

Lippiello v Fein

2003 NY Slip Op 30123(U)

March 11, 2003

Supreme Court, New York County

Docket Number:

Judge: Walter Tolub

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

PRESENT: WALTER B. TOLUB
Justice

PART 15

Lippello, Lisa
- v -
Fein, Benjamin

INDEX NO. 114571102
MOTION DATE 11/21/2002
MOTION SEQ. NO. 004
MOTION CAL. NO. 77

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

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

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 3/11/03

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Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
WALTER B. TOLUB J.S.C.

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

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LISA LIPPIELLO,

Plaintiff,

Index No. 114571/2002
Mtn Seq. 004

-against-

BENJAMIN D. FEIN and
MEISTER SEELIG & FEIN, LLP

Defendants.

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WALTER B. TOLUB, J.:

By this motion, defendants Benjamin D. Fein and Meister Seelig & Fein LLP (hereinafter, defendants) seek to dismiss the above captioned action pursuant to CPLR 3211(a) (1) and (a)(7). Plaintiff Lisa Lippiello (hereinafter, plaintiff) cross moves for an order pursuant to CPLR 602 directing the consolidation of this action for discovery and trial with the action captioned, Benjamin D. Fein v. Lisa Lippiello (Dkt No. 3598/02), currently pending in Civil Court, New York County.

Plaintiff's verified complaint in the above captioned action contains five causes of action. The first and fourth causes of action allege 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.

In the Civil Court action commenced **by** defendant Benjamin D. Fein, the complaint contains three causes of action tied to alleged reliance on promises made by plaintiff concerning joint custody of

plaintiff's child with Ms. Sharmat and visitation rights of Judy and defendant Fein. Defendant's first cause of action is grounded in breach of contract. The second cause of action is for unjust enrichment, and the third cause of action is grounded in allegations of fraud in the inducement.

Facts

Plaintiff and her former life partner, Lee Sharmat, began their relationship in 1997¹ and resided in New York. Through Ms. Sharmat, plaintiff met and became friendly with Ms. Sharmat's family, including her stepmother, Judy Fein, and her stepmother's husband, defendant Benjamin D. Fein (hereinafter, defendant Fein).

In 1998, plaintiff, seeking to have a child, began researching sperm banks and various methods of conceiving a child. Through Judy and defendant Fein, plaintiff was introduced to John and Jane Doe², longtime friends of the Fein family. Upon learning of plaintiff's plan to become pregnant, John Doe offered to become a sperm donor. To protect the interest 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 executed **by** the pertinent parties in 1999.

Plaintiff and Ms Sharmat held a commitment ceremony that was hosted by Judy and defendant Fein in June, 1999. In late 1999,

¹ Plaintiff and **Ms.** Sharmat registered as domestic partners in **New York City**.

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

plaintiff became pregnant through the donated sperm and gave 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 in the instant motion, and from those presented in prior motion practice, it also appears that John Doe may have attempted to file a petition for custody in Kings County Family Court, although said petition was not, and has never been filed. In July 2002 Plaintiff commenced the instant action.

Discussion

Motion to Dismiss

It is well established that a motion to dismiss pursuant to CPLR 3211 requires that this Court (1) accept all allegations in the Complaint as true; (2) afford plaintiff all favorable instances to be drawn from the allegations contained within the Complaint; and (3) determine whether, on **any** reasonable view of the facts, plaintiff can succeed (Campaign for Fiscal Equity, Inc. et. al v. State of New York, 86 N.Y.2d 307 at 318 [1995]; People v. New York City Transit Authority, 59 N.Y.2d 343 at 318 [1983]). Plaintiff bears the burden of supporting each allegation or cause of action with facts. Accordingly, failure to demonstrate the existence of an element **of** the cause of action, or attempts to support a cause

of action with conclusory allegations, warrants dismissal of the cause of action (DiPalma v. Phelan, 81 N.Y.2d 754 [1992]; ~~Creed v. United Hospital et al.~~, 190 A.D.2d 489 [2nd Dept. 1993]).

When a motion to dismiss is sought under CPLR 3211(a)(1), "dismissal is **warranted** only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (Leon v. Martinez, 84 N.Y.2d 83, 88 [1994]; Gessen v. Mutual Life Insurance Company of New York, 98 N.Y.2d 314, 326 [2002]). Defendant is thus required to prove that the documentary evidence in question "resolves all factual issues as a matter of law and definitively disposes of the plaintiff's claim" (Unadilla Silo Company, Inc. v. Ernst & Young, 234 A.D.2d 754 [3rd Dept. 1996]; Fischbach & Moore, Inc. v. E.W. Howell Co. Inc., 240 A.D.2d 157 [1st Dept. 1997]; ~~Greenwood Packing Corp. v. Associated Telephone Desian, Inc.~~, 140 A.D.2d 303, 305 [2nd Dept. 1988]).

Breach of Contract

At the outset, this court notes that plaintiff's second cause of action alleging breach of contract is identical to the causes of action of the complaint alleging legal malpractice. Accordingly, plaintiff's second cause of action for breach of contract is dismissed as duplicative (DiPlacidi v. Walsh, 243 A.D.2d 335 [1st Dept. 1997]; Feldman v. Jasne, 294 A.D.2d 307 [1st Dept. 2002]).

Legal Malpractice

To establish a prima **facie** cause of action for legal malpractice, plaintiff is required to prove (1) that the attorney was negligent, (2) that the attorney's negligence was the proximate

cause of plaintiff's damages, and (3) evidence of actual damages (Pellegrino v. File, 291 A.D.2d 60, 63 [1st Dept. 2002]; Schwartz v. 1462 Olshan Grundman Frome & Rosenzweig, 2003 WL 131652 [1st Dept. 2003]; Between the Bread Realty Corp v. Salans Hertzfeld Heilbronn Christy & Viener, 290 A.D.2d 380 [1st Dept. 2002], *lv. denied* 98 N.Y.2d 603 [2002]). Plaintiff is also required to prove that an attorney-client relationship existed between the parties (Volpe v. Canfield, 237 A.D.2d 282 [2nd Dept. 1997], Wei Cheng Chana v. Pi, 288 A.D.2d 378 [2nd Dept. 2001]).

At the core of plaintiff's complaint lies the argument that when defendant Fein volunteered to draft the sperm donor contract for the parties, an attorney client was created between defendant Fein and plaintiff, notwithstanding the lack of a formalized agreement between the parties. Although plaintiff is correct in stating that "neither an express agreement nor payment of a **fee** is essential to a finding of an attorney-client relationship" (Hansen v. Caffry, 280 A.D.2d 704 at 705 [3rd Dept. 2001]), "a plaintiff's unilateral beliefs and actions do not confer upon it the status of a client" (Jane Street Company v. Rosenberg & Estis, 192 A.D.2d 451 [1st Dept. 1993]). The court must therefore **look** at the actions of the parties in order to determine whether in fact, an attorney-client relationship existed (Volpe, 237 A.D.2d 282; McLenithan v. McLenithan, 273 A.D.2d 757, 758 [3rd Dept. 2000]; Wei Cheng Chang, 288 A.D.2d 378 [2nd Dept. 2001]).

In the instant case, plaintiff, Ms. Sharmat, and Mr. Doe were encouraged by defendant Fein to create and execute a sperm donor

contract that would serve to protect the interests of the donor, and the prospective biological mother. Although defendant Fein may have drafted the document, there **is** evidence that defendant Fein not only told all of the parties that he was not their attorney, but encouraged them to obtain independent legal counsel to review the document prior to its execution. In fact, paragraph 9 of the executed sperm donor contract states that "the parties warrant that they have had the opportunity to consult with separate, independent legal counsel regarding this Agreement" (Ex. C. *Notice of Motion to Dismiss*). However, the inclusion of this provision does not necessarily mean that an attorney-client privilege did not exist between the parties and defendant Fein. Defendant Fein explicitly undertook the task to draft the contract for plaintiff, Ms. Sharmat, and John Doe, albeit for free. That express undertaking, may in fact translate into an attorney-client relationship (see Volpe, 237 A.D.2d 282, 284; Sucese v. Kirsch, 199 A.D.2d 718, 719 [3rd Dept. 1993]).

Assuming *arguendo* that an attorney-client privilege did exist, to survive dismissal of a legal malpractice claim, plaintiff must show that "but for counsel's alleged malpractice, plaintiff would not have sustained some actual, ascertainable damages" (Pelligrino v. File, 291 A.D.2d 60, 63 [1st Dept. 2002]; Strook Strook and Lavan v. Beltramini, 157 A.D.2d 590, 591 [1st Dept. 1990]). In the instant action, the source of the legal malpractice claim against the defendants was the alleged mishandling in the drafting of the sperm donor contract and the failure of defendants to disclose

conflicts of interests to plaintiff prior to the drafting and execution of that contract. However, plaintiff has not shown that she has suffered any actual damages. The primary goal of the contract was to enable plaintiff to use John Doe's sperm to conceive a child through artificial insemination. This in fact, was accomplished. Moreover, even if defendants failed to disclose conflicts of interests to plaintiff, that failure, although violative of the Code of Professional Responsibility, does not on its own support a cause of action for legal malpractice (Sumo Container Station, Inc. v. Evans, Orr, Pacelli, Norton and Laffan, P.C., 278 A.D.2d 169, 170 [1st Dept. 2000]; Lavanant v. General Accident Insurance Company of America, 212 A.D.2d 450 [1st Dept. 1995]). Inasmuch **as** plaintiff has **not** made out a cause of action for legal malpractice, the first cause **of** action against defendants is dismissed.

Violation of Judiciary Law §487

Plaintiff's fourth cause of action alleging violations of the Judiciary Law **is** also dismissed. A violation of §487 of the Judiciary Law, requires a showing that during the course of judicial proceedings, **an** attorney **or** counselor (1) intentionally deceived the court or any party to the action or (2) willfully delayed a client's suit **for** his **or** her own gains (N.Y. Judiciary Law §487). In the instant case, the conduct complained of arises out of the drafting of the sperm donor contract. That conduct was neither directed at the Court nor did it arise during the pendency of a judicial proceeding. Accordingly, §487 of the Judiciary Law

is inapplicable, thereby requiring dismissal of plaintiff's fourth cause of action.

Breach of Fiduciary Duty

Plaintiff's third cause of action for breach of fiduciary duty is also dismissed. "The violation of a disciplinary rule, does not, without more, generate a cause of action" ~~Schwartz v. 1462 Olshan~~ Grundman Frome & Rosenzweig, 2003 WL 131652 at 4 (1st Dept. 2003). Moreover, **as** previously stated in this Court's decision of November, 2002, plaintiff has not demonstrated that a fiduciary duty owed to her has been breached. On the papers presented before this Court, plaintiff has not shown that defendants are representing, have represented, or are providing legal assistance to Ms. Sharmat or Mr. Doe in any of the pending legal actions.³ Nor has plaintiff demonstrated that defendants have divulged confidential information to either Ms. Sharmat or Mr. Doe. Absent evidence supporting plaintiff's allegations, the third cause of action must be, and is, dismissed.

Intentional Infliction of Emotional Distress

Plaintiff's final cause of action alleges that the actions of defendants, **specifically those of defendant** Fein, give rise to a claim of intentional infliction of emotional distress. A prima facie showing of intentional infliction of emotional distress requires a showing that a defendant's conduct was (1) extreme an

³ Indeed, affidavits previously submitted **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.

outrageous, (2) intended to cause severe emotional distress, (3) caused the nexus between the conduct and the injury, and (4) resulted in severe emotional distress (Howell v. New York Post Co., 81 N.Y.2d 115, 121 [1993]). The conduct complained of must be extreme, surpassing conduct comprised of mere threats or annoyances and must be "so outrageous in character, and so extreme in degree, as to go beyond **all** possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community" (Fischer v. Maloney, 43 N.Y.2d 553, 557 [1978], quoting Restatement [Second] Torts §46, comment [d]. See also Seltzer v. Baver, 272 A.D.2d 263 [1st Dept. 2000]; Owen v Leventritt, 174 A.D.2d 471 [1st Dept. 1991]; Sirianni v. Rafaloff, 284 A.D.2d 447 [2nd Dept. 2001]).

In the instant case, plaintiff's contention **is** that as a result of defendants' collective malpractice and defendant Fein's "relentless campaign to deprive plaintiff of her parental rights" (*Plaintiff's Memorandum of Law in Opposition to Defendant's Motion to Dismiss* p. 31), plaintiff has suffered severe emotional distress. However, plaintiff has not established that defendants' conduct can be characterized as extreme and outrageous behavior.

As to the collective alleged behavior of the defendants, assuming that plaintiff and defendants had an attorney-client relationship, if defendants had in fact failed to disclose conflicts of interest prior to representing plaintiff, that failure would clearly constitute a violation of the Rules of Professional Conduct. However, that failure, while not looked upon with favor, "cannot, standing alone, be reflexively characterized as 'utterly

intolerable in a civilized community " (Nestlerode v. Federal Insurance Company, 66 A.D.2d 504, 507 [4th Dept. 1979]), and does not give rise to a cause of action for intentional infliction of emotional distress.

As to defendant Fein, while his behavior may not be appropriate, the threat of or commencement of litigation, however coordinated it may **be**, does not constitute intentional infliction of emotional distress (Deising v. Town of Esopus, 204 A.D.2d 940 [3rd Dept. 1994]). Moreover, "commencement of litigation, even if alleged to be for the purpose of harassment and intimidation is insufficient to support such a claim" (Walentas v. Johnes, 257 A.D.2d 352 [1st Dept. 1999]; Fischer, 43 N.Y.2d 553). Inasmuch as the conduct alleged does not rise to the level of outrageousness needed in order to sustain a prima facie cause of action grounded in intentional infliction of emotional distress, plaintiff's fifth cause of action is dismissed.

Plaintiff's cross motion to consolidate the above action with the action pending in the Civil Court is denied.

Accordingly, it is


ORDERED that defendant's motion to dismiss plaintiff's **complaint pursuant** to CPLR 3211 is granted, and it is further

ORDERED that plaintiff's cross motion to consolidate the above captioned action with the action in the civil court is denied.

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

Dated:

3/11/03


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