

Aydiner v Karasik Law Group, P.C.

2021 NY Slip Op 30781(U)

March 15, 2021

Supreme Court, Richmond County

Docket Number: 151944/2020

Judge: Ralph J. Porzio

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND**

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IBRAHIM AYDINER and AYNER GAS,

Plaintiffs,

DECISION AND ORDER

Index No. 151994/2020

-against-

**KARASIK LAW GROUP, P.C. and ALEXANDER
KARASIK**

Defendants.

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PROCEDURAL HISTORY

Plaintiffs Ibrahim Aydiner and Ayner Gas (“Plaintiffs”) brought this Action for legal malpractice against Defendants Karasik Law Group, P.C. and Alexander Karasik (“Defendants”). Plaintiffs allege that Defendants failed to adequately represent them in an underlying residential foreclosure action entitled *Deutsche Bank National Trust Company as Trustee for Indymac Indx Mortgage Loan Trust 2006-AR35, Mortgage v. Ibrahim Aydiner, Anguy Gas et. al.*, Index No. 135234/2018 (“Underlying Foreclosure Action”). The Underlying Foreclosure Action concerns the property located at 16 Furness Place, Staten Island NY (the “Property”), which Plaintiffs purchased on October 19, 2006. Plaintiffs represent that on December 20, 2019, a Judgment of Foreclosure and Sale was entered against them for the sum of \$795,469.23 as the amount due under the note and mortgage, \$2,620.00 for costs and disbursements, \$300.00 as an “additional allowance” and \$4,950.00 in attorney’s fees.

Plaintiffs bring causes of action for legal malpractice, breach of contract or retainer agreement and a violation of New York Judiciary Law Section §487. In their Complaint, Plaintiffs contend that Defendants failed to interpose a timely answer and failed to assert a purportedly “viable” statute of limitations defense. Plaintiffs also allege that Defendants failed to oppose the motions of the lender-plaintiff Deutsche Bank and failed to vacate the default judgments in the Underlying Foreclosure Action. Plaintiffs allege that as a result of Defendants’

failure to properly represent them, the Judgment of Foreclosure and Sale was entered against them and they stand to lose their home unless the sum and other accrued interest is paid off. Plaintiffs maintain they obtained a payoff letter from Deutsche Bank which indicated that a total of \$865,071.58 was due and owing from the Plaintiff through and including March 31, 2020. Plaintiffs argue that their liability to Deutsche Bank would have been diminished or even extinguished if Defendants had interposed a statute of limitations defense on their behalf in the Underlying Foreclosure Action. Plaintiffs seek judgment against Defendants for consequential damages in the amount of \$865,071.58 plus interest for the first and second causes of action. Plaintiffs also seek \$5,000.00 in actual damages for their second cause of action and more than \$2,595,214.74 in treble damages for their third cause of action under Judiciary Law §487.

Plaintiffs represent that they were served with a Notice of Sale on February 20, 2020. Plaintiffs' current counsel filed an Order to Show Cause ("OSC") seeking a temporary restraining order ("TRO") to stay the foreclosure auction that was scheduled for February 20, 2020 and to vacate the Judgment of Foreclosure and Sale. (Plaintiff's Opposition, Exhibit J). The Honorable Orlando Marrazzo, Jr. granted the requested TRO staying the foreclosure auction and set the return date for March 4, 2020. After the return date was adjourned several times by the Court due to COVID restrictions, the Order to Show Cause has been calendared for argument on March 17, 2021.

Defendants' Motion to Dismiss

Defendants currently move this Court to dismiss this Action pursuant to CPLR §3211(a)(1), §3211(a)(2), and/or CPLR §3211(a)(7). Defendants maintain that Plaintiffs' legal malpractice cause of action is premature, since their alleged damages will remain speculative until there is a final adjudication in the Underlying Foreclosure Action. Therefore, Defendants argue, Plaintiffs cannot show that but for Defendants' alleged breach of duty, they suffered actual and ascertainable damages. Defendants also argue that documentary evidence shows that the statute of limitations defense at issue would not have been successful in the Underlying Foreclosure Action. According to Defendants, this Court does not have jurisdiction since the parties agreed in their Retainer Agreement that New York County would have "exclusive jurisdiction" over any disputes.

Defendants also seek to dismiss the Plaintiffs' breach of contract cause of action on the basis that it is duplicative of their legal malpractice cause of action, since it is "premised on the

same facts as the legal malpractice claim and seeks almost identical relief.” Defendants also argue that to the extent that Plaintiffs are requesting a return of their \$5,000.00 retainer, they have the right to submit this to binding arbitration pursuant to 22 NYCRR Part 137 of the Rules of the Chief Administrator of the Courts of the State of New York, which establishes the New York State Fee Dispute Resolution Program.

Defendants further argue that the Court should dismiss Plaintiffs’ third cause of action under Judiciary Law Section §487 due to Plaintiffs’ failure to meet the statute’s heightened pleading standard. Specifically, Defendants state that Plaintiffs’ Complaint is devoid of facts showing that Defendants had the intent to deceive them or the Court or that Defendants committed wrongful acts that rise to the level of attorney misconduct required to award treble damages under the statute. Defendants note that Plaintiffs’ third cause of action is also duplicative of their legal malpractice claim. Defendants request that the Court impose sanctions based on Plaintiffs’ and their attorneys’ alleged “frivolous conduct” in commencing this Action.

Plaintiffs’ Opposition

Plaintiffs argue, in opposition, that based upon the entry of the Judgment of Foreclosure and Sale, they have suffered actual and ascertainable damages that are required to sustain a legal malpractice cause of action. Plaintiffs maintain that since a final judgment was entered, the Underlying Foreclosure Action is not still currently pending despite the outstanding Order to Show Cause. Plaintiffs also note that if the Order to Show Cause is granted and the Judgment of Foreclosure and Sale is vacated, the current legal malpractice action will be deemed moot and either withdrawn or dismissed.

According to Plaintiffs, the Court should not dismiss their breach of contract cause of action since they pled it in the alternative. Plaintiffs further argue that while the Retainer did not contain a promise for a specific result in the Underlying Foreclosure Action, Defendants failed to exercise their best efforts consistent with their professional obligations despite their promise to do so in the Retainer. Plaintiffs also state that the Retainer does not have a mandatory fee arbitration clause and that the choice of forum clause allows for cases to be brought in court located in both the County and City of New York.

With respect to their third cause of action, Plaintiffs maintain that their allegations under Judiciary Law §487 are non-frivolous and are sufficiently pled to survive a motion to dismiss pursuant to CPLR §3211(a)(7). Plaintiffs represent they have provided affidavits to the Court,

which specify Plaintiffs' allegations of deceit, to supplement their pleading. Plaintiffs allege that they were deceived by the Defendants in numerous ways, specifically that the Defendants allegedly failed to convey to the Plaintiffs pertinent information regarding their case and the Defendants missed several court appearances. Based upon such allegations, Plaintiffs argue that they have a viable cause of action under Judiciary Law Section §487.

DISCUSSION

Under CPLR §3211(a)(7), a motion to dismiss for failure to state a cause of action must be construed in the light most favorable to the plaintiff and all factual allegations accepted as true. (*Parekh v Cain*, 96 A.D.3d 812, 815 [2d Dept., 2012]). Such a motion to dismiss should be granted "where, even viewing the allegations as true, the plaintiff cannot establish a cause of action." *Id.* "To succeed on a motion to dismiss a complaint pursuant to CPLR 3211(a)(1), the documentary evidence relied upon by the defendant must "conclusively establish[] a defense to the asserted claims as a matter of law." *Guayara v Harry I. Katz, P.C.*, 83 AD3d 661, 662-63 [2d Dept 2011]. CPLR §3211(a)(2) provides for dismissal of a cause of action due to lack of jurisdiction. *See CPLR §3211(a)(2)*.

Defendants' Legal Malpractice Cause of Action

To state a cause of action 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 breach of this duty proximately caused the plaintiff to sustain actual and ascertainable damages." *Cervini v. Zanoni*, 95 AD3d 919, 920 [2d Dept 2012]. (*See Kahlon v. DeSantis*, 182 AD3d 588 [2d Dept 2020]). "To establish the element of causation, a plaintiff must show that he or she would have prevailed in the underlying action or would not have incurred any damages but for the attorney's negligence" *Cervini v. Zanoni*, 95 AD3d 919, 920 [2d Dept 2012]. The key question in the instant Motion is whether Plaintiffs' legal malpractice cause of action is premature based on Plaintiffs' pending Order to Show Cause with respect to the Underlying Foreclosure Action. This Court finds that the answer to this question is yes.

In *Spitzer v. Newman*, the plaintiff brought an action for legal malpractice against his attorney who represented him during loan transactions with borrowers. (*See Spitzer v. Newman*, 163 AD3d 1026, 1027 [2d Dept 2018]). The Supreme Court denied the attorney's motion to

dismiss and stayed the action pending the resolution of the plaintiff's underlying action against the borrowers. (*See id.*) The Appellate Division, Second Department held that to the extent that the plaintiff's action might have been premature since it could not be determined that the defendants' alleged legal malpractice proximately caused him to sustain damages, the Supreme Court providently exercised its discretion by staying the case instead of dismissing it under CPLR §3211(a)(7). (*See id.* at 1028).

In the case of *Kahan Jewelry Corp v. Rosenfeld*, the Supreme Court dismissed a plaintiff's legal malpractice action, with leave to replead, against defendants based on their representation of plaintiff in a mortgage foreclosure action. (*See Kahan Jewelry Corp. V. Rosenfeld*, 295 AD2d 261, 261 [1st Dept 2002]). The Appellate Division, First Department upheld the Supreme Court's decision since the foreclosure action was still pending at the time and the plaintiff therefore had not suffered any actual damages attributable to the alleged malpractice. (*See id.*). In *Parametric Capital Mgt., LLC v. Lacher*, the Appellate Division, First Department dismissed the Plaintiff's legal malpractice claim in part since the subject matter of the services provided by the defendant attorneys was still pending and there was no adverse decision that but for defendants' alleged negligence, would have been more favorable to plaintiffs. (*See Parametric Capital Mgt., LLC v. Lacher*, 15 AD3d 301, 302 [1st Dept 2005]).

Here, the Court recognizes that a final Judgment and Sale of Foreclosure was entered against the Plaintiffs in the Underlying Foreclosure Action. The Court has also considered Plaintiffs' argument that this fact demonstrates that the Underlying Foreclosure Action is not "pending." However, the Court finds that the relevant issue of whether Defendants' alleged breach of duty caused Plaintiffs to suffer actual and ascertainable damages is not ripe due to Plaintiffs' Order to Show Cause, which is still pending.

In their Order to Show Cause, Plaintiffs seek to have the Judgement of Foreclosure and Sale dismissed using the same defenses Defendants allegedly failed to bring on their behalf in the Underlying Foreclosure Action. Plaintiffs also seek to have the Judgment of Foreclosure and Sale vacated on the basis of law office failure and make the same allegations about Defendants' alleged failures in the Order to Show Cause that they make in the legal malpractice action. While Plaintiffs argue that they have suffered actual and ascertainable damages by way of the Judgment of Foreclosure and Sale, Plaintiffs also concede that their legal malpractice action will be deemed moot if the Judgment of Foreclosure and Sale is vacated. Therefore, if the Order to

Show Cause is granted, there will be no adverse decision that but for Defendants' alleged breach of duty, would have been more favorable to the Plaintiffs.

This Court finds that since the elements of causation and damages in Plaintiffs' legal malpractice cause of action are dependent on the outcome of the Order to Show Cause, such cause of action is premature and must be dismissed with leave to replead under CPLR §3211(a)(7).

Plaintiffs' Breach of Contract Cause of Action

The Appellate Division, Second Department has ruled that as a general rule, “where a cause of action alleging breach of contract or fraud arises from the same facts as a legal malpractice cause of action and does not allege distinct damages, the breach of contract or fraud cause of action must be dismissed as duplicative of the legal malpractice cause of action.” *Postiglione v. Castro*, 119 AD3d 920, 922 [2d Dept 2014]. (See *Leon Petroleum, LLC v Carl S. Levine & Assoc., P.C.*, 80 AD3d 573, 574 [2d Dept 2011]; *Kvetnaya v. Tylo*, 49 AD3d 608, 609 [2d Dept 2008]. See also *Weissman v. Kessler*, 78 AD3d 465, 466 [1st Dept 2010]). Here, the Court finds that Plaintiffs' breach of contract cause of action is duplicative of their cause of action for legal malpractice since they arise “from the same operative facts” and do not seek “distinct and different damages.” *Kliger-Weiss Infosystems, Inc. v. Ruskin Moscou Faltischek, P.C.*, 159 AD3d 683, 685 [2d Dept 2018]. Therefore, Plaintiffs' cause of action for breach of contract is hereby dismissed.

Plaintiffs' Cause of Action Under Judiciary Law §487

The Court also finds that Plaintiffs' third cause of action under Judiciary Law §487 warrants dismissal. Under Judiciary Law §487, a plaintiff must allege sufficient facts demonstrating that a defendant attorney had the “intent to deceive the court or any party” and allegations regarding an act of deceit or intent to deceive “must be stated with particularity.” *Bill Birds, Inc. v Stein Law Firm, P.C.*, 164 AD3d 635, 637 [2d Dept 2018], *affd.*, 35 NY3d 173 [2020]. In *Jaroslawicz v. Cohen*, the Appellate Division, First Department held that “the cause of action for statutory treble damages under Judiciary Law §487 was properly dismissed because there is no pleading that defendants acted with “intent to deceive the court or any party” (see Judiciary Law § 487[1]), and no pleading of a pattern of delinquent, wrongful or deceitful behavior by the attorney defendants, or of pecuniary damages resulting from the alleged wrong.”

Jaroslawicz v. Cohen, 12 AD3d 160, 160-61 [1st Dept 2004]. Here, “even as amplified by the plaintiff’s affidavit, and according the plaintiff the benefit of every favorable inference”, the Complaint fails “to allege that the defendants acted ‘with intent to deceive the court or any party.’” *Fleyshman v. Suckle & Schlesinger, PLLC*, 91 AD3d 591, 593 [2d Dept 2012] (citing Judiciary Law § 487[1]; *Jaroslawicz v. Cohen*). (See also *Yerushalmi v. Schoenfeld*, 164 AD3d 550, 551 [2d Dept 2018]). Defendants’ Motion to dismiss Plaintiffs’ third cause of action is hereby granted.

Defendants’ Other Requests for Relief

Based upon the ruling of this Court under CPLR §3211(a)(7), Defendants’ Motion to dismiss pursuant to CPLR §3211(a)(1) and §3211(a)(2) are rendered moot. The Court also denies Defendants’ request for sanctions against Plaintiffs and their attorneys.

Accordingly, it is hereby

ORDERED that Defendants’ Motion to Dismiss Plaintiffs’ First Cause of Action for legal malpractice is hereby granted and such cause of action is dismissed with leave to replead; it is further

ORDERED that Defendants’ Motion to Dismiss Plaintiffs’ Second Cause of Action for breach of contract is hereby granted and such cause of action is dismissed; it is further

ORDERED that Defendants’ Motion to Dismiss Plaintiffs’ Third Cause of Action under Judiciary Law §487 is hereby granted and such cause of action is dismissed; and it is further

ORDERED that the remainder of Defendants’ Motion, including their request for sanctions, is hereby denied.

Dated: March 15, 2021

ENTER



Hon. Ralph J. Porzio, J.S.C.