

Clifford v McElroy

2007 NY Slip Op 33285(U)

September 27, 2007

Supreme Court, Suffolk County

Docket Number: 0022062/2000

Judge: Robert W. Doyle

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SUPREME COURT - STATE OF NEW YORK
 POST-NOTE MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT W. DOYLE
 Justice of the Supreme Court

MOTION DATE 7-6-07
 Mot. Seq. # 002 - MotD

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Estate of MARGARET M. CLIFFORD and	:	FRIEDRICH & FRIEDRICH
MAUREEN CLIFFORD,	:	Attorneys for Plaintiffs
Plaintiffs,	:	203 Godwin Avenue
	:	Ridgewood, New Jersey 07450
- against -	:	
	:	L'ABBATE, BALKAN, COLAVITA, et al.
ANDREW McELROY, PAUL KERSON and	:	Attorneys for Defendants Kerson & Leavitt,
LEAVITT, KERSON & LEFFLER,	:	Kerson & Leffler
	:	1001 Franklin Avenue
Defendants.	:	Garden City, New York 11530
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Upon the following papers numbered 1 to 37 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 31 ; Notice of Cross Motion and supporting papers _____ ; Answering Affidavits and supporting papers 32 - 36 ; Replying Affidavits and supporting papers 37 ; Other ___ ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendants Paul Kerson and Leavitt, Kerson & Leffler (hereinafter referred collectively as "Kerson") for an order granting summary judgment dismissing the complaint of plaintiffs, Estate of Margaret M. Clifford and Maureen Clifford is decided as follows.

Plaintiff commenced this action to recover damages allegedly suffered in connection with the legal representation of plaintiffs by defendants. On or about April 4, 1989, plaintiff Maureen Clifford retained attorney Andrew McElroy to probate the will and settle the estate of her aunt, the decedent Margaret Clifford. On or about July 11, 1989, Margaret Clifford (hereinafter "Clifford"), was appointed Executor of the Estate. On or about July 18, 1989, letters testamentary were issued to Clifford. Pursuant to decedent's will, Clifford, the Little Sisters of the Poor and decedent's godchild were each bequeathed \$10,000, with the residuary of the estate to be distributed in equal shares to six Catholic charities. On November 30, 1989, after the initial \$10,000 bequests were satisfied, but before the remainder of the estate was distributed to the six Catholic charities, Clifford, a licensed and experienced real estate broker, loaned Patrick and Lillian Desiderio \$200,000 from the estate. The loan, which was secured by a mortgage on real property located at 661-69 Jericho Turnpike, Hempstead, New York, was to be paid back, together with 15% interest over the course of one year. About this time, Clifford also prepaid herself a \$17,630 executor fee and paid McElroy \$16,312 as attorney for the estate.

The Desiderios defaulted on the terms of the loan. Attorney McElroy subsequently commenced a foreclosure action on behalf of the estate against the Desiderios. After preparing but not filing a motion for summary judgment, attorney McElroy decided to relocate to Georgia and met with Clifford to give her the file and advise her to obtain new counsel. After a few months passed, Clifford was unable to find counsel that she wished to represent the estate. On a return trip to New York State, McElroy met with Clifford and advised her to hire a colleague of his as the attorney for the estate. In January of 1992, Clifford retained defendant Kerson to represent the estate both in Surrogates Court and in Nassau Supreme Court with regard to the foreclosure matter, paying him \$15,000. Kerson filed a "consent to change attorneys" form with the court on January 15, 1992.

On September 17, 1992, Kerson filed a motion for summary judgment in the foreclosure action. Due to a change of counsel by the Desiderios, the motion was adjourned until January 7, 1993. That same month, Clifford took possession of the estate checkbook, bank records and file back from Kerson. By order of the court (O'Shaughnessy, J.) dated March 23, 1993, the motion was granted and the estate was directed to submit an order of reference. On June 16, 2003 an order of reference was signed. In late 1993, Kerson notified Clifford of taxes due and owing on the property and of the need to pay at least those owed for 1991. On January 25, 1994 the appointed referee issued a report. On February 15, 1994, Kerson moved to confirm the referee's report and for a judgment of foreclosure and sale. This motion was denied by order of the court (De Maro, J.) dated April 1, 2004, without prejudice to renew upon submission of the subject mortgage, note and complaint in the foreclosure action. In the interim, a technical discrepancy in the mortgage was discovered that needed to be remedied. Subsequently, on October 7, 1994, Kerson did renew the motion and the relief requested was granted by order of the court (De Maro, J.) on November 23, 1994 and entered on March 9, 1995.

On May 10, 1995, the estate purchased the subject property that had been owned by the Desiderios for the sum of \$1. On June 22, 1995, Kerson again notified Clifford of the need to pay back taxes owed on the property in order to satisfy a tax lien placed by the Nassau County Treasurer. Clifford thereafter listed the property for sale, with an asking price of \$300,000, although it was professionally appraised at \$160,000. An \$156,000 offer was made on the property, which Clifford rejected it as being too low. Upon Clifford's request, Kerson offered advice to Clifford as to various options she could pursue in order to contend with the fact that the property may be valued at less than the cost of the original loan. In the three years that followed, no additional offers were made on the property.

By letters date August 10, 1995, October 20, 1995, November 16, 1995, June 27, 1996 and October of 1997, Kerson repeatedly notified Clifford of the need to sign the Real Property Transfer Tax Return in regards to the subject property. Throughout this time and continuing through July of 1998, Kerson repeatedly, by letter and orally, advised Clifford to at least make some partial distribution to the Catholic charities who were to share in the remainder of the estate. Clifford rejected this advice, however, stating that she needed the money to pay the taxes owed on the property. Additionally, Kerson communicated with the charities and the Attorney General's office on Clifford's behalf. Ultimately, the New York State Attorney General's Office served a citation and petition upon Clifford for a compulsory accounting. In October of 1998, Kerson made an application to be relieved as counsel and a consent to change attorneys was subsequently filed with the court. On June 2, 1999, a stipulation of settlement was place on the record in connection with the accounting proceeding. As part of the settlement, Clifford resigned as fiduciary of the estate of her aunt and consented to a surcharge in the amount of \$133,961.61. On September 21, 2000, \$100,000 was given in equal shares

to the six charities named in Margaret Clifford's will as a partial distribution of the estate.

The Hempstead piece of property was subsequently auctioned off and sold for \$260,000. Ultimately, the estate which was originally valued in 1989 at \$467,965.83, was valued at \$519,318.97 and, upon final distribution on September 12, 2000, each of the 6 Catholic charities at issue received an additional \$57,499.53.

Plaintiffs commenced this action against McElroy, Kerson and Leavitt, Kerson and Leffler stating causes of action sounding in legal malpractice, breach of contract, breach of fiduciary duty, fraud and for money had and received.

It is uncontroverted that defendant McElroy died prior to the commencement of this action.

Kerson and Leavitt, Kerson & Leffler now move this court for an order granting them summary judgment dismissing the complaint of plaintiffs arguing that any damages allegedly suffered by the plaintiffs were caused directly and indirectly by Clifford's breach of her fiduciary duty in making the loan using estate funds and/or the role allegedly played by attorney McElroy in the arrangement of that loan at a time when Kerson and his law firm were not in any way involved with Clifford or the estate. Furthermore, Kerson and his partners argue that they committed no malpractice in the prosecution of the foreclosure action in that any delay was caused by the Kerson's professional decision, allegedly made after consultation with Clifford, to pursue negotiations to collect the money owed rather than foreclose on the property. The defendants argue that even if the estate could prove that the foreclosure action should have been resolved at an earlier date, it would have made no monetary difference to the estate if it had obtained the property sooner. Specifically, the defendants point to the fact that the Clifford was either not given or chose not to accept any offer on the property from the time the estate obtained it until the time she resigned as executor, some four years later. Additionally, defendants state that plaintiff's cannot prove that they could have collected on some hypothetical deficiency judgment against the Desiderios as the Desiderios declared bankruptcy. Finally, defendants argue that plaintiff's causes of action for breach of contract, breach of fiduciary duty and fraud must all be dismissed because they are duplicative of the malpractice claim and, furthermore, the fraud cause of action fails to satisfy the pleading requirements of CPLR 3016(a).

In opposition, plaintiffs argue that the claim for legal malpractice is predicated on the business relationship between McElroy and Kerson who acted as co-counsel on the subject cases and shared in the \$15,000 fee the estate paid to Kerson. In addition, their claim is based on Kerson's subsequent failure to repudiate the loan and seek redress from McElroy as well as Kerson allegedly allowing the estate to languish for 10 years without resolution. Furthermore, plaintiffs argue that Kerson's reliance on the "professional judgment rule" is misplaced in that Kerson never provided Clifford with the opportunity to choose between two or more courses of action. Rather, only the summary judgment route was discussed and that should have been pursued more vigorously and in any event counsel states that the foreclosure action should not have taken three years to complete. As to the causal link between the alleged negligence of the defendants and the damages suffered, plaintiffs argue that there would have been an obvious benefit to the estate in that they could have potentially had the property in question in the estate's hands three years sooner. Additionally, plaintiff's allege that although the estate paid Kerson a \$15,000 fee, he failed to return any of it even though he only allegedly spent 45 hours on the matter at a rate of \$200 per hour. Plaintiffs state that Kerson's claim that he gave \$5000 to McElroy is only evidence of Kerson and McElroy's illegal fee splitting arrangement.

Finally, in regards to the causes of action for fraud and contract, the plaintiffs state that based on all the facts submitted, they properly pled causes of action for both.

In reply, defendants note that plaintiffs' opposition contains no affidavit from plaintiff and no affidavit from a legal expert setting forth that LK & K or Kerson were negligent in the prosecution of the foreclosure action or the probating of the estate. Furthermore, defendants argue that Kerson was not retained to pursue an action against McElroy and that, regardless, plaintiff still had adequate time to commence an action against McElroy and thus any failure to act on Kerson's part was not the cause of any loss suffered by plaintiffs.

Plaintiffs' First Cause of Action for Legal Malpractice

To establish a cause of action for legal malpractice, a plaintiff must prove: (1) that defendant attorney failed to exercise that degree of care, skill, and diligence commonly possessed by a member of the legal community; (2) the attorney's negligence was the proximate cause of the loss sustained; and (3) damages. To show proximate cause, plaintiff must establish that but for attorney's negligence, the plaintiff would have been successful in the underlying action (*see, Ippolito v McCormack*, 265 AD2d 303, 696 NYS2d 203 [1999]; *Raphael v Clune*, 201 AD2d 549, 607 NYS2d 743 [1994]). For a defendant in a legal malpractice action to succeed on a motion for summary judgment, evidence must be presented in admissible form, establishing that plaintiff is unable to prove at least one of these essential elements (*McCormack v Krim*, 283 AD2d 464, 465, 724 NYS2d 643 [2001], *citing Suydam v O'Neill*, 276 AD2d 549, 550; *Ippolito*, 265 AD2d 303, 696 NYS2d 203; *Purificati v Meyer & Disenhouse*, 243 AD2d 697, 665 NYS2d 308 [1997]). Submission of an attorney's affirmation supported by deposition testimony provides such a proper evidentiary showing (*Gaeta v New York News*, 62 NY2d 340, 350, 477 NYS2d 82, 86 [1984]; *Zuckerman v City of New York*, 49 NY2d 557, 563, 427 NYS2d 595, 598 [1980]). An attorney's selection among several reasonable strategies does not constitute malpractice, even if the strategy is ultimately unsuccessful (*Rosner v Paley*, 65 NY2d 736, 492 NYS2d 13 [1985]). Furthermore, speculative damages cannot form the basis for establishing the damages in a malpractice action (*Pellegrino v File*, 291 AD2d 60, 738 NYS2d 320 [2002]).

Here, defendants have met their prima facie burden in establishing that they did not fail to exercise the degree of care, skill, and diligence commonly possessed by a member of the legal community. Plaintiffs, in opposition, have failed to offer sufficient evidence establishing issues of fact which would preclude summary judgment. The facts, as set forth above, establish that, even assuming the truth of plaintiffs' allegations concerning the questionable actions of attorney McElroy, such actions and Clifford's decision to loan the money to the Desiderios came over two years before she hired Kerson to take over the case. Logically, Kerson cannot be held accountable for the alleged negligent actions of another attorney, even one who is held out to be his co-counsel, which predated Kerson's involvement with the case (*Pellegrino*, 291 AD2d 60, 738 NYS2d 320). Furthermore, the court notes at no time did plaintiff indicate to Kerson that she thought McElroy was negligent in his dealings with the estate or in his alleged involvement with the loan at issue, nor did she ever state she wished to retain Kerson for the purposes of pursuing an action against McElroy, or his estate, for malpractice (*see, Ambase Corp. v Davis Polk & Wardwell*, 8 NY3d 428, 834 NYS2d 705 [2007]).

It is also undisputed that Clifford, on behalf of the estate, retained Kerson to give her advice concerning the probating of her aunt's estate and to complete the foreclosure action, which ultimately was accomplished. Plaintiffs do not dispute Kerson's contention that it was with Clifford's approval that he

continued his strategy to negotiate with the Desiderios in an attempt to have the loan repaid as an alternative to obtaining the property. Furthermore, while plaintiff's counsel argues that the foreclosure proceeding should have been completed in a more timely fashion, his affirmation fails to set forth any specific action that Kerson should have undertaken in a different manner that would have yielded better results. Moreover, the plaintiff's attorney's conclusory statements are tantamount to arguing that since he would have done things differently, defendants were therefore incompetent. "Such a contest of strategies is easily reduced to a malpractice standard that impermissibly compares the defendant-attorney's choice of strategies with the afterthoughts later offered by plaintiff's now-favored attorney, for whom bias is a necessary concern, rather than measuring counsel's performance against the much more objective standard of the profession's commonly prevailing practices" (*Russo v Feder, Kaszovitz, Isaacson, Weber, Skala & Bass, LLP*, 301 AD2d 63, 69, 750 NYS2d 277, 282 [2002]; *Rosner v Paley*, 65 NY2d 736, 492 NYS2d 13 [1985]).

Additionally, plaintiffs do not offer any evidence that but for the actions of Kerson and his partners, the plaintiffs would have had a more favorable result in the foreclosure proceeding, which was ultimately successful. Nor have they put forth any proof that they would have been able to recover additional damages against the Desiderios, who filed for bankruptcy in 1991.

Finally, it is clear that once the foreclosure action was complete, it was Clifford's actions alone in failing to sign the real estate transfer tax forms and in listing the property at approximately \$150,000 more than its appraised value that caused any non-market related delay in the sale of the property. Indeed Clifford never did sell the property, rather it was sold only after she resigned as executor in 1999 at the request of the New York State Attorney General.

In regards to Clifford's choice to settle the proceeding for an accounting brought against her by the New York State Attorney General, the evidence presented by defendants makes it abundantly clear that Clifford repeatedly refused to adhere to Kerson's advice concerning paying the taxes owed on the property, signing the real estate transfer tax form and in distributing at least some of the monies owed to the charities listed in her aunt's will. Thus, although settlement of an action does not necessarily preclude a subsequent action for legal malpractice in situations where the settlement was compelled by mistakes of counsel, plaintiff has failed to allege that such mistakes were made by Kerson (*see, Rau v Borenkoff* 262 AD2d 388, 691 NYS2d 777 [1986]; *Wolstencroft v Sassower* 124 AD2d 582, 507 NYS2d 728 [1986]). Furthermore, in light of Clifford's own complicity in the making of the loan to the Desiderios in violation of her duties as an executor and in her subsequent decisions to not sell the property, to not pay the taxes owed on the property and to not distribute estate money's to the heirs, settlement of the claim was not an unreasonable course of action (*see, Colleran v Rockman*, 275 AD2d 222, 712 NYS2d 108 [2000]; *see also, Rosner v Paley, supra; Dweck Law Firm, LLP v Mann*, 283 AD2d 292, 727 NYS2d 58 [2001]; *Williams v Brentwood Farmers Market, Inc.*, 256 AD2d 613, 683 NYS2d 134 [1998]).

Moreover, plaintiff has failed to establish causation and damages. These elements of malpractice are closely related to each other because if causation is lacking, it can frequently be said that there are no damages (*see, e.g., Cramer v Spada*, 203 AD2d 739, 610 NYS2d 662 [1994] [no malpractice where plaintiff failed to establish damages resulting from attorney's error]). The attorney's conduct must have caused damages that are actual and ascertainable as "[m]ere speculation of a loss resulting from an attorney's alleged omission is insufficient to sustain a prima facie case in malpractice" (*Luniewski v Zeitlin*, 188 Ad2d 642, 643, 591 NYS2d 524 [1992]; *Zarin v Reid & Priest*, 184 AD2d 385, 585 NYS2d 379 [1992]; *Brown v Samalin &*

Bock, P.C., 168 AD2d 531, 563 NYS2d 426 [1990]). Plaintiffs' allegation that Clifford and the estate may have been able to obtain the Hempstead property quicker if Kerson had done things differently, does not demonstrate "actual and ascertainable" damages necessary for a malpractice claim. Even assuming arguendo that plaintiffs had established questions of fact concerning some allegedly negligent actions on Kerson's part, Plaintiffs have offered nothing beyond mere speculation concerning what their actual damages may have been had the foreclosure action proceeded more expeditiously (*Perkins v Norwick*, 257 AD2d 48, 693 NYS2d 1 [1999] [damages based on what "might" or "would" have been done are "couched in terms of gross speculation"]). Nor can plaintiff establish, especially in view of her repeated failure to heed the advice of Kerson concerning the need to distribute the estate in accordance with her aunt's will, that the surcharge imposed as part of the settlement of the accounting proceeding was somehow causally connected to the actions of Kerson and his partners.

Plaintiffs' Causes of Action for Breach of Contract, Breach of Fiduciary Duty and Fraud

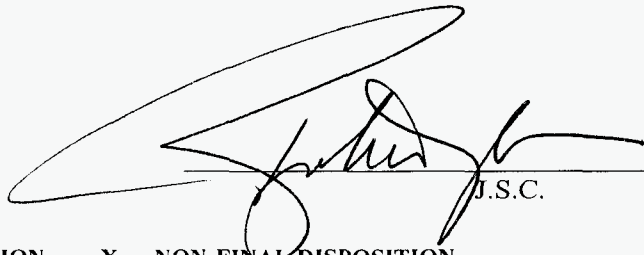
It is well settled that causes of action for breach of contract, breach of fiduciary duty and fraud cannot be maintained when they arise from the same set of facts and circumstances as that for legal malpractice claim and do not alleged distinct damages (*Mecca v Shang*, 258 Ad2d 569, 685 NYS2d 458 [1999]). Therefore, since plaintiffs' second, third and fourth causes of action are duplicative of their claim for legal malpractice, the court is compelled to grant that part of defendants' motion which seeks an order dismissing those claims.

Plaintiffs' Fifth Cause of Action for Money had and Received

In support of this cause of action, plaintiffs allege that Clifford, as executor of the estate, paid Kerson \$15,000.00 as a retainer fee based on Kerson billing the estate at a rate of \$200.00 per hour. To the extent that Kerson, in his deposition, states that he only spent 45 hours on this matter, it is clear he was only entitled to charge the estate \$9,000.00. There are clearly issues of fact as to whether Clifford on behalf of the estate authorized or, in the alternative, whether Kerson was justified in giving McElroy \$5,000.00 of the money the estate paid to Kerson as compensation for McElroy's ongoing work on the case after Kerson was retained. Moreover, Kerson offers no explanation as to why he failed to return at least the remaining undisputed \$1,000.00 of the unearned retainer fee to the estate. Therefore, defendants motion as to plaintiffs' fifth cause of action is denied.

Accordingly, the motion of defendants Kerson and Leavitt, Kerson and Leffler for an order granting summary judgment dismissing the complaint of plaintiffs is granted to the limited extent set forth above and in all other respects is denied.

Dated: SEP 27 2007



 J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION