

Alaimo v Mongelli

2007 NY Slip Op 33857(U)

November 8, 2007

Supreme Court, Nassau County

Docket Number: 0651-07/

Judge: Joseph P. Spinola

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SHORT FORM ORDER
SUPREME COURT, STATE OF NEW YORK
COUNTY OF NASSAU

RICHARD J. ALAIMO and LAURA ALAIMO,
Plaintiffs

Trial/IAS Part 21
Index No. 07-12651
Sequence No. 01
Submit Date 10/31/06

against

MICHAEL F. MONGELLI, MICHAEL F.
MONGELLI P.C., WALLACE LEINHEARDT
and JASPAN SCHLESSINGER HOFFMAN, LLP,
Defendants

The following papers read on this motion:

- Notice of Motion/Order to Show Cause..... X**
- Cross-Motions.....**
- Answering Affidavits..... X**
- Replying Affidavits.....**

PRESENT: HON. JOSEPH P. SPINOLA

Motion by defendants Wallace Leinhardt and Jaspan Schlessinger Hoffman, LLP for an order dismissing the Seventh and Eighth causes of action for legal malpractice pursuant to CPLR 3211(a)(1) and (7) is denied.

In this legal malpractice action plaintiff Richard Alaimo, an attorney, alleges, *inter-alia*, that defendants Leinhardt and Jaspan Schlessinger Hoffman, LLP (collectively referred to as Jaspan or the Jaspan firm) negligently advised him that an appeal of a certain Surrogate's order holding him responsible for a breach of fiduciary duty would not succeed, and that he suffered damages as a result of Jaspan's failure to prosecute the appeal.

The underlying facts include the following. Plaintiff Richard Alaimo, an attorney, drafted a will and acted as the executor for one Vito Cristina, who wanted his estate to go to his wife Monica Apostale if she was still married to him at the time of his death. Cristina died on May 13, 2000, at a time when Apostale was not his wife. The will apparently did not provide for contingent beneficiaries, and his estate passed under the laws of intestacy.

The complaint alleges that several days prior to Cristina's death he stated to his brother, in plaintiff Alaimo's presence, that "he had been accused of fathering a child by one Stephanie DePace, and if a DNA test showed that the four month old child Katlyn was fathered by him, then plaintiff Richard Alaimo should convey to DePace certain real property situated at 10 Hideaway Lane, Marlboro, NY. According to the complaint, DePace attended Cristina's funeral and told Alaimo that she "may be the mother of decedent's child."

In July of 2000 DePace married a man named Philip Toro, who, at the time of the child Katlyn's birth in January of 2000, legally admitted paternity. Thereafter DePace refused to allow the child to be tested to establish Cristina as the father. Notwithstanding an inability to establish whether Cristina was Katlyn's father, Alaimo and the decedent's heirs entered into a settlement with DePace and conveyed the Marlboro real property to her in March of 2001. Alaimo distributed the remainder of the decedent's property to his heirs on March 23rd.

In April of 2001, DePace commenced a proceeding against Toro for child support. Toro defended claiming the child was not his and moved to vacate the order adjudging him to be Katlyn's father.

The complaint states that one year later, in April of 2002, "a test of a tissue sample from the decedent and from the child found the decedent to be the likely father." (¶ 19). The Family court issued an order in March of 2003, declaring the decedent to be the father of the child as of July 1, 2001. The complaint does not indicate when the decedent's tissue sample was taken, whether voluntarily before his death at the time he asked for a paternity test, or later by order to exhume his body.

After the declaration of the decedent's paternity, DePace commenced a proceeding against Alaimo for breach of fiduciary duty in distributing the decedent's estate to persons other than the child, who, it was alleged, was his sole heir under the laws of intestacy. Alaimo was represented by defendant Michael F. Mongelli, PC. DePace moved for partial summary judgment seeking a decree determining that the child be declared the sole heir of Cristina.

Alaimo's counsel argued that the Family Court order of filiation was not binding on the Surrogate's court on the issue of the child's right to inherit, as the DNA results are not sufficient under the EPTL for inheritance purposes. Alaimo argued that DePace failed to establish that the decedent openly and notoriously acknowledged the child as required by EPTL 4-1.2(a)(2)(C).

By order dated June 28, 2005, the Surrogate found that the decedent's instructions to his brother in the presence of Alaimo to conduct a paternity test constituted "open and notorious acknowledgment" of paternity of the child Katlyn. The court found that

Alaimo breached his fiduciary duty by distributing the assets of the estate with knowledge of the possibility that the decedent fathered a child out of wedlock who would be his sole heir. At the insistence of Alaimo, Mongelli filed a notice of appeal. The retainer explicitly excluded appellate representation.

After his attorney trust accounts were restrained, Alaimo retained the Jaspian firm. The firm secured the release of Alaimo's trust accounts as well as those accounts belonging solely to Laura Alaimo. The Jaspian firm retainer agreement reveals that Jaspian advised Alaimo that an appeal of the Surrogate's order, which found an open and notorious acknowledgment of paternity by the decedent, would not be successful and the appeal was not perfected.

Alaimo now alleges that the advice to forgo appeal was negligent and that but for that advice he would have appealed and prevailed. He relies upon then recent authority which held that a private conversation does not constitute an open and notorious acknowledgment of paternity for purposes of EPTL 4-1.2(a)(2)(C) (*see, Matter of Davis*, 27 AD3d 124, 128-129 [2d Dept 2006]).

A cause of action to recover damages for legal malpractice requires proof of three elements: "(1) that the defendant failed to exercise that degree of care, skill, and diligence commonly possessed and exercised by an ordinary member of the legal community, (2) that such negligence was the proximate cause of the actual damages sustained by the plaintiff, and (3) that, but for the defendant's negligence, the plaintiff would have been successful in the underlying action" (*Cummings v. Donovan*, 36 AD3d 648 [2d Dept 2007]).

A legal malpractice claim may arise out of the negligent giving of advice (*see Scheller v. Martabano*, 177 AD2d 690 [2d Dept 1991]). In such a case, the elements may be set forth as follows: "(1) within the context of an attorney-client relationship, (2) the attorney negligently (3) gave improper advice, (4) which was a proximate cause of the client's doing of things he would not otherwise have done, (5) resulting in harm and damage to the client" (*Marks Polarized Corp. v. Solinger & Gordon*, 124 Misc.2d 266, 267 [Supreme Court Queens County 1984]). However, "if the client cannot demonstrate its own likelihood of success absent such advice", there is no cause of action (*Pellegrino v. File*, 291 AD2d 60 [1st Dept 2002], *lv app denied* 98 NY2d 606 [2002]).

Because this is an application in part pursuant to CPLR 3211 for failure to state a cause of action, "the court must presume the facts pleaded to be true and must accord them every favorable inference" (*Leder v. Spiegel*, 31 AD3d 266, *affd* 9 NY3d 836 [2007]).

Inheritance by non-marital children is governed by EPTL § 4-1.2(a)(2). For purposes of the section, a "nonmarital child" is the legitimate child of his father so that he

and his issue inherit from his father if “paternity has been established by clear and convincing evidence *and* the father of the child has openly and notoriously acknowledged the child as his own” (EPTL § 4-1.2 [a][2][C][emphasis supplied]). Here the only evidence in support of open and notorious acknowledgment is one private conversation between the decedent and his brother. The Surrogate stated at page 4 of its decision, “the Court finds that the decedent's instructions to his brother, in the presence of the Petitioner, constitutes open and notorious acknowledgment”.

Alaimo argues that the Appellate Division would have reversed the Surrogate based upon *Matter of Davis* (27 AD3d 124, 128-129 [2d Dept 2006]). *Davis* held that EPTL § 4-1.2 [a][2][C] requires a showing of open and notorious acknowledgment of paternity during the life of a decedent before a blood test will be ordered and his remains be exhumed for testing, thus establishing a threshold showing. The court found that a private conversation does not constitute open and notorious acknowledgment. Explaining its rationale the Second Department stated:

the legislative history of EPTL 4-1.2 (a) (2) (C) . . . indicates that that provision was enacted, not to create rights for all nonmarital children, but to insure the rights of nonmarital children *known to the decedent and openly acknowledged by the decedent during his lifetime*

(*Matter of Davis*, 27 AD3d 124, 128-129 [2d Dept 2006][emphasis supplied]). The conversation here did not constitute such an acknowledgment, as the child was not known to the decedent. Indeed, the decedent's wish for testing cannot be construed as acknowledgment of the child, but rather an admission of intimate access to her mother, DePace.

As noted earlier, the complaint is not clear with regard to the timing of the decedent's blood test. It states: “On or about April 1, 2002 a DNA test of a tissue sample from the decedent and from the child found the decedent to be the likely father.” The wording is not clear with respect to whether the tissue sample of Cristina was taken when he was alive or after his death. Because the application is pursuant to CPLR 3211, plaintiff is entitled to a favorable inference that the sample was taken after Cristina's death, which would render § EPTL 4-1.2 (a) (2) (D), which does not require an open and notorious acknowledgment, inapplicable (*see, Matter of DeLuca*, N.Y.L.J., January 15, 1998, p37, col 2 [Surrogate's Court Suffolk County (Prudenti, J.)][“it having been established that the samples were obtained post-death, the court need not determine the issue of whether blood samples as opposed to tissue samples would be required”]).

The court rejects the Jaspán firm's contention that the cause of action fails because their retainer did not include the perfection of an appeal. The retainer states that the firm advised the client not to appeal. Indeed, had counsel simply refused to prosecute an appeal, Alaimo might have sought other counsel. The advice not only precluded securing

the services of counsel who could have prosecuted an appeal, it also precluded inclusion of an appeal in the retainer. Counsel cannot inoculate against malpractice for bad legal advice in this manner. The subject of the appeal was discussed between counsel and client, and would have been part of the retainer had counsel not given the alleged erroneous advice.

The court finds authority relied upon by Jaspan inapposite. In *Matter of Thayer* (1 Misc3d 791 [Surrogates Court Madison County 2003]), the evidence showed that the decedent had gone with his girlfriend Bethany to his mother and then to his aunt “to announce that they were going to have a baby” and told his aunt Stephanie Pylman “that he and Bethany would raise the baby together.”

The court stated, “While one commentator has opined that ‘the likelihood of a decedent’s acknowledging a child still in utero is slim’ * * * this court is satisfied that, under the circumstances presented here, the decedent did all that he might reasonably be expected to do to openly and notoriously acknowledge that he was the father of the child that would ultimately be born to Bethany” (*Matter of Thayer, supra, at p 794*). In this case the child was not in utero, the decedent never acknowledged that he was the father, and, did not indicate any intention to leave his estate to or raise the child. Cristina acknowledged that he might be the father of a four month old child, not that he was. Nor did he indicate any desire to raise the child as did the decedent in *Thayer*, or go to family members making an announcement. Jaspan’s attempt to distinguish *Davis* by citing *Thayer* fails, as the facts are not comparable. Moreover, the contention that *Davis* is distinguishable is without merit. *Davis* held that a private conversation does not constitute an open and notorious acknowledgment, and EPTL § 4-1.2 (a)(2)(C) requires an open and notorious acknowledgment. Thus, clear and convincing evidence of paternity such as a DNA test is not sufficient when the test is administered after the father’s death. Accordingly, the eighth cause of action states a cause of action and will not be dismissed.

With respect to the Seventh cause of action alleging that Alaimo entered into an unfavorable settlement based upon Jaspan’s failure to seek a stay pending appeal, the Jaspan firm argues that the appeal was outside the matters for which it was retained, and, that plaintiffs do not allege that they had the assets to collateralize a bond for a stay. As the court has found that the failure to appeal is not outside the scope of the retainer where counsel has misadvised the client not to include it, a stay pending appeal falls within the coverage as well. Moreover, the complaint does allege that “a stay could have been secured on terms that could have been met by plaintiffs....”. Accordingly, the pleading states a cause of action.

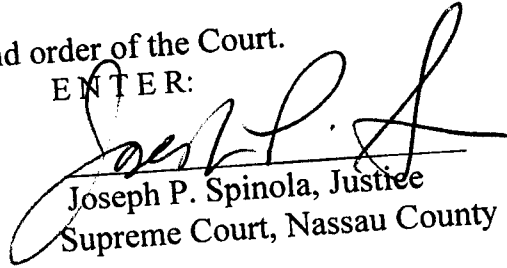
Insofar as the Jaspan firm raises new arguments in a reply memorandum of law, the court has not considered such arguments. “The function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds for the motion”

[* 6]
(*Dannasch v. Bifulco*, 184 AD2d 415, 417 [1st Dept 1992]).

Accordingly the motion to dismiss is denied.

This constitutes the decision and order of the Court.

ENTER:


Joseph P. Spinola, Justice
Supreme Court, Nassau County

Dated: November 8, 2007

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**NASSAU COUNTY
COUNTY CLERK'S OFFICE**