

**Ashmore v Lewis**

2012 NY Slip Op 30189(U)

January 23, 2012

Supreme Court, New York County

Docket Number: 108248/11

Judge: Alice Schlesinger

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SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

PRESENT: ALICE SCHLESINGER  
Justice

PART 1A PART 16

Index Number : 108248/2011  
ASHMORE, BENJAMIN J.  
vs.  
LEWIS, WILMA COHEN  
SEQUENCE NUMBER : 001  
DISMISS

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

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_

Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_

Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_

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

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

FILED

JAN 27 2012

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: JAN 23 2012  
January 23, 2012

Alice Schlesinger, J.S.C.  
ALICE SCHLESINGER

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
  - 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
  - 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

**FILED**

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

JAN 27 2012

NEW YORK  
COUNTY CLERK'S OFFICE

-----X  
BENJAMIN J. ASHMORE, SR., individually and as  
father of FAITH ASHMORE, BENJAMIN ASHMORE  
and LUCIENNE ASHMORE, minor children,

Index No. 108248/11  
Motion Seq. No. 001

Plaintiffs,

-against-

DR. WILMA COHEN LEWIS,

Defendant.

-----X  
SCHLESINGER, J.:

Plaintiff Benjamin Ashmore, Sr. commenced this action representing himself and his three minor children, claiming that defendant Wilma Cohen Lewis, Ph.D., committed professional malpractice in connection with her service as a neutral forensic evaluator in the Ashmore's divorce action. Defendant has moved to dismiss the action pursuant to CPLR §3211(a)(1) based on a defense founded upon documentary evidence. Specifically, Dr. Cohen Lewis asserts that she is entitled to immunity from suit because she was appointed by Justice Eric I. Prus in the divorce action and acted pursuant to his written orders. Mr. Ashmore opposes, contending that Dr. Cohen Lewis is not entitled to immunity because she acted outside the scope of her authority.

Background Facts

The plaintiff's former wife Kelly Ashmore commenced the underlying divorce action *Ashmore v Ashmore*, Index No. 37380/07, by filing a summons and complaint in the Kings County Supreme Court on or about October 19, 2007 (Exh A).<sup>1</sup> By order dated October 30, 2007, Justice Prus appointed Dr. Cohen Lewis to serve as a forensic evaluator (Exh C). The credentials of Dr. Cohen Lewis include a Ph.D. in Counseling

<sup>1</sup> All referenced exhibits are appended to defendant's Motion to Dismiss, unless otherwise noted.

Psychology from the University of Pennsylvania in 1974, as well as two Certificates from the Postgraduate Center for Mental Health; the first was received in Psychoanalysis and Psychoanalytic Psychotherapy in 1974, and the second was received in Supervision of the Therapeutic Process in 1985.

Justice Prus's order of appointment was broad in scope and authority, directing Dr. Cohen Lewis to "conduct a complete forensic evaluation of the parties and the children in this matter, including but not limited to evaluations of each parent, the children, and each parent with the children, in such environments and circumstances as Dr. Cohen Lewis finds appropriate, as well as interviews with any extended family members or personnel affiliated with either party's household(s) with whom the evaluator wishes to speak."

The order further directed that Dr. Cohen Lewis focus specifically on the following issues: "The overall functioning of the parties, including assessments of any psychological difficulties of either parent which might impact on custody and/or visitation arrangements." Justice Prus also authorized Dr. Cohen Lewis to engage the services of a psychologist, with any fees to be shared equally by the parties, and to consult with any treating physician or therapist of either of the parties or their children. He directed that a report be prepared within ninety days "as to the evaluator's findings, including a recommendation as to the residential and address arrangements that best suit the children's emotional, developmental and psychological needs, as well as a recommendation regarding the custody and each parent's ability to make appropriate decisions for the children, and addressing any other issues to which the evaluator believes it appropriate to alert the Court."

With regard to the evaluator's fees, the Court directed that Mr. Ashmore pay 100% of the fees, including an initial consultation fee of \$3000 at an hourly rate of \$200, subject to reallocation at trial. The judge directed that Mr. Ashmore promptly arrange for the payment of the retainer, and he authorized Dr. Cohen Lewis to have her fees replenished upon notice.

Despite various fee disputes that caused delays in her work, and after spending nearly 100 hours interviewing the parties and children and the children's teachers and pediatricians, Dr. Cohen Lewis issued her 106-page report to Justice Prus on July 19, 2008 (Exh D). In the report, she recommended that the mother be awarded custody of the three children – Faith, age 10, Benjamin, Jr., age 9, and Lucienne, age 2. The basis for this recommendation was her finding that: "The mother is clearly the more competent parent in meeting the developmental needs of the children." On August 12, 2008, Dr. Cohen Lewis issued a supplemental report, which included documents submitted for review by each party, professional literature references, and a photograph of the Ashmore family's "religious compound" in Michigan" (Exh E).

About one year later, on July 15, 2009, Justice Prus issued another order directing Dr. Cohen Lewis to prepare an updated report (Exh F). The order was similar to the initial one with two significant exceptions: it directed Dr. Cohen Lewis to address the mother's application for supervised visitation by Mr. Ashmore, and it directed that the fees be split evenly by the parties.

On October 26, 2009, Dr. Cohen Lewis submitted an updated report about 56 pages in length pursuant to the court's order. There she recommended that "the emotional, developmental, and psychological needs of Faith, age 12, Benny, age 10,

and Luci, nearly 4, would best be served by the Court granting their sole residential and legal custody to their mother with permission to relocate to Michigan and supervised visitation and monitored phone calls for their father" (Exh G, p 55).

A trial was held in March of 2010. Dr. Cohen Lewis testified at that time consistent with her reports, and Mr. Ashmore cross-examined her on his own behalf without the assistance of counsel. On May 15, 2011, Justice Prus issued a lengthy decision and order, which was submitted to this Court for *in camera* review. There he confirmed that he had appointed Dr. Cohen Lewis to conduct various investigations and prepare reports in connection with the matter. The judge then adopted the recommendation of Dr. Cohen Lewis in various significant respects and held as follows in his decision (Exh J, p 74, quoted in defendant's papers):

It is indisputable that both parties love and care for their three children very much. However, in the instant matter, the [mother] has demonstrated by a preponderance of the evidence that because of the [father's] conduct, the terms of the custody arrangement may be modified as requested in [the mother's] application. The record contains a valid and substantial basis for this Court to permit the [mother] to relocate to the state of Michigan.

Mr. Ashmore commenced this action a few months later. In addition to money damages, he requests an order suspending the New York State Psychologist License held by Dr. Cohen Lewis and that she be permanently barred from serving as a Forensic Evaluator or expert in any custody proceeding in New York State (Exh A). Defendant made this motion to dismiss before answering.

#### Discussion

As defendant correctly argues, the cases are legion that hold that a court-appointed forensic expert, such as Dr. Cohen Lewis here, is entitled to judicial immunity

from suit in connection with the work performed pursuant to court order. For example, in *Bridget M. V Billick*, 36 AD3d 489, 490 (1<sup>st</sup> Dep't 2007), a case directly on point, the appellate court affirmed the trial court's dismissal of an action against a psychiatrist appointed by the court as the neutral forensic evaluator in a Family Court custody proceeding, finding that the evaluator had "judicial immunity from suit for malpractice regarding the work he performed..." (citations omitted). Similarly, in *Braverman v Halpern*, 259 AD2d 306 (1<sup>st</sup> Dep't 1999), the court found that allegedly defamatory statements made by an expert witness in a judicial proceeding involving child custody and visitation were not actionable, as the plaintiff's mental state was pertinent to a determination of the issues in the case. *See also, Alvarez v Snyder*, 264 AD2d 27 (1<sup>st</sup> Dep't 2000), *lv denied* 95 NY2d 759, *cert denied sub nom Diaz v Snyder*, 531 US 1158 (2001); *Finkelstein v Bodek*, 131 AD2d 337 (1<sup>st</sup> Dep't 1987), *app denied* 70 NY2d 612 (statements made by a certified social worker cannot be the basis of suit, as the court-appointed expert enjoyed immunity when acting pursuant to court order).

The principle is not only firmly established in this judicial department, but it is well-recognized in the Second Department where the underlying divorce action was heard in this case. As recently as last year, the Appellate Division affirmed the trial court's dismissal of a malpractice suit against psychologists and social workers who had been appointed as neutral experts either in the plaintiff's divorce action or in the Family Court proceeding involving custody and visitation with the children. In support of their motion to dismiss, the defendants employed by Family Psychological Services, P. C., had submitted their orders of appointment and evidence that they had acted pursuant

to those orders. In affirming the dismissal of the negligence and malpractice claims, the court held:

Here, the evidentiary material submitted by the defendants on their respective motions established conclusively that judicial immunity precludes the plaintiff from recovering damages for negligence or malpractice against them ...

*Young v Campbell*, 87 AD3d 692, 693 (2<sup>nd</sup> Dept 2011), *lv denied* 2011 WL 6155561 (citations omitted); *see also, Hom v Reubins*, 268 AD2d 461 (2<sup>nd</sup> Dept' 2000), *app dismissed* 95 NY2d 886 (defendant has judicial immunity from suit regarding the work he performed as a court-appointed forensic psychiatric expert in connection with the plaintiff's child custody litigation); *Colombo v Schwartz*, 15 AD3d 522, 523 (2d Dep't 2005)(affirming dismissal based on immunity of lawsuit against court-appointed psychiatric expert who had served in connection with the plaintiff's spousal support litigation).

Public policy supports the protection afforded a court-appointed expert based on immunity from suit. Oftentimes a court needs to hear the opinions of experts to fully and fairly determine the issues raised in litigation. Judicial immunity protects judges in the performance of their judicial functions so as to allow them to exercise independent judgment without the threat of legal reprisal, which is "critical to our judicial system." *Mosher-Simons v County of Allegany*, 99 NY2d 214, 219 (2002), *quoting Tarter v State of New York*, 68 NY2d 511, 518 (1986). "A logical extension of this premise is that 'other neutrally positioned [individuals], regardless of title, who are delegated judicial or quasi-judicial functions should also not be shackled with the fear of civil retribution for their acts.'" *Mosher-Simons*, 99 NY2d at 220, *quoting Tarter, supra*. Here, because Dr.

Cohen Lewis was a court-appointed neutral forensic evaluator serving a quasi-judicial function, she is entitled to immunity from suit.

Citing *Della Pietra v State of New York*, 71 NY2d 792 (1988), the plaintiff here correctly argues that judicial immunity does not protect a court-appointed expert who acts beyond the scope of her authority. Plaintiff claims that Dr. Cohen Lewis acted beyond the scope of her authority in essentially two respects: first, she allegedly did not strictly follow the directives of Justice Prus in connection with the collection of various fees from the parties and the timeliness of her reports, and secondly, she allegedly had contact with the attorney for Mrs. Ashmore in violation of the court's order.

Although plaintiff is correct that judicial immunity is not absolute, he has wholly failed to establish that Dr. Cohen Lewis acted beyond the scope of her authority or that she failed to comply with the orders of Justice Prus in any significant way. On the contrary, the record suggests that any extension of deadlines obtained by Dr. Cohen Lewis were obtained with the permission of the court. To the extent that Dr. Cohen Lewis may have accepted from Mrs. Ashmore's father fees that may have been payable at the time by Mr. Ashmore, or to the extent that she otherwise may not have rigidly adhered to the fee guidelines set by the court, Mr. Ashmore has failed to establish any bad faith or illegality or any prejudice to him. What is more, Justice Prus indicated in his initial order of appointment that any fee payments would be reallocated at trial.

In this regard, the *Della Pietra* case is readily distinguishable from the case at bar. The court there held that New York could not assert immunity on behalf of its Organized Task Force agents, in light of the finding that the agents had acted in the

clear absence of all jurisdiction and without a colorable claim of authority when they raided and searched certain businesses. Also readily distinguishable is the case of *Barnes v County of Nassau*, 108 AD2d 50 (2d Dep't 1985) cited by plaintiff, as it involves a claim of negligent supervision of children in the county's charge and has no discussion of the immunity available to a court-appointed forensic expert.

Equally unsubstantiated is Mr. Ashmore's claim that Dr. Cohen Lewis exceeded the scope of her authority by contacting the attorney for Mrs. Ashmore. In his initial order, Justice Prus gave Dr. Cohen Lewis broad investigatory powers. The record here shows that, at most, Dr. Cohen Lewis contacted counsel to obtain documents, and she provided to both parties copies of all the documents she had reviewed while preparing her report.

In sum, Dr. Cohen Lewis is entitled to immunity from a suit in connection with her service as a court-appointed forensic evaluator in the Ashmore's divorce action. Wholly unavailing is Mr. Ashmore's attempt to diminish the principle of immunity by seeking to distinguish the cases cited by defendant in her moving papers. Nor has he established a colorable claim that Dr. Cohen Lewis exceeded the scope of her authority. Simply put, Mr. Ashmore's claims here amount to nothing more than his dissatisfaction with the findings and opinions stated by Dr. Cohen Lewis and accepted by Justice Prus, which favored Mrs. Ashmore rather than him. Mr. Ashmore had the opportunity to challenge those findings and opinions in his divorce action before Justice Prus, and it appears from the decision of Justice Prus that he did. His claims do not form the basis for a malpractice action, nor for the revocation of defendant's professional license or a bar to her future service as a court-appointed expert.

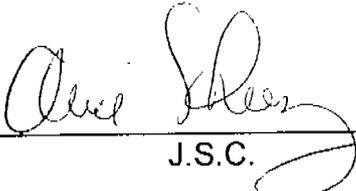
Accordingly, it is hereby

ORDERED that the motion by defendant to dismiss is granted and the complaint is dismissed without costs or disbursements; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: January 23, 2011

JAN 23 2012



J.S.C.

**ALICE SCHLESINGER**

**FILED**

JAN 27 2012

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