

**Cangro v Solomon**

2008 NY Slip Op 33345(U)

December 9, 2008

Supreme Court, New York County

Docket Number: 114547/07

Judge: Doris Ling-Cohan

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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: Hon. Denis Ling-Cohen

PART 36

Index Number : 114547/2007  
**CANGRO, JENNIFER**  
vs.  
**SOLOMON, PHYLLIS C.**  
SEQUENCE NUMBER : 001  
DISMISS ACTION

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

This motion to/for \_\_\_\_\_

PAPERS NUMBERED	
1, 2	
3, 4	
5	
6	
7, 8	

Notice of Motion/ Order to Show Cause - Affidavits - Exhibits ...  
Answering Affidavits -- Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

*interim order dated 7/13/08*  
Cross-Motion:  Yes  No *supplemental papers*

Upon the foregoing papers, it is ordered that this motion *to dismiss is granted*  
*in accordance with the attached memorandum*  
*decision.*

**FILED**  
DEC 15 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 12/9/08

  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate  DO NOT POST  REFERENCE

FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 36

-----X  
JENNIFER CANGRO,

Plaintiff,

Index No. 114547/07

- against -

Motion Seq. No.: 001

PHYLLIS C. SOLOMON,

**FILED**

Defendant.  
-----X

DEC 15 2008

LING-COHAN, J.:

COUNTY CLERK'S OFFICE  
NEW YORK

Pro se plaintiff Jennifer Cangro ("Cangro") commenced this action against defendant based upon defendant's alleged conduct in a previous matter involving the upward modification of support from plaintiff's former husband. Defendant Phyllis Solomon ("Solomon") is an attorney who was retained by plaintiff's guardian in the support case.<sup>1</sup>

Defendant moves to dismiss the complaint in its entirety based upon: (1) that plaintiff failed to secure the required permission from the court prior to the commencement of this action; (2) the failure to state a cause of action pursuant to CPLR 3211(a)(7); and (3) documentary evidence pursuant to CPLR 3211(a)(1).<sup>2</sup>

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<sup>1</sup> The court acknowledges the assistance of Suzanne Haile, Zena Kim and Kalenna Lee.

<sup>2</sup> By order dated July 13, 2008, this court requested that the parties supply additional papers including a copy of the order which terminated the guardianship, and memorandum of law. In response to such order, defendant supplied a copy of an order dated January 3, 2006 by the Hon. Lucindo Suarez, which authorized the discharge of plaintiff's guardian Mary V. Rosado ("Rosado"); such order, however, was *reversed* and the matter remanded, by the Appellate Division, First Department (*Matter of Rosado [Cangro]*, 45 AD3d 281, 282 [1<sup>st</sup> Dept 2007]). Neither plaintiff nor defendant have supplied a more recent order with respect to the discharge of Rosado as plaintiff's guardian.

This case presents a novel issue: whether court approval is needed prior to the commencement of a lawsuit against an attorney retained by a guardian.

It appears from the submitted papers that plaintiff was divorced by the time of the underlying case, which was in the Supreme Court in Richmond County (*Cangro v Cangro*, Index No. 5660/01). According to plaintiff, the judge in such case scheduled a trial on equitable distribution and upward modification of plaintiff's monthly maintenance. Upon a stipulation of settlement being proposed, plaintiff's guardian, Rosado, retained defendant to address whether Rosado should sign the proposed stipulation on behalf of plaintiff. Defendant discussed the matter with plaintiff's guardian ad litem, Gina Marie Reitano, Esq., and wrote a memorandum addressed to Rosado, recommending that Rosado sign the stipulation. Defendant's memorandum dated November 3, 2004 was presented to the court in the matrimonial case on December 20, 2004. It further appears that Rosado signed the stipulation and that the Judge approved it. Significantly, it does not appear that either plaintiff, her guardian or her guardian ad litem, ever moved to vacate the so ordered stipulation of settlement.

Plaintiff further alleges that the Judge relied on defendant's statements in the memorandum and was thereby deceived, and that she was injured by defendant's actions. Plaintiff also alleges that guardian ad litem Reitano did not properly represent her in the underlying case, and that defendant relied on false statements made by Reitano when writing her memorandum. Plaintiff asserts that the memorandum contains numerous fraudulent and defamatory statements, given that she and defendant never met.

The first through twelfth and the fourteenth causes of action in the complaint allege fraud, based on various statements in the memorandum. The allegedly fraudulent statements are that:

(1) the recommended monthly payment to plaintiff is sufficient; (2) plaintiff will not be able to support herself; (3) plaintiff wrongly removed money from certain accounts; (4) plaintiff sold a marital real property at an artificially low price; (5) another property went into foreclosure because plaintiff did not pay the mortgage; (6) plaintiff wasted marital property; and (7) plaintiff's former husband need not purchase life insurance naming plaintiff as the beneficiary, because plaintiff will continue to receive a monthly payment from his pension for the rest of her life, even if he predeceases her. Plaintiff contends that this last statement is wrong because the pension will stop when her ex-husband dies. Plaintiff alleges that the memorandum also falsely states the value of a piece of marital real property.

The thirteenth cause of action sounds in libel and defamation based on statements in the memorandum regarding plaintiff's mental and psychological condition. The fifteenth cause of action is that defendant's \$1,500 payment from Rosado, the guardian, was a bribe and that defendant did not file the proper affidavit to obtain payment. The sixteenth cause of action is that defendant failed to appear for a pre-trial hearing in the support case on October 29, 2004. The seventeenth seeks punitive and compensatory damages.

Preliminarily, defendant argues that dismissal is warranted since plaintiff may not bring this action without permission of the court that appointed her guardian. This court agrees for the reasons stated below.

At the outset, it is noted that it does not appear from the submissions that Rosado was ever discharged as plaintiff's guardian; the order dated January 3, 2006 (Exh.B, Defendant's Supplemental Submission) which authorized the discharge of Rosado upon presentation of an ex parte order, was reversed by the Appellate Division, First Department on or about November 1,

2007 (*In re Rosado v. Cangro*, 45 AD3d 281 (1<sup>st</sup> Dept 2007)). This court has not been supplied with any updated information with respect to the discharge of guardian Rosado, despite this court's interim order dated July 13, 2008, requesting such information. Accordingly, if Rosado was never discharged as plaintiff's guardian, plaintiff may not bring this suit, on her own behalf. See CPLR §1201; Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C1201:2 (CPLR 1201 provides that a person who has been adjudicated incompetent must appear through his or her judicially appointed [guardian]).

As an appointee of the court, a guardian and, logically, a guardian's agent, act "as an arm of the court" in matters involving the incapacitated person's property and person. See *Matter of Becan*, 26 AD2d 44, 45 (1<sup>st</sup> Dept 1999). Once a guardian is appointed by a court to represent the interests of an incapacitated person, litigation against the guardian as a representative of the incapacitated person may not proceed without the permission of the court which appointed the guardian (see *Matter of Linden-Rath*, 188 Misc 2d 537 (Sup Ct, New York County 2001); *Smith v. Keteltas*, 27 AD 279 (1<sup>st</sup> Dept 1898); *Lau v Berman*, 6 Misc 3d 934, 937 [Civ Ct, NY County 2004], *affd* 6 Misc 3d 128[A], 2005 NY Slip Op 50015[U] [App Term, 1<sup>st</sup> Dept 2005]).

Significantly, section 1(H) of the Part 36 of the Rules of the Chief Judge specifically provides that a judicial appointment is required when a guardian seeks to retain counsel. Thus, since an attorney retained by a guardian acts with the express authority and permission of the court, it reasonably follows that litigation against such an appointed person may not proceed without the permission of the court, notwithstanding that there appears to be no published cases directly addressing this specific issue.

The policy reasons for barring suit against a guardian, and any agent of the

guardian, are obvious. "A guardian is appointed by a court when a person is under a disability and in need of court assistance and court protection" ('Guardians' and 'Guardians Ad Litem': What are the Differences?, NYLJ, Sept 4, 1997, at1, col 1). Thus, without such rule, it is not farfetched to assume that virtually every person adjudged incompetent, who is not satisfied with the guardian's decisions, will attempt to sue the guardian. Without a requirement that judicial permission be sought prior to the commencement of a suit, it would be extremely difficult for a court to find individuals willing to serve as guardians or agents of guardians.

Nevertheless, even if prior to the commencement of this case, plaintiff sought and obtained the appropriate permission from the court which appointed the guardian, dismissal would still be warranted based upon the insufficiency of the pleadings.

It is well settled that, on a CPLR 3211(a)(7) motion to dismiss for failure to state a cause of action, the sole question for review is whether the complaint states a cause of action (*Acquista v New York Life Ins. Co.*, 285 AD2d 73, 76 [1<sup>st</sup> Dept 2001]). The court is to assume the truth of the allegations in the complaint and is not to determine facts (*id.*). At the same time, however, such an assumption fails where the complaint contains conclusory allegations, which are not backed up with factual allegations (*SNS Bank, N.V. v Citibank, N.A.*, 7 AD3d 352, 355 [1<sup>st</sup> Dept 2004]). "[A]llegations consisting of bare legal conclusions, as well as factual claims inherently incredible or flatly contradicted by documentary evidence are not entitled to such consideration" (*Carniglia v Chicago Tribune-NY News Syndicate*, 204 AD2d 233, 233-34 [1<sup>st</sup> Dept 1994]).

In this case, plaintiff merely claims in a conclusory fashion that she was damaged and injured; however, she fails to allege any facts to detail the extent of her alleged damage and injury. As detailed below, this deficiency, amongst others, are fatal to each of her numbered

causes of action and various claims.

In the complaint and in her opposing affidavit, plaintiff indicates that the court relied on defendant's statements in the memorandum and incorporated them into orders and judgments, thereby damaging plaintiff. Plaintiff does not provide information as to the contents of such court orders and judgments. Additionally, it does not appear from plaintiff's allegations that she was affected, in an actionable way, by the prior court's orders which incorporated defendant's recommendations.

Plaintiff explicitly claims fraud and defamation as causes of action and makes many allegations as to unidentified torts. A review of the complaint and plaintiff's affidavit submitted in opposition on this motion, in a light favorable to plaintiff, reveals that plaintiff has failed to assert causes of action which fit into any cognizable legal theories (*see Wiener v Lazard Freres & Co.*, 241 AD2d 114, 120 [1<sup>st</sup> Dept 1998]).

Plaintiff alleges that defendant disparaged the value of some real property. To the extent that such an allegation may amount to a cause of action for injurious falsehood, this tort is negated by the failure to plead damages. "The action for injurious falsehood lies when one publishes false and disparaging statements about another's property under circumstances which would lead a reasonable person to anticipate that damage might flow therefrom" (*Cunningham v Hagedorn*, 72 AD2d 702, 704 [1<sup>st</sup> Dept 1979]). Injurious falsehood is actionable only if it results in a pecuniary loss to another's interests, that is, if it causes special, rather than general, damages (Restatement [Second] of Torts: Injurious Falsehood § 623A; *Lieberman v Gelstein*, 80 NY2d 429, 434-435 [1992]). Plaintiff utterly fails to allege the requisite special damages, that is, pecuniary loss that results directly and immediately from the effect of the conduct of third

persons, as influenced by the disparaging statement (Restatement [Second] of Torts: Injurious Falsehood § 633; *L.W.C. Agency, Inc. v St. Paul Fire & Marine Ins. Co.*, 125 AD2d 371, 373 [2d Dept 1986]; *see also Nu-Life Constr. Corp. v Board of Educ. of City of N.Y.*, 204 AD2d 106, 108 [1<sup>st</sup> Dept 1994]).

To the extent that the complaint attempts to plead legal malpractice, such tort consists of three elements: the negligence of the attorney; the negligence being the proximate cause of the loss sustained; and actual damages suffered by the client (*Bishop v Maurer*, 33 AD3d 497, 498 [1<sup>st</sup> Dept 2006], *affd* 9 NY3d 910 [2007]). To show proximate cause, a plaintiff must demonstrate that “but for” the attorney's negligence, the plaintiff would either have prevailed in the matter at issue, or would not have sustained any “ascertainable damages” (*Brooks v Lewin*, 21 AD3d 731, 734 [1<sup>st</sup> Dept 2005]; *see also Tydings v Greenfield, Stein & Senior, LLP*, 43 AD3d 680, 682 [1<sup>st</sup> Dept 2007]; *Leder v Spiegel*, 31 AD3d 266, 267-268 [1<sup>st</sup> Dept 2006], *affd* 9 NY3d 836 [2007]). The failure to establish proximate cause mandates the dismissal of a legal malpractice action, regardless of the attorney's negligence (*Brooks*, 21 AD3d at 734). Again, plaintiff does not claim any actionable injury; nor does she claim that but for defendant's actions, she would have prevailed in the underlying case. Significantly, plaintiff does not clearly indicate that she did not prevail in the underlying action.

Plaintiff's claims for emotional and mental distress are not sufficiently pleaded. Claims of emotional distress require allegations of conduct “so outrageous and extreme as to exceed all bounds of decency” (*Mollerson v City of New York*, 8 AD3d 70, 71 [1<sup>st</sup> Dept 2004]; *see also Sheila C. v Povich*, 11 AD3d 120, 130-131 [1<sup>st</sup> Dept 2004]). No such allegations exist here.

Regarding plaintiff's claim of defamation,

[a]n attorney at law is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding, or in the institution of, or during the course and as a part of, a judicial proceeding in which he participates as counsel, if it has some relation to the proceeding

(Restatement [Second] of Torts: Defamation § 586; *see also Sexter & Warmflash, P.C. v Margrabe*, 38 AD3d 163, 175 [1<sup>st</sup> Dept 2007]; *Caplan v Winslett*, 218 AD2d 148, 152 [1<sup>st</sup> Dept 1996]; *Hinckley v Resciniti*, 159 AD2d 276, 276-277 [1<sup>st</sup> Dept 1990]). Here, defendant made the alleged offending statements in the context of a judicial proceeding. Such statements were directly related to the proceeding and are therefore privileged and cannot form the basis of a cause of action for defamation. Furthermore, the rules regarding absolute privilege to publish defamatory matters apply to the publication of injurious falsehoods (Restatement [Second] of Torts: Injurious Falsehood § 635; Defamation § 586).

To the extent that plaintiff claims defendant improperly relied upon false statements made by her guardian ad litem when writing the legal memorandum, clearly defendant had a good faith basis to rely on statements made by the court appointee. It appears that defendant was hired for a limited purpose by the guardian to write a memorandum based on facts supplied to her by the guardian and guardian ad litem, and advise the guardian as to whether the appointed guardian should sign the stipulation of settlement. To the extent plaintiff - the subject of the guardianship - now disagrees with the actions of the court appointed guardians and the court's actions in approving the stipulation of settlement, it should not be through a collateral lawsuit of this nature. Plaintiff's recourse, if she is dissatisfied with decisions made, should be made in the context of the underlying legal proceeding, as the full record is available. Further, significantly, the submitted papers do not reflect that there was ever a motion to vacate the stipulation of

settlement due to the alleged fraud.

The elements of a cause of action for fraud are a material misrepresentation of fact, made with knowledge of its falsity, with intent to deceive, justifiable reliance on the misrepresentation by the party claiming that it was deceived, and damages suffered by that party as a result of the reliance (*Desideri v D.M.F.R. Group [USA] Co.*, 230 AD2d 503, 505 [1<sup>st</sup> Dept 1997]; *Swersky v Dreyer and Traub*, 219 AD2d 321, 326 [1<sup>st</sup> Dept 1996]). Assuming the truth of plaintiff's claims, the complaint does not contain the necessary elements for a cause of action based upon fraud. The allegedly false statements were made in a document upon which the court in the underlying case relied. Plaintiff did not rely on the statements and took no actions based on those statements. Nor does it appear that plaintiff was deceived by the statements, since she knew that they were false when made. Thus, there was no deceit and no reliance.

The fifteenth cause of action alleges that defendant did not file an affidavit of legal services for her fee and that her fee was a bribe. The sixteenth cause of action alleges that defendant failed to appear for the pre-trial hearing on October 29, 2004. The conclusory allegation of bribery does not support any cause of action. Nor does the allegation that defendant failed to attend the pre-trial hearing, by itself, indicate that she engaged in malpractice or any other wrong. Moreover, the alleged failure to file an affidavit of legal services is a matter, if true, which should have been brought to the attention of the court which supervised the guardianship.

It is also noted that questions concerning payment to defendant Solomon may already be the subject of an ongoing proceeding. In *Matter of Rosado* (45 AD3d 281 [1<sup>st</sup> Dept 2007]), Cangro appealed an order by the Supreme Court which approved the final accounting of the guardianship account. The Appellate Division, First Department reversed the Supreme Court's

Plaintiff argues that this motion to dismiss should not be entertained because it is untimely. Plaintiff filed her complaint on October 30, 2007. Defendant mailed the motion to her on December 11, 2007, as the postmark shows. Plaintiff says that she did not receive the motion until January 9, 2008.

Plaintiff's affidavit of service indicates she served defendant by leave and mail service, pursuant to CPLR 308 (2), on November 7, 2007. That statute provides that proof of such service must be filed with the Clerk of the Court within 20 days of delivery or mailing, and that service is complete 10 days after the proof of service is filed. CPLR 320 (a) provides that defendant must appear within 30 days of service being completed. There is no sign that plaintiff filed proof of service. Noncompliance with a filing provision indefinitely postpones a defendant's time to appear (*Flannery v General Motors Corp.*, 214 AD2d 497, 504 [1<sup>st</sup> Dept], *aff'd* 86 NY2d 771 [1995]). Therefore, since service was not completed, defendant's motion is timely.

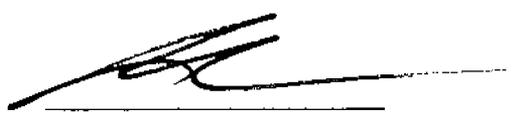
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Accordingly, it is

ORDERED that defendant's motion to dismiss the complaint is granted in its entirety, and the Clerk of the Court is directed to enter a judgment of dismissal in favor of defendant; and it is further

ORDERED that, within 30 days of entry of this order, defendant shall serve a copy upon plaintiff with notice of entry.

Dated: December 9, 2008

  
\_\_\_\_\_  
Hon. Doris Ling-Cohan,

J.S.C.J:\Dismiss\Cangro.Solomon.wpd