

Demo v Badie

2005 NY Slip Op 30601(U)

September 6, 2005

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

DECISION AND ORDER

Plaintiff,

Index No. 107444/04

-against-

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

Defendants.

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Jane S. Solomon, J.:

Plaintiff moves to renew and reargue the prior motion, wherein I granted defendants' motion to dismiss. The motion is denied because the original determination was correct, and no new facts are alleged to warrant renewal.

The facts are set forth in some detail in the underlying decision. They must be considered not only in the general context of the standard of review upon a motion to dismiss, but also in the particular context of this lawsuit where Mona Demo, in her individual capacity, previously commenced a lawsuit against these same defendants. That lawsuit was dismissed by another justice of this court, and the dismissal was affirmed by the Appellate Division, First Department. Demo v Badie, 14 AD3d 436 (1st Dept 2005), rearg. denied, 2005 NY App. Div. LEXIS 4011 (April 14, 2005).

In distinguishing this action from the one that already was dismissed, Demo claims that there are "several major additions" to the new complaint, but can point only to two: (1) that her

sister signed the June 11, 2001 agreement (agreement) as a condition of her cooperation in selling the house Demo and her sister jointly owned; and (2) that defendant James Badie committed malpractice as against Demo individually, as opposed to having committed malpractice against the estate.¹

The first alleged distinction is apparent from the text of the agreement itself, which was at issue in the previous action. The second alleged distinction is belied by the fact that Demo was the only plaintiff in the previous action, and that complaint in that action makes repeated reference to advice she received from Badie during a time that she was named individually as a defendant in a lawsuit arising from her refusal to abide by the terms of the agreement. Amended Verified Complaint (index number 102408/03), paragraphs 12, 17-22, annexed to opposing affidavit at Exhibit F.

Demo maintains that since the previous action was dismissed on a motion to dismiss for failure to state a cause of action, it was not dismissed on the merits and she is free to commence a new action upon the same claim. To prove her faith in this proposition, she has commenced yet a third lawsuit since this motion was made, based upon the same transaction and naming the same defendants.² Her argument was addressed in the underlying

¹ She omits that in this action she also is suing in her capacity as executrix of her mother's estate, but she does not contest that part of the underlying decision which determined that no claim is stated on the estate's behalf.

² New York County index number 103740/05. This third action is also the subject of a motion to dismiss, which is

decision, and will not be rehashed except to state that this court does not review decisions of the Appellate Division, First Department, and I may not second-guess their reasoning. (It should be noted that the Appellate Division arrived at its conclusion under the standard of review applicable to a motion to dismiss.)

Demo further argues that, in the prior motion before me, I failed to accept as true all the allegations in the complaint. However, the distinctions Demo claims between the facts alleged in this lawsuit and those in the previous one do not rectify an important component of the Appellate Division's decision: that Demo did not state a "but for" relationship between the alleged malpractice and loss. Demo v Badie, 14 AD3d at 437.

Plaintiff argues that every item she relinquished in her negotiation with her sister is a loss, and that satisfies her burden to plead damages sustained as a proximate result of Badie's negligence. It is apparent from her papers, however, that she obtained benefits from the agreement with her sister, not the least being an immediate end to their dispute over the mother's estate and all the benefits that come from avoiding protracted estate litigation, and she was permitted to sell the house on the terms she sought. That she subsequently tried not to abide by the agreement, and suffered losses in unsuccessful bids to defend that decision, is not an element of damages recoverable in a legal malpractice action. Demo v Badie, 14 AD3d at 437; and see Stevi

granted today by a separate decision.

Brooks v Lewin, 2005 NY App Div LEXIS 8873 (1st Dept, September 1, 2005).

It bears mentioning here that the substance of Demo's malpractice claim, as most recently advanced by counsel, is that once Badie gave her bad advice - namely, that the home she and her sister owned as surviving joint tenants was part of their mother's estate - he was obliged not to assist Demo in extracting her from the ensuing events. She argues that the attorney's effort to resolve the problem presents an impermissible conflict of interest. However, the agreement shows that an effort to correct the error was made by resolving the dispute with Demo's sister, which, together with the attorney's waiver of \$10,000 in legal fees, constitutes a reasonable course of action under the circumstances.

Paley v Rosner, 65 NY2d 735 (1985).

Plaintiff's other contentions have been considered, and are unavailing. Accordingly, it hereby is

ORDERED that plaintiff's motion to renew and reargue is denied.

Dated: September 6, 2005

ENTER: JANE S. SOLOMON
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J.S.