

Chiantella v Kroll

2011 NY Slip Op 32140(U)

July 19, 2011

Sup Ct, Nassau County

Docket Number: 019337/07

Judge: Jeffrey S. Brown

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

**P R E S E N T : HON. JEFFREY S. BROWN
JUSTICE**

	X TRIAL/IAS PART 21 INDEX # 019337/07 Motion Seq. 6 Motion Date 6.3.11 Submit Date 6.28.11
JOACHIM CHIANTELLA, Individually, and as CO-EXECUTOR OF THE ESTATE OF LUCY CHIANTELLA,	

Plaintiff,

-against-

MARTIN KROLL and KROLL, MOSS & KROLL, LLP.,

Defendants.

	X
--	----------

The following papers were read on this motion:	Papers Numbered
Notice of Motion, Affidavits (Affirmations), Exhibits Annexed.....	1
Answering Affidavit	2
Reply Affidavit.....	3

This motion by the plaintiff, Joachim Chiantella, Individually and as Co-Executor of the Estate of Lucy Chiantella for an order pursuant to CPLR 3025(b) granting him leave to amend his complaint is granted.

In this legal malpractice action, the plaintiff seeks to recover damages allegedly caused by the defendant attorneys' negligence and mishandling in representing him with respect to his mother's Trust and Estate.

The plaintiff's mother Lucy Chiantella created the Lucy Chiantella Revocable Trust on November 6, 2002. Bernard Vishnick and Lucy Chiantella were Co-Trustees and John Gavros was named Successor Co-Trustee in the event that Vishnick or Chiantella ceased to serve. Pursuant to the Trust, the plaintiff was to receive the monthly payments of principal and interest on mortgages and notes held by the Trust immediately upon the Trust's receipt thereof and the Trust's income was to be distributed to him at least annually. The Trust provided that if the plaintiff survived his mother, one-third of the Trust's assets would be paid to him at her death, one-half of the remaining Trust assets would be paid to him on the third anniversary of her death and the remainder of the Trust assets would be paid to him on the seventh anniversary of her death. In the event that the plaintiff died without issue before all of the assets were distributed, the Trust balance was to be paid to various religious entities. The plaintiff's mother also made a will which devised all of her residuary estate to the Trust. The plaintiff was the sole named legatee. The plaintiff and Vishnick were Co-Executors of the Estate.

The plaintiff's mother died on April 14, 2003.

Shortly thereafter, conflict regarding Vishnick's handling of the Estate developed. When faced with Vishnick's attempt to evict him from his lifelong home at his mother's Little Neck property, which had devolved to the Trust at her death, the plaintiff sought removal of Vishnick as Trustee and Co-Executor via prior counsel. When that attorney was discharged, the plaintiff retained the defendants via a retainer agreement dated May 14, 2004. The retainer agreement

provided that the defendants were retained to represent the plaintiff “in connection with the Estate of his mother and matters related thereto.” The plaintiff alleges that via the retainer agreement, he retained the defendants to represent him both as a beneficiary of the Trust and Estate and in his capacity of Co-Executor of the Estate. Ultimately, the plaintiff, represented by the defendant Martin Kroll of Kroll, Moss & Kroll, executed a Stipulation of Settlement on June 22, 2004 which provided that he was purchasing the Little Neck property which was owned by the Trust for \$475,000.00, towards which he was receiving a credit of \$101,300.36 as part of his initial Trust distribution; that the balance was to be paid to the Trust via a purchase money mortgage with six percent interest which balance including principal and interest was due on the seventh anniversary of his mother’s death; and, that the plaintiff would procure life insurance benefits of \$375,000.00 payable to the Trust. Via that Settlement, as part of his initial Trust distribution, the plaintiff also acquired his mother’s Rocky Point property which was valued at \$117,500.00 and had also devolved to the Trust at her death.

As Co-Executor of Chiantella’s Estate, Vishnick filed a petition for an order judicially settling his account on February 21, 2006, to which the plaintiff as Co-Executor filed objections via the defendant attorneys. Those objections included, *inter alia*, an objection to the legal fees paid to the firm of Capell & Vishnick. On June 26, 2006, Vishnick, as Co-Executor of Chiantella’s Estate, commenced a proceeding seeking Discovery of Property Withheld and Belonging to Chiantella. Via Order to Show Cause, Vishnick procured a Temporary Restraining Order staying the plaintiff, his wife, HSBC, Astoria Federal Savings Bank and North Fork Bank from transferring, withdrawing, conveying or in any way affecting funds, monies and property belonging to, held in trust for or emanating from Chiantella; from diverting or destroying any

records absent further order of the court; and, directing the plaintiff and his wife to appear for an inquiry pursuant to Surrogate's Court's Practice Act § 2103. In support of that application, Vishnick submitted four tax refund checks payable to the plaintiff as Executor which he had allegedly cashed personally. The plaintiff ultimately admitted directly receiving those funds which belonged to the Estate, although he claimed entitlement to them.

On August 8, 2006, the Surrogate ordered the plaintiff to file a final account of his acts as Co-Executor of his mother's Estate.

On September 11, 2006, plaintiff and Vishnick entered into a written stipulation. One was orally placed on the record by the Surrogate, as well. The plaintiff testified under oath that he was represented by an attorney (the defendant Kroll) with whose services he was satisfied; that he was entering into the settlement of his own free will; and, that he understood all of the Settlement terms and did not have any questions. Via the Settlement placed on the record, the plaintiff withdrew his outstanding objections to Vishnick's accounting with prejudice and discontinued his proceeding to remove Vishnick as Executor and Trustee, with prejudice. Vishnick withdrew his Discovery proceeding against plaintiff and his wife with prejudice based upon the plaintiff's admission of the receipt of tax refunds which had been due the Estate as well as plaintiff's agreement to hold Vishnick, Capell, Vishnick LLP, Martin Kroll and Kroll, Moss & Kross, LLP harmless from any action or proceedings that might emanate on account of his receipt of those refunds, as well as his proceeding to compel an accounting by him. The temporary restraining order on the plaintiff's finances was discontinued. As read into the record,

the plaintiff and Vishnick released each other from any claim of one against the other “arising out of their fiduciary services and obligations with respect to the . . . Estate.” This, however, was inconsistent with the written stipulation where that paragraph is crossed out, allegedly by the plaintiff. Finally, the Settlement provided that the plaintiff was entitled to copies of the Estate’s financial records, at his expense.

On October 30, 2006, a Decree Settling Vishnick’s Estate Account was entered by the Surrogate.

One year later, the plaintiff commenced a special proceeding pursuant to Article 77 seeking, *inter alia*, an accounting of the Trust and Estate by Vishnick as well as an action to recover from Vishnick for fraud. The plaintiff also commenced this action against the defendant law firm alleging that it was negligent in representing him with respect to the Trust and his mother’s Estate.

Via order dated February 27, 2009 this court denied the defendants’ motion to dismiss the Amended Complaint in this action, which is not markedly different from the one proposed now.

The special proceeding against Vishnick seeking an accounting by him was dismissed by the Supreme Court, Suffolk County, pursuant to CPLR 3211(a)(2) for lack of subject matter jurisdiction via order dated July 30, 2009. However, that holding was reversed by the Appellate Division by order dated May 3, 2011 on the grounds that CPLR 7701 conferred jurisdiction on the Supreme Court over plaintiff Chiantella’s claims. The petition was nevertheless dismissed as barred by the doctrine of *res judicata*. The court found that the proceeding had been

“commenced after the conclusion of the prior proceedings in the Surrogate’s Court, Queens County, involving the same parties and the same issues.” Chiantella v Vishnick, 84 AD3d 797 (2nd Dept. 2011).

The plaintiff presently seeks to amend his complaint based primarily upon the Appellate Division’s dismissal of his Article 77 proceeding. Essentially, he continues to allege that the defendants were negligent in counseling and permitting him to enter into the September 11, 2006 Settlement Agreement because it has precluded him from obtaining accountings and recovering from Vishnick for his mishandling of the Trust and Estate. He states that this specific claim was not advanced in detail sooner because he did not anticipate that his Article 77 proceeding against Vishnick would in fact be dismissed.

A party seeking leave to amend his/her complaint bears the burden of demonstrating that the proposed amendments are not palpably insufficient or patently devoid of merit. See, Zeleznik v MST Const., Inc., 50 AD3d 1024 (2nd Dept. 2008). “Although leave to amend should be freely given in the absence of prejudice or surprise to the opposing party (see CPLR 3025[b]), the motion should be denied where the proposed amendment is palpably insufficient or patently devoid of merit.” Ferrandino & Son, Inc. v Wheaton Builder, Inc., LLC, 82 AD3d 1035 (2nd Dept. 2011), citing Scotfield v DeGroot, 54 AD3d 1017, 1018 (2nd Dept. 2008); Lucido v Mancuso, 49 AD3d 220, 227 (2nd Dept. 2008). Legal malpractice may be predicated on an ill-advised settlement agreement. Steven L. Levitt & Associates, P.C. v Balkin, 54 AD3d 403 (2nd Dept. 2008); Fusco v Fauci, 299 AD2d 263 (1st Dept. 2002).

Via his first cause of action, the plaintiff has alleged malpractice and breach of contract based upon the defendants' failure to procure all of the benefits to which he was allegedly entitled under the Trust and Estate. Plaintiff challenges the defendants' failure to enforce the Trust and procure his mortgage income distributions upon their receipt, his annual distributions of Trust income and entire first and second Trust distributions. He also challenges the defendants' failure to interpose objections to Vishnick's Estate accounting and to procure an accounting of the Trust and to have him removed as Co-Trustee and Co-Executor. He also challenges the defendants' failure to properly defend him in the holdover proceeding and counseling him to enter into the June 22, 2006 Settlement whereby he agreed to purchase property to which he was already entitled pursuant to the Trust which caused him the loss of an immediate distribution to which he was also entitled pursuant to the Trust, and counseling him to renounce a portion of mortgage income to which he was also entitled pursuant to the Trust. This, plaintiff avers, was all done to generate counsel fees. The plaintiff now seeks to amend the first cause of action to include the defendants' failure to procure his final distribution under the Trust at the seventh anniversary of his mother's death and to obtain a satisfaction of the mortgage which was placed on the Little Neck property pursuant to a June 22, 2004 Settlement.

As and for his second cause of action, the plaintiff seeks to recover damages for, *inter alia*, the defendants' negligence in failing to properly advise him regarding his verses the Trust and Estate's obligations for taxes; to properly defend him against Vishnick's allegations that he stole money from the Trust, including the temporary restraining order; and, for counseling him to enter into September 11, 2006 Settlement and in part falsely representing his consent thereto, i.e., his release of Vishnick. The plaintiff seeks to amend his second cause of action to include as

damages the defendants' failure to challenge Vishnick's failure to make the third distribution at the seventh anniversary of his mother's death as required by the Trust; the defendants' withdrawal of the objections to Vishnick's Estate accounting with prejudice; and their failure to seek an accounting by Vishnick of the Trust.

As and for his third cause of action, the plaintiff seeks to hold defendants responsible for the oral release of Vishnick for any and all claims in the September 11, 2006 Settlement on the record.

As for his fourth cause of action, the plaintiff maintains that the defendants' agreement to \$150,000.00 in counsel fees for Vishnick was negligent.

As for his fifth cause of action, the plaintiff seeks to recover for the defendants' consenting to the withdrawal of objections to Vishnick's Estate accounting with prejudice. The plaintiff seeks to amend that cause of action to provide that as a result of that negligence, he has lost his right to an accounting and suffered the consequential damages.

As for his sixth cause of action, the plaintiff challenges the defendants' fees as excessive, in particular because the defendants were discharged for cause.

As and for his seventh cause of action, the plaintiff seeks to recover for an allegedly improper allocation from the defendants' escrow account.

The defendants' alleged negligence in failing to properly counsel the plaintiff with respect to the September 11, 2006 Settlement Agreement is not being advanced for the first time in the plaintiff's proposed Second Amended Complaint: Such allegations are the predicate of the third, fourth and fifth causes of action in the Amended Complaint, and, via order dated February 27, 2009, this court denied the defendants' motion to dismiss those causes of action predicated

upon the Statute of Limitations. This court found that whether the continuous representation doctrine applied could not be readily resolved because despite the defendants' assertion that their representation of the plaintiff was separate and distinct, there was no evidence of multiple retainers and "the issues of eviction, the estate and trust issues were inextricably interwoven." See, Shumsky v Einstein, 96 NY2d 164 (2001); Hasty Hills Stables, Inc. v Dorfman, Lynch, Knoebel & Conway, LLP, 52 AD3d 566 (2009). This court further held that language immunizing the attorneys from suit found in the 2004 Settlement Agreement did not insulate them from liability if that Agreement was the product of legal malpractice.

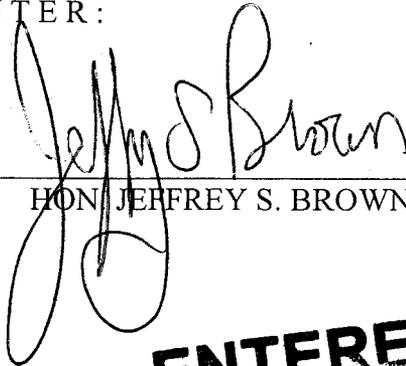
Those holdings continue to apply here. The minimal modifications sought to be made here are not palpably insufficient or lacking in merit. The proposed Second Amended Complaint does no more than identify with greater specificity the damages allegedly incurred by the plaintiff as a result of the defendants' alleged negligence, some of which have only been realized since the commencement of this action. That those claims emanate from an agreement between plaintiff and Vishnick and that the plaintiff is precluded from recovering from Vishnick hardly serves to insulate the defendant attorneys pursuant to the doctrine of *res judicata*. Furthermore, whether the plaintiff's inability to recover of Vishnick is owing in whole or part to his attorneys' mishandling of the special proceeding does not lay to rest the question of the defendants' negligence and require that leave to amend be denied.

The motion for leave to amend is **GRANTED**.

This constitutes the decision and order of this court. All applications not specifically addressed herein are denied.

Dated: July 19, 2011

ENTER:



HON. JEFFREY S. BROWN, J.S.C.

Attorney for Plaintiff
Jeffrey Levitt, Esq.
PO Box 306
Massapequa, NY 11758

Attorney for Defendants
L'Abbate Balkan Colavita & Contini, LLP
1001 Franklin Avenue
Garden City, NY 11530

ENTERED
JUL 26 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE