Capoziello v Blackman
2020 NY Slip Op 33655(U)
September 2, 2020
Supreme Court, Queens County
Docket Number: 716751/18
Judge: Timothy J. Dufficy

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. TIMOTHY J. DUFFICY **PART 35**
Justice

FILED
9/4/2020
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QUEENS COUNTY

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STEPHEN CAPOZIELLO,

Plaintiff,

-against-

Index No. 716751/18,
Mot. Date: 8/25/20
Mot. Seq. 6

BRENT BLACKMAN, 1137 LINCOLN PLACE CORP, 99 DOSCHER STREET CORP., 67 SOMERS STREET INC, JULIA G. PANE,

Defendants.

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The following papers were read on this motion by defendants Barack P. Cardenas, and Cardenas Islam & Associates, PLLC (the Cardenas Defendants) seeking dismissal of plaintiff's Second Amended Complaint, dated September 23, 2019, pursuant to CPLR 3211 (a) (1) and (7), or, in the alternative, severance of the legal malpractice claims, and a stay of the action, pursuant to CPLR 603.

	PAPERS NUMBERED
Notice of Motion - Affirmation - Exhibits	E159-E165,
Answering Affirmation - Exhibits	E167-E176
Reply Affirmation - Exhibits	E177-E180

Upon the foregoing papers, it is ordered that branch of the motion by the Cardenas Defendants seeking dismissal of the Second Amended Complaint as against them, is granted solely with regard to the causes of action numbered Seventeenth, Nineteenth, Twentieth, Twenty-First, and Twenty-Second, and denied with regard to the Eighteenth Cause of Action. The alternative branch of the motion, seeking severance and a stay, is denied.

In 2016, plaintiff Capoziello, alleges he invested money with defendant,Brent Blackman, a "real estate investor," to buy certain properties for resale, and share in the profits. After the plaintiff questioned the progress of such enterprise, it is alleged that Blackman offered the plaintiff the "full benefit" of a deal on property, known as 25 Surrey Lane, Hempstead, New York (Surrey property), making the plaintiff the sole officer, shareholder, and owner of the corporation that purchased the Surrey property, at a closing, at the office of Barak P. Cardenas, Esq., and attorney the plaintiff alleges was

representing him. Plaintiff further contends that Blackman then executed a mortgage, with the active assistance of attorney Cardenas to defendant Julia G. Pane, without plaintiff's authority to bind said corporation. Plaintiff commenced suit against Blackman and others, in November, 2018, for, among other things, breach of contract, fraud, and conversion. In November, 2019, the plaintiffs' motion to amend the complaint to add the Cardenas Defendants, was granted and said defendants were served with the Second Amended Complaint herein.

The Cardenas Defendants move to dismiss plaintiffs' Second Amended Complaint, as against them, pursuant to CPLR 3211 (a) (1) and (7), or, in the alternative, to sever the legal malpractice action, and stay it pending a determination against the other defendants, pursuant to CPLR 306.

Moving defendants contend that the plaintiffs' causes of action against them should be dismissed, pursuant to CPLR 3211 (a) (1), founded upon defenses based on documentary evidence; and CPLR 3211 (a) (7), for failure to state a cause of action against them. Plaintiffs oppose.

Initially, the sole criterion to dismiss a complaint is whether the pleading, and the factual allegations contained within its four corners, manifests any cause of action cognizable at law (*see Gaidon v. Guardian Life Ins. Co. of America*, 94 NY2d 330 [1999]; *Guggenheimer v Ginzburg*, 43 NY2d 268 [1977]). "To withstand dismissal, the requisite elements of the cause of action must be discernable from the pleadings, and the complaint must give notice of the transactions and occurrences to be proved" (CPLR 3013; *see Dolphin Holdings, Inc. v Gander & White Shipping, Inc.*, 122 AD3d 901[2014]).

The first branch of the Cardenas Defendants' motion, seeks dismissal of plaintiffs' complaint, as against it, pursuant to CPLR 3211 (a) (1), on the grounds that it is barred by documentary evidence. In this branch of defendants' motion, the evidence submitted in support, in the form of, among other things, deposition transcripts and affidavits, was not "documentary" within the meaning of CPLR 3211 (a) (1), as it did not conclusively establish defenses to plaintiffs' claims as a matter of law (*see Dedaj v Berisha*, 185 AD3d 782 [2d Dept 2020]; *McHale v Metropolitan Life Ins. Co.*, 165 AD3d 914 [2d Dept 2018]; *Stone v Blumberg,* 163 AD3d 1028 [2d Dept 2018]). Such evidence, taken alone, failed to undeniably support movant's claims or utterly refute plaintiffs' factual allegations (*see Goshen v Mutual Life Ins. Co. of NY,* 98 NY2d 314, 326 [2002]; *Arnell*

Construction Co. v New York City School Construction Auth. , – AD3d –, 2020 NY Slip Op. 04445 [2d Dept 2020]; *U.S. Bank National Assoc. v Hunte*, 176 AD3d 894 [2d Dept 2019]). For the evidence to be considered "documentary" under that statute, such evidence must be of undisputed authenticity, unambiguous and undeniable (*see Qureshi v Vital Tranp., Inc.*, 173 AD3d 1076 [2d Dept 2019]; *Anderson v Armento*. 139 AD3d 769 [2016]; *Pasquaretto v Long Island University*, 106 AD3d 794 [2013]). "To succeed on a motion to dismiss pursuant to CPLR 3211 (a) (1), the documentary evidence which forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and conclusively disposes of plaintiff's claim" (*Sciadone v Stepping Stones Associates, L.P.*, 148 AD3d 953, 954 [2017]; *see Pacella v RSA Consultants, Inc.*, 164 AD3d 806 [2d Dept 2018]; *Philips v Taco Bell Corp.*, 152 AD3d 806 [2017]). Such evidence submitted did not have the required effect herein.

Formal judicial admissions are facts admitted by a party's pleadings (*Re/Max of N.Y., Inc. v Weber*, 177 AD3d 910, 914 [2d Dept 2019]), which are not present here. Informal judicial admissions are recognized as "facts incidentally admitted during the trial or in some other judicial proceeding, as in statements made by a party as a witness, or contained in a deposition, a bill of particulars, or an affidavit" (Prince, Richardson on Evidence § 8-219, at 529 [Farrell 11th ed.]). While not conclusive, "[a]n informal admission is evidence of the fact or facts admitted" (*Rosales v Rivera*, 176AD3d 753, 755 [2d Dept 2019]; *see Michigan Nat'l. Bank - Oakland v American Centennial Ins. Co*, 89 NY2d 94 [1996]; *Ocampo v Pagan*, 68 AD3d 1077 [2d Dept 2009]), "the circumstances of which may be explained at trial" (*Bogoni v Friedlander*, 197 AD2d 281, 293 [1st Dept 1994]; *see Re/Max of N.Y., Inc. v Weber*, 177 AD3d 910). Consequently, such informal judicial admissions do not conclusively resolve the issues, and cannot serve to dismiss the causes of action herein.

On a motion to dismiss the complaint, pursuant to CPLR 3211 (a) (7), for failure to state a cause of action, the court must afford the pleading a liberal construction, accept as true all the facts alleged therein, give the nonmoving plaintiff the benefit of all favorable inferences, and determine only whether the alleged facts fit within any cognizable legal theory, and not whether plaintiff can ultimately prove such facts (*see J.P.Morgan Securities, Inc. v Vigilant Ins. Co.,* 21 NY3d 324 [2013]; *People ex rel. Cuomo v Coventry First LLC*, 13 NY3d 108 [2009]; *Odierna v RSK, LLC*, 171 AD3d 769 [2d Dept

2019]; *Ramirez v Donado Law Firm, P.C., 169 AD3d 940 [2d Dept 2019]; Webster v Sherman,* 165 AD3d 738 [2d Dept. 2018]; *Murphy v Department of Educ. of the City of N. Y.*, 155 AD3d 637 [2017]; *Bank of New York Mellon Trust Co., N.A. v Universal Dev., LLC*, 136 AD3d 850 [2016]). A motion to dismiss merely addresses the adequacy of a pleading, and does not reach the substantive merits of plaintiff's cause of action (*see Kaplan v New York City Dep't. of Health and Mental Hygiene*, 142 AD3d 1050 [2016]; *Lieberman v Green*, 139 AD3d 815 [2016]). Whether the pleading will later survive a summary judgment motion, or plaintiff will ultimately prevail on the claims, is not relevant on a pre-discovery motion to dismiss (see *Lopez v Lozner & Mastropietro, P.C.*, 166 AD3d 871 [2d Dept 2018]; *Lieberman v Green*, 139 AD3d 815; *Tooma v Grossbarth*, 121 AD3d 1093 [2014]).

A CPLR 3211 (a) (7) motion may be employed to dispose of actions in which the plaintiff has failed to state a claim cognizable at law, or an action in which plaintiff has identified a cognizable cause of action, but failed to assert a material allegation necessary to support the cause of action. "To state a cause of action to recover damages for legal malpractice, a plaintiff must allege: (1) that the attorney 'failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession'; and (2) that the attorney's breach of a duty proximately caused the plaintiff actual and ascertainable damages" (*Dempster v Liotti*, 86 AD3d 169, 176 [2d Dept 2011], quoting *Leder v Spiegel*, 9 NY3d 836, 837 [2007]; *see Rudolf v Shayne, Dachs, Stanici, Corker & Sauer*, 8 NY3d 438 [2007]; *Jenkins v Cadore*, 185 AD3d 558 [2d Dept 2020]; *Blumencranz v Botter*, 182 AD3d 568 [2d Dept 2019). "The elements of a cause of action to recover damages for breach of fiduciary duty are (1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant's misconduct" (*Rut v Young Adult Inst., Inc.*, 74 AD3d 776, 777 [2d Dept 2010]; *see Mann v Sasson, – AD3d –, 2020 NY Slip Op. 04737 [2d Dept 2020]; SCE Assoc., Inc. v Coglianese*, 179 AD3d 730 [2d Dept 2020]; *Weinberg v Picker*, 172 AD3d 784 [2d Dept 2019).

Construing the pleadings liberally, and giving the nonmoving plaintiffs the benefit of all favorable inferences (*see Leon v Martinez*, 84 NY2d 83 [1994]; *Monroy v Lexington Operating Partners*, LLC, 179 AD3d 1053 [2d Dept 2020]; *Rivera v Town of Wappinger*, 164 AD3d 932 [2d Dept 2018]: *Boulos v Lerner-Harrington*, 124 AD3d 709

[2d Dept 2015]), the plaintiffs have established, *prima facie*, the necessary elements of such causes of action (*see* generally, *Astro Kings, LLC v Scannapieco*, 185 AD3d 537 [2d Dept 2020]; *Kimso Apts., LLC v Rivera*, 180 AD3d 1033 [2d Dept 2020]; *Starr Indemnity & Liab. Co. v Global Warranty Group, LLC*, 165 AD3d 1308 [2d Dept 2018]). Plaintiffs' complaint asserts language to the effect, if not the eact verbiage, "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 his duty proximately caused plaintiff to sustain actual and ascertainable damages" (*Rudolf v Shayne, Dachs, Stanici, Corker & Sauer*, 8 NY3d 438, 442 [2007], quoting *McCoy v Feinman*, 99 NY2d 295, 301 [2002]), and that the plaintiffs "would not have incurred any damages, but for the lawyer's negligence" *(Rudolf v Shayne, Dachs, Stanici, Corker & Sauer*, 8 NY3d at 442; *see Nomura Asset Capital Corp. v Cadwalader, Wickersham & Taft, LLP*, 26 NY3d 40 [2015]; *Blumencranz v Botter*, 182 AD3d 568 [2d Dept 2020]; *Lauder v Goldhamer*, 180 AD3d 185 [2d Dept 2020]*; Nill v Schneider*, 173 AD3d 753 [2d Dept 2019]).

"A court is, of course, permitted to consider evidentiary material submitted by a defendant in support of a motion to dismiss pursuant to CPLR 3211(a)(7)" (*Gugliotta v Wilson*, 168 AD3d 817, 818 [2d Dept 2019], quoting *Sokol v Leader*, 74 AD3d 1180, 1181 [2d Dept 2010]; *see* CPLR 3211 [c]; *Ravix v Oligario*, 170 AD3d 763 [2d Dept 2019]). When evidentiary submissions are considered on this type of motion, "and the motion has not been converted to one for summary judgment, the criterion is whether the plaintiff has a cause of action, not whether he or she has stated one, and, unless it has been shown that a material fact as claimed by the plaintiff to be one is not a fact at all, and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate" (*Belling v City of Long Beach*, 168 AD3d 900, 901 [2d Dept 2019]; *see Guggenheimer v Ginzburg*, 43 NY2d 268; *J & JT Holding Corp v Deutsche Bank Nat. Trust Co.*, 173 AD3d 704 [2d Dept 2019]; *McKee v McKee*, 171 AD3d 909 [2d Dept 2019]; *Odierna v RSK, LLC*, 171 AD3d 769; *Cukoviq v Iftikhar*, 169 AD3d 766 [2d Dept 2019]). Here, the movants have failed to proffer such proof.

However, moving defendants have contended that the Seventeenth Cause of Action, for breach of fiduciary duty, and the Nineteenth Cause of action, for breach of contract, are duplicative of the Eighteenth Cause of Action, claiming negligence/legal

malpractice, herein. Such claim has merit, as the three causes of action are "based on the same facts and do not allege distinct damages" (*Urias v Daniel P. Buttafuoco & Assoc., PLLC*, 173 AD3d 1244, 1245 [2d Dept 2019]; *see Pacella v Town of Newburgh Volunteer Ambulance Corps., Inc.*, 164 AD3d 809 [2d Dept 2018]). As such, the Cardenas Defendants' motion is granted with regard to the plaintiffs' Seventeenth Cause of Action, and Nineteenth Cause of Action.

The elements of a cause of action to recover damages for fraud are "a misrepresentation or a material omission of fact which was false and known to be false by [the] defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury" (*Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996]; *see Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173 [2011]). "When a cause of action ... is based upon misrepresentation, fraud, mistake, willful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail" (CPLR 3016 [b]).

Moving defendants contend that the necessary material allegation of "reliance" has not been properly pleaded herein, as same was allegedly made to a third party. The complaint states that "The misrepresentations were intended to induce reliance on the part of Pane" and "Pane relied on the misrepresentations." Contrary to the plaintiffs' assertion, they failed to state a cause of action sounding in fraud/misrepresentation based on the allegation that the defendants' misrepresentations were made to third party, Pane, and, because the plaintiffs failed to also allege that the third party "acted as a conduit to relay the false statement to plaintiff, who then relied on the misrepresentation to his detriment" (*Pasternack v Laboratory Corp of America Holdings*, 27 NY3d 817, 828 [2016]; *see Robles v Patel*, 165 AD3d 858 [2d Dept 2018]; *New York Tile Wholesale Corp. v Thomas Fatato Realty Corp.*, 153 AD3d 1351 [2d Dept 2017]). Consequently, the branch of defendant's motion seeking dismissal of the Twentieth Cause of Action, for misrepresentation, and the Twenty-First Cause of Action, for fraud, against the Cardenas Defendants, is granted.

The motion also seeks to dismiss the remaining Twenty-Second Cause of Action against the Cardenas Defendants, *i.e.*, conspiracy to commit fraud. This branch of defendants' motion is granted. New York does not recognize an independent tort cause of action for civil conspiracy (*see Vetro v Middle Country Cent. School Dist.*, 148 AD3d

964 [2d Dept 2017]; *Arvanitakis v Lester*, 145 AD3d 650 [2d Dept 2016]; *Oseff v Scotti*, 130 AD3d 797 [2015]; *Rose v Different Twist Pretzel, Inc.*, 123 AD3d 897 [2014]).

Finally, moving defendants seek severance of the legal malpractice claim against them, and a stay of such claim "pending a determination against the other defendants," pursuant to CPLR 603. CPLR 603 states, in part, that "[i]n furtherance of convenience or to avoid prejudice, the court may order a severance." "Although it is within a trial court's discretion to grant a severance, this discretion should be exercised sparingly" (*Shanley v Callahan Indus.*, 54 NY2d 52, 57 [1981]; *see HSBC Bank USA, N.A. Simms,* 163 AD3d 930 [2d Dept 2018]; *Barrett v New York City Health & Hosps. Corp.*, 150 AD3d 949 [2d Dept 2017]; *Naylor v Knoll Farms of Suffolk County, Inc.*, 31 AD3d 726 [2d Dept 2006]). Severance may be inappropriate where there are common factual and legal issues involved in the action and the third-party action, and where the interests of judicial economy and consistency of verdicts will be served by having a single trial (*see New York Schools Ins. Reciprocal v Milburn Sales Co., Inc.*, 138 AD3d 940 [2d Dept 2016]; *Sumi Chuang Yeh v Leonardo*, 134 AD3d 695 [2d Dept 2015]; *Herskovitz v Klein,* 91 AD3d 598 [2d Dept 2012]). It must be noted that the instant action does not involve a third-party claim, as all defendants, including movants, are "first-party defendants." All of the facts and legal issues are similar and arise from the same transactions. The Cardenas Defendants are seeking to sever the causes of action against them from the main action.

As such, here, "there are common factual and legal issues involved ... and the interests of judicial economy and consistency of verdicts will be served by having a single trial ... (and) any potential for prejudice is outweighed by the possibility of inconsistent verdicts in the event that the causes of action against those entities were tried separately, and any prejudice to (plaintiff) can be mitigated" (*Bennett v State Farm Fire and Casualty Company*, 181 AD3d 774 [2d Dept 2020]; *see Barrett v New York City Health & Hosps. Corp.*, 150 AD3d 949). Further, a severance of the legal malpractice cause of action is unnecessary, as it is the sole cause of action against the moving defendants surviving this decision.

Moving defendants' request for a stay of the action against them, pending the outcome of the action against the other defendants, is denied. A plaintiff is permitted to commence an action for legal malpractice "even though the underlying ... action was still pending"(*Lopez v Lozner & Mastropietro, P.C.*, 166 AD3d at 873). Movants' cited case

of *Spitzer v Newman*, 163 AD3d 1026, 1028 [2d Dept 2018], the Appellate Division held that an action for legal malpractice may be brought even when the damages are as yet unconfirmed, and opined that the lower court "providently exercised its discretion in staying the action ... rather than granting dismissal of complaint" (at 1028),per CPLR 3211 (a) (7). However, in the instant matter, the complaint has not been dismissed; the single action has not been severed; discovery from the Cardenas Defendants is, potentially, material to an understanding of the claims herein; and discovery is in its preliminary stages. As such, a stay of the legal malpractice action against the Cardenas Defendants, is denied (*see Malik v Beal*, 54 AD3d 910 [2d Dept 2008]; *Mourtil v Korman & Stein, P.C.*, 33 AD3d 898 [2d Dept 2006]).

The parties' remaining contentions and arguments either are without merit, or need not be addressed in light of the foregoing determinations.

Accordingly, based upon the foregoing, it is

ORDERED that the branch of the motion by the Cardenas Defendants seeking dismissal of the Second Amended Complaint as against them, is granted in part and denied in part:

The branch of the motion seeking dismissal of the Second Amended Complaint as against them, is granted solely with regard to the causes of action numbered Seventeenth, Nineteenth, Twentieth, Twenty-First, and Twenty-Second.

The branch of the motion seeking dismissal of the Second Amended Complaint as against them is denied with regard to the Eighteenth Cause of Action, for the reasons discussed above; and it is further

ORDERED that the alternative branch of the motion, seeking severance and a stay, is denied.

Dated: September 2, 2020

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