

Simpson v Alter

2010 NY Slip Op 30495(U)

March 3, 2010

Supreme Court, Nassau County

Docket Number: 11095/09

Judge: Thomas P. Phelan

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,

Justice

TRIAL/IAS PART 3
NASSAU COUNTY

SHAWNDYA L. SIMPSON,

Plaintiff(s),

ORIGINAL RETURN DATE: 10/22/09
SUBMISSION DATE: 12/21/09
INDEX No.: 11095/09

-against-

BERNARD M. ALTER, BERNARD M.
ALTER, ESQ., ALTER & BARBARO,
ESQS. and DIANA A. JOHNSON,

MOTION SEQUENCE #3,4

Defendant(s).

The following papers read on this motion:

Notice of Motion.....	1,2
Answering Papers.....	3,4
Reply.....	5,6
Correspondence.....	7

Motion by defendant Bernard M. Alter ("Alter") pursuant to CPLR 3211(a)(5) and (a)(7) for an order dismissing the complaint on the grounds that this action is precluded by principles of res judicata and collateral estoppel or, in the alternative, for failure to state a cause of action is denied. Motion by defendant Diana A. Johnson ("Johnson") pursuant to CPLR 3211 (a)(1), (a)(5) and (a)(7) for an order dismissing the complaint on the grounds of documentary evidence, res judicata and failure to state a cause of action is denied, except that the cause of action for unjust enrichment as asserted against her is dismissed.

Plaintiff ("Simpson") brings this action against defendants asserting causes of action for breach of fiduciary duty, breach of contract, legal malpractice, aiding and abetting, tortious interference with contractual relations, unjust enrichment and constitutional violations.

Plaintiff alleges that defendant Alter was her attorney in the year 2003 and was retained to establish a sufficient residency in the borough of Brooklyn to allow her to run for judicial office in that County. All causes of action asserted in the complaint are premised upon Simpson's claim that defendant Alter revealed her confidences to defendant Johnson, Simpson's opponent in a 2007 judiciary primary campaign. She alleges that Alter represented Johnson against her in an

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election law challenge regarding her residency in Brooklyn (the prior proceeding). She asserts that Alter violated her confidences by revealing confidential information to Johnson and to the press.

Simpson did not succeed in her application to disqualify Alter as Johnson's counsel in the prior proceeding. However, she ultimately prevailed for placement on the ballot.

Defendants both seek dismissal of the complaint on the grounds of res judicata or collateral estoppel, arguing that the former proceeding established that defendant Alter did not possess confidences material to the issue of Simpson's residency challenge. The court finds that record is not so clear.

The order of Justice Peter J. O'Donoghue, Queens County, dated August 17, 2007 addresses two interlocutory applications as well as the ultimate relief to remove Simpson from the ballot. The order grants an open commission allowing Johnson to seek Simpson's records in New Jersey, presumably to establish that her principal residence was in New Jersey, where her husband and children reside. The order denies Simpson's application to disqualify Alter, stating:

According to the testimony of the respondent, the attorney/client relationship existing between respondent and attorney B. Mitchell Alter terminated in 2003. The Brooklyn residence which was the subject of the 2003 Petition Challenge differs from the Brooklyn residence which is the subject of the within petition challenge. The respondent assumed residency at 275 Park Avenue, Apt. 5P, Brooklyn, N.Y., which is the subject of this lawsuit, in 2004.

It is difficult to precisely assess the meaning of the determination. In both races Simpson's opponents claimed that her domicile was in New Jersey. The court declined to disqualify Alter but nevertheless precluded him from exploring or introducing documentary materials with regard to the year 2003. A lone transcript page, which is not certified but which is not disputed as part of the record of the former proceeding, reveals attorney Alter seeking to introduce evidence regarding voter registration and a mortgage application against his former client and arguing for its introduction as relevant. The following colloquy is on the record:

THE COURT: You want me to disqualify you? You want me to disqualify you from this case?"

MR. ALTER: No, sir.

THE COURT: Then don't bring up anything from '03 because you were counsel in '03. Let's move on. Do you understand where I am coming from?

MR. ALTER: I understand where you're coming from, your Honor.

The clear implication is that Alter was Simpson's attorney in 2003, did have confidential information with regard to, *inter-alia*, her New Jersey residence and would not be permitted to use it against her. Ultimately the court denied Johnson's petition to remove Simpson from the ballot finding "clear and convincing evidence . . . that respondent, Shawndya L. Simpson, has lived at 275 Park Avenue, Apt. 5P, Brooklyn, N.Y. for the last three years."

Collateral estoppel is a doctrine "based on general notions of fairness involving a practical inquiry into the realities of the litigation" and must never be "rigidly or mechanically" applied (*Halyalkar v. Board of Regents of State of N.Y.*, 72 NY2d 261, 268-269 [1988]). The doctrine is a species of *res judicata* and prevents a party from relitigating an issue "clearly raised in a prior action or proceeding and decided against that party . . . whether or not the tribunals or causes of action are the same" (*Ryan v. New York Telephone Co.*, 62 NY2d 494, 500 [1984]). To qualify for estoppel, the issue in the first action must have been "material . . . and essential to the decision rendered therein" (*Ryan v. New York Telephone Co.*, *supra*), i.e., "a necessary step in arriving at the final judgment" and "necessary to the result" (*Hinchey v. Sellers*, 7 NY2d 287, 293 [1959]).

The issue decided in the prior proceeding was whether or not Simpson resided in Brooklyn for a sufficient period of time to be placed on the ballot. In this action the issue is defendants' role in the alleged disclosure of confidential information. The ruling in the prior proceeding on Simpson's motion to disqualify Alter for disclosure of confidential information was not material to the ultimate resolution. Although there was a "finding of an evidentiary fact," it was not a finding "essential to the judgment" or a finding "from which the resolution of the ultimate legal issue necessarily followed" (*see, Hinchey v. Sellers, supra* [limitation upon permission for use of automobile was a finding of fact essential to the judgment]). Alter's possession of confidential information was unnecessary to any reasoning in determining that Simpson resided in Brooklyn.

Moreover, the court's ruling in the residency challenge clearly held that Alter represented Simpson in 2003, and the court's warning to counsel in the transcript indicates that there was confidential information which the court would not allow into evidence without having to disqualify Alter. This apparent contradiction also speaks against collateral estoppel binding Simpson in this proceeding. In addition, as plaintiff prevailed in the challenge to her residency, she had no cause to appeal the ruling denying her motion for disqualification. It is more than apparent that with regard to the prior proceeding, the "realities of the litigation" proscribe any "mechanical application" of the doctrine (*Baxter v. Fulton Ice & Cube Co.*, 106 AD2d 82, 85 [2d Dept 1985]).

Defendants' reliance upon *Vavolizza v. Krieger* (33 NY2d 351, 356 [1974]) for the proposition that collateral estoppel is applicable to the resolution of a motion in a prior proceeding is misplaced. The question presented in *Vavolizza* was "whether the denial of a party's motion to vacate a guilty plea in a criminal action can act as collateral estoppel in a later action brought by

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the party against his attorney for malpractice based on the attorney's advice to plead guilty in the criminal action" (*Vavolizza v. Krieger, supra*). While in *Vavolizza* the issue arose on a motion, the guilty plea was necessary to resolution of the action. Collateral estoppel effect is given "to issues necessarily decided in prior criminal actions, including those which terminate in judgments based on pleas of guilty" (*William Floyd Union Free School Dist. v. Wright*, 61 AD3d 856, 858 [2d Dept 2009]).

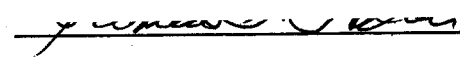
Defendant Alter also avers that plaintiff's legal malpractice claim is beyond the limitations period as his representation of Simpson ended in 2003. "[A] lawyer, as one in a confidential relationship and as any fiduciary, is charged with a high degree of undivided loyalty to his client" and "the duty to preserve client confidences and secrets continues even after representation ends" (*Keller v. Loews Corp.*, 69 AD3d 451 [1st Dept 2010]). Defendant has failed to provide authority to show that a cause of action in legal malpractice premised upon a disclosure of confidential information does not arise upon such disclosure.

Both defendants also move to dismiss upon grounds other than collateral estoppel. However, they do not present any argument which does not rest upon a finding that plaintiff is precluded from raising a claim regarding disclosure of confidential information. The sole exception is the cause of action for unjust enrichment asserted against Johnson. There is no allegation of Johnson's enrichment. Accordingly, the unjust enrichment claim against Johnson is dismissed, and the motions to dismiss are otherwise denied.

This decision constitutes the order of the court.

Dated: 3-3-10

HON THOMAS P. PHELAN



J.S.C.

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