Westchester Hills Golf Club, Inc. v Panken
2017 NY Slip Op 30045(U)
January 10, 2017
Supreme Court, New York County
Docket Number: 155528/2016
Judge: Cynthia S. Kern
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 55

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WESTCHESTER HILLS GOLF CLUB, INC.,

Plaintiff,

DECISION/ORDER
Index No. 155528/2016

-against-

PETER PANKEN, EPSTEIN, BECKER & GREEN, P.C.

Defendants.

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HON. CYNTHIA KERN, J.:

Plaintiff Westchester Hills Golf Club, Inc. commenced the instant action seeking damages arising out of defendants Peter M. Panken, Esq. ("Panken") and Epstein, Becker & Green, P.C.'s ("EBG") (hereinafter collectively referred to as "defendants") legal representation of plaintiff. Defendants now move to dismiss the complaint. For the reasons set forth below, defendants' motion is denied.

The relevant facts according to the complaint are as follows. Plaintiff operates a golf course, clubhouse and restaurant for its members which is located in White Plains, New York. The full-time bartenders, wait staff and kitchen employees of the restaurant are members of Unite Here Local 100 of New York and Vicinity (the "Union"). Plaintiff retained defendants to be general counsel with respect to plaintiff's labor and employment issues, specifically to negotiate labor agreements with the Union and to address disputes between plaintiff and those employees who were Union members. Plaintiff alleges that defendants negligently handled two employee disputes between 2009 and 2013 regarding Timothy Cremin ("Cremin"), a bartender and Union member, and Mark Wills ("Wills"), a line cook/chef and Union member.

Specifically, with regard to defendants' handling of plaintiff's dispute with Cremin, the complaint alleges as follows. Beginning in 2009 and over the course of approximately a year, Cremin started to

display outrageous and insulting behavior toward plaintiff's management, staff, members and guests, including verbally and physically assaulting a manager, resulting in Cremin's termination in or around 2010 (the "Cremin matter"). The Union filed a grievance on Cremin's behalf and the arbitrator presiding over the grievance held that Cremin's conduct warranted dismissal, but, due to procedural errors in the disciplinary process, he issued a disposition against Cremin suspending him for ten months and declaring that the disposition was to be a "final warning" and that any act of insubordination or inappropriate language by Cremin would enable plaintiff to establish grounds to summarily discharge Cremin (the "2010 final warning").

After his suspension and throughout 2011, Cremin continued to display inappropriate conduct. He was written up sixteen additional times for such conduct with at least nine of the incidents involving insubordination and/or inappropriate language, ignoring the directions of managers and acting belligerently toward them, including telling one manager that he was "a real scumbag" and "an asshole." Plaintiff kept Panken and EBG informed of Cremin's infractions and disciplinary write-ups. When plaintiff reached its limit of tolerating Cremin's conduct, plaintiff suspended Cremin and sought Panken's advice about discharging him. Panken advised plaintiff to give Cremin another chance to improve his conduct and to require that Cremin sign a Last Chance Agreement ("LCA"), which would allow plaintiff to summarily discharge Cremin if he committed one more infraction. Panken drafted the LCA, which stated, *inter alia*, that plaintiff could discharge Cremin for committing one more infraction, and sent the draft to the Union which responded with suggested changes. However, in or around December 2011, Panken secured Cremin's and plaintiff's signatures of the LCA but not the approval or signature of the Union.

Thereafter, Cremin continued to exhibit rude and offensive behavior. Specifically, at a bereavement luncheon hosted by one of plaintiff's members in August 2013, Cremin insulted guests, members and other employees. In or around December 2013, plaintiff discharged Cremin and the Union filed a grievance on Cremin's behalf. During the arbitration hearing on the grievance, which was held in December 2014, Panken relied heavily on the LCA arguing that Cremin's discharge should be upheld because he committed an infraction after signing the LCA and that the LCA allowed for summary discharge. The arbitrator held

that plaintiff could not use the LCA as a basis for discharging Cremin because the Union never approved or signed the LCA and thus, declared the LCA to be a nullity. The complaint asserts that "[h]ad Panken not committed malpractice by failing to receive the Union's approval and signature of the LCA, or at least arguing that the Union had notice of the LCA, the LCA would have been enforceable, [plaintiff] would have been able to easily prove an infraction relating to the August luncheon, and Cremin's discharge would have been affirmed."

As the arbitrator found that the LCA was a nullity, the arbitrator determined that Cremin's discharge would only be upheld if plaintiff showed the discharge was for "just cause" pursuant to the Collective Bargaining Agreement ("CBA") in place. However, Panken failed to investigate or advise plaintiff to investigate the complaints regarding Cremin's behavior at the August 2013 luncheon and thus, Panken was unprepared at the hearing to establish just cause. Panken failed to submit any witness statements or investigation notes into evidence at the hearing to demonstrate Cremin's alleged misconduct and failed to call any witnesses with personal knowledge of Cremin's misconduct at the August 2013 luncheon to testify at the arbitration hearing, including club members, the wait staff, a myriad of guests who were at the clubhouse on that date or any of plaintiff's board members and managers who were present at the luncheon, evidence which would have supported plaintiff's decision to discharge Cremin. At the hearing, Panken presented testimony from one club member who did not actually observe any of Cremin's misconduct as well as the testimony of Stephen Till, plaintiff's General Manager, who was not employed by plaintiff when the August 2013 luncheon took place. As plaintiff failed to present any first-person evidence of Cremin's misconduct, the member's testimony was disregarded by the arbitrator as hearsay. Additionally, Panken failed to argue at the arbitration that pursuant to the 2010 final warning, plaintiff did not need to show "just cause" in discharging Cremin, thereby subjecting plaintiff to a higher burden of proof. Plaintiff also alleges that Panken chose an arbitrator for the 2014 hearing who was "unabashedly pro-union" in that a cursory review of the arbitrator's background reveals that he rarely upholds an employer's decision to discharge an employee.

At the conclusion of the 2014 hearing, the arbitrator held that plaintiff failed to establish "just cause" for Cremin's discharge and directed that plaintiff reinstate Cremin with full back pay plus interest. The complaint alleges that "[h]ad Panken properly investigated the matter, called witnesses who actually observed Cremin's misconduct at the luncheon, called witnesses who had knowledge of Cremin's prior infractions, argued for the correct standard to be applied to Cremin's discharge, and/or reviewed [the arbitrator's] prior history, [plaintiff's] discharge of Cremin would have been affirmed, and [plaintiff] would not have been subject to the direction to reinstate Cremin with full back pay, and would not have incurred the legal costs in appealing the arbitrator's decision."

With regard to defendants' handling of plaintiff's dispute with Wills, the complaint alleges as follows. Wills was hired by plaintiff in 1988 as a line cook and was ultimately promoted to Executive Chef. However, in March 2012, due to member complaints, Wills was demoted to Executive Sous Chef. In or around March 2013, Wills was again demoted to Senior Line Cook at which point the Union filed a grievance and requested arbitration on Wills' behalf (the "Wills matter"). Specifically, the Union asserted that plaintiff violated the CBA by not paying Wills the same rate he received when he was the Executive Sous Chef. However, the Executive Sous Chef position is not covered by the CBA. Despite this available defense, Panken failed to file a motion to stay the arbitration. Additionally, Panken failed to assert the defense that Wills' grievance was untimely. Specifically, based on the CBA, the Union must file a grievance within ten days of the event which is the subject of the dispute. Wills' demotion occurred in March 2013 and the Union did not file the grievance based on such demotion until July 2013. Despite plaintiff notifying Panken of the untimeliness of the grievance in an e-mail, Panken waived such defense. Thereafter, plaintiff engaged in settlement negotiations with Wills and eventually settled the Wills matter. The complaint alleges that "[i]n failing to file a motion to stay the arbitration and assert the defense of the untimely grievance, Panken failed to exercise the degree of care, skill and diligence commonly possessed and exercised by members of the legal community, and deviated from the accepted standards of the practice of law" and that but for such negligence, plaintiff "would not have had to engage in negotiations with Wills, prepare for the scheduled arbitration hearing, and settle the matter with Wills."

Based on the above allegations, in or around July 2016, plaintiff commenced the instant action asserting a cause of action against defendants for legal malpractice arising out of defendants' alleged mishandling of the Cremin and Wills matters. Defendants now move to dismiss the complaint.

On a motion addressed to the sufficiency of the complaint, the facts pleaded are assumed to be true and accorded every favorable inference. *Morone v. Morone*, 50 N.Y.2d 481 (1980). Moreover, "a complaint should not be dismissed on a pleading motion so long as, when plaintiff's allegations are given the benefit of every possible inference, a cause of action exists." *Rosen v. Raum*, 164 A.D.2d 809 (1st Dept. 1990). "Where a pleading is attacked for alleged inadequacy in its statements, [the] inquiry should be limited to 'whether it states in some recognizable form any cause of action known to our law.'" *Foley v. D'Agostino*, 21 A.D.2d 60, 64-65 (1st Dept 1977) (quoting *Dulberg v. Mock*, 1 N.Y.2d 54, 56 (1956)). However, "conclusory allegations – claims consisting of bare legal conclusions with no factual specificity – are insufficient to survive a motion to dismiss." *Godfrey v. Spano*, 13 N.Y.3d 358, 373 (2009).

Legal malpractice is defined as the failure of an attorney to "exercise that degree of skill commonly exercised by an ordinary member of the legal community." *Estate of Nevelson v. Carro, Spanbock, Kaster & Cuiffo*, 259 A.D.2d 282, 284 (1st Dept 1999). To sufficiently plead a claim for legal malpractice, a plaintiff must allege "(1) that the attorney was negligent; (2) that such negligence was the proximate cause of plaintiff's losses; and (3) proof of actual damages." *Brooks v. Lewin*, 21 A.D.3d 731, 734 (1st Dept 2005).

The court first turns to defendants' motion to dismiss the complaint on the ground that the complaint fails to sufficiently allege that defendants' conduct in both the Cremin matter and the Wills matter was the proximate cause of plaintiff's damages. In order to sufficiently allege proximate cause in a legal malpractice action, a plaintiff must allege "that but for the attorney's negligence, [plaintiff] would have prevailed in the underlying matter or would not have sustained any ascertainable damages." *Brooks*, 21 A.D.3d at 734.

In the present case, this court finds that the complaint sufficiently alleges that defendants' conduct in the Wills matter was the proximate cause of plaintiff's damages. The complaint alleges that "but for [defendants'] malpractice,...Wills'[] grievance would have been dismissed" and that plaintiff would not

have been damaged. Specifically, the complaint alleges that defendants' conduct in failing to move to stay the arbitration based on the fact that Wills was not covered under the CBA and in failing to assert the defense of untimeliness, which was then waived, proximately caused plaintiff's damages in that plaintiff had to prepare for the scheduled arbitration hearing, engage in settlement negotiations with Wills and eventually settle the matter with Wills, causing plaintiff to incur damages from the settlement as well as the payment of a $2,000 arbitrator fee and the fee for late cancelation of the arbitration. The complaint further asserts that but for defendants' failure to properly litigate the Wills matter, the grievance would have been dismissed and plaintiff would not have negotiated with Wills or agreed to settle Wills' grievance.

To the extent defendants assert that the portion of the complaint that alleges malpractice with respect to the Wills matter must be dismissed based on the fact that plaintiff voluntarily agreed to settle the Wills matter, such assertion is without merit. "Where the termination [of the underlying case] is by settlement rather than by a dismissal or adverse judgment, malpractice by the attorney is more difficult to establish, but a cause of action *can* be made out if it is shown that assent by the client to the settlement was compelled because prior misfeasance or nonfeasance by the attorneys left no other recourse." *Becker v. Julien, Blitz & Schlesinger, P.C.*, 95 Misc.2d 64, 66 (Sup. Ct. N.Y. County, Special Term, 1977)(emphasis added). Indeed, "the cause of action for legal malpractice must stand or fall on its own merits, with no automatic waiver of a plaintiff's right to sue for malpractice merely because plaintiff had voluntarily agreed to enter into a stipulation of settlement." *Id.* Here, plaintiff has alleged that it negotiated a settlement with Wills based on defendants' negligence in litigating the Wills matter.

Additionally, this court finds that the complaint sufficiently alleges that defendants' conduct in the Cremins matter was the proximate cause of plaintiff's damages. The complaint alleges that "but for [defendants'] malpractice, Cremin's discharge would have been upheld" and that plaintiff would not have suffered damages in having to pay Cremin back pay for the time during which Cremin was discharged. Specifically, the complaint alleges that defendants' conduct in failing to enforce the terms of the 2010 final warning, failing to draft and procure an enforceable LCA, failing to investigate the complaints made about Cremin's conduct during the August 2013 luncheon in order to meet plaintiff's burden of proving that

Cremin was discharged for "just cause" and failing to call any witnesses to testify at the arbitration hearing who observed Cremin's conduct proximately caused plaintiff's damages in that plaintiff was required to reinstate Cremin and pay him back pay based on the arbitrator's determination that Cremin should not have been discharged. Indeed, the arbitrator determined that plaintiff failed to establish that Cremin was discharged for "just cause" based on the testimony provided at the hearing which was disregarded as hearsay, that no testimony was provided from someone who witnessed Cremin's alleged conduct and that no evidence was provided that plaintiff investigated the complaint made against Cremin or provided him with sufficient notice under the CBA or the opportunity to provide his side of the story before imposing discipline. Further, the arbitrator made clear that the "final warning" portion of the LCA could not be used as a basis for Cremin's discharge as the arbitrator found that the LCA was void and a nullity as the signature and approval of the Union had not been secured, which was contrary to the requirements of the CBA.

To the extent defendants assert that the complaint must be dismissed on the ground that defendants' conduct in the Cremins matter was not the proximate cause of plaintiff's damages based on their assertion that plaintiff knew that the LCA was not signed or approved by the Union, such assertion is without merit. Plaintiff alleges that defendants were tasked with drafting and procuring an enforceable LCA that provided Cremin with a final warning so that any subsequent infraction would constitute grounds for plaintiff to discharge Cremin. Merely because plaintiff knew that the LCA was unsigned by the Union does not mean that plaintiff knew the LCA was unenforceable.

The court next turns to defendants' motion to dismiss the complaint on the ground that plaintiff's alleged damages are speculative and were not proximately caused by the defendants. It is well-settled that "[t]he damages claimed in a legal malpractice action must be 'actual and ascertainable' resulting from the proximate cause of the attorney's negligence." *Zarin*, 184 A.D.2d at 387-88.

Here, the court finds that plaintiff has sufficiently alleged actual and ascertainable damages based on defendants' alleged conduct. With regard to the Wills' matter, plaintiff asserts that its actual and ascertainable damages are those damages plaintiff incurred in settling the Wills matter as well as the $2,000 fee paid to the arbitrator and the late fee for the arbitration cancellation. With regard to the Cremin matter,

plaintiff asserts that its actual and ascertainable damages are those damages plaintiff incurred in reinstating Cremin to his position with full back pay and benefits, with interest, and having to hire counsel to appeal and otherwise try to settle the Cremin matter.

To the extent defendants assert that the complaint should be dismissed on the ground that it fails to set forth the amount of damages purportedly sustained by plaintiff in the Wills matter, such assertion is without merit as defendants have failed to provide any basis for the proposition that plaintiff is required to plead the exact amount of damages it has sustained. With regard to damages, all that a plaintiff is required to plead in a legal malpractice action is that it has sustained actual and ascertainable damages.

The court next turns to defendants' motion to dismiss the complaint on the ground that defendants' alleged conduct is protected by the attorney judgment rule. Under the attorney judgment rule, "[a]ttorneys may select among reasonable courses of action in prosecuting their clients' cases without thereby committing malpractice so that a purported malpractice claim that amounts only to a client's criticism of counsel's strategy may be dismissed." *Dweck Law Firm v. Mann*, 283 A.D.2d 292, 293 (1st Dept 2001)(internal citation omitted). Indeed, "[a]ctions or conduct which constitute an error of judgment or are found to constitute one of several alternative ways in which a reasonable prudent attorney would proceed, are not actionable as legal malpractice." *Gonzalez v. Ellenberg*, 5 Misc.3d 1023 at *6 (Sup. Ct. N.Y. County 2004).

In the instant action, defendants' motion to dismiss the complaint on the ground that the conduct alleged in the complaint is protected by the attorney judgment rule is denied. Contrary to defendants' assertion that "the Complaint's bare factual allegations merely express overall dissatisfaction with the results of [defendants'] underlying tactical decisions," the complaint makes allegations that defendants failed to exercise that degree of skill commonly exercised by members of the legal community, including, *inter alia*, failing to call any fact witnesses at the arbitration of the Cremin matter to support Cremin's discharge, failing to advise plaintiff that the grievance filed in the Wills matter was untimely and failing to secure the Union's approval and signature of the LCA, all of which caused plaintiff damages in that plaintiff lost the Cremin arbitration and was required to pay Cremin back pay and had to settle the Wills matter.

The only allegation in the complaint of conduct that is protected by the attorney judgment rule is defendants' choice of arbitrator in the arbitration of the Cremin matter. Specifically, the complaint alleges that the arbitrator chosen by defendants was "unabashedly pro-union" and that it was negligent for defendants to make such a choice. However, "a lawyer's decision regarding the identity of the trier of fact cannot support a malpractice claim." *Forest City Enterprises, Inc. v. Russo*, 9 Misc.3d 151, 157 (Sup. Ct. N.Y. County 2005). Thus, plaintiff may not base its malpractice claim on defendants' choice of arbitrator.

To the extent defendants attempt to provide reasonable explanations for some of their conduct, the court need not address said explanations as they are not appropriate on a motion to dismiss.

Finally, the court turns to defendants' motion to dismiss the portion of the complaint that alleges that defendants were negligent in failing to advise plaintiff in 2011 that it could summarily discharge Cremin based on the 2010 final warning on the ground that it is time-barred. A claim for legal malpractice is subject to a three-year statute of limitations. *See* CPLR § 214(6). "A legal malpractice claim accrues 'when all the facts necessary to the cause of action have occurred and an injured party can obtain relief in court." *McCoy v. Feinman*, 99 N.Y.2d 295, 301 (2002), quoting *Ackerman v. Price Waterhouse*, 84 N.Y.2d 535, 541 (1994). However, "[t]he continuous representation doctrine tolls the statute of limitations…where there is a mutual understanding of the need for further representation on the specific subject matter underlying the malpractice claim." *McCoy*, 99 N.Y.2d at 306. "For the doctrine to apply, there must be 'clear indicia of an ongoing, continuous, developing, and dependent relationship between the client and the attorney.'" *Piliero v. Adler & Stavros*, 282 A.D.2d 511, 512 (2d Dept 2001), quoting *Luk Lamellen U. Kupplungbau GmbH v. Lerner*, 166 A.D.2d 505, 506 (2d Dept 1990).

Here, the court finds that any claim by plaintiff that defendants were negligent in failing to advise plaintiff in 2011 that it could summarily discharge Cremin based on the 2010 final warning is not time-barred based on the continuous representation doctrine. It is undisputed that plaintiff commenced the instant legal malpractice action in or around July 2016. It is further undisputed that defendants began handling the Cremin matter in 2009 and continued handling the Cremin matter until early 2015. Based on the allegations in the complaint, during that period, there was a mutual understanding between plaintiff and

defendants of the need for further presentation of plaintiff on the Cremin matter and an ongoing, continuous, developing and dependent relationship between the parties. The complaint contains allegations that plaintiff informed defendants each time Cremin acted inappropriately or insubordinately during that period and that plaintiff followed defendants' advice from 2009 until 2015 on how to handle the Cremin matter. Thus, based on the continuous representation doctrine, any failure of defendants to inform plaintiff in 2011 that it could discharge Cremin pursuant to the 2010 final warning is not time-barred.

Accordingly, defendants' motion to dismiss the complaint is denied. This constitutes the decision and order of the court.

DATE : 1/10/17

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KERN, CYNTHIA S., JSC

HON. CYNTHIA S. KERN
J.S.C.