

Blumencranz v Botter
2012 NY Slip Op 32089(U)
July 27, 2012
Sup Ct, Nassau County
Docket Number: 15489/11
Judge: Joel K. Asarch
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU: I.A. PART 13

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LISA BLUMENCRANZ,

Plaintiff,

- against -

DECISION AND ORDER

Index No: 15489/11

ALLAN S. BOTTER, ESQ.,

Motion Sequence No: 002

Original Return Date: 04-16-12

Defendant.

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P R E S E N T :

HON. JOEL K. ASARCH,
Justice of the Supreme Court.

The following named papers numbered 1 to 5 were submitted on this Notice of Motion on April 23, 2012:

	<u>Papers numbered</u>
Notice of Motion and Affirmation	1-2
Memorandum of Law in Support	3
Affirmation in Opposition	4
Reply Memorandum of Law in Further Support	5

The motion by the defendant, Allan S. Botter, for an Order pursuant to CPLR 3211(a)(7) dismissing the Amended Verified Complaint, is decided as follows:

Plaintiff, Lisa Blumencranz, retained the services of defendant, Allan S. Botter, to represent her in a divorce proceeding. Blumencranz alleges that her former husband presented her with the names of two attorneys and advised her to choose one of them "if she wished the matter to proceed smoothly". He allegedly warned that if she retained an attorney of her own choosing, the choice "would result in greater difficulty" for her. Blumencranz avers that her former husband had "been in contact" with the attorney she chose, defendant Alan S. Botter, before she retained him. He had

reached “an understanding” with Botter that he would be “paid directly by her then-husband” for representing her.

In an Amended Complaint, Blumencranz avers that the fee arrangement represented a serious conflict of interest, that Botter failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession in a matrimonial action, and continually ceded her best interests on numerous critical issues to those of her then-husband. She avers that but for defendant’s negligence she would have prevailed in “receiving a significantly greater amount . . . for maintenance” and “a significantly greater amount due her under equitable distribution” (¶¶ 16 and 17 of Amended Verified Complaint). She seeks damages in the approximate sum of \$2,500,000.

Blumencranz also asserts a cause of action for breach of contract, contending that Botter failed to present bills for his services, failed to negotiate a fair and equitable child custody agreement and failed to properly and zealously represent her. She seeks damages in the approximate sum of \$750,000.

Finally, Blumencranz asserts causes of action for intentional and negligent infliction of emotional harm. She alleges that Botter “belittled and demeaned” her, and mocked her when she “begged” for changes to the child custody agreement. She alleges that the parties had joint custody but final decisions were with the husband, and that no set holiday schedule was included. The agreement also allowed the children “to decide when and if” they would speak to her. She alleges that her attorney told her that is how things were and to “deal with it.”

The cause of action for negligent infliction of emotional harm asserts the same allegations in support, asserting extreme outrageous and aggressive conduct. Plaintiff states that Botter owed

her a duty as her lawyer, which he breached, “causing Plaintiff to actually fear for both her physical and emotional safety and well-being.” (¶ 44 of Amended Verified Complaint).

The standard on a motion to dismiss under CPLR 3211(a)(7) “is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action”, and the court “must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Bokhour v. GTI Retail Holdings*, 94 AD3d 682 [2d Dept 2012]).

Plaintiff adequately states a cause of action for legal malpractice. “ ‘To establish a prima facie case of legal malpractice, the plaintiff must prove that (1) the attorney departed from the exercise of that degree of care, skill, and diligence commonly possessed and exercised by a member of the legal community, (2) the attorney's departure from the standard of care was the proximate cause of the loss sustained by the plaintiff, and (3) the plaintiff incurred damages as a direct result of the attorney's actions’ ” (*Caruso, Caruso & Branda, P.C. v. Hirsch*, 41 AD3d 407, 409 [2d Dept 2007], quoting *Edwards v Haas, Greenstein, Samson, Cohen & Gerstein, P.C.*, 17 AD3d 517, 519 [2d Dept 2005]). At the pleading stage, contrary to defendant's contention, plaintiff “need not establish actual damages, but is only required to set forth allegations from which damages attributable to the defendant's alleged malpractice might be reasonably inferred” (*Caruso, Caruso & Branda, P.C. v. Hirsch*, supra at p 411). Plaintiff alleges, *inter alia*, that, notwithstanding questions regarding accuracy, Botter failed to demand proof regarding her then-husband's separate property claims concerning a substantial portion of the down payment on the marital home, failed to demand proof for the value of fine art and antiques, and failed to obtain independent appraisals to determine the value of marital assets rather than relying on her then-husband's statement regarding

values. She avers that an expensive gun collection was not valued, expensive household furnishings were not valued and defendant failed to include increased values of the marital estate as detailed in a pre-nuptial agreement.

Plaintiff will have to prove the value of the items she now impliedly claims were undervalued at trial in order to succeed in showing malpractice; however, such evidence need not be presented on a motion to dismiss pleadings. Whether plaintiff can ultimately establish her allegations “is not part of the calculus” at the pleading stage (*Bokhour v. GTI Retail Holdings*, 94 AD3d 682, *supra*).

The breach of contract action is dismissed as duplicative of the malpractice claim. The claim arises from the same facts as the malpractice claim and does not allege distinct damages (*Daniels v Lebit*, 299 AD2d 310 [2d Dept 2002]).

Addressing the emotional injury causes of action, the tort of intentional infliction of emotional distress predicates liability upon the basis of “extreme and outrageous conduct which so transcends the bounds of decency as to be regarded as atrocious and intolerable in a civilized society” (*Freihofer v. Hearst Corp.*, 65 NY2d 135 [1985]). The requirements are “rigorous, and difficult to satisfy” (*Howell v New York Post Co.*, 81 NY2d 115, 122 [1993]), as even conduct which may be characterized as “unacceptable and socially repugnant” does not “rise to the level of atrocity” (*Shea v. Cornell University*, 192 AD2d 857 [3d Dept 1993]). The wrongful conduct must consist of more than “insults” or “indignities” and must be so “shocking and outrageous” as to “exceed all reasonable bounds of decency” (*Nestlerode v. Federal Ins. Co.*, 66 AD2d 504, 508 [4th Dept 1979], *app denied* 48 NY2d 604 [1979]).

An example of conduct which survived the difficult threshold for atrocious conduct may be found in *Bunker v Testa*, 234 AD2d 1004 [4th Dept 1996} There the complaint alleged, *inter alia*,

“yelling and gesturing obscenely at plaintiff [], following her home, refusing to leave the premises”, and significantly, “following her children . . . and telling her that he knew where the children went to school and when they got out of school” (*Id.*).

Here, the nature of plaintiff’s alleged complaints in the cause of action for the intentional infliction of emotional harm amount to insult, emotional distress and inadequate legal representation. The alleged conduct, while utterly failing in propriety and professionalism, is not so outrageous as to exceed all reasonable bounds of decency as a matter of law. Insofar as plaintiff includes alleged professional failures, “[d]amages for the intentional infliction of emotional distress are not recoverable in a legal malpractice action” (*Epifano v. Schwartz*, 279 AD2d 501, 503 [2d Dept 2001]).

With respect to the claim for negligent infliction of emotional distress, the cause of action principally alleges the same conduct as does the cause of action of intentional conduct, and adds a conclusory claim that plaintiff feared for her physical well-being. The facts alleged cannot support a claim as no harm to physical safety is encompassed by insult or legal malpractice. No physical threats of any sort are alleged. “ ‘While physical injury is not a necessary element of a cause of action to recover damages for negligent infliction of emotional distress, such a cause of action must generally be premised upon conduct that unreasonably endangers a plaintiff’s physical safety or causes the plaintiff to fear for his or her own safety’ ” (*Gaylord v. Fiorilla*, 28 AD3d 713, 713-714 [2d Dept 2006], quoting *Perry v Valley Cottage Animal Hosp.*, 261 AD2d 522, 522-523 [2d Dept 1999]). Accordingly, the Third and Fourth causes of action are dismissed.

Thus, after due deliberation, it is

ORDERED, that the motion is **granted in part and denied in part**. So much of the motion

as seeks dismissal of the causes of action for breach of contract, intentional infliction of emotional harm and negligent infliction of emotional harm is **granted** and the Second, Third and Fourth Causes of Action are dismissed. So much of the motion as seeks dismissal of the First Cause of Action for legal malpractice is **denied**; and it is further

ORDERED, that counsel for the parties shall appear in the DCM Part of this Court at 100 Supreme Court Drive, Mineola, New York 11501, on **September 12, 2012 at 9:30 a.m.** for a preliminary conference.

This constitutes the Decision and Order of the Court.

Dated: Mineola, New York
July 27, 2012

ENTER:



JOEL K. ASARCH, J.S.C.

Copies mailed to:

Daniel Frisa, Attorney at Law, P.C.
Attorneys for Plaintiff

Abrams Garfinkel Margolis Bergson, LLP
Attorneys for Defendant

ENTERED
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