Brandland v Kunkis
2007 NY Slip Op 34583(U)
February 5, 2007
Supreme Court, New York County
Docket Number: 103516/04
Judge: Shirley Werner Kornreich

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

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DR. CARYN BRANDLAND,

Plaintiff,

-against-

Index No.: 103516/04

MARTHA H. KUNKIS & BAUMAN & KUNKIS,

DECISION & ORDER

Defendants.

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KORNREICH, SHIRLEY WERNER, J.:

This is an action sounding in legal malpractice, breach of contract, breach of fiduciary duty and intentional infliction of emotional distress. Plaintiff alleges that defendants, who represented her and her domestic partner in the purchase of a condominium apartment, failed to advise her of the legal consequences of the documents she signed and of conflicts of interest inherent in their representing her and her domestic partner. Defendants now move for summary judgment, dismissing all of the causes of action. CPLR 3212.

I. Factual Background

Plaintiff is a doctor of podiatric medicine who, as a result of an accident in 1998, suffered injury, which she claims included cognitive deficits. Plaintiff began a romantic relationship with Pamela Eagle in April of 1996 and moved into Ms. Eagle's apartment in July 1997.[1] Subsequent to the 1998 accident, Ms. Eagle handled plaintiff's medical care and finances. In January 2001, plaintiff settled a personal injury action arising from the 1998 accident and received $2,025,000. In February 2001, the couple met with an attorney, Mark Hochberg, and set up mutual revocable

[1] Ms. Eagle testified that Dr. Brandland was in debt when she moved in with Ms. Eagle. Ms. Eagle claimed she paid off Dr. Brandland's debt, and Dr. Brandland contributed only $500 a month to live in Ms. Eagle's apartment.

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living trusts and wills and a durable power of attorney in favor of Ms. Eagle from Dr. Brandland. Then, on March 9, 2001, they entered into a contract to purchase a condominium apartment located at 22 West 15 Street in Manhattan for the sum of $1,595,000. The proceeds from the settlement were used to buy the apartment, and the couple closed on the apartment on June 28, 2001.[2]

The women's real estate broker had referred them to defendant, Martha Kunkis, who represented them in purchasing the apartment for a flat fee of $1,200. According to Ms. Kunkis, during the first one and one-half hour consultation, the women informed her "that [plaintiff] had been in a personal injury accident; that she had had head trauma; that she was sensitive to light; and that she had an uneven gait." Kunkis EBT, p. 18. Ms. Kunkis, however, testified that she never was made aware of plaintiff's alleged cognitive deficits until the commencement of the instant lawsuit and that both women were involved in the discussion and understood the issues regarding title to the apartment. Ms. Kunkis testified that she repeated the ramifications of joint ownership a number of times until she was certain both women understood and that she elicited a "yes" response from Dr. Brandland when she asked her if she understood.

Ms. Eagle confirmed that Ms. Kunkis advised the women of the different forms of ownership available to them and explained the advantages and disadvantages of each option. Ms. Eagle testified that Ms. Kunkis explained the joint ownership to Dr. Brandland and that Dr. Brandland understood the concept. Ms. Eagle also testified that she read and explained the contract to Dr. Brandland at home. Although Ms. Kunkis admitted that she did not discuss

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[2] Dr. Brandland signed a retainer agreement with the attorneys who represented her in the negligence action and signed the settlement papers. The case was settled for $3,200,000 in January 2001, and she received $2,025,000.

separate counsel for the purchase of the apartment, she testified that she explained the need for a partnership agreement that would control the division of all of their property should they break up or disagree on what should be done with the apartment and that she told them they needed separate counsel for such an agreement. She stated that the women were adamant about providing that the apartment would be left to the other should one die and that she advised them that the partnership agreement could provide for repayment of funds that each contributed to the apartment. She, however, testified that she either mailed or faxed the women three drafts of a "partial" partnership agreement, at their request. Ms. Kunkis denied knowing that the full purchase price for the apartment came from Dr. Brandland, until the closing.

Dr. Brandland and Ms. Eagle both testified that they decided to take title to the apartment as joint tenants with right of survivorship, because they were unable to marry and they wished the other to inherit the apartment if either should die. Ms. Eagle testified that Dr. Brandland "was fully involved and engaged in the whole process." Dr. Brandland admitted that she knew that Ms. Eagle was on the title, knew that Ms. Eagle would inherit the apartment should she die and that it was "a gay issue;" she denied knowing that Ms. Eagle was a co-owner of the apartment. She further averred by affidavit and testified that Ms. Kunkis never explained what a joint tenancy was nor that the couple needed a partnership agreement. She later acknowledged that she was aware of the partnership agreement, knew there were three documents, but that it was "a tax thing." Ms. Eagle, on the other hand, testified that Ms. Kunkis advised the couple to create a partnership agreement and told them to seek separate counsel for it. According to Ms. Eagle, the couple discussed the matter among themselves, decided against seeking separate counsel, insisted on obtaining drafts of such an agreement from Ms. Kunkis, received the drafts from a "reluctant" Ms.

Kunkis and, then, took the three drafts and signed all three before a notary at a bank.

The preamble to each agreement recited the following:

> WHEREAS the parties are contract vendees and will soon be owners of record (as joint tenants with the right of survivorship) of condominium unit 18C, 22 West 15th Street, New York, New York (hereinaftre referred to as the "premises"), and
>
> WHEREAS Eagle is the title owner of a Lexus GS 300 (hereinafter referred to as the "Vehicle"), and
>
> WHEREAS the parties now desire to confirm the existence of a partnership...regarding the ownership of both the Premises and the Vehicle and possibly other assets in the future, and
>
> WHEREAS the parties are both friends and life partners and wish to memorialize their desire to share ownership as set forth herein...

Paragraph 1 of each agreement acknowledged that ownership of the apartment was subject to the agreement and contained the only term in the three agreements which differed – the percentages of ownership. One version specified 50% ownership for both, another specified 25% ownership for Ms. Eagle and 75% for Dr. Brandland and the third specified 25% ownership for Dr. Brandland and 75% for Ms. Eagle. Moreover, the agreement provided for: addition of assets to the partnership in future; repayment of any loan account prior to the apportionment of profits from the sale of an asset; waiver of any right to maintain an action for partition; mutual control of the assets; and the arbitration of any disagreement over partnership assets.

The partnership agreement covered only property that was not covered by the couple's revocable trust – the newly purchased apartment and Ms. Eagle's car. Ms. Eagle's apartment was in the revocable trust and, thus, was not part of the partnership agreement.

The couple resided in the newly purchased apartment after its renovation until early 2003, when their relationship broke up. When Ms. Eagle refused to vacate the apartment upon Dr. Brandland's demand, Dr. Brandland commenced an action against her, seeking "hundreds of

thousands of dollars" in misappropriated funds, title to the apartment, a constructive trust and ejectment of Ms. Eagle from the apartment. The action was settled on July 10, 2003, after which this lawsuit was filed to recover the $200,000 paid in settlement to Ms. Eagle, mortgage costs, $50,000 in legal fees and the cost of replacing certain household items given to Ms. Eagle.

II. Conclusions of Law

A. Breach of Contract, Breach of Fiduciary Duty , Intentional Infliction of Emotional Distress & Punitive Damages

The court agrees with defendants that plaintiff's claims for breach of contract, breach of fiduciary duty, intentional infliction of emotional distress and punitive damages, must be dismissed. Indeed, plaintiff has not opposed defendants' motion to dismiss these causes of action.

The breach of contract and breach of fiduciary duty claims are duplicative of plaintiff's legal malpractice claim, since they are predicated on the same allegations and seek the same relief. As such, they should be dismissed. *See Estate of Nevelson v. Carro, Spanbock, Kaster & Cuiffo*, 290 A.D.2d 399, 400 (1st Dept. 2002). In addition, damages for intentional infliction of emotional distress are not recoverable in a legal malpractice action. *Epifano v. Schwartz*, 279 A.D.2d 501, 503 (2d Dept. 2001). Nor does plaintiff allege conduct so "extreme and outrageous as to go beyond all bounds of decency and as to be regarded as atrocious and intolerable in a civilized society." *See Kaiser v. Van Houten*, 12 A.D.3d 1012, 1015 (3d Dept. 2004). Finally, plaintiff does not allege that Ms. Kunkis acted deliberately, intentionally or fraudulently. Her allegations, therefore, cannot sustain a claim for punitive damages. *See Gamiel v. Curtis & Reiss-Curtis, P.C.*, 16 A.D.3d 140, 141 (1st Dept. 2005), *rearg. denied* 2006 N.Y. App. Div. LEXIS 14775(to sustain claim for punitive damages in tort, plaintiff must demonstrate intentional wrongdoing, outrageous

circumstances, fraudulent intent or conscious act that wilfully disregards rights of others).

B. Legal Malpractice

Defendants' motion to dismiss the legal malpractice claim, however, 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.*

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. Neither avenue, however, would have made plaintiff whole.

Although statutory partition could provide an equitable remedy to a joint tenant, allowing an individual in plaintiff's position to retrieve her entire investment in the property, it was not available to plaintiff. Plaintiff, in the partnership agreement, specifically waived her right to move for partition. Nor would her assertion of her right to arbitration or any other rights under the agreement, have avoided damages. Arbitration would have been costly, and the outcome, which need not have followed strict legal precepts and would not have been appealable, may well have

been the same or worse.[3] Similarly, 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. Again, this avenue would have entailed costly litigation and would have required plaintiff to sell the apartment, thereby entailing brokerage fees, attorney costs and capital gains taxes, and live with Ms. Eagle until such sale. 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 cause of plaintiff's damages. Accordingly, it is

ORDERED that defendants' motion to dismiss plaintiff's second, third and fourth causes of action for breach of contract, breach of fiduciary duty and intentional infliction of emotional distress and for punitive damages is granted and those causes of action are severed and dismissed with prejudice; and it is further

ORDERED that the Clerk shall enter judgment accordingly; and it is further

ORDERED that defendants' motion to dismiss the first cause of action alleging legal malpractice is denied and that cause of action shall continue; and it is further

ORDERED that the parties shall appear in Part 54, 111 Centre St., New York, N.Y., at 9:30 a.m. for a pre-trial conference on February 15, 2007.

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

Dated: February 5, 2007

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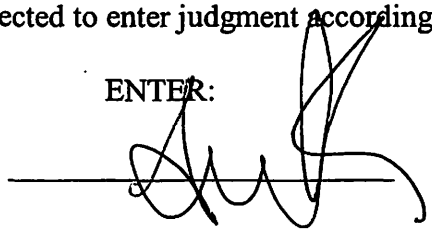

[3] The affirmation of Dr. Brandland's attorney states that Ms. Eagle refused arbitration. Litigation, therefore, would probably have been required, if only to achieve arbitration. Additionally, litigation would have been required to evict Ms. Eagle from the apartment.