SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
CENTRAL

MINUTE ORDER

DATE: 07/26/2010 TIME: 12:55:00 PM DEPT: C-71

JUDICIAL OFFICER PRESIDING: Ronald S. Prager
CLERK: Lee Ryan
REPORTER/ERM: Not Reported
BAILIFF/COURT ATTENDANT:

CASE NO: **37-2010-00086284-CU-PN-CTL** CASE INIT.DATE: 02/24/2010
CASE TITLE: **Ellis vs. Jackson DeMarco Tidus & Peckenpaugh**
CASE CATEGORY: Civil - Unlimited CASE TYPE: Professional Negligence

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EVENT TYPE: Demurrer / Motion to Strike

APPEARANCES

The Court, having taken the above-entitled matter under submission on 7/23/10 and having fully considered the arguments of all parties, both written and oral, as well as the evidence presented, now rules as follows:

After taking the matter into submission, the Court affirms its tentative ruling on Defendant Jackson, DeMarco, Tidus & Peckenpaugh's ("Jackson DeMarco") demurrer to Plaintiffs Christopher Ellis, Bradley D. Elow, Robert Finch and Howard LaBore's (collectively "Plaintiffs") Complaint as follows:

The Court notes that Defendant Stephaney Windsor's filed a joinder to Defendant DeMarco's demurrer to Plaintiffs' Complaint.

As a preliminary matter, the Court GRANTS the Defendants Jackson DeMarco and Stephaney Windsor's (collectively "Defendants") request for judicial notice of Exhibits A-E and G. (Evid. Code § 452(b), (d).) The Court DENIES the Defendants' request for judicial notice of the documents listed in paragraph 6 of the Request for Judicial Notice because Defendants did not attach the documents to the request. The Court DENIES the Defendants' Supplemental Request for Judicial Notice of Exhibit F.

Standard for Demurrer
In determining whether to sustain a demurrer, the trial court admits the truth of all properly pleaded facts but does not assume the truth of contentions, deductions or conclusions of fact or law. (*Kamen v. Lindly* (2001) 94 Cal.App.4th 197, 201; see also *Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967.) A demurrer will be sustained if the "pleading does not state facts sufficient to constitute a cause of action." (Code Civ. Proc. § 430.10(e).) A demurrer can only be used to challenge defects appearing on the face of the complaint or from matters that are judicially noticeable. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) Moreover, "points raised in a reply brief for the first time will not be considered unless good cause

is shown for the failure to present them before." (*Balboa Ins. Co. v. Aguirre* (1983) 149 Cal.App.3d 1002, 1010.) The Supreme Court has held that the complaint must allege ultimate facts supporting the cause of action with enough particularity to apprise the defendant of the nature, source and extent of the claim. (*Semole v. Sansoucie* (1972) 28 Cal.App.3d 714, 719 (hereafter "*Semole*"); see also *Davaloo v. State Farm Ins. Co.* (2005) 135 Cal.App.4th 409, 414-415 (hereafter "*Davaloo*"); 4 Witkin, Summary of Cal. Law (5th ed. 2008), Civil Procedure, § 378, p. 514.)

Legal Malpractice

"The elements of a cause of action for professional negligence are: (1) the duty of the professional to use such skill, prudence and diligence as other members of the profession commonly possess and exercise; (2) breach of that duty; (3) a causal connection between the negligent conduct and the resulting injury; and (4) actual loss or damage resulting from the professional negligence." (*Shopoff & Cavallo LLP v. Hyon* (2008) 167 Cal.App.4th 1489, 1509 [citing *Loube v. Loube* (1998) 64 Cal.App.4th 421, 429].) In a litigation malpractice action, a plaintiff "must show that *but for* the alleged malpractice, it is more likely than not that the plaintiff would have obtained a more favorable result." (*Viner v. Sweet* (2003) 30 Cal.4th 1232, 1244 (hereafter "*Viner*").) This method of proving causation, also known as a "case within a case" approach, is an objective way to determine what the result should have been in the underlying proceeding. (*Ambriz v. Kelegian* (2007) 146 Cal.App.4th 1519, 1531 (hereafter "*Ambriz*"); *Viner*, *supra*, 30 Cal.4th at p. 1242.) Causation is generally a question of fact. (E.g., *Ambriz*, *supra*, 146 Cal.App.4th at p. 1531; *Slovensky v. Friedman* (2006) 142 Cal.App.4th 1518, 1528.) However, in legal malpractice actions, whether the case within a case is decided by a court or a jury turns on whether the underlying issues are predominantly questions of law or fact. (*Salisbury v. County of Orange* (2005) 131 Cal.App.4th 756, 764; *Piscitelli v. Friedenberg* (2001) 87 Cal.App.4th 953, 970.)

Sufficiency of Pleading

Negligence and proximate cause may be pleaded in legal malpractice cases just as in other negligence cases. (4 Witkin, Summary of Cal. Law (5th ed. 2008), Pleading, § 616, p. 747.) In general, allegations of negligence have long been excused from the code pleading requirement of specificity in pleading the cause of action. (*Rannard v. Lockheed Aircraft Corp.* (1945) 26 Cal.2d 149, 154; see also *Pultz v. Holgerson* (1986) 184 Cal.App.3d 1110, 1116-1117.) For example, in *Charnay v. Cobert* (2006) 145 Cal.App.4th 170 (hereafter "*Charnay*"), the court held that to withstand a demurrer, the plaintiff simply had to plead that but for her attorney's malpractice she would have received a more favorable judgment entered against her. (*Charnay*, *supra*, at p. 180-181.)

Causation

Plaintiffs have alleged that: 1) Defendants failed to properly advise them about the retiree health litigation; 2) Defendants failed to conduct adequate research on the issue of retiree health before raising the issue in the litigation; 3) Defendants failed to conduct adequate discovery on the issue after it had been raised; 4) Defendants failed to present available factual evidence that would have shown the retiree health benefits were vested; 5) Defendants did not competently argue the available factual evidence and legal precedent in Plaintiffs' favor; 6) Defendants conceded the retiree health issue without seeking approval from Plaintiffs; and 7) Defendants concealed the above actions while still charging Plaintiffs. (Complaint, ¶ 31.)

In a ruling on summary judgment, the district court in the underlying action found that the plaintiffs failed to create a triable issue of fact to show that the retiree health benefits were constitutionally protected and could not be unilaterally modified, noting that plaintiffs did not present any legal precedent or evidentiary support. (Plaintiffs' Notice of Logement ("PNOL") 2 at p. 41:11-13.) Based on this lack of evidence, the court held that the retiree health benefits affected employment rights and not protected pension benefits,

the retiree health benefits were not vested rights subject to constitutional protection under either the Contracts or Takings Clause. (*Id.* at p. 41:11-13.) The district court made that determination based on the facts in the record as presented by the Defendants. On appeal, the Ninth Circuit affirmed the district court's ruling on the summary judgment motion given the alleged deficiency in the record. Assuming Plaintiffs allegations in the Complaint to be true, if Defendants had diligently searched for and argued available factual evidence and legal precedent, then either the issue would not have been raised in the first place or the district court may have ruled favorably due to additional factual evidence. (See Complaint, ¶ 31.) Moreover, if Defendants had informed their clients of the difficult legal issue and their conduct in handling the case, Plaintiffs would have had the option to drop the retiree health benefits issue, preventing an adverse ruling, or to select new counsel. (See *Id.*) Accordingly, Plaintiff has properly pleaded that but for Defendants' negligent actions and omissions in conducting the litigation the federal courts may have ruled in Plaintiffs' favor.

Furthermore, Plaintiffs have properly alleged that but for these adverse rulings, the City would not have capped retiree health benefits to $8,800 per year. (Complaint, ¶ 21.) If even one federal court had ruled that the retiree health benefits were subject to constitutional protection under either the Contracts or Takings Clause as originally alleged in the underlying action, the City would not have implemented this reduction in benefits. In any case, assuming the truth of Plaintiffs' allegation that the City relied on the federal court rulings when it set the cap on yearly benefits, then the Complaint has sufficiently pleaded causation required to establish their claim of legal malpractice against Defendants.

Defendants argue that because Plaintiffs dismissed one state law case, they cannot prove causation. However, the dismissal of one state law case does not preclude Plaintiffs from seeking damages for legal malpractice arising out of the underlying litigation in the federal courts.

Damages

Defendants contend that Plaintiffs have not adequately alleged damages. Although it is true that damages may not be based upon speculation or surmise and the mere possibility or probability that damage will result does not render the conduct actionable (*Thompson v. Halvonik* (1995) 36 Cal.App.4th 657, 661-662), Plaintiffs allege that they have already sustained more than $142 million in damages resulting from Defendants' alleged negligence. (Complaint, ¶ 22.)

Collateral Estoppel

Furthermore, Defendants argue that because Plaintiffs "have either terminated or failed to prosecute these state court claims, Plaintiffs are now precluded from asserting that any act or failure to act on the part of the defendants in this litigation caused them any injury." (Demurrer at pp. 2:27-3:1, 3:16-18, 9:25-28.) Defendants appear to be claiming that the doctrine of collateral estoppel, or issue preclusion, bars Plaintiffs from asserting legal malpractice in the present action. In order for collateral estoppel to apply, the issue must be identical to the issue decided in a former proceeding, it must have been actually litigated and decided in the former proceeding, the decision must be final and on the merits, and the party against whom preclusion is sought must be the same as the party to the former proceeding. (*Lucido v. Super. Ct.* (1990) 51 Cal.3d 335, 341.) The alleged negligence by the Defendants in the underlying litigation gave rise to Plaintiffs' cause of action in tort, which could not possibly have been litigated in the underlying action.

In *Ruffalo v. Patterson* (1991) 234 Cal.App.3d 341 (hereafter "*Ruffalo*"), the plaintiff sued her attorney in a prior marital dissolution proceeding for negligently advising her to characterize her property as community property, which prevented her from fully and fairly litigating the issue. (*Ruffalo*, *supra*, at p. 344.) The court explained that because the plaintiff was not seeking a redetermination of the character

of the property but only to recover damages due to her attorney's negligent instruction, the doctrine of collateral estoppel did not apply. (*Id.*) The court reasoned that "[t]o hold otherwise would be to rule that where an attorney's negligence has caused a court to make an erroneous adjudication of an issue, the fact that the court has made that adjudication absolves the attorney of all accountability and responsibility for his negligence." (*Id.*) Similarly, the doctrine of collateral estoppel does not apply in this case. Plaintiffs are not seeking a redetermination of whether the retiree health benefits were vested but rather a determination of whether the alleged negligence of their attorneys in that litigation, the Defendants, caused the court to erroneously decide the issue.

The Supreme Court has held that the complaint should be liberally construed when examining the sufficiency of the pleading, "with a view to attaining substantial justice among the parties." (*Semole*, *supra*, 28 Cal.App.3d at p. 719 [citing Code Civ. Proc. § 452].) In this case, the crucial inquiry of what would have happened had the Defendants not engaged in the conduct as alleged by Plaintiffs should not be determined at this early stage in the litigation. (Complaint, ¶ 31; *Viner*, *supra*, 30 Cal.4th at p. 1242.) Furthermore, Plaintiffs have alleged sufficient facts to apprise Defendants of the nature of the claim against them.. (*Semole*, *supra*, 28 Cal.App.3d at p. 719; *Davaloo*, *supra*, 135 Cal.App.4th at p. 414-415.) In the interest of justice, the case should continue to discovery to afford the Plaintiffs the opportunity to substantiate their allegations.

Based on the foregoing, Defendants' demurrer to Plaintiffs' Complaint is OVERRULED.

Defendants are directed to file and serve their Answer by August 6, 2010.

IT IS SO ORDERED.

Ronald S. Prager

Judge Ronald S. Prager

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

Central
330 West Broadway
San Diego, CA 92101

SHORT TITLE: Ellis vs. Jackson DeMarco Tidus & Peckenpaugh

CLERK'S CERTIFICATE OF SERVICE BY MAIL	CASE NUMBER: **37-2010-00086284-CU-PN-CTL**

I certify that I am not a party to this cause. I certify that a true copy of the attached minute order was mailed following standard court practices in a sealed envelope with postage fully prepaid, addressed as indicated below. The mailing and this certification occurred at San Diego, California, on 07/27/2010.

Clerk of the Court, by: L Ryan Ryan, Deputy

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