

Siracusa v Sager

2011 NY Slip Op 32244(U)

August 3, 2011

Supreme Court, Suffolk County

Docket Number: 06-35942

Judge: Peter Fox Cohalan

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.

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 24 - SUFFOLK COUNTY

PRESENT:

Hon. PETER FOX COHALAN
Justice of the Supreme Court

MOTION DATE 7-23-08 (# 003)
MOTION DATE 11-25-08 (#004 & #005)
ADJ. DATE 10-6-10
Mot. Seq. #003 - MG
 # 004 - MG
 # 005 - XMD; CASEDISP

-----X			
JACK SIRACUSA,	:	BALLON, STOLL & ITZLER, ESQS.	
	:	Attorney for Plaintiff	
Plaintiff,	:	729 Seventh Avenue, 17th Floor	
	:	New York, New York 10019	
	:		
- against -	:	GARCIA & STALLONE, ESQS.	
	:	Attorney for Defendants Horn	
	:	2076 Deer Park Avenue	
AUDREY SAGER, STEVEN GELLERMAN,	:	Deer Park, New York 11729	
SAGER & GELLERMAN, ESQ., JEFFREY	:		
HORN, ESQ., HORN & HORN, and HORN	:	RICHARD M. GORDON & ASSOCIATES, P.C.	
HORN & RAMME,	:	Attorney for Defendants Sager & Gellerman	
	:	780 New York Avenue, Suite 3	
Defendants.	:	Huntington, New York 11743	
	:		
-----X			

Upon the following papers numbered 1 to 65 read on these motions and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 14; 15 - 21; Notice of Cross Motion and supporting papers 22 - 52; Answering Affidavits and supporting papers 54 - 56; Replying Affidavits and supporting papers 57 - 58; 59 - 62; 63 - 65; Other plaintiff's memorandum of law - p. 53; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (#003) by the defendants Jeffrey Horn, Esq., Horn & Horn, Esq. and Horn, Horn & Ramme, Esq. seeking dismissal of the plaintiff's complaint, the motion (#004) by the defendants Audrey Sager, Esq., Steven Gellerman, Esq., and Sager & Gellerman, Esq., seeking dismissal of the plaintiff's complaint, and the cross-motion (#005) by the plaintiff Jack Siracusa for an order staying the defendants' motions are consolidated for the purposes of this determination; and it is

ORDERED that the motion by the defendants Jeffrey Horn, Esq., Horn & Horn, Esq., and Horn, Horn & Ramme, Esq., seeking dismissal of the plaintiff's complaint against them is granted; and it is

217

ORDERED that the motion by the defendants Audrey Sager, Esq., Steven Gellerman, Esq., and Sager & Gellerman, Esq. seeking dismissal of the plaintiff's complaint against them is granted; and it is further

ORDERED that the cross-motion by the plaintiff for an order staying or holding in abeyance the defendants' dismissal motions is denied, as moot.

The plaintiff commenced this action against the defendants Jeffrey Horn, Esq., Horn & Horn, Esq., and Horn, Horn & Ramme, Esq. (hereinafter collectively referred to as the Horn defendants), and Audrey Sager, Esq., Steven Gellerman, Esq., and Sager & Gellerman, Esq. (hereinafter collectively referred to as the Sager defendants) to recover damages he allegedly sustained as a result of their legal malpractice. The gravamen of the plaintiff's complaint is that Jeffrey Horn, Esq. and Audrey Sager, Esq. failed to confer with or prepare the plaintiff's certified public accountant, William Carney (hereinafter CPA), to testify on the plaintiff's behalf or to introduce documents from the CPA into evidence; that they advised the plaintiff to enter into a stipulation to modify his custodial arrangement from sole custody to joint custody; and that they failed to make an application to disqualify the plaintiff's former wife's attorney during their matrimonial action.

In 1998, the plaintiff retained the Sager defendants to represent him in an action seeking sole custody of his infant daughter. Following the filing of a petition for sole custody, the plaintiff's wife commenced a separate action for a judgment of divorce. On March 12, 1999, they entered into a stipulation resolving the issues of custody and visitation and, on June 16, 1999, a judgment of divorce was granted. Under the March 12, 1999 stipulation, the plaintiff was designated as the non-custodial parent for child support purposes and the plaintiff's former wife was designated as the primary custodian. On December 8, 2000, the parties entered into a stipulation modifying the March 12, 1999 stipulation of custody. Pursuant to the new custody stipulation, the parents were given joint custody of the infant child, with the plaintiff designated as the primary custodial parent and his former wife designated as the secondary custodial parent. However, the issue of child support was left unresolved and a hearing on the issue of child support was scheduled.

On January 23, 2001, my distinguished colleague Mr. Justice Robert Lifson, in an order, determined that the plaintiff was required to make weekly child support payments in the amount of \$125.00, to be held in escrow by his attorney. However, the plaintiff failed to make such payments. On February 11, 2004, the plaintiff retained the Horn defendants to represent him in the post judgment hearing on the issue of child support because his former counsel, Audrey Sager, Esq. was unable to do so. On February 25, 2005, after a post-judgment hearing, my distinguished colleague Mr. Justice James F. X. Doyle determined that the plaintiff was required to pay \$257.00 per week as child support. His order also stated that the current order of \$257.00 per week for child support was retroactive, beginning July 16, 1999, and the plaintiff was held to have accrued arrears in the amount of \$75,815.00. In addition, the plaintiff was ordered to pay the remainder of his former wife's legal expenses and her expert fees. In 2006, the plaintiff commenced the instant action against the Horn and Sager defendants seeking damages for legal malpractice.

The Horn defendants now seek dismissal of the plaintiff's complaint because it fails to state a cause of action, and that, based upon his documentary evidence and affidavits, the plaintiff is unable to demonstrate that "but for" the Horn defendants' purported negligence he would have prevailed in the underlying post-judgment support hearing. The Horn defendants also assert that the complaint against Horn, Horn & Ramme, Esq. must be dismissed, because the firm was dissolved in 1989. The Horn defendants further assert that Jeffery Horn, Esq. reasonably exercised his discretion in deciding not to call the plaintiff's CPA as a witness, that the Justice presiding during the matrimonial action found the plaintiff was not a credible witness, and that the plaintiff failed to disclose requested financial records.

The Sager defendants also move for summary judgment arguing the plaintiff is unable to establish that he suffered damages when advised to enter into a joint custody stipulation. In addition, the Sager defendants assert that because they did not represent the plaintiff in connection with the child support hearing, they were not in a position to determine what evidence was introduced at trial. The Sager defendants further assert that the plaintiff never requested to have his former wife's counsel disqualified during the time they represented him, and that there was no basis for seeking such relief.

The plaintiff submits a cross-motion for an order staying or holding in abeyance the Horn and Sager defendants' motions to dismiss because he should be allowed an opportunity to conduct discovery.

On a motion to dismiss for failure to state a cause of action, initially the sole criterion is whether the pleading states such a cause of action. If from the four corners of a complaint factual allegations are discerned which taken together manifest any cause of action cognizable at law, a motion to dismiss will fail (see **511 W. 232nd Owners Corp. v Jennifer Realty Co.**, 98 NY2d 144, 746 NYS2d 131 [2002]; **Polonetsky v Better Homes Depot**, 97 NY2d 46, 735 NYS2d 479 [2001]; **Foley v D'Agostino**, 21 AD2d 60, 248 NYS2d 121 [1st Dept 1964]). However, in assessing a motion to dismiss a cause of action pursuant to CPLR §3211 (a)(7) where evidentiary material is adduced in support of the motion, and the Court has not converted it into a motion for summary judgment, the criterion becomes whether the proponent of the pleading has a cause of action, not whether the proponent has stated one (see **Guggenheimer v Ginzburg**, 43 NY2d 268, 275, 401 NYS2d 182 [1977]; **Bodden v Kean**, __ AD3d __, 2011 NY Slip Op 05794 [2d Dept 2011]; **Peter F. Gaito Architecture, LLC v Simone Dev. Corp.**, 46 AD3d 530, 846 NYS2d 368 [2d Dept 2007]). If the documentary proof disproves an essential allegation of the complaint, dismissal is warranted, even if the allegations, standing alone, could withstand a motion to dismiss for failure to state a cause of action (see **Lawrence v Miller**, 11 NY3d 588, 873 NYS2d 517 [2008]; **McGuire v Sterling Doubleday Enters., LP**, 19 AD3d 660, 661, 799 NYS2d 65 [2d Dept 2005]). Further, pursuant to CPLR §3211 (a)(1), dismissal is warranted where documentary evidence conclusively establishes a defense as a matter of law (see **Beal Sav Bank v Sommer**, 8 NY3d 318, 834 NYS2d 44 [2007]; **Goshen v Mutual Life Ins. Co. of N.Y.**, 98 NY2d 314, 746 NYS2d 758 [2002]; **Capogrosso v Landsman**, 83 AD3d 638, 919 NYS2d 899 [2d Dept 2011]; **Turner v Irving Finkelstein & Meiorowitz, LLP**, 61 AD3d 849, 879 NYS2d 145 [2d Dept 2009]).

To establish a prima facie case of legal malpractice, a plaintiff must prove that the attorney failed to exercise that degree of care, skill and diligence commonly possessed and exercised by members of the legal community, that the attorney's negligence was a proximate cause of the loss sustained by the client, and that the client incurred damages as a direct result of the attorney's actions (**Attonito v La Mirage of Southampton**, 276 AD2d 454, 454, 713 NYS2d 883 [2d Dept 2000]; see **McCoy v Freinman**, 99 NY2d 295, 755 NYS2d 693 [2002]; **Edwards v Haas, Greenstein, Samson, Cohen & Gerstein, P.C.**, 17 AD3d 517, 793 NYS2d 167 [2d Dept 2005]; **Allen v Potruch**, 282 AD2d 484, 723 NYS2d 101 [2d Dept 2001]). What constitutes ordinary and reasonable skill and knowledge is to be measured at the time of the representation and if the rules are clearly defined at the time of the representation, an attorney's disregard of them is inexcusable (see **Darby & Darby v VSI Intl.**, 95 NY2d 308, 716 NYS2d 378 [2000]; **Rosen v Paley**, 65 NY2d 736, 492 NYS2d 13 [1985]; **Bernstein v Oppenheim & Co.**, 160 AD2d 428, 544 NYS2d 487 [1st Dept 1990]). Additionally, a plaintiff is required to prove that but for the attorney's negligence, the plaintiff would have prevailed on his or her underlying cause of action (see **Rudolph v Shayne, Dachs, Stanisci, Corker & Sauer**, 8 NY3d 438, 835 NYS2d 534 [2007]; **Williams v Kublick**, 302 AD2d 961, 754 NYS2d 804 [4th Dept 2003]; **Carpenter v Weichert**, 51 AD2d 817, 379 NYS2d 191 [3d Dept 1976]). Therefore, a plaintiff is required to prove a "case within a case," which is a distinctive feature of legal malpractice actions arising from an attorney's alleged negligence in preparing or conducting the underlying lawsuit (**McKenna v Forsyth & Forsyth**, 280 AD2d 79, 82, 720 NYS2d 654 [4th Dept 2001]; see **Walker v Glotzer**, 79 AD3d 737, 913 NYS2d 290 [2d Dept 2010]; **Barnett v Schwartz**, 47 AD3d 197, 848 NYS2d 663 [2d Dept 2007]). Generally, an attorney may be held liable for ignorance of the rules of practice, failure to comply with conditions precedent, or neglect to prosecute or defend an action (see **Bernstein v Oppenheim & Co.**, *supra*; **Grago v Robertson**, 49 AD2d 645, 370 NYS2d 255 [3d Dept 1975]). However, an attorney is not to be held to the rule of infallibility and is not liable for an honest mistake of judgment, especially where the proper course of action is subject to reasonable doubt (see **Grago v Robertson**, *supra*).

Here, the Horn and Sager defendants have established a prima facie case that the plaintiff is unable to show they failed to exercise the degree of skill and care commonly possessed by members of the legal community or that they were the proximate cause of the plaintiff's failure to prevail in the underlying matrimonial proceedings (see **Rupert v Gates & Adams, P.C.**, 83 AD3d 1393, 919 NYS2d 706 [4th Dept 2011]; **Dupree v Voorhees**, 68 AD3d 810, 891 NYS2d 422 [2d Dept 2009], *lv denied* 15 NY3d 705, 908 NYS2d 158 [2010]; **Pignataro v Walsh**, 38 AD3d 1320, 834 NYS2d 917 [4th Dept 2007]; **Schwartz v Olshan Grundman Frome & Rosenzweig**, 302 AD2d 193, 753 NYS2d 482 [1st Dept 2003]). The evidence shows that the plaintiff signed a retainer agreement with Jeffery Horn, Esq. on February 11, 2004 and that based upon the retainer agreement, the Horn defendants would not be responsible for the plaintiff's decision to enter into a stipulation modifying his child custody arrangements with his former wife or any claimed malpractice associated therewith. As to the Sager defendants, the evidence demonstrates that the plaintiff was advised of the consequences of signing the December 8, 2000 stipulation, and that Audrey Sager, Esq. did not represent the plaintiff during his child support hearing and, therefore, did not have the authority to decide who would be called as a witness or other matters of the trial strategy. In

addition, the Sager defendants have demonstrated that the plaintiff's rights were protected by subsequent counsel and, therefore, they cannot be considered the proximate cause of any damages allegedly suffered by the plaintiff (see *Katz v Herzfeld & Rubin, P.C.*, 48 AD3d 640, 853 NYS2d 104 [2d Dept 2008]; *Marshel v Hochberg*, 37 AD3d 559, 831 NYS2d 199 [2d Dept 2007]; *Perks v Lauto & Garabedian*, 306 AD2d 261, 760 NYS2d 231 [2d Dept 2003]). Further, as to the individual defendants, the evidence submitted demonstrates that each defendant pursued a reasonable strategy during the representation of the plaintiff in the underlying child support hearing and that the determination as to whether to call the CPA as a witness was within the purview of each attorney in devising his or her trial strategy (see *Healy v Finz & Finz, P.C.*, 82 AD3d 704, 918 NYS2d 500 [2d Dept 2011]; *Rodriguez v Lipsig, Shapey, Manus & Moverman, P.C.*, 81 AD3d 551, 917 NYS2d 563 [1st Dept 2011]; *Noone v Stieglitz*, 59 AD3d 505, 873 NYS2d 661 [2d Dept 2009]). "Attorneys are free to select among reasonable courses of action in [defending] a client's case without thereby exposing themselves to liability for malpractice" (*locovello v Weingrad v Weingrad, LLP*, 4 AD3d 208, 208, 772 NYS2d 53 [1st Dept 2004]; see *Dimond v Salvan*, 78 AD3d 407, 909 NYS2d 725 [1st Dept 2010]; *Palazzolo v Herrick, Feinstein, LLP*, 298 AD2d 372, 751 NYS2d 401 [2d Dept 2002]).

In opposition, the plaintiff has failed to demonstrate that the Horn and Sager defendants committed malpractice by allegedly not calling the plaintiff's CPA as a witness, by advising him to enter into a modification of his March 12, 1999 child custody stipulation, or by failing to move to disqualify his former wife's counsel (see generally *Waggoner v Caruso*, 14 NY3d 874, 903 NYS2d 333 [2010]; *Davis v Klein*, 88 NY2d 1008, 648 NYS2d 871 [1996]). In any event, the plaintiff has failed to present any proof that such alleged failures were the proximate cause of any damages sustained by the plaintiff (see *Leder v Speigel*, 9 NY3d 836, 840 NYS2d 888 [2007]; *Manna Fuel Oil Corp v Ades*, 14 AD3d 666, 789 NYS2d 288 [2d Dept 2005]). The trial Court conducted a thorough hearing on the child support issue and noted that the testimony of the plaintiff was "evasive, contrived, inconsistent, and designed to obfuscate the financial issues before the court," and that the plaintiff's explanations for his failure to produce tax returns, bank statements and checks was best described as "blase, indifferent and unconcerned." The trial Court also noted in its determination that the plaintiff's lifestyle and living accommodations bordered on lavish. Moreover, the plaintiff's claim of damages remains speculative and unascertainable (see *Parola, Gross & Marino, P.C. v Susskind*, 43 AD3d 1020, 843 NYS2d 104 [2d Dept 2007]; *Dweck Law Firm v Mann*, 283 AD2d 292, 727 NYS2d 58 [1st Dept 2001], *Oot v Arno*, 275 AD2d 1023, 713 NYS2d 382 [4th Dept 2000]).

Additionally, the CPA's affidavit is without probative value since he states that he does not have personal knowledge, and that his knowledge is based upon "what the plaintiff told him and the documentation that he received from the plaintiff." Despite its lack of probative value, even if the Court were to consider this affidavit, the CPA fails to explain how the application of the "Gross Profits Tests" by the plaintiff's former wife's expert, which found that the plaintiff's company was grossly understating its income, was an incorrect assessment. The CPA's affidavit that he met with Audrey Sager, Esq. and Jeffrey Horn, Esq. to discuss the plaintiff's business belies the plaintiff's argument that Audrey Sager, Esq. and Jeffrey Horn,

Siracusa v Sager
 Index No. 06-35942
 Page No. 6

Esq. failed to “do what was necessary to counter and destroy the Alice-in-Wonderland fairy tales [of] Mr. David Marcus,” his former wife’s expert. Instead, the plaintiff’s complaint seems to allege dissatisfaction with the strategic choices made by his counsel and, as noted above, such claims do not support a malpractice claim (see *Melnitzky v Nathanson*, 13 AD3d 131, 785 NYS2d 688 [1st Dept 2004]; *Bernstein v Oppenheim & Co.*, *supra*). As a result, the plaintiff’s claims are conclusory, speculative and contradicted by the documentary evidence submitted on the motions to dismiss.

Finally, the plaintiff has failed to show that either the Horn defendants or the Sager defendants committed legal malpractice by failing to seek disqualification of his former wife’s counsel. A party seeking to have another party’s counsel disqualified bears a heavy burden of proving that disqualification is warranted (see *S & S Hotel Ventures Ltd. Partnership v 777 S. H. Corp.*, 69 NY2d 437, 515 NYS2d 735 [1987]; *Olmos v Town of Fishkill*, 258 AD2d 447, 684 NYS2d 611 [2d Dept 1999]). Moreover, disqualification of counsel during litigation implicates not only the ethics of the legal profession, but also the parties’ substantive rights, and requires that such assertions be carefully scrutinized (see *Unger v Unger*, 15 AD3d 389, 790 NYS2d 176 [2d Dept 2005]). The plaintiff’s assertions that his former wife’s counsel obtained corporate records by entering the office of counsel for the plaintiff’s business and searching the business records therein amounts to nothing more than speculation and supposition (see *Lipschitz v Stein*, 65 AD3d 573, 884 NYS2d 442 [2d Dept 2009]; *Gulino v Gulino*, 35 AD3d 812, 826 NYS2d 903 [2d Dept 2006]). Accordingly, the Horn and Sager defendants’ motions for an order dismissing the complaint are granted. Having granted these motions, the plaintiff’s cross-motion is denied, as moot.

Dated: AUG 03 2011



 J.S.C.

 X FINAL DISPOSITION NON-FINAL DISPOSITION