

Hearst v Hearst

2007 NY Slip Op 30482(U)

February 28, 2007

Supreme Court, Suffolk County

Docket Number: 0001959/2006

Judge: Edward D. Burke

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SUPREME COURT - STATE OF NEW YORK
IAS/TRIAL PART 9 - SUFFOLK COUNTY

PRESENT:

Hon. EDWARD D. BURKE
Acting Justice of Supreme Court

Motion R/D : 09/22/06
Adj. Date : 02/07/07
Mot Seq # : 004 MG
CASE DISPOSED
SETTLE JUDGMENT

JOHN RANDOLPH HEARST, JR.,

Plaintiff(s),

- against -

BARBARA W. HEARST, LEONARD ACKERMAN,
ACKERMAN & WAINWRIGHT, LLP,
ACKERMAN & O'BRIEN, LLP, THE JOHN R.
HEARST JR. IRREVOCABLE TRUST and GENTA
HAWKINS HOLMES, as Trustee,

Defendant(s).

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Upon the following papers numbered 1 to 7 read on this motion by defendants Ackerman, Ackerman & Wainwright, LLP and Ackerman & O'Brien, LLP for dismissal of plaintiff's complaint ; Notice of Motion/Order to Show Cause and supporting papers 1 to 4 ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 5-8 ; Replying Affidavits and supporting papers ; Other SFO dated 11/15/06 and evidentiary submissions of the movants 9-12 and by the plaintiff 13-15 ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion (#004) by defendants, Ackerman, Ackerman & Wainwright, LLP and Ackerman & O'Brien, LLP, for an accelerated judgment dismissing the complaint served and filed in this action by the plaintiff is decided as follows:

Plaintiff commenced this action to recover money damages and a judgment awarding various forms of equitable relief, including the vacatur and/or rescission of various documents and deeds, the existence of which, the plaintiff attributes to the purportedly fraudulent acts and other tortious conduct on the part of the defendants which allegedly deprived the plaintiff of income and assets titled in his name. In September of 2006, defendants Ackerman, Ackerman & Wainwright, LLP and Ackerman & O'Brien, LLP, interposed the instant motion pursuant to, *inter alia*, CPLR 3211(a)(5) and 3211(a)(7) for dismissal of the plaintiff's complaint. By prior order of this court dated November 15, 2006, said motion was converted into one for summary judgment and adjourned to

January 17, 2007 to afford the moving defendants and the plaintiff time to assemble and submit evidentiary materials in support of their respective positions. After an adjournment requested by the parties was granted by the court, the instant motion (#003) was marked submitted to this court on February 7, 2007.

The provisions of the complaint served and filed in this action that are relevant to determination of this motion charge the defendant, Barbara Hearst, the wife of the plaintiff with fraudulent, deceptive and coercive acts, including fraud in the execution of documents and conversion of income, which deprived the plaintiff of title to and the use of certain of his assets and income. The commission of all of such act were purportedly aided and abetted by the conduct of defendant Ackerman. Money damages and rescission are remedies demanded by the plaintiff with respect to the execution of the following documents: the November 2, 1990 deed conveying 122 Lopers Path to defendant Hearst; the November 16, 1995 deed conveying 142 Loper's Path to Lopers Path LLC; the Lopers Path Operating agreement dated November 16, 1995; the John R. Hearst, Jr. Irrevocable Trust Agreement dated December 13, 2002; the Power of Attorney dated July 12, 1990, to defendant Hearst and the limited power of attorney dated March 7, 1995 to defendant Leonard Ackerman; the December 13, 2002 Ratification of Prior Gifts; and the April 27, 2004 Waiver of Right of Election.

Plaintiff demands money damages from and the disgorgement of legal fees by defendant Leonard Ackerman under the following legal theories; aiding and abetting defendant, Barbara Hearst's purportedly fraudulent conduct, breach of professional and fiduciary duties and legal malpractice. Plaintiff further demands money damages from defendant Ackerman and O'Brien, LLP., as successor to Ackerman, Ackerman & Wainwright, LLP. under theories of legal malpractice and breach of fiduciary duties.

The plaintiff and defendant Barbara Hearst were married on June 21, 1990. Prior thereto, the plaintiff suffered a debilitating stroke which purportedly left him with limited physical and mental capabilities. Notwithstanding said limitations, the plaintiff executed a general power of attorney in favor of defendant Hearst on July 12, 1990 that was prepared and notarized by the Robert Litman, Esq., the plaintiff's longtime personal, estate and tax attorney.

On November 2, 1990, the plaintiff executed a will prepared by Robert Litman, Esq., who was present for such execution and supervised same. Also executed on November 2, 1990, by the plaintiff and, thereafter, by his co-tenant's daughter and son-in-law, was a deed conveying a parcel of vacant land known as 122 Lopers Path in Water Mill, New York, to defendant, Barbara Hearst. Plaintiff claims that defendant Ackerman advised the plaintiff that the transfer was necessary to avoid a merger of deeds, as the plaintiff owned other properties on Lopers Path. Plaintiff claims that such representation by Ackerman was false and designed to enable defendant Hearst to acquire sole title to the three acre parcel known as 122 Lopers Path. Plaintiff alternatively claims that Ackerman's representation regarding the merger doctrine was negligent because said property was not in danger of a merger with other properties owned by the plaintiff. Also on the date of November 2, 1990, the plaintiff, and thereafter, his co-tenant daughter, executed a deed to premises they owned and known as Parcel B at 170 Lopers Path, conveying same to the plaintiff and defendant Hearst, jointly with right of survivorship.

On November 16, 1995, defendant Ackerman, purportedly in concert with defendant, Barbara Hearst, is alleged to have "caused" the plaintiff to sign a deed transferring his sole title to premises known as 142 Lopers Path to a limited liability company known as Lopers Path, LLC, in which the plaintiff and defendant Barbara Hearst then had a 50% interest as joint tenants with rights of survivorship. The operating agreement for said LLC was prepared by Ackerman and executed by the parties on November 16, 1995, the same date as the aforesaid deed conveying 142 Lopers Path to the LLC.

Plaintiff next alleges that on December 13, 2002, defendant Ackerman "caused" the establishment of the John R. Hearst, Jr., Irrevocable Trust and two Amendments to the Lopers Path LLC Operating Agreement as well as a Third Amendment that was executed by the plaintiff on January 29, 2003. According to the plaintiff, the import of said documents was to effect a transfer of all of the assets of the Lopers Path LLC, including its ownership of the real property at 142 Lopers Path, to the Trust and to permit defendant Hearst and/or the Trustee of the John R. Hearst, Jr., Irrevocable Trust to, *inter alia*, bind the LLC without participation by the plaintiff. The plaintiff claims that, at the time of the creation of the Trust, Ackerman represented that the terms of the trust would pass the 142 Lopers Path property to the plaintiff's grandchildren. The plaintiff alleges he was not aware that the terms of the Trust authorized the Trustee, in her sole discretion to invade the Trust principal for the benefit of defendant Hearst and thus cause a sale of the 142 Lopers Path property and so as to defeat the remainder interest of the plaintiff's grandchildren. Based upon Ackerman's representations, the plaintiff allegedly executed the trust even though the terms thereof "were not as the plaintiff believed" since said terms "did not provide, irrevocably, for the house at 142 Lopers Path to pass to the plaintiff's grandchildren". Plaintiff further charges defendant Ackerman with like transgressions in connection with the plaintiff's execution a Ratification of Prior Transfers and the two (2) amendments to the Lopers Path, LLC operating agreement also bearing the date of December 13, 2002. Plaintiff further seeks set aside a power of attorney executed by him on December 13, 2002 in favor of his wife and others subsequently executed, all of which were purportedly overly broad and favored the defendant's interests over those of the plaintiff.

The plaintiff also complains about Ackerman's preparation of a contract for the sale of an apartment in New York City owned by the plaintiff and defendant Hearst jointly. The record indicates, however, that such property was sold to persons not parties to this action, after the non-party purchasers prevailed in action to compel specific performance of said contract. The plaintiff also charges that defendant Ackerman prepared and caused the plaintiff to sign a Waiver of Right of Election against the estate of defendant Hearst in April of 2004, just prior to the defendant's commencement of divorce proceedings against the plaintiff. Ackerman is alleged to have undertaken all of these acts and others, in concert with defendant Hearst, as part of scheme to divest the plaintiff of his assets and income and other property rights belonging to him by fraudulent and other tortious conduct.

All of the documents for which rescission is demanded bear the signature of the plaintiff and all of the signatures of the plaintiff appearing thereon are duly acknowledged by a notary public except the Lopers Path Operating agreement dated November 16, 1995 and the three Amendments thereto. There are no allegations that the plaintiff did not sign the aforesaid documents or that the documents signed were different in kind and nature than that represented. Rather, the plaintiff's

demands for relief are predicated upon claims that poor health and the physical and mental limitations that afflicted the plaintiff since 1989, when he suffered a significantly debilitating stroke, left the plaintiff incapacitated and without the ability to understand the nature and import of the aforesaid documents and without the ability to resist executing same at the behest defendant Hearst and defendant Ackerman. Lacking the sufficient physical abilities, mental acuity and the legal capacity to understand the nature and effect of said documents, the plaintiff claims to have been fraudulently induced, forced and/or coerced by the defendants into executing said documents. The purportedly fraudulent and deceptive acts committed by the defendants are further alleged to have allowed defendant Hearst to convert, to her own use, an unidentified portion of the annual trust distributions the plaintiff derives from an inheritance. Plaintiff further claims that his physical and mental limitations left him without the ability to resist and discover the purportedly wrongful conduct engaged in by the defendants, which conduct is alleged to have continued over a period of fourteen years, commencing in 1990 and ending in 2004.

The plaintiff attributes his want of understanding and diminished mental capabilities to the stroke he suffered in 1989. The plaintiff's physical and mental condition purportedly worsened over the relevant fourteen year period that commenced in 1990 and ended in the first half of 2004. Only after the defendant's commencement of a matrimonial action against the plaintiff in July of 2004, did the plaintiff allegedly discover the defendants' purportedly wrongful conduct. Specifically, the plaintiff alleges that he first discovered the purported conversion of his assets and income in October of 2004, when the plaintiff reviewed with his matrimonial counsel, the affidavit of net worth filed by the defendant in the divorce action. By virtue of these circumstances, plaintiff contends that the deeds, trust indentures and other documents executed by him and/or by others empowered by him during the course of the aforesaid fourteen year period, during which, the defendants allegedly duped the plaintiff into executing said documents so as to effect the challenged transfers, gifts and/or waivers of the plaintiff's rights and legal interests, are invalid thus entitling the plaintiff to a judicial vacatur and/or rescission thereof. Plaintiff also seeks to recapture all lost income and assets attributable to the defendants' purportedly wrongful conversion of the plaintiff's annual income by awards of equitable relief and the recovery of punitive and compensatory money damages. Finally, the plaintiff seeks money damages from the moving defendants by reason of the acts of legal malpractice purportedly committed by defendant Ackerman and the recovery of all fees paid to Ackerman.

By separate order issued herein on the separate, converted motion of defendants, Hearst and Holmes for summary judgment (#003), all of the plaintiff's claims against defendant, Barbara Hearst, for money damages and equitable relief sounding in fraud, undue influence, constructive fraud, breach of fiduciary duties and a want of understanding and/or lack of capacity on the part of the plaintiff due physical and/or mental disabilities were found to be wholly lacking in merit and were dismissed by the court's award of summary judgment to defendants, Hearst and Holmes. Plaintiff's claims for the recovery of damages from defendant Ackerman, by reason of his purportedly tortious conduct in aiding and abetting conduct on the part of defendant, Barbara Hearst, which this court found to be non-actionable under any of the theories pleaded by the plaintiff, including, fraud, breach of fiduciary duties and conversion, are thus without merit. Defendant Ackerman is thus entitled to an award of summary judgment dismissing the Fourth Cause of Action asserted against him in the plaintiff's complaint.

The evidentiary submissions adduced by the moving defendants on this converted summary judgment motion included affirmations by two attorneys who, as members of a law firm not associated with the moving defendants, attested to the fact that the John R. Hearst, Jr., Irrevocable Trust and the Ratification of Prior Transfers each dated December 13, 2002 and the April 27, 2004 Waiver of Right of Election were prepared by one of said attorneys and executed by the plaintiff under supervision of the other of said attorneys. The affirmation of John Barnosky, Esq. states that in 2001, defendant Ackerman referred the plaintiff and defendant Barbara Hearst to him regarding development of an estate plan. After examining existing documents relevant to the parties' existing estate plan and after speaking to the plaintiff and defendant Hearst to ascertain their wishes and desires with respect to the parties' estate plan and whether changes to their estate plan were necessary to effectuate said wishes, Mr. Barnosky prepared the aforesaid documents, all of which were executed by the plaintiff under the supervision of attorney, Theresa K. Quigley, an associate of Mr. Barnosky. Both Ms. Quigley and Mr. Barnosky aver that at all times relevant to the preparation and execution of the aforesaid documents, the plaintiff had the ability to understand the nature and import of the documents and was fully competent to execute same. These evidentiary materials, together with the others attached to the moving defendants' submissions, established, *prima facie*, the moving defendant's entitlement to summary judgment dismissing the plaintiff's claims for recovery of money damages from the moving defendants under theories of legal malpractice, breach of fiduciary duties and the disgorgement by defendant Ackerman of all legal fees paid to him. by the plaintiff.

To establish a cause of action to recover damages for legal malpractice, the plaintiff must establish that: counsel failed to exercise the care, skill and diligence commonly possessed by a member of the legal profession; counsel's departure from the standard of care was a proximate cause of the loss sustained; and the plaintiff suffered actual damages as a results of counsel's action or inaction (*Edwards v Haas, Greenstein, Samson, Cohen & Gerstein*, 17 AD3d 517, 793 NYS2d 167 and the cases cited therein). Where a defendant in a legal malpractice action presents evidence of the plaintiff's inability to establish any one of the three essential elements of his or her claims, the defendant is entitled to an award summary judgment (*Porello v Longworth*, 21 AD3d 541, 771 NYS2d 918).

Here, the moving defendant's evidentiary submissions were sufficient to establish that neither the defendant Ackerman nor the other defendants failed to exercise the care, skill and diligence commonly possessed by a member of the legal profession. The proof demonstrated that the plaintiff was, at the time of the execution of all of the challenged documents, sufficiently competent and possessed of the requisite legal capacity to understand the nature and import of said documents; that the plaintiff had been independently counseled by attorneys not associated with the moving defendants in connection with the preparation and execution of the challenged documents on December 13, 2002 and April 27, 2004, including the Ratification of Prior Transfers, all of which, were consistent with the intentions and directives as expressed by the plaintiff at the time of the preparation and execution of said documents. The plaintiff's opposing papers failed to establish that the moving defendants' conduct in representing the plaintiff over the course of the fourteen year period complained of herein by the plaintiff violated the standard of care, skill and diligence commonly possessed by members of the legal profession. Indeed, the evidentiary and other submissions adduced by the plaintiff on this converted motion for summary judgment were largely devoted to issues

concerning the plaintiff's purported incapacity by reason of his physical and mental condition and that prosecution of plaintiff's was not barred by any applicable statute of limitations. There was no evidentiary showing of the existence of facts sufficient to raise genuine factual issues regarding any breach of the duty of care, skill and diligence owing to the plaintiff by the moving defendants' by reason of their attorney/client relationship (*Edwards v Haas, Greenstein, Samson, Cohen & Gerstein, supra*). Summary judgment dismissing the Fifth Cause of Action set forth in the plaintiff's complaint is thus awarded to the defendants. Defendant Ackerman is also entitled to summary judgment dismissing the Ninth Cause of Action wherein the plaintiff demands the return of all legal fees collected by defendant Ackerman's by reason of his purported breach of professional duties.

Defendant Ackerman, together with his co-moving defendants, are also entitled to summary judgment dismissing the plaintiff's Sixth Cause of Action which charges the moving defendants with a breach of fiduciary duties. It is well established, that where breach of fiduciary duty claims arise from the same facts as the plaintiff's pleaded claims for legal malpractice and do not include allegations of separate and distinct damages, the breach of fiduciary duty claims are subject to dismissal as duplicative of the legal malpractice claims (*Town of North Hempstead v Winston & Strawn, LLP*, 28 AD3d 746, 814 NYS2d 237). Here, the record indicates that the plaintiff's claims for recovery of damages under theories of breach of fiduciary duties are duplicative of the plaintiff's malpractice claims as they arise out of the same facts and do not include allegations of separate and distinct damages. The moving defendants are thus awarded summary judgment dismissing the Sixth Cause of Action set forth in the plaintiff's complaint.

The court has considered the remaining contentions advanced by the parties and finds all of them to be unavailing and/or moot.

In view of the foregoing, the instant motion (#004) by defendants, Ackerman, Ackerman & Wainwright, LLP and Ackerman & O'Brien, LLP, for summary judgment dismissing the plaintiff's complaint is granted. The claims upon which summary judgment have been awarded are severed from all other claims and the movants shall settle a judgment, upon a copy of this order, *providing for the severance herein directed* and the award of summary judgment granted herein to the movants. Upon entry of this order, the within action shall be marked disposed as all pending claims have been now been determined.

Settle judgment.

Dated: February 28, 2007.


EDWARD D. BURKE, A.J.S.C.