

**Orosz v Eppig**

2009 NY Slip Op 33177(U)

October 29, 2009

Supreme Court, Suffolk County

Docket Number: 08-44492

Judge: Joseph C. Pastorella

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.



The plaintiff, Louise Ann Orosz (Orosz), the Executrix of the Estate of Alice Gast, her deceased mother, commenced the underlying action against William J. Eppig (Eppig) for alleged legal malpractice in negligently and prematurely advising Orosz in September 2008 to distribute the Estate's assets. Orosz alleges that after the distribution of assets, she received notice in October 2008 of a claim against the Estate from the Suffolk County Department of Social Services (DSS) in the sum of \$36,326.43 for medical assistance provided to Alice Gast, for which Orosz is now personally liable. The defendant Eppig subsequently commenced a third-party action for contribution and indemnification against the attorney, Rinaldo A. Pace (Pace), who referred Orosz to him in early 2008 for probate of Alice Gast's will. Eppig alleges that Pace continued to represent Orosz and the Estate on various matters after said referral, including the sale of Alice Gast's premises which was the primary asset of the Estate, and knew of DSS' claim but never advised Orosz to resolve said claim prior to the distribution of the Estate's assets.

In September 2007, Alice Gast had retained Pace to draft her will and on September 28, 2007 she had executed her will. Then, on October 29, 2007, Alice Gast died following complications from surgery. Pursuant to the will, Orosz was nominated and appointed Executrix of her mother's Estate. In early 2008, Pace referred Orosz to Eppig for the purpose of probating the will to obtain Letters Testamentary from Surrogate's Court. On May 23, 2008, Orosz retained Pace with respect to the sale of Alice Gast's premises located at 17 Long Street in Lake Grove, New York. Pace ordered a title search of said property in November 2007 and May 2008 and both title reports indicated the sole lien on the property to be a bank mortgage in the sum of \$6,650.00. Letters Testamentary were issued to Orosz on June 18, 2008. The closing on the property occurred on August 12, 2008, Pace prepared the closing statement, and after the closing Orosz left with the checks and deposited them in the Estate's account.

In early September, Eppig sent letters to Alice Gast's four other children informing them that the Estate was now in a position to pay the beneficiaries the specific bequests contained in the will. The Estate's proceeds were thereafter distributed pursuant to the terms of the will to Alice Gast's children. Subsequently, Orosz received a letter dated October 17, 2008 from DSS informing that a Bond and Mortgage that Alice Gast had executed in July 1965 was due in the sum of \$81,426.91 and that DSS was a preferred creditor of the Estate for Medicaid granted to Alice Gast and that the claim was \$36,326.43. Eppig faxed said letter to Pace. Thereafter, by letter dated November 5, 2008, DSS notified the plaintiff that its Bond and Mortgage had not been properly indexed at the Suffolk County Clerk's Office and that DSS would not be enforcing the mortgage. The Court's computer records indicate that no note of issue has been filed in this action.

The third-party defendant, Pace, now seeks dismissal of the third-party complaint pursuant to CPLR 3211 (a)(1) and (7) on the grounds that Pace represented the Estate solely in connection with the sale of Alice Gast's premises, as evidenced by the retainer agreement dated May 23, 2008 executed by Orosz, which representation ended when Orosz received the sale proceeds, and the premises was sold with good title inasmuch as both title reports that Pace ordered prior to the sale of the premises showed no liens other than the bank mortgage. In addition, Pace asserts that the third-party claims fail for lack of privity inasmuch as Pace did not owe any duty, including the duty to provide legal advice on the distribution of the Estate's assets, to Orosz in her individual capacity. Pace asserts that said duty belonged to Eppig inasmuch as he probated Alice Gast's will and as evidenced by Eppig's informal

Orosz v Eppig  
Index No. 08-44492  
Page No. 3

accounting of the Estate and letters to Alice Gast's children and Receipt and Releases to the children, Eppig solely handled the distribution of assets without any notification to Pace. Moreover, Pace asserts that inasmuch as there was no contractual relationship between Pace and Eppig, there is no basis for the contractual indemnification claim.

In opposition to the dismissal motion, Eppig points to the submitted retainer agreement dated May 23, 2008 to demonstrate that it makes no mention of the Estate therein and was signed by Orosz in her individual capacity as well as an e-mail dated September 18, 2008 purportedly from Pace's office to Orosz concerning distribution of the Estate's funds to show that Pace was still representing Orosz and the Estate after the closing date of sale of the subject premises and that Pace was aware of the distribution of the Estate's assets at the time they were being made. Eppig contends that the documentary evidence demonstrates that he and Pace were representing Orosz and were aware of her distribution of assets in September 2008 such that both are responsible to the plaintiff.

In the context of a legal malpractice claim, as in any other case, when determining whether a valid third-party claim for contribution exists, the decisive issue is whether the third-party defendant owed a duty to the plaintiff which was breached and which contributed to or aggravated the plaintiff's damages (**Rosner v Paley**, 65 NY2d 736, 738; see, **Aglira v Julien & Schlesinger, P.C.**, 214 AD2d 178, 183). An attorney does not owe a duty of care to his adversary or one with whom he is not in privity (**Matter of Podolsky v Narnoc Corp.**, 196 AD2d 593; see, **Aglira v Julien & Schlesinger, P.C.**, supra). The predicate for common-law indemnity is vicarious liability without fault on the part of the proposed indemnitee, and it follows that a party who has itself participated to some degree in the wrongdoing cannot receive the benefit of the doctrine (see, **Kagan v Jacobs**, 260 AD2d 442).

A motion to dismiss a complaint based on documentary evidence pursuant to CPLR 3211 (a)(1) may be granted only where the documentary evidence that forms the basis of the defense is such that it resolves all of the factual allegations as a matter of law, and conclusively disposes of the plaintiff's claims (see, **Turkat v Lalezarian Developers, Inc.**, 52 AD3d 595, 596; see also, **Goshen v Mutual Life Ins. Co. of N.Y.**, 98 NY2d 314, 326; **Mazur Bros. Realty, LLC v State of New York**, 59 AD3d 401, 402; **Troccoli v Zarabi**, 57 AD3d 971, 972).

In considering a motion to dismiss pursuant to CPLR 3211 (a)(7), the court should accept the facts alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine whether the alleged facts fit within any cognizable legal theory (see, **Turkat v Lalezarian Developers, Inc.**, 52 AD3d at 595-596; **Town of Riverhead v County of Suffolk**, 39 AD3d 537, 539; **Hartman v Morganstern**, 28 AD3d 423, 424). When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one, and, unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, again dismissal should not eventuate (see, **Guggenheimer v Ginzburg**, 43 NY2d 268, 275).

Here, the third-party complaint states legally cognizable causes of action against Pace for contribution and indemnification and the documentary evidence submitted is not dispositive of the third-party claims (see, CPLR 3211 (a)(1) and (7); **Weiss v Cuddy & Feder**, 200 AD2d 665, 667; see

also, **Stein v Garfield Regency Condominium**, \_\_\_ NYS2d \_\_\_, 2009 WL 2960388, 2009 NY Slip Op 06531 [NYAD 2 Dept Sep 15, 2009]; **Walker v Kramer**, 63 AD3d 723; **Turkat v Lalezarian Developers, Inc.**, 52 AD3d at 596). The extent of Pace's knowledge of a potential DSS claim as the preparer of Alice Gast's will is unclear at this juncture and the documents submitted indicate a possible overlap of duties of Pace and Eppig to fully inform Orosz and the Estate concerning the proper disposition and distribution of the sale proceeds of Alice Gast's premises (cf. **Conti v Polizzotto**, 243 AD2d 672). Therefore, Pace's motion for dismissal of the third-party complaint is denied.

Orosz now requests summary judgment in her favor on the complaint on the grounds that it was a departure from the minimum standard of law practice for Eppig to advise her to completely distribute the Estate's modest assets prior to the expiration of the seven month period of Surrogate's Court Procedure Act (SCPA) §1802 without informing her of the risk of personal liability for claims made against the Estate within said period after the distribution. In support of her request, Orosz submits her affidavit stating that she followed Eppig's advice to distribute the Estate's assets approximately three months after the issuance of Letters Testamentary and upon receipt of the DSS claim attempted to recoup the distribution from her siblings without success and that as a result of erroneous legal advice, she is now personally liable for payment of the sum of \$36,326.43 to DSS. Orosz also submits the affidavit of an expert witness, Adam Minella, Esq., who represents estates and their fiduciaries opining that there was a departure under the circumstances of this action.

In opposition to the motion for summary judgment, Eppig argues that Orosz knew or should have known of the DSS claim prior to retaining him and distributing the Estate's assets inasmuch as she mentioned a letter from DSS at their first meeting but never revealed its contents and that Orosz presumably knew that her mother had been receiving medical assistance from DSS for ten years such that his failure to advise of a potential DSS claim was not the proximate cause of her personal liability. Rather, he argues, if Orosz knew or had reason to know of the DSS claim, she would be personally liable regardless of when she disbursed the Estate's assets. In addition, Eppig contends that the request for summary judgment is premature at this juncture inasmuch as his counsel has not yet had the opportunity to depose Orosz on these matters. Eppig also contends that the action is premature since Orosz has not paid said DSS claim so she has not yet sustained actual damages.

To prevail in an action to recover damages for legal malpractice, a plaintiff must establish that the attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession and that the attorney's breach of said duty proximately caused the plaintiff to sustain actual and ascertainable damages (see, **Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer**, 8 NY3d 438, 442; see also, **Hashmi v Messiha**, \_\_\_ NYS2d \_\_\_, 2009 WL 3048417, 2009 NY Slip Op 06665 [NYAD 2 Dept Sep 22, 2009]). To establish causation, a plaintiff must show that he or she would have prevailed in the underlying action or would not have incurred any damages, but for the attorney's negligence (see, **Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer**, supra). An attorney may not shift to the client the legal responsibility the attorney was specifically hired to undertake because of the attorney's superior knowledge (see, **Hart v Carro, Spanbock, Kaster & Cuiffo**, 211 AD2d 617, 619; **Cicorelli v Capobianco**, 90 AD2d 524, 525, affd 59 NY2d 626).

Orosz v Eppig  
 Index No. 08-44492  
 Page No. 5

An executor or executrix is protected from personal liability in making lawful payment or distribution of the funds of the estate after waiting seven months from the date of issuance of his or her letters testamentary (see, SCPA §1802, EPTL §11-1.5; **Matter of Gill**, 199 NY 155; **Matter of Huseher's Estate**, 251 App Div 156; see also, **In re Segall's Will**, 287 NY 52). However, said protection does not go so far as to shield an executor or executrix if he or she has made payment or distribution in bad faith and it has always been held that good faith requires the executor or executrix to recognize claims of which he or she has knowledge, at least to the extent of citing the claimants upon his final accounting (see, id).

Here, summary judgment is inappropriate before adequate discovery has been conducted concerning, among other things, what matters Eppig was specifically retained to undertake and the actual scope and extent of his representation and whether Orosz knew of a potential DSS claim but failed to disclose its existence to Eppig prior to the informal accounting (see, CPLR 3212 [f]; **Kew Gardens Hills Apartment Owners, Inc. v Horing Welikson & Rosen, P.C.**, 35 AD3d 383; **Plaza Investments v Kim**, 208 AD2d 704; **Cicorelli v Capobianco**, supra; see also, **Maddux v Schur**, 16 AD3d 873; 22 NYCRR § 1215.1). The Court notes that no copy of the retainer agreement between Eppig and Orosz has been submitted. In addition, the Court notes that to the extent that the complaint alleges that the plaintiff has incurred personal liability for the DSS claim that she would not otherwise have incurred but for erroneous legal advice, said personal debt although currently unpaid is an identifiable loss constituting actual and ascertainable damages (see, **Proskauer Rose Goetz & Mendelsohn LLP v Munao**, 270 AD2d 150; see also, **Plymouth Organization, Inc. v Silverman, Collura & Chernis, P.C.**, 21 AD3d 464).

Accordingly, the motion by the third-party defendant, Rinaldo A. Pace, for dismissal and the motion by the plaintiff, Louise Ann Orosz, for summary judgment are denied.

Dated: October 29, 2009



HON. JOSEPH C. PASTORELLA

       FINAL DISPOSITION      X   NON-FINAL DISPOSITION