

Pistilli v Gandin

2004 NY Slip Op 30099(U)

July 1, 2004

Supreme Court, Livingston County

Docket Number: 1000841/2002

Judge: Edward D. Burke

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SUPREME COURT - STATE OF NEW YORK
D.C.M.-J PART - SUFFOLKCOUNTY

P R E S E N T :

Hon. EDWARD D. BURKE
Justice of the Supreme Court

MOTION DATE 5-19-03
ADJ. DATE 6-16-03
Mot. Seq. # 001 - MG; CASEDISP

-----X
MARY ANN PISTILLI, :

Plaintiff,

- against -

MICHAEL GANDIN and GANDIN SCHOTSKY :
RAPPAPORT GLASS & GREENE, :

Defendants. :
-----X

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Upon the following papers numbered I to= read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-22; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 23-26; Replying Affidavits and supporting papers 27-33; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendants for an order pursuant to CPLR 3212 granting them summary judgment dismissing plaintiffs complaint is granted.

Plaintiff commenced this legal malpractice action to recover damages allegedly sustained by the failure of defendant and defendant's law ~~firm~~ to adequately represent her in actions before the Queens County Surrogate's Court. Plaintiffs uncle, Walter Lederer, executed a power-of-attorney, naming plaintiffs husband, Frank Pistilli, as attorney-in-fact on July 20, 1987; on July 21, 1987 Frank utilized the power-of-attorney to withdraw approximately \$252,000.00 from Lederer's accounts and deposit same in a money market account bearing only Frank's name; and on July 23, 1987 Lederer died. Two

¹ Defendants represented plaintiff and her husband, Frank Pistilli, in the proceedings in the Surrogates Court. Frank Pistilli filed a separate action against defendants (*Index No. 8411-02*) relative to the same proceedings and joint representation.

other accounts opened jointly with plaintiff's husband, and linked to the money market account, remained unfunded on the date of decedent's death. Plaintiff and her husband have asserted that the money was intended to be a gift from her uncle to herself and two of his **brothers**.² None of the putative donees of the alleged gifts were beneficiaries under the decedent's will.

In **1992** plaintiff and her husband sought the advice of defendants after being served with a subpoena from Eleanor Te Nyenhuis, one of the decedent's beneficiaries, for discovery purposes relative to the **\$252,000.00**. By objections filed by order to show cause returnable February **26, 1993**, Te Nyenhuis sought, in an intermediate accounting, return of the money to the estate. Defendants cross-moved on behalf of plaintiff and his wife, seeking (a) to dismiss (CPLR **3211**) on the grounds that there was proper delivery of the gift to the donees prior to decedent's death and that Te Nyenhuis was without standing to challenge the conduct of Frank and/or Mary Ann in their capacity as agents of the donees; and (b) the proceeding was procedurally flawed by the lack of a petition. Upon oral argument and conference with the Surrogate's Court on May **18, 1993**, both the objectant and defendants consented to withdrawal of the objection and cross motions *so* that Te Nyenhuis could obtain appointment as Administratrix C.T.A., with limited letters, and commence a turnover proceeding (SCPA § 2103).³

Upon obtaining letters of administration c.t.a., the turnover proceeding was commenced in **1994**. Defendants sought to dismiss the proceeding (CPLR **3211[5]**) by asserting that, since it was based on conversion, the three-year statute of limitations (CPLR **214[3]**) had expired. By decision dated July **20, 1994**, the Surrogate found that the action to be one to impose a constructive trust that arose from the breach of a confidential relationship created by the power of attorney, which is governed by the six-year statute of limitations, and respondents motion was denied. Thereafter, Te Nyenhuis moved for summary judgment on the turnover proceeding and defendants cross-moved on plaintiff's behalf to dismiss based on the six-year statute of limitations for a constructive trust in that the turnover proceeding was not commenced until **1994**, more than six years after **1987**.

By decision dated April **17, 1995**, Surrogate Nahman found that respondents were equitably estopped from asserting the statute of limitations as a defense to the discovery proceeding. The Surrogate found that the agreement to withdraw the motions in the accounting proceeding was based on the simultaneous agreement to resolve the issue in the "format of a discovery proceeding and that it would be obviously unfair to permit the respondents to assert the statute of limitations defense." Te Nyehuis was granted summary judgment, the Surrogate finding that Frank Pistilli's status as attorney-in-fact ceased when the decedent died on July **23, 1987**, while Frank was still in possession of the funds, and, therefore, the putative gift was not delivered during the decedent's lifetime. That decision was

² The decedent's brothers each received \$20,000.00 on October **8, 1987** and each received \$67,500.00 on July 17, **1989**. In February **1988**, over **\$130,000.00** from the money market account went into joint investment accounts in the name of plaintiff and her husband.

³ Te Nyehuis also cross-moved for an order directing the administrator to pursue return of the funds, to remove the present administrator, or to appoint her administrator c.t.a. limited to the turnover proceeding.

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affirmed by the Appellate Division (*Estate of Lederer*, 225 AD2d 395,641 NYS2d 3 [1996]) and appeal to the Court of Appeals was dismissed (88 NY2d 962 [1996]) and denied (89 NY2d 801[1996]). Thereafter, plaintiff and her husband retained new counsel.

Plaintiffs complaint alleges three causes of action. The first alleges that defendants negligently consented to withdrawal of the objections to the contested accounting and plaintiffs cross motion to dismiss same, and that the withdrawal affected a waiver of her statute of limitations defense. The gravamen of the second cause of action is that the defendants negligently failed to bifurcate her three-year statute of limitations defense, relative to conversion, from the six-year statute of limitations defense, relative to a constructive trust, asserted by her husband. Plaintiff argues that, since she was not the fiduciary, the six-year statute of limitations could not be applied to her. The third cause of action alleges that defendants negligently failed to subpoena the signature cards for the accounts opened two days before decedent's death, notwithstanding her husband's statement to them that such subpoena would have been inappropriate due to the nature of his employment (as a bank examiner for the Federal Reserve Bank).

To establish a cause of action to recover damages for legal malpractice, a plaintiff must prove: (1) that the defendant attorney failed to exercise that degree of care, skill, and diligence commonly possessed by a member of the legal community; (2) proximate cause; (3) damages; and (4) that the plaintiff would have been successful in the underlying action had the attorney exercised due care (*see, Zannarone v Gramer*, 256 AD2d 443,682 NYS2d 84 [1998]). On a motion for summary judgment to dismiss a legal malpractice cause of action, the attorney "must proffer admissible evidence establishing that the plaintiff is unable to prove at least one of the essential elements of his or her case" (*Suydam v O'Neill*, 276 AD2d 549,714 NYS2d 686 [2000]; *see, Shopsin v Siben & Siben*, 268 AD2d 578,702 NYS2d 610 [2000]).

By motion returnable June 9, 1994, defendants sought dismissal of the turnover proceeding because the petition indicated that the Pistillis were charged with conversion of the \$252,000, which was barred by the applicable three-year statute of limitation. By Order dated July 20, 1994 the Surrogate found that the petition sounded in one for a constructive trust, not conversion, and denied the motion to dismiss. Therefore, defendants did not waive the three-year statute of limitation. The motion to dismiss based on conversion was made, albeit on behalf of both plaintiff and her husband, and was denied. Plaintiff has not alleged that refusing to consent to withdrawal of the accounting objections would have resulted in their dismissal based on conversion. The conversion argument was made by defendants and rejected by the Surrogate and the Surrogate's decision was affirmed by the Appellate Division (*see, Estate of Lederer, supra*). Defendants, therefore, established their entitlement to summary judgment and plaintiff was charged with laying bare her proof and presenting evidentiary facts sufficient to raise a genuine triable issue of fact (*see generally, Winegrad v New York University Medical Center*, 64 NY2d 85 1,487 NYS2d 3 16 [1985]).

In her opposition plaintiff argues that defendants negligently failed to assert her conversion statute of limitations defense separately from her husband, and that this failure resulted in application of the constructive trust six-year statute of limitation against her. She argues that she cannot be held to the constructive trust statute of limitations because she was not the attorney-in-fact. However, the

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“constructive trust is the formula through which the conscience of equity finds expression” (*Beatty v Guggenheim Exploration Co.*, 225 NY 380,386 [1919]) and is applicable to “whatever human ingenuity can invent” (*Simonds v Simonds*, 45 NY2d 233,241,408 NYS2d 359 [1978]). It is remedial in nature, designed to prevent unjust enrichment and may be based on a fiduciary or confidential relationship (*see generally*, , 13 Warren’s Heaton on Surrogates’ Courts § 209.06[3]). A confidential relationship may be evinced by blood or marriage ties (*Sharp v Kosmalski*, 40 NY2d 119,386 NYS2d 72 [1976]).

To survive defendants’ summary judgment motion plaintiff cannot merely rest on “allegations of what [she] views as deficiencies in defendant’s conduct as [her] attorney” but must “offer evidence to establish the standard of professional care and skill that [defendant] allegedly failed to meet” *Thaler & Thaler v Gupta*, 208 AD2d 1130,617 NYS2d 605 [1994]; *Hatfield v Herz*, 109 F.Supp2d 174 [2000]). Here, plaintiff argues that she could not be held to the standard of a constructive trust because it was her husband who had the power-of-attorney, not her. She has not offered any expert evidence that would support her allegation that but for defendants’ failure to separately argue that she had no fiduciary relationship with the decedent that she would have been successful in avoiding the imposition of a constructive trust (*Estate of Nevelson v Carro, Spanbock, Kaster & Cuiffo*, 259 AD2d 282,686 NYS2d 404,405-6 [1991]).

Plaintiff was represented by her present attorneys in a hearing before a special referee conducted on February 5, 1997. In his decision of May 29, 1997, the referee noted that the Surrogate’s Order, affirmed by the Appellate Division, found that a constructive trust and the six year statute of limitations was applicable to the proceeding. He found that Mary Ann Pistilli accompanied her husband when he withdrew the decedent’s funds and deposited them, that she was aware that these funds were used in part to find a joint Merrill Lynch account, and the referee directed that she pay to the estate \$ 83,747.50 (plus interest) which came under her dominion and control from July 23, 1987. Plaintiffs present attorneys moved to modify the referee’s report (SCPA 506, CPLR 4403) and argued that the referee’s conclusions were inconsistent because he assessed damages against Mary Ann from July 23, 1987, the day of decedent’s death. Therefore, her present counsel argued, the referee believed the delivery of the gift to Mary Ann was complete before decedent’s death (¶ 36, affirmation of Marvin Neiman, Esq. dated June 6, 1997) and she can only be liable for conversion. However, by Order dated September 2, 1997, the Surrogate confirmed the report of the special referee.

Whatever incongruity can be drawn from those decisions does not equate to legal malpractice on the part of defendants. That the conversion statute of limitations should be applicable to plaintiff, was argued by both her former attorneys, defendants herein, and by her present attorneys. The fact that the Surrogate did not agree with her position does not establish that the defendant attorneys failed to exercise that degree of care, skill, and diligence commonly possessed by a member of the legal community or that the plaintiff would have been successful in the underlying action had the attorney exercised due care (*see, Estate of Burke v Repetti & Co.*, 255 AD2d 483,680 NYS2d 645 [1998]; *Thaler & Thaler v Gupta, supra*). Mere dissatisfaction with a particular outcome, or representation by an associate rather than a principal in defendants’ **firm**, does not establish malpractice (*Bernstein v Oppenheim & Co. P.C.*, 160 AD2d 428,554 NYS2d 487 [1990]).

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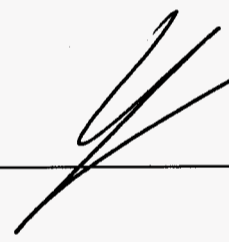
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To the extent that plaintiff argues that defendants negligently represented both her and her husband together, plaintiff has not successfully rebutted defendants' motion. While dual representation may, under certain circumstances, violate a disciplinary rule (DR 5-105 [C], 22 NYCRR 1200.24 [c]), such violation does not, in itself, generate a cause of action for legal malpractice (*see, Kaufman Org. v Graham & James LLP*, 269 AD2d 171, 703 NYS2d 439 [2000]; *Swift v Choe*, 242 AD2d 188, 674 NYS2d 17 [1998]). Here, plaintiff has not shown that such dual representation was the proximate cause of any alleged damages and that, but for defendants' negligent dual representation, she would have prevailed in the Surrogate's Court (*Rau v Borenkoff*, 262 AD2d 388, 691 NYS2d 140 [1999]).

Plaintiffs last cause of action alleges that defendants were negligent in failing to subpoena signature cards for the accounts established two days before decedent's death. The gravamen of plaintiffs argument is that these signature cards would have established that delivery of the gift was complete as to her, necessitating a different decision from the Surrogate. However, the Surrogate's decision of September 8, 1997, addressed the relevance of the signature cards and found that they were not material evidence: "Although the signature card for the Joint Account No 61404949 was not in evidence, it was referred to in bank statements that were offered in support of the motion. This statement shows that from July 22, to July 28, 1987 there was a \$1.00 balance in a Checking Account No. 61404949 and a \$1.00 balance in a Savings Account with that account number. The statement also shows that Insured Market Rate Account No. 144045 had a balance of \$251,243.51 during this period. The signature card for that account is in the name of Frank Pistilli alone." This decision was affirmed at 254 AD2d 489. Therefore, even if defendants had subpoenaed the signature cards, plaintiff cannot establish that she would have prevailed on her theory that the gift was complete as to her (*Shopsin v Siben & Siben, supra; Winegrad v New York University Medical Center, supra*) nor has plaintiff offered expert evidence that defendants' conduct was deficient (*Estate of Nevelson v Carro, Spanbock, Kaster & Cuiffo, supra*). Accordingly, defendants' motion for summary judgment is granted and the complaint is dismissed.

Dated: 7/1/07



J.S.C.

X FINAL DISPOSITION _____ NON-FINAL DISPOSITION