

<b>Fielding v Kupferman</b>
2011 NY Slip Op 31983(U)
July 12, 2011
Supreme Court, New York County
Docket Number: 113572/07
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT **HON. EILEEN A. RAKOWER**

PART 15

Index Number : 113572/2007

FIELDING, SETH

vs  
KUPFERMAN, STEPHANIE

Sequence Number : 004

REARGUMENT/RECONSIDERATION

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

1

2

3

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH  
THE ACCOMPANYING MEMORANDUM DECISION.**

**FILED**

JUL 15 2011

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 7/12/11

  
**HON. EILEEN A. RAKOWER**

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 15

-----X  
SETH FIELDING,

Plaintiff,

- against -

STEPHANIE KUPFERMAN and KUPFERMAN &  
KUPFERMAN, LLC.,

Defendants.  
-----X

HON. EILEEN A. RAKOWER

INDEX 113572/07

**DECISION  
and ORDER**

Mot. Seq.004

**FILED**

**JUL 15 2011**

NEW YORK  
COUNTY CLERK'S OFFICE

This action, sounding in attorney malpractice, arises from a stipulation of settlement in a divorce action, wherein defendants represented plaintiff. Specifically, the alleged malpractice involves defendants advising plaintiff to sign the settlement agreement, which required that a 1.2 million dollar payment be made "within 30 days after the execution [of the stipulation of settlement] . . . in immediately available funds." Plaintiff claims that funds were not immediately available, as stated, and he failed to make payment as required. Plaintiff brought this action, and defendants moved to dismiss. The Appellate Division, reversing Justice Walter Tolub's dismissal, found that, accepting plaintiff's allegations as true, the stipulation may constitute evidence of defendants' negligence. Further, "a pleading need only state allegations from which damages attributable to the defendant's conduct may reasonably be inferred." They went on to say that "at this early stage of the proceedings, plaintiff is not obliged to show that he actually sustained damages, but only that damages attributable to defendants' conduct might be reasonably inferred."

Defendants later moved for summary judgment dismissing this action as against them. Defendants urged that any damages were pure speculation, and that plaintiff could not sustain his burden of showing, by proof in admissible form, that he suffered non speculative and ascertainable damages as a result of entering into

the stipulation of settlement which required that payment be made within 30 days in immediately available funds. This Court, after oral argument and by Decision and Order dated December 14, 2010, denied the motion. That decision is currently on appeal. Defendants now move to reargue. Defendants' motion to reargue is granted and, upon reargument, defendants' motion for summary judgment is granted.

Initially, this Court found that there was an issue of fact as to whether there was negligence on the part of the attorney, whether she understood there were family funds immediately available which were not mentioned in the agreement, or what the considerations were which the attorney and client explored and understood regarding the Keogh, tax consequences, etc.. The focus of the oral argument, however, was whether such negligence, if found, was the proximate cause of any damages to plaintiff. The Appellate Division found that at the pleading stage, the "complaint sufficiently asserts that 'but for' defendants' faulty advice that plaintiff sign the stipulation, he would not have incurred the tax liability that resulted from the withdrawal of funds from his retirement account." Indeed, through discovery and depositions, it was found that plaintiff was able to restore much of his prematurely withdrawn retirement funds, thereby avoiding the tax penalty as it regarded those funds. He was able to make full payment pursuant to the stipulation using funds advanced on his inheritance as well. Finally, he took out a mortgage on the marital residence, which he retained pursuant to the stipulation, and was able to use those funds.

Defendants argue that this Court did not address the failure of plaintiff to submit evidence, in admissible form, to establish that he suffered actual and ascertainable damages. Defendants correctly state that plaintiff must establish (1) conduct by an attorney that fell below the ordinary and reasonable skill and knowledge commonly possessed by a member of the profession, (2) that the attorney's conduct was the proximate cause of plaintiff's loss, and (3) actual damages.

The focus of this Court at oral argument was the provision calling for payment within 30 days in immediately available funds. Plaintiff claims he was damaged due to the illiquidity of his retirement account. While he anticipated draining the account, he did not expect that taxes would be withheld, and the amounts disbursed to him fell short of what he believed was immediately available. It was this unanticipated illiquidity which plaintiff claims caused him damages.

Again, the clause in the settlement agreement noted that funds were immediately available, and payment was to be made within 30 days.

The question is whether that particular clause was ill advised in light of, among other things, the tax consequences of prematurely withdrawing from plaintiff's retirement account. Indeed, the taxes being withheld as opposed to the full amount of the withdrawal being disbursed to plaintiff for his use in timely satisfying his obligation under the stipulation was the genesis of plaintiff's claimed damages.

Assuming a jury found that the attorney was negligent in counseling plaintiff to agree to such clause, despite her testimony that she knew family money was immediately available, the next question is whether such negligence was the proximate cause of plaintiff's loss. Here, the claimed loss is multifaceted. Initially, plaintiff urges that he suffered a tax consequence which he later struggled to avert by replenishing his withdrawal from his retirement account. Replenishing the account involved borrowing money from various sources, including from his anticipated inheritance (anticipated because the anticipated money served as a trust used to support his mother during her lifetime, and who was still alive). Plaintiff claims that the trust earned less interest due to his withdrawal, and thus, there are ascertainable damages. Further, he claims he took out a mortgage on the settlement property, involving fees and interest.

While defendants point out that tax consequences were consequences plaintiff would have been responsible to pay under any circumstances, plaintiff urges that he relied on defendant's counsel to minimize these taxes. In fact, plaintiff focuses on negotiations involving tax credits specifically allocated to him to show the importance taxes played in his agreeing to the settlement.

Finally, the question turns to whether plaintiff has shown "actual damages." Assuming a jury were to find that the attorney negligence was the proximate cause of sending plaintiff through the many hoops he claims he had to jump through in order to meet his responsibility of paying approximately 1.2 million dollars within 30 days, the question remains, did plaintiff show that he suffered actual damages. Plaintiff claims that even if he suffered nominal damages, a finding in his favor would require defendants to disgorge back to plaintiff all of the fees they charged in representing plaintiff in his divorce action.

A cause of action for legal malpractice does not afford recovery for damages other than pecuniary loss, which itself is limited to the loss sustained as a direct result of the wrong. *Wolkstein v. Morgenstern*, 275 AD2d 635, 637 (1<sup>st</sup> Dept, 2000). The damages must be "actual and ascertainable," resulting from the proximate cause of the attorney's negligence. *Zarin v. Reid & Priest*, 184 AD2d 385, 387-388 (1<sup>st</sup> Dept, 2004). Here, defendants call upon plaintiff to demonstrate the actual damages, fees paid, interest earned on the balance of the trust, taxes paid which would have been otherwise exempt, or some other damage that flowed from the language in the stipulation of settlement that called for payment of the 1.2 million dollars within 30 days.

Plaintiff, in opposition to the motion for summary judgment, was faced with the burden of demonstrating damages. In support of plaintiff's opposition, he provided his own sworn affidavit, communications between plaintiff and defendants, bank statements indicating wire transfers and withdrawals, communications between defendants and the attorneys representing plaintiff's now ex-wife, tax returns, a mortgage commitment letter, cancelled checks showing payments plaintiff made to defendants, an expert affirmation, and a letter from plaintiff's brother to plaintiff explaining funds given to him by his parents.

While plaintiff raises an issue of fact as to whether his attorney's counsel insufficiently apprised him of the ramifications of signing the agreement with the terms set forth, he fails to provide evidence demonstrating a loss as a result of signing such agreement. Plaintiff fails to demonstrate that an advance on his inheritance caused him actual damages. Plaintiff fails to show any fees paid in taking a mortgage on the property, which was taken after his technical default of the agreement and not for the purpose of satisfying the 30 day payment term. Finally, while plaintiff shows a tax liability on his 2007 tax return for the liquidation of his pension/annuity, he readily admits he replenished it to avoid such tax consequence. He does not provide later tax returns.

Section 10.1 of the settlement agreement, states:

[I]n the event that the Wife is successful in any subsequent action or proceeding instituted for the purpose of enforcing the Husband's obligations to her hereunder and is awarded counsel fees in connection with such subsequent action or proceeding, she shall also

receive the sum of \$25,000, representing a portion of the counsel fees expended by her in connection with the Action and the negotiation and execution of this stipulation. The parties expressly agree that the sum of \$25,000 (if and when paid to Wife by the Husband) will represent liquidated damages and compensation for sums already paid by her and not a penalty. The Husband waives any right to claim that such payment is a penalty.

The Wife did engage her attorney to address plaintiff's failure to timely meet his obligations under the agreement. While that attorney cautioned that Section 10.1 was applicable, the Wife did not pursue a claim or seek liquidated damages pursuant to the above.

Plaintiff claims actual damages connected to his mortgage application, which he shows with a mortgage commitment letter. Plaintiff fails to show closing documents or evidence of payments made in connection with his taking out a new mortgage. The mortgage application was not made in anticipation of making a timely payment of the 1.2 million dollars, as it was made months after his default. Indeed, the Agreement called for the Wife's cooperation with such application, which it was anticipated could be used to pay the remainder of the settlement (\$182,072). Section 6.1.2 provides that the "Husband may prepay any payments under the Husband's Promissory Note at his election, and in the event the Husband seeks to refinance the Bank Note for the purpose, *inter alia*, of accelerating payments to the Wife, the Wife shall cooperate therewith."

Plaintiff fails to show that he incurred tax penalties which he would not otherwise have incurred had he had more time to pay the 1.2 million dollars. Again, while he provides his 2007 tax return to demonstrate the tax liability on pensions and annuities at line 16b of his federal return, he concedes he timely replenished much of that account in order to alleviate the tax penalty. He fails to provide future tax returns reflecting such mitigation.

While plaintiff argues that he now buys his mother's groceries to make up for the interest she is not earning on the "inheritance" he invaded prematurely, he shows no account statements which might reflect the interest rate the balance of the trust account received after his withdrawal, from which one might deduce that income was lost. Further, he provides no proof of expenses he pays for his mother which he can causally relate to the requirement that he pay 1.2 million dollars

within 30 days in readily available funds as provided for in the settlement agreement.

Plaintiff seems to suggest that even nominal damages would entitle him to defendants having to disgorge back to him the fees he paid for their representation in the divorce proceedings, such disgorgement of all fees paid is not automatic. Plaintiff misstates the law as to whether a defendant who is found negligent *must* disgorge his/her fees. The case plaintiff cites relies on the Court of Appeals' decision in *Campagnola*, which deals with credits for unearned fees and not for legal fees already paid to the defendant-attorney *Campagnolia v. Mulholland*, 76 NY2d 38 (1990).

Finally, plaintiff urges he could have reached a better settlement but for defendant's negligence. Such a conclusion is speculative and no evidence was provided to demonstrate a different result would have been secured from which to quantify damages.

Based upon careful consideration of all of the submissions and review of the exhibits presented, the motion to reargue and to grant summary judgment to defendants is granted and the matter dismissed in its entirety.

Wherefore, it is hereby

ORDERED that the motion to reargue is granted; and it is further

ORDERED that, upon reargument, defendants' motion for summary judgment is granted and the action is dismissed in its entirety; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of defendants.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: July 12, 2011

**FILED**

  
EILEEN A. RAKOWER, J.S.C.

JUL 15 2011