Federal Ins. Co. v Lester Schwab Katz & Dwyer, LLP

2021 NY Slip Op 32305(U)

November 15, 2021

Supreme Court, New York County

Docket Number: Index No. 151093/2021

Judge: Shawn T. Kelly

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 57

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FEDERAL INSURANCE COMPANY,

Plaintiff,

- v -

LESTER SCHWAB KATZ & DWYER, LLP, PAUL KASSIRER

Defendant.

INDEX NO. 151093/2021

MOTION DATE 07/20/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

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HON. SHAWN KELLY:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32
were read on this motion to/for DISMISS

Defendants, Lester Schwab Katz & Dwyer, LLP and Paul L. Kassirer, Esq. ("Kassirer") (collectively, "LSKD") move to dismiss Plaintiff Federal Insurance Company's ("Chubb") Complaint pursuant to CPLR §3211(a)(1) based upon documentary evidence and pursuant to CPLR §3211(a)(7) for failure to state a cause of action.

In opposition, Plaintiff's maintain that they have sufficiently pled factual allegations to support the causes of action for legal malpractice, breach of duty, fraud, and negligent misrepresentation. The allegations arise from Defendants' representation of Alan and Nancy Manocherian (the "Insured") in a personal injury action filed by Richard Willgerodt ("Willgerodt") against the Insured, the City of New York ("City"), and Stribling & Associates, Ltd (herein "the underlying action"). Specifically, Plaintiff contends that Defendants failed to protect the Insured's interests (and Chubb's) by, (i) accepting and proceeding with the representation despite a conflict of interest with a co-defendant; (ii) failing to investigate, put forth, or pursue viable liability arguments and defenses; (iii) failing to protect, pursue, or file

appropriate claims, motions, and opposition papers against alternate tortfeasors; and (iv) failing to investigate, put forth, or preserve viable causation and damages defenses.

Background

In the underlying action, LSKD was retained by the primary insurer, non-party Fireman's Fund Insurance Company (FFIC), to represent the Insured. Willgerodt alleged that on December 8, 2012, he tripped and fell on a sidewalk that straddled the neighboring properties of the Insured and Stribling, causing serious injuries including a left ankle fracture which lead to nine surgeries and accompanying neurological issues. Willgerodt claimed over $2.2 million in medical expenses and lost earnings. FFIC's primary policy limits were $1 million and Chubb provided $25 million in excess coverage.

Plaintiff contends that Defendants improperly accepted and proceeded with the representation despite a conflict of interest with co-defendant City. Defendants contend that the conflict of interest was disclosed to the carrier and was further disclosed in the Initial Litigation Report.

Plaintiff argues that LSKD neglected to take basic and critical investigatory steps related to obvious defenses to liability. For instance, Plaintiff alleges that Defendants did not timely investigate the site, did not hire a site expert to inspect the alleged sidewalk defects, waited at least two years to photograph the scene (by which time the alleged defects were gone), made no attempt to locate, interview, depose, or otherwise question any potential witnesses, never investigated evidence of comparative negligence, and never sought discovery of SPRINT/FDNY 911 reports or pertinent phone records.

Additionally, Plaintiff contends that when Stribling and the City moved for summary judgment on all claims against them, including the cross-claims asserted by the Insured against

Stribling, Defendants did not oppose those motions. Plaintiff also takes issue with Defendants' alleged failure to investigate the responsibilities of Insured's then-tenant and failure to support the expert witnesses with medical records.

Plaintiff argues that trial counsel, Ahmuty, Demers & McManus ("Ahmuty"), took over a mere two months before trial and did not have the time to correct the deficiencies in the case that were caused by LSKD, and therefore the Insured were forced to settle the case for $4 million – of which Chubb paid $3 million.

In opposition, LSKD contends that Chubb, evidently aware of the substantial exposure of the underlying premises liability action from the outset, retained Ahmuty as monitoring counsel. LSKD further maintains that Ahmuty was copied on all reports and communications from LSKD to FFIC and Chubb relating to liability and damages in the underlying case. In view of the liability prospects and the substantial damages presented, LSKD alleges that FFIC attempted for months to offer its policy and tender the defense to the excess carrier, Chubb.

The parties attended a mediation at JAMS on December 12, 2014. Although the mediator recommended a settlement of $2.5 million, LSKD contends that Chubb refused to provide authority, and urged FFIC not to offer the $1 million primary policy. The case did not settle, and following the mediation, Willgerodt's counsel forwarded a "bad faith" letter to FFIC, noting that FFIC only offered $250,000, thereby precluding Willgerodt from negotiating with Chubb as the excess carrier. Ahmuty was present for key events in the litigation, including Willgerodt's continued deposition on March 21, 2017 and two settlement conferences. Upon Chubb's request, LSKD contends that it provided an electronic copy of its litigation file to Ahmuty on June 2, 2017. On June 27, 2017, Ahmuty appeared on behalf of Chubb for a pre-trial settlement conference. LSKD maintains that it attended with the understanding that LSKD would offer

FFIC's primary policy limit of $1 million, and Ahmuty would take over negotiations on behalf of Chubb. However, Chubb failed to offer any money at the conference and the case did not settle.

In July 2017, Chubb accepted FFIC's $1 million policy tender and directed that Ahmuty, be formally substituted as defense counsel in place of LSKD. On September 25, 2017, Chubb and Ahmuty settled the case for $4,000,000 in lieu of proceeding to trial.

Analysis

On a CPLR §3211(a)(7) motion to dismiss for failure to state a cause of action, the complaint must be construed in the light most favorable to the plaintiff and all factual allegations must be accepted as true" (*Alden Global Value Recovery Master Fund, L.P. v KeyBank National Association*, 159 AD3d 618, 621-22 [2018]). In addition, "on such a motion, the complaint is to be construed liberally and all reasonable inferences must be drawn in favor of the plaintiff" (*Id.* at 622). However, vague and conclusory allegations cannot survive a motion to dismiss (*see, Kaplan v Conway and Conway*, 173 AD3d 452, 452-53 [2019]; *D. Penguin Brothers Ltd. v City National Bank*, 270 NYS3d 192, 192 [2018] [noting that "conclusory allegations fail"]; *R & R Capital LLC, et al., v Linda Merritt*, 68 AD3d 436, 437 [2010]).

The criterion for establishing whether a Complaint should be dismissed pursuant to §3211(a)(7) is "whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *see also Foley v D'Agostino*, 21 AD2d 60, 64-65 [1964]). Whether the pleader will ultimately be able to establish the allegations in the pleading is irrelevant to the determination of a motion to dismiss pursuant to CPLR §3211(a)(7) (*see EBC I, Inc., v Goldman Sachs & Co.*, 5 NY3d 11, 19 [2005]; *Polonetsky v Better Homes Depot*, 97 NY2d 46, 54 [2001][motion must be denied if "from [the] four corners [of the

pleadings] factual allegations are discerned which taken together manifest any cause of action cognizable at law"]).

Dismissal under CPLR §3211(a)(1) is warranted where the documentary evidence submitted "resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim." (*Fortis Financial Services, LLC v Fimat Futures USA*, 290 AD2d 383, 383 [1st Dept 2002]; *see Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc.*, 120 AD3d 431 [1st Dept. 2014]).

First Cause of Action, Legal Malpractice

It is settled that an action for legal malpractice requires proof of three elements: the negligence of the attorney; that the negligence was the proximate cause of the loss sustained; and actual damages (*Between The Bread Realty Corp. v Salans Hertzfeld Heilbronn Christy & Viener*, 290 AD2d 380 [2002], *lv denied* 98 NY2d 603; *Prudential Ins. Co. of Am. v Dewey, Ballantine, Bushby, Palmer & Wood*, 170 AD2d 108, 114 [1991], *affd* 80 NY2d 377). "To prove malpractice, a client must establish, among other things, that the attorney failed to exercise that degree of care, skill and diligence commonly possessed by a member of the legal profession" (*Schafrann v N.V. Famka, Inc.*, 14 AD3d 363, 364 [1st Dept 2005]; *TNJ Holdings, Inc. v Rubenstein*, No. 654120/2020, 2021 WL 4148809, at *3 [2021]).

In order to establish proximate cause, plaintiff must demonstrate that "but for" the attorney's negligence, plaintiff would have prevailed in the matter in question or would not have sustained any ascertainable damages (*Senise v Mackasek*, 227 AD2d 184, 185 [1996]; *Stroock & Stroock & Lavan v Beltramini*, 157 AD2d 590, 591 [1990]). The failure to establish proximate cause mandates the dismissal of a legal malpractice action, regardless of the negligence of the attorney (*Tanel v Kreitzer & Vogelman*, 293 AD2d 420, 421 [2002]; *Pellegrino v File*, 291

AD2d 60, 63, [2002], *lv denied* 98 NY2d 606; *Reibman v Senie*, 302 AD2d 290, 290–91, 756 NYS2d 164 [2003]).

While proximate cause is generally a question for the factfinder (*see e.g. Hain v Jamison*, 28 NY3d 524, 529, 46 NYS3d 502 [2016]), it can, in appropriate circumstances, be determined as a matter of law (*id.*; *see also Jeremias v Allen*, 146 AD3d 623, 623–624, 44 NYS3d 755 [1st Dept 2017]; *DiPlacidi v Walsh*, 243 AD2d 335, 664 NYS2d 537 [1st Dept 1997]; *180 Ludlow Dev. LLC v Olshan Frome Wolosky LLP*, 165 AD3d 594, 595, 87 NYS3d 20, 22 [2018]).

Plaintiff has alleged that Defendants' actions and inactions proximately caused it to sustain actual damages. Additionally, Plaintiff has alleged that he would not have been damaged had Defendant exercised due care. Accordingly, the branch of Defendants' motion to dismiss Plaintiff's claim for legal malpractice is denied.

Second Cause of Action, Breach of Fiduciary Duty of Utmost Faith

Plaintiff's claim for breach of a fiduciary duty relies on the same factual allegations and seeks the same damages as its legal malpractice claim. Accordingly, Plaintiff's breach of fiduciary duty of utmost faith claim is dismissed as duplicative of the legal malpractice claim (*Roth v Oster*, 161 AD3d 433, 435 [1st Dept 2018]; *Eurotech Constr. Corp. v Fischetti & Pesce, LLP*, 155 AD3d 437, 437 [1st Dept 2017]; *Ullman-Schneider v Lacher & Lovell-Taylor, P.C.*, 121 AD3d 415, 416 [1st Dept 2014]; *Cascardo v Dratel*, 171 AD3d 561, 562 [1st Dept 2019]; *Trafelet v Buchanan Ingersoll & Rooney PC*, WL 2542079, at *2 [2020]).

Third Cause of Action, Fraud

When a plaintiff brings a cause of action based upon fraud, "the circumstances constituting the wrong shall be stated in detail" (CPLR §3016[b]). "The purpose of section 3016(b)'s pleading requirement is to inform a defendant with respect to the incidents complained

of." Therefore, "[w]e have cautioned that section 3016(b) should not be so strictly interpreted as to prevent an otherwise valid cause of action in situations where it may be impossible to state in detail the circumstances constituting a fraud" (*Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 491 [2008]). What is "[c]ritical to a fraud claim is that a complaint allege the basic facts to establish the elements of the cause of action." and although under CPLR §3016(b) "the complaint must sufficiently detail the allegedly fraudulent conduct, that requirement should not be confused with unassailable proof of fraud" (*id.* at 492). "Necessarily, then, section 3016(b) may be met when the facts are sufficient to permit a reasonable inference of the alleged conduct" (*id.*).

The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff, and damages (*Eurycleia Partners, LP v Seward & Kissel. LLP*, 12 NY3d 553 [2009]). A fraud claim asserted in connection with charges of a legal malpractice claim "is sustainable only to the extent that it is premised upon one or more affirmative, intentional misrepresentations - that is, something more egregious than mere 'concealment or failure to disclose [one's] own malpractice' " (*White of Lake George v Bell*, 251 AD2d 777, 778, 674 NYS2d 162 [1998], appeal dismissed 92 NY2d 947, 681 NYS2d 477 [1998], *quoting La Brake v Enzien*, 167 AD2d 709, 711, 562 NYS2d 1009 [1990]). In addition to establishing each element of fraud, plaintiff has the burden of proving that the alleged fraud "caused additional damages, separate and distinct from those generated by the alleged malpractice" (*White of Lake George*, 251 AD2d at 778, *La Brake v Enzien*, 167 AD2d at 711).

Plaintiff alleges that Lester Schwab made (a) a false representation of fact to the Insured that the conflict check returned negative results; (b) defendants had knowledge of the falsity as

shown by their internal e-mails; (c) the misrepresentation was made to induce plaintiff's reliance that Lester Schwab did not have any conflict of interest and so could continue its representation of the Insured in the underlying case; (d) the Insured and its insurers justifiably relied on the misrepresentation as it is known that performing a conflict check in the context of litigation, especially with multiple parties, is required to be done so that the Insured and its insurers could rely on Lester Schwab to advocate and protect their interests solely; and (e) the Insured and its insurers were injured by the reliance on the misrepresentation.

On this pre-Answer motion to dismiss, Plaintiff's allegations are sufficient to sustain a fraud cause of action distinct from the legal malpractice claim. Accordingly, Defendants' motion to dismiss is denied as to the fraud cause of action.

Fourth Cause of Action, Negligent Misrepresentation

On a cause of action alleging negligent misrepresentation, the plaintiff is required to demonstrate "(1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information" (*J.A.O. Acquisition Corp. v Stavitsky*, 8 NY3d 144, 148, 831 NYS2d 364, [2007]; *Ginsburg Dev. Companies, LLC v Carbone*, 134 AD3d 890, 894, 22 NYS3d 485, 490 [2015]).

Plaintiff contends that because of Defendants' failure to disclose the alleged conflict of interest, Defendants (a) did not assert a cross-claim against the City; (b) failed to perform any meaningful investigation into the City's potential liability and responsibility for installation, maintenance, and repair of the sidewalk and tree well; and (c) did not oppose summary judgment, which resulted in the dismissal of the City as a co-defendant.

At this juncture in the case, prior to any discovery, Plaintiff's allegations are sufficient to sustain a negligent misrepresentation cause of action, distinct from the legal malpractice claim. Accordingly, Defendants' motion to dismiss is denied as to the negligent misrepresentation cause of action.

Accordingly, it is hereby

ORDERED that Defendants' motion to dismiss is granted solely to the extent that the second cause of action is dismissed; and it is further

ORDERED that defendant is directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry.

11/15/2021
DATE

SHAWN KELLY, J.S.C.

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