

Steffan v Wilensky

2015 NY Slip Op 31194(U)

July 8, 2015

Supreme Court, New York County

Docket Number: 150020/11

Judge: Cynthia S. Kern

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

-----X
JOHN E. STEFFAN, as Executor of the ESTATE OF
ANNE MCLAUGHLIN DORIS,

Index No. 150020/11

Plaintiff,

-against-

DECISION/ORDER

MITCHELL E. WILENSKY,

Defendant.

-----X
HON. CYNTHIA KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Answering Affidavits and Cross Motion.....	2
Replying Affidavits.....	3
Exhibits.....	4

Plaintiff John E. Steffan, as Executor of the Estate of Anne McLaughlin Doris (the "Estate") commenced the instant action asserting a claim for legal malpractice against defendant Mitchell E. Wilensky ("Wilensky"), the Estate's former attorney. Plaintiff now moves for an Order pursuant to CPLR § 3212 granting it summary judgment on its claim for legal malpractice. Defendant Wilensky cross-moves for an Order pursuant to CPLR § 3212 for summary judgment dismissing the complaint. For the reasons set forth below, both plaintiff's motion and defendant's cross-motion are denied.

The relevant facts are as follows. Anne McLaughlin Doris (the "decedent") died on August 20, 1993. Thereafter, in December 1993, John M. Steffan was appointed executor of the

decedent's will and the Estate and he served in that capacity until his death in 2009. In 1994, in his capacity as executor of the Estate, John M. Steffan retained defendant Wilensky, an attorney, to represent and advise the Estate and Wilensky served as counsel for the Estate until May 7, 2009. On or about June 18, 2010, Letters of Administration were issued to John E. Steffan in New York County Surrogate's Court for the Estate.

At the time of her death, the decedent maintained a savings account at Chemical Bank with a date of death balance of \$97,986.00 (the "Chemical Account"). The Chemical Account was a joint account titled in the name of the decedent and Bridie McKiernan ("McKiernan"). Plaintiff maintains that the Chemical Account was in joint name as a matter of convenience, for payment of the decedent's medical and other bills, and that there was never an intent to make a gift to McKiernan. On or about June 9, 1994, Wilensky, on behalf of the Estate, wrote to Chemical Bank requesting that the Chemical Account, along with two other accounts held at Chemical Bank, be closed and the proceeds be disbursed to the Estate. Wilensky submitted documents required to close the Chemical Account, including, *inter alia*, a withdrawal form signed by McKiernan, with medallion signature guarantee. However, the funds from the Chemical Account were not remitted to the Estate.

In or around May 1999, JP Morgan Chase ("Chase"), successor-in-interest to Chemical Bank, generated a letter which was sent to the Internal Revenue Service for forwarding to "Anne M. Doris, deceased," which was forwarded to Wilensky, as counsel for the Estate. The letter advised that pursuant to New York banking regulations, the Chemical Account was deemed "inactive" and explained that the bank did "not want to remit the funds in [the account] to the Comptroller's Office, so please return the attached form to [Chase] by June 23, 1999."

Wilensky arranged for John M. Steffan to sign the required papers and then forwarded them to Chase on or about June 1, 1999, again requesting that the funds be disbursed to the Estate. However, the funds from the Chemical Account were not remitted to the Estate.

In or around June 2006, Wilensky filed a proceeding against Chase in Surrogate's Court, New York County, pursuant to Surrogate's Court Procedure Act ("SCPA") § 2103 (the "SCPA 2103 Proceeding") seeking delivery of the funds in the Chemical Account to the Estate. Chase moved to dismiss the petition as time-barred, which was granted on or about May 7, 2009. In dismissing the petition, the court held that the Estate's "cause of action arose no later than 1999, when the bank acknowledged the existence of the account in its letter inviting reactivation. Since the current proceeding was not commenced until 2006, it is barred by the six-year statute of limitations."

In or around 2011, plaintiff commenced the instant action against Wilensky alleging a cause of action for legal malpractice, specifically alleging that as counsel for the Estate, Wilensky owed it a duty to render legal services in a competent and professional manner and to act with ordinary and reasonable skill, care and diligence and that Wilensky instead acted negligently under the circumstances by failing to, *inter alia*, timely file the SCPA 2103 Proceeding. Plaintiff now moves for an Order pursuant to CPLR § 3212 granting it summary judgment on its complaint.

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary

proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim.” *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). However, “mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient” to defeat summary judgment. *Id.* A *prima facie* case for legal malpractice requires a plaintiff to establish “that the defendant attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession which results in actual damages to a plaintiff, and that the plaintiff would have succeeded on the merits of the underlying action ‘but for’ the attorney’s negligence.” *Leder v. Spiegel*, 9 N.Y.3d 836 (2007) (quoting *Am-Base Corp. V. Davis Polk & Wardwell*, 8 N.Y.3d 428, 434 (2007)).

In the instant action, plaintiff has failed to establish its *prima facie* right to summary judgment on its claim for legal malpractice as it has failed to demonstrate that it would have succeeded on the merits of the SCPA 2103 Proceeding “but for” Wilensky’s negligence in untimely commencing the proceeding. Based on the evidence before this court, even if the SCPA 2103 Proceeding had been timely commenced, plaintiff has failed to establish that it would have been successful as a matter of law as there exist issues of fact as to whether plaintiff would have been entitled to recover the funds in the Chemical Account pursuant to the Banking Law. Pursuant to Banking Law § 675,

When a deposit of cash...has been made...in or with any banking organization...in the name of such depositor...and another person and in form to be paid or delivered to either, or the survivor of them, such deposit or shares...shall become the property of such persons as joint tenants and the same...shall be held of the exclusive use of the persons so named, and may be paid or delivered to either during the lifetime of both or to the survivor after the death of one of them, and such payment or delivery and the receipt or acquittance of the one to whom such payment or delivery is made, shall be a valid and sufficient release and discharge to the banking organization...

Thus, in order for plaintiff to have been successful in the SCPA 2103 Proceeding and obtain the funds in the Chemical Account, plaintiff would have had to rebut the presumption that the remaining funds in the Chemical Account should go to McKiernan as sole survivor on the joint account. However, no evidence has been presented to this court that plaintiff would have been able to rebut said presumption as a matter of law. Indeed, there is no evidence that Chemical Bank and/or Chase's receipt of the withdrawal form signed by McKiernan would have been sufficient for the remittance of the funds in the Chemical Account to the Estate and plaintiff has not established, as a matter of law, that the Chemical Account was in fact a "convenience account" as opposed to a "joint account" for purposes of the Banking Law. Even the Surrogate's Court in its 2009 decision dismissing plaintiff's proceeding noted that although the funds from the Chemical Account were requested by the Estate, "the balance of the subject account was not remitted" and that "[n]either party has an explanation for the bank's alleged failure to honor the executor's directions." The Surrogate's Court noted that "[t]he subject account was a joint account titled in the name of decedent and Bridie McKiernan" and states in a footnote that it is only the "[p]etitioner [who] maintains that the account was in joint name as a matter of convenience...." Further, it noted that petitioner had made efforts to locate McKiernan in order to testify as to the nature of the Chemical Account but that "her whereabouts remain unknown." Thus, if the Surrogate's Court would have determined that the Chemical Account was not merely a joint account as a matter of convenience, plaintiff may not have succeeded on the merits of the proceeding. Thus, plaintiff's motion for summary judgment on its claim for legal malpractice is denied.

Additionally, defendant's cross-motion for summary judgment dismissing the complaint

