

Minkow v Sanders

2009 NY Slip Op 32847(U)

December 3, 2009

Supreme Court, New York County

Docket Number: 117264/08

Judge: Jane S. Solomon

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: JANE S. SOLOMON
Justice

PART 55

Minkow, Ellen
- v -
Allan J. Sanders

INDEX NO. 117264/08
MOTION DATE _____
MOTION SEQ. NO. 02
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...	<u>1-4</u>
Answering Affidavits -- Exhibits _____	<u>5-7</u>
Replying Affidavits _____	<u>8</u>

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided by the answerd
Decision and order.

FILED
DEC 07 2009
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 12/3/09

J. S. Solomon
JANE S. SOLOMON S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 55

-----X
ELLEN MINKOW,

Plaintiff,

-against-

Index No.: 117260/08

ALAN J. SANDERS, ESQ. and
SANDERS & SOLOMON, P.C.,

DECISION and ORDER

Defendants.

FILED

DEC 07 2009

NEW YORK
COUNTY CLERK

JANE S. SOLOMON, J.:

FACTUAL BACKGROUND

Defendants Alan J. Sanders, Esq. (Sanders) and Sanders & Solomon, P.C. move, pursuant to CPLR 3211(a)(1), (a)(5), and (a)(7), to dismiss the complaint.

Sanders was the third attorney retained by plaintiff, Ellen Minkow, to represent her in a contested divorce action she brought against her now former husband, Elliot D. Metelka (Metelka).¹ Sanders was hired by plaintiff on June 9, 2005, after previous counsel, who alleged plaintiff failed to follow counsel's advice, was relieved by court order.

When Sanders was hired there was in place a court order, originally issued on April 5, 2005 and modified on May 5, 2005. Under the order, to avoid being held in contempt, plaintiff was to turn over to Metelka's counsel all custodial

¹Minkow v Metelka, Supreme Court, Suffolk County, Index No. 29250/03.

accounts maintained for the benefit of the parties' children that were under her control, or that were under joint control by her and one of the children. This order was further modified by stipulation, so ordered on August 31, 2005, which required plaintiff to immediately turn over two Morgan Stanley accounts, or their proceeds, to the escrow agent for the parties' children, failing which plaintiff "waives any further notice requirements with respect to being held in contempt" (Motion Ex. A [5]).

Prior to the August stipulation, Sanders appeared at a court conference on July 6, 2005, after which he counseled plaintiff to turn over the subject accounts, and made a file memo of the conversation. According to this memo, plaintiff indicated that she would refuse to honor the court order (Motion Ex. D and E).

On October 17, 2005, Sanders wrote to Metelka's counsel, advising that if he, Sanders, did not receive discovery that had been requested five weeks earlier, Sanders would seek a modification of an order issued by the court approximately one year before his retention, in which Metelka was awarded pendente lite relief of \$1,000 per month (Motion Ex. I).

Plaintiff failed to turn over the subject custodial accounts and, on Metelka's application, the parties appeared for a contempt hearing on December 23, 2005. At the hearing, Sanders unsuccessfully sought to convince the court not to send plaintiff

to jail; plaintiff was ordered incarcerated until January 6, 2006, (Motion Ex. A [12]), although a purge was possible. Indeed, on December 27, 2005, Metelka's counsel confirmed to the court that plaintiff had transferred all funds, and Sanders prepared an Order of Release, under which plaintiff was freed on December 28 (Motion Ex. M).

Sanders maintains that the attorney-client relationship deteriorated on December 23 and, in January 2006, he sought to be relieved. The court granted his request on January 23, 2006 (Motion Ex. N). Plaintiff retained new counsel on or about February 1, 2006. Metelka subsequently discovered a prenuptial agreement, which disposed of the financial issues in the underlying divorce action (Sanders Aff).

Plaintiff commenced this legal malpractice action on December 26, 2008, alleging five causes of action: (1) negligence in failing to gain plaintiff's compliance with the so-ordered August 2005 stipulation; (2) negligence in failing to purge plaintiff's contempt or to seek her release from jail between December 23, 2005 and December 28, 2005; (3) negligence in failing to correct the amount contained in the Amended Order dated December 23, 2005 to conform to the August stipulation amount; (4) negligence in failing to respond to discovery requests; and (5) negligence in failing to verify Metelka's income and failing to obtain an order providing plaintiff with

child support.

Defendants assert, among other things, that the instant legal malpractice action is time-barred by the statute of limitations, having been filed more than three years after the alleged malpractice occurred.

DISCUSSION

CPLR 3211 (a), "Motion to dismiss cause of action," states that:

"[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

(1) a defense is founded upon documentary evidence;

(5) the cause of action may not be maintained because of ... release;

(7) the pleading fails to state a cause of action ..."

As stated in *Ladenburg Thalmann & Co., Inc. v Tim's Amusements, Inc.* (275 AD2d 243, 246 [1st Dept 2000]),

"the court's task is to determine only whether the facts as alleged, accepting them as true and according plaintiff every possible favorable inference, fit within any cognizable legal theory (*Leon v Martínez*, 84 NY2d 83, 87-88 [1994]). Dismissal pursuant to CPLR 3211 (a) (1) is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law (*id.*, at 88)."

To defeat a pre-answer motion to dismiss pursuant to CPLR 3211, the opposing party need only assert facts of an evidentiary nature which fit within any cognizable legal theory. *Bonnie & Co. Fashions, Inc. v Bankers Trust Co.*, 262 AD2d 188

(1st Dept 1999). Further, if any question of fact exists with respect to the meaning and intent of the contract in question, based on the documentary evidence supplied to the motion court, a dismissal pursuant to CPLR 3211 is precluded (*Khayyam v Doyle*, 231 AD2d 475 [1st Dept 1996]).

"The three-year statute of limitations in a legal malpractice action (see CPLR 214 [6]) runs from the time of the alleged malpractice, not from when it is discovered." (*Shivers v Siegel*, 11 AD3d 447 [2d Dept 2004]). However, this statutory period may be tolled by the application of the continuous representation doctrine.

"[T]he continuous representation doctrine tolls the statute of limitations only where there is a mutual understanding of the need for further representation on the specific subject matter underlying the malpractice claim."

(*McCoy v Feinman*, 99 NY2d 295, 306 [2007]).

However, the application of the continuous representation doctrine "envisions a relationship between the parties that is marked with trust and confidence" (*Muller v Sturman*, 79 AD2d 482, 486 [4th Dept 1981]). To apply, "there must be clear indicia of an ongoing, continuous, developing and dependent relationship between the client and the attorney" (*Piliero v Adler & Stavros*, 282 AD2d 511, 512 [2d Dept 2001]).

"[E]ven when further representation concerning the specific matter in which the attorney allegedly committed the complained of malpractice is needed and contemplated by the client, the continuous

representation toll would nonetheless end once the client is informed or otherwise put on notice of the attorney's withdrawal from representation."

(*Shumsky v Eisenstein*, 96 NY2d 164, 170-171 [2001]).

In the instant matter, even though Sanders considered that the attorney-client relationship terminated after the contempt hearing on December 23, 2005, he did not put plaintiff on notice of that fact until January 2006, when he filed his Order to Show Cause to be relieved. Additionally, there is no evidence that plaintiff terminated the relationship prior to January 2006. As a consequence, this action is not time-barred.

Furthermore, a close reading of the complaint indicates that part of the alleged malpractice continued until December 28, 2005, when plaintiff was released from jail. The commencement of this action on December 26, 2008 is within the statutory period.

In order to sustain an action for legal malpractice, the proponent must prove three elements: one, that the attorney was negligent; two, that such negligence was a proximate cause of plaintiff's losses; and three, proof of actual damages. (*Brooks v Lewin*, 21 AD3d 731 [1st Dept 2005]).

"In order to survive dismissal, the complaint must show that but for counsel's alleged malpractice, the plaintiff would not have sustained some actual ascertainable damages, so that a failure to establish proximate cause requires dismissal regardless whether negligence is established. Even if counsel improperly advises the client, the advice is not the proximate cause of the harm if the client cannot demonstrate its own likelihood of success absent such advice. Moreover, speculative damages cannot be a basis for

legal malpractice [internal citations omitted]."

(*Pellegrino v File*, 291 AD2d 60, 63 [1st Dept 2002]).

Plaintiff's first cause of action, alleging attorney malpractice based on Sanders' inability to gain plaintiff's compliance with a court order is summarily dismissed. Prior to Sanders being retained by plaintiff, plaintiff was under a court order to turn over custodial funds to Metelka's counsel. In the transcript of the contempt proceeding, the presiding judge specifically found that the failure to turn over the subject accounts was wilful conduct on the part of plaintiff, despite counsel by her various attorneys to comply with the order (Motion Ex. A [12]). A client's wilful disregard of a court order cannot be attributed to her attorney who consistently advised compliance (*Delfyette v Fisher*, 40 AD2d 674 [2d Dept 1972]).

Plaintiff's second cause of action, alleging malpractice in Sanders' failure to purge plaintiff's contempt or to seek her release from jail between December 23, 2005 and December 28, 2005, is dismissed. The documentary evidence conclusively demonstrates that the ability to purge the contempt was solely within the power of plaintiff, who was required to honor the court's instructions (Motion Ex. A [12], at 24). Further, plaintiff would only be released, and the contempt purged, upon some representation from Metelka's counsel, which was provided on December 27, 2005; Sanders immediately prepared

the required release order. *Id.* Plaintiff's own wilful actions led to the contempt finding, not any action by Sanders.

Plaintiff's third cause of action also is dismissed. This cause of action states that Sanders failed to correct the amount contained in the December 23, 2005 order to conform with the August 2005 stipulation. However, plaintiff both fails to plead what that difference was, or to demonstrate that she suffered any actual damages thereby. Under these circumstances, the unspecified damages alleged by plaintiff are insufficient to sustain a legal malpractice action (See *Plymouth Org., Inc. v Silverman, Collura & Chernis, P.C.*, 21 AD3d 464 [2d Dept 2005]).

Plaintiff's last two causes of action similarly are dismissed. She makes vague and conclusory assertions that Sanders failed to respond to discovery requests, which are insufficient to sustain the fourth cause of action (See *Tatta v State of New York*, 19 AD3d 817 [3d Dept 2005][complaint alleging medical malpractice]). Furthermore, subsequent counsel had sufficient opportunity to remedy any discovery defects to protect her rights, negating any damage occasioned by Sanders' alleged actions. (See *Golden v Cascione, Chechanover & Purcigliotti*, 286 AD2d 281 [1st Dept 2001]).

With respect to the last cause of action, the documents indicate that, Sanders made discovery requests in October 2005 that were not responded to (regarding Metelka's finances) before

plaintiff was held in contempt and the relationship deteriorated, leading to Sander's termination of it. In any event, the prenuptial agreement disposed of the financial aspects of the divorce. Notably, it appears that plaintiff withheld information about the existence of the prenuptial agreement, conduct which cannot be attributed to her counsel. (See *Cook v David Rozenholc & Associates*, 226 AD2d 311 [1st Dept 1996]).

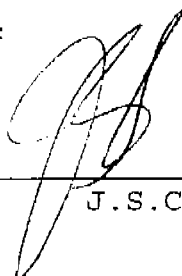
Based on the foregoing, it hereby is

ORDERED that defendants' motion to dismiss the complaint is granted with costs and disbursements to defendants as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: December 3, 2009

ENTER:



J.S.C.

JAMES S. SOLOMON

FILED
DEC 07 2009
NEW YORK
COUNTY CLERK'S OFFICE