

<b>Fielding v Kupferman</b>
2008 NY Slip Op 33600(U)
January 7, 2008
Supreme Court, New York County
Docket Number: 113572/07
Judge: Walter B. Tolub
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: WALTER B. TOLUB  
*Justice*

PART 15

Index Number : 113572/2007

FIELDING, SETH

vs

KUPFERMAN, STEPHANIE

Sequence Number : 002

DISMISS

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

This motion is 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

**FILED**

JAN 09 2009

COUNTY CLERK'S OFFICE  
NEW YORK

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

Dated: 1/7/08

WALTER B. TOLUB

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 STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 15

-----x  
SETH FIELDING

Plaintiff,

-against-

STEPHANIE KUPFERMAN and  
KUPFERMAN & KUPFERMAN, LLC,

Defendants.  
-----x

Index No. 113572/07  
Mtn Seq. 002

**FILED**

JAN 09 2009

COUNTY CLERK'S OFFICE  
NEW YORK

**WALTER B. TOLUB, J.:**

This action for legal malpractice arises out of plaintiff's claim that defendants failed to properly advise him of various tax consequences that befell him in connection with the underlying matrimonial action captioned Susan Fielding v. Seth Fielding (New York Co. Index No. 350043/2005) (the "matrimonial action"). By this motion, defendants move to dismiss plaintiff's complaint pursuant to CPLR 3211(a)(1) and (a)(7).

Background

Seth and Susan Fielding were married on June 22, 1966 in Brooklyn, New York. In 2005, Susan Fielding commenced the underlying matrimonial action, and plaintiff hired defendants to provide him with legal representation.

The matrimonial action was ultimately resolved by stipulation of settlement dated April 30, 2007, and incorporated into the Judgment of Divorce which was granted by Hon. Sarah Lee Evans on June 22, 2007. The stipulation of settlement

specifically provides, among other things,<sup>1</sup> that in exchange for the marital residence located on West End Avenue, plaintiff would pay Stephanie Fielding the sum of \$1,597,013. \$198,700 of this figure was credited to plaintiff via his relinquishment of any claim to his ex-wife's accounts as delineated in paragraph 7.1.2 of the settlement agreement. \$1.2 million dollars of this figure was to be paid within 30 days by plaintiff to his ex-wife from "immediately available funds", and the balance of \$182,072 was to be paid to plaintiff's ex-wife in 48 monthly payments together with a 5% per annum (calculated at \$4,192.99 per installment) (Notice of Motion, Exhibit 3).

From the papers presented, it appears that plaintiff did not have \$ 1.2 million dollars in "immediately available funds" and ultimately fulfilled this obligation<sup>2</sup> by obtaining a mortgage on his property and by taking an early distribution from his retirement account, thereby incurring a significant tax loss. This action followed.

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<sup>1</sup> The court notes that in the settlement agreement, Stephanie Fielding declined spousal maintenance and made no claim toward plaintiff's medical license. Other assets were either split, as in the case of a jointly held investment account, or individually retained, as in the case of individually held investment and retirement accounts.

<sup>2</sup> Although the settlement agreement is devoid of language concerning the source of the "immediately available funds" necessary to satisfy plaintiff's \$1.2 million dollar obligation, plaintiff claims that the financing was to have been derived either by obtaining a home equity line of credit or a mortgage using the West End Avenue property as collateral.

[\* 4]

Comprised of three causes of action, plaintiff's amended complaint asserts two causes of action for legal malpractice. The third cause of action advanced seeks disgorgement of the \$75,000 legal fee paid by plaintiff to defendants for their legal services (Notice of Motion, Ex. A). Specifically, plaintiff claims that defendants were negligent in their representation, and that their failure to properly advise him induced him to act without informed consent, resulting in significant tax liabilities.<sup>3</sup>

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<sup>3</sup> The causes of action asserting claims of legal malpractice read, in pertinent part, as follows:

(First Cause of Action - Legal Malpractice)

28. Defendants committed negligence insofar as he did not act as would an attorney using ordinary and reasonable skill and knowledge commonly possessed by a member of the legal profession.

29. Plaintiff sustained damages because of this malpractice.

30. The attorney's negligence was the proximate cause of the plaintiff's loss. [\*\*\*]

(Second Cause of Action - Lack of Informed Consent)

33. Plaintiff did not act with informed consent because he was not properly advised by the defendant. Had he been properly advised, he would have made different choices, including but not limited to insisting on a trial and an equitable division of assets by the Court or holding out for a better settlement result considering the tax consequences. Defendants' ignorance of the tax consequences put plaintiff in a worse position than he would have been had he been represented by counsel fully familiar with such considerations - or had he at least been informed that he should obtain new counsel. [\*\*\*] (Complaint, Notice of Motion Exhibit A).

### Discussion

As with any motion to dismiss, the only inquiry to be made by the court at this juncture is whether plaintiffs' facts, as alleged, "fit within any cognizable legal theory" upon which plaintiff may succeed (Leon v. Martinez, 84 NY2d 83, 87-88 [1994]; Campaign For Fiscal Equity, Inc. v. State of New York, 86 NY2d 307, 318 [1995]. See generally, Barr, Altman, Lipshie, and Gerstman; New York Civil Practice Before Trial [James Publishing 2008] §36.01 *et seq.*).

Since all of the advanced causes of action in plaintiff's complaint arise out of claimed legal malpractice, success on the asserted claims require plaintiff to establish that (1) his attorney was negligent; (2) the negligence was the proximate cause of the loss sustained; and (3) actual damages (Reibman v. Senie, 302 AD2d 290 [1<sup>st</sup> Dept 2003]; Between The Bread Realty Corp. v. Salans Hertzfeld Helibronn Christy & Viener, 290 AD2d 380 [1<sup>st</sup> Dept 2002], *lv den.* 98 NY2d 603 [2002]).

In support of his claims for legal malpractice, plaintiff argues that defendants failed to properly represent his interests by encouraging the signing of an unrealistic and inequitable settlement agreement which plaintiff claims contemplated that he would be able to obtain either a mortgage or a home equity line of credit on the property within a short period of time and before the divorce was made final. Plaintiff further claims that

[\* 6]

the settlement agreement, which defendants refused to renegotiate or seek judicial intervention from, ultimately resulted in a significant tax loss because plaintiff was unable to obtain financing and was required to make an early distribution of his retirement account funds. Plaintiff asserts that but for defendant's failure to advise him of the tax consequences associated with the early distribution of his retirement funds and the "bad advice" obtained during the course of settlement negotiations, he would not have signed the settlement agreement and would now be in a better financial position based on a trial and/or the equitable distribution of the marital assets.<sup>4</sup>

There are multiple problems with plaintiff's arguments, the most significant of which is plaintiff's obvious change of position. In order to end the divorce action, plaintiff represented in the stipulation of settlement that he had \$1.2 million dollars of "immediately available funds" to satisfy a large portion of his financial obligations to his ex-wife. The fact that the source of the "immediately available funds" was

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<sup>4</sup>The claims advanced in plaintiff's memorandum of law, which differ from those advanced in the amended complaint, are indeed bold; not only does plaintiff claim that but for the settlement agreement he would have had a better financial outcome (Memorandum in Opposition, ¶22-26), he claims that he would have done better "had a neutral magistrate, applying statutorily defined concepts of equity, decided the divorce instead (id. p. 9. Compare, Complaint, Notice of Motion Exhibit A). The court notes that the latter assertion appears to be an attempt to collaterally attack the Judgment of Divorce.

undefined in the stipulation does not change the simple fact that plaintiff represented that he possessed those funds at the time that the stipulation of settlement was executed, and more importantly, when the final Judgment of Divorce was entered. As such, plaintiff is judicially estopped from now claiming that he did not have the necessary funds on hand when the settlement agreement was executed, and was financially damaged because in order to satisfy his judicially ordered financial obligations, he had to finance his property and dip into his retirement accounts (see, State Farm Mutual Auto Insurance Co. v Chandler, 35 AD3d 588 [2<sup>nd</sup> Dept 2006]; Manhattan Avenue Development Corp v. Meit, 224 AD2d 191 [1<sup>st</sup> Dept 1996]). As such, the very cornerstone of plaintiff's claim for legal malpractice fails.

Even were this not the case, plaintiff's papers fail to demonstrate that but for the claimed negligent acts of his attorney, plaintiff would have prevailed in the underlying matrimonial action (Reibman, 302 AD2d 290, 290-91; Senise v. Mackasek, 227 AD2d 184 [1<sup>st</sup> Dept 1996]). Plaintiff's claims that he would have gotten a better result had the matrimonial action gone to trial or had he "held out" for a better settlement or allowed the court or a "neutral magistrate" to calculate the distribution of the marital assets amount to no more than mere speculation. Mere speculation may not be used to establish the proximate cause element of a legal malpractice claim, and in

[\* 8]

fact, warrants dismissal of the claim (see, Sherwood Group, Inc. v. Dornbush, Mensch, Mandelstam & Silverman, 191 AD2d 292 [1<sup>st</sup> Dept 1993]; Tanel v. Krietzer & Vogelman, 291 AD2d 60 [1<sup>st</sup> Dept 2002]).

Having considered the submissions of the parties, it is this court's conclusion that plaintiff has not advanced a cognizable legal theory upon which he may succeed. As such, it is

ORDERED that defendants' motion to dismiss is granted and the within complaint is dismissed; and it is further

ORDERED that the clerk of court enter judgment accordingly.

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

Dated: 1/2/09

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HON. WALTER B. TOLUB, J.S.C.

**FILED**  
JAN 09 2009  
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