

**Boglia v Greenberg**

2008 NY Slip Op 31416(U)

May 2, 2008

Supreme Court, Nassau County

Docket Number: 4069-05/

Judge: Kenneth A. Davis

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SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. KENNETH A. DAVIS,

Justice

TRIAL/IAS, PART 3  
NASSAU COUNTY

SUSAN BOGLIA,

Plaintiff,

SUBMISSION DATE: 4/7/08  
INDEX No.: 14069/05

-against-

EDWARD GREENBERG and GREENBERG  
& REICHER, LLP,

MOTION SEQUENCE # 5

Defendants.

The following papers read on this motion:

Notice of Motion/ Order to Show Cause.....	X
Answering Papers.....	X
Reply.....	X
Briefs: Plaintiff's/Petitioner's.....	
Defendant's/Respondent's.....	X

This motion by plaintiff Susan Boglia for an order pursuant to CPLR 2221(d) granting her reargument of an order of this court dated December 17, 2007 is denied.

This is an action to recover for legal malpractice. In her Amended Verified Complaint, the plaintiff alleges that she retained the defendants to represent her in her matrimonial action.

As and for her first cause of action, the plaintiff alleges that the defendants were negligent and failed to perform the services for which she retained them. More specifically, she alleges that the defendants negligently advised her to pursue

equitable distribution of certain real property located at 411 Hunt Lane, Manhasset, New York, which was acquired by her husband prior to their marriage. She alleges that the defendants were negligent in advising her that that property would be considered marital property and that she was entitled to "one-half of the current value less \$80,000 as an original acquisition cost." The plaintiff alleges that the property was in fact not marital property, but the husband's separate property. She further alleges that the defendants were negligent in advising her that in the event that the subject property was deemed the husband's separate property, she nevertheless would be entitled to a portion of the increase in its value during their marriage. Thus, she alleges that the defendants negligently further represented to her that continuing litigation and a trial were necessary for her to achieve such recovery, with the attendant legal fees and expenses. She alleges that "but for" the defendants' negligence, she would not have continued to pursue a claim to that property in litigation because her actual recovery at trial would be less than her expenditure of legal fees. That is, she would not have expended \$50,000 in legal fees and \$8,794 for a forensic expert which were superfluous to her case.

As and for her second cause of action, the plaintiff alleges that the defendants were negligent in failing to advise her of a \$250,000 offer made by her ex-husband, to be paid from the proceeds

of the sale of the property, and to advise her to accept that offer. She alleges that "but for" those negligent acts, she would have settled for \$250,000 and not pursued equitable distribution of the increase in the value of her husband's property with the attendant expenditure of legal fees and expenses. She specifically alleges having lost \$50,000 since her claim against her husband ultimately settled for \$200,000, as well as \$10,000 legal fees she incurred to obtain that settlement.

As and for her third cause of action in which the plaintiff alleges a violation of Judiciary Law § 487(2), she alleges that with fraudulent intent, the defendants willfully delayed the marital litigation with a view toward their own gain, causing her to incur excessive legal and forensic expert fees. She alleges that defendants' acts were part of a chronic extreme pattern of legal delinquency, whereby they continued litigation under false pretenses.

As and for her fourth cause of action in which the plaintiff alleges a violation of Judiciary Law § 487(1), she alleges that defendants' representations regarding her rights were knowingly false and fraudulent and were made to induce her to continue their retention. She further alleges that had she known this, she would have terminated the defendants for cause.

As and for her fifth cause of action, the plaintiff alleges that defendants' fees were not fair and reasonable; that defendants

were discharged for cause, thus disentitling them to fees; and, that defendants' fees were excessive as defined by 22 NYCRR § 1200.1.

The defendants counterclaimed for fees owing.

The plaintiff moved for summary judgment on her first (negligence) and fifth (discharged for cause) causes of action and to dismiss the defendants' counterclaim. The defendants cross-moved for summary judgment dismissing the complaint and on their counterclaim for legal fees.

By order dated December 17, 2007, this Court ( DeMaro, J.) denied plaintiff's motion and granted defendants' motions. Relying primarily on a decision by Justice Balkin in the matrimonial action in which she concluded that the defendant attorneys rendered substantial legal services to the plaintiff and were accordingly entitled to a charging lien pursuant to Judiciary Law §475, this Court found that there was no issue of fact concerning the attorney's negligence. As for their alleged failure to communicate the \$250,000 settlement offer, the Court found that the damages alleged were speculative. It noted:

"Mere speculation about a loss resulting from an attorney's alleged omission is insufficient to sustain a *prima facie* case of legal malpractice" (Giambrone v Band of N.Y., 253 AD2d 786, 787 [1998]). Rather, "[the] plaintiff must prove that it was the attorney's negligence which proximately caused the actual and ascertainable damages that resulted" (Reiss v Wojick, 105 AD2d 565, 567 [1984], as cited in Plymouth Organization,

Inc. v Silverman, Collura & Chernis, P.C., 21 AD3d 464).

The plaintiff seeks reargument of this Court's order. Reargument of a court's order is in the court's discretion. It may be granted if the movant establishes that the court overlooked or misapprehended the facts or the applicable law or for some reason mistakenly arrived at its decision. Carillo v PM Realty Group, 16 AD3d 611 (2<sup>nd</sup> Dept. 2003); Foley v Roche, 68 AD2d 558 (1<sup>st</sup> Dept. 1978).

"On a motion for summary judgment pursuant to CPLR 3212, the proponent must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." Sheppard-Mobley v King, 10 AD3d 70, 74 (2d Dept. 2004), aff'd. as mod., 4 NY3d 627 (2005), citing Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986); Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985). "Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers." Sheppard-Mobley v King, supra, at p. 74; Alvarez v Prospect Hosp., supra; Winegrad v New York Univ. Med. Ctr., supra. Once the movant's burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact. Alvarez v Prospect Hosp., supra, at p. 324. The evidence presented by the opponents of summary judgment must be accepted as true and they must be given the benefit of every reasonable inference. See,

Demishick v Community Housing Management Corp., 34 AD3d 518 (2d Dept. 2006), citing Secof v Greens Condominium, 158 AD2d 591 (2d Dept. 1990).

"In an action to recover damages for legal malpractice, a 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." Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer, 8 NY3d 438, 442 (2007), quoting McCoy v Feinman, 99 NY2d 295, 301-302 (2002) (internal quotation marks and citation omitted); see also, Town of North Hempstead v Winston & Strawn, LLP, 28 AD3d 746 (2<sup>nd</sup> Dept. 2006), lv den., 7 NY3d 715 (2006). "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." Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer, supra, at p. 442, citing Davis v Klein, 88 NY2d 1008, 1009-1010 (1996) and Carmel v Lunney, 70 NY2d 169, 173 (1987); see also, AmBase Corp. v Davis, Polk & Wardwell, 8 NY3d 428, 434 (2007); Town of North Hempstead v Winston, supra. The "burden of proving 'a case within a case' is a heavy one." Aguino v Kuczinski, Vila & Associates, P.C., 39 AD3d 216, 219 (1<sup>st</sup> Dept. 2007), citing Lindenman v Kreitzer, 7 AD3d 30, 34 (1<sup>st</sup> Dept. 2004). In fact, where a defendant attorney presents evidence in

admissible form establishing that the plaintiff client would be unable to prove any one of these elements, the defendant attorney has sustained his *prima facie* burden of demonstrating his entitlement to summary judgment. Town of North Hempstead v Winston & Strawn, LLP, supra, at p. 748, citing Ostriker v Taylor, Atkins & Ostrow, 258 AD2d 572 (2<sup>nd</sup> Dept. 1999), lv to app den. 93 NY2d 809 (1999).

To the extent that the plaintiff alleged the defendants were negligent or acted fraudulently, those claims are duplicative of her claim for legal malpractice and are subject to dismissal on that ground alone. Iannucci v Kuckler & Bruh, LLP, 42 AD3d 436 (2<sup>nd</sup> Dept. 2007), citing Town of Hempstead v Winston & Strauss, supra, at p. 749. In addition, this court properly relied on Justice Balkin's order to determine that the defendants' fee was appropriate and that there was no malpractice was proper. Bauza v Livingston, 40 AD3d 791 (2<sup>nd</sup> Dept. 2007), citing Izko Sportswear Co., Inc. v Flaum, 25 AD3d 534, 537 (2<sup>nd</sup> Dept. 2006); Lefkowitz v Schulte, Roth & Zabel, 279 AD2d 457 (2<sup>nd</sup> Dept. 2001).

In any event, as for this Court's alleged misnomer of plaintiff's former attorneys' affidavit as an expert's affidavit as opposed to a factual one, where, like here, a party's claims involve allegations of legal malpractice that ordinary jurors could not evaluate based on their own knowledge and experience, an expert's affidavit delineating the appropriate standards of

professional care to which the attorneys were required to adhere under the circumstances is required. Natale v Jeffrey Samel & Associates, 308 AD2d 568 (2<sup>nd</sup> Dept. 2004), lv den., 2 NY3d 701 (2004) (citations omitted). Thus, contrary to plaintiff's allegations, this court actually indulged her by treating the "fact witness' " affidavit as coming from an expert. Furthermore, while the plaintiff alleges that the defendants erroneously advised her as to whether she was entitled to equitable distribution of her husband's property's increase in value, the defendants established as a matter of law that she had a valid claim to it. Scammacca v Scammacca, 15 AD3d 382 (2<sup>nd</sup> Dept. 2005) citing Arvantides v Arvantides, 64 NY2d 1033 (1985); Capasso v Capasso, 129 AD2d 267 (1<sup>st</sup> Dept. 1987), lv den., 70 NY2d 988 (1988); see also, Hartog v Hartog, 85 NY2d 36 (1995).

As for the defendants' alleged failure to tell the plaintiff of a \$250,000 offer, a wealth of evidence is to the contrary, in view of which it is questionable whether the plaintiff's naked self-serving, otherwise unsubstantiated denial of being told of the \$250,000 offer survives. See, Leder v Spiegel, 31 AD3d 266, 268 (1<sup>st</sup> Dept. 2006), aff'd. 9 NY3d 836 (2007), cert. den., Spiegel v Rowland, \_\_\_ U.S. \_\_\_, 2008 WL 695644 (2008). In establishing legal malpractice, "[u]nsupported factual allegations, conclusory legal argument[s], or allegations contradicted by documentation do not suffice." Dweck Law Firm, LLP v Mann, 283 AD2d 292 (1<sup>st</sup> Dept. 2001),

citing Franklin v Winard, 199 AD2d 220 (1<sup>st</sup> Dept. 1993). In any event, assuming, *arguendo*, that this occurred, the plaintiff's claim that this constituted negligence is speculative since how much she could have recovered had she gone to trial remains a mystery, thus rendering damages speculative. "Mere speculation about a loss resulting from an attorney's alleged omission is insufficient to establish a *prima facie* case of legal malpractice. Siciliano v Forchelli & Forchelli, 17 AD3d 343 (2<sup>nd</sup> Dept. 2005) citing Giambrone v Bank of N.Y., 253 AD2d 786 (2<sup>nd</sup> Dept. 1998); Luniewski v Zeitlin, 188 AD2d 642 (2<sup>nd</sup> Dept. 1992).

The plaintiff's claim that the defendants improperly caused her to hire a forensic accountant to assess her husband's business similarly fails. Her ex-husband's failure to produce all the requested information clearly worked in her overall favor via the issuance of an order of preclusion by the matrimonial court.

The plaintiff's claims pursuant to section 487 of the Judiciary Law fail for the same reasons. An "intent to deceive or a "chronic and extreme pattern of legal delinquency" has hardly been established. Knecht v Tusa, 15 AD3d 626 (2<sup>nd</sup> Dept. 2005); O'Connell v Kerson, 291 AD2d 386 (2<sup>nd</sup> Dept. 2002).

As for plaintiff's excessive fees claims, it is predicated on the identical facts as her legal malpractice claim and for that reason fails as well. Mecca v Shang, 258 AD2d 569 (2<sup>nd</sup> Dept. 1999), lv. dismiss., 95 NY2d 791 (2000).

