

Walker v Kramer

2007 NY Slip Op 34008(U)

December 11, 2007

Supreme Court, Suffolk County

Docket Number: 0005219/2007

Judge: Paul J. Baisley

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SUPREME COURT - STATE OF NEW YORK
DCM PART- SUFFOLK COUNTY

COPY

PRESENT:**HON. PAUL J. BAISLEY, JR., J.S.C.**

-----X
JUDITH WALKER,

Plaintiff,

-against-

LYNN ADAIR KRAMER, ESQ., GREGORY RABINOWITZ, ESQ., each individually and operating as KRAMER & RABINOWITZ, LLC, DEBRA RUBIN, ESQ., KRAMER & RUBIN PLLC as successor in interest to KRAMER & RABINOWITZ, LLC, GAIL ROSENBLUM ESQ. and RUBEN & ROSENBLUM, PLLC as successor in interest to KRAMER & RUBIN, PLLC,

Defendants.

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INDEX NO.: 5219/2007

MOTION DATE: 5/25/2007

ADJ. DATE: 9/7/2007

MOT NO.: 001 MG

002 MOT D

003 MD

004 MG

PLAINTIFFS' ATTORNEY:

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Upon the following papers numbered 1 to 54 read on these motions and cross motion to dismiss: Notice of Motion/ Order to Show Cause and supporting papers 1-10; Notice of Cross Motion and supporting papers 11-14; 15-26; 27-32; Answering Affidavits and supporting papers 34-38; 42-48; 51-53; Replying Affidavits and supporting papers 39-41; 49-50; Other 54; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by the defendants, Debra L. Rubin Esq., Gayle R. Rosenblum, Esq. and Rubin and Rosenblum PLLC to dismiss the complaint for failure to state a cause of action pursuant to CPLR §3211(a)(7) is considered together with a motion by defendant, Gregory Rabinowitz, also to dismiss for failure to state a cause of action, a cross motion by the plaintiff for summary judgment, a cross motion by defendants, Lynne Kramer, Esq., Kramer & Rabinowitz, LLC, and Kramer & Rubin, PLLC also to dismiss the complaint for failure to state a cause of action and because of a defense founded upon documentary evidence. They are decided as follows:

This action sounds in legal malpractice. Defendant, Gregory Rabinowitz Esq., while practicing under the firm name of Wachtel & Rabinowitz, undertook to represent the plaintiff in her divorce action against her husband, Wesley Walker, on May 14, 2003. In that action bearing index number 25058-2001, the parties entered into a stipulation of settlement on April 19, 2004. The stipulation provided:

In consideration and exchange of a tax free equitable distribution Payment of Three Hundred Thousand (\$300,000.00) Dollars to the Wife, she will waive all of her right, title and interest in and to the 10 Schoolhouse Way property.

The Defendant shall have the later of July 19, 2004 or four (4) months from the date of entry of a Judgment of Divorce between the parties to pay to the plaintiff, by a certified and /or bank check, a lump sum of at least Two Hundred and Seventy

Thousand (\$270,000.00) dollars payable to the order of Kramer & Rabinowitz, LLC as attorneys for Judith Walker. (Article 13 of the stipulation)

It further provided that :

Within 10 days from the execution of the within Stipulation, the plaintiff's attorney shall prepare all of the necessary documents for the Defendant to transfer his right, title and interest in and to the premises to the Plaintiff and Defendant as "joint tenants in common" by bargain and sale Deed with Covenants against Grantors Acts which deed and transfer papers shall be immediately filed at the defendant's sole cost and expense."

It is not disputed that Mr. Rabinowitz did not prepare the aforesaid documents and that the marital home, whose title was held solely in Wesley Walker's name, was never transferred to their joint names. Thereafter, Wesley Walker encumbered the premises with three additional mortgages on July 27, 2004, and two on January 14, 2005. At the time the stipulation of settlement was signed, Mr. Rabinowitz had left the firm of Wachtel & Rabinowitz and was practicing with Lynne Adair Kramer under the firm name of Kramer & Rabinowitz, LLC, as is reference in the quoted language of the stipulation. The divorce was finalized on December 7, 2004. On March 7, 2005, Mr. Rabinowitz, practicing under the firm name of Kramer and Rabinowitz, LLC, and Judith Walker entered into a post-judgment retainer agreement. Approximately one year later, apparently due to a falling out between Lynn Adair Kramer and Gregory Rabinowitz, Mr. Rabinowitz left the firm. The plaintiff's file stayed with the firm and Debra Rubin became a partner in place of Mr. Rabinowitz. The firm was known as Kramer & Rubin. Debra Rubin appeared on behalf of Ms. Walker concerning the enforcement of the stipulation. On October 6, 2006, Ms. Kramer left the firm and Debra Rubin formed a partnership with Gayle Rosenblum. Ms. Kramer consented to a change of attorney to the firm of Rubin and Rosenblum PLLC. which continued to represent Ms. Walker in the post-judgment proceedings. In late 2006, Plaintiff obtained new counsel to prosecute her enforcement proceeding. The last appearance in this proceeding was November 30, 2007 before the Honorable Justice Marion T. McNulty.

The complaint alleges that the defendants' conduct in failing to prepare the papers to convey title to the marital home, in failing to timely prosecute the divorce, and to commence enforcement proceedings resulted in plaintiff's loss of her equity in the marital home. It further seeks damages for breach of contract and the retainer agreement.

A prerequisite to a claim for legal malpractice is a showing that the plaintiff and counsel are in privity of contract. Thereafter, the plaintiff must demonstrate that the attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession and that the attorney's breach of this duty proximately caused plaintiff to sustain actual and ascertainable damages. To establish causation, a plaintiff must show that he or she would have prevailed in the underlying action or would not have incurred any damages, but for the lawyer's negligence (*Eisenberger v. Septimus*, 44 A.D.3d 994, 845 N.Y.S.2d 102).

Here each of the named defendant counsels had a relationship with the plaintiff at various points in time. As noted above, the complaint sets forth three purported acts of negligence. The first involves the failure to prepare papers to convey title to the marital home; the second to timely prosecute the divorce action; and the third to commence enforcement proceedings.

The first allegation of negligence occurred in April of 2004. At that time plaintiff had an attorney/client relationship with Gregory Rabinowitz, who was associated with Lynne Adair Kramer. However, Ms. Kramer's association with Rabinowitz did not take place until after plaintiff had retained Mr. Rabinowitz. Accordingly there is no privity of contract with Ms. Kramer concerning this allegation (*Vogel v. Lyman*, 246 A.D.2d 422, 668 N.Y.S.2d 162). Since none of the other defendants were involved at this time, the claim based on this allegation is dismissed as against all the defendants except Mr. Rabinowitz.

Mr. Rabinowitz argues that this claim should be dismissed as to him because the plaintiff is unable to show actual damages due to the pending proceeding to enforce the stipulation of settlement. On a motion to dismiss for failure to state a cause of action under CPLR §3211(a)(7), the plaintiff need not show that she actually sustained damages but that there are damages attributable to the defendant's negligence which can reasonably be inferred (*Tenzer, Greenblatt, Fallon & Kaplan v. Ellenberg*, 199 A.D.2d 45, 604 N.Y.S.2d 947; *Home Ins. Co. v. Liebman, Adolf & Charme*, 257 A.D.2d 424, 683 N.Y.S.2d 519). Here it can reasonably be inferred that had counsel acted immediately by taking the steps required under the stipulation to secure her distributive award, Mr. Walker would have been prevented from encumbering the home some two months later (*Ehlinger v. Ruberti, Girvin & Ferlazzo, P.C.*, 304 A.D.2d 925, 758 N.Y.S.2d 195). Mr. Rabinowitz's reasoning that even if had he prepared the papers, Mr. Walker may not have signed them is speculative, as is the assumption that plaintiff may in fact recover her monies, when it is just as likely that Mr. Walker may simply be incarcerated for contempt. Neither is the outcome of the underlying action unknown, as the divorce has been completed. The proceeding to enforce it is separate, as is evidenced by the second post-judgment retainer agreement. As the enforcement proceeding is ongoing, this action is stayed pending its completion (CPLR§2201). Accordingly the claim against Mr. Rabinowitz concerning this allegation remains viable but is stayed.

The second alleged act of negligence is that the defendants failed to timely prosecute the divorce action. Since the divorce has been completed, plaintiff has not in fact incurred any damages as a result of any alleged delay. Accordingly that claim is dismissed as to all the defendants.

The third claim is the failure to commence enforcement proceedings. Since plaintiff obtained new counsel to prosecute the enforcement proceeding, predecessor counsel cannot be held liable for the failure to do so (*Ramcharan v. Pariser*, 20 A.D.3d 556, 557, 799 N.Y.S.2d 564). This claim is also dismissed as to all the defendants.

Finally the third cause of action in the complaint seeks damages for breach of contract and breach of the retainer agreement. The claim is without basis in law since the retainer agreements fail to promise a specific result (*Steiner v. Lazzaro & Gregory, P.C.*, 271 A.D.2d 596, 706 N.Y.S.2d 157; *Magnacoustics, Inc. v. Ostrolenk, Faber, Gerb & Soffen*, 303 A.D.2d 561, 755 N.Y.S.2d 726). Accordingly it is dismissed.

In sum, the motion (001) by defendants Debra L. Rubin Esq., Gayle Rosenblum Esq. and Rubin & Rosenblum PLLC to dismiss is granted. The motion (002) by defendant Gregory Rabinowitz Esq. to dismiss is denied only as to the claim that he failed to prepare the necessary papers to transfer the marital residence and thereby placed in jeopardy plaintiff's equitable distribution. The cross motion (003) by plaintiff for summary judgment is denied as premature as no answers have been filed in the action. The cross motion (004) by Lynne Kramer Esq., Kramer &

Rabinowitz LLC and Kramer & Rubin, PLLC to dismiss is granted. The remaining claim is stayed until completion of the enforcement proceeding.

Date: 12-11-07

HON. PAUL J. BAISLEY, JR.

J.S.C.

FINAL DISPOSITION X NON-FINAL DISPOSITION