the firm performed no legal services for him and sent him no bills or invoices, and that he did not believe that the firm was representing him. Thus, defendants demonstrate, *prima facie*, that there was no attorney-client relationship between them and plaintiff. In any event, plaintiff has apparently retreated from the claim in his complaint that he had retained defendants to represent him, and now asserts that at the consultation, a fiduciary duty arose.

The evidence offered by defendants also reflects that plaintiff transmitted to the firm no confidences, that they had no history with him nor communications following the consultation apart from the alleged rejection letter, and that the firm had undertaken no task on plaintiff's behalf beyond referring him to the Workers' Compensation attorney. Thus, defendants demonstrate, *prima facie*, that no fiduciary relationship resulted from the consultation.

The opinion offered by plaintiff's expert that defendants owed him a fiduciary duty not to "give false recommendations or false advice where it was reasonably foreseeable that the client would rely on the recommendation or advice" is unsupported by legal authority as are all of his opinions. His opinion that a lawsuit against City is "implicate[d]" under the Labor Law is of no evidentiary value and likewise, unsupported.

Even if plaintiff had felt overwhelmed by the firm's opinion that he had no case and thus pursued the claim against City no further, he offers no evidence that defendants were aware of his feelings in that regard. (*See Gregor v Rossi*, 120 AD3d 447 [1st Dept 2014] ["Plaintiffs subjective belief did not create an attorney-client relationship or a close relationship approaching privity that imposed upon defendants a duty to them to impart correct information ..."]). That the firm made available to him a Workers' Compensation attorney does not prove otherwise. In any

event, plaintiff's feeling apparently subsided when he eventually retained not one but two successor attorneys to pursue his claim against City.

Additionally, plaintiff cites decisions that address the existence of a fiduciary duty in the context of attorney-client privilege or disqualification, which are inapposite.

For all of these reasons, the evidence, viewed in the light most favorable to plaintiff, raises no issue of fact as to the existence of a fiduciary duty in these circumstances, even without considering the alleged rejection letter.

Absent an attorney-client relationship or fiduciary duty, there is no need to address the parties' other arguments and requests for relief. And, as plaintiff apparently abandons his cause of action for breach of contract, it need not be addressed.

For all of these reasons, it is hereby

ORDERED, that defendants' motion for summary judgment is granted and the action is dismissed in its entirety, and the clerk is directed to enter judgment accordingly.

6/3/2020
DATE

BARBARA JAFFE, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
	X	GRANTED	☐	DENIED	GRANTED IN PART	☐	OTHER
APPLICATION:	☐	SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:	☐	INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT	☐	REFERENCE