

Lappin v Greenberg

2008 NY Slip Op 32162(U)

July 30, 2008

Supreme Court, New York County

Docket Number: 0110213/2004

Judge: Walter B. Tolub

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

PRESENT: WALTER B. TOLUB

PART 15

Index Number : 110213/2004
LAPPIN, GRACE
vs.
MARGERY GREENBERG
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED _____

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

Answering Affidavits - Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED

AUG 01 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 7/30/08

WALTER B. TOLUB J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 15

-----x
GRACE LAPPIN,

Plaintiff,

Index No.: 110213/04
Mtn. Seq. 002

-against-

DECISION AND ORDER

MARGERY GREENBERG, PHILIP SEGAL, and
SEGAL & GREENBERG,

Defendants.
-----x

TOLUB, J.

This is a motion to dismiss plaintiff's complaint pursuant
to CPLR §3212.

FILED
AUG 01 2008
COUNTY CLERK'S OFFICE
NEW YORK

FACTS

Plaintiff is suing defendants, her former attorneys, for legal malpractice and breach of contract resulting from defendants' representation of plaintiff in a divorce action. Plaintiff alleges that because of defendants' malpractice, there was a four-year delay in receiving the portion of her ex-husband's 401K retirement plan (Plan) which she was entitled pursuant to a Stipulation of Settlement (Stipulation). During this period of delay, the value of the assets declined by over \$150,000.00.

The matrimonial action was initially settled by Stipulation in July, 1998, but had to be re-signed by plaintiff's ex-husband

in May of 1999 because his original signature was not properly witnessed. A judgment of divorce was entered on August 19, 1999, however the judgment did not provide for a Qualified Domestic Relations Order (QDRO), which was necessary to release the assets from the 401K Plan.

In December, 1999, defendant Margery Greenberg (Greenberg) was informed that a QDRO was needed to release the 401K Plan Employee Stock Option Plan (ESOP). Greenberg was also informed that the assets in the ESOP were administered by the U.S. Trust, and that the terms of the Stipulation were contrary to the distribution terms of the U.S. Trust and the Plan.

In February, 2000, defendants obtained a Resettled Judgment of Divorce, which provided for the QDRO. Seven months later, in August of 2000, Greenberg submitted the QDRO to the U.S. Trust, but was informed by the plan administrator that the terms of the Resettlement were still contrary to the distribution terms of the Plan.

More than one year later, on November 29, 2001, defendants filed a motion to amend the Stipulation so that plaintiff could receive the entire retirement plan's assets¹. In September, 2002, an order was issued amending the Stipulation so as to make the distribution of the retirement account acceptable to U.S.

¹Plaintiff was originally to receive 80% of the assets in the plan.

Trust.

One year later, in September, 2003, defendants again obtained a QDRO, but did not serve that order on U.S. Trust until March 1, 2004. Defendants assert that the delays were caused by plaintiff's ex-husband, who was trying to block distribution of the assets, and their inability to locate the QDRO at the courthouse.

Defendants initially moved to dismiss the action pursuant to CPLR 3211. Defendants' pre-answer motion was granted, but the court's decision was reversed on appeal. Discovery having taken place, defendants now move for summary judgment, pursuant to CPLR 3212.

DISCUSSION

Summary judgment is appropriate when the movant establishes a prima facie entitlement to judgment as a matter of law by the submission of competent evidence (See Zuckerman v City of New York, 49 NY2d 557, 562 [1980]). Summary judgment is warranted where there are no genuine issues of material fact (Alvarez v Prospect Hospital, 68 NY2d 320, 324 [1986]). However, summary judgment must be precluded if, upon the papers submitted, there remains a question of fact in the mind of the court.

At the outset, the court notes that plaintiff's argument that defendants' motion should be denied because the affirmation is by an attorney without personal knowledge, is misguided. The

affirmation of counsel, who is without personal knowledge, may serve as a vehicle for the submission of documentary exhibits providing evidentiary proof in admissible form, such as transcripts of depositions and examinations before trial (Krupp v Aetna Life & Casualty Co., 103 AD2d 252, 262 [2d Dept 1984]).

As to the malpractice claim, to succeed on a claim for legal malpractice, a plaintiff must establish; (1) a duty owed to a client; (2) a breach of that duty; and (3) actual damages. (Marshall v Nacht, 172 AD2d 727 [2d Dept 1991]): A defendant may prevail by showing that the plaintiff is unable to prove any one of these three elements.

Neither party argues a lack of duty on the part of defendants to represent a client diligently. Defendants assert that the delay in transferring the assets was not caused by attorney negligence or malpractice, but that it was caused by plaintiff's ex-husband blocking the transfer. However, defendants offer no proof of this assertion. Defendants submit an affidavit of the plaintiff in which she talks about the delays her husband had continually caused, but those statements do not relate to the transfer of assets after the conclusion of the divorce action, which forms the basis of this litigation. Defendants offered only conclusory, self-serving statements with no expert or other evidence which would tend to establish, prima facie, that they did not depart from the requisite standard of

care (Estate of Nevelson v Cerro, Spanbock, Kaster & Cuiffo, 259 AD2d 282, 284 [1st Dept 1999]).

Defendants also argue that the delays were the result of reasonable strategy judgments, which do not constitute negligence or malpractice (See Rosner v Paley, 65 NY2d 736, 738 [1985]). In support of this contention, defendants point to the fact that plaintiff eventually received 100% of the 401K Plan instead of the lesser portion the original stipulation provided. Defendants further assert that the fact that the value of the assets diminished by more than 50% during this period is not their fault, and they are not the guarantors of the eventual value or collectibility of judgments in litigation (See generally Lindenman v Kreitzer, 7 AD3d 30 [1st Dept 2004]).

In making their arguments, defendants overlook several factors. First, the Stipulation of Settlement called for plaintiff's ex-husband to arrange for the transfer of assets within ten days (the transfer took over four years), and defendants provide no evidence that they attempted to force the ex-husband into action during this period. Second, defendants claim that the Stipulation required the husband to arrange the transfer in order to reduce plaintiff's legal fees. However, delay resulted in a vast diminution in the value of the assets, and defendants eventually had to arrange for the transfer anyway. Third, defendants offer no explanation as to why the original

Stipulation was not drafted to meet the distribution requirements of the U.S. Trust ESOP. The problem with the provisions of the Stipulation was one of the main causes for the four-year delay in distribution.

All of the above factors raise questions as to the propriety and efficiency of the legal work performed. This is not to say that there may be reasonable excuses for these problems that are not occasioned by malpractice or negligence, but aside from defendants' conclusory statements, those reasons are not evident in the papers submitted.

Defendants' main argument for summary judgment rests on the argument that plaintiff cannot demonstrate actual damages that were proximately caused by defendants' purported malpractice (See Pellegrino v File, 291 AD2d 60 [1st Dept 2002]). Defendants contend that the fluctuation in the market value of the securities is not their fault. Further, defendants point out that plaintiff, in her deposition, stated that she did not have an alternate investment plan, which contradicts the complaint in which she alleges that, if she had the funds in hand, she would have made more appropriate investments. The court finds this argument specious.

It is a general rule of law that actual damages may result from delays in transferring goods, measured from the date on which the goods should have been delivered and the date of actual

delivery (J.M. Rodriguez & Co., Inc. v Moore-McCormick Lines, Inc., 32 NY2d 425 [1973]). It is a logical extrapolation from that doctrine that any delay in transfer may result in actual damages to the person to whom the transfer was to be made.

What must be determined is when the transfer was supposed to take place. If it can be shown that defendants were negligent in obtaining the QDRO, plaintiff was injured on the day that the judgment of divorce was entered without the QDRO (McCoy v Feinman, 291 AD2d 799 [4th Dept 2002][statute of limitations case involving legal malpractice when an attorney failed to obtain a QDRO at the time of the client's divorce]). It was the lack of the QDRO and the failure of the Stipulation to follow the distribution requirements of the U.S. Trust which caused the delay in plaintiff's receiving the 401K shares. Thus, plaintiff's injury dates from the time the transfer should have taken place.

Once the original transfer date is established, the court must then ascertain the extent, if any, of plaintiff's damages. In Riskin v National Computer Analysis, Inc., 37 AD2d 952 [1st Dept 1971]), the appellate court had to determine the value of damages resulting from a defendant's delay in transferring shares of stock to the plaintiff. The court concluded that the plaintiff's actual damages were the market value of the shares of stock on the day they should have been transferred and the market

*9]
value of those shares on the day they were in fact transferred.

In the case at bar, the alleged market value of the shares in the 401K Plan at the time they should have been transferred was in excess of \$300,000.00. The shares alleged market value at the time they were in fact transferred was less than \$150,000.00. Therefore, the delay resulted in a loss in value of over \$150,000.00.

Defendants' argue that plaintiff was not damaged because she was unable to specify an investment plan that would have resulted in maintaining or appreciating the value of the shares. The gravamen of the complaint is not that plaintiff could have mitigated damages by strategic investments, but that, because of defendants' alleged malpractice, she had no funds with which she could invest.

As the appellate division stated in reversing this court's prior ruling,

Plaintiff agreed to accept the proceeds of the Plan, not the investments it represented.

Moreover, it is clear that the stipulated agreement contemplated a prompt transfer and distribution of funds. Finally, at this stage of the proceedings, we are not prepared to rule that defendants' failure to fix the value of the Plan in the stipulated agreement or otherwise insulate plaintiff from the market risk attendant upon a delay in transfer and distribution of the proceeds cannot be deemed a lapse in the exercise of professional diligence."

Therefore, based on the foregoing, questions of material

fact exist with respect to the reasons for the delay in transferring the 401K plan assets. As such, defendants motion for summary judgment on the malpractice cause of action is denied.

However, the court grants defendants' motion for summary judgment with respect plaintiff's breach of contract cause of action because it arises from the "same facts as the legal malpractice claim and allege[s] similar damages." (InKline Pharmaceutical Co. v Coleman, 305 AD2d 151, 152 [1st Dept 2003]; Sonnenschine v Giacomo, 295 AD2d 287, 288 [1st Dept 2002]; Turk v Angel, 293 AD2d 284 [1st Dept 2002]).

Accordingly, it is

ORDERED that defendants' motion is granted to the extent of granting partial summary judgment in favor of defendants and against plaintiff, dismissing plaintiff's second cause of action for breach of contract; and it is further

ORDERED that the action shall continue as to the first cause of action for legal malpractice.

Counsel for the parties are to appear for a preliminary conference on September 19, 2008 at 11 AM in room 336 at 60 Centre Street.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 7/30/08

ENTER:

W

Walter B. Tolub, J.S.C.

FILED
AUG 01 2008
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NEW YORK