

Trundle v Garr Silpe, P.C.
2020 NY Slip Op 34233(U)
December 18, 2020
Supreme Court, New York County
Docket Number: 159437/2019
Judge: Lucy Billings
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 46

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EDWARD R. TRUNDLE,

Index No. 159437/2019

Plaintiff

- against -

DECISION AND ORDER

GARR SILPE, P.C.,

Defendant

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LUCY BILLINGS, J.S.C.:

Plaintiff claims that defendant law firm's legal malpractice in an underlying divorce action damaged him in the amount of \$3,000,000, plus interest, attorneys' fees, and costs. Defendant moves to dismiss the amended complaint pursuant to C.P.L.R. § 3211(a)(7).

I. THE AMENDED COMPLAINT

The amended complaint alleges as follows. After plaintiff retained defendant in August 2014, it committed legal malpractice during its five years representing plaintiff by wholly failing to pursue his expressly identified goal of removing his wife as the trustee and administrator of the pension plan established by his corporation Trundle & Company, Inc. Defendant did not introduce relevant evidence in the divorce action against his wife, in particular by (1) excluding from his witness list a handwriting expert who would have testified about his wife's fraud and (2)

failing to lay a foundation for the admission of stamps of plaintiff's signature that his wife used to misappropriate pension funds. Defendant unnecessarily issued fourteen subpoenas after the Note of Issue had been filed, inflating defendant's bills for its legal services to plaintiff, and causing \$30,000 to be assessed against plaintiff. Defendant's further dishonest conduct included misrepresenting whether child support would be included in the final divorce settlement and failing to apply promised discounts to its bills to plaintiff. In sum, defendant's overall inaction and billing practices amounted to legal malpractice.

II. STANDARDS APPLICABLE TO DEFENDANT'S MOTION

Upon defendant's motion to dismiss the amended complaint pursuant to C.P.L.R. § 3211(a)(7), defendant bears the burden to establish that the amended complaint "fails to state a viable cause of action." Connolly v. Long Island Power Auth., 30 N.Y.3d 719, 728 (2018). In evaluating defendant's motion, the court must accept plaintiff's allegations as true, liberally construe them, and draw all reasonable inferences in his favor. Id.; JF Capital Advisors, LLC v. Lightstone Group, LLC, 25 N.Y.3d 759, 764 (2015); Migliano v. Bally Total Fitness of Greater N.Y., Inc., 20 N.Y.3d 342, 351 (2013); M & E 73-75 LLC v. 57 Fusion LLC, 189 A.D.3d 1, 5 (1st Dep't 2020). The court will not give such consideration, however, to allegations that consist of only bare

legal conclusions, Simkin v. Blank, 19 N.Y.3d 46, 52 (2012); M & E 73-75 LLC v. 57 Fusion LLC, 189 A.D.3d at 5; Doe v. Bloomberg L.P., 178 A.D.3d 44, 47 (1st Dep't 2019). Instead, the court accepts as true only plaintiff's factual allegations that set forth the elements of a legally cognizable claim and from them draws all reasonable inferences in his favor. Dismissal is warranted if the amended complaint fails to allege facts that fit within any cognizable legal theory. Faison v. Lewis, 25 N.Y.3d 220, 224 (2015); ABN AMRO Bank, N.V. v. MBIA Inc., 17 N.Y.3d 208, 227 (2011); Lawrence v. Graubard Miller, 11 N.Y.3d 588, 595 (2008); Nonnon v. City of New York, 9 N.Y.3d 825, 827 (2007).

III. PLAINTIFF'S LEGAL MALPRACTICE CLAIMS

To plead legal malpractice, plaintiff must allege that defendant's negligence proximately caused him actual damages. Leder v. Spiegel, 9 N.Y.3d 836, 837 (2007); Kaplan v. Conway & Conway, 173 A.D.3d 452, 452 (1st Dep't 2019); Brookwood Cos., Inc. v. Alston & Bird LLP, 146 A.D.3d 662, 666 (1st Dep't 2017); Excelsior Capitol LLC v. K&L Gates LLP, 138 A.D.3d 492, 492 (1st Dep't 2016). Specifically, plaintiff must show that defendant's failure to exercise the ordinary reasonable skill of a member of the legal profession adversely affected him in the divorce action. Darby & Darby v. VSI Intl., 95 N.Y.2d 308, 313 (2000); Genet v. Buzin, 159 A.D.3d 540, 540 (1st Dep't 2018); Brenner v. Reiss Eisenpress, LLP, 155 A.D.3d 437, 438 (1st Dep't 2017);

O'Callaghan v. Brunelle, 84 A.D.3d 581, 582 (1st Dep't 2011). Plaintiff alleges the requisite proximate cause if he shows that he would not have sustained actual damages but for defendant's negligence. Waggoner v. Caruso, 14 N.Y.3d 874, 875 (2010); Courtney v. McDonald, 176 A.D.3d 645, 645 (1st Dep't 2019); Knox v. Aronson, Mayefsky & Sloan, LLP, 168 A.D.3d 70, 75 (1st Dep't 2018); Ladera Partners, LLC v. Goldberg, Scudieri & Lindenberg, P.C., 157 A.D.3d 467, 468 (1st Dep't 2018). Finally, plaintiff's damages must be actual economic losses. Kaplan v. Conway & Conway, 173 A.D.3d at 452-53; Freeman v. Brecher, 155 A.D.3d 453, 453-54 (1st Dep't 2017); Estate of Feder v. Winne, Banta, Hetherington, Basralian & Kahn, P.C., 117 A.D.3d 541, 542 (1st Dep't 2014); Cohen v. Kachroo, 115 A.D.3d 512, 513 (1st Dep't 2014).

A. DEFENDANT'S FAILURE TO PURSUE PLAINTIFF'S GOAL

Plaintiff's identified primary goal was removing his wife as the trustee and administrator of his corporation's pension plan. Plaintiff alleges that defendant's lack of efforts to pursue this requested objective required him to pay a separate law firm additional attorneys' fees, totaling \$150,000.

Plaintiff also alleges that, when his wife was not removed, she allowed the pension fund to become underfunded, requiring plaintiff to pay \$300,000 in fines imposed by the Internal Revenue Service (IRS). According to plaintiff, defendant

promised to sue his wife for breach of her fiduciary duty, but failed ever to interpose such a claim. Had defendant made that claim, plaintiff alleges, he would have recovered the amount of the IRS fine.

Plaintiff further alleges that his wife, when not removed as the pension plan administrator, continued to misappropriate pension funds until 2017, paying \$400,000 to her own business and \$500,000 to repay a personal loan, and keeping an extra \$500,000 for herself when closing the pension plan. Plaintiff alleges that defendant then failed to recover his 50% or more share of the remaining assets in the pension plan. Finally, plaintiff alleges that defendant unnecessarily conceded \$205,000, the cash value of a life insurance policy, to his wife without consulting plaintiff.

In reply, defendant's attorney claims that defendant tried to remove plaintiff's wife as the trustee and administrator of the pension plan and performed a full accounting of the pension plan, pursuant to plaintiff's request. Reply Aff. of Mark K. Anesh ¶¶ 16-17. Defendant's attorney also maintains that plaintiff and his wife agreed to dissolve the pension plan. Id. ¶ 18. The court may not consider these allegations, however, even were they upon personal knowledge, in support of a motion to dismiss the amended complaint pursuant to C.P.L.R. § 3211(a)(7). Serao v. Bench-Serao, 149 A.D.3d 645, 646 (1st Dep't 2017);

Calpo-Rivera v. Siroka, 144 A.D.3d 568, 568 (1st Dep't 2016); Asmar v. 20th & Seventh Assoc., LLC, 125 A.D.3d 563, 564 (1st Dep't 2015); City of New York v. VJHC Dev. Corp., 125 A.D.3d 425, 426 (1st Dep't 2015). Accepting plaintiff's allegations as true and drawing all reasonable inferences in his favor, as required upon defendant's motion pursuant to C.P.L.R. § 3211(a)(7), plaintiff shows how defendant's negligence adversely affected him in the divorce action and caused him actual financial damages.

Not all plaintiff's claimed damages, however, are attributable to defendant's negligence. First, the \$150,000.00 paid to a separate law firm is not attributable to defendant's negligence because plaintiff would have paid an attorney to close the pension fund regardless whether the attorney was defendant or a new attorney, Brookwood Cos., Inc. v. Alston & Bird LLP, 146 A.D.3d at 666-67; Cohen v. Hack, 118 A.D.3d 460, 460 (1st Dep't 2014); Cohen v. Kachroo, 115 A.D.3d at 513, unless plaintiff shows that, due to defendant's conduct, he paid more fees to his new attorney than he would have paid to defendant. Exeter Law Group LLP v. Immortalana Inc., 158 A.D.3d 576, 577 (1st Dep't 2018); Macquarie Capital (USA) Inc. v. Morrison & Foerster LLP, 157 A.D.3d 456, 457 (1st Dep't 2018); Garnett v. Fox, Horan, & Camerini, LLP, 82 A.D.3d 435, 436 (1st Dep't 2011). Second, as plaintiff alleges that his wife began misappropriating funds in 2003, and he retained defendant for the divorce action in 2014,

any of her misappropriations totalling the \$400,000 and \$500,000 alleged amounts before 2014 are not attributable to defendant.

Knox v. Aronson, Mayefsky & Sloan, LLP, 168 A.D.3d at 75; Brenner v. Reiss Eisenpress, LLP, 155 A.D.3d at 438.

Plaintiff's damages of \$300,000 from IRS fines, \$500,000 kept by his wife when closing the pension plan, 50% or more of the remaining pension plan assets, and the \$205,000 value of a life insurance policy, however, are attributable to defendant's negligence and thus survive defendant's motion. First, plaintiff sustains a legal malpractice claim by alleging that defendant's failure to file a claim against his wife for breach of her fiduciary duty eliminated his opportunity to recoup the \$300,000 in fines. Liporace v. Neimark & Neimark, LLP, 162 A.D.3d 570, 570 (1st Dep't 2018); Trapp-White v. Fountain, 149 A.D.3d 466, 466 (1st Dep't 2017); Phoenix Erectors, LLC v. Fogarty, 90 A.D.3d 468, 469 (1st Dep't 2011); Garnett v. Fox, Horan, & Camerini, LLP, 82 A.D.3d 435, 436 (1st Dep't 2011). Plaintiff's further allegations that defendant failed to prevent his wife from misappropriating \$500,000 when closing the pension plan and failed to pursue plaintiff's entitlement to 50% or more of the pension plan's remaining assets also sustain a legal malpractice claim. Trapp-White v. Fountain, 149 A.D.3d at 466; Facie Libre Assoc. I, L.L.C. v. Littman Krooks, L.L.P., 125 A.D.3d at 490; Russo v. Rozenholc, 130 A.D.3d 492, 497 (1st Dep't 2015).

Finally, plaintiff's allegations that defendant unilaterally and unnecessarily conceded \$205,000 when negotiating the closure of the pension plan state a claim for legal malpractice. Roth v. Ostrer, 161 A.D.3d 433, 434 (1st Dep't 2018). In support of this claim, plaintiff alleges that the pension plan's closure did not require his wife's agreement, so that defendant's concession of the \$205,000 value of an insurance policy in exchange for her agreement regarding the closure was an unnecessary compromise, a claim to which defendant does not even respond.

In sum, plaintiff shows that defendant's negligence proximately caused him damages, but not all his claimed damages. He nevertheless supports legal malpractice claims for any increased attorneys' fees paid to a separate law firm attributable to defendant's conduct and for its failure to sue his wife for breach of her fiduciary duty, failure to seek his 50% or more share of the remaining pension plan assets, and unnecessary concession of the \$205,000 value of a insurance policy. Thus, as a whole, the amended complaint claims that defendant's actions caused financial injury to plaintiff.

B. DEFENDANT'S EVIDENTIARY MISSTEPS

Defendant maintains that plaintiff's allegations concerning defendant's failures to introduce evidence in the divorce action are nothing more than retrospective complaints about strategic trial decisions.

1. Defendant's Failure to Call a Handwriting Expert

Defendant claims that excluding a handwriting expert from plaintiff's witnesses was a reasonable trial decision. Genet v. Buzin, 159 A.D.3d at 540; Excelsior Capitol LLC v. K&L Gates LLP, 138 A.D.3d at 492. Defendant further claims that, even had it retained a handwriting expert, the expert's testimony might not have been helpful. Brookwood Cos., Inc. v. Alston & Bird LLP, 146 A.D.3d at 667.

Decisions regarding what evidence will support a client's position are trial strategy, id., yet the question remains whether, under the circumstances alleged here, the abject failure to retain an expert and develop the expert's testimony to ascertain whether it would be helpful was an unreasonable strategy. Furthermore, even though the amended complaint suggests that the resulting economic loss may be only speculative, Courtney v. McDonald, 176 A.D.3d at 645; Kaplan v. Conway & Conway, 173 A.D.3d at 452; Knox v. Aronson, Mayefsky & Sloan, LLP, 168 A.D.3d at 75, because the fraud claim foreclosed by defendant's failure to pursue this avenue of evidence was only a potential claim, see Ladera Partners, LLC v. Goldberg, Scudieri & Lindenberg, P.C., 157 A.D.3d at 467, the certainty of the damages depends on the strength of the fraud claim. If plaintiff ultimately shows that a handwriting expert would have established a fraud claim against plaintiff's wife, plaintiff may in turn

show the requisite causal connection between defendant's failure and his loss and the amount of that loss, eliminating the speculative nature of the damages and satisfying the requirement for actual ascertainable damages. See Freeman v. Brecher, 155 A.D.3d at 454.

2. Defendant's Failure to Lay a Foundation to Admit Evidence

Plaintiff also alleges that defendant failed to lay the foundation to admit evidence, causing the exclusion of relevant exhibits, specifically the stamps of his signature that his wife used to misappropriate pension funds from his corporation. To support this claim, plaintiff alleges that defendant received notice, instructions, and admonitions from the court about the procedure for introducing these exhibits in evidence, which defendant failed to follow.

While decisions about what admissible evidence to introduce are discretionary, Brookwood Cos., Inc. v. Alston & Bird LLP, 146 A.D.3d at 667, lack of knowledge or skill in laying the foundation to admit evidence amounts to negligence. Roth v. Ostrer, 161 A.D.3d at 434; Taylor v. Paskoff & Tamber, LLP, 102 A.D.3d 446, 447 (1st Dep't 2013). Plaintiff's allegations that defendant's failure to introduce evidence resulted in a lower final divorce settlement show actual damages that state a legal malpractice claim. Roth v. Ostrer, 161 A.D.3d at 434; Liporace v. Neimark & Neimark, LLP, 162 A.D.3d at 570; Trapp-White v.

Fountain, 149 A.D.3d at 466; Facie Libre Assoc. I, L.L.C. v. Littman Krooks, L.L.P., 125 A.D.3d at 490. Accepting plaintiff's allegations as true, as the court must upon defendant's motion pursuant to C.P.L.R. § 3211(a)(7), plaintiff establishes that defendant's failure to introduce evidence adversely affected him in the underlying divorce action. Roth v. Ostrer, 161 A.D.3d at 434; Facie Libre Assoc. I, L.L.C. v. Littman Krooks, L.L.P., 125 A.D.3d at 490.

3. Defendant's Excessive Subpoenas

Defendant maintains that all the subpoenas it issued were in good faith, at plaintiff's request, and to obtain valuable disclosure regarding financial issues. While defendant's pursuit of additional disclosure after the Note of Issue had been filed, might have been a strategic decision, whose unsatisfactory result was discernable only in hindsight, plaintiff claims that the decision was unilateral, without his informed consent.

Sejfuloski v. Michelstein & Assoc., PLLC, 137 A.D.2d 549, 549-50 (1st Dep't 2016); Tenasca Delgado v. Bretz & Coven, LLP, 109 A.D.3d 38, 43-44 (1st Dep't 2013).

Because the Note of Issue had been filed, limiting the circumstances in which plaintiff was permitted to pursue additional disclosure, 22 N.Y.C.R.R. § 202.21(d), the court allowed only three of defendant's fourteen subpoenas. Those three allowed subpoenas may evidence defendant's reasonable trial

strategy, Genet v. Buzin, 159 A.D.3d at 540; Brenner v. Reiss Eisenpress, LLP, 155 A.D.3d at 438; Rubin v. Duncan, Fish & Vogel, L.L.P., 148 A.D.3d at 433; Brookwood Cos., Inc. v. Alston & Bird LLP, 146 A.D.3d at 666-67, but the remaining eleven prompted the court to award \$30,000 in attorneys' fees to the opponent of the subpoenas, payable by plaintiff. While plaintiff does not claim that defendant's issuance of the subpoenas adversely affected the outcome of the divorce action, the subpoenas did cause him ascertainable damages of \$30,000. See Brookwood Cos., Inc. v. Alston & Bird LLP, 146 A.D.3d at 666-67.

C. DEFENDANT'S MISREPRESENTATIONS

In addition to defendant's actions without plaintiff's consent and inflation of its bills, plaintiff alleges its further dishonesty both in misrepresenting whether child support would be included in the final divorce settlement and in failing to apply promised discounts to defendant's bills to plaintiff for its attorneys' fees. Even accepting plaintiff's allegations as true as required upon defendant's motion pursuant to C.P.L.R. § 3211(a)(7), plaintiff alleges neither proximate causation nor damages. The failure to fulfill promises may state a claim for breach of a contract, but not for legal malpractice, as plaintiff does not show how these misrepresentations adversely affected him in the divorce action. Kaplan v. Conway & Conway, 173 A.D.3d at 452; Freeman v. Brecher, 155 A.D.3d at 454; Rubin v. Duncan, Fish

& Vogel. L.L.P., 148 A.D.3d at 433; Cohen v. Hack, 97 A.D.3d at 460. Nor does he allege any actual damages, apart from defendant's extra attorneys' fees, Chowaiki & Co. Fine Art Ltd. v. Lacher, 115 A.D.3d 600, 601 (1st Dep't 2014); Cohen v. Kachroo, 115 A.D.3d at 513; Certain Underwriters at Lloyd's London Subscribing to Policy No. SYNC-1000263 v. Lacher & Lovell-Taylor, P.C., 112 A.D.3d 434, 434-35 (1st Dep't 2013), and his wife's use of the issue of child support as leverage, neither of which constitutes ascertainable damages that support a legal malpractice claim. Kaplan v. Conway & Conway, 173 A.D.3d at 452; Freeman v. Brecher, 155 A.D.3d at 454.

D. DEFENDANT'S INACTION AND EXCESSIVE BILLING

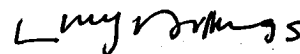
Again, even accepting plaintiff's allegations as true and affording plaintiff every possible favorable inference, plaintiff's allegations that defendant excessively billed him while rendering no services on his behalf do not support a legal malpractice claim, as the excessive billing did not adversely affect his position in the divorce action. Chowaiki & Co. Fine Art Ltd. v. Lacher, 115 A.D.3d at 601; Certain Underwriters at Lloyd's London Subscribing to Policy No. SYNC-1000263 v. Lacher & Lovell-Taylor, P.C., 112 A.D.3d at 434-35. See Cascardo v. Dratel, 171 A.D.3d 561, 562 (1st Dep't 2019); Brenner v. Reiss Eisenpress, LLP, 155 A.D.3d at 438; Johnson v. Proskauer Rose LLP, 129 A.D.3d 59, 70 (1st Dep't 2015); Ullman-Schneider v.

Lacher & Lovell-Taylor, P.C., 121 A.D.3d 415, 416 (1st Dep't 2014).

IV. CONCLUSION

In sum, for the reasons explained above, the court grants defendant's motion to dismiss the amended complaint's claims for excessive billing and misrepresentations that did not adversely affect plaintiff in the underlying divorce action. C.P.L.R. § 3211(a)(7). The court denies defendant's motion to dismiss the remaining claims for damages caused by defendant's negligence in failing to pursue plaintiff's goal, limited to the damages specified above; failing to retain a handwriting expert; failing to lay the foundation to admit evidence; and causing \$30,000 to be assessed against plaintiff for excessive subpoenas to which he did not consent. Id.

DATED: December 18, 2020



LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C.