

Oxman v Herman Sloan Robarge & Sullivan, LLP

2009 NY Slip Op 30040(U)

January 9, 2009

Supreme Court, New York County

Docket Number: 102310/08

Judge: Doris Ling-Cohan

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

PRESENT: Hon. Doris Ling-Cohan

PART 36

Index Number : 102310/2008

OXMAN, ELLEN

INDEX NO. 102310/08

vs

HERMAN SLOAN ROBARGE

MOTION DATE _____

Sequence Number : 001

MOTION SEQ. NO. 001

DISMISS ACTION

MOTION CAL. NO. _____

The following papers, numbered 1 to 5 were read on this motion to for dismiss

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

1, 2

Answering Affidavits — Exhibits _____

3, 4

Replying Affidavits _____

5

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

is disposed of in accordance with the attached memorandum decision

FILED

JAN 13 2009

COUNTY CLERK'S OFFICE
NEW YORK

DORIS LING-COHAN
J.S.C.

Dated: 1-9-09

[Signature]

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE _____ FOR THE FOLLOWING REASON(S):

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

-----X
ELLEN OXMAN,

Plaintiff,

-against-

HERMAN SLOAN ROBARGE & SULLIVAN, LLP,
WILLIAM HERMAN, MARY G. NOTARO and
KAREN ROBARGE,

Defendants.
-----X

INDEX NO. 102310/08

Motion Seq., No. 001

FILED
JAN 13 2009
COUNTY CLERK'S OFFICE
NEW YORK

DORIS LING-COHAN, J.:

This is a legal malpractice action in which defendants Herman Sloan Robarge & Sullivan, LLP, William Herman, Mary G. Notaro and Karen Robarge (collectively, Herman Sloan) move to dismiss the complaint for failure to state a cause of action, pursuant to CPLR 3211(a) (7).

Plaintiff Ellen Oxman (Oxman) commenced the instant action against Herman Sloan, the attorneys who represented plaintiff in her divorce action against her former husband, John Craig Oxman. The underlying facts, as relevant to this motion, are as follows. Herman Sloan was retained by Oxman in 2004 to represent plaintiff in her divorce proceeding that had already been commenced, under New York County Index No. 350213/04, by the law firm of Raoul Lionel Felder P.C., which was representing her at that time. Plaintiff contends that prior to retaining defendant law firm, she met with William Herman who advised her, among other things, that he and his firm would vigorously pursue her rights and protect her interests, conduct all necessary discovery to determine and locate the marital assets for equitable distribution, and retain experts to determine the value of the marital assets so that plaintiff would obtain her fair and just share of the rather considerable marital estate. Prior to the completion of trial, the attorney-client

relationship between Oxman and her trial counsel, William Herman, apparently broke down, resulting in a delay, her retention of a new attorney, and a financial settlement which was significantly less than what plaintiff believes she was entitled to receive.

Central to her complaint is defendants' alleged failure, prior to trial, to obtain the services of an expert to determine the true and correct value of specific marital assets. Instead, defendants allegedly adopted the inaccurate values placed on these assets by plaintiff's husband or counsel, which negatively affected her financial settlement.

Defendants contend that the complaint must be dismissed in its entirety because plaintiff fails to plead facts necessary for a legal malpractice claim. Specifically, defendants assert that by failing to plead "but for" the alleged acts of negligence she would have achieved a better result, plaintiff has failed to properly plead causation and, furthermore, that plaintiff's allegations are in reality a disagreement over trial strategy, which is not actionable.

On a motion to dismiss a complaint for failure to state a cause of action, the court determines whether the alleged facts fit within any cognizable legal theory (Arnav Indus., Inc. Ret. Trust v Brown, Raysman, Millstein, Felder & Steiner, L.L.P., 96 NY2d 300, 303 [2001]; Morone v Morone, 50 NY2d 481, 484 [1980]). The pleading is to be liberally construed, accepting all the facts alleged therein to be true and according the allegations the benefit of every possible favorable inference (Leon v Martinez, 84 NY2d 83, 87-88 [1994]). Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss (EBC I, Inc. v Goldman, Sachs & Co., 5 NY3d 11, 19 [2005]). Any deficiencies in the complaint may be amplified by supplemental pleadings and other evidence (AG Capital Funding Partners, L.P. v State St. Bank and Trust Co., 5 NY3d 582, 591 [2005]; Rovello v Orofino Realty Co., 40 NY2d

633, 635 [1976]).

In order to maintain an action for legal malpractice, plaintiff must allege, and ultimately prove: (1) the attorney's failure to exercise that degree of care, skill and diligence commonly possessed by a member of the legal profession; (2) the attorney's negligence was a proximate cause of the loss sustained; and (3) actual damages (Prudential Ins. Co. of Am. v Dewey, Ballantine, Bushby, Palmer & Wood, 170 AD2d 108, 114 [1st Dept 1991]. Whether or not the attorney's conduct meets the standard is generally a question of fact for the jury (Werle v Rumsey, 278 NY 186, 186 [1938]).

Viewing the allegations in the light most favorable to the plaintiff (Leon, 84 NY2d at 87-88), the complaint states a cognizable cause of action against Herman Sloan for legal malpractice. The complaint alleges the failure of Herman Sloan to exercise reasonable skill and diligence commonly possessed by members of the legal profession in representing plaintiff in her divorce action by: (1) failing to retain experts to value marital assets; (2) adopting plaintiff's husband's valuation of marital assets without challenging or further investigating such values, which were far lower than they should have been; and (3) failing to include marital assets that should have been equitably distributed.

Further, plaintiff's affidavit expands on the alleged legal malpractice by detailing instances where the incorrect valuation caused her financial harm. Plaintiff states that her husband's extensive guitar collection, equity transactions, their home in Greenwich, CT, jewelry, and other personal property were seriously undervalued (Oxman Aff at 3-6). Plaintiff also alleges that some of her personal property was separate property, yet incorrectly considered marital property (id. at 4).

As to causation and damages, plaintiff alleges: "[a]s a result of [Herman Sloan's] failure to

perform the legal services required in a competent manner, and as a result of [Herman Sloan's] negligence and malpractice the plaintiff suffered monetary damages" (Thomas W. Hyland Affirm, Exh A, ¶ 11). Plaintiff indicates that "[b]ased upon what was done legally on [her] behalf by the defendants in their representation of [her] [she] received much less by way of [her] equitable distribution" (Oxman Aff at 6). She further contends: "In short, 'but for the defendants improper representation [she] would have received [her] true share of the martial [sic] estate, which would have been hundreds of thousands of dollars more than [she] did receive'" (*id.*). Additionally, plaintiff asserts in her affidavit that, at a minimum, she suffered damages in the amount of \$300,000 for the undervaluation of an Eric Clapton guitar and further discusses other monetary damages as well (Oxman Aff at 4-5).

At this stage, plaintiff has sufficiently set forth allegations to support a cause of action for legal malpractice and withstand a motion to dismiss. Thus, defendants' motion to dismiss is denied.

The court notes that, while the notice of motion, as well as the supporting affidavit and memorandum of law, recite and rely only on CPLR 3211 (a) (7) as grounds for dismissing plaintiff's complaint, defendants introduce, in their reply papers, CPLR 3211(a) (1) as another ground.¹ A movant's reply affirmation is not the proper vehicle in which to raise new grounds or new arguments in support of a pending motion (Schultz v 400 Coop. Corp., 292 AD2d 16, 21 [1st 2002]). As such, the court has not considered any new arguments based on CPLR 3211(a) (1) raised for the first time in the reply papers, to which plaintiff has not been afforded an

¹ Defendants' reply papers consist of a voluminous "reply affirmation in further support of motion to dismiss" with numerous exhibits and an additional memorandum of law.

opportunity to respond.

Accordingly, it is

ORDERED that defendants' motion to dismiss is denied; and it is further

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

Dated: January 9, 2009



Hon. Doris Ling-Cohan, J.S.C.

J:\Dismiss\Oxman.Herman - legal malpractice, law dept.wpd

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