Kahanovitz v Goldweber

2007 NY Slip Op 33365(U)

October 12, 2007

Supreme Court, New York County

Docket Number: 0107950/2005

Judge: Doris Ling-Cohan

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SCANNED ON 10/17/2007
[* 1]

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

PRESENT: Hon. Doris Ling-Cohan, Justice — PART 36

Index Number : 107950/2005
KAHANOVITZ, NEIL
vs
GOLDWEBER, ELYSE S.
Sequence Number : 002
SUMMARY JUDGMENT

INDEX NO. ____
MOTION DATE ____
MOTION SEQ. NO. ____
MOTION CAL. NO. ____

this motion + cross-motion to/for summary judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2
Answering Affidavits — Exhibits	5
Replying Affidavits	6
	3, 4

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion + cross-motion for summary judgment are decided in accordance with the attached memorandum decision.

FILED
OCT 17 2007
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 10/12/07

HON. DORIS LING-COHAN
J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 36

---X

NEIL KAHANOVITZ, M.D.,

Plaintiff,

-against-

Index No. 107950/05

ELYSE S. GOLDWEBER and GOLDWEBER, LAURIELLO and EPSTEIN, LLP.,

Motion Seq. No.:002

Defendants.

---X

DORIS LING-COHAN, J.:

The plaintiff Neil Kahanovitz, M.D. (Kahanovitz) moves, pursuant to CPLR 3212, for an order granting summary judgment on liability, and setting the matter down for an inquest on damages. The defendants Elyse S. Goldweber and Goldweber, Lauriello and Epstein, LLP (defendants) cross-move for an order granting summary judgment dismissing the complaint.

This is an action to recover damages for alleged attorney malpractice committed in an underlying matrimonial action. The complaint alleges that the defendants never advised Kahanovitz that as the parent and joint custodian having primary residency of his two minor children, he was entitled to receive statutory child support from his former spouse Melanie Kahanovitz, and that the stipulation and judgment settling his divorce action deviated from the Child Support Standards Act (CSSA) (Domestic Relations Law § 240 [h]). The Court notes that plaintiff has not sought to vacate such stipulation and judgment settling his divorce action.

In support of his motion for summary judgment, Kahanovitz alleges that the stipulation or judgment of divorce did not disclose: (i) that Kahanovitz, as the parent with primary residency of the minor child, was entitled to child support, as opposed to Melanie Kahanovitz; (ii) the statutory child support percentage applicable to the child support for two children; (iii) the income, maintenance and imputed income which would be attributable to Melanie Kahanovitz for child support purposes; (iv) the child support cap and ability of the court to exceed the

$80,000 child support cap under applicable circumstances; (v) the basis of child support obligation of Melanie Kahanovitz as provided in the CSSA and that such calculation would presumptively result in the correct amount of child support to be awarded; (vi) the calculation of 25% of the child support applicable to the combined parental income of $80,000, and the prorated portions thereof as each parent's income bears to the combined parental income; (vii) that the court in its discretion would determine the child support, if any, with respect to combined parental income in excess of $80,000 through consideration of the facts set forth in paragraph (f) of Section 240 of the Domestic Relations Law; (viii) the presumed child support obligations of the CSSA; (ix) that the CSSA provides for the payment of certain additional amounts of child support for reimbursed medical expenses and educational expenses; (x) the Court could apply the child support percentage to the amount of the parties' combined income in excess of $80,000 after carefully considering the parties' respective circumstances and finding no reason why there should be a departure from applying the prescribed child support percentage to the entire amount of the parties' combined amount; (xi) the parties' adjusted gross income, nor apply the statutory percentage to the parties' actual income for what the presumptive child support would have been; and (xii) the imputation of income as defined in the CSSA as the court, in its discretion, could determine to impute to a party.

Subsequent to the divorce, Kahanovitz sought and was awarded child support for his youngest daughter. Kahanovitz alleges that he sustained $75,705.00 in damages in uncollected child support from Melanie Kahanovitz which accrued from June 22, 2002 through May 13, 2004; $2,250 in unreimbursed contributions to maintain medical insurance coverage during this period; $9,000 in unreimbursed contributions to his older daughter's college education during this period; and $50,000 in legal fees to have his subsequent attorneys obtain the child support. Kahanovitz argues that, absent an accurate recitation in the stipulation of settlement of a

presumptively correct amount of child support pursuant to the CSSA, he was deprived of the ability to knowingly agree to deviate from CSSA guidelines. Kahanovitz maintains that he is therefore entitled to summary judgment on his claim for legal malpractice, due to this failure to comply with the CSSA.

In opposition to Kahanovitz's motion, and in support of their cross motion for summary judgment, the defendants allege that they did advise Kahanovitz of the CSSA, and that on June 20, 2002, Justice Fields allocuted Kahanovitz about opting out of the CSSA. It is further alleged that a review of the March 2, 2002 *pendente lite* decision by Justice Fields in the underlying divorce, clearly demonstrates that Kahanovitz was well aware of the CSSA. Both during the marriage, and at the time of the settlement, Melanie Kahanovitz was not employed outside of the home. Defendants further maintain that after acrimonious litigation and extensive negotiations, the settlement reached by the parties, benefitted plaintiff by: reducing the maintenance paid by him from the sum of $15,000 per month non-taxable, to the sum of $11,550 per month deductible to plaintiff; changing primary physical custody of their minor daughter Katie from Melanie Kahanovitz, to plaintiff; granting plaintiff the right to move outside of New York; distributing marital assets; avoiding a trial; obtaining a waiver of Melanie Kahanovitz's interest in plaintiff's practice; and granting an immediate divorce.

In seeking summary judgment of dismissal, the defendants raise, *inter alia*, the following arguments: (1) Kahanovitz is unable to prove that the defendants failed to inform him about the CSSA; (2) the award of child support to Kahanovitz, in post-divorce proceedings years after his settlement, does not show malpractice; and (3) Kahanovitz is unable to establish that but for the defendants's negligence, he would have recovered a more favorable outcome in the underlying divorce action.

The proponent of a summary judgment motion must make a prima facie showing of

entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact from the case (JMD Holding Corp. v Congress Fin. Corp., 4 NY3d 373 [2005]; Alvarez v Prospect Hosp., 68 NY2d 320 [1986]; Friends of Animals v Associated Fur Mfrs., 46 NY2d 1065 [1979]). The failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 [1985]). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which requires a trial of the action. Mere conclusions, expressions of hope, or unsubstantiated allegations are insufficient for this purpose (Zuckerman v City of New York, 49 NY2d 557 [1980]).

In order to establish a cause of action to recover damages for legal malpractice, a plaintiff must show that (1) the attorney failed to exercise the degree of skill, care, and diligence commonly possessed by a member of the legal community; (2) the attorney's conduct was a proximate cause of plaintiff's injury or damage; (3) the plaintiff incurred damages as a direct result of the attorney's negligent actions; and (4) the plaintiff would have been successful but for the attorney's failure to exercise due care (see Moran v McCarthy, Safrath & Carbone, P.C., 31 AD3d 725 [2d Dept 2006]). "A plaintiff's burden of proof in a legal malpractice action is a heavy one" (Nazario v Fortunato & Fortunato, PLLC, 32 AD3d 692, 695-96 [1st Dept 2006], quoting Lindenman v Kreitzer, 7 AD3d 30, 34 [1st Dept 2004]). "The plaintiff must prove first the hypothetical outcome of the underlying litigation and, then, the attorney's liability for malpractice in connection with that litigation" (id. at 695-696).

> Only after the plaintiff establishes that he would have recovered a favorable judgment in the underlying action can he proceed with proof that the attorney engaged to represent him in the underlying action was negligent in handling that action and that the attorney's negligence was the proximate cause of the plaintiff's loss since it prevented him from being properly compensated for his loss.

(id.).

For a defendant in a legal malpractice case to succeed on a motion for summary judgment, evidence must be presented in admissible form establishing that the plaintiff is unable to prove at least one of the essential elements of a malpractice cause of action (Ippolito v McCormack, Damiani, Lowe & Mellon, 265 AD2d 303 [2d Dept 1999]).

Applying such principles to this case, plaintiff Kahanovitz's motion for summary judgment is denied and defendants' cross-motion of summary judgment of dismissal is granted. Significantly absent from the moving papers is a showing that but for defendants' alleged legal malpractice - the failure to adequately advise plaintiff of the CSSA guidelines - plaintiff would have prevailed in the underlying divorce action, or would not have sustained any ascertainable damages (see Leder v. Spiegel, 31 AD2d 266 [1st Dept 2006]). Thus, plaintiff cannot establish his legal malpractice claim against defendants. Moreover, defendants have established that Kahanovitz knowingly waived the provisions of the CSSA, when he entered into the stipulation of settlement.

On June 20, 2002, plaintiff and Melanie Kahanovitz appeared in court with their counsel on their pending divorce action before Hon. Marjorie Fields. The parties announced that they had a settlement. [Transcript, Exh. B, Notice of Motion, at 3]. Throughout the allocution of the stipulation on the record, Justice Fields made inquiries of the parties and their counsel. Justice Fields asked the lawyers about child support, and when she was told that there is no child support, stated that "I have a statute that we have to comply with, so you are going to need to provide us with sufficient basis for that." [id. at 5]. Justice Fields further reminded the parties that they "need to have a provision for her support and maintenance in this as well." [id. at 22]. In fact, Justice Fields specifically stated that the "statute requires an award of child support up until the age of 21. You're not putting a dollar amount on this. If you're opting out, someone has to take responsibility ... you have to provide for me sufficient information so that this order is

enforceable, because otherwise the judgment will not be enforceable if it doesn't comply with the Child Support Standards Act. You can opt out, but your opt out has to be, specifically, sufficient so it is enforceable." [id. at 23]. Counsel for Kahanovitz then said "both parties request that we opt out of the Child Support Standards Act." [id. at 23]. Justice Fields reiterated "Can I have a minimum dollar amount so there is an ascertainable amount?" [id. at 24].

Finally, Justice Fields, in direct contradiction of Kahanovitz's complaint and affidavit in this action, told the parties and their lawyers: "I just want ... both your clients to know ...spousal maintenance is income" and that in the future "a court could request it from both of you, because there's no dollar amount here." [id. at 25-26]. Justice Fields then said: "[j]ust so long as you understand that you can make this agreement." [id. at 26]. In response Kahanovitz's counsel asked: "May we have a one moment, your Honor?" [id.]. According to the transcript a discussion was held off the record. Kahanovitz's counsel then said "[y]es, we understand." [id.]. In response to a series of question from Justice Fields, Kahanovitz swore that he understood the terms, had an opportunity to discuss the settlement with his attorney and had no questions. [id. at 40-42].

Thus, the transcript of the settlement, shows that Kahanovitz knowingly and voluntarily entered into the stipulation of settlement, which included opting out of the CSSA (Domestic Relations Law § 240 1-b [h]) and demonstrates that Kahanovitz was advised that he was opting out of the CSSA. Kahanovitz's protestations to the contrary are not supported by the record.

Moreover, even if the submitted proof showed that Kahanovitz was not adequately informed of the provisions of the CSSA and that in fact defendants were negligent in failing to so advise, Kahanovitz's failure to establish that he would have received a more favorable outcome in the divorce proceeding if he were properly informed is futile to this legal malpractice action. Kahanovitz fails to offer any expert opinion creating an issue of fact that he would have received

a more favorable outcome.

The submitted evidence shows that the settlement, which was allocuted on the record, was a global settlement which included the consideration of many factors, both financial and non-financial. It is clear from the submitted transcript that one of the factors considered in reaching the parties' settlement was the waiver of the provisions of the CSSA, and that plaintiff was informed of such waiver. Moreover, as there is no proof before the Court to show that but for defendants' alleged malpractice, defendant would have received a more favorable result in the underlying divorce action, defendants are entitled to summary judgment of dismissal.[1]

Accordingly, it

ORDERED that the plaintiff's motion for summary judgment is denied; and it is further

ORDERED that the defendants' cross motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to the defendants as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that within 30 days of entry of this order, defendants shall serve a copy upon plaintiff with notice of entry; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

FILED

OCT 17 2007

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 10/12/07

Hon. Doris Ling-Cohan, J.S.C.

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[1] The Court notes that, it is telling in this legal malpractice action that on the record before Justice Fields on June 20, 2002, after counsel for Kahanovitz's ex-wife praised Kahanovitz's counsel for her "professionalism, and her candor", Justice Fields, stated to the parties: "you're lucky you have good lawyers, otherwise you'd be litigating this for the next five years". [Transcript, Exh. B, Notice of Motion, at 48]