Rooney v Manzo
2012 NY Slip Op 32966(U)
December 5, 2012
Sup Ct, Queens County
Docket Number: 5865/2012
Judge: Robert J. McDonald
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : **HON. ROBERT J. MCDONALD**
Justice

- x

ROBERT ROONEY, Pro Se,

Plaintiff,

- against -

PATRICIA MANZO, ESQ., a/k/a PATRICIA MANZO PROCHASKA,

Defendant.

- x

Index No.: 5865/2012

Motion Date: 09/27/12

Motion No.: 32

Motion Seq.: 3

The following papers numbered 1 to 16 were read on this motion by the plaintiff for an order pursuant to CPLR 2221(d)(e) granting plaintiff leave to renew and reargue the decision and order of this court dated June 12, 2012 on the ground of newly discovered evidence; and for an order pursuant to CPLR 4404(b) setting aside the order dated June 12, 2012 on the grounds that the court overlooked relevant principles of law; and for an order granting the plaintiff leave to serve an amended complaint and restore the matter to the calendar of this court:

	Papers Numbered
Notice of Motion-Affidavits-Memo of Law	1 - 6
Affirmation in Opposition-Affidavits	7 - 11
Reply affirmation-Memo of Law	12 - 16

The procedural background of this action was set forth in the prior decision of this court dated June 12, 2012 and entered on June 29, 2012. As stated in this court's prior decision:

"Plaintiff, Robert Rooney, commenced this action seeking monetary damages against his prior attorney Patricia Manzo, Esq., for breach of contract and legal malpractice. In his verified complaint, dated March 15, 2012, plaintiff states that he retained defendant on September 20, 2004, to represent him in a child visitation enforcement proceeding in Queens Supreme Court.

In his first cause of action, plaintiff sets forth his claim that defendant breached her agreement with him by refusing his request to petition the Court for custody of his children; by unilaterally withdrawing from his case; by attempting to coerce him into conceding to his ex-wife's demands; by failing to conduct adequate and appropriate discovery regarding his ex-wife's financial circumstances; by failing to provide him with copies of all documents regarding the case; by refusing his request for a second copy of a bill; by failing to make application to enforce his so-ordered visitation; by failing to apply for court intervention regarding his daughter Shannon's disabilities; by failing to file criminal charges against his ex-wife for custodial interference; by failing to petition the court to amend the child support provisions of a prior order; by failing to provide receipts to the Quadro matter; by improperly co-mingling funds with the Tryon Company; and by failing to petition the Court for his share of his ex-wife's IRA account. As a result of the alleged misfeasance by the defendant, plaintiff contends that he has been damaged in the amount of two million dollars and caused to sustain mental anguish and anxiety.

In his second cause of action, the plaintiff states that he paid defendant the sum of $8,000 as a retainer for rendering legal services and that defendant failed to render said services and failed to provide regular billing statements. As a result the plaintiff seeks a return of the retainer amount.

The third cause of action sounds in legal malpractice and alleges that the defendant failed to represent the plaintiff in a skillful and proper manner in accordance with professional standards by abandoning his case before trial, failing to ascertain the ex-wife's financial condition and failing to provide documents to the plaintiff so that he could make decisions affecting him and his minor children. Plaintiff seeks the sum of $250,000 under this cause of action."

In the prior motion defendant moved to dismiss the complaint pursuant to CPLR 3211(a)(1)(7) and 214(6) on the ground that the complaint was time-barred by the three year statute of limitations prescribed for causes of action for legal malpractice. Defendant claimed that although the complaint sets forth three causes of action, two for breach of contract and one for legal malpractice, that all the causes of action are duplicative and that all the alleged breaches arose from the defendant's alleged misrepresentation in failing to properly render legal services for the plaintiff.

By decision dated June 12, 2012, this Court dismissed the complaint in its entirety holding that although the theory of the first two causes of action were breach of contract, they were based upon allegations that Ms. Manzo breached her promises to competently represent Mr. Rooney and to provide legal services in connection with his matrimonial action. Therefore, this Court held that the causes of action for breach of contract essentially plead a legal malpractice claim that is barred by the applicable three-year statute of limitations under CPLR 214(6).

In addition, the Court held that although the plaintiff contends that he was defrauded by Ms. Manzo, the complaint did not contain a properly pleaded cause of action for fraud and, in any event, is duplicative of the legal malpractice cause of action (see Daniels v Turco, 84 AD3d 858 [2d Dept. 2011]).

In the instant motion, in addition to moving for leave to renew and reargue, plaintiff moves to amend the complaint to add a cause of action for fraud stating that he first learned from defendant's prior motion papers that defendant never intended to represent him with respect to his custody and visitation issues but only to assist him in the finalization of his uncontested divorce documents. He states that he expected that Ms. Manzo was retained to be his general divorce counsel and he expected Ms. Manzo to give him guidance in all matters relating to his divorce. He states that Ms. Manzo gave him her implied promise that she would address the problems relating to his visitation rights and related concerns for his two daughters. He states that he has sufficient factual allegations to plead a cause of action for fraud in that he was misled into believing that Ms. Manzo would address all aspects of his divorce and not just act to finalize his divorce papers. Thus, plaintiff moves for leave to amend the complaint to plead a cause of action for fraud.

With respect to the court's decision dismissing the causes of action for malpractice, the plaintiff argues that the cause of action for legal malpractice did not begin to accrue until August 25, 2011 when Justice Raffaele reduced his child support on the ground that his ex-wife had caused parental alienation. A copy of that decision has not been provided to the Court. He states that this finding confirmed his theory that Ms. Manzo was negligent in not proceeding against his ex-wife at that time for change of custody or modification of visitation. He states that in Florida a cause of action for malpractice does not accrue until a final determination of the action which he contends is August 25, 2011.

Plaintiff also contends that he has a valid cause of action for personal injuries due to the actions of Ms. Manzo and that the accrual period for personal injury claims does not begin to run until the injury is discovered. In this regard plaintiff states that his personal injuries, which include a cause of action for mental anguish were not manifested until July 2010.

In opposition, defendant argues, that all of the causes of action set forth by the plaintiff in his complaint as well as the purported cause of action for fraud sounded in legal malpractice and as such the complaint which was served five years after the representation terminated on December 21, 2006 was time barred pursuant to the three year statute of limitations prescribed by CPLR 214(6).

A motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination" (CPLR 2221 [e] [2]) and "shall contain reasonable justification for the failure to present such facts on the prior motion" (CPLR 2221 [e] [3]; see Barnett v Smith, 64 AD3d 669 [2d Dept. 2009]). Here, plaintiff does not offer any new facts which were not known at the time of the initial motion. Ms. Manzo's assertion that she was retained only for purposes of finalizing the plaintiff's divorce was addressed by the parties in the initial motion papers and considered by the court at that time.

In addition, it is well established that motions for reargument are addressed to the sound discretion of the court and may be granted upon a showing that the court overlooked or misapprehended the facts or the law or for some other reason mistakenly arrived at its determination (see McDonald v Strah, 44 AD3d 720 [2d Dept. 2007]; Everhart v County of Nassau, 65 AD3d 1277 [2d Dept. 2009]). CPLR 2221 provides that a motion for leave to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion" (CPLR 2221 [d][2]). A motion for leave to reargue is not designed to provide an unsuccessful party with successive opportunities to reassert or propound the same arguments previously advanced or to present arguments different from those already presented (see Veeraswamy Realty v Yenom Corp. 71 AD3d 875 [2d Dept. 2010]; Woodys Lumber Co., Inc. v Jay Ram Realty Corp., 30 AD3d 590 [2d Dept. 2006]; Williams v Board of Educ. of City School Dist. of New York City, 24 AD3d 458 [2d Dept. 2005]; Simorz v Mekryari, 16 AD3d 543, [2d Dept. 2005]). Here, this court finds that the moving papers fail to establish that the court overlooked, misapprehended either the facts or law or otherwise mistakenly arrived at its prior determination. As

stated previously, all of the plaintiff's causes of action in including the proposed cause of action for fraud all sound in legal malpractice. As the defendant's representation of the plaintiff ended on December 21, 2006, the complaint, which was served subsequent to the expiration of the three year statute of limitations for legal malpractice claims was time-barred.

Accordingly, for all of the above stated reasons, it is hereby,

ORDERED, that the plaintiff's motion pursuant to CPLR 2221 for leave to renew and reargue the defendant's motion to dismiss the complaint is granted, and upon reargument the decision of this court dated June 12, 2012 is adhered to in its entirety, and it is further,

ORDERED, that the branch of the plaintiff's motion for leave to amend the complaint to add a cause of action for fraud and to restore the action to the calendar of the court is denied.

Dated: December 5, 2012
Long Island City, N.Y.

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ROBERT J. MCDONALD, J.S.C.