

Lippiello v Fein

2002 NY Slip Op 30108(U)

November 1, 2002

Supreme Court, Queens County

Docket Number: 114571/2002

Judge: Walter B. Tolub

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

PRESENT: WALTER B. TOLUB
Justice

PART 8

Lisa Lippicco

INDEX NO. 114571/02

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

- v -

BENJAMIN D. FELAN

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

SCANNED
NOV 04 2002

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

MOTION/CASE IS RESPECTFULLY REFERRED TO
JUSTICE

Bated: 11/1/02

WALTER B. TOLUB s.c.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

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LISA LIPPIELLO,

Plaintiff,

-against-

BENJAMIN D. FEIN and
MEISTER SEELIG & FEIN, LLP

Defendants.

Index No. 114571/2002
Mtn Seq. 001

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WALTER B. TOLUB, J.:

Plaintiff Lisa Lippiello (hereinafter, Plaintiff) seeks a preliminary injunction enjoining attorney Benjamin D. Fein and the law firm of Meister Seelig & Fein, LLP (hereinafter Defendants) from representing and/or providing legal advice or assistance to Lee Sharmat, John Doe, or any other party connected with claims against Plaintiff arising from a Sperm Donor Contract dated July 1, 1999.

Plaintiff's verified complaint contains five causes of action. The first and fourth causes of action contain allegations of legal malpractice and violation of Judiciary Law §487. **The** second and third causes of action allege breach of contract and breach of fiduciary duty. The fifth and final cause of action is for intentional infliction of emotional distress.

Facts

Seeking to have a child, in 1998, Plaintiff, a lesbian, began researching sperm banks and the various methods for conceiving a child. During this time, Plaintiff was romantically involved with

her then life partner, Lee Sharmat'. Through Ms. Sharmat, Plaintiff met and became friendly with Ms. Sharmat's family, including Ms. Sharmat's stepmother, Judy Fein, and stepfather, Defendant Benjamin D. Fein.

Through the relationship with Mr. and Mrs. Fein, Plaintiff was introduced to two of Mr. and Mrs. Fein's friends, John and Jane Doe². After learning of Plaintiff's plans to become pregnant, John Doe offered to become a sperm donor to Plaintiff. To protect the interests of the parties, Defendant Fein recommended that Plaintiff, Ms. Sharmat, and John Doe enter into a sperm donor contract. This contract was drafted and negotiated by Defendant Fein, and was executed by all pertinent parties in 1999.

In addition to the sperm donor contract, Defendants were responsible for the drafting and execution of Plaintiff's will. Plaintiff's will, allegedly drafted by Fein, was executed at the law firm of Defendant Meister Seelig & Fein LLP, and witnessed by several employees of the Firm. According to the papers submitted, the will not only named a member of the Fein family as the executor of Plaintiff's will, but named Fein and his wife as the alternate guardians of Plaintiff's minor child.

Through the donated sperm, Plaintiff became pregnant and gave

¹According to the papers, Plaintiff and Ms. Sharmat began a relationship in 1997 and registered in New York City as domestic partners. In 1999, the parties had a commitment ceremony, where they committed themselves to each other as life partners.

² The terms of the Sperm Donor Contract require the identities of the sperm donor and his wife to remain confidential in all proceedings.

birth to a child in 2000. Following the birth of Plaintiff's child, but before the child's first birthday, Plaintiff and Ms. Sharmat ended their relationship. On December 10, 2001, Ms. Sharmat commenced an action seeking child visitation in Kings County Family Court. Shortly thereafter, Defendant Fein commenced an action in the New York County Civil Court against Plaintiff alleging breach of contract, unjust enrichment and fraudulent inducement. From the papers presented, it also appears that John Doe may have attempted to file a petition for custody in Kings County Family Court³. In July, 2002, Plaintiff commenced the instant action.

Discussion

Preliminary Injunctions

CPLR 6301 identifies **two** situations that warrant the granting of a preliminary injunction. The first, is where defendant either violates or threatens to violate the "plaintiff's rights respecting the subject of the action, and the threatened or actual violation tends to render the judgment ineffectual" (Barr, Altman, Lipshie and Gertsman; New York Civil Practice Before Trial [James Publishing 2001] §17:91, CPLR 6301). The second situation, applicable in the instant motion, is where plaintiff "seeks and would be entitled to a permanent injunction restraining defendant from an act that, if committed while the case was pending would injure plaintiff" (Id.).

"The drastic remedy of a preliminary injunction is appropriate

³ None of the parties have offered an explanation **as** to why John Doe's petition **was** not filed with the Family **Court**.

only where the moving party has established a likelihood of success on the merits, irreparable injury in its absence of such relief and a balancing of the equities in its favor" (In the Matter of Non-Emergency Transporters of New York, Inc. v. Marva L. Hammons, 249 A.D.2d 124, 127 [1st Dept. 1998]; Doe v. Axelrod, 73 N.Y.2d 748, 750 [1988]; Network Financial Planning, Inc. v. Prudential-Bache Securities Inc. et al., 194 A.D.2d 651, 652 [2nd Dept. 1993]; Aetna v. Capasso, 75 N.Y.2d 860 [1990]). Evidence in support of a motion for a preliminary injunction must be clear and convincing (Network Financial Planning, Inc., 194 A.D.2d 651, 652; Aetna, 75 N.Y.2d 860). Accordingly, allegations that are bare or merely conclusory are deemed insufficient (Doe, 73 N.Y.2d 748, 750; Falls Street Leasing Corp. & Teltech Holdings, Inc. v. City of Niagra Falls, 743 N.Y.S.2d 368 [4th Dept. 2002]; Kaufman v. International Business Machines Corp., 97 A.D.2d 925, 926 [3rd Dept. 1983] aff'd, 61 N.Y.2d 930 [1984]; Business Networks of New York, Inc. v. Complete Network Solutions, 265 A.D.2d 194 [1st Dept. 1999]).

In the instant case, Plaintiff contends that Defendants are now representing interests that are adverse to hers, in matters related to the subjects of their former representation of Plaintiff. Such action on Defendants' part, if true, would constitute a violation of the Disciplinary Rules, and would amount to an irreparable injury (William Kaufman Ora., Ltd. v Graham & James LLP, 263 A.D.2d 440 [1st Dept. 1999]). However, Plaintiff's assertion, standing alone, is not sufficient to support the granting of a preliminary injunction against Defendants.

Plaintiff is correct in stating that DR 5-108 prevents an attorney from representing "another person in the same or substantially related matter in which that person's interests are adverse to the interests of the former client" (Code of Professional Responsibility DR 5-108[A][1]; 22 N.Y.C.R.R. 1200.27(a)(1), see also Jamaica Public Service Co. Ltd. v. AIU Insurance Company et al., 92 N.Y.2d 631, 636 [1998]). Plaintiff is also correct in stating that DR 4-101 prevents attorneys from revealing information confided by a former client, and from using that information to the disadvantage of the former client or to the advantage of a third party (Tekni-Plex Inc. v. Mevner & Landis, 89 N.Y.2d 123, 130 [1996]; 22 N.Y.C.R.R. 1200.191; Code of Professional Responsibility DR 4-101(B)). However, while it is undisputed that Defendants drafted Plaintiff's will⁴, and that Defendant Fein, to some extent, participated in the drafting and execution of the 1999 sperm donor contract, Plaintiff has not demonstrated that Defendants are representing, have represented or are providing legal assistance to Ms. Sharmat or Mr. Doe in any of the pending legal actions⁵.

With regard to the Civil Court action, Defendant Fein has an absolute right to represent himself, a right which plaintiff acknowledges. Had plaintiff alleged that she had given

⁴Plaintiff's will contains a provision naming Defendant Fein **as the** alternate guardian for Plaintiff's **child**.

⁵ Indeed, affidavits from each **of** the parties to the **1999** contract aver that Defendant Fein stated to them that he was not representing any of the parties, and encouraged each party to obtain independent counsel to review the contract.

confidential information to a member of the Firm, other than Fein, it might have been appropriate to bar the Firm from assisting Fein in the Civil Court action. However, she has not so alleged, and this court sees no reason to deny Fein the assistance of the Firm in the action that he has commenced.

It should be further noted that although the request was never expressly made, it appears that the remedy Plaintiff seeks is that of attorney disqualification, that is to say that Plaintiff seeks to disqualify Defendants from representing any of the parties connected with the 1999 contract. As such, the more appropriate forum for the resolution of this issue would be the court where the particular action is pending, which in this case, would be the New York County Civil Court, and the Kings County Family Court, respectively.

Lastly, this court notes that Defendant Fein has averred that he has neither appeared in court for Ms. Sharnat nor drafted any pleading or memorandum of law for her, in the Family Court action, and Roslyn A. Quarto, Esq., Ms. Sharnat's attorney in that action, affirms that Defendant Fein "never served as co-counsel or otherwise" in the case. Ross M. Abelow, Esq., counsel for the sperm donor, affirms that neither Fein nor the Firm provided him with any legal assistance in his representation of John Doe.⁶ Although Ms. Sharnat has acknowledged discussing the Family Court

⁶ Mr. Abelow's firm **sublets** space from the Firm, and Mr. Abelow acknowledges that, when **his** printer broke down while he **was** preparing **the** sperm donor's petition, **he** e-mailed the petition to an associate in the Firm, who then printed it on a Firm printer.

action with Defendant Fein, and although the filing of the Family Court action and the Civil Court action, and the attempted filing of the sperm donor's petition, all within 20 days of a telephone call in which Defendant Fein failed to obtain Plaintiff's agreement to visitation by Sharmat, suggests a degree of coordination among Defendant Fein and counsel for Ms. Sharmat and John Doe, Plaintiff has failed, thus far, to show that Defendant Fein is providing any legal services to Ms. Sharmat or to John Doe. Consequently, she has not, thus far, shown that she is entitled to injunctive relief.

Accordingly, it is

ORDERED that Plaintiff's motion for a preliminary injunction is denied; and it is further

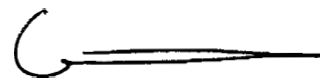
ORDERED that the Clerk of Court is directed to enter judgment in favor of the respective parties.

Counsel for the parties are directed to appear for a Preliminary Conference at I.A. Part 15, Room 335, 60 Centre Street, **New** York, New York on November 22, 2002 at 11:00 a.m.

This memorandum opinion constitutes the decision and order of the Court.

Dated:

11/1/02



HON. WALTER B. TOLUB, J.S.C.