

<b>Subin v Slade &amp; Newman LLP</b>
2006 NY Slip Op 30717(U)
December 4, 2006
Supreme Court, New York County
Docket Number: 600387/05
Judge: Shirley Werner Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

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VICTORIA SUBIN,

Plaintiff,

-against-

SLADE & NEWMAN LLP, LOUIS I. NEWMAN, ESQ.  
and IRA L. SLADE, ESQ.,

Defendants.

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KORNREICH, SHIRLEY WERNER, J.

Index No.: 600387/05

**DECISION  
and  
ORDER**

Plaintiff Victoria Subin ("Mrs. Subin") brings this action against her former matrimonial attorneys for negligence, legal malpractice and breach of express and implied contract. At oral argument, the parties consented to dismiss the breach of contract claims as duplicative.

Defendant now moves to dismiss the negligence and legal malpractice causes of action for failure to state a valid cause of action.

**FILED**  
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NEW YORK  
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I. *Facts*

A. *The Divorce Action*

On November 12, 2004, plaintiff retained defendants to represent her in divorce proceedings against her then husband, Eliot Subin ("Mr. Subin"). Thereafter, the divorce action, entitled *Victoria Subin v. Eliot Subin*, was commenced before the Supreme Court in Westchester County (the "Divorce Action"). In October 2005, the divorce action went to trial and the parties "engaged in extended settlement discussions." Transcript of Oct. 19, 2005 hearing in Divorce Action (hereinafter, "Transcript"). On October 19, 2005, the parties stipulated to a settlement in open court before the Honorable James Montagnino, Court Referee.

On that date, the Referee encouraged both parties “to pay very careful attention to what is being placed on the record and not to hesitate if [they] have a question at any time for [their] counsel or for [the Referee].” He, also, stated that he would ensure that the parties “have every opportunity to discuss with counsel any questions [they] may have.” Transcript, p. 4. During the course of the hearing, Mrs. Subin interjected at times and spoke up regarding, *inter alia*, the use of her preferred real estate broker for the sale of the marital residence and her responsibility for taxes on the marital residence<sup>1</sup>. Transcript, pp. 10-13, 23-25.

After recording the stipulation, the Referee conducted a voir dire of both Mr. and Mrs. Subin verifying that they: had heard the stipulation as it was placed on the record; understood that if a written agreement was not made after the hearing that the outline/transcript would become the final stipulation of settlement; gave up their rights to trial by entering into the stipulation; had not been coerced, threatened “or in any way forced . . . into accepting the agreement”; were not in any way impaired; had the opportunity to discuss all the terms of the agreement with counsel; and were satisfied with the representation of counsel. The Referee also asked the parties if they understood that:

this stipulation of settlement is intended to be incorporated but not merged into the judgment of divorce, which is fancy legal language that means this: The stipulation of settlement is an agreement between the two of you that binds you as a contract would bind you, but it will be more than that. By becoming part of the divorce judgment, it takes on the effect of a Court order. In fact, the agreement will be court-ordered.

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<sup>1</sup> In this instance, Mrs. Subin stated: “In other words, I can’t get a mortgage, so [Mr. Subin’s] being kind enough to sign and get me a mortgage. I have to put most of the money I get from the sale of my house into this condo, and pay it, and everything else in my entire life, because I’m not marketable yet . . . . And I have to pay all that on \$6,000 [per month]. That’s what we’re saying? Everything? Including taxes, which are probably \$7,000 a month, in itself. Is that what we’re saying?” The Referee then inquired, “Taxes of \$7,000 on what?” and Mrs. Subin responded, “My condo. Hello. We live in Westchester County and Bedford.”

In other words, if either of you should willfully break any of the promises that you've made by this agreement, you could find yourself faced not only with a law suit for breach of contract but with contempt of Court.

Transcript, pp. 47-48. Both Mr. and Mrs. Subin agreed that they did understand and committed to live up to all they had agreed to in the stipulation. When given the opportunity to add something or ask any questions, Mrs. Subin did not do so.

B. *The Instant Action*

Plaintiff's present complaint alleges the following. During their representation of her in the divorce action, defendants "were consistently unprepared for hearings, trial-related activities, conferences, and demonstrated failings associated with inadequate performance of due diligence obligations." Specifically, defendants did not ascertain the value of marital property, "so that Plaintiff could not possibly make an informed decision whether to enter into a settlement agreement with H. Eliot Subin to terminate the divorce proceedings." Plaintiff claims that, upon information and belief, Mr. Subin has sold, or will sell, one such unappraised property "for sums exceeding \$1,000,000.00."

Plaintiff alleges that, during the trial of the divorce action, "Defendant Newman was called into chambers due to, *inter alia*, Defendants' abject failure to properly examine Mr. Jeffery Pasternak (the central accountant/financial officer for Mr. Subin's various real estate related entities) on the witness stand." The complaint states that defendants "encouraged the Plaintiff to settle her claims [in the divorce action] without understanding the terms and conditions of the settlement agreement." Plaintiff requests reasonable attorneys fees and expenses, costs of this litigation, compensatory, consequential, punitive and exemplary damages.

## II. *Conclusions of Law*

A party may move to dismiss a cause of action asserted where “the pleading fails to state a cause of action[.]” CPLR 3211 (a)(7). When addressing such a motion to dismiss, the Court must accept as true the facts as alleged in the complaint as well as submissions in opposition to the motion, according plaintiffs the benefit of every possible favorable inference. *Sokoloff v. Harriman Estates Dev. Corp.*, 96 N.Y.2d 409, 414 (2001). However, allegations that consist only of bare legal conclusions are not entitled to such consideration. *Kliebert v. McKoan*, 228 A.D.2d 232 (1st Dept. 1996) (citations omitted). Upon a motion to dismiss, a defendant is obligated to demonstrate that the facts as alleged by plaintiff fit within no cognizable legal theory. *CBS Corp. v. Dumsday*, 268 A.D.2d 350, 352 (1st Dept. 2000), citing *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994). The CPLR 3211 viability of plaintiff’s claims is assessed below.

Defendants argue that plaintiff’s claims are judicially estopped by the so-ordered settlement in the divorce action. The doctrine of judicial estoppel serves to “preclude[] a party who assumed a certain position in a prior legal proceeding and who secured a judgment in his or her favor from assuming a contrary position in another action simply because his or her interests have changed[.]” *D & L Holdings, LLC v. RCG Goldman Co. LLC*, 287 A.D.2d 65, 71 (1st Dept. 2001) (internal citations omitted). The doctrine “is intended to prevent abuses of the judicial system by which a party obtains relief by maintaining one position, and later, in a different action, maintains a contrary position. This policy would not be served by limiting its application to cases where the legal position at issue was ruled upon in the context of a judgment.” *Id.* at 72.

Citing to *DeGregorio v. Bender* (4 A.D.3d 384 [1st Dept. 2004]), defendants argue that

the Judgement of Divorce, Stipulation of Settlement and the transcript of the voir dire preclude plaintiff from asserting legal malpractice claims in the instant action. The court agrees. In *DeGregorio*, the plaintiff sued her former matrimonial attorneys, claiming that due to their negligence “she entered into a stipulation of settlement in [the] matrimonial action that was detrimental to her interests[.]” The First Department found that “plaintiff’s claims in [the] action [were] belied by the terms of the stipulation and her approval of those terms in open court [in the matrimonial action.]” *Id.* at 385. In that stipulation, also made on the record, plaintiff “acknowledged that she participated in the negotiation of the agreement and understood its terms, that no one had forced her into the agreement, and that she wanted the court to approve the settlement.” *Id.*

Plaintiff argues that *DeGregorio* is inapposite, since in that action, plaintiff had waived her right to further disclosure regarding the value of certain property and business interests. However, the fact that plaintiff here did not specifically waive discovery does not render *DeGregorio* inapplicable. In the instant case, the complained-of settlement was not made prior to trial, but in the midst of trial. Discovery was long over.

Moreover,

Stipulations of settlement are favored by the courts and are not lightly set aside. *This is all the more so in the case of stipulations in open court* within CPLR 2104. A stipulation made of settlement is enforceable as a binding contract if it is definite and complete upon its face. The parties to a stipulation may have it set aside only for reasons which would allow a contract to be set aside, such as fraud, collusion, mistake or accident.

*Cirrincone v. Joseph A. Bruno, Inc.*, 143 A.D.2d 722, 723 (2d Dept. 1988) (emphasis supplied); *see also Lowinger v. Lowinger*, 303 A.D.2d 723, 724 (2d Dept. 2003) (“[a] stipulation made in

open court is to be strictly enforced, and a party will not be relieved from its consequences unless he or she establishes cause sufficient to invalidate a contract, such as fraud, collusion, mistake, or accident”). Here, the stipulation in the divorce action was made in open court and was, thereafter, so-ordered. In that stipulation, plaintiff agreed that she was satisfied with the settlement and with her attorneys, the instant defendants. Plaintiff’s papers fail to set forth any grounds for invalidation in anything but a conclusory manner.

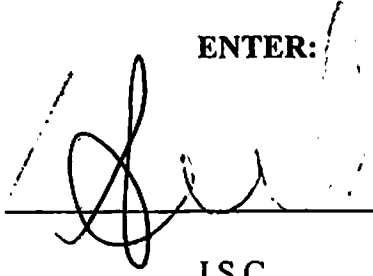
The court, who apparently was all too familiar with the parties, counsel and the case, made certain that plaintiff had an opportunity to air any complaints she might have. Plaintiff, who was far from shy in voicing her feelings, made clear that she understood the settlement and was satisfied with counsel. Regret over the choice that she made will not now serve to invalidate the settlement she voluntarily entered into in open court and under the supervision of the court referee. *See Hallock v. State*, 64 N.Y.2d 224, 230 (1984) (stipulations of settlement are favored by court and not easily set aside). Accordingly, it is

ORDERED that the motion is granted and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: December 4, 2006

**FILED**  
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 J.S.C.