

Marte v Graber

2007 NY Slip Op 30493(U)

March 28, 2007

Supreme Court, New York County

Docket Number: 0402200/2005

Judge: Barbara R. Kapnick

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

BARBARA R. KAPNICK

PART 12

PRESENT:

Index Number : 402200/2005

MARTE, AMIN

vs

GRABER, HERMAN ESQ.

Sequence Number : 002

DISMISS

INDEX NO. 402200/05

MOTION DATE _____

MOTION SEQ. NO. 002

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**

FILED
APR 03 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 3/28/07


BARBARA R. KAPNICK S.C.
J.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 12

-----X
AMIN MARTE,

Plaintiff,

-against-

HERMAN I. GRABER,

Defendant.

DECISION/ORDER

Index No. 402200/05
Motions Seq. Nos.
002 and 003

-----X
BARBARA R. KAPNICK, J.:

Motions sequence numbers 002 and 003 are consolidated for disposition.

Plaintiff Amin Marte commenced this action pro se for 'breach of fiduciary contract' and 'quantum meruit' against defendant Herman I. Graber, Esq., an attorney he retained to handle the appeal of his conviction after a jury trial for assault in the first degree and criminal use of a firearm in the second degree.

FILED

NEW YORK
COUNTY CLERK'S OFFICE

After commencement of the instant action, but prior to the making of these motions, plaintiff retained counsel who served a Verified Amended Complaint as of right, pursuant to CPLR § 3025(a).

Plaintiff claims that Mr. Graber, who is now deceased, was paid a total of \$8,500.00 in fees "for and on behalf of the plaintiff" "[i]n consideration of the legal services to be rendered", but "failed and refused substantially to perform such contemplated legal services." Plaintiff further alleges that he

"has duly demanded the return of the said sum, and the same has been refused." He thus seeks a judgment in the sum of \$8,500.00 together with interest from January 2, 2001.

Defendant now moves (under motion sequence number 002) for an order dismissing this action and awarding sanctions on the grounds that: (i) this action is barred by the three-year statute of limitations applicable to claims for legal malpractice; (ii) the complaint does not state a claim for legal malpractice; (iii) this Court lacks jurisdiction because the summons filed by plaintiff pro se is defective since it fails to state the basis for venue, it is unsigned and it fails to set forth the time in which defendant must answer; and (iv) plaintiff lacks standing to bring this lawsuit because there is no claim that any of the monies were paid out of his funds.

Plaintiff opposes the motion and moves (under motion sequence number 003) for an order: (a) pursuant to CPLR § 1021 substituting Sandra Graber, voluntary administrator, as defendant in place and stead of Herman I. Graber, deceased; and (b) pursuant to CPLR § 305(c) granting leave to amend the summons herein.

The motion by plaintiff for permission to substitute Sandra Graber, voluntary administrator, as defendant in place and stead of

Herman I. Graber, deceased is granted and the caption is amended accordingly.

Based on the papers submitted and the oral argument held on the record on December 6, 2006, this Court finds that the Verified Amended Complaint states a claim for breach of decedent's duty to provide services under a contract, which is governed by a six-year statute of limitations.

Therefore, that portion of defendant's motion seeking to dismiss plaintiff's complaint based on the statute of limitations applicable to legal malpractice is denied.

Likewise, that portion of defendant's motion seeking to dismiss the Complaint for failure to sufficiently plead a claim for legal malpractice is denied, since plaintiff does not claim that the attorney was negligent in his representation, but rather that he retained monies that were paid pursuant to a contract for services that were never rendered.

CPLR § 3026 provides that

Pleadings shall be liberally construed. Defects shall be ignored if a substantial right of a party is not prejudiced.

CPLR § 2101(f) provides, in relevant part, that:

A defect in the form of a paper, if a substantial right of a party is not prejudiced, shall be disregarded by the court, and leave to correct shall be freely given ...

See, Tobia v. Town of Rockland, 106 A.D.2d 827 (3rd Dep't 1984).

None of the defects in the Summons identified by defendant prejudice a substantial right of the defendant. Therefore, that portion of defendant's motion seeking to dismiss this action for lack of jurisdiction is denied.

That portion of defendant's motion seeking to dismiss plaintiff's Complaint on the ground that he lacks standing to bring this action is denied, as there is at least a triable issue of fact as to whether or not plaintiff paid at least a portion of the fees advanced to the decedent through the sale of a 1995 Toyota truck.

Thus, defendant's motion to dismiss is denied in all respects.

This action is removed to the Civil Court, New York County pursuant to CPLR § 325(d) by separate order issued simultaneously herewith.

This constitutes the decision and order of this Court.

Date: March 28, 2007



Barbara R. Kapnick
J.S.C.
BARBARA R. KAPNICK
J.S.C.

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