

Posner v Mallow, Konstam & Hager, P.C.

2009 NY Slip Op 30697(U)

March 24, 2009

Supreme Court, New York County

Docket Number: 107413/07

Judge: Joan A. Madden

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

PRESENT: Hon. Jack A. Wiedow

PART 1

Index Number : 107413/2007

POSNER, DEVORAH

VS.

MALLOW, KONSTAM

SEQUENCE NUMBER : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE: 10/23/08

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 and cross-motion are decided in accordance with the attached Memorandum Decision & Order.

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

FILED
MAR 31 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: March 24, 2009



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 11

-----X
DEVORAH POSNER,

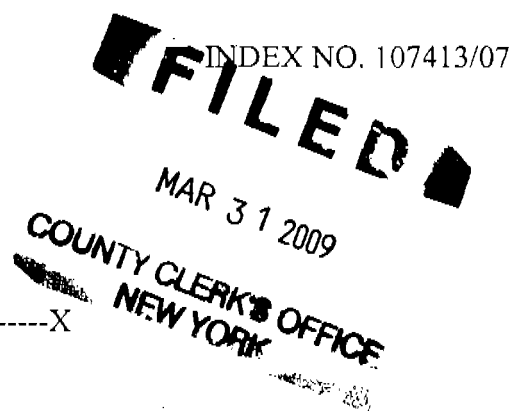
Plaintiff,

-against-

MALLOW, KONSTAM & HAGER, PC and
DANIEL B. SCHWARTZ, ESQ.,

Defendants
-----X

JOAN A. MADDEN, J.:



In this legal malpractice action, defendants Mallow, Konstam & Hager, P.C. and Daniel B. Schwartz Esq.¹ (together “the Mallow firm”) move for an order granting summary judgment dismissing the complaint against them or, in the alternative, imposing discovery sanctions pursuant CPLR 3126 based on the failure of plaintiff Devorah Posner (“Posner”) to comply with prior court orders directing that she turn over certain medical records. Posner opposes the motion and cross moves for a protective order and for summary judgment in her favor.

Background

This action arises out of the Mallow firm’s representation of Posner in a matrimonial action commenced in 2003 by Posner’s then husband, Michael Minick (“Minick”). Prior to their marriage in May 1996, Posner and Minick entered into an ante-nuptial agreement dated April 3, 1996, which sets forth, inter alia, the parties’ respective financial obligations after marriage (“The Agreement”).

Under paragraph 5 of the Agreement each party waived the right to seek maintenance, alimony and counsels fees “[i]n the event of the termination of the anticipated marriage.”

¹During the time periods relevant to the allegations in the complaint, Mr. Schwartz was an associate at defendant Mallow, Konstam & Hager, P.C.

Paragraph 26, however, provides that in the event that either party is “unemployable, disabled or unable to work, the Prospective Husband or Prospective Wife will be solely responsible for support so long as they are not separated.”

At the time of the marriage, Minick owned the property located at 440 W. 22nd Street, New York, NY, and was in litigation to regain possession of the apartment consisting of the parlor floor of the building (“the 22nd Street apartment”). Paragraph 13 of the Agreement states that Minick is attempting to gain possession of the 22nd Street apartment and

the parties agree that they will reside in that apartment if and when the Prospective Husband gains possession...the Prospective Husband shall be responsible for all expenses associated with the maintenance of said premises. In the event the parties reside in a location other than an apartment in the aforementioned building, any rent payable shall be paid two-thirds by the Prospective Husband and one-third by the Prospective Wife. If the parties become legally or physically separated while residing at a rental location, for which each party is paying a portion of rent, then neither party shall remain in the rental location unless they receive written consent from the other.

During the initial period of their marriage, Posner and Minick maintained separate residences in Manhattan, with plaintiff living at 24 Fifth Avenue and defendant living at 1391 Madison Avenue, an apartment owned by her brother-in-law. On or about October 1, 1996, they began to live together in a leased home in Pelham, New York, where they resided until February 2000. After that date, Posner moved back to her brother-in-laws apartment and began to pay rent, while Minick moved into the 22nd Street apartment.

In connection with its representation of Posner, the Mallow firm filed an answer containing several counterclaims, including for divorce on the grounds of cruel and inhumane treatment, and abandonment based on Minick’s alleged refusal to allow Posner to co-habit with

him at the 22nd Street apartment. Additional counterclaims alleged that Minick failed to provide support for Posner, and that the Agreement was unconscionable as Minick had no obligation to pay maintenance to her under its terms.

The Mallow firm moved, on Posner's behalf, by order to show cause for an award of temporary maintenance, exclusive use and possession of the 22nd Street apartment, payment of the costs associated with that 22nd Street apartment, and other relief, including an order invalidating the Agreement as unconscionable and the product of fraud and misrepresentation. Posner's request for temporary maintenance was based in part on her disability which began in 2002, when she underwent emergency surgery for a diaphragmatic hernia, which allegedly made her unable to work. Posner maintains that the condition resulted from an automobile accident that occurred when she and Minick were still married, in which Posner suffered multiple injuries, some of which were obvious after the accident while the others, including the diaphragmatic hernia were latent and only discovered later. Notably, the request for temporary maintenance was not based on the provisions of the Agreement, which does not address the right to temporary maintenance, and is irrelevant to whether Posner was entitled to support under Paragraph 26 of the Agreement.²

By decision and order dated February 27, 2004, Justice Joan B. Lobis denied Posner's requests for relief. However, Justice Lobis found that there were factual issues with respect to whether the parties agreed to live apart or whether Minick breached paragraph 13 of the

²When a prenuptial agreement is silent as to temporary maintenance, as was the case with the Agreement, such relief may be granted if the court finds it is warranted pursuant to DRL § 236(B) after balancing and considering various factors including, inter alia, the financial status of the respective parties, their age, health, necessities and obligations.

Agreement regarding the 22nd Street apartment by unjustly refusing to allow Posner to live with him there and, if so, whether Minick would therefore be responsible for paying Posner's rent. These issues were referred to a special referee to hear and report with recommendations. In his report dated July 15, 2005, Special Referee Steven E. Liebman found, *inter alia*, that the parties agreed not to live together at the 22nd Street apartment, that Minick did not unjustly refuse to allow Posner to reside with him in the apartment, and that Minick therefore was not liable to Posner for any payments of rent under the Agreement.

By decision and order dated February 6, 2006, Justice Lobis granted Minick's motion to confirm the referee's report and to dismiss Posner's claim for damages for the alleged breach of Paragraph 13 of the Agreement, and denied Posner's cross motion to reject the report. The Mallow firm subsequently moved to withdraw as counsel for Posner and the motion was granted.

Posner commenced this legal malpractice action against the Mallow firm on May 25, 2007. The gravamen of the complaint is that the Mallow firm failed to assert Posner's disability as a ground for recovery of support from Minick under Paragraph 26 of the Agreement which provided for such support in the event that she was "unemployable, disabled or unable to work," as long as the parties were not separated. The complaint further alleges that at the time she was disabled Posner and Minick were not "physically or legally" separated within the meaning of the Agreement.

Motion and Cross Motion for Summary Judgment

The Mallow firm now moves for summary judgment dismissing the complaint on the grounds that no viable action for legal malpractice exists since the record from the underlying divorce proceeding demonstrates that it moved on behalf of Posner to vacate the Agreement and

sought reimbursement of Posner's living expenses based on a breach of the Agreement, but that the court found that the Agreement was valid and that none of the clauses in the Agreement which Posner relied upon were triggered by the circumstances underlying the action. Moreover, the Mallow firm asserts that plaintiff's medical condition and alleged disability were irrelevant since the court found that Posner and Minick were living separately, and that Minick was therefore not obligated to provide Posner with support under the Agreement. Thus, the Mallow firm asserts that its claimed failure to present proof of Posner's disability was not a proximate cause of Posner's claimed loss.

In opposition to the summary judgment motion and in support of her cross motion for summary judgment, Posner submits the expert affidavit of Howard Herman, Esq. who, based upon his review of the file in the underlying divorce proceeding, opines that the Mallow firm committed legal malpractice based on its failure to offer sufficient evidence supporting Posner's disability, and failing to seek to obtain support payments for her pursuant to Paragraph 26 of the Agreement and by focusing exclusively on Posner's right to recover rent payments based on Minick alleged breach of Paragraph 13 of the Agreement. Mr. Herman further opines that the Mallow firm failed to conduct sufficient discovery regarding Posner's disability and to present evidence of this disability to the court or the special referee.³

Moreover, according to Mr. Herman the issue of whether the parties were separated for the purposes of Paragraph 26 was not determined by Justice Lobis or the special referee, and that

³The court notes, however, that in connection with Posner's application for temporary maintenance that Justice Lobis noted that Posner became disabled in 2002, at which time she began receiving \$67,920 annually in disability benefits. Thus, it appears from the record that the Mallow firm presented evidence to the court regarding Posner's disability and that the court accepted that she was disabled as of 2002.

the term separated as used in Paragraph 26 was not the same as living in different apartments analysis under Paragraph 13. In addition, Mr. Herman states that as a result of advice of the Mallow firm to consent to grounds of "constructive abandonment" Posner was damaged as she was unable to assert in whole or in part that she was due benefits of Paragraph 26 of the agreement. Mr. Herman opines that "but for" the negligence of the Mallow firm, Posner would have been able to obtain support benefits under Paragraph 26.⁴

In reply, the Mallow firm argues that issue of whether Posner was entitled to disability payments pursuant to Paragraph 26 was raised in the underlying divorce proceeding and that the court found that this paragraph was only triggered if the parties lived together at the time Posner became disabled. In support of this argument, the Mallow firm points out that in finding that the Agreement was not unconscionable, Justice Lobis wrote that "the provision for payments in the event of disability (i.e. Paragraph 26), if the parties are still residing together, provides some protection in the event [Posner] was no longer able to work." (Exhibit F to the Mallow Firm's Motion, Decision and order dated February 27, 2004, at 4) The Mallow firm contends given that Justice Lobis interpreted Paragraph 26 to apply only if the parties were still residing together and as the record in the divorce proceeding showed that the parties had not lived together since February 2000, which is before the time that Posner claims she became disabled in 2002, Paragraph 26 did not provide a viable ground for relief.

On a motion for summary judgment, the proponent "must make a prima facie showing of

⁴Mr. Herman also opines that with respect to Paragraph 13, the Mallow firm failed to provide sufficient evidence or to obtain discovery concerning the manner in which Posner and Minick were or were not separated.

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entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case..." Winegrad v. New York Univ. Med. Center, 64 N.Y.2d 851, 852 (1985). Once the proponent has made this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which require a trial. Alvarez v. Prospect Hospital, 68 N.Y.2d 320, 324 (1986).

"To prevail on a claim for legal malpractice, a plaintiff must establish that the attorney breached a duty of care, that the breach was the proximate cause of the loss, and actual damages." Allen v. Potruch, 282 AD2d 484, 484 (2d Dept 2001); see also, Metrokane Imports, Ltd. v. Kane, Dalsimer, Kane, Sullivan & Kurucz, 150 AD2d 153 (1st Dept 1989). At issue on the Mallow firm's summary judgment motion is whether the Mallow firm has met its burden of establishing that "the plaintiff is unable to prove at least one of these essential elements." Allen v. Potruch, 282 AD2d at 454.

Here, the Mallow firm has not met its burden of demonstrating a prima facie entitlement to summary judgment. It cannot be determined from the record whether the Mallow firm negligently handled the underlying divorce proceeding by purportedly failing to argue that under Paragraph 26 of the Agreement Posner was disabled prior to the time that the parties were separated, in accordance with the meaning of that term in Paragraph 26, and therefore was entitled to support. Likewise, it cannot be determined on this record whether "but for" the alleged failure, Posner would have been entitled to support. Additionally, while not dispositive, it is noted that the Mallow firm does not support its motion with an expert affidavit. Compare Orchard Motorcycle Distributors, Inc. v. Morrison Cohen Singer & Weinstein, LLP, 49 AD3d

292 (1st Dept 2008)(holding that defendant law firm's expert affidavit was adequate to sustain its prima facie burden on its motion for summary judgment dismissing former client's legal malpractice action).

Although the record shows that the Mallow firm moved on Posner's behalf to, inter alia, vacate the Agreement and obtain damages based on the alleged breach of Paragraph 13 of the Agreement, it does not establish that Mallow firm argued that Posner was entitled to support based on her disability under Paragraph 26 of the Agreement. Furthermore, the determination of the issues relating to Paragraph 13, which concerned whether the parties agreed to live apart and whether Minick unjustly refused to allow Posner to live with him, and turned on whether the parties were "legally or physically separated" as provided under Paragraph 13, are not necessarily controlling of whether the parties were separated for the purposes of Paragraph 26. Specifically, it is unclear whether the Mallow firm argued that the meaning of separated in Paragraph 26 did not mean physical separation and that this argument was rejected by Justice Lobis.

Under these circumstances, in the absence of evidence that the Mallow firm made such an argument, although Justice Lobis in her decision denying Posner's application to vacate the Agreement as unconscionable noted that the Agreement provided for the payments in the event of disability if the parties are still residing together, her apparent interpretation of the term "separated" in Paragraph 26 is insufficient to warrant a grant of summary judgment in the Mallow firm's favor.

In addition, even assuming arguendo that Mallow firm met its prima facie burden of demonstrating that it was entitled to summary judgment, Posner has controverted this showing based the affidavit of her expert who delineates the standard of care and opines that the Mallow

firm breach this standard by among other things, failing (i) to seek support payments under Paragraph 26 based on Posner's disability, (ii) to obtain evidence regarding her disability, and (iii) to argue or raise the issue of the meaning of separation under that paragraph 26 of the Agreement, and that "but for" this breach Posner would have obtain support payments from her husband based on her disability.

Neither is Posner entitled to summary judgment as there exist triable issues of fact regarding whether the Mallow firm negligently handled the divorce proceeding and, if so, whether such negligence was a proximate cause of any damage to Posner.

Accordingly, the motion and cross motion for summary judgment are denied.

Motion for Discovery Sanctions and Cross Motion for a Protective Order

The Mallow firm moves for discovery sanctions pursuant to CPLR 3126 based on Posner's failure to provide authorizations for medical records for treatment of injuries she sustained in an automobile accident which gave rise to her claim for disability. The Mallow firm sought these and other authorizations in its Notice of Discovery and Inspection dated January 18, 2008. In addition, after a compliance conference held on April 18, 2008, this court directed that Posner respond to the notice. After a further compliance conference was held on June 26, 2008, Posner was directed to provide the authorizations by July 7, 2008.

Posner cross moves for a protective order on the ground that the Mallow firm's Notice of Discovery and Inspection which seeks "all treating health care providers concerning plaintiff's automobile accident" and all records concerning Posner's disability insurance award and an authorization to obtain the file of the attorney representing Posner prior to and after the Mallow firm's representation of her is overbroad. Moreover, Posner asserts that she has not put her medical treatment arising from the automobile accident in issue as she has not claimed physical

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injuries in this action.

Contrary to Posner's position, her medical condition and the extent of her disability are at issue here since the focus of this legal malpractice action is the Mallow firm's purported negligence in failing to provide evidence of Posner's disability and to seek support from Minick based on this disability under Paragraph 26 of the Agreement. Likewise, the file of other counsel working on the case are relevant to the legal malpractice claim and may provide the basis for a third-party claim by the Mallow firm. To the extent these files may contain privileged material, Posner has waived the privilege by bringing this legal malpractice action which placed the advice of the other counsel who represented her in the divorce proceeding "in issue" in this action⁵. See IMO Industries, Inc. v. Anderson Kill & Olick, P.C., 192 Misc2d 605, 609 (Sup Ct NY Co. 2002) ; Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A., 210 FRD 506, 510 (S.D. N.Y. 2002).

Accordingly, the cross motion for a protective order is denied, and the Mallow firm's motion for discovery sanctions is granted to the extent of directing Posner to provide the authorizations sought in the Notice of Discovery and Inspection on or before April 1, 2009, or be subject to the discovery and/or monetary sanctions as directed below.

Conclusion

In view of the above, it is

ORDERED that the motion and cross motion for summary judgment are denied; and it is further

ORDERED that the cross motion for a protective order is denied; and it is further

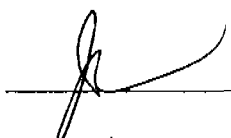
⁵Notably, Posner has not asserted that these files should be withheld on the basis of the attorney-client or work-product privileges.

ORDERED that the Mallow firm's motion for discovery sanctions is granted to the extent of directing Posner to provide the authorizations demanded in the Notice of Discovery and Inspection on or before April 7, 2009, or discovery sanctions and/or monetary sanctions shall be imposed upon submission to this court by the Mallow firm of an affidavit on notice to Posner indicating the failure to provide such authorizations; and it is further

ORDERED that a compliance conference shall be held in Part 11, room 351, 60 Centre Street, New York, NY on April 2, 2009 at 9:30 am.

A copy of this decision and order is being mailed by my chambers to counsel for the parties.

DATED: March 24, 2009



U.S.C.

FILED
MAR 31 2009
COUNTY CLERK'S OFFICE
NEW YORK