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

PRESENT: MARCY S. FRIEDMAN PART 57

Index Number : 116675/2003
MARS, ARNOLD J.
VS
DOBRISH, ROBERT Z. ESQ.
Sequence Number : 014
SUMMARY JUDGMENT

INDEX NO. 116675/2003
MOTION DATE
MOTION SEQ. NO. 014
MOTION CAL. NO. 1

The following papers, numbered 1 to ____ were read on this motion to/for by Dobrish Summary J

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 4
Answering Affidavits — Exhibits	5, 6, 7, 8
Replying Affidavits	

Memo of law M1

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion and cross motion are

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION/ORDER.

FILED
OCT 27 2008
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 10-15-08

MARCY S. FRIEDMAN, 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 – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

ARNOLD J. MARS,

Plaintiff,

- against -

ROBERT Z. DOBRISH, et al.,

Defendants.

Index No.: 116675/03

DECISION/ORDER

This is a legal malpractice action arising out of a contentious divorce action. Plaintiff, Dr. Arnold Mars, sues two of his former attorneys in the divorce action, Robert Dobrish and Nina Gross of the firm Hoffinger, Friedland, Dobrish & Stern, P.C. (the "Dobrish defendants") and their successor, Aimee Maddalena. The Dobrish defendants and defendant Maddalena separately move for summary judgment dismissing the complaint. Plaintiff cross-moves for partial summary judgment.

Plaintiff commenced the underlying divorce action (Mars v Mars, Sup Ct, New York County 350590/97) in 1997. He has been represented by at least seven attorneys in that action. In a decision issued on November 30, 1999 after a five day trial ("trial court decision"), the matrimonial Court (Elliott Wilk, J.) determined the issues of visitation, parental decision-making authority, child support, the distributive award, and occupancy of the marital apartment. In 2001, the Appellate Division of this Department modified the trial court decision on the decision-making issue and on a limited aspect of the child support award. (See Mars v Mars, 286 AD2d

201.) As discussed below, although the central issues between the parties were resolved in the divorce action as of 2001, plaintiff continued to attempt to litigate these issues in the divorce action at least through 2006, with further appeals in 2005 and 2007. (See Mars v Mars, 19 AD3d 195 [1st Dept 2005], lv dismissed 6 NY3d 195; Mars v Mars, 39 AD3d 232 [1st Dept 2007].) Unfortunately, this action is another attempt, albeit in a different context, to relitigate the issues that were resolved against plaintiff.

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action "sufficiently to warrant the court as a matter of law in directing judgment." (CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980].) "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985].) Once such proof has been offered, to defeat summary judgment "the opposing party must 'show facts sufficient to require a trial of any issue of fact' (CPLR 3212, subd. [b]." (Zuckerman v City of New York, supra, at 562.)

It is further settled that "[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 profession 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 429, 434 [2007][internal citations omitted].)

Plaintiff's claims against both defendants primarily concern legal advice and representation they provided in connection with a pre-nuptial agreement between plaintiff and

Andrea Sokol, made in September 1992, prior to their marriage on November 19, 1992. The relevant terms of the agreement are not in dispute: Andrea Sokol agreed to waive maintenance in the event of divorce, and to accept as her sole distributive award an amount based on the duration of the marriage – $30,000 if the divorce occurred before the first anniversary of marriage plus $10,000 for each additional year of marriage. (Art. VIII[1], [2][a] [Dobrish Ex. C].) She also agreed to vacate the marital residence within 30 days after an event of marital dissolution, which was defined to include the filing of a divorce action by either party. (Art. VIII[2][a].) The agreement further provided that if there were children, child support would be determined pursuant to the Child Support Standards Act, Domestic Relations Law § 240(1-b) ("CSSA"), and that Andrea Sokol would have sole custody. (Art. VIII[5][a], [b].)

The Dobrish defendants were retained pursuant to a written retainer agreement dated December 14, 1998, and represented plaintiff at the trial which commenced four months later on April 27, 1999. The trial court awarded to Andrea Sokol, then Mars, "no maintenance and no equitable distribution other than as provided by the pre-nuptial agreement." Recognizing that the pre-nuptial agreement required Ms. Mars to vacate the marital residence, the court nevertheless held that it would not be in the best interests of the children to vacate. Specifically, the court found: "Although the pre-nuptial agreement requires that Ms. Mars vacate the marital residence, this would not be in the best interests of the children. Dr. Mars has been given an opportunity to find reasonably equivalent accommodations in the neighborhood of the marital residence and has been unable to do so. Until such time as he does, or the youngest child is emancipated, Ms. Mars may continue to occupy the marital residence." (Trial Court Decision at 4.) The court directed Dr. Mars to provide for all of the costs for the care of the children "[b]ecause Ms. Mars will

receive no maintenance and only the distributive award provided by the pre-nuptial agreement." (Id.) The court specified that the child care costs would include maintenance (i.e., carrying costs) associated with the marital residence. (Id.) Noting that "[r]eference to the guidelines to determine additional child support would serve little purpose in this case," the court further found that Ms. Mars' projected income would not allow her to contribute significantly to the support of the parties' children, and that Dr. Mars should pay an additional $300 per week per child for food and clothing. (Id. at 5-6.)

The Dobrish defendants represented plaintiff after the trial in preparing briefs for an appeal of the trial court decision. However, plaintiff executed a consent to change attorney (Dobrish Ex. I), retaining defendant Maddalena in place of the Dobrish defendants as of October 30, 2000. Subsequent correspondence between defendant Maddalena and the Dobrish defendants and between the Dobrish defendants and plaintiff confirmed that the Dobrish defendants would submit the appellate briefs, but Maddalena would "handle all the remaining issues, including the oral argument in connection with the appeal." (Maddalena letter to Dobrish, dated Nov. 1, 2000 [Dobrish Ex. JJ. See also Dobrish Exs. K, X.)

Prior to submission of the appeal, defendant Maddalena notified the Appellate Division, by letter dated January 31, 2001 (Dobrish Ex. Y), that she had been substituted for the Dobrish firm, and that plaintiff had authorized her to withdraw two issues from the appeal: the portion of the trial court decision awarding Ms. Mars exclusive occupancy of the marital apartment until plaintiff was able to locate comparable housing for her, and the child support award except to the extent that the award granted Ms. Mars child care costs even though she was not working.

The Appellate Division decision (286 AD2d 201 [2001]) modified the trial court decision

in two respects: It granted plaintiff decision-making authority over the childrens' religious upbringing and dental care, whereas the trial court had vested full decision-making authority in Ms. Mars. It also vacated the trial court's award to Ms. Mars of the costs of child care. The Appellate Division upheld the portion of the trial court decision finding Ms. Mars entitled to payment of a distributive award pursuant to the pre-nuptial agreement in the amount of $70,000. Finally, in dictum, the Appellate Division disapproved the trial court's failure to apply the Child Support Standards Act in determining plaintiff's child support obligations. The Court thus stated: "[D]espite plaintiff's post-submission withdrawal of that part of his appeal from the trial court's award of child support and its award to defendant of exclusive occupancy of the marital apartment, we note that the trial court incorrectly determined plaintiff's liability for child support without engaging in either a calculation using the statutory child support percentage or a detailed analysis of the factors enumerated under Domestic Relations Law § 240(1-b) (f)." (Mars, 286 AD2d at 203.)

While plaintiff asserts numerous malpractice claims against both defendants which are mired in largely irrelevant factual minutiae, the principal malpractice claim that emerges against both defendants is that they failed to enforce the pre-nuptial agreement. In addition to the malpractice claims, plaintiff contends that both defendants' fees were excessive. Defendants seek dismissal of all of plaintiff's claims.[1]

Dobrish Defendants

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[1]The court notes that the papers on these motions were unnecessarily massive. Plaintiff and the Dobrish defendants violated the 25 page limit for affirmations. (Rules of the Justices, Supreme Court, New York County, Rule 14.) The parties are admonished that submission of multiple, repetitive 25 page affidavits is not compliance with the rule. The Dobrish defendants also submitted thousands of pages of trial transcripts, although there were few references to particular pages.

Plaintiff argues that the Dobrish defendants failed to enforce the provisions of the pre-nuptial agreement requiring Ms. Mars to vacate the marital residence and requiring child support to be determined pursuant to the CSSA. This contention is flatly contradicted by the documentary evidence. The Dobrish defendants expressly argued at trial that the marital residence provision of the pre-nuptial agreement was not being challenged by Ms. Mars and should be enforced. (Post-Trial Memo. at 1 [Dobrish Ex. Q].) They also argued extensively that the CSSA must govern the child support determination, although they did not expressly argue that the pre-nuptial agreement provided for application of the CSSA. (Pre-Trial Memo. at 5-6 [Dobrish Ex. P]; Post-Trial Memo. at 11-17 [setting forth detailed application of CSSA standards].) The trial court rejected these arguments in the decision summarized above. In the brief the Dobrish defendants prepared for the appeal, they argued at length that the trial court had erred in declining to enforce the marital residence provision of the pre-nuptial agreement and awarding the marital residence to Ms. Mars based on the best interests of the children. (Appellant's Brief at 28-30 [Dobrish Ex. R].) They also argued that the child support award disregarded the CSSA and Ms. Mars' waiver of maintenance under the pre-nuptial agreement. (Id. at 18-24.) Significantly, both of these issues were withdrawn by defendant Maddalena before submission of the appeal.

Contrary to plaintiff's contention, there is no evidence that the Dobrish defendants participated in any respect in the decision to withdraw the marital residence and child support issues from the appeal. Defendant Maddalena acknowledges that it was she who suggested to

Dr. Mars that he withdraw these issues. (Maddalena Aff. In Support, ¶¶ 8, 13.)[2] While Maddalena states that during her representation of plaintiff he insisted that she seek the opinions of Mr. Dobrish and other attorneys (id., ¶ 50), she does not claim that she ever spoke to any of the Dobrish defendants about the withdrawal of the issues from the appeal. Rather, she states that she discussed the withdrawal of the issues "during several hours of conferences with plaintiff and his former (and then subsequent) matrimonial counsel, Robert Wayburn," and that both plaintiff and Mr. Wayburn agreed with her advice. (Id., ¶ 17.) Robert Dobrish also categorically denies that he participated in any respect in the decision to withdraw the issues from the appeal. (Dobrish Aff. In Support, ¶ 25.) The 56 page affidavit submitted by Dr. Mars in opposition to defendants' motions (P.'s Cross-Motion Ex. A) addresses every conceivable factual detail concerning the claims in this action, and is notable for what it does not state: Dr. Mars nowhere claims that he ever discussed the withdrawal of the issues from the appeal with any of the Dobrish defendants. Nor does he deny that he conferred with Mr. Wayburn before agreeing to defendant Maddalena's suggestion that he withdraw the issues. While he claims in a reply that Mr. Wayburn has no recollection of having discussed the withdrawal of the issues with Ms. Maddalena, he again does not claim that he himself lacks any recollection of the conferences with Ms. Maddalena and Mr. Wayburn, and again does not deny that he obtained legal advice

[2]Maddalena states that she was told by Dr. Mars that the issues that most interested him related to decision-making authority and custody of his children. (Maddalena Aff. In Support, ¶ 7.) She further states that she advised Dr. Mars to withdraw the marital residence portion of the appeal in order to "deflect the Court's focus from the more reckless circumstances of the litigation" – an eviction proceeding which Dr. Mars brought (without success) against Ms. Mars and a criminal complaint for domestic violence filed by Ms. Mars against Dr. Mars, both in the early stages of the divorce action. (Id., ¶ 8.) Maddalena claims that she advised Dr. Mars to withdraw the child support portion of the appeal because she believed that, if the child support issue were remanded for reconsideration, any modification would have been an increase. (Id., ¶ 16.)

from Mr. Wayburn about the withdrawal. (Mars Aff. dated Oct. 1, 2007, ¶ 3 n 2 [Reply to P.'s Cross-Motion Ex. 10].)

Plaintiff's claim that the Dobrish defendants personally participated in the withdrawal of the issues from the appeal thus rests wholly on supposition.[3] To the extent that plaintiff also argues that the Dobrish defendants are legally responsible for the withdrawal of the issues because they were counsel for the appeal, this argument ignores the undisputed documentary evidence, discussed above, that plaintiff continued to retain the Dobrish defendants on the appeal for the sole purpose of preparing the briefs, and retained defendant Maddalena for all other purposes on the appeal. (See Dobrish Exs. J, K, X.) Finally, in regard to the appeal, plaintiff cannot establish that a different result would have been obtained had the Dobrish defendants not failed to request oral argument (assuming arguendo that it was their obligation and not Maddalena's to do so).

Plaintiff further premises his malpractice claim on the Dobrish defendants' failure to seek return of maintenance that Dr. Mars paid to Ms. Mars during the pendency of the divorce action and to seek damages for her failure to vacate the marital residence. This argument ignores stipulations that he entered into in the divorce action prior to his retention of the Dobrish defendants. While represented by predecessor counsel, Robert Wayburn, he entered into a

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[3]Dr. Mars' claim that there is "circumstantial evidence" that the Dobrish defendants participated in the withdrawal of issues is based on the fact that Robert Dobrish's August 6, 2001 letter informing Dr. Mars of the outcome of the appeal [P.'s Cross-Motion Ex. A 11] contains the statement: "I don't know why the child support was 'withdrawn' but I trust you had a good reason." Dr. Mars argues that the fact Mr. Dobrish's letter did not also mention the marital residence raises an issue of fact as to whether Mr. Dobrish did know of, and actually participate in, the decision to withdraw the marital residence issue. (Mars. Aff., ¶¶ 106-11 [P.'s Cross-Motion Ex. A].) This argument hardly merits a response. It is regrettably typical of the specious bases plaintiff advances for his numerous malpractice claims.

stipulation, dated October 30, 1997, in which he agreed to pay Ms. Mars "spousal support (maintenance)" pendente lite. She agreed to vacate the marital residence by August 1998[4] "into suitable housing for her & children COMPARABLE to her present home." (Oct. 30, 1997 Stip., ¶¶ 7, 5 [Dobrish Ex. D] [capitals and emphasis in original].)[5] The stipulation further provided that "both parties shall cooperate in achieving this relocation & temporary financial arrangements as set forth hereinbelow shall govern & apply only to such time as wife has relocated at which time both parties agree that adjustments to support will be necessary & shall be obtained either by agreement or application to this court for resolution thereof." (Id., ¶ 5.) While also represented by Mr. Wayburn, plaintiff entered into a stipulation, dated December 11, 1997, which provided that the October 30, 1997 stipulation "shall continue IN FULL FORCE AND EFFECT UNTIL FURTHER ORDER OF THIS COURT AND VISITATION AND SUPPORT SHALL BE GOVERNED THEREBY." (Dec. 11, 1997 Stip., ¶ 1 [capitals in original].) The sole exception made in the December stipulation to the continuation of the October stipulation was that the December stipulation permitted either party to make an interim application as to custody. (See id.) The further order of the court, until which this stipulation remained in effect, was the trial court decision which ultimately held both that Ms. Mars was entitled to remain in the marital residence until Dr. Mars found reasonably equivalent accommodations in the neighborhood (or until the youngest child was emancipated), and that maintenance (i.e., carrying

[4]The stipulation gives the year as 1997, but the parties agree that was a scrivener's error and should have been 1998.

[5]The stipulation also contains a provision in which Ms. Mars agreed to withdraw her opposition to diversion (referral) to a family court of a criminal complaint filed by Ms. Mars against Dr. Mars for domestic violence in Connecticut based on an incident at a summer home there. (Oct. 30, 1997 Stip., ¶ 4.)

charges) for the residence must be paid by Dr. Mars as part of child support.

In the face of these stipulations and the trial court decision, plaintiff lacks a colorable basis on which to claim that "but for" the Dobrish defendants' inaction, he would have been entitled to return of the temporary maintenance he paid or to damages based on Ms. Mars' failure to vacate the marital residence by August 1998. In so holding, the court notes that plaintiff submits the expert affidavit of Fred Shapiro, Esq. (retired J.S.C.), opining that the Dobrish defendants' failure to seek these damages was malpractice. (Shapiro Aff., dated Aug. 25, 2007, ¶ 14 [P.'s Cross-Motion Ex. B].) This opinion simply ignores that the December 1997 stipulation left the maintenance obligation in effect until the further order of the court, and that such further order – the trial court decision – continued the obligation to pay carrying charges for the apartment, albeit as child support. The opinion also is based on the assertion that Ms. Mars had an unconditional obligation to vacate the marital residence by August 1998. This assertion is untenable because it ignores both the term of the October stipulation that conditioned Ms. Mars' vacatur of the residence on Dr. Mars' cooperation in finding reasonably equivalent accommodations, and the trial court's determination that he had not found such accommodations and that Ms. Mars was entitled to remain in the apartment until he did so.[6] As the expert's opinion does not take into account, and is contradicted by, the stipulations and trial court decision, it is insufficient to raise a triable issue of fact on the claim that the Dobrish defendants should have sought to recover maintenance and other damages resulting from Ms. Mars' failure to vacate.

[6]The court rejects plaintiff's contention that the divorce judgment made material changes to the trial court decision with respect to plaintiff's obligations to find comparable accommodations.

Plaintiff further argues that the Dobrish defendants committed malpractice by not advising plaintiff that he should have accepted a settlement offer by Andrea Mars, dated April 14, 1999 (P.'s Cross-Motion Ex. A 5). In opposition, the Dobrish defendants submit a letter, dated April 23, 1999 (Dobrish Ex. O), setting forth the extensive terms of Dr. Mars' counter-offer. Dr. Mars does not deny that he instructed the Dobrish defendants to request these terms. (See Mars' Aff., ¶¶ 122-132.) While plaintiff's expert opines that the Dobrish defendants' failure to advise plaintiff to accept the April 14 offer was malpractice (Shapiro Aff., ¶¶ 27-30 [P.'s Cross-Motion Ex. B]), this opinion again ignores the documentary evidence of the counter-offer and the undisputed evidence that these other terms were requested by plaintiff, a sophisticated party who was fully familiar with court proceedings and had already litigated extensively against his wife.

Plaintiff also argues that the Dobrish defendants committed malpractice by not recovering his personal property from the marital residence. By order dated September 10, 2004 (Dobrish Ex. BB), the court in the divorce action (Gische, J.) directed that certain mementos be returned to plaintiff and permitted him, on certain conditions, to inventory his property in the marital residence. It is undisputed that plaintiff never took the inventory. Plaintiff subsequently sought in the divorce action to retrieve personal property remaining in the apartment, and this request was denied by order of the court (Evans, J.), dated January 24, 2006. The Appellate Division declined to review the trial court's 2006 ruling on the property issue because it "was previously considered in an unappealed prior order." (Mars, 39 AD3d at 233.) Given these orders and plaintiff's failure, subsequent to his representation by the Dobrish defendants, to avail himself of the opportunity to inventory his property, the Dobrish defendants' failure, if any, to protect

plaintiff's property cannot be deemed a "but for" cause of loss.

Plaintiff's malpractice claim also cannot be established based on his argument that the Dobrish defendants failed to prove that plaintiff had already paid Ms. Mars the $70,000 distributive award that was the sole payment to which she was entitled under the pre-nuptial agreement ($30,000 plus $10,000 for each of the four years that the marriage continued). The pre-nuptial agreement required that Dr. Mars maintain a separate account for the distributive award, and deposit into it the initial $30,000 payment and the yearly $10,000 amounts. (Art. VIII[3][a].) Contrary to plaintiff's contention, the fact that the Dobrish defendants did not bring bank account statements to the trial to document that he had already paid the $70,000 is immaterial. Ms. Mars did not dispute at the trial that Dr. Mars was the original source of deposits in a joint savings account totaling at least $70,000 or that she had transferred funds from the joint account to her own account. She took the position that the deposits were for spending money and for household expenses. (May 3, 1999 Trial Tr. at 89-95 [Dobrish Ex. BBB].) As Dr. Mars had not complied with the requirement of the pre-nuptial agreement that he set up a separate account for the distributive award deposits, there was a credibility issue as to whether Dr. Mars' deposits were on account of the distributive award or for the purposes Ms. Mars claimed. Thus, noting that the "the issue was purely one of credibility," the Appellate Division held there was "no occasion to second guess the trial court's finding that plaintiff 'has not proven that any of that [$70,000] amount has been satisfied.'" (Mars, 286 AD2d at 202.)

Similar considerations are presented by plaintiff's claim that the Dobrish defendants should have argued that Ms. Mars owed him $120,000 which Ms. Mars had allegedly removed from a joint bank account to her bank account. As discussed above, Ms. Mars conceded that Dr.

Mars was the original source of the funds, and contended that the funds were given to her for spending money or household expenses. As this claim also involves credibility issues, plaintiff cannot demonstrate that he would have recovered the funds "but for" the Dobrish defendants' failure to seek them.

The court has considered plaintiff's additional malpractice contentions against the Dobrish defendants and finds them to be without merit. The court also finds that plaintiff fails to raise a triable issue of fact on his independent claim that the Dobrish defendants' fees were excessive. As of the time of submission of these motions, plaintiff had paid approximately $700,000 in legal fees – $400,000 to the Dobrish defendants, $150,000 to his wife's attorney, Pat Grant, and the remainder to other attorneys who represented him in the divorce action. While the Dobrish defendants' fees are unquestionably considerable, plaintiff makes no showing, by expert affidavit or otherwise, that these fees were not based on usual and customary rates or involved excessive hours, given the contentiousness of the litigation and the nature of the issues and property involved. The Dobrish defendants will accordingly be granted summary judgment dismissing the complaint.

Defendant Maddalena

Plaintiff's principal malpractice claim against defendant Maddalena is that she should not have withdrawn the marital residence and child support issues from the appeal. It is well settled that "[n]either an error in judgment nor in choosing a reasonable course of action constitutes malpractice." (Hand v Silberman, 15 AD3d 167 [1st Dept 2005], lv denied 5 NY3d 707.) An attorney's error of judgment thus does not rise to the level of malpractice where an attorney selects "one among several reasonable courses of action." (Rosner v Paley, 65 NY2d 736, 738

[1985].) Moreover, "[e]ven if counsel improperly advises the client, the advice is not the proximate cause of the harm if the client cannot demonstrate its own likelihood of success absent such advice." (Pellegrino v File, 291 AD2d 60, 63 [1st Dept 2002], lv denied 98 NY2d 606.)

Here, plaintiff argues that defendant Maddalena's advice to withdraw the issues from the appeal was not reasonable and therefore constituted malpractice. In support of this contention, plaintiff relies on his expert's opinion that "but for" Maddalena's advice to withdraw the issues from the appeal, the Appellate Division would have ruled in plaintiff's favor on occupancy of the marital residence (Shapiro Reply Aff., ¶ 5 [Reply to P.'s Cross-Motion Ex. 11]). and would have awarded child support in the amount of approximately $4200 per month, an amount lower than that awarded by the trial court. (Shapiro Reply Aff., ¶ 10.) Plaintiff's expert concludes that because Dr. Mars would have had a favorable result on appeal, "there was no valid strategic basis for withdrawing" either issue. (Id., 12.)

Plaintiff's expert does not discuss the reasonableness of the strategic concerns advanced by Maddalena for withdrawing the issues and focusing on plaintiff's request for decision-making authority over the children. To the extent that Maddalena's withdrawal of the issues was a strategic decision, it cannot support a malpractice claim as a matter of law. (See Bernstein v Oppenheim & Co., P.C., 160 AD2d 428 [1st Dept 1990].) Given the magnitude of defendant Maddalena's decision to withdraw the appeal on two such major issues, however, this court's determination of the malpractice claim will not rest on a characterization of the decision as strategic, but will turn to consideration of whether the decision was a "but for" cause of damage to plaintiff.

Notably, in none of his several submissions does plaintiff's expert cite a single legal

authority in support of his largely conclusory claims that plaintiff would have prevailed on the marital residence and child support issues but for their withdrawal. On the contrary, the opinion ignores substantial authority that the housing provisions of a pre-nuptial agreement may be modified if inequitable when considered in light of the best interests of minor children who reside with the custodial parent against whom the pre-nuptial agreement is sought to be enforced. (See Cron v Cron, 8 AD3d 186 [1st Dept 2004], lv dismissed 7 NY3d 864 [2006] and lv denied 10 NY3d 703 [2008].) The opinion also ignores longstanding authority that carrying charges for a marital residence may be considered child support. (See Yunis v Yunis, 94 NY2d 787 [1999].) Plaintiff's expert fails to cite any statutory or case law in support of his claim that it was improper for the trial court, on the particular facts of this case, to include carrying charges for the apartment in the child support awarded to Ms. Mars.

Nor does the expert affidavit raise a triable issue of fact as to whether the child support award would have been lower if the CSSA had been applied. It is well settled that the CSSA enacted a three-step method for determining child support:

> [S]tep one of the three-step method is the court's calculation of 'combined parental income' * * *. Second, the court multiplies that figure, up to $80,000, by a specified percentage based on the number of children in the household – 17% for one child [25% for two children] -- and then allocates that amount between the parents according to their share of the total income.
> * * *
> Third, where combined parental income exceeds $80,000 * * * the statute provides that 'the court shall determine the amount of child support for the amount of the combined parental income in excess of such dollar amount through consideration of the factors set forth in paragraph (f) of this subdivision and/or the child support percentage."

(Cassano v Cassano, 85 NY2d 649, 653 [1995] [internal citations omitted] [decided under Family Ct Act § 413, the analog of Domestic Relations Law § 240 [1-b]].) The CSSA "afford[s]

courts the discretion to apply the 'paragraph (f)' factors, or to apply the statutory percentages, or to apply both in fixing the basic child support obligation on parental income over $80,000." (Id. at 655.) The paragraph (f) factors in turn include not only the financial resources of the parents, but the "standard of living the child would have enjoyed had the marriage or household not been dissolved." (Domestic Relations Law § 240 [1-b][f][3].])

Here, Dr. Mars' income was approximately $700,000 per year. Under the statutory scheme, therefore, the trial court unquestionably had the discretion to apply the paragraph (7) factors in setting the amount of child support. Plaintiff's expert's affidavit makes no showing that the Appellate Division would have found that a proper exercise of such discretion could not have resulted in an award in the amount that the trial court set. Nor did the Appellate Division decision on the appeal in any respect suggest that the amount of the award was improper. It emphasized that in making a child support award, the matrimonial court was required to, but did not, apply the CSSA three-step method and set forth its "articulation of the reasons for the method used (whether the percentage or the factors)." (Mars, 286 AD2d at 204.)

The court thus holds that plaintiff fails, through his expert's testimony or otherwise, to raise a triable issue of fact on whether defendant Maddalena's withdrawal of the issues from the appeal was a "but for" cause of loss to plaintiff.

The court further finds that plaintiff's agreement to defendant Maddalena's suggestion that he withdraw the two issues is a complete defense to the malpractice claim based on the withdrawal. Dr. Mars was not only a sophisticated client with considerable exposure to the litigation process, but also consulted with another attorney, Robert Wayburn, before accepting Maddalena's advice to withdraw the issues. Under these circumstances, in which there is no

dispute that plaintiff, with full information, elected to follow defendant Maddalena's advice, she is not liable for malpractice. (See PJI 2:152 ["[I]f an attorney points out to the client the nature of the risks involved in a certain course of procedure and the client elects to follow that course, the attorney is not responsible for the consequences."]. See also Cicorelli v Capobianco, 89 AD2d 842 [2d Dept 1982], affd for reasons stated below 59 NY2d 626 [1983].)[7]

Plaintiff's claim against defendant Maddalena for failure to recover his personal property is denied for the reasons stated in connection with the denial of this claim as against the Dobrish defendants. Plaintiff also fails to raise triable issues of fact as to whether he sustained damages on his numerous other claims against this defendant, including his claims that she failed to obtain decision-making authority over his son's piano lessons, gave improper advice on child support deductions and posting of an appeal bond, and made an error in settling the order on the amount of attorney's fees to be paid by Dr. Mars to Ms. Mars' counsel.

Finally, the court finds that plaintiff fails to raise a triable issue of fact as to the excessiveness of defendant Maddalena's fees. However, to the extent Maddalena billed plaintiff for preparation for an oral argument on the appeal that was never scheduled, that time should be deducted from any unpaid legal fees that she claims.

It is accordingly hereby ORDERED that the motion of the Dobrish defendants for summary judgment is granted to the extent of dismissing the complaint against them in its

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[7]It is noted that notwithstanding plaintiff's agreement to withdraw the marital residence issue on the appeal, he has continued in the divorce action to challenge the trial court decision that he provide reasonably equivalent accommodations to his former wife and children. In 2007, the Appellate Division roundly rejected his argument that while the trial court decision requires him to pay for the marital apartment for as long as they live there, "it does not require him to pay for the cost of maintaining the equivalent apartment he would have them move into." (Mars, 39 AD3d at 232.)

entirety; and it is further

ORDERED that the motion of defendant Maddalena is granted to the extent of dismissing the complaint against her in its entirety; and it is further

ORDERED that the cross-motion of plaintiff for partial summary judgment as to liability is denied; and it is further

ORDERED that the parties shall appear in Part 57 of this Court on November 13, 2008 at 11:00 a.m. for a status conference on defendants' counterclaims for unpaid legal fees.

This constitutes the decision and order of the court.

Dated: New York, New York
October 15, 2008

MARCY FRIEDMAN, J.S.C.