

**Deith v Barbara**

2007 NY Slip Op 30471(U)

March 30, 2007

Supreme Court, New York County

Docket Number: 0114634/2005

Judge: Leland G. DeGrasse

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. LELAND DEGRASSE

PART \_\_\_\_\_

Index Number : 114634/2005

DEITH, SUSAN J.

vs

BARBARA, DOMINIC A.

Sequence Number : 001

DISMISS ACTION

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

*Motion is decided in accordance with  
accompanying Memorandum Decision.*

MAR 30 2007

**FILED**  
APR 02 2007  
COUNTY CLERK'S OFFICE  
NEW YORK

Dated: \_\_\_\_\_

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

[\* 1]

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

-----X  
SUSAN J. DEITH,

Plaintiff,

-against-

Index No. 114634/05

DOMINIC A. BARBARA, et al.,

Defendants.  
-----X

**DeGrasse, J.:**

Defendant Ann L. Detiere moves for an order dismissing the complaint pursuant to CPLR 3211 (a)(1) and (7), granting summary judgment and awarding sanctions against plaintiff. Defendants Dominic A. Barbara and Carol Harrow Bernstein (collectively "the Barbara firm") cross-move for an order dismissing the complaint pursuant to CPLR 3211 (a)(1) and (7) and granting summary judgment. The Barbara firm represented plaintiff in a matrimonial action which was resolved by stipulation of settlement executed by plaintiff on December 21, 2000. The stipulation gave plaintiff and her former husband joint custody of their son who was to reside principally with plaintiff. The stipulation provided for maintenance and support payments to plaintiff in the sum of \$1, 000 per week and child support also to plaintiff in the sum of \$1, 000 per week. The child support was to continue until the occurrence of an "emancipation event" as defined by the stipulation even if the child were to reside away from plaintiff's residence. The terms of the stipulation were incorporated by reference but not merged into a judgment of divorce dated February 20, 2001.

In April 2002, plaintiff brought a writ of habeas corpus alleging that her former husband had improperly detained and kept the child away from plaintiff. Plaintiff was represented by the Barbara firm until Detiere was substituted as her counsel on November 14, 2002. On or about February 3, 2003, plaintiff entered in an agreement modifying the stipulation and the judgment of divorce. As of the date

of the modification agreement plaintiff's son had been living with his father. The modification agreement was itself amended by instrument dated March 11, 2003. The judgment of divorce was amended on October 22, 2003. On or about October 4, 2004, the Supreme Court, Nassau County (Ross, J.) granted the father's motion to modify the amended judgment so as to terminate the child support payments plaintiff was receiving. The court's order was affirmed (*Deith v Deith*, 27 AD3d 613 [2006]). In rendering its decision, the Appellate Division cited the fact that the child had not lived with or seen plaintiff for over a year as an unanticipated change in circumstances which necessitated a change in the child support award (*id.* at 613-614).

Plaintiff alleges in the complaint that

"Defendants and each of them failed to exercise reasonable care and skill in performing legal services on behalf of Plaintiff, in that they failed to advise plaintiff as to the legal consequences of [the child support] provisions of the said settlement agreements, and the possible impact on the continued applicability of certain provisions of the settlement agreements in the event of future changes in circumstances."

Plaintiff further alleges that

"Had Plaintiff been advised that such changes of circumstances could result in such a determination by Supreme Court, Nassau County, Plaintiff would not have agreed to the allocation of such payments as child support, and would have sought to have such payments made as part of maintenance and equitable distribution."

As noted above, Detiere was not plaintiff's attorney when she entered into the December 21, 2000 stipulation. At paragraph 35 of her September 13, 2006 affidavit, plaintiff states: "Had I received proper advice from DETIERE, who had a duty to give me such advice, prior to signing the Modification Agreement and the Amendment to Modification Agreement, I would not have signed those agreements." This single sentence reveals that plaintiff's claim against Detiere lacks merit and is discredited by documentary evidence. Plaintiff had agreed to the child support provision 23 months before she retained Detiere. The said provision was in force and unchanged by the modification agreement. Plaintiff's claim against Detiere is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law.

Before executing the stipulation of settlement plaintiff countersigned a letter dated December 21, 2000 by which the Barbara firm advised her that a settlement of the matrimonial action would have been more advantageous after the receipt of a statement of net worth and discovery regarding her former husband's finances. Plaintiff acknowledged her attorneys' advise that such discovery would have placed her in a better negotiating position and possibly yielded a greater distributive award and greater maintenance. Plaintiff acknowledged that notwithstanding such advice she chose to proceed with the stipulation of settlement. Plaintiff's acknowledgments set forth in the letter constitute documentary evidence refuting her claims that the Barbara firm's advice was the proximate cause of any damage she sustained.

For the foregoing reasons, Detiere's motion is granted to the extent that the complaint is dismissed as against her pursuant to CPLR 3211 (a)(1) and (7). Detiere shall recover from plaintiff costs in the form of reimbursement for actual costs and reasonable attorneys' fees reasonably incurred in her defense in this action (Uniform Rules for Trial Courts [22 NYCRR] § 130-1.1). This matter is assigned to the Special Referee Clerk in the IAS Motion Support Office for assignment to a special referee to hear and determine the amount of costs recoverable by Detiere. As a condition of the reference, Detiere shall file a copy of this order with the Special Referee Clerk within 20 days after entry. The branch of the motion by which Detiere seeks summary judgment is denied. The papers before the court do not include a copy of her answer as required by CPLR 3212 (b) (*see e. g. Ridell v Brown*, 32 AD3d 1212 [2006]). The Barbara firm's cross motion is granted to the extent that the complaint is dismissed pursuant to CPLR 3211 (a)(1), (a)(7) and 3212. The branch of the cross motion by which the Barbara firm seeks summary judgment on its counterclaim is denied. Issue has apparently not been joined on the counterclaim (*see* CPLR 3212 (a)). The Clerk shall enter judgment dismissing the complaint in its entirety. The Barbara

firm's counterclaim is severed and continued.<sup>1</sup> A preliminary conference regarding the counterclaim shall be conducted on May 14, 2007 at 2:00 p. m.



J. S. C.

Dated: March 30, 2007

**HON. LELAND DeGRASSE**

**[ FILED ]**  
APR 02 2007  
COUNTY CLERK'S OFFICE  
NEW YORK

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<sup>1</sup>Plaintiff has not moved for leave to amend the complaint. Therefore, her purported amended complaint dated December 15, 2006 would be a nullity if it was not served within the periods prescribed by CPLR 3025 (a).