

Van Ravenstein v Ponder

2023 NY Slip Op 33072(U)

September 6, 2023

Supreme Court, New York County

Docket Number: Index No. 161420/2019

Judge: Shlomo S. Hagler

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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. SHLOMO S. HAGLER PART 17

Justice

-----X
ANNA VAN RAVENSTEIN, INDEX NO. 161420/2019
Plaintiff, MOTION DATE 11/30/2021
MOTION SEQ. NO. 002

- v -

BRIAN L. PONDER, BRIAN PONDER LLP.

**DECISION + ORDER ON
MOTION**

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33

were read on this motion to/for DISMISS.

In this action to recover damages for legal malpractice and breach of contract, defendants move pursuant to CPLR 3211 to dismiss the amended complaint. For the following reasons, the motion is denied.

BACKGROUND

In this action, plaintiff Anna Van Ravenstein a/k/a Anna Cleveland (hereinafter, plaintiff or Cleveland) seeks to recover damages for legal malpractice and breach of contract against defendant Brian Ponder, Esq. and his law firm defendant Brian Ponder, LLP (together Ponder), alleging that she incurred damages as a result of Ponder's representation of her in an action entitled *All in the Works, LLC v Cleveland* (Sup Ct, NY County, Index No. 650646/2017) (hereinafter "the underlying action").

The Underlying Action - All in the Works, LLC v Cleveland

In the underlying action, All in the Works, LLC (AITW), a creator and producer of film and digital content, alleged that in 2016 it entered into a contract with Cleveland, a fashion model, to produce a documentary film detailing certain aspects of Cleveland's life. According to

AITW, Cleveland breached the contract by failing to cooperate with the production of the film, instead signing on to produce a different documentary with Next Management, LLC (Next). AITW initiated the underlying action seeking to recover damages against Cleveland for breach of contract and breach of the implied covenant of good faith and fair dealing, and to recover damages from Next for tortious interference with contract (Record in Underlying Action, NYSCEF Doc. Nos. 9 & 25). On April 19, 2018, AITW stipulated to discontinue the underlying action insofar as asserted against Next.

In the meantime, Cleveland was served with the summons and complaint in the underlying action on or about February 13, 2017. After Cleveland failed to appear or answer, AITW moved for leave to enter a default judgment against her on the issue of liability. In an order, dated June 11, 2018, the court granted the motion without opposition and ordered an immediate trial on damages.

On June 25, 2018, Cleveland entered into a retainer agreement with Ponder, pursuant to which Ponder agreed to represent her in the underlying action and Cleveland paid Ponder a \$5,000 retainer (NYSCEF Doc. No. 3). On July 12, 2018, Ponder filed a notice of appearance and a jury demand, along with a document entitled “Notice of Rejection,” purporting to “reject” the note of issue filed by AITW. However, Ponder took no steps to vacate the default judgment against Cleveland.

AITW moved to strike the jury demand filed by Ponder. Ponder did not oppose the motion, which the court granted on default by order dated September 21, 2018. Ponder then filed a document entitled “Amended Jury Demand” on September 24, 2018.

In the interim, an inquest on damages was scheduled for September 7, 2018. On August 22, 2018, AITW's counsel filed a letter requesting a continuance of the damages inquest to October 5, 2018. Ponder did not file a response to the letter.

The inquest took place on October 5, 2018. Neither Cleveland nor Ponder appeared. According to Cleveland, Ponder never made her aware of the scheduled inquest. At the inquest, AITW's principal, Brian Willard, testified. The court also examined the damages provisions of the contract between Cleveland and AITW, as well as AITW's expenses and receipts. After the inquest, AITW obtained a judgment against Cleveland, entered October 25, 2018, in the amount of \$480,279.03.

Cleveland thereafter retained new counsel. On October 4, 2019, Cleveland's new counsel moved to vacate Cleveland's default, arguing that Cleveland's failure to appear or respond was not intentional or part of a pattern of neglect, but rather the direct result of Ponder's incompetence.

By order, dated May 7, 2020, the court denied the motion, reasoning as follows:

“The sole excuse offered by Cleveland in support of the motion is her allegation that her failure to appear was due to incompetence and malpractice on the part of her attorney. At the outset, this excuse is deficient as Cleveland defaulted in appearing in this action prior to engaging her attorney and the filing of his notice of appearance. Further, even if a portion of the delay is attributable to her attorney, this excuse, substantiated by Cleveland's conclusory affidavit, is insufficient particularly in light of the pattern of neglect in this case. Cleveland failed to answer despite personal delivery of the summons and complaint. The motion to strike her jury demand was ‘granted on default’ and neither Cleveland nor her attorney appeared at the inquest. Only nearly a year after entry of judgment did Cleveland move to vacate her default.

Inasmuch as movant failed to demonstrate a reasonable excuse for her default, it is unnecessary to determine whether Cleveland has shown the existence of a potentially meritorious defense. Even if the court were to assume a reasonable excuse were proffered, Cleveland's posited defenses to the motion and action lack merit”

(NYSCEF Doc. No. 29 [internal citations omitted]).

The Present Action

On November 22, 2019, while Cleveland's motion to vacate the default judgment in the underlying action was pending, Cleveland commenced the present action against Ponder alleging that he committed legal malpractice by (1) failing to take steps to vacate the default judgment in the underlying action, (2) never informing her of the inquest hearing on damages, and (3) failing to appear at the inquest on her behalf. In addition to seeking damages for legal malpractice, Cleveland's initial complaint sought to recover damages for breach of fiduciary duty, negligence, and breach of contract.

On February 6, 2020, Ponder moved pre-answer to dismiss the complaint pursuant to CPLR 3211. In an order, dated August 10, 2020, the court (1) dismissed the breach of fiduciary duty and negligence causes of action on consent, and (2) granted defendant's motion to dismiss the complaint as to the legal malpractice and breach of contract causes of action unless Cleveland repleaded them within 30 days (NYSCEF Doc. No. 19).

On September 3, 2020, plaintiff filed an amended complaint pleading causes of action for legal malpractice and breach of contract, this time including the fact that the court in the underlying action had since denied Cleveland's motion to vacate the default judgment against her. Ponder now moves to dismiss the amended complaint pursuant to CPLR 3211 (a)(1) (documentary evidence), (a)(5) (res judicata), (a)(7) (failure to state a cause of action), and (a)(10) (absence of a person who should be a party).

DISCUSSION

First Cause of Action - Legal Malpractice

It is well settled that “[o]n a motion to dismiss a complaint pursuant to CPLR 3211, [the court] must liberally construe the pleading and accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP v Matthew Bender & Co.*, 37 NY3d 169, 175 [2021][internal quotation marks and citations omitted]). In assessing the adequacy of a complaint under CPLR 3211 (a) (7), “the sole criterion . . . is whether, from the four corners of the pleading, factual allegations are discerned which taken together manifest any cause of action cognizable at law” (*885 3rd Ave. Realty Owners LLC v Alden Global Capital LLC*, 210 AD3d 570, 571 [1st Dept 2022][internal quotation marks and citations omitted]). “Whether the plaintiff will ultimately be successful in establishing those allegations is not part of the calculus” (*Landon v Kroll Lab. Specialists, Inc.*, 22 NY3d 1, 6 [2013][internal quotation marks and citations omitted]).

“In order to recover damages in a legal malpractice action, a plaintiff must establish 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 this duty proximately caused plaintiff to sustain actual and ascertainable damages” (*Dombrowski v Bulson*, 19 NY3d 347, 350 [2012][internal quotation marks and citations omitted]). “To establish 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 lawyer’s negligence” (*Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438, 442 [2007][citations omitted]). “[C]onclusory allegations of

proximately caused damages cannot serve as a basis for a legal malpractice claim” (*Freeman v Brecher*, 155 AD3d 453, 453 [1st Dept 2017]).

Here, the amended complaint sufficiently states a cause of action to recover damages for legal malpractice. It alleges that Ponder failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession by failing to take any steps to vacate Cleveland’s default, in failing to inform her of, or to prepare for, the scheduled inquest, and in failing to appear at the scheduled inquest. The amended complaint also alleges that Ponder’s negligence in this regard proximately caused Cleveland to sustain damages in that it led to a judgment against her in the amount of \$480,279.03, which was based on the unchallenged testimony elicited at the hearing. Ponder’s failure to attend the hearing and challenge the evidence subjected Cleveland to an award of damages beyond those rightly attributed to her in addition to additional costs including attorneys’ fees (Amended Complaint at ¶¶ 54, 59-60, NYSCEF Doc. No. 28).

These contentions are not impermissibly speculative or conclusory. The court notes in this regard that “[a]t this early stage of the proceedings, plaintiff is not obliged to show ... that [she] actually sustained damages, but only that damages attributable to [defendant’s conduct] might be reasonably inferred” (*Fielding v Kupferman*, 65 AD3d 437, 442 [1st Dept 2009][internal quotation marks and citation omitted]). As such, dismissal of the legal malpractice cause of action is not warranted pursuant to CPLR 3211 (a) (7).

On a motion seeking dismissal under CPLR 3211 (a) (1), the defendant’s “documentary evidence must utterly refute[] plaintiff’s factual allegations, conclusively establishing a defense as a matter of law” (*Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP v Matthew Bender & Co.*, 37 NY3d at 175 [internal quotation marks and citations omitted]). In other words,

“[t]he materials submitted by defendant [must] resolve[] all factual issues as a matter of law, and conclusively dispose[] of the plaintiff’s claim” (*309 Fifth Owners LLC v MEPT 309 Fifth Ave. LLC*, 156 AD3d 583, 583 [1st Dept 2017])[internal quotation marks and citations omitted].

Here, the documentary evidence submitted by Ponder in support of his motion does not establish, as a matter of law, that Ponder did not depart from the requisite standard of care in his representation of Cleveland or that the amount of the judgment entered against Cleveland would have been the same regardless of whether Ponder notified her of the inquest and/or appeared at the inquest on her behalf. Ponder contends that the order denying Cleveland’s motion to vacate the default judgment against her in the underlying action establishes that the court would have denied the motion to vacate regardless of whether Ponder took steps to vacate the default at an earlier juncture. In this regard, the court in the underlying action found that even if it were to assume a reasonable excuse was proffered by Cleveland in seeking to vacate her default, “Cleveland’s posited defenses to the motion and action lack merit.” However, this does not establish, or even address, whether Ponder’s failure to appear at the scheduled inquest had an impact on the amount of the judgment or the award of attorneys’ fees and costs as against Cleveland. As such Ponder’s motion insofar as it seeks dismissal of the legal malpractice cause of action cannot be granted pursuant to CPLR 3211 (a) (1).

Ponder’s contention that the amended complaint should be dismissed pursuant to CPLR 3211 (a) (5) as barred by the doctrine of res judicata is also without merit. “[U]nder res judicata, or claim preclusion, a valid final judgment bars future actions between the same parties, or those in privity with them, on any claims arising out of the same transaction or series of transactions . . . , even if based upon different theories or if seeking a different remedy” (*East Hampton Capital LLC v Fergusson*, 183 AD3d 409, 409-410 [1st Dept 2020])[internal quotation marks and

citations omitted]). “Since res judicata precludes relitigation of issues actually litigated and resolved in a prior proceeding, the party seeking to invoke the doctrine of res judicata must demonstrate that the critical issue in a subsequent action was decided in the prior action and that the party against whom estoppel is sought was afforded a full and fair opportunity to contest such issue” (*Gomez v Brill Sec., Inc.*, 95 AD3d 32, 35 [1st Dept 2012]).

Here, Cleveland’s claims against Ponder in the present action do not arise out of the same transaction or series of transactions as those raised in the underlying litigation which involved the alleged breach of a contractual agreement between Cleveland and AITW regarding the production of a documentary film. In addition, Cleveland was not afforded an opportunity to contest the issue of Ponder’s inadequate representation in the underlying action. Therefore, the claims in the instant action are not barred by res judicata.

To the extent Ponder is arguing that the doctrine of collateral estoppel precludes Cleveland’s malpractice claim against him, this contention also lacks merit. “Collateral estoppel precludes a party from relitigating in a subsequent action or proceeding an issue raised in a prior action or proceeding and decided against that party or those in privity” (*Buechel v Bain*, 97 NY2d 295, 303 [2001], *cert denied* 535 US 1096 [2002]). At issue in the instant action is whether Ponder was negligent in his representation of Cleveland in the underlying action, including his failure to prepare for, or appear at, the hearing on damages. The underlying action neither addressed nor decided this question. As such, there is no identity of issues necessary to sustain application of collateral estoppel.

Finally, Ponder seeks dismissal pursuant to CPLR 3211 (a) (10) on the ground that Cleveland failed to join as necessary parties Next and Next’s counsel in the underlying action, Stephen Hildebrand, who purportedly advised Cleveland in the underlying action prior to her

retaining Ponder. Ponder also contends that counsel who represented Cleveland in her unsuccessful motion to vacate her default in the underlying action should be joined as necessary parties.

Under CPLR 3211 (a) (10), a motion to dismiss may be premised on the ground that “the court should not proceed in the absence of a person who should be a party.” However, dismissal is not warranted on this basis where the person is not a necessary party to the action under CPLR 1001 (a) (*see Leak v Live Well Fin., Inc.*, 145 AD3d 992, 994 [2d Dept 2016]). CPLR 1001 (a) states: “Persons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants.”

At oral argument, this Court denied defendants’ motion to dismiss based on failure to join necessary parties (tr at 11).

Thus, Ponder’s motion to dismiss the amended complaint pursuant to CPLR 3211 is denied insofar as the Ponder defendants seek to dismiss the cause of action for legal malpractice.

Second Cause of Action - Breach of Contract

In order to recover damages for breach of contract, a plaintiff must plead “the existence of a contract, the plaintiff’s performance thereunder, the defendant’s breach thereof, and resulting damages” (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). Here, Cleveland sufficiently pleads all of the required elements. The amended complaint alleges that Ponder agreed pursuant to their retainer agreement to represent Cleveland in the underlying action and to “exert effort at all times to represent [her] interests and rights” (Retainer Agreement, NYSCEF Doc. No. 3; Amended Complaint at ¶ 63, NYSCEF Doc. No. 21). The amended complaint further alleges that Ponder breached his obligation to do so by failing to,

among other things, keep Cleveland informed of matters related to her defense and by failing to attend court hearings. Cleveland alleges that based upon this breach, she is entitled to the return of the \$5,000 retainer she paid to Ponder.

As a general rule, where a cause of action for breach of contract is predicated on the same facts and seeks the same relief as a legal malpractice claim, the breach of contract claim must be dismissed as duplicative (see *Palmeri v Willkie Farr & Gallagher LLP*, 156 AD3d 564, 567 [1st Dept 2017]; *Sun Graphics Corp. v Levy, Davis & Maher, LLP*, 94 AD3d 669 [1st Dept 2012]; *Garten v Shearman & Sterling LLP*, 52 AD3d 207, 207-208 [1st Dept 2008]). Here, both causes of action arise from the same operative facts -- i.e., that Ponder provided inadequate legal representation -- but seek different relief. Cleveland is seeking separate and distinct damages under the breach of contract cause of action in that she is only seeking the return of her \$5,000 retainer.

Thus, Ponder's motion to dismiss the amended complaint pursuant to CPLR 3211 is likewise denied insofar as the Ponder defendants seek to dismiss the cause of action for breach of contract.

CONCLUSION

On the basis of the foregoing, it is hereby

ORDERED that defendants' motion to dismiss the amended complaint is denied.

9/6/2023
DATE


SHLOMO S. HAGLER, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input checked="" type="checkbox"/>	OTHER
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	REFERENCE
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT