

Grucci v Rabinowitz

2011 NY Slip Op 30494(U)

February 9, 2011

Supreme Court, Suffolk County

Docket Number: 06-22727

Judge: Peter Fox Cohalan

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SHORT FORM ORDER

INDEX No. 06-22727
CAL. No. 10-01375OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 24 - SUFFOLK COUNTY

PRESENT:

Hon. PETER FOX COHALAN
Justice of the Supreme Court

MOTION DATE 9-29-10
MOTION DATE 10-27-10
ADJ. DATE 11-15-10
MNEMONIC: # 005 - MD
006 - XMotD

-----X
MARGUERITE GRUCCI, :
 :
 :
 Plaintiff, :
 :
 - against - :
 :
 GREGORY RABINOWITZ and KRAMER & :
 RABINOWITZ, LLC, :
 :
 Defendants. :
-----X

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Upon the following papers numbered 1 to 32 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 12; Notice of Cross-Motion and supporting papers 13 - 27; Answering Affidavits and supporting papers 28 - 30; Replying Affidavits and supporting papers 31 - 32; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by the plaintiff for an order pursuant to CPLR §3212 granting partial summary judgment in her favor is denied; and it is further

ORDERED that this cross-motion by the defendants for an order pursuant to CPLR §3212 granting them summary judgment dismissing the complaint is determined herein.

The plaintiff commenced this action to recover damages for alleged legal malpractice by the defendants in failing to file a complaint and prosecute her action for a divorce. The plaintiff retained the defendant law firm and the defendant attorney, Gregory Rabinowitz Esq. (hereinafter Rabinowitz), on June 26, 2003 to represent her in an action for divorce from her husband, Vincent J. Grucci. The defendants commenced the divorce action by filing a summons with notice at the Suffolk County Clerk's Office

Grucci v Rabinowitz
Index No. 06-22727
Page 2

on July 23, 2003. By order, dated December 30, 2005, (Blydenburgh, J.), the Court granted an unopposed motion by the plaintiff's husband to dismiss the action pursuant to CPLR §3012 (b) for failure to serve a verified complaint despite due demand. The plaintiff subsequently commenced a new action for divorce in 2006 and obtained a judgment of divorce on March 18, 2009 pursuant to a stipulation of settlement, dated November 3, 2008.

In her complaint, the plaintiff alleges a first cause of action for legal malpractice for failure to prosecute; a second cause of action for legal malpractice for failure to obtain a permanent order of protection; and a third cause of action for breach of contract. In addition, the plaintiff alleges a fourth cause of action for treble damages pursuant to Judiciary Law § 487 for delay in turning her file over to her new attorney, removing documents from her file, willfully delaying recommencement of her suit, and deceitfully advising her that her grounds for divorce were not strong enough. The plaintiff also alleges a fifth cause of action for loss of use of unpaid support and maintenance due to the defendants' delay in releasing them from escrow; and a sixth cause of action for excessively billing the plaintiff. In their answer, the defendants admit that the defendant law firm accepted the plaintiff's retainer and agreed to represent her and they assert affirmative defenses including that the plaintiff authorized the decision not to file a complaint. The Court's computer records indicate that the note of issue in this action was filed on June 29, 2010.

The plaintiff now moves for partial summary judgment on her first cause of action for legal malpractice for failure to prosecute. In her affidavit, dated August 25, 2010, the plaintiff asserts that she had good and sufficient grounds for divorce but that the defendants advised her not to oppose her husband's motion to dismiss the plaintiff's action for divorce purportedly because the defendants believed that she had already been awarded sufficient pendente lite arrears. In addition, the plaintiff asserts that but for the failure of the defendants to file the complaint that had already been drafted she would have prevailed in said action and would have obtained a divorce. The plaintiff argues that after two and a half years litigation and \$38,300.00 in legal fees paid to the defendant law firm she had to commence a new action for divorce.

The defendants cross-move for summary judgment dismissing the complaint because the decision not to file a complaint was a legitimate tactical decision made by the defendants in consultation with and with the consent of the plaintiff. The defendants explain that the decision was made based on the plaintiff's financial condition, poor health, and ineffectiveness as a witness. In addition, the defendants contend that the plaintiff cannot prove actual loss and has not established that she would have succeeded in the first action inasmuch as she obtained a divorce on the grounds of constructive abandonment in the subsequent second action for divorce through agreement of the parties as part of settlement, not after trial.

Grucci v Rabinowitz
Index No. 06-22727
Page 3

To establish a prima facie case of legal malpractice, the plaintiff must prove that (1) the attorney departed from the exercise of that degree of care, skill, and diligence commonly possessed and exercised by a member of the legal community, (2) the attorney's departure from the standard of care was the proximate cause of the loss sustained by the plaintiff, and (3) the plaintiff incurred damages as a direct result of the attorney's actions (**Edwards v Haas, Greenstein, Samson, Cohen & Gerstein, P.C.**, 17 AD3d 517, 519, 793 NYS2d 167 [2nd Dept 2005]; see, **Barnett v Schwartz**, 47 AD3d 197, 848 NYS2d 663 [2nd Dept 2007]). 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**, 8 NY3d 438, 442, 835 NYS2d 534 [2007]). Expert evidence generally is required if the basis for judging the adequacy of professional service is not within the ordinary experience of the fact finder, although an affirmation from the plaintiff's attorney may be sufficient (see, **Zasso v Maher**, 226 AD2d 366, 367, 640 NYS2d 243 [2nd Dept 1996][internal citations omitted]). Conclusory allegations of damages or injuries predicated on speculation cannot suffice for a malpractice action (see, **Holschauer v Fisher**, 5 AD3d 553, 554, 772 NYS2d 836 [2nd Dept 2004]).

For an attorney who is a defendant in a legal malpractice action to succeed on a motion for summary judgment evidence must be submitted in admissible form establishing that the plaintiff is unable to prove at least one of the essential elements of legal malpractice (see, **Shopsin v Siben & Siben**, 268 AD2d 578, 578, 702 NYS2d 610 [2nd Dept 2000]; see also, **Eisenberger v Septimus**, 44 AD3d 994, 995, 845 NYS2d 102 [2nd Dept 2007]). The selection of one among several reasonable courses of action by an attorney does not constitute malpractice (see, **Rosner v Paley**, 65 NY2d 736, 738, 492 NYS2d 13 [1985]).

The attorney who represented the plaintiff in her subsequent divorce action, Jeffrey W. Walker Esq., (hereinafter Walker), has submitted an affidavit, dated September 2, 2010, in support of the plaintiff's motion and states that the failure of the defendants to file a complaint after notice and demand from their adversary was a departure from the minimum standards of legal practice for attorneys practicing in the field of matrimonial law. He adds that this was a particularly egregious departure because two years had passed from the time that the complaint had been demanded. Walker points out that the plaintiff was granted a divorce in her subsequent divorce action based on the same allegations as those in the first action's draft complaint. He further opines that based on his knowledge of the case, the plaintiff would have been able to prove the allegations in the draft complaint in the first divorce action and the plaintiff would have been granted a judgment of divorce.

In his deposition testimony, dated July 31, 2009, Rabinowitz testified that he believed that the plaintiff would not be a strong witness in a divorce action because the

Grucci v Rabinowitz
Index No. 06-22727
Page 4

plaintiff was very frail and she did not follow his advice and did not testify appropriately during the Family Court hearing for a permanent order of protection. He testified that he advised the plaintiff not to oppose the motion to dismiss even though she wanted a divorce because it might not be in her best financial interest to obtain a divorce. Rabinowitz explained that his advice was based on consideration that the plaintiff had been able to recover close to all the marital assets, she had a very favorable support order, she had been awarded counsel fees, and she was near the ten year marriage threshold for enhanced Social Security payments. In addition, Rabinowitz pointed out that the plaintiff had indicated her understanding and had given her consent in Court not to oppose the motion to dismiss. He also explained that the escrow funds were released after a correction was made to the transcript to indicate the proper attorney holding the funds.

In her deposition testimony, dated September 5, 2008, the plaintiff testified that she was puzzled by the failure of Rabinowitz to ask her questions at the Family Court hearing for a permanent order of protection and by his reaction to her after the hearing. In addition, the plaintiff's testimony indicates that she did not comprehend why Rabinowitz considered that her grounds for divorce were not strong given all the background information that she had provided him. The plaintiff explained that she gave her consent to dismissal of the first divorce action relying on the advice of Rabinowitz as an attorney and his assurances that if they recommenced the divorce action there would be no gap in her recovery and that the new action would be assigned to the same judge, both of which did not occur. According to the plaintiff, the defendant law firm incorrectly billed her prior to and after her representation by Rabinowitz. The plaintiff also testified that the defendant law firm delayed months in releasing the funds that were ordered to be immediately released from escrow and turned over her file in incomplete form to her new attorney. She pointed out that the draft verified complaint that had been prepared by the defendant law firm's staff with information that she provided was one of the items missing from the file.

Here, the plaintiff met her burden by submitting expert proof that the defendants' failure to file a complaint after a two year outstanding demand and advising the plaintiff not to oppose the dismissal motion without obtaining her divorce, the ultimate relief that she desired, was a departure from the minimum standards of care in the field of matrimonial law. However, the defendants have raised triable issues of fact as to the extent to which the plaintiff cooperated with the defendants in the prosecution of the divorce action and whether she would have prevailed in the first divorce action (see, **Greene v Sager**, 78 AD3d 777, 910 NYS2d 546 [2nd Dept 2010]; **Avery v Sirlin**, 26 AD3d 451, 451, 809 NYS2d 468 [2nd Dept 2006]). Therefore, the request by the plaintiff for summary judgment on her first cause of action for legal malpractice for failure to prosecute and the request by the defendants for summary judgment dismissing the first and second causes of action for legal malpractice are denied (see, **Eisenberger v Septimus**, 44 AD3d at 995; **Avery v Sirlin**, 26 AD3d at 451).

