

Brandland v Kunkis

2007 NY Slip Op 31718(U)

June 18, 2007

Supreme Court, New York County

Docket Number: 0103516/2004

Judge: Shirley W. Kornreich

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

PRESENT: Shirley Werner Kornreich,
Justice

PART 54

Dr. Payne Bransford

INDEX NO. 103516/04

MOTION DATE 3/29/07

MOTION SEQ. NO. 005

MOTION CAL. NO. _____

- v -
Matthew H. Kunkin

The following papers, numbered 1 to 3 were read on this motion to/for reargument

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

| PAPERS NUMBERED |
|-----------------|
| <u>1-2</u> |
| <u>3</u> |

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

FILED

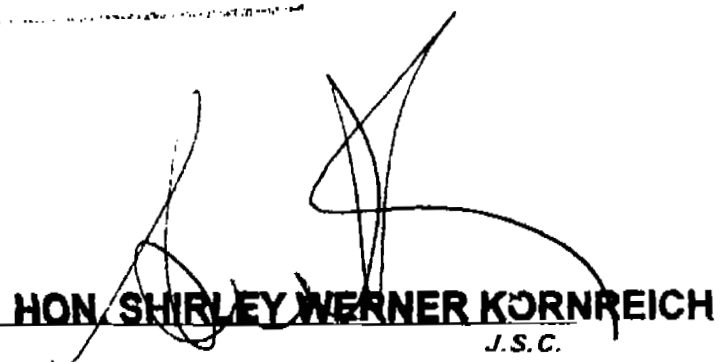
JUN 20 2007

COUNTY CLERK'S OFFICE
NEW YORK

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION AND ORDER.**

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

Dated: June 18, 2007


HON. SHIRLEY WERNER KORNREICH
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

-----X

DR. CARYN BRANDLAND,

Plaintiff,

-against-

Index No.: 103516/04

MARTHA H. KUNKIS & BAUMAN & KUNKIS,
Defendants.

DECISION & ORDER

-----X

KORNREICH, SHIRLEY WERNER, J.:

Defendants move to reargue this court's decision and order, dated February 5, 2007 ("Prior Order"), insofar as it denied defendants' motion for summary judgment on the ground that plaintiff cannot prove that she suffered damages as a result of legal malpractice. The court hereby grants reargument and, upon reargument, adheres to its original determination. However, in the exercise of the court's inherent power to modify its prior decisions, part II.B. of the Prior Order, which appears on pages 6-7, is hereby recalled and the following part II.B. is substituted in its place.

II.B. Legal Malpractice

Defendants' motion to dismiss the legal malpractice claim is denied. To prevail on a claim for attorney malpractice, a plaintiff must prove the negligence of the attorney, that the attorney's negligence was the proximate cause of plaintiff's loss and proof of actual loss. *Bishop v. Maurer*, 33 A.D.3d 497, 498 (1st Dept. 2006); *Brooks v. Lewin*, 21 A.D.3d 731, 734 (1st Dept. 2005). In order to establish proximate cause, plaintiff must demonstrate that, but for her attorney's negligence she would have suffered no damages. *Id.* Thus, if damages were caused by a factor other than the negligent attorney's actions, the claim must be dismissed. *Bishop, id.* Where the settlement of a subsequent action is necessitated as a result of malpractice, the amount of the settlement and litigation costs can be recovered as damages. *National Enters. Corp. v. Dechert Price & Rhoads*,

246 A.D.2d 481, 482 (1st Dept. 1998)(settlement and litigation costs recoverable and not superseding cause of malpractice as matter of law); *Jones Lang Wootton USA v. LeBoeuf, Lamb, Greene & MacRae*, 243 A.D.2d 168, 175 (1st Dept. 1998)(“Settlement, when compelled by an attorney’s breach of the standard of care, does not present an intervening cause so as to bar a malpractice action.”)

Here, defendants argue that plaintiff cannot prove that their conduct was the proximate cause of her damages. Specifically, they argue that any damages she sustained were proximately caused by her failure to move for partition of the jointly owned apartment or to assert her rights under the partnership agreement through arbitration, rather than by initiating the plenary action against Ms. Eagle.

There is a question of fact as to whether the settlement and litigation costs incurred by plaintiff are referable to the alleged malpractice. Plaintiff claims that while she was suffering from mental deficits and, contrary to her understanding or agreement and without advising her to obtain separate counsel, defendants put title to the condominium in a joint tenancy with right of survivorship and drafted a partnership agreement giving Eagle interests in plaintiff’s property. If plaintiff’s version of events is accepted by a jury, her damages could include, among other things, the cost of the settlement and the litigation costs associated with the action against Eagle, as well as consequential damages.

Defendants are incorrect that the availability of partition, arbitration, and other remedies under the partnership agreement negate plaintiff’s damages. Partition was not a remedy available to plaintiff because she specifically waived her right to it in the partnership agreement, which was drawn by defendants. Whether and to what extent plaintiff would have been made whole by assertion of her rights in arbitration is entirely speculative. Moreover, parties can waive arbitration

by participating in litigation. *Sherrill v. Grayco Builders*, 64 NY2d 261 (1985). Here, the affirmation of Dr. Brandland's attorney states that Ms. Eagle refused to go to arbitration and plaintiff was within her rights to elect plenary litigation. Defendants' argument that the partnership agreement's provision regarding the apportionment of the proceeds of sale of the apartment and repayment of "loan accounts" would have made plaintiff whole, does not negate the element of proximate cause. Accepting plaintiff's allegations, had plaintiff never signed the partnership agreement prepared by defendants, she would not have had to enforce her rights under it. Defendants, therefore, have not met their burden of demonstrating that the intervening conduct of plaintiff or her attorneys, rather than defendants' alleged negligence, was the proximate cause of plaintiff's damages. Accordingly, it is

ORDERED that defendants' motion for reargument is denied and, upon reargument, the court adheres to its original determination.

Dated: June 18, 2007

ENTER:

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 JUN 20 2007
 COUNTY CLERK'S OFFICE
 NEW YORK

HON. SHIRLEY WERNER KORNREICH
 J.S.C.

