

Nichols v Curtis

2010 NY Slip Op 33847(U)

July 14, 2010

Sup Ct, NY County

Docket Number: 112297/08

Judge: Melvin L. Schweitzer

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

PRESENT: MELVIN L. SCHWEITZER
J.S.C. Justice

PART 45

Stevi Brooks Nichols,
v.
W. Robert Curtis, Esq.,
et al

INDEX NO. 112297/08
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

to dismiss the complaint is GRANTED per the attached Decision and Order.

Plaintiff's motion for sanctions against attorney Marion Pice, Esq. is DENIED, and Ms. Pice's cross motion for sanctions is GRANTED, each per the attached Decision and Order.

Dated: July 15, 2010

Melvin L. Schweitzer
MELVIN L. SCHWEITZER J.S.C.
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

owned her own dress design and manufacturing business. Her business ultimately failed which Ms. Brooks attributes to copyright and trademark infringements by competitors that the Lewin Defendants failed to protect her against. After proceeding pro se against the Lewin Defendants for several years, in October 1998 Ms. Brooks retained the firm of C&R-C to represent her in the case. Ms. Brooks' friend, Ms. Riess, was a principal in that law firm, along with Mr. Curtis, who then was Ms. Riess' husband. Ms. Riess signed the engagement agreement on behalf of C&R-C. C&R-C was a professional corporation organized under the laws of Massachusetts. Its offices were located in New York. Ms. Brooks alleges that, unbeknownst to her at the time she retained the firm, C&R-C recently had been administratively dissolved by the Commonwealth of Massachusetts for the firm's failure to timely file required Annual Reports with the Commonwealth. She alleges that, as a result, C&R-C operated in New York as an illegal corporation for over three years since the time of its dissolution in Massachusetts.

In May 2001, Ms. Riess left C&R-C and moved to Florida when she and Mr. Curtis divorced. Shortly thereafter, because of Ms. Riess' departure, Mr. Curtis sought and obtained from Ms. Brooks a second engagement agreement of C&R-C which Ms. Brooks signed in September 2001. Thereafter, Ms. Brooks also signed a consent to change attorney on April 25, 2003, agreeing to make Mr. Curtis her new attorney. Ms. Brooks and her husband also subsequently moved to Florida in 2004, where they reconnected with Ms. Riess as social friends.

Over a year later, in the course of C&R-C's continued representation of Ms. Brooks, the firm amended the original pro se complaint Ms. Brooks had filed against the Lewin Defendants to eliminate three of the original causes of action, ostensibly to simplify the complaint. Ms. Brooks alleges that this amendment would not have been conceived and effected by a reasonable and competent attorney. She further alleges that C&R-C also unreasonably failed to

include in the amended pleading new, additional evidence that would have further strengthened her case against the Lewin Defendants. Ultimately, Ms. Brooks lost her underlying action against the Lewin Defendants. She alleges here that this was because of the allegedly negligent decisions and acts taken by C&R-C.

Ms. Brooks also alleges that while her underlying action was still pending, Mr. Curtis coerced her into signing yet a third engagement agreement. He told her in April 2003 that he was phasing out the business of C&R-C and that he had formed another law firm, C&A, a professional corporation organized in New York, to assume C&R-C's identity and affairs. He allegedly threatened her that he and his firm would stop working on the underlying action, and refuse to send her critical opposition papers he was preparing to defend against a motion for summary judgment made by the Lewin Defendants if she did not sign the engagement agreement.

Ultimately, on December 3, 2003, Ms. Brooks terminated Mr. Curtis and C&A's services, and in an underlying action against the Lewin Defendants, on December 24, 2003, the court granted C&A's request for a quantum meruit hearing against her before a Special Referee. The Referee found that Mr. Curtis and C&A were guilty of misconduct which had warranted Ms. Brooks terminating their services. Although the court in that action then reversed the Referee's Hearing Report, Ms. Brooks ultimately was successful in having the court's decision reversed on appeal (*Brooks v Lewin*, 48 AD3d 289 [1st Dept 2008], holding that Ms. Brooks had terminated Mr. Curtis' services for cause).

On September 9, 2008, Ms. Brooks commenced this action here against Mr. Curtis, C&R-C, and C&A, and Ms. Riess was subsequently interposed added as a defendant on December 12, 2008. Ms. Brooks alleges nine causes of action which include two causes for

breach of fiduciary duty, and causes for misrepresentation and perjury under oath, defamation, abuse of process, legal malpractice and negligence, breach of contract, fraud, and conversion (Complaint ¶¶ 30-94).

Discussion

The complaint's first cause of action for breach of fiduciary duty is duplicative of the sixth cause and is discussed together with that cause, *infra*.

The second cause of action alleges that Mr. Curtis and C&A committed perjury under oath. The claim is that when Mr. Curtis filed C&R-C's past due 1992-2001 Annual Reports in Massachusetts to obtain retroactive reinstatement of the firm's corporate status, he perjured himself by stating that both he and Ms. Riess were "duly licensed to render one or more of the professional services for which the corporation [C&R-C] was organized." Additionally, Mr. Curtis allegedly cited in the Annual Reports that Ms. Riess resided in New York although she had left the state to reside in Florida. Ms. Brooks also alleges that Mr. Curtis was guilty of perjury during the Court's quantum meruit hearing. Even if defendants did commit perjury as alleged, this does not give rise to a private right of action (*see Alexander v City of Peekskill*, 80 AD2d 626, 626-27 [2d Dept 1981]). Accordingly, the second cause of action alleging perjury is dismissed.

The third cause of action for defamation relates to statements made by defendants to the Special Referee, to the Court, and to the Appellate Division. Ms. Brooks claims, for example, that defendants falsely stated in their brief to the Court that, *inter alia*, she was involved in possible insurance fraud, criminal violations of Nevada law, fraud on the IRS, and illegal taping of phone conversations. Statements and affirmations made during judicial proceedings are

protected from defamation claims by privilege if they are at all pertinent to the litigation (*Youmans v Smith*, 153 NY 214, 219 [1897]). Only a minimal possibility of pertinence is required for a statement to be privileged (*id.*). Statements made in the course of litigation are privileged irrespective of the motive for which the statements are used (*Mosesson v Jacob D. Fuchsberg Law Firm*, 257 AD2d 381, 383 [1st Dept], *lv denied* 93 NY2d 808 [1999]). The alleged defamatory statements by defendants all were made during judicial proceedings. Ms. Brooks has not made a showing the statements fall outside the broad and liberal privilege rule afforded to statements made in judicial proceedings. This cause of action for defamation is dismissed.

The fourth cause of action alleges abuse of process. Ms. Brooks claims that the filing of legal papers containing lies and misrepresentations of fact to the Special Referee, the Court, and the Appellate Division amounted to an abuse of process because it delayed the legal process and forced her into costly litigation to defend against these alleged falsehoods. Abuse of process has three essential elements: (1) regularly issued process, either civil or criminal, (2) an intent to do harm without excuse or justification, and (3) use of the process in a perverted manner to obtain a collateral objective (*Curiano v Suozzi*, 63 NY2d 113, 116 [1984]). Here, the first and third elements are not satisfied. Filing of legal papers, such as affidavits, are not considered process (*Julian J. Studley v Lefrak*, 41 NY2d 881, 884 [1977]). Ms. Brooks has not stated a claim for abuse of process and the fourth cause of action is dismissed.

The fifth cause of action is Ms. Brooks' legal malpractice case. Such a cause must be commenced within three years of its accrual (*Thruway Invs. v O'Connell and Aronowitz*, 278 AD2d 606, 607 [3d Dept 2000]). Accrual occurs either at the time of the alleged malpractice, or from the date the attorney's representation ends, if the attorney has continued to represent the

client in the matter out of which the claim arises (*Citibank v Suthers*, 68 AD2d 790, 795 [4th Dept 1979]). Ms. Brooks terminated C&A's services in December 2003. The latest possible date she could have brought an action against Mr. Curtis or either of the firms named as defendants was in December 2006, and that against Ms. Riess, personally, was in May 2004. However, she did not commence her action until December 2008. The Statute of Limitations has run, and the fifth cause of action for legal malpractice claim is dismissed.

The sixth cause of action is for breach of fiduciary duty (as is the first). Ms. Brooks claims defendants' failure to disclose the administrative dissolution of C&R-C, and Mr. Curtis' refusal to give Ms. Brooks access to legal memoranda his firm was preparing on her behalf in opposition to the summary judgment motion, as well as defendants' engaging in other coercive conduct pertaining to the request for a third engagement letter, all constitute a breach of defendants' fiduciary obligations to her. An action alleging breach of fiduciary duty that seeks money damages carries the same Statute of Limitations as does an action alleging injury to property, three-years (*Kaufman v Cohen*, 307 AD2d 113, 119 [1st Dept 2003]). Only where the action for breach of fiduciary duty is based on allegations of fraud is it subject to a six-year limitations period (*id.*).

As discussed *infra*, the fraud cause here (the eighth cause of action) for failure to disclose C&R-C's administrative dissolution does not state a cause of action for fraud. As such, only the three-year statute of limitations is applicable to the breach of fiduciary duty claim. The latest time Ms. Brooks could have brought a claim for breach of fiduciary duty was three years after the fiduciary relationship with the defendants ended, that is, 2001 in case of Ms. Riess when she left the law firm, and 2003 in case of the other defendants when she terminated them. The sixth cause of action is thus barred by the Statute of Limitations and is dismissed.

The seventh cause of action is for breach of contract. By allegedly engaging in legal malpractice, defendants also are alleged to have breached their retainer agreements. A legal malpractice claim in which the underlying theory is based in contract also must be commenced within three years. *Kinberg v Garr*, 60 AD3d 597 (1st Dept 2009). The contract claim here, arising out of defendants' alleged legal malpractice, is thus barred by the Statue of Limitations.

In connection with the claims barred by the three year statute of limitations, during oral argument, Ms. Brooks asserted that Ms. Riess' assistance in September 2005 on her appeal of her underlying action against the Lewin Defendants represented a continuous lawyer-client fiduciary relationship which tolled the statute of limitations. *See e.g. Siegel v Kranis*, 29 AD2d 477 (2nd Dept 1968). The court disagrees. First, both Ms. Riess and Ms. Brooks, in their oral arguments, acknowledged the fact that in the period between 2001 and 2005 they had maintained *social* contact through phone calls, emails and even personal visits and eventually became close friends. So, when on September 1, 2005 the Appellate Division, First Department, affirmed the court's dismissal of Ms. Brooks' action against the Lewin Defendants, Ms. Riess, as a friend, offered to assist Ms. Brooks with a possible appeal of that decision to the Court of Appeals. Second, at the time Ms. Riess helped Ms. Brooks with the possible appeal, she no longer was a partner in C&A or C&R-C, having left that firm in 2001 and moved to Florida. In fact, as recounted *supra*, on September 9, 2001, Ms. Brooks had signed a second engagement letter with C&R-C after Ms. Riess left the firm, and thereafter on April 25, 2003 she signed a consent to change attorney, agreeing to make Mr. Curtis her new attorney. Ms. Brooks was thus well aware of the fact that Ms. Riess was no longer representing her in her litigation. The fact that Ms. Riess also suggested names of other attorneys in New York to represent Ms. Brooks in her appeal further highlights the fact that the advice Ms. Riess offered Ms. Brooks was only as a

friend and not as her attorney. Ms. Brooks argues that Ms. Riess is still listed in the Commonwealth of Massachusetts Division of Corporation Records as C&R-C's president, but there is no doubt, for reasons discussed above, that when she assisted Ms. Riess in 2005, she did so as a friend, and not as a representative of her old firm and Ms. Brooks clearly understood that.

Ms. Brooks also argues that she was prevented from bringing her malpractice claim against C&A and C&R-C back in 2005 when it was obvious she had lost her case against the Lewin Defendants because she was denied access to key documents and other evidence in the possession of C&A, which she claims she has not received entirely until now. The record, however, does not support that argument. Rather, Ms. Brooks knew in 2001 that Mr. Curtis had not included the evidence as exhibits in opposition to the Lewin Defendants' motion for summary judgment which she contends to be malpractice. Even assuming Mr. Curtis' decision not to include the evidence was malpractice, this cause of action accrued when he made that decision. *Glamm v Allen*, 57 NY2d 87 (1982). Any delay in discovering the act or omission which is the predicate for the claim is not a legal excuse for failing to timely initiate a claim. *Alston v. Sone*, 2005 WL 668395. In any event, the record does not support Ms. Brooks' contention that she was denied access to the evidence located at C&A or C&R-C. Beginning in February 2005, Mr. Curtis had sent letters to Ms. Brooks' then attorney, Mr. John Fried, asking him to send someone to his office to pick up Ms. Brooks' files. In spite of repeated reminders and opportunities, neither Ms. Brooks, nor Mr. Fried, collected the files from Mr. Curtis' office.

Ms. Brooks' attorney-client relationship with Mr. Curtis, C&R-C and C&A terminated in December 2003, and her attorney-client relationship with Ms. Riess terminated in May 2001, when Ms. Riess left the firm. Therefore, the latest possible date Ms. Brooks could have brought an action for legal malpractice, breach of fiduciary duty and breach of contract, against

defendants Mr. Curtis, C&R-C and C&A, was in December 2006, and against Ms. Riess, in May 2004, since the statute of limitations for each of these causes of action is three years (as discussed *supra*). Ms. Brooks commenced this action against Mr. Curtis, C&R-C and C&A on September 9, 2008 and interposed Ms. Riess was added as a defendant on December 12, 2008. For the reasons discussed *supra*, the statute of limitations has not been tolled and Ms. Brooks' causes of action for legal malpractice, breach of fiduciary duty and breach of contract are dismissed as being time barred.

The eighth cause of action is for fraud. To establish a claim for fraud, a plaintiff must prove that (1) defendant made a material representation or omission of fact, (2) which was false and known by defendant to be false, (3) which was made for the purpose of inducing the plaintiff to rely upon it, (4) justifiable reliance by the plaintiff on the material misrepresentation or omission, and (5) injury (*Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996]). The complaint alleges that defendants' failure to disclose the administrative dissolution of C&R-C fraudulently induced her to obtain legal representation from C&R-C. Ms. Brooks claims defendants' alleged deception deprived her of the right and ability to make an informed decision regarding retaining the services of C&R-C. Her complaint does not specify how this alleged misrepresentation caused her injury. The only damages stemming from Ms. Brooks' allegations that she was fraudulently induced to retain C&R-C are the legal fees she paid to C&R-C. In exchange for those legal fees, however, C&R-C provided her with legal services. That Ms. Brooks claims the legal representation she received was inadequate is a separate matter which, if properly plead and timely brought, would give rise to a legal malpractice claim. Here, the court has determined *supra* that Ms. Brooks' claim for legal malpractice is time barred. Because the complaint has not stated any actual damages caused by the alleged

misrepresentations in connection with Ms. Brooks' retention of C&R-C, the cause for fraud does not state a cause of action and must be dismissed.

The ninth cause of action alleges that defendants, by accepting legal fees paid to a dissolved corporation, has converted these funds. To establish a cause of action for conversion, a plaintiff must show legal ownership or an immediate superior right of possession to a specific identifiable thing, and that defendant exercised unauthorized dominion over that thing to the exclusion of plaintiff's rights (*Fiorenti v Central Emergency Physicians*, 305 AD2d 453, 454-55 [2d Dept 2003]). Here, Ms. Brooks paid legal fees to C&R-C in exchange for legal services. Once she paid the fees, she no longer had ownership of these funds and thus lost her right of possession to the money. Without a showing that Ms. Brooks retained a legal right to the fees she paid to C&R-C, the claim for conversion does not state a cause of action. It, too, is dismissed.

Finally, Ms. Nichols brings a motion for sanctions and contempt in connection with the document production in this case against Marian Rice, Esq. of the law firm L'Abbate, Balkan, Colavita & Contini, L.L.P. , a firm that was retained as counsel for Mr. Curtis but which then had to withdraw because of a conflict of interest; and the L'Abbate firm cross moves for sanctions and an award of attorneys fees against Ms. Nichols.

The document production at issue pre-dated Ms. Rice's retention to represent Mr. Curtis and involved an ongoing dispute between Ms. Nichols and Mr. Curtis as to whether he ever turned over to her the entire file to which she was entitled. This dispute continued while Ms. Rice acted briefly as Mr. Curtis' counsel and also thereafter when the conflict of interest between Mr. Curtis and the L'Abbate firm prevented the firm from continuing to represent him. Ms. Rice brought on a motion before this court to be relieved as counsel because of the conflict,

but the court required the firm to remain as counsel for a period of 60 days so that Ms. Nichols could review her file to determine if documents to which she was entitled remained in Mr. Curtis' possession and if so, she could obtain them.

It was during that period of time that Ms. Rice arranged for the file to be made available to Ms. Nichols for inspection at Mr. Curtis' office (apparently also his residence).² In the course of the session, Ms. Nichols insisted that not everything of hers was there in the boxes she inspected, e.g. videotapes, garments, Bates-stamped documents, etc. and demanded its production. The dispute ultimately was brought before this court's principal law clerk, Jay Wilker, and, according to Ms. Rice, material which was determined to be required to be duplicated and produced ultimately was sent to Ms. Nichols in Colorado in compliance with Mr. Wilker's directive. Notwithstanding all this, Ms. Nichols saw fit to bring a motion for sanctions against Ms. Rice individually in connection with the matters now before the court (despite the fact that Ms. Rice has not been Mr. Curtis' attorney for six months since the inspection and production took place) which, according to Ms. Rice has required her to expend over \$7000 of time and disbursements defending against Ms. Nichols' motion for sanctions.

The court has reviewed the record of the conduct of both Ms. Nichols and Ms. Rice during this matter and concludes that Ms. Rice conducted herself in an appropriate manner and there was no reasonable basis for Ms. Nichols to bring on a vexatious motion for sanctions and contempt against Ms. Rice personally, which has caused Ms. Rice, who was seeking to withdraw from this matter for legitimate reasons, undue hardship in discharging an obligation imposed

² A dispute also ensued when Ms. Rice attempted to ensure that Ms. Nichols did not bring with her any recording devices or cameras into Mr. Curtis' office/residence. Despite being assured by Ms. Nichols that certain recording equipment Ms. Nichols and her investigator had brought with them would not be used, other recording equipment was, in fact, used by Ms. Nichols and her investigator to audio/video record a DVD of the entire document inspection session surreptitiously.

upon her by this court to accommodate Ms. Nichols until Mr. Curtis could secure substitute counsel. The court has concluded that it is Ms. Nichols' conduct in this aspect of the matter that has been contemptuous and deserving of sanctions here, in the form of her being made to pay for the time and legal fees Ms. Rice has sustained in defending herself against Ms. Nichols' unwarranted motion against Ms. Rice individually. Accordingly, the court will refer this matter to a special referee to determine the appropriate amount of legal fees and disbursements incurred by Ms. Rice which Mr. Nichols shall be made to pay as a penalty in the court's grant of Ms. Rice's cross-motion and the denial of Ms. Nichols' motion.

Accordingly, it 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 upon the submission of an appropriate bill of costs; and it is further

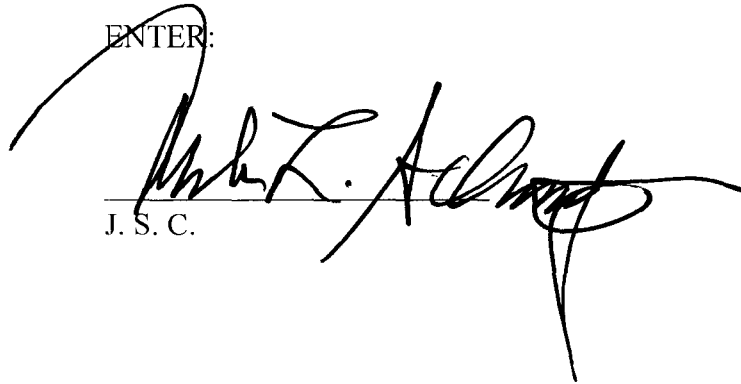
ORDERED that the action is severed and continued for the sole purpose of resolving the amount of legal fees and disbursements to be awarded to Ms. Rice; and it is further

ORDERED that a Special Referee shall be designated to hear and determine the appropriate amount of legal fees and disbursements incurred by Ms. Rice to be paid by Ms. Nichols; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119 M. 646-386-3028 or spref@courts.state.ny.us) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this Court at www.nycourts.gov/supctmanh at the "References" link under "Courthouse Procedures"), shall assign this matter to an available Special Referee to hear and determine as specified above.

Dated: July 14 2010

ENTER:



A handwritten signature in black ink, appearing to read "J. S. C.", is written over a horizontal line. The signature is highly stylized and cursive.

J. S. C.