

**Scott v Leventhal**

2020 NY Slip Op 33276(U)

September 30, 2020

Supreme Court, New York County

Docket Number: 656211/2017

Judge: Debra A. James

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DEBRA A. JAMES PART IAS MOTION 59EFM

Justice

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INDEX NO. 656211/2017
MOTION DATE 02/28/2020
MOTION SEQ. NO. 013

PATRICIA SCOTT, AS EXECUTRIX OF THE ESTATE OF
PATRICK FLEMING,

Plaintiff,

- v -

JASON LEVENTHAL and LEVENTHAL LAW GROUP, P.C.,

Defendants.

DECISION + ORDER ON
MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 013) 234, 235, 236, 237,
238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258,
259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER)

ORDER

Upon the foregoing documents, it is

ORDERED that the motion for partial summary judgment as to
liability (sequence number 013) of plaintiff Patricia Scott, as
executrix of The Estate of Patrick Fleming, on the breach of
contract claim is denied; and it is further

ORDERED that the cross motion of defendants Jason Leventhal
and Leventhal Law Group, P.C. for summary judgment dismissing
the complaint is granted only to the extent that the causes of
action for breach of fiduciary duty and breach of contract are
dismissed, and the motion is otherwise denied; and it is further

ORDERED that counsel are directed to submit a proposed
discovery status conference order or a proposed competing

discovery status conference order by transmitting such proposed order(s) to [59nyef@nycourts.gov](mailto:59nyef@nycourts.gov) and filing with NYSCEF on or before November 3, 2020.

#### DECISION

In this action, plaintiff Patricia Scott, as executrix of The Estate of Patrick Fleming, alleges claims of legal malpractice, breach of fiduciary duty, breach of contract, conversion, fraud and violation of Judiciary Law § 487 against defendants Jason Leventhal and Leventhal Law Group, P.C. (collectively, defendants). Plaintiff moves, pursuant to CPLR 3212 (e), for partial summary judgment on the issue of liability on the breach of contract claim. Defendants cross-move, pursuant to CPLR 3212, for summary judgment on all causes of action.

#### Background

Decedent, Patrick Fleming (Fleming or decedent) retained the legal services of defendants on September 8, 2015, after he was allegedly assaulted by a New York City Department of Correction officer on August 16, 2015, while incarcerated at Rikers Correctional Facility (second amended complaint, New York St Cts Electronic Filing System [NYSCEF] Doc No. 5 at ¶¶ 1, 6, 12). Defendants were retained to file a personal injury lawsuit on Fleming's behalf (retainer agreement, NYSCEF Doc No. 239 ¶ 2). Fleming alleged that as a result of the assault, his right

testicle had to be amputated (NYSCEF Doc No. 5 ¶ 7). Medical imaging as a result of Fleming's assault revealed right testicular cancer (id. ¶ 10).

On October 17, 2016, defendants wrote to Fleming and declined to bring a lawsuit on his behalf (withdrawal letter, NYSCEF Doc No. 246). Fleming later passed away due to complications from cancer (NYSCEF Doc No. 5 ¶ 11). His mother, as administrator of his estate, eventually brought suit in federal court for the alleged incident (federal court filing, NYSCEF Doc No. 273; Scott deposition tr, NYSCEF Doc No. 261 at 96).

#### Contentions of the Parties

Plaintiff contends that defendants breached their contract with decedent when they failed to file suit on his behalf in state court.

Defendants claim that after an investigation, that revealed that decedent's amputation was due to his cancer and not the assault, defendants chose to exercise their right under the retainer agreement to terminate its representation of Fleming. Defendants point to the section of the retainer agreement entitled, "Law Firm's right to terminate at any time", which states, "The LAW FIRM has the right to terminate this agreement at any time and the CLIENT agrees to consent to the LAW FIRM'S withdrawal of this matter at any time" (NYSCEF Doc

No. 239 ¶ 5). As such, they contend that withdrawing from representation was proper, especially when taken into consideration Rule 1.16 (b)(1) of the Rules of Professional Conduct, which states that attorneys shall withdraw from the representation of a client when "the lawyer knows or reasonably should know that the representation will result in a violation of these Rules or of law" (memorandum of law in opposition to plaintiff's motion for summary judgment and in support of defendants' cross motion for summary judgment, NYSCEF Doc No. 269 at 5). Thus, defendants argue that to bring suit as Fleming intended, against the City of New York and the Department of Corrections, would be considered non-meritorious under Rule 3.1 of the Rules of Professional Conduct and they were "obligated" to withdraw as counsel (*id.*). Moreover, defendants contend that plaintiff has failed to show ascertainable damages, since she can recover in a separate federal lawsuit for the same injuries sustained by decedent. As for their cross motion, defendants argue that plaintiff cannot show causation or negligence, as required for a legal malpractice claim. They further contends that the breach of fiduciary duty claim is duplicative of the legal malpractice claim and must be dismissed. Moreover, defendants request sanctions pursuant to section 130-1.1 of the Uniform Court Rules.

In reply and opposition to defendants' cross motion, plaintiff argues that defendants failed to provide good cause or reasonable notice before terminating its attorney-client relationship with Fleming, especially considering the one-year statute of limitations for Fleming's assault claim had already expired on August 15, 2016, two months before the withdrawal letter from defendants on October 17, 2016 (plaintiff's reply and opposing brief, NYSCEF Doc No. 276 at 4). Moreover, defendants failed to timely file a notice of claim pursuant to General Municipal Law 50-e (*id.* at 6). Furthermore, plaintiff contends that her breach of fiduciary duty claim is not duplicative of her legal malpractice claim since she alleges facts that differ from her legal malpractice claim, specifically that defendants accepted a bribe in exchange for not commencing a lawsuit on Fleming's behalf (*id.* at 9). As for defendants' request for sanctions, plaintiff points to several news articles that reveal bribery and corruption scandals within the New York City Department of Correction, illustrating that her allegation of bribery is not without merit.

Defendants' sur-reply argues that "prior to the pendency of an action on behalf of the client, the attorney-client relationship is contractual in nature, and, thus, [d]efendants were free to cease the relationship" without leave of court (aff in further support of cross motion, NYSCEF Doc No. 278 ¶

12). Defendants argue that Fleming's surgery "was necessary as a result of the cancer . . . [e]rgo the alleged assault by correction officers did not proximately cause the resulting surgery . . . [and] any claim brought by Defendants on Plaintiff's behalf would have been considered non-meritorious" (id. ¶ 28). Furthermore, they contend that the bribery allegations are without merit and point to plaintiff's deposition wherein she admits that she has no evidence that a bribe occurred in this action (id. ¶ 33; NYSCEF Doc No. 261 at 224-225). While the court recites defendants' sur-reply arguments, they will not be considered, as there is no CPLR provision permitting such a submission in further support of a cross motion (Meka v Pufpaff, 167 AD3d 1547, 1547 [4th Dept 2018] [facts or arguments submitted for the first time in a sur-reply are generally improper and not to be considered]).

#### DISCUSSION

It is well-established that to obtain summary judgment under CPLR 3212 (b), the movant must put forth "proof in admissible form" to "establish [a] cause of action or defense 'sufficiently to warrant the court as a matter of law in directing judgment' in the [movant's] favor" (Friends of Animals v Associated Fur Mfrs., 46 NY2d 1065, 1067 [1979]). If the movant "fails to meet this initial burden, summary judgment must

be denied 'regardless of the sufficiency of the opposing papers'" (Voss v Netherlands Ins. Co., 22 NY3d 728, 734 [2014], quoting Vega v Restani Constr. Corp., 18 NY3d 499, 503 [2012] [emphasis omitted]). Once the movant meets this initial burden, then the burden shifts to the opposition to rebut that prima facie showing, by producing evidence, in admissible form, sufficient to require a trial of material factual issues (De Lourdes Torres v Jones, 26 NY3d 742, 763 [2016]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980]). On a motion for summary judgment, the role of the court is that of issue-finding, not issue-determination (Insurance Corp. of N.Y. v Central Mut. Ins. Co., 47 AD3d 469, 472 [1st Dept 2008]). The court will view the evidence "'in the light most favorable to the nonmoving party'" and grant summary judgment "only where the moving party has 'tender[ed] sufficient evidence to demonstrate the absence of any material issues of fact'" (Vega, supra, 18 NY3d at 503 [2012] [internal quotation and citation omitted]). "If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied" (Grossman v Amalgamated Hous. Corp., 298 AD2d 224, 226 [1st Dept 2002] [internal quotation and citation omitted]).

The elements of a breach of contract claim are: (1) the existence of a valid contract; (2) performance of the contract by the injured party; (3) breach by the other party; and (4)

resulting damages (Morris v 702 E. Fifth St. HDFC, 46 AD3d 478, 479 [1st Dept 2007]), citing Furia v Furia, 116 AD2d 694, 695 [2d Dept 1986]).

Here, there is no dispute that a contract was formed and that the only parties required to perform under the contract were defendants, by commencing a personal injury action on behalf of decedent (NYSCEF Doc No. 269 at 4). However, the retainer agreement explicitly outlines that defendants could withdraw as counsel at any time (NYSCEF Doc No. 239 ¶ 5). Had defendants held themselves out as decedent's attorneys of record by commencing an action and appearing in court, their unfettered right to unilaterally withdraw would require good cause, to be determined by the court (Benefield v City of New York, 14 Misc 3d 603, 606 [Sup Ct, Bronx County 2006]). However, in the case at bar, defendants had yet to commence the personal injury action, and therefore, leave of court was not required.

In any event, plaintiff's cause of action for breach of contract arises from the same facts as the legal malpractice, i.e., as discussed below, defendants' failure to file a notice of claim and to commence an assault action against the City of New York Department of Corrections within the statutory deadlines for same. As the breach of contract action is, therefore, duplicative of the legal malpractice action, the breach of contract cause of action must be dismissed. See

Petitio v Law Offices of Bart J. Egale, PLLC, 170 AD3d 555, 556 (1<sup>st</sup> Dept 2019); see also Rivas v Raymond Schwartzberg & Assoc, PLLC, 52 AD3d 401 (1<sup>st</sup> Dept 2008). As such, plaintiff's motion for partial summary judgment on its claim for breach of contract must be denied and defendants' cross motion to dismiss same shall be granted.

Notwithstanding the above, the court finds unconvincing defendants' argument that they were obligated to withdraw after their investigation showed that the underlying tort claim was without merit (see Willis v Holder, 43 AD3d 1441, 1441 [4th Dept 2007] [conclusory assertion that the underlying action lacks merit is insufficient to establish good and sufficient cause for withdrawal]). While it may be arguable that decedent's amputation was due to cancer and not the assault, the medical records indicate that the cancer was found incidentally and subsequent to imaging performed as a result of the assault. The fact that a lawsuit is of "questionable liability, limited damages, and a likely unfavorable trial result is not the type of impairment of the attorney-client relationship that permits withdrawal of counsel" (Countryman v Watertown Hous. Auth., 13 Misc 3d 632, 633 [Sup Ct, Jefferson County 2006]).

While the complaint also alleges violation of Judiciary Law § 487, conversion and fraud, defendants have failed to put forth

any arguments regarding such causes of action and therefore their dismissal will not be considered by the court.

The remainder of defendants' cross motion to dismiss concerns the causes of action sounding in legal malpractice and breach of fiduciary duty.

Legal malpractice is an attorney's failure to exercise "reasonable skill and knowledge commonly possessed by a member of the legal profession" (Darby & Darby v VSI Intl., 95 NY2d 308, 313 [2000] [internal quotation marks and citation omitted]). An attorney may be held liable for "ignorance of the rules of practice, failure to comply with conditions precedent to suit, or for his neglect to prosecute or defend an action" (Bernstein v Oppenheim & Co., 160 AD2d 428, 430 [1st Dept 1990]). Here, plaintiff has raised a triable issue of fact that defeats summary judgment by putting forth proof in admissible form that defendants failed to file a timely notice of claim as required pursuant to General Municipal Law § 50-e, allowing the statute of limitations on the assault and battery claim to expire and for failure to prosecute the underlying tort action (see CPLR 215 [3]; see also Prout v Vladeck, 316 F Supp 3d 784, 798 [SD NY 2018], reconsideration denied, 319 F Supp 3d 741 [SD NY 2018] ["An attorney's negligence in allowing a statute of limitations to run constitutes malpractice under New York law"]). Moreover, defendants' withdrawal letter to plaintiff

failed to specify the time she had left to pursue a state claim on any remaining causes of action, such as negligence or excessive use of force, against the contemplated municipal defendants (see Burke v Law Offs. of Landau, Miller & Moran, 289 AD2d 16, 16-17 [1st Dept 2001])

“defendant law firm was not entitled to dismissal of the legal malpractice cause of action against it, where it notified plaintiff merely 33 days before expiration of the statutory period that the firm was declining to represent plaintiff in her contemplated medical malpractice action, and further failed to specifically call her attention to the number of days remaining before the Statute of Limitations expired”

see Cabrera v Collazo, 115 AD3d 147, 151 [1st Dept 2014] [when “the expiration of the statute of limitations is imminent and the possibility that another attorney might be engaged to commence a timely action is foreclosed, there is a duty to take action to protect the client’s rights”]). Accordingly, defendants’ motion for summary judgment on its cause of action for legal malpractice shall be denied.

While typically, a claim for fiduciary duty is dismissed as duplicative when it alleges similar facts and damages as a claim for legal malpractice, when the facts alleged and the relief sought are unique, a cause of action for breach of fiduciary duty may proceed (Ulico Cas. Co. v Wilson, Elser, Moskowitz, Edelman & Dicker, 56 AD3d 1, 9 [1st Dept 2008])). Here, a portion of the claim alleges facts that are different from those

of the legal malpractice claim. Specifically, plaintiff alleges that defendants breached their duty to Fleming when they failed to prosecute his tort action in exchange for a bribe. However, defendants have met their burden on summary judgment dismissal on the breach of fiduciary duty claim as it relates to the alleged bribe. Testimony from plaintiff reveals that the bribery allegation is based purely on speculation (NYSCEF Doc No. 261 at 224-225). In opposition, plaintiff has failed to raise a triable issue of fact that a bribe was received in exchange for abandoning the underlying suit. The remaining allegations of breach of fiduciary duty duplicate the legal malpractice and breach of contract claim and therefore must be dismissed (Estate of Nevelson v Carro, Spanbock, Kaster & Cuiffo, 290 AD2d 399, 400 [1st Dept 2002] [claims for breach of fiduciary duty and breach of contract were dismissed because they were redundant when they were predicated on the same allegations and sought relief identical to malpractice claim]). Accordingly, defendants' motion for summary judgment on the cause of action sounding in breach of fiduciary duty shall be granted.

Lastly, defendants request sanctions for plaintiff's prosecution of the bribery allegations. Pursuant to Rules of the Chief Administrator of the Courts 22 NYCRR §130-1.1, the court may award reasonable attorney's fees or costs in the form

of reimbursement for actual expenses reasonably incurred or impose financial sanctions on any party or attorney who engages in frivolous conduct. Conduct for the purposes of this rule is frivolous if:

"(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;

(2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or

(3) it asserts material factual statements that are false"

(22 NYCRR §130-1.1 [c] [1], [2], [3]).

To determine whether conduct is frivolous, the court considers, "among other issues, the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal

factual basis was apparent or should have been apparent or was brought to the attention of counsel or the party" (22 NYCRR §130-1.1 [c]). The court has considered the above, and in its discretion, denies defendants' request for sanctions.

9/30/2020

DATE

*[Signature]*  
DEBRA A. JAMES, 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