

Alaimo v Mongelli

2009 NY Slip Op 31307(U)

June 5, 2009

Supreme Court, Nassau County

Docket Number: 07-10651

Judge: Joseph P. Spinola

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SCAN

SHORT FORM ORDER
SUPREME COURT, STATE OF NEW YORK
COUNTY OF NASSAU

RICHARD J. ALAIMO and LAURA ALAIMO,
Plaintiff

Trial/IAS Part 17
Index No. 07-10651
Sequence No. 05
Submit Date 1/14/09

against

MICHAEL F. MONGELLI, MICHAEL F.
MONGELLI P.C., WALLACE LEINHEARDT
and JASPAN SCHLESSINGER HOFFMAN, LLP,
Defendants

The following papers read on this motion:

- Notice of Motion/Order to Show Cause..... X**
- Answering Affidavits..... X**
- Replying Affidavits..... X**

PRESENT: HON. JOSEPH P. SPINOLA

Motion by plaintiff Richard J. Alaimo pursuant to CPLR 3025(b) for an order permitting plaintiff to serve an amended complaint in the form annexed is granted in part, and the complaint is deemed served except for the Fifth cause of action which is stricken for patent insufficiency. Defendant Mongelli shall have until twenty days after service of a copy of this order upon his counsel to serve an amended answer. Should defendant wish to conduct disclosure on the newly added Fourth and Sixth causes of action, such disclosure shall be provided upon reasonable notice and shall be completed within forty-five days after service of a copy of this order.

This action alleges legal malpractice against the named defendants who represented plaintiff Richard J. Alaimo in relation to an underlying action for breach of fiduciary duty in distributing an estate in a Surrogate's proceeding to persons other than the sole heir under the laws of intestacy. Alaimo had failed to list an illegitimate child of

the decedent Vito Cristina as a possible heir.

By order dated February 5, 2008, the Second, Third and Fourth causes of action, and all causes of action asserted by Laura Alaimo were dismissed on defendant Mongelli's motion for summary judgment.

Plaintiff now seeks to amend the complaint to assert three new causes of action. The proposed Fourth cause of action against defendant Mongelli asserts an additional legal malpractice claim based upon Mongelli's failure to convey settlement possibilities to plaintiff in the underlying action. The amended Fifth cause of action alleges that Mongelli misadvised plaintiff that he could safely ignore a supplementary subpoena *duces tecum* and did not have to "appear." The amended Sixth cause of action alleges that Mongelli over billed plaintiff

The proffered grounds for the allegation that settlement possibilities were not conveyed is an August 8, 2008 deposition transcript of the testimony of defendant Wallace L. Leinhardt of Jaspan Schlessinger Hoffman, LLP, who represented Alaimo subsequent to Mongelli's representation of him. Leinhardt testified that the attorney for the complaining heir in the underlying litigation was angry because early on he had "proposed settlements which were apparently rejected" during the period that Mongelli represented Alaimo. Alaimo avers that Mongelli failed to discuss a \$300,000.00 to \$350,000.00 settlement figure, and that he would have accepted and paid it. The allegations are not patently without merit. Plaintiff also offers sufficient grounds to support his claim for overcharging.

The Fifth cause of action alleging that Mongelli offered erroneous information regarding a subpoena *duces tecum* is rejected, as plaintiff suffered no damages.

Plaintiff alleges that he was subject to a motion for contempt and that his bank accounts were frozen because he did not respond to a post judgment supplementary subpoena *duces tecum*. The motion for contempt however, alleged additional grounds for the application, specifically that "upon the order of this court made and entered on June 28th, 2005, Richard J. Alaimo, Esq. wholly failed and refused and wilfully neglected . . . to obey the Order contained directing him to pay the sum of \$878,510.96 plus interest . . .".

A cause of action to recover damages for legal malpractice requires proof of three elements: "(1) that the defendant failed to exercise that degree of care, skill, and diligence commonly possessed and exercised by an ordinary member of the legal community, (2) that such negligence was the proximate cause of the actual damages sustained by the

plaintiff, and (3) that, *but for* the defendant's negligence, the plaintiff would have been successful in the underlying action" (*Cummings v. Donovan*, 36 AD3d 648 [2d Dept 2007])[emphasis supplied]. The cause of action fails to plead facts to the effect that, "but for the alleged negligence of the defendant . . . the plaintiff would not have suffered some actual, ascertainable damages" (*Cummings v. Donovan, supra*). "If there are no damages, there can be no cause of action" (*Zletz v. Outten & Golden, LLP*, 18 AD3d 322, 323 [1st Dept 2005]).

Counsel directs the court's attention to Alaimo's deposition for a description of alleged damages. Alaimo testified that "on the return date of this order to show cause (for contempt) we were before Judge Nahman and he . . . told us we were not to make any withdrawals from any account in which each of our names appeared. That meant no withdrawals could be made from any account where Laura's name appeared or mine . . . I couldn't use any of my accounts."

Plaintiff fails to show that but for counsel's alleged failure to properly advise him to "appear" on a subpoena *duces tecum*, he would not have suffered frozen bank accounts. The supporting affidavit to the order to show cause for contempt indicates that not only did Alaimo refuse to comply with the order to pay the surcharge, he was also hiding assets.

Said supporting affidavit revealed that the order which he failed to obey arose from yet another contempt proceeding. Alaimo was compelled to file a final account as the Executor of the Estate of Vito Cristina under the threat of contempt. Said account resulted in the Order dated June 28, 2005 surcharging Alaimo \$878,510.96. The same affidavit alleged that Alaimo "rather than pay the surcharges" as directed "systematically attempted to transfer, hide and secrete assets in order to frustrate the rights of the estate and the ability to recover the surcharges that have been Ordered and decided." Alaimo is alleged to have transferred large sums from his attorney business account to his attorney escrow account and to have mortgaged his residence in the total amount of \$500,000.00 using the proceeds to purchase property in Florida in the name of his wife only. The freezing of his bank accounts operated to prevent a further dissipation of assets. Thus, the resultant lack of access to his accounts would have eventuated based upon plaintiff's secretion of assets regardless of his response to the information subpoena. Indeed had plaintiff supplied financial information in accordance with the subpoena, his bank accounts could have been seized rather than frozen. Accordingly, the application to amend is denied with respect to the Fifth cause of action as it is palpably insufficient.

In opposition to the motion to amend defendant Mongelli avers that plaintiff has failed to establish the merits of his newly added claims. The authority relied upon, which

requires evidentiary support for an amended complaint, has been rejected by the Second Department, which has stated:

Cases involving CPLR 3025 (b) that place a burden on the pleader to establish the merit of the proposed amendment erroneously state the applicable standard and are no longer to be followed. No evidentiary showing of merit is required under CPLR 3025 (b). The court need only determine whether the proposed amendment is “palpably insufficient” to state a cause of action or defense, or is patently devoid of merit. Where the proposed amended pleading is palpably insufficient or patently devoid of merit, or where the delay in seeking the amendment would cause prejudice or surprise, the motion for leave to amend should be denied. If the opposing party wishes to test the merits of the proposed added cause of action or defense, that party may later move for summary judgment upon a proper showing (see CPLR 3212).

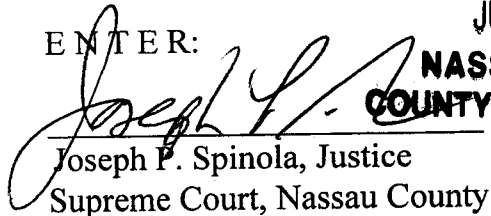
(*Lucido v. Mancuso*, 49 AD3d 220, 229 [2d Dept 2008]). Here no prejudice is alleged. And the newly added Fourth and Sixth causes of action are not palpably insufficient or palpably devoid of merit.

Mongelli’s contention that the statute of limitations has run on the newly proposed claims is also rejected. It is undisputed that Mongelli ceased his representation of Alaimo in March of 2006. The three year period to commence an action is tolled until such time as the defendant’s representation of plaintiff is ended (*Shumsky v Eisenstein*, 96 NY2d 164 [2001]). Thus any claim arising out of that representation is not time barred until March of 2009, and this application, served on December 9, 2008, is timely. With regard to the claim of overcharging, the statute of limitations is six years for breach of contract (CPLR 213). The invoices run from July of 2004 forward, and accordingly, are timely.

This constitutes the decision and order of the Court.

ENTERED

ENTER:


Joseph P. Spinola, Justice
Supreme Court, Nassau County

JUN 10 2009

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**

Dated: June 5, 2009