

Recine v Adler

2009 NY Slip Op 32095(U)

July 30, 2009

Supreme Court, Nassau County

Docket Number: 21035/08

Judge: F. Dana Winslow

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SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

**TRIAL/IAS, PART 6
NASSAU COUNTY**

**PHYLLIS A. RECINE, STEVEN M. DEL VECCHIO
and DEL VECCHIO & RECINE, LLP.,**

Plaintiffs,

-against-

**MOTION SEQ. NO.: 001, 002
MOTION DATE: 5/8/09**

**STEVEN M. ADLER, JANET S. STERN, MARIO
J. DeROSSI and STERN, ADLER & DeROSSI, LLP.,**

INDEX NO.: 21035/08

Defendants.

The following papers having been read on motion (numbered 1-5):

Notice of Motion.....1
Affirmation.....2
Notice of Cross Motion.....3
**Memorandum in Reply and in Opposition
to Plaintiff's Motion for Summary Judgment.....4**
Affidavit in Reply.....5

Relief Requested:

The defendants Steven M. Adler, Janet S. Stern, Mario J. De Rossi and Stern, Adler & DeRossi move pursuant to CPLR 3211 (a)(1) and (7) for an order dismissing the within complaint (Sequence #001).

The plaintiffs, Phyllis A. Recine, Steven M. Del Vecchio and Del Vecchio & Recine, LLP cross-move pursuant to CPLR 3212 for an order granting summary judgment on the complaint as to the issue of liability (Sequence #002).

Factual Background:

The plaintiffs herein previously represented a Ms. Ann Margolis in a matrimonial matter during the period of September 2006 through August of 2007. In accordance with said representation, a "Retainer Agreement" and "Consent to Submit Fee Dispute to Arbitration" were signed by the defendant on September 27, 2006 and a "Statement of Client's Rights and

Responsibilities” was signed by Ms. Margolis on September 28, 2006. In August 2007, Ms. Margolis discharged the plaintiffs and retained the firm of Schlissel, Ostrow and Karabatos, LLC.

Thereafter, a fee dispute arose between the plaintiffs and Ms. Margolis and as a result she hired the defendants herein to represent her in connection with the fee arbitration instituted by the plaintiffs. By letter dated October 3, 2007, Stern, Adler and DeRossi informed the Office of Court Administration of their representation of Ms. Margolis and that she was not consenting to arbitrate the fee dispute. Said letter characterized the “Consent to Submit Fee Dispute to Arbitration” as both a nullity and illegal per se. Notwithstanding the foregoing, the fee arbitration was assigned to a panel and a hearing was scheduled to take place on March 3, 2007.

In the interim, on or about January 11, 2008, Stern, Adler and DeRossi commenced a legal malpractice action on behalf of Ms. Margolis and against the named plaintiffs herein which included the following: a first cause of action alleging violations of the New York State Deceptive Practices Act; a second cause of action for conversion; a third cause of action alleging negligent handling of the matrimonial matter; and a fourth cause of action seeking a declaratory judgment determining that the Retainer Agreement and/or waiver of dispute Agreement be deemed null and void.¹

On March 3, 2008, the day upon which the fee arbitration hearing was scheduled, Ms. Margolis, through her attorney’s, moved by order to show cause within the context of the legal malpractice action and obtained a temporary injunction staying the hearing. On the return date of that application, neither Ms. Margolis nor her counsel appeared and the temporary restraining order expired. Thereafter, and by order dated April 9, 2008, the application was formally denied based upon the failure to provide an affidavit attesting that the moving papers were served on all parties. The fee arbitration hearing ultimately convened on April 10, 2008 at which time the Plaintiffs were awarded \$39,548.14 plus interest, which award was thereafter confirmed on May 9, 2008. This amount has since been paid to the plaintiffs by Ms. Margolis.

The plaintiffs subsequently commenced the within action against the defendants which contained one cause of action sounding in malicious prosecution, one of cause action sounding in abuse of process and two causes of action alleging violations of Judiciary Law 487. The

¹ On July 3, 2008, counsel representing the plaintiff in the legal malpractice action moved for dismissal thereof. By order dated July, 25, 2008, the Honorable Roy S. Mahon granted the application, which was unopposed by counsel for Ms. Margolis.

defendants herein now move seeking dismissal of the within complaint and the plaintiffs cross-move seeking summary judgment as to the issue of liability.

Defendants' Motion seeking dismissal of the complaint and the Plaintiffs' Cross-Motion seeking summary judgment as to liability

In support of their application, the defendants claim that the cause of action sounding in malicious prosecution should be dismissed as the plaintiffs have not demonstrated two of the requisite elements necessary to sustain such an action, to wit: that the action was terminated in their favor and that they sustained special damages. As to the cause of action sounding in abuse of process, the defendants argue that the plaintiffs have failed to demonstrate that the process was employed in a perverted manner and that special damages have been sustained. Finally, as to those causes of action alleging violations of Judiciary Law 487, the defendants contend that the conduct complained of by the plaintiffs was the defendants' legitimate representation of their client, Ms. Margolis, and accordingly is outside the ambit of the statute.

The defendants provide the annexed affidavit of Janet Stern, one of the named defendants herein who states that the legal malpractice action was commenced "at the behest of Ms. Margolis, and in the sincere and founded belief that the actions by the plaintiffs fell short of the standards by which an attorney should practice." Ms. Stern further stated that within the course of representing their client, the defendants "requested that the Court declare the arbitration agreement void, so that Ms. Margolis could litigate her issues in Court, as was her preference." Ms. Stern states that once it became clear that a settlement with respect to the outstanding fees could not be achieved, the defendants "sought a stay of the arbitration, being aware that once it went forward, our objections would be moot and our client might not have the opportunity to litigate her claims."

The plaintiffs oppose the within application and cross-move for summary judgment as to the issue of liability on the complaint. As to the cause of action sounding in malicious prosecution, the plaintiffs argue that when the defendants commenced the legal malpractice action, they did so maliciously and without probable cause. The plaintiffs strenuously assert that Ms. Margolis' claims as related to the defendants, did not constitute malpractice, but were "no more than 'complaints' by an angry divorce litigant who did not want to pay the \$40,000 she owed." With particular respect to the damages alleged to have been sustained, the plaintiffs maintain that the temporary restraining order obtained by the defendants during the legal

malpractice action directly prevented them from timely exercising their contractual rights to submit the fee dispute to arbitration. The plaintiffs also allege the following special damages, as are articulated in their verified complaint, :“injury to their reputation, embarrassment, loss of time, loss of income, anxiety, mental distress, mental suffering, expenses incurred in the defense of the action, and being required to report said action to its insurance carrier thereby becoming a permanent part of plaintiffs’ records”.

With respect to that cause of action sounding in abuse of process, the plaintiffs argue that the temporary restraining order issued within the context of the legal malpractice action was maliciously procured by the defendants with the intent to obtain improper collateral objectives including extorting money from the plaintiffs, depriving them of legal fees to which they were lawfully entitled and preventing them from utilizing the legal remedies available to procure same. As recited in the complaint, the plaintiffs allege that as a result of the such abuse of process they have suffered the following special damages: “injury to their reputation, embarrassment, loss of time, loss of income, anxiety, mental distress, mental suffering, expenses incurred in the defense of the legal process issued by defendant, and delay in the lawful adjudication of their claims in fee arbitration.”

Finally, with respect to those causes of action under Judiciary Law 487, the plaintiffs argue that notwithstanding that the defendants had actual knowledge that the plaintiffs were not guilty of the allegations which comprised the legal malpractice action, they nonetheless deliberately acted with the intent to deceive both the Court and the plaintiffs by inducing the perjury of Ms. Margolis in composing the Verified Complaint relative to the legal malpractice action, as well as the affidavit accompanying the application for the temporary injunction staying the fee arbitration. The plaintiffs argue, that the defendants deceptive actions were done to construct a means through which their client, Ms. Margolis, could avoid paying the legal fees to which they were entitled.

Malicious Prosecution

In order to establish a cause of action sounding in malicious prosecution, the plaintiff must demonstrate the following: [1] the initiation of a proceeding against the plaintiff by the defendant; [2] termination of the proceeding in favor of the plaintiff; [3] an absence of probable cause for the institution of the prior proceeding; [4] actual malice on the part of the defendant in bringing the prior proceeding to achieve something other than the adjudication of the claim;[5]

and special damages (*Colon v City of New York*, 60 NY2d 77 [1983]; *Engel v CBS, Inc.*, 93 NY2d 195 [1999]; *Nardelli v Stamberg*, 44 NY2d 500 [1978]; *Hornstein v Wolf*, 109 Ad2d 129 [2d Dept 1985]).

With respect to the requisite showing of special damages, while the imposition of a provisional remedy is not necessary to demonstrate the existence of same, the plaintiffs must demonstrate that the defendant's institution of the prior proceeding functioned as "a highly substantial and identifiable interference" with person, property, or business and that they have been forced to suffer "some concrete harm that is considerably more cumbersome than the physical, psychological or financial demands of defending a lawsuit" (*Engel v CBS, Inc.*, 93 NY2d 195 [1999], *supra*). The requirement of a plaintiff having to establish special damages serves to protect the important public policy that "all persons should freely resort to the courts for redress of wrongs" and that the law should protect such litigants "when they act in good faith and upon reasonable grounds in commencing either a civil or criminal prosecution" (*see Burt v Smith*, 181 NY 1 [1905]).

The Court now initially addresses the defendants' motion to dismiss the plaintiffs cause of action sounding in malicious prosecution. On a motion to dismiss a complaint for failure to state a cause of action, the pleadings must be liberally construed (*Sotomayor v Kaufman, Malchman, Kirby & Squire, LLP*, 252 AD2d 554 [2d Dept 1998]; *Mayer v Sanders*, 264 AD2d 827 [2d Dept 1999]; CPLR 3026). In rendering a determination on such an application, "the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*Guggenheimer v Ginzburg*, 43 NY2d 268 [1977]). The facts as alleged in the complaint "are presumed to be true and are to be accorded every favorable inference, although bare legal conclusions as well as factual claims flatly contradicted by the record are not entitled to such consideration" (*Sotomayor v Kaufman, Malchman, Kirby & Squire, LLP*, 252 AD2d 554 [2d Dept 1998], *supra*; *see also Morone v Morone*, 50 NY2d 481 [1980]).

Applying the foregoing to the plaintiffs complaint, the court hereby **grants** the defendants motion seeking dismissal of the action sounding in malicious prosecution. A review of the plaintiffs' complaint reveal that the allegations therein contained do not sufficiently set forth the requisite element of special damages (*Colon v City of New York*, 60 NY2d 77 [1983], *supra*).

Based upon the foregoing, the motion interposed by the defendants, Steven M. Adler, Janet S. Stern, Mario J. De Rossi and Stern, Adler & DeRossi pursuant to CPLR 3211 (a) (7) for an order dismissing the plaintiffs' cause of action sounding in malicious prosecution is hereby **GRANTED** and accordingly that portion of the plaintiffs' cross-motion seeking summary judgment as to the issue of liability thereon is hereby **DENIED** as moot.

Abuse of Process

A cause of action sounding in abuse of process embodies the following elements: [1] regularly issued process, civil or criminal, compelling performance or forbearance of some act; [2] the person activating the process was moved by an ulterior purpose to do harm, without economic or social excuse or justification; [3] the person activating the process sought some collateral advantage or corresponding detriment to the plaintiff that is outside the legitimate ends of the process (*Curiano v Suozzi*, 62 NY2d 113 [1984]; *Board of Education of Farmingdale Union Free School District v Farmingdale Classroom Teachers Ass'n., Inc.*, 38 NY2d 397 [1975]). Additionally, in order to sustain a cause of action sounding in abuse of process a plaintiff must plead and prove actual or special damages (*Board of Education of Farmingdale Union Free School District v Farmingdale Classroom Teachers Ass'n., Inc.*, 38 NY2d 397, 405 [1975], *supra*; *see also Weisman v Weisman*, 108 AD2d 852 [2d Dept 1985]; *Bohm v Holzberg*, 47 AD2d 764 [2d Dept 1975]). The "gist of the action for abuse of process lies in the improper use of process after it has been issued" (*Williams v Williams*, 23 NY2d 592 [1969] quoting *Dean v Kochendorfer*, 237 NY 384 [1924]; *see also Curiano v Suozzi*, 62 NY2d 113 [1984], *supra*). A malicious motive in instituting the process is, in and of itself, insufficient to give rise to an action sounding in abuse of process (*Curiano v Suozzi*, 62 NY2d 113 [1984], *supra*).

The Court finds that the plaintiffs have failed to state a cause of action sounding in abuse of process (*Board of Education of Farmingdale Union Free School District v Farmingdale Classroom Teachers Ass'n., Inc.*, 38 NY2d 397 [1975], *supra*). In the matter *sub judice*, the process which is alleged to have been abused is the temporary retraining order issued during the pendency of the now dismissed legal malpractice action. However, the plaintiffs allege that the defendants acted maliciously in obtaining the injunction so as to delay the fee arbitration. They do not allege that the process itself was abused subsequent to it being issued. That the defendants herein may have been malicious in obtaining said injunction is inadequate to maintain a cause of action for abuse of process (*Curiano v Suozzi*, 62 NY2d 113 [1984], *supra*). Additionally, the

Court notes that the plaintiffs have failed to make the requisite showing of special damages (*Board of Education of Farmingdale Union Free School District v Farmingdale Classroom Teachers Ass'n, Inc.*, 38 NY2d 397, 405 [1975], *supra*; *see also Weisman v Weisman*, 108 AD2d 852 [2d Dept 1985], *supra*; *Bohm v Holzberg*, 47 AD2d 764 [2d Dept 1975], *supra*). As noted above, the temporary restraining order did not substantially interfere with the plaintiffs right to obtain their fees but only delayed the award for same by a matter of weeks (*Engel v CBS, Inc.*, 93 NY2d 195 [1999], *supra*). Moreover, the special damages alleged in the complaint of “injury to their reputation, embarrassment, loss of time, loss of income, anxiety, mental distress, mental suffering, expenses incurred in the defense of the legal process issued by defendant, and delay in the lawful adjudication of their claims in fee arbitration” are clearly incidental to defending the legal malpractice suit (*id.*).

Based upon the foregoing, the motion interposed by the defendants, Steven M. Adler, Janet S. Stern, Mario J. De Rossi and Stern, Adler & DeRossi pursuant to CPLR 3211 (a) (7) for an order dismissing the plaintiffs’ cause of action sounding in abuse of process is hereby **GRANTED** and accordingly that portion of the plaintiffs’ cross-motion seeking summary judgment as to the issue of liability thereon is hereby **DENIED** as moot.

Judiciary Law 487

Judiciary Law 487 provides, in relevant part that an “an attorney or counselor who is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party * * * is guilty of a misdemeanor, and in addition to the punishment prescribed therefor by the penal law, he forfeits to the party injured treble damages, to be recovered in a civil action.” A plaintiff may successfully plead a violation of the statute by demonstrating an intent by the defendants to deceive or “ an alleged chronic, extreme pattern of legal delinquency” engaged in by the defendants which proximately caused the damages alleged by the plaintiffs (*O’Connell v Kerson*, 291 AD2d 386 [2d Dept 2002]; *Knect v Tusa*, 15 AD3d 626 [2d Dept 2005]).

Inasmuch as the defendants’ within application seeks dismissal of the plaintiffs’ complaint pursuant to CPLR 3211(a)(7) and as the allegations therein contained must be deemed true, the Court finds that same are sufficient to withstand the defendants’ dismissal application. However, as the plaintiffs’ are cross-moving for summary judgment on the issue of liability they bear the burden of demonstrating the absence of material issues of fact entitling them to

judgment as a matter of law (*Alvarez v Prospect Hospital*, 68 NY2d 320 [1980]). A thorough review of the record herein, including the affidavits of defendant Janet Stern, Esq., reveals that there exists material issues of fact as to whether the defendants, in undertaking to commence the legal malpractice action, consented to any deceit or collusion or personally and affirmatively engaged in same, “ with intent to deceive the court or any party.”

Based upon the foregoing, the motion interposed by the defendants, Steven M. Adler, Janet S. Stern, Mario J. De Rossi and Stern, Adler & DeRossi pursuant to CPLR 3211 (a) (7) for an order dismissing those causes of action alleging violations of the Judiciary Law 478 is hereby **DENIED** and the plaintiffs’ cross-motion seeking summary judgment on the causes of action alleging violations of Judiciary Law 478 at to the issue of liability is also **DENIED**.

All applications not specifically addressed herein are deemed **DENIED**.

This constitutes the Order of the Court.

Dated: July 30, 2009

ENTER:


J.S.C.

ENTERED

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**NASSAU COUNTY
COUNTY CLERK'S OFFICE**