

Boykin v Campbell

2009 NY Slip Op 32721(U)

November 9, 2009

Supreme Court, Nassau County

Docket Number: 2217/08

Judge: Thomas A. Adams

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS A. ADAMS,
Acting Supreme Court Justice

TRIAL/IAS, PART 36
NASSAU COUNTY

ROBERT BOYKIN,

Plaintiff(s),

MOTION DATE: 9/22/09

INDEX NO.: 2217/08

-against-

SEQ. Nos. 1 & 2

LOIS S. CAMPBELL,

Defendant(s)

The parties' respective motions, pursuant to CPLR 3212, for summary judgment are determined as hereinafter provided.

The defendant, an attorney, previously represented the plaintiff in an unrelated divorce action. In or about mid-2004 he retained her to represent him with respect to a series of Family Court petitions filed by his former girlfriend and "domestic partner" (see defendant's Exhibit G) Aida Cabrera-Moro (see plaintiff's Exhibit D-I). These family offense petitions included a report of suspected abuse of their daughter Elizabeth (born October 7, 1999) (see plaintiff's Exhibits H & I).

After extensive negotiations, on February 17, 2005 the plaintiff and Ms. Cabrera-Moro executed an agreement pursuant to which she agreed to withdraw the aforementioned petitions and the plaintiff agreed, inter alia, to convey a fifty (50%) percent interest in a Lecanto, Florida residence to her as a tenant in common (see plaintiff's Exhibit B). The parties were subsequently allocated in detail with respect to the settlement before the Honorable Tammy S. Robbins (see defendant's Exhibit W).

Paragraph 3 of the agreement states:

"The parties represent and acknowledge that as a result of a complaint filed by [Ms. Cabrera-Moro] regarding the parties' daughter, Elizabeth, there is now a criminal investigation against [the plaintiff] as well as a CPS investigation against [the plaintiff]. [Ms. Cabrera-

Moro] agrees to cooperate fully with [the plaintiff] and his attorneys, if necessary, so that no criminal charges or prosecution is brought against [the plaintiff]. She agrees to cooperate with [the plaintiff] and his attorneys, if necessary, so that no abuse or neglect charges or prosecution is brought against [the plaintiff] by Child Protective Services, or the County of Nassau or any agency involved in the current CPS investigation. In the event criminal charges are brought against [the plaintiff] or an abuse or neglect petition or any other proceeding is instituted against [the plaintiff] as a result of her petitions filed by [Ms. Cabrera-Moro] in Family Court and with Child Protective Services or the District Attorney's Office, that she, [Ms. Cabrera-Moro], will not testify against [the plaintiff] relative to any charges or complaints against [the plaintiff]" (see plaintiff's Exhibit B).

Notably, when the settlement was later placed on the record Ms. Cabrera-Moro's counsel more accurately stated, inter alia, that Ms. Cabrera-Moro would "take the appropriate steps to see if those charges could be dropped" (see defendant's Exhibit W, p.4) (emphasis added). In any event, after the plaintiff failed to transfer title to the Florida premises to both parties in accordance with the February 17, 2005 agreement, Ms. Cabrera-Moro filed a specific performance, constructive trust and conversion action against the plaintiff in that state (see defendant's Exhibit X). In that action, she alleged, inter alia, that she contributed "in excess of \$20,000.00 toward the purchase price of as well as improvements to the real estate" (para.8), however, purportedly "[f]or convenience purposes" (para.7), title to the premises was placed in the plaintiff's name alone. Not surprisingly, the plaintiff alternatively alleges that he alone paid for the property (see plaintiff's Exhibit A, plaintiff's January 31, 2008 complaint, para.19).

In direct contrast to their earlier agreement, the plaintiff thereafter moved for summary judgment dismissing the specific performance cause of action asserting that it was void as against public policy. Ultimately, on May 30, 2007 Circuit Judge Patricia Thomas of Citrus County Florida granted the plaintiff's motion (see

plaintiff's Exhibit S).

In the interim, on or about January 16, 2006, the plaintiff also filed a declaratory judgment action in this Court seeking to declare the February 17, 2005 agreement a nullity and that he is therefore the sole owner of the Florida property (see plaintiff's Exhibit L). Following the May 30, 2007 order, on February 21, 2008 this Court (Davis, J.), in effect, accorded the Florida order full faith and credit and granted the plaintiff's unopposed motion for summary judgment (see plaintiff's Exhibit M). A separate judgment (Davis, J.) was subsequently entered on March 31, 2008 (see plaintiff's Exhibit N).

Finally, on or about January 31, 2008 the plaintiff filed this legal malpractice action alleging that the defendant negligently advised him to enter into the February 17, 2005 agreement (and convey a fifty [50%] percent interest in the Florida premises) when it "was void and unenforceable due to the illegality of the consideration proffered by Moro ..." (see plaintiff's Exhibit A, para.38). Issue was joined on or about March 24, 2008. Upon the completion of disclosure, including the March 27, 2009 deposition of Ms. Cabrera-Moro, a non-party (see defendant's Exhibit H), the case was certified for trial and on April 23, 2009 the plaintiff moved, pursuant to CPLR 3212, for summary judgment. On or about July 22, 2009 the defendant cross moved for summary judgment. Both motions were therefore timely filed (see CPLR 3212[a]).

Preliminarily, the defendant is not collaterally estopped from disputing her alleged negligence since she was not a party to either the Florida or New York proceedings (see Lyons v Medical Malpractice Ins. Assoc., 275 AD2d 396).

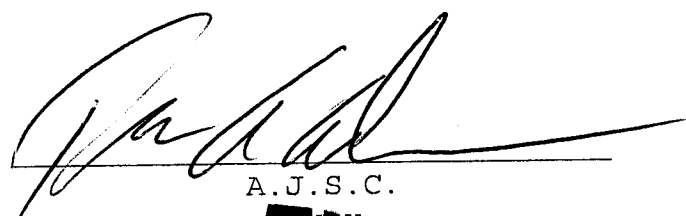
Moreover, the plaintiff has acknowledged, inter alia, that between the time he executed the February 17, 2005 agreement and when the parties were allocuted, the defendant informed him that Child Protective Services had determined that the abuse allegation was unfounded (see defendant's Exhibit C, p.245,L17-p246,L9;p.254,L17-19; plaintiff's Exhibit I). Whether or not paragraph 3 is violative of public policy and void was therefore rendered academic and irrelevant. To the extent that the defendant was allegedly negligent in advising the plaintiff to enter into the

agreement after Child Protective Services' determination, Ms. Cabrera-Moro supplied separate consideration for the settlement i.e., the withdrawal of the other Family Court petitions as well, allegedly, as her disputed contributions to the Florida premises.

"To establish a prima facie case of legal malpractice, the plaintiff must prove that (1) the attorney departed from the exercise of that degree of care, skill, and diligence commonly possessed and exercised by a member of the legal community, (2) the attorney's departure from the standard of care was the proximate cause of the loss sustained by the plaintiff, and (3) the plaintiff incurred damages as a direct result of the attorney's actions" (Caruso, Laruso & Branda, P.C. v Hirsch, 41 AD3d 407,408 quoting Edwards v Haas, Greenstein, Samson, Cohen & Gerestein, P.C., 17 AD3d 517,519). Here, as a result of the foregoing the defendant has established an entitlement to judgment as a matter of law dismissing the complaint and the plaintiff has failed to raise a triable issue of fact. Moreover, the defendant's purported negligence does not provide a reason to set aside the stipulation since the plaintiff was present during the negotiations, the stipulation was read in open court, and the plaintiff did not object to the settlement (see DeGregorio v Bender, 4 AD3d 385,386).

Accordingly, the plaintiff's motion, pursuant to CPLR 3212, for summary judgment is denied and the defendant's cross motion for summary judgment dismissing the complaint is granted.

Dated: NOV 09 2009


A. J. S. C.

ENTERED

NOV 12 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE