

Malvasio v Savran

2011 NY Slip Op 31763(U)

June 30, 2011

Supreme Court, Nassau County

Docket Number: 6932/09

Judge: Jeffrey S. Brown

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SHORT FORM ORDER

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

**P R E S E N T : HON. JEFFREY S. BROWN
JUSTICE**

-----X **TRIAL/IAS PART 21**
**LENORE MALVASIO and CHERUBIN ANTIQUES,
INC.,**

Plaintiffs,

-against-

**EDWARD SAVRAN, SAVRAN LAW, PLLC, MICHAEL
J. SCHLUSSEL a/k/a MICHAEL SCHWARTZ,
NICHOLAS PELLEGRINI, LLP and KATHERINE
RICHARDS, ESQ.,**

Defendants.

**Index No. 6932/09
Mot. Seq. # 3
Motion Date 11/9/09
Submit Date 5/18/11
X X X**

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The following papers were read on this motion:	Papers Numbered
Notice of Motion, Affidavits (Affirmations), Exhibits Annexed.....	1
Answering Affidavit	2
Reply Affidavit.....	3

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Motion pursuant to CPLR 3211(a)(7) by defendants Nicholas Pellegrini, LLP and Katherine Richards, Esq. to dismiss the complaint is granted and the complaint is hereby dismissed.

BACKGROUND

Pursuant to an agreement dated May 30, 2007, plaintiffs Lenore Malvasio and Cherubin Antiques, Inc. (collectively referred to as "plaintiff") retained the moving defendants to represent her in an action¹ to recover monies allegedly owed by the decedent Ursula Egger, plaintiff's friend and business associate who died in Germany in 2007. Plaintiff and decedent Ursula Egger were engaged in an antique business together wherein Ms. Egger would purchase merchandise to be sold in plaintiff's store, Cherubin Antiques, Inc. The retainer agreement specifically

¹Plaintiff sought to recover \$183,048, plus interest in the amount of \$262,052, for a total of \$445,100 allegedly owed by decedent Ursula Egger.

acknowledges that defendant Katherine Richards, Esq. was of counsel to the Law Offices of Anthony A. Capetola and that plaintiff had no current nor anticipated conflict with Mr. Capetola, the principal of 2 Audrey Inc., plaintiff's landlord.

After a dispute arose between plaintiff and Cherubin's landlord, attorney Anthony A. Capetola, defendant Katherine Richards informed plaintiff, by letter dated March 5, 2008, that the Pellegrini law firm was closing its file with regard to the *Malvasio v Egger* matter and returning all of the documents originally supplied to it. A consent to change attorney, which apparently was never executed by plaintiff, was forwarded to her on May 27, 2008. Allegedly under the belief that plaintiff had retained new counsel² to further represent her interests in the action against Egger's estate, defendants Katherine Richards, Esq. and the Pellegrini law firm took no steps to defend or respond to a motion brought by Mark Egger, decedent's son, for summary judgment dismissing the action commenced by defendants in Supreme Court, Suffolk County (Index No. 07-21289) to impose a constructive trust on the assets of the decedent's estate, i.e., a house located at 33 View Point Road, East Setauket, New York.

Plaintiff seeks to hold defendants Katherine Richards and the Pellegrini law firm liable for legal malpractice contending that as a result of their acts and omissions plaintiff was prevented from recovering the monies owed by the decedent. Specifically, plaintiff alleges that defendants failed to:

commence an action against the estate of Ursula Egger in Surrogate's Court³; and
oppose a motion for summary judgment brought by defendant Mark Egger in the Suffolk County action, as a result of which the motion was granted on default, and the action against Mark Egger was dismissed.

Defendants Katherine Richards and the Pellegrini law firm seek to dismiss the legal malpractice claim pursuant to CPLR 3211(a)(7) predicated on the grounds that the complaint fails to allege facts tending to show that "but for" their actions, plaintiff would have prevailed in the underlying action. As such, the moving defendants contend that plaintiff's complaint lacks the requisite element of proximate causation essential to a legal malpractice claim.

²In a letter dated June 17, 2008 from Mark Matiash, Esq., defendants were informed that Savran Law, PLLC was retained by plaintiff in connection with the proceeding against Mark Egger.

³According to plaintiff's attorney, the moving defendants initially advised plaintiff to become a creditor of the decedent's estate, and attempted to file a petition to compel production of the decedent's will in Surrogate's Court: Suffolk County. The petition was allegedly rejected in the absence of documentation as to the death of Ursula Egger in Germany.

Plaintiff's opposition to defendants' motion is based on allegations, *inter alia*, that defendants failed to obtain a copy of Ursula Egger's death certificate, did not file a proceeding in Surrogate's Court, brought a defective lawsuit against decedent's son, Mark Egger, in Supreme Court and failed to properly advise plaintiff with respect to a possible personal injury action arising from an automobile accident.

ANALYSIS

On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction; the facts alleged must be accepted as true, and the plaintiff is to be accorded the benefit of every favorable inference. *Thomas v Thomas*, 70 AD3d 588, 590 [1st Dept 2010]. In assessing a CPLR 3211(a)(7) motion, the test is not whether plaintiff has artfully drafted a complaint but whether deeming the complaint to allege whatever can reasonably be implied from its statements, a cause of action can be sustained. *Ambassador Factors v Kandel & Co.*, 215 AD2d 305, 306 [1st Dept 1995] (citations and internal quotation marks omitted). The criteria is whether plaintiff has a cause of action, not whether he has stated one. *Wilner v Allstate Ins. Co.*, 71 AD3d 155, 159 [2nd Dept 2010].

The motion must be denied if, from the complaint's four corners, factual allegations are discerned which taken together manifest any cause of action cognizable at law. *Polonetsky v Better Homes Depot, Inc.*, 97 NY2d 46, 54 [2001]. A court is permitted to consider evidentiary material submitted by a defendant in support of a motion to dismiss pursuant to CPLR 3211(a)(7). In such a situation, the criteria becomes whether the proponent of the pleading has a cause of action, not whether she had stated one. *Sokol v Leader*, 74 AD3d 1180, 1181-1182 [2nd Dept 2010].

In an action to recover damages for legal malpractice, a plaintiff must demonstrate that the attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession; that the attorney's breach of this duty proximately caused plaintiff to sustain actual and ascertainable damages; and that but for the negligence of the attorney the plaintiff-client would have prevailed in the underlying action or would not have incurred damages. *Bells v Foster*, 83 AD3d 876 [2nd Dept 2011]; *Malik v Beal*, 54 AD3d 910, 911 [2nd Dept 2008]; *Barnett v Schwartz*, 47 AD3d 197, 201 [2nd Dept 2007]. An attorney may be liable for ignorance of the rules of practice for failure to comply with conditions precedent to suit, for neglect to prosecute or defend an action or for failure to conduct adequate legal research. *Conklin v Owen*, 72 AD3d 1006, 1007 [2nd Dept 2010]. An attorney is free, however, to select among reasonable courses of action in prosecuting a client's case without exposing him or herself to liability for malpractice. *Healy v Finz & Finz, P.C.*, 82 AD3d 704, 706 [2nd Dept 2011]; *Noone v Stieglitz*, 59 AD3d 505, 507 [2nd Dept 2009]. The failure to demonstrate the requisite "but for" proximate cause requires dismissal of a legal malpractice action regardless of whether the attorney was negligent. *Snolis v Clare*, 81 AD3d 923, 925 [2nd Dept 2011]; *Kluczka v Lecci*, 63 AD3d 796, 797 [2nd Dept 2009]; *Leder v Spiegel*, 31 AD3d 266, 267-268 [1st Dept 2006] *aff'd* 90 NY3d 836 [2007]; *Russo v Feder, Kaszovitz, Isaacson, Weber, Skala & Bass, LLP*, 301 AD2d

63, 67 [1st Dept 2002]. Mere speculation about a loss resulting from an attorney's alleged omission is insufficient to sustain a *prima facie* case of legal malpractice. *Dupree v Voorhees*, 68 AD3d 810, 812 [2nd Dept 2009], *lv to appeal den.*, 15 NY3d 705 [2010].

Plaintiff's claim fails to allege material facts giving rise to a cognizable claim alleging legal malpractice. By demonstrating that plaintiff did not possess, and was unable to submit, sufficient evidence, i.e., documentary evidence, of the existence of the purported loans, and Ursula Egger's promise to repay same, the moving defendants have shown that the essential element of "but for" causation is absent from plaintiff's legal malpractice claim. Plaintiff failed to establish defendants' negligence by showing they did not exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession.

Although the court must accept the allegations in the complaint as true, bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, are insufficient to defeat a motion to dismiss. Here, the complaint fails to plead specific allegations demonstrating that "but for" defendants' alleged negligence, she would have prevailed in the underlying action. Nothing in plaintiff's submissions sheds any additional light on or demonstrates that plaintiff has a meritorious claim against defendants Katherine Richards and/or the Pellegrini law firm. The facts show that defendants notified plaintiff that they could no longer represent her and had closed their file in the underlying matter as of March 5, 2008.

The summary judgment motion in the Suffolk County action was granted on default seven months after plaintiff had retained new counsel on June 17, 2008. Plaintiff has failed to set forth any factual basis on which to conclude that had defendants opposed the summary judgment motion at issue, plaintiff would have prevailed in the suit against Mark Egger and ultimately received the monies allegedly due and owing by the Egger estate.

The foregoing constitutes the decision and order of this Court. All applications not specifically addressed herein are denied.

Dated: June 20, 2011

ENTER
ENTERED
JUN 22 2011 HON. JEFFREY S. BROWN
NASSAU COUNTY J. S. C.
COUNTY CLERK'S OFFICE

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