Liberty Assoc. v Etkin

2009 NY Slip Op 30401(U)

January 29, 2009

Supreme Court, Nassau County

Docket Number: 14404/01

Judge: F. Dana Winslow

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SLAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

TRIAL/IAS, PART 6
NASSAU COUNTY

LIBERTY ASSOCIATES,

Plaintiff,

MOTION DATE: 10/30/08
MOTION SEQ. NO.: 005

-against-

MICHAEL S. ETKIN,

INDEX NO.: 14404/01

Defendant.

The following papers having been read on this motion (numbered 1-2):

Notice of Motion to Reargue. 1
Affirmation in Opposition. 2

Plaintiff moves pursuant to **CPLR §2221** to reargue the decision and order of this Court, signed on August 10, 2008 and entered on August 21, 2008 (the "Prior Order"), in which the Court granted defendant's motion for summary judgment dismissing the complaint. As grounds for reargument, plaintiff asserts: (i) that the Court may have failed to consider plaintiff's affirmation in opposition, insofar as it was not listed in the papers read on the motion; and (ii) that the Court misapprehended the applicable case law.

The Court grants leave to reargue and proceeds to the merits. The Court notes, at the outset, that the omission of plaintiff's opposition from the list of papers in the Prior Order was the result of a typographical error. In fact, the Court did read and consider plaintiff's affirmation. Accordingly, the following centers on plaintiff's substantive challenge.

This is an action for legal malpractice arising from defendant's representation of plaintiff from September 1998 until November 1999 in connection with certain mortgage foreclosure matters (the "Underlying Litigation"). In essence, plaintiff claims that defendant's negligence and failure to "perfect" the foreclosure resulted in losses to plaintiff in an amount exceeding $4.69 million dollars. The action was commenced on or about September 19, 2001. On or about December 24, 2002, an action for non-payment

of attorneys fees in the amount of $25,928.88 plus interest at 18% per annum (the "Attorneys Fees Dispute") was filed against plaintiff by the law firm of Ravin, Sarasohn, Cook, Baumgarten, Fisch & Rosen ("Ravin, Sarasohn"). Defendant asserts, without contradiction, that Defendant was employed by Ravin, Sarasohn at the time of the Underlying Litigation, and that the Attorney Fees Dispute pertained to fees incurred in connection with the Underlying Litigation. On or about April 14, 2004, a Stipulation and Dismissal With Prejudice and Without Costs was executed, which reflected a settlement of the Attorneys Fees Dispute for the sum of $17,500.00. Thereafter, in the instant malpractice action, defendant brought a motion to dismiss on grounds that the action was barred by the doctrine of collateral estoppel. Citing **Izko Sportswear Co. v. Flum** [25 AD3d 534], this Court granted the motion to dismiss.

As Plaintiff notes, the Prior Order reflected the general principle, articulated in **Blair v. Bartlett** [75 NY 150 (1878)], that a judicial determination fixing the value of a professional's services in the context of a collection action precludes a claim for malpractice arising out of the rendering of those professional services. Plaintiff reargues that to apply this principle in circumstances in which the matter of attorneys fees was resolved by settlement, as opposed to judicial determination, is an unprecedented and unwarranted extension of the law.

The Court finds that the propriety of preclusion in the instant circumstances depends, in part, on whether the preclusion is predicated on collateral estoppel or res judicata (or both). This is because a settlement or stipulation of discontinuance is treated differently under the different doctrines. The doctrine of collateral estoppel or "issue preclusion" requires that the matter to be precluded in the present action be "actually litigated" or "necessarily decided" in the prior action. **Kaufman v. Eli Lilly & Co.,** 65 NY2d 449, 455. Accordingly, courts hold that collateral estoppel does not apply where the prior proceeding was terminated by stipulation. **Id.,** at 456-457; **Robinson v. Crawford,** 46 AD3d 252; **Angel v. Bank of Tokyo-Mitsubishi, Ltd.,** 39 AD3d 368, 371. By contrast, the doctrine of res judicata or "claim preclusion" requires only that the prior litigation result in a final determination on the merits. It has been held that a stipulation with prejudice is a final determination on the merits for purposes of res judicata. *See* **North Shore-Long Is. Jewish Health Sys., Inc. v. Aetna US Healthcase, Inc.,** 27 AD3d 439, **Vigliotti v. North Shore University Hosp.,** 24 AD3d 752; **Forte v. Kaneka Am. Corp.,** 110 AD2d 81.

The question is: which doctrine applies here? Where courts have barred a malpractice action based upon a prior determination in an action for professional fees, the articulated rationale seems to rely on elements of both doctrines, interchangeably. Collateral estoppel is implicit in the finding that a determination fixing the value of a

professional's services necessarily decides that there was no malpractice. *See* **Blair,** at 75 NY 150; **Koppelman v. Liddle,** 246 AD2d 365, **Altamore v. Friedman,** 193 AD2d 240; **Chisolm-Ryder Co. v. Sommer & Sommer,** 78 AD2d 143. Res judicata is implicit in the holdings that "[t]he issues involving conflicts over professional services and those in malpractice actions are necessarily intertwined" [**Altamore,** 193 AD2d at 247], and that a malpractice defense must be raised in a suit for professional fees or it will be precluded. **Chisolm-Ryder**, 78 AD2d at 146. The Second Department in **Altamore** tacitly invokes both doctrines by citing such factors as the "identity of issues" and "full and fair opportunity to litigate," while also emphasizing that the fee dispute and the legal malpractice action arose from the same transaction. **Altamore,** 193 AD2d at 247. In both **Altmamore** and **Izko**, the Second Department explicitly states that it relies upon both collateral estoppel and res judicata. **Izko**, 25 AD3d at 537; **Altamore,** 193 AD2d at 241.

To the extent that the holdings in **Izko** and **Altamore** rest upon the doctrine of collateral estoppel, plaintiff's argument that they should not be applied in the instant circumstances is valid. Without a judicial or quasi-judicial determination, it cannot be said that the issue of the value of the professional's services (and, hence, the lack of malpractice), has been necessarily decided. *Compare,* **Bauza v. Livington,** 40 AD3d 791 (court approval of infant compromise order was sufficient to bar subsequent malpractice action).

To the extent that the above precedent rests upon the doctrine of res judicata, however, plaintiff's argument is unavailing. The Court finds that res judicata is properly applied in the instant circumstances. "It is blackletter law that a valid final judgment bars future actions between the same parties on the 'same cause of action'. . . [citations omitted]. The difficulty arises in determining when a second action involves the same cause of action as an earlier one." **Reilly v. Reid,** 45 NY2d 24, 27. The State has adopted the transactional approach to res judicata. Once a claim is brought to a final conclusion, all other claims arising out of the same transaction, or series of transactions, are barred. **O'Brien v. City of Syracuse,** 54 NY2d 353, 357. "Where the same foundation facts serve as a predicate for each proceeding, differences in legal theory and consequent remedy do not create a separate cause of action." **Reilly,** 45 NY2d at 30. *See also* **O'Brien**, 54 NY2d at 357.

Res judicata is applied, not on a case-by-case basis, but according to recognized categories or "factual groupings." **Reilly,** 45 NY2d at 30. The present facts fall within factual groupings or categories that the Courts have examined (i.e., disputes regarding professional malpractice and professional fees), and in which the Courts have found res judicata to be applicable. *See* **Altamore,** 193 AD2d at 247, citing **John Grace & Co. v.**

Tunstead, Schechter & Torre, 186 AD2d 15. The only distinction here is that the matter of attorneys fees has been resolved by stipulation, rather than by judicial determination.

As discussed above, a stipulation with prejudice generally carries res judicata authority with respect to the same transaction or series of transactions. "[T]he language 'with prejudice' may be narrowly interpreted when the interests of justice, or the particular equities involved, warrant such an approach." **Dolitsky's Dry Cleaners v. YL Jericho Dry Cleaners,** 203 AD2d 322; 322-323. *See also* **Employers' Fire Ins. Co. v. Brookner,** 47 AD3d 754. In this case, however, there is no evidence that the equities warrant a departure from the general rule.

The Court notes that the Complaint contains allegations of malpractice that pre-date defendant's association with Ravin, Sarasohn. With respect to those allegations, res judicata does not operate as a bar, insofar as the scope of the representation is not the same as in the Attorneys Fees Dispute. Nonetheless, those claims are barred by the applicable statute of limitations. The Court also notes that the instant malpractice action was filed prior to the Attorneys Fees Dispute. The law is clear, however, that a stipulation of discontinuance with prejudice may have res judicata effect, not only with respect to future proceedings, but also with respect to proceedings pending at the time of the stipulation. **Forte,** 110 AD2d at 86.

The Court adheres to its original determination as set forth in the Prior Order, for the reasons elaborated herein. Accordingly, it is

ORDERED, that, upon reargument, the relief sought is **denied.** The Prior Order dismissing the Complaint remains in full force and effect.

ENTER:

Dated: 1/29/09 Dana Winslow

J.S.C.

ENTERED

FEB 18 2009

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