

Demo v Badie
2004 NY Slip Op 30393(U)
October 21, 2004
Supreme Court, New York County
Docket Number: 107444/04
Judge: Jane S. Solomon
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 55

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MONA DEMO, as the Executrix of the
Estate of REVA WEINBERGER, and in her
individual capacity,

Plaintiff,

-against-

JAMES BADIE, and STOLL, MISKIN, PREVITO,
HOFFMAN & BADIE,

Defendants.

-----X

JANE S. SOLOMON, J.:

Defendants James Badie ("Badie") and the law firm of
Stoll, Miskin, Previto, Hoffman & Badie ("the Stoll firm") move
pursuant to CPLR § 3211 to dismiss the complaint in this legal
malpractice action. For the reasons set forth below, the motion is
granted.

BACKGROUND

This is the second action filed by Mona Demo ("Demo")
against Badie and his law firm pertaining to his representation of
her as executrix of the estate of her mother, Reva Weinberger
("Weinberger"), and the sale of Weinberger's house in Brooklyn, New
York. The house was jointly owned with survivorship rights by
Weinberger, Demo and her sister, Ellen Weinberger Vera ("Vera").
Vera moved into it upon Weinberger's death. Demo alleges that, in
or about November 2000, Badie advised her that as executrix she
could sell the house; that she contracted to sell it to George and
Elizabeth Gaul; but she could not close the sale because the house

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was not, in fact, part of the estate.

In June 2001, the Gauls sued Demo, individually and as executrix, and Vera for specific performance. Gaul v. Demo, Supreme Court, Kings County, Index No. 24712/01 ("the Gaul action"). According to Demo, after substantial pressure from Badie, she signed an agreement prepared by Vera's attorney that would allow the house to be sold and settle various disputes with her sister, but asked Badie not to forward until instructed. However, Badie sent the agreement out, and Vera signed it on June 13, 2001. The next day, Demo wrote to Badie that she had decided to rescind her approval of the agreement.

In March 2003, Demo sued Badie. Demo v. Badie, Supreme Court, New York County, Index No. 102408/03. The complaint alleged that Badie's advice constituted legal malpractice for which she suffered damages in the amount of \$173,700. On October 10, 2003, Justice Leland DeGrasse dismissed the action stating that Demo had "not met the burden of alleging actual ascertainable damages as a consequence of either her inability to convey title to the Gauls or the June 11, 2001 agreement with her sister." On May 4, 2004, Justice DeGrasse granted Demo's motion to reargue, but adhered to his original decision, stating that Demo's complaint alleged that Badie's advice was to her as executrix, but no claims for damages had been made on behalf of the estate, and that her individual claims were not viable.

Prior to Justice DeGrasse's decision, on April 5, 2002,

the court in the Gaul action rejected Demo's argument that she had entered into the agreement with her sister under duress, ordered specific performance of the contract for sale of the house, and granted Vera's cross-motion directing Demo to fulfill her obligations under the agreement. Gaul v. Demo, supra.

On or about May 14, 2004, Demo filed this action.

Discussion

In her first cause of action, Demo alleges that Badie negligently advised her regarding (1) sale of the house; (2) her personal entry into the agreement with Vera; (3) payment to Vera of unowed monies to assure her participation in the sale; and (4) her renunciation of certain rights affecting distribution of Weinberger's property. Defendants move to dismiss on the grounds that the claims are barred by res judicata and collateral estoppel.

Justice DeGrasse's ruling dismissing Demo's previous complaint for failure to state a cause of action is not a ruling on the merits; therefore, the doctrines of res judicata and collateral estoppel do not apply. Hodge v. Hotel Employees and Restaurant Employees Union Local 100 of the AFL-CIO, 269 A.D.2d 330 (1st Dept. 2000). However, where the original pleading defects are not corrected in the new action, the judgment may be a bar to another action. 175 E. 74th Corp. v. Hartford Acc. & Indem. Corp., 51 N.Y.2d 584, 586, n.1 (1980).

Demo's first cause of action here suffers from the same

defects it did before. She makes general conclusory allegations, now in her capacity as executrix, but fails to allege any damages to the estate itself. Since the house ultimately was sold, the cause of action falls because Demo has failed to allege actual and ascertainable damages.

The second cause of action alleges that Demo individually was damaged, which differs from her claim in the first action only in that she now alleges that Badie broke his agreement to hold the signed agreement pending further direction. This is close to the argument in the Gaul action where she unsuccessfully claimed its invalidity because of duress. The court there found she had entered into the agreement voluntarily, stating that:

[n]o one alleges that the Weinberger Agreement does not contain all elements of a valid enforceable contract between the defendants, with the exception of [Demo's] bare assertion of duress. Insofar as she was the first to sign the Agreement; that she did so in her own home, without the presence of [Vera] or [Vera's] attorney; that it was [Demo] who initiated the sale of the Premises in the first instance and agreed to the purchase price; and that it was [Demo] who sought to persuade [Vera] to cooperate in the sale of the Premises as the other titleholder, the Court regards her claim of duress [as] unsubstantiated and insincere.

Gaul v. Demo, supra, slip opinion, at 8. Unlike Justice DeGrasse's decision, the decision in Gaul is a ruling on the merits. In any event, no damages are pleaded adequately.

Demo also alleges that Badie acknowledged that she sustained monetary damages by promising in writing to waive his legal fee and compensate her up to \$10,000. It is undisputed that

Demo wished to sell the house, that she owned it with her sister, and that her sister had moved into the house. As the Gaul court concluded, it is clear from the face of the agreement that each party made certain concessions to sell the house. Given these facts, it is hard to see how Badie's advice to Demo to enter into an agreement with Vera was not merely the "selection of one among several reasonable courses of action." Paley v. Rosner, 65 N.Y.2d 735, 738 (1985). Even assuming that Badie's initial advice to her constituted negligence, to state a cause of action for legal malpractice, Demo must show that, but for the negligence, what would have been a favorable outcome was an unfavorable one. Id. This she failed to do, and she still has failed to plead ascertainable damages from his conduct. Therefore, the second cause of action falls.

With regard to the third cause of action, Demo alleges that the Stoll firm is vicariously liable for Badie's malpractice. Given that the first and second causes of action are dismissed, the third must also fall.

In her fourth cause of action, Demo seeks treble damages, presumably pursuant to Judiciary Law § 487, for allegedly false statements made by Badie in the first action. She claims he lied when stating that he knew the estate was not the owner of the house.

To obtain treble damages, Demo must establish that she was deceived by the allegedly false affidavit or that her damages

were proximately caused by the alleged deceit. O'Connor v. Dime
Sav. Bank of New York, F.S.B., 265 A.D.2d 313, 314 (2nd Dept.
1999). The damages claimed by Demo were not caused by Badie's
alleged falsehood to the court. Rather, the claim is based on the
original advice, as to which this lawsuit has no merit. See Manna
v. Ades, 237 A.D.2d 264, 265 (2nd Dept. 1997).

Demo makes other arguments which similarly fail, and the
fourth cause of action is dismissed.

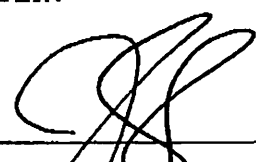
Accordingly, it is hereby

ORDERED that defendants' motion to dismiss is granted,
and the complaint is dismissed with costs and disbursements to
defendants as taxed by the Clerk of the Court on submission of an
appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment
accordingly.

Dated: October 21, 2004

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