

Young v Quatela

2010 NY Slip Op 31607(U)

June 18, 2010

Supreme Court, Nassau County

Docket Number: 601658/09

Judge: Thomas Feinman

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SHORT FORM ORDER

**SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU**

Present:

Hon. Thomas Feinman
Justice

RAYMOND YOUNG,

Plaintiff,

- against -

JOSEPH QUATELA, MORGANSTERN & QUATELA,
KEVIN WENER, TUMINELLO, BESSO, SELIGMAN,
QUINLAN & WERNER, LLP,

Defendants.

TRIAL/IAS PART 15
NASSAU COUNTY

INDEX NO. 601658/09

MOTION SUBMISSION
DATE: 5/5/10

MOTION SEQUENCE
NO. 1

The following papers read on this motion:

- Notice of Motion and Affidavits..... X
- Memorandum in Support of Motion..... X
- Affirmation in Opposition..... X
- Memorandum of Law in Support of Opposition..... X
- Reply Affirmation..... X
- Memorandum of Law in Support of Reply..... X

The defendants, Kevin Werner, Tuminello, Besso, Seligman, Quinlan & Werner, LLP, move for an order pursuant to CPLR §3211(a) dismissing the third and fourth causes of action in plaintiff's complaint. The defendants submit a Memorandum of Law in support of their motion. The plaintiff submits opposition and a Memorandum of Law in support of plaintiff's opposition. The defendants submit a reply affirmation and Memorandum of Law in support of the defendants' reply.

The plaintiff initiated this action sounding in legal malpractice. Plaintiff claims that he retained defendant, Joseph Quatela, Esq., of Morganstern & Quatela, and defendant, Kevin Werner, Esq., of Tuminello, Besso, Seligman, Quinlan & Werner, LLP, as co-counsel, to represent him in plaintiff's matrimonial action in which plaintiff sought custody of his children, visitation with his children, equitable distribution, and a divorce. Plaintiff's third cause of action as and against defendant, Kevin Werner, sounds in legal malpractice. Plaintiff's fourth cause of action as and against defendant, Kevin Werner, and defendant Tuminello, Besso, Seligman, Quinlan & Werner, LLP, sounds in breach of contract and fiduciary duties.

The defendants, Kevin Werner, (hereinafter referred to as "Werner"), and the defendant firm, Long, Tuminello, Besso, Seligman, Werner, Johnston & Sullivan, LLP, sued herein as Tuminello, Besso, Seligman, Quinlan & Werner, LLP, (hereinafter referred to as "Werner firm"), move, pursuant to CPLR §3211(a), to dismiss the third and fourth causes of action in plaintiff's complaint in their entirety. The defendants submit that pursuant to CPLR §3211(a)(1) and (7) plaintiff fails to state a cause of action for which relief can be granted, and the plaintiff's allegations are refuted by documentary evidence supported by the motion.

This being a motion to dismiss for failure to state a cause of action pursuant to CPLR §3211(a)(7), the Court starts with the presumption that the allegations contained in the plaintiff's pleadings are true. (*Becker v. Schwartz*, 46 NY2d 401). A motion for failure to state a cause of action will fail if from its four corners, the factual allegations are discerned which taken together maintain any cause of action cognizable of law, regardless of whether the plaintiff will ultimately prevail on the merits. (*Gruen v. County of Suffolk*, 187 AD2d 564).

In view of the foregoing, this Court being only concerned with the sufficiency of the plaintiff's pleadings, and not evidentiary matters, finds that the plaintiff has stated a cause of action for legal malpractice, breach of contract and fiduciary duties against the defendants.

Contrary to the defendants' contention, the plaintiff's third cause of action for legal malpractice as and against Werner is not duplicative of the plaintiff's fourth cause of action as and against Werner and the Werner firm for breach of contract and fiduciary duties. Plaintiff's claims for breach of fiduciary duty and legal malpractice are not premised on the same facts. Recovery for professional malpractice against an attorney requires proof of three elements, *to wit*, negligence of the attorney, that the negligence was the proximate cause of the loss sustained, and proof of actual damages. (*Ulico Casualty Company v. Wilson, Elser, Moskowitz, Edelman & Dicker*, 56 AD3d 1). However, an action for breach of a fiduciary duty against an attorney is governed by a considerably lower standard as it requires the plaintiff identify a conflict of interest which amounts to a substantial factor in the plaintiff's loss. (*Id.*) A cause of action asserted as breach of fiduciary duty is not redundant when it is based upon different facts than those underlying the causes of action alleging malpractice. (*Id.*) "[A]ny act of disloyalty by counsel will also compromise a breach of the fiduciary duty owed to the client." (*Id.*)

Here, plaintiff's complaint provides that the defendants failed to pursue plaintiff's matrimonial action when they breached their duty of loyalty to plaintiff by opting to represent plaintiff's parents and discontinue representing plaintiff's cause of action, and by undertaking dual representations. As to plaintiff's cause of action as and against the defendant, Werner, for legal malpractice, plaintiff's complaint provides, *inter alia*, that the defendant failed to timely seek a hearing to restore plaintiff's visitation, failed to request a forensic examination, failed to advise plaintiff that plaintiff had grounds to have plaintiff's wife declared an unfit mother, negligently advised the plaintiff that he had no right to seek custody of his children, causing plaintiff to have been unable to pursue visitation and contact with plaintiff's children for approximately four years, and failed to take steps to preserve the marital property causing plaintiff to incur pecuniary losses.

[* 3]

The defendants also assert that plaintiff's third and fourth causes of action should be dismissed based upon documentation annexed in support of defendants' motion, *to wit*, the transcript of plaintiff's settlement of the matrimonial action. Plaintiff was allocated on the record in open court.

The Court in *N.A. Kerson Co., Inc. v. Shayne, Dachs, Weiss, Kolbrenner, Levy and Moe Levine*, 59 AD2d 551, reversed a jury verdict in favor of the plaintiffs and against the defendants, and dismissed plaintiff's complaint. The Court found that the "record indicates that this action is merely a collateral means of attacking a stipulation of settlement which has already withstood a direct attack". The Court held that the plaintiffs could not base their action in malpractice upon the mistakes of counsel prior to settlement since their agreement to the terms of that settlement terminated the litigation. (*Id.*)

However, "[a] plaintiff's legal malpractice cause of action must stand or fall on its own merits, and there is no automatic waiver, as a matter of law, of plaintiff's right to sue, even if the plaintiff voluntarily settled [the] underlying action." (*Broad v. Conway*, 675 F.Supp. 768). A settlement and release in an underlying action do not preclude a subsequent action for legal malpractice where the settlement was compelled because of the mistakes of former counsel. (*Lattimore v. Bergman*, 224 AD2d 497). "Settlement compelled by an attorney's breach of the standard of care does not present an intervening cause so as to bar a malpractice action". (*Jones Lang Wooton USA v. LeBoeuf, Lamb, Greene & MacRae*, 243 AD2d 168).

The Court in *Broad v. Conway, supra*, found that the plaintiffs were estopped from raising an issue as to whether they were coerced into settling the underlying action. The plaintiffs were asked by the Judge, in open court, on the record, if they were coerced or influenced to settle. The plaintiffs expressly stated on the record in open court that they were not coerced or influenced to settle. In *DeGregorio v. Bender*, 4 AD3d 384, the plaintiff acknowledged that she participated in negotiation and understood the terms of her stipulation of settlement in her matrimonial action, and acknowledged that no one forced her into the agreement.

Here, plaintiff, in open court, on the record, was asked if he entered into the settlement agreement "voluntarily", if he fully understood the agreement and if he was "satisfied with the legal services he had obtained". Plaintiff answered in the affirmative. Plaintiff was specifically asked if he "entered into this agreement voluntarily" and plaintiff responded "Yes". Plaintiff was asked if he "wanted to enter into this agreement" and he responded "Yes". Plaintiff was asked if he felt that he was afforded competent legal services by the defendants and he responded "Yes".

Plaintiff's complaint provides that plaintiff was "pressured" to settle. However, the plaintiff's settlement and allocation on the record flatly contradicts plaintiff's claim that he was pressured to settle, and that he was not satisfied with the legal services provided by the moving defendants herein. Accordingly, here, as in *Broad v. Conway, supra*, the plaintiff is estopped from bringing the instant legal malpractice action as and against the missing defendants, as the plaintiff is precluded from raising an issue as to whether he voluntarily settled the underlying action.

Accordingly, in light of the foregoing, as plaintiff is estopped from bringing the instant legal malpractice action as and against the moving defendants, and therefore, the defendants' motion is granted.

It is hereby

ORDERED that plaintiff's complaint as and against the defendant, Kevin Werner, sued herein as Kevin Wener, and the defendant, Tuminello, Besso, Seligman, Quinlan & Werner, LLP is dismissed, and it is hereby further,

ORDERED that the caption in the above referenced matter is amended as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

RAYMOND YOUNG,

Plaintiff,

- against -

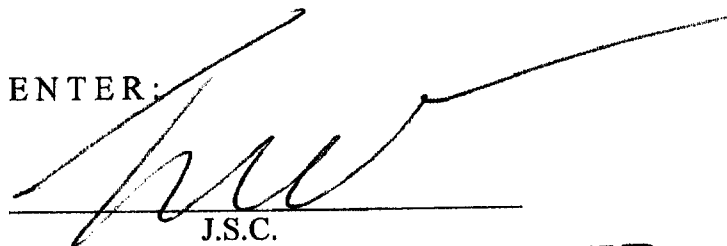
JOSEPH QUATELA, and MORGANSTERN & QUATELA,

Defendants.

and it is hereby further

ORDERED that the remaining parties are hereby directed to appear for a Preliminary Conference which shall be held at the Preliminary Conference part located at the Nassau County Supreme Court on the 18th day of August, 2010, at 9:30 A.M. This directive, with respect to the date of the Conference, is subject to the right of the Clerk to fix an alternate date should scheduling require. The attorneys for the plaintiff shall serve a copy of this order on the Preliminary Conference Clerk and the attorneys for the defendants.

ENTER:



J.S.C.

Dated: June 18, 2010

cc: Ororio & Associates, LLC
Long, Tuminello, Besso, Seligman, Werner, Johnston & Sullivan, LLP

ENTERED
JUN 24 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE