

John P. DiMascio & Assoc., LLP v Mendelsohn

2011 NY Slip Op 31574(U)

May 27, 2011

Sup Ct, Nassau County

Docket Number: 15931-09

Judge: Vito M. DeStefano

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SUPREME COURT - STATE OF NEW YORK

Present:

HON. VITO M. DESTEFANO,
Justice

TRIAL/IAS, PART 19
NASSAU COUNTY

JOHN P. DIMASCIO & ASSOCIATES, LLP.,
a/s/I to **THE LAW OFFICES OF JOHN P.**
DIMASCIO,

Plaintiff,

-against-

NANCY MENDELSON,

Defendant.

Decision and Order

MOTION SUBMITTED:
March 18, 2011
MOTION SEQUENCE:01,
02, 03
INDEX NO.: 15931-09

The following papers and the attachments and exhibits thereto have been read on this motion:

Notice of Motion	1
Notice of Cross Motion	2
Amended Notice of Cross Motion	3
Memorandum of Law in Opposition to Motion and in Support of Cross Motion	4
Affirmation in Opposition to Cross Motion	5
Memorandum of Law in Opposition to Cross Motion	6

In this action to recover fees for legal services rendered, the Plaintiff¹ moves for an order pursuant to CPLR 3211(a)(1) and (a)(7) dismissing the Defendant's counterclaims and for sanctions pursuant to 22 NYCRR 130-1.1. The Defendant opposes Plaintiff's motion and cross-moves for: 1) an order pursuant to 22 NYCRR 130-1.1 and 130-1.2 imposing sanctions and attorneys fees upon the Plaintiff and its attorneys; 2) a finding and order pursuant to CPLR 2214 (c); (3) awarding attorneys' fees, costs and disbursements to defense counsel; 4) permitting the Defendant leave of court to amend the counterclaims; and 5) ordering a hearing with respect to sanctions. For the reasons that follow, the Plaintiff's motion is granted in part and denied in part; and the Defendant's motion is denied.

Background

The Plaintiff rendered professional legal services to the Defendant in a matrimonial action from 2003 through 2007. The Defendant asserts that at the time she retained the Plaintiff to represent her in the matrimonial action, the Plaintiff promised her as follows:

[T]hat she was entitled to a large settlement, that he would be asking for maintenance of a million dollars but that he would get at least \$750,000.00, that the maintenance would be for a significant period of time and that she would not have to work unless she chose to, that she could invest the money she would be getting and that she could live off the interest that it would generate, that she would be obtaining monies due to the leverage of the safe deposit box containing \$200,000

(Ex. "B" to Plaintiff's Motion at ¶ 39). The Plaintiff denies having made any such promises.

After 33 days of trial, Thomas Liotti, Esq. was substituted for the Plaintiff because, according to the Defendant, the Plaintiff: Wanted to increase the billing statements to obtain more attorneys' fees; inflated the billing statements despite the protest of the Defendant; and "presented the documents for filing with the court." The Defendant allegedly refused and questioned the Plaintiff about its proposed conduct, after which Plaintiff "determined to cease representing the defendant" (Ex. "B" to Plaintiff's Motion at ¶ 41; Affirmation in Support of Cross Motion at ¶¶ 9-11).

Mr. Liotti concluded the remainder of the trial, after which Justice Anthony Falanga issued a post-trial decision wherein the Defendant was awarded, *inter alia*, one-half of the

¹ John P. DiMascio & Associates, LLP. is the successor in interest to The Law Offices of John P. DiMascio. Under the circumstances and considering that the parties draw no distinction between the entities, the court shall treat the entities as the same.

marital estate; maintenance in the amount of \$6,000 per month for 36 months (\$216,000), and then \$5,000 per month until Defendant reached the age of 65 (\$900,000); and \$100,000 towards her \$330,000 in attorneys' fees (Justice Falanga's Decision and Order annexed as Ex. "E" to Plaintiff's Motion; Affirmation in Support of Motion at ¶¶ 14-15).² The remaining amount of attorneys' fees incurred by the Defendant but not awarded by Justice Falanga (in the amount of \$150,000) is the subject of this action, which was commenced by the Plaintiff in August 2009 (Ex. "A" to Plaintiff's Motion). The Defendant answered the complaint with general denials and affirmative defenses and asserted three counterclaims, for legal malpractice, breach of contract and fraud (Ex. "B" at ¶¶ 33-54).

Plaintiff's Motion to Dismiss Counterclaims

In the instant motion, the Plaintiff argues that the legal malpractice counterclaim should be dismissed as it fails to state a cause of action for which relief can be granted in that Defendant has not suffered any damages - a requisite element to sustain a cause of action for legal malpractice. In a legal malpractice action, the claimant must show that an 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 this professional duty caused the [claimant's] actual damages" (*McCoy v Feinman*, 99 NY2d 295, 301-02 [2002]). In order to survive a motion to dismiss, the complaint must allege that but for counsel's alleged malpractice, the claimant would have prevailed in the underlying action or not have incurred any damages (*Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438 [2007]).

In the instant case, the Defendant's counterclaim asserts that had the Plaintiff competently prosecuted her claim, the "defendant would not have had to retain substitute counsel and would have recovered significantly more maintenance, a larger share of the marital assets, and would not have had to incur the additional attorneys fees" (Ex. "B" to Plaintiff's Motion at ¶ 39). However, a review of Justice Falanga's decision demonstrates that the Defendant received more maintenance than what was purportedly promised to her by the Plaintiff, that she received approximately half of all of the marital assets, and half of the value of her husband's interest in

² An additional \$85,000 had previously been paid from marital assets to both Plaintiff as well as the attorney for the husband in the underlying matrimonial action (Justice Falanga's Decision and Order annexed as Ex. "E" to Plaintiff's Motion at p 30).

his law practice (Justice Falanga's Decision and Order annexed as Ex. "E" to Plaintiff's Motion).³ Accordingly, the record is devoid of evidence that the Defendant sustained any actual damages. To the contrary, in rendering his decision, Justice Falanga considered the Defendant's contribution of her inheritance toward the marital assets and, in doing so, awarded the Defendant one-half of the value of her husband's law practice despite ample case law awarding typically less to the non-owner spouse.⁴

³ The Defendant asserts in her affidavit that the Plaintiff was also negligent in failing to point out at trial that had the Defendant remained working she would have been entitled to lifetime medical benefits (Affidavit in Support of Cross Motion at ¶ 27). However, Justice Falanga noted that the Defendant "came into the marriage with a valuable commodity, her master's degree in education" and that "she sacrificed her career by agreement of both parties to perform duties as parent, spouse and homemaker" (Justice Falanga's Decision and Order annexed as Ex. "E" to Plaintiff's Motion at p 23). But Justice Falanga also concluded that the Defendant had the ability to contribute toward her own support, to earn \$30,000 a year, and that she would have investment income stemming from maintenance and her share of the marital assets (Justice Falanga's Decision and Order annexed as Ex. "E" to Plaintiff's Motion at p.26).

The Defendant also states in her affidavit that the Plaintiff "failed to point out and emphasize to the court that my inheritance funds [\$220,000] were not to be distributed to my former husband" (Affidavit in Support of Cross Motion at ¶ 28). However, Justice Falanga was well aware of the Defendant's inheritance from her mother and the fact that the Defendant had commingled these funds with marital assets resulting in Defendant's loss of a separate property credit for such inheritance. Despite Defendant's loss of her entitlement to the separate property credit, Justice Falanga nevertheless "consider[ed] her contribution of \$220,000.00 in separate property toward the creation of the marital assets as a factor in determining her equitable share of marital assets" (Justice Falanga's Decision and Order annexed as Ex. "E" to Plaintiff's Motion at p.19).

⁴ In a decision and order dated January 15, 2008, Justice Falanga stated:

The court finds that the marital estate should be distributed equally. The court notes that it was not required to divide all assets equally and in certain cases, the owner of a professional practice is awarded a larger proportion of its value. In the instant case, the Court awards the wife 50% of the value of the husband's interest in his law practice on the following grounds, to wit: although the wife came into the marriage with a valuable commodity, her master's degree in education, she sacrificed her career by agreement of both parties to perform duties as parent, spouse and homemaker; the wife contributed \$220,000.00 of her separate inheritance assets to the marital estate; and the wife worked in the husband's law firm for no remuneration for ten years and later for nominal pay

(Justice Falanga's Decision and Order annexed as Ex. "E" to Plaintiff's Motion at pp.22-23).

The legal malpractice claim should be dismissed, in any event, insofar as any purported promises made by the Plaintiff as to what Defendant would receive in the matrimonial action is contradicted by the express language of the retainer agreement (“retainer”). It is axiomatic that where documentary evidence flatly contradicts the factual allegations of a claim and conclusively disposes of the claim, dismissal pursuant to 3211(a)(1) is warranted (*Pacella v Berardino v Ochlan*, 2 AD3d 556 [2d Dept 2003]; *Kalivia Food Corp. v Hunts Point Cooperative Market, Inc.*, 244 AD2d 460 [2d Dept 1997]). The documentary evidence submitted by the Plaintiff, to wit, the retainer agreement, established that Plaintiff made no representations to the Defendant as to what she would be awarded in the matrimonial action (*see Hallman v Kantor, et al.*, 72 AD3d 895 [2d Dept 2010] [retainer agreement constituted documentary evidence which conclusively established a defense to the plaintiff’s claim of legal malpractice]). The Defendant acknowledged receipt of the retainer and signed it. The retainer provides, in relevant part:

ACKNOWLEDGMENT AND UNDERSTANDING

- a. The client acknowledges that he or she has read this agreement in its entirety, has had full opportunity to consider its terms, and has had full and satisfactory explanation of same, and fully understands its terms and agrees to such terms.
- b. The client fully understands and acknowledges that there are no additional or different terms or agreements other than those expressly set forth in this written agreement.

....

NO GUARANTEES

It is specifically acknowledged by you that this firm has made no representations to you express or implied concerning the outcome of the litigation presently pending or hereafter to be commenced between you and your spouse. You further acknowledge that this firm has not guaranteed and cannot guarantee the success of any action taken by the firm on your behalf during such litigation with respect to any matter therein including without limitation issues of spousal and/or child support, custody and/or visitation, exclusive occupancy of the marital premises, equitable distribution of marital assets, the declaration of separate property, counsel fees and/or a trial.

(Ex. "D" to Plaintiff's Motion).⁵ Contrary to the Defendant's argument, the retainer is not ambiguous and, thus, the retainer must be enforced according to its terms and the language therein must be given its plain and ordinary meaning (*W.W.W. Associates, Inc. v Giancontieri*, 77 NY2d 157 [1990]; *Edwards v Poulmentis*, 307 AD2d 1051 [2d Dept 2003]).

The counterclaims asserting breach of contract and fraud based upon alleged oral representations made by the Plaintiff must also be dismissed pursuant to CPLR 3211(a)(1) because they are directly contradicted by recitals contained in the retainer agreement, which established that Plaintiff made no representations to the Defendant as to what she would be awarded in the matrimonial action.⁶ In addition, the court notes that the fraud claims asserted in the answer and proposed amended answer are also deficient given the Plaintiff's inability to establish that she reasonably relied on Defendant's alleged oral representations, a necessary element to support a claim of fraud (*Stone v Schulz*, 231 AD2d 707 [2d Dept 1996] [where there is "meaningful" conflict between an express provision in a written contract and a prior oral representation, "the conflict negates a claim of a reasonable reliance upon the oral

⁵ Noticeably absent from the copy of the retainer agreement annexed to the Defendant's motion papers is the page which contains express language as to the clients "acknowledgments and understanding" as well as the "no guarantees" section.

⁶ It is noted that the counterclaim for breach of contract sets forth that the Plaintiff contracted with the Defendant, and as part of the retainer, was "to represent the defendant diligently and competently", and that Plaintiff breached that contract by "failing to properly prosecute the case", "negligently encouraging her to settle", and "drastically change the terms of the promises and guarantees that he had made" (Ex. "B" to Plaintiff's Motion at ¶¶ 44-47).

Insofar as fraud is alleged, the Defendant maintains that such statements were made with the "intent to deceive the defendant and to induce her to sign a retainer agreement, become responsible for additional and unnecessary fees, and incur unnecessary attorneys fees" (Ex. "B" to Plaintiff's Motion at ¶¶ 49-54). While the Defendant maintains in her affidavit that a large part of the fraud claim concerns the "over-billing and over-charging" by the Plaintiff (Affidavit in Support of Cross Motion at ¶ 18), the Defendant asserts a claim for inflated billing in her counterclaim for legal malpractice (Ex. "B" to Plaintiff's Motion at ¶ 41).

representation”]).⁷

Furthermore, the breach of contract and fraud claims arise from the same set of facts as the legal malpractice cause of action, do not allege distinct damages, and, thus, are duplicative of the legal malpractice action (*Kvetnaya v Tylo*, 49 AD3d 608 [2d Dept 2008]; *Malarkey v Piel*, 7 AD3d 681 [2d Dept 2004]; *Laruccia v Forchelli, Curto, Schwartz, Mineo, Carlino & Cohn, LLP*, 295 AD2d 321 [2d Dept 2002]).

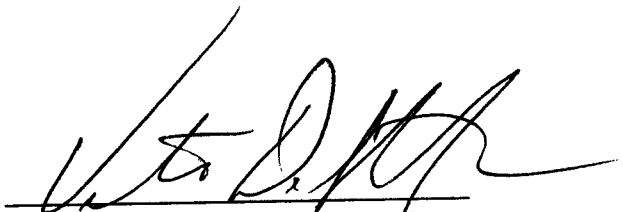
Notwithstanding that leave to amend is freely granted, where the amendment, as here, is patently devoid of merit, leave shall be denied. Moreover, the proposed amendments are duplicative of the legal malpractice cause of action (*Laruccia v Forchelli, Curto, Schwartz, Mineo, Carlino & Cohn, LLP*, 295 AD2d 321 [2d Dept 2002] [leave to amend to add new facts for fraud claim were duplicative of legal malpractice claim and thus, leave to amend denied]).

Accordingly, it is hereby ordered that: the branch of Plaintiff’s motion to dismiss the counterclaims is granted and the branch of Plaintiff’s motion for sanctions is denied; the Defendant’s motion is denied in its entirety.

This constitutes the decision and order of the court.

Dated: May 27, 2011

ENTERED
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NASSAU COUNTY
COUNTY CLERK'S OFFICE


Hon. Vito M. DeStefano, J.S.C.

⁷ Regarding, the portion of Defendant’s fraud claim pertaining to inflated billing statements, the Defendant asserts that the Plaintiff “had falsely and fraudulently added to and inflated the billing statements despite the protest of the defendant, and presented the documents for filing with the court. The defendant wanted no part of this and the plaintiff insisted to obtain a higher amount of counsel fees. The defendant became quite upset and upon questioning the plaintiff of this and other conduct, the plaintiff determined to cease representing the defendant” (Ex. “I” to Defendant’s Motion). Given the Defendant’s admission that she was aware of any purported over billing and that her objection to it allegedly resulted in a termination of the attorney-client relationship, the Defendant cannot maintain that she was deceived by ‘justifiably relying’ on the Plaintiff’s purported representation.