

Weksler v Kane Kessler, P.C.

2008 NY Slip Op 31720(U)

June 18, 2008

Supreme Court, New York County

Docket Number: 0113492/2007

Judge: Edward H. Lehner

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

EDWARD H. LEHNER

PRESENT: _____
Justice

PART 19

Wekeler, ff

INDEX NO. 113492/07

- v -

MOTION DATE _____

Kane, Kessler

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

_____ motion is decided in accordance

with accompanying memorandum decision

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

FILED
JUN 20 2008
COUNTY CLERK'S OFFICE
NEW YORK

JUN 18 2008

Dated: JUN 18 2008

[Signature] 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 19

-----X
HARRIET WEKSLER,

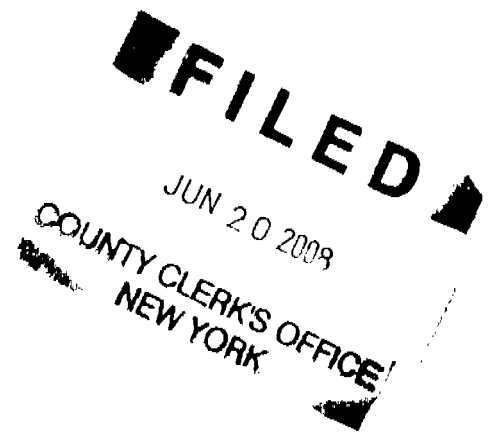
Plaintiff,

INDEX NO.
113492/07

- against -

KANE KESSLER, P.C., MITCHELL D.
HOLLANDER, ESQ., BRUCE WEKSLER
and JOSEPH WEKSLER,

Defendants.



-----X
EDWARD H. LEHNER, J.;

Before the court are motions i) by Kane Kessler, P.C. ("Kane Kessler") and Mitchell Hollander ("Hollander") (collectively, the "Law Firm") to dismiss the complaint against them pursuant to CPLR 3211, and ii) by Bruce Weksler ("Bruce") and Joseph Weksler ("Joseph") (collectively, "the Sons") to dismiss the complaint against them pursuant to CPLR 3211 and 3016(b).

The amended complaint has nine causes of action: i) fraud against all defendants; ii) breach of contract against the Sons; iii) legal malpractice against the Law Firm; iv) negligence against the Law Firm; v) breach of contract against the Law Firm; vi) tortious interference with contract against the Law Firm; vii) negligent representation against the Law Firm; viii) violation of Judiciary Law § 487 against the Law Firm; and ix) punitive damages against all defendants.

Plaintiff contends: that she married Jack Weksler ("Jack") on June 29, 2004 (amended complaint ¶ 19); that in April 2006, Kane Kessler represented both her and the Sons in drafting an agreement (the "Agreement") (Id. ¶ 22); that the Agreement was executed on May 24, 2006 and that it provided for Joseph and Bruce to each pay plaintiff \$2,000 per month (Agreement ¶ 1); the payments were to commence the first full month after Jack's death and to terminate on the earlier of plaintiff's death, her remarriage, the parties' written agreement or the separation of Jack and plaintiff, defined as "the commencement by either (plaintiff) or Jack of an action for divorce, marriage dissolution, separation, annulment or the like" (the "Termination Clause") (Id. ¶2); on June 12, 2007 Jack filed for divorce (complaint ¶ 41); and that on July 20, 2007, Jack died (Id., ¶ 44). Plaintiff asserts that, pursuant to the Agreement, she is now entitled to the payment of \$2,000 per month from each of the Sons.

The Sons contend: that they contacted Hollander to draft a document reflecting Jack's wishes to provide for his wife after his death (tr. p. 15); that the Agreement reflected Jack's and the Sons' wishes (Id.); that there was no consideration given by plaintiff for the Agreement (Id. p. 40); that among the Agreement's provisions was the Termination Clause; that Jack decided to commence a divorce action triggering the Termination Clause (Id. p. 18-19); and that plaintiff has not set forth factual allegations supporting fraud, and that her other claims are duplicative (Id. p. 33).

The Law Firm contends: that Hollander is married to Joseph's sister (Id. p. 26); that Hollander was contacted by Joseph on behalf of the Sons to draft a document providing for plaintiff after Jack's death (Hollander affidavit ¶ 7); that he prepared the Agreement but never represented plaintiff (Id., ¶ 9); that Hollander only had casual non-legal conversations with plaintiff at family social affairs, but never had any contact with her in connection with the Agreement (Id., ¶ 9); and that the negligence, breach of contract, and tortious interference causes of action are duplicative of the claim for malpractice and that the cause of action for punitive damages cannot be separately sustained.

Plaintiff asserts that the alleged fraud consisted of making the Agreement with no intention of paying the \$4,000 monthly sum (tr. p. 9) and including in the Agreement the Termination Clause (Id., p. 44). "The essential elements of a cause of action for fraud are 'representation of a material existing fact, falsity, scienter, deception and injury'. ... General allegations that defendant entered into a contract while lacking the intent to perform are insufficient to support the claim (of fraud)" [New York University v. Continental Insurance Company, 87 NY2d 308, 318 (1995)]. See also, Rocchio v. Biondi, 40 AD3d 615 (2nd Dept. 2007); The Hawthorne Group, LLC v. RRE Ventures, 7 AD3d 320 (1st Dept. 2004). Based on such principles, the court finds that plaintiff has failed to plead a viable cause of action of fraud. Therefore, the first cause of action is dismissed.

Plaintiff claims in her second cause of action that the Sons breached the Agreement. However, she has not alleged any consideration by her to enter into the contract and "since there was no bargained-for exchange established, there was insufficient consideration for (the) agreement" [Delor Corp. v. Quinley, Langer, Hames, Perlmutter, Mankes & Nuskind, 287 AD2d 680, 682 (2nd Dept. 2001)]. "(A) promise (that is) wholly unsupported by consideration (is) legally unenforceable" [Loft Restaurant Associates, Ltd. v. McDonagh, 209 AD2d 482, 483 (2nd Dept. 1994)]. See also, American Express Bank, Ltd. v. Spire Puerto Rico, Inc., 226 AD2d 158 (1st Dept. 1996).

Moreover, if the Agreement is an enforceable contract "the terms of a written agreement define the rights and obligations of the parties to the agreement ... (and) the fundamental objective when interpreting a written contract is to determine the intention of the parties, as derived from the language employed in the contract" [Abiele Contracting Inc. v. New York City School Construction Authority, 91 NY2d 1, 9 (1997)]. See also, W.W.W. Associates, Inc. v Giancontieri, 77 NY2d 157, 162 (1990). Under the Termination Clause, the Agreement "immediately (terminated) upon ... the commencement by either (plaintiff) or Jack of an action for divorce." Therefore, since Jack filed for divorce on June 12, 2007 (tr. p. 18), the Agreement was terminated according to its terms. Plaintiff's second cause of action is therefore dismissed.

Plaintiff's third cause of action asserts that the Law Firm breached the duty to give their client (plaintiff) "reasonably competent and good-faith legal representation" (Amended complaint, ¶ 45). The Law Firm contends that plaintiff was never its client (Hollander affidavit, ¶ 9). However, plaintiff alleges that the Law Firm did represent her (amended complaint, ¶¶ 23, 24, 25), and "(o)n a motion to dismiss pursuant to CPLR 3211 ... (the court accepts) the facts as alleged in the complaint as true" [Leon v. Martinez, 84 NY2d 83, 87 (1994)]. Hence, the court must accept, for the purpose of deciding this motion, that the Law Firm represented plaintiff. However, "(i)n order to sustain a claim for legal malpractice, a plaintiff must establish both that the defendant attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal community which results in actual damages to a plaintiff and that the plaintiff would have succeeded on the merits of the underlying action 'but for' the attorney's negligence" [AmBase Corp. v. Davis Polk & Wardwell, 8 NY3d 428, 434 (2007)]. See also, Rudolf v. Shayne, Dachs, Stanisci, Corker & Sauer, 8 NY3d 438 (2007). Here, plaintiff has not set forth facts that would give rise to a viable cause of action of malpractice. Consequently, plaintiff's third cause of action is dismissed.

The fourth, fifth, sixth and seventh causes of action against the Law Firm are dismissed as duplicative of the third cause of action for legal malpractice [Sage Realty

Corp. v. Proskauer Rose LLP, 251 AD2d 35, 38-39 (1st Dept. 1998)].

The eighth cause of action is for violation of Judiciary Law § 487. This statute prohibits an attorney's "deceit or collusion." However, "civil relief ... is warranted only where the defendant has engaged in a 'chronic, extreme pattern of legal delinquency'" [Schindler v. Issler & Schrage, P.C., 262 AD2d 226, 228 (1st Dept. 1999)]. Plaintiff has not alleged such a pattern of conduct. Moreover, plaintiff alleges that the meeting among Jack, the Sons, plaintiff and Hollander, at which the parties worked out the terms of the Agreement, took place in Norwood, New Jersey (amended complaint, ¶ 23), and the divorce action was filed in that state (Id., ¶ 29). Section 487 regulates "the conduct of litigation before the New York courts (and it does not) apply to acts by attorneys outside New York's territorial borders" [Schertenleib v. Traum, 589 F2d 1156, 1166 (2nd Cir. 1978)]. Since the eighth cause of action alleges wrongful acts in New Jersey amounting to filing false documents in Florida and New Jersey (amended complaint, ¶ 63), it is dismissed.

The ninth cause of action for punitive damages is dismissed since "a demand for punitive damages does not amount to a separate cause of action for pleading purposes" [Benjamin Park v. YMCA of Greater New York Flushing, 17 AD3d 333, 334 (2nd Dept. 2005)]. See also, Rose Lee Mfg., Inc. v. Chemical Bank, 186 AD2d 548 (2nd Dept. 1992). The court declines to impose sanctions.

In sum, the Sons' motion to dismiss the complaint against them and the motion of Kane Kessler and Hollander to dismiss the complaint against them are both granted, and the Clerk is directed to enter judgment accordingly.

Dated: June 18, 2008



J.S.C.

FILED
JUN 20 2008
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