

**Mars v Maddalena**

2004 NY Slip Op 30385(U)

November 18, 2004

Supreme Court, New York County

Docket Number: 104186/04

Judge: Sherry Klein Heitler

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 30**

-----X  
ARNOLD J. MARS,

Plaintiff,

Index No. 104186/04

**DECISION & ORDER**

-against-

AIMEE M. MADDALENA and WILLIAM BESLOW,

Defendants.

-----X  
**SHERRY KLEIN HEITLER, J.:**

In this legal malpractice suit, plaintiff moves for a default judgment against defendant Aimee Maddalena ("Maddalena") for failure to file an answer or otherwise appear within the time required by law.<sup>1</sup> Defendant cross-moves to dismiss the action in its entirety pursuant to New York Judiciary Law § 470. In addition, defendant cross-moves to dismiss the summons served pursuant to CPLR §§ 305 and 3211 (a)(8).

On August 1997, Arnold J. Mars ("Mars") filed for divorce. Andrea Mars ("Andrea"), Mars' wife at the time, refused to vacate the marital apartment. However, prior to marriage, the couple had entered into a prenuptial agreement which, it is alleged, required Andrea to surrender the apartment in the event of marital dissolution. In late 1998, Andrea filed a civil lawsuit against the City of New York and Robert Wayburn ("Wayburn"), Mars' attorney at the time, for false arrest. The lawsuit was dismissed. On December 1998 Mars hired Robert Dobrish ("Dobrish"), new counsel, to avoid any conflict of interest. The divorce court rendered a decision in favor of Andrea and ordered

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<sup>1</sup> As of the date of the filing of this motion, defendant Beslow had not yet been served with the summons and complaint.

Mars to pay child support, in addition to Andrea's attorneys' fees, notwithstanding a prenuptial agreements which allegedly contained a provision to the contrary.

During the appeal, Mars became dissatisfied with Dobrish's performance. On October 2000, Mars hired a new attorney, Aimee Maddalena. The relationship between Mars and Maddalena turned sour after Maddalena's allegedly unsuccessful coordination of efforts with Dobrish in preparing the appeal and her alleged failure to obtain a favorable outcome on various issues. On January 14, 2002, Maddalena filed a complaint in Civil Court claiming that Mars owed her \$15,134 in unpaid legal fees. Mars counterclaimed for legal malpractice. Both parties to the suit missed the scheduled bench trial and the case was dismissed without prejudice on February 19, 2002.

On January 14, 2004, Mars served Dobrish and co-defendants with a legal malpractice complaint filed in Supreme Court. Dobrish moved, unsuccessfully, to dismiss that complaint on the ground that he was improperly served.

The present lawsuit was commenced on March 18, 2004 when Mars filed a legal malpractice complaint against defendant Maddalena and co-defendant William Beslow ("Beslow") alleging defendants' negligence and breach of fiduciary duties.

Maddalena moved to dismiss the summons and complaint on the ground that counsel is not qualified, pursuant to Judiciary Law § 470, to commence a lawsuit in New York on behalf of a client. Judiciary Law § 470 provides, "A person, regularly admitted to practice as an attorney and counsellor, in the courts of record of this state, whose office for the transaction of law business is within the state, may practice as such attorney or counsellor, although he resides in an adjoining state." Maddalena alleges that plaintiff's counsel, Howard Altschuler ("Altschuler"), has not met the requirements of

Judiciary Law § 470, in that he uses an answering service and mail forwarding service, rather than maintaining his own office in New York. In response, Altschuler argues that his arrangement with an office service company provides him with a legitimate New York address and office space, and so qualifies him to practice law in New York State.

Specifically, Altschuler has submitted the affidavits of James Zanata and Robert Porter at EFLS Total Communications, of 545 Eight Avenue, New York, NY, attesting to the fact that Altschuler's arrangement with the company entitles him to the use of desk space and conference rooms, in addition to mail and call forwarding and, perhaps most significantly, acceptance of service of process. This is all that Judiciary Law § 470 requires. Austria v. Shaw, 143 Misc.2d 970 (S.Ct. N.Y. Cty. 1989); In re Estate of Scarsella, 195 A.D.2d 513 (2<sup>nd</sup> Dept. 1993).

As noted above, Mars has also brought a legal malpractice action against Dobrish and other defendants. Maddalena alleges that, rather than serving her with the complaint in this case, Mars actually attached to her summons a copy of the complaint in the Dobrish case. Maddalena asserts that, as a result, she has never been served properly in this action and that Mars's claim is now barred by the three-year statute of limitations for legal malpractice actions. See CPLR § 214.

"On a traverse hearing, challenging the validity of service, the burden of proof is placed on the plaintiff asserting compliance with statutory requirements." Master Navigation Co., Inc. V. Great Circle Shipping Corp., 86 Misc.2d 829, 830 (S.Ct. N.Y. Cty. 1976) (internal citations omitted). Accordingly, it is hereby

ORDERED that defendant Maddalena's motion to dismiss this action pursuant to Judiciary Law § 470 is denied; and it is further

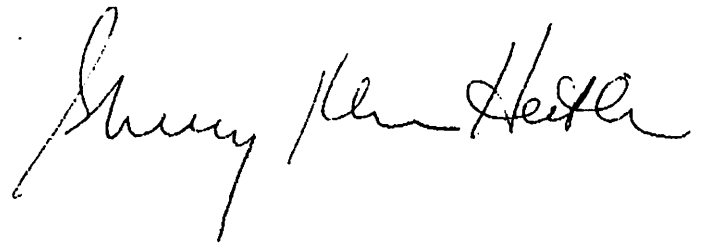
ORDERED that the issue of whether defendant Maddalena was properly served with the summons and complaint in this action is referred to a Special Referee to hear and report; and it is further

ORDERED that this motion is held in abeyance pending receipt of the report of the Special Referee and a motion pursuant to CPLR § 4403; and it is further

ORDERED that a copy of this order with notice of entry shall be served on the Judicial Support Office (Room 311) on or before December 20, 2004 to arrange a date for the reference to a Special Referee.

This shall constitute the decision and order of the court.

DATED: November 18, 2004



**FILED**  
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