

Robinson v Day

2011 NY Slip Op 33758(U)

August 30, 2011

Sup Ct, New York County

Docket Number: 600907/2010

Judge: Melvin L. Schweitzer

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

PRESENT: MELVIN L. SCHWEITZER
Justice

PART 45

ADAM ROBINSON

INDEX NO. 600907/10

- v -

LAURA DAY, DAVID J. DEPINTO, et al

MOTION DATE _____

MOTION SEQ. NO. 003

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

by defendant De Pinto, Hornes and Associates to dismiss the complaint is DENIED per the attached Decision and Order.

Dated: August 30, 2011

Melvin L. Schweitzer

MELVIN L. SCHWEITZER

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 45

-----X	
ADAM ROBINSON,	:
	:
Plaintiff,	:
	:
-against-	:
	:
LAURA DAY, DAVID J. DEPINTO,	:
ROBINSON DAY, LLC and LAURA DAY, INC.,	:
and DEPINTO NORNES & ASSOCIATES, LLP,	:
	:
Defendants.	:
-----X	

Index No. 600907/10
 DECISION AND ORDER
 Motion Sequence Nos. 002, 003

MELVIN L. SCHWEITZER, J.:

This matter arises out of a relationship between a prominent writer and his sometime companion. At issue is the validity of assignments of items of the author’s income stream.

Background

According to plaintiff Adam Robinson’s (Mr. Robinson) complaint in this case, he first met defendant Laura Day (Ms. Day) in 1994. Shortly thereafter, they formed a close relationship. He asserts that she had no career or regular source of income, but supported herself by providing psychic readings to select clients, including celebrities. He asserts she had no marketable skills and had never written a book or published an article. As she needed money to be expended in a custody battle with her husband over her son, Mr. Robinson allegedly took matters into his hands and converted Ms. Day’s stream of consciousness notes into a book titled “Practical Intuition.” Ms. Day became affluent as a result of the book’s popularity.

In 1997 Mr. Robinson commenced an action against the Princeton Review, a company he had co-founded, which, after settlement of the action, would result in providing him with a substantial stream of income, approximating \$350,000 a year. According to Mr. Robinson,

Ms. Day immediately began a systematic campaign of psychological and emotional manipulation to obtain dominion over his financial assets. Using the veiled threat that he should show that he really cared about her and her son, she allegedly relentlessly pursued control over his income.

In 2000, Mr. Robinson, after concluding the Princeton Review action, succumbed to Ms. Day's assault. Based on her alleged oral representation that she would use all of Mr. Robinson's money for his benefit, Mr. Robinson executed an unambiguous assignment on February 11, 2000 (2000 Agreement), providing Ms. Day with 50% of the proceeds of the Princeton Review settlement. Ms. Day allegedly told Mr. Robinson that she would return the income stream if they ceased being a couple. As noted below, he terminated their relationship in 2009.

In fact, according to Mr. Robinson, Ms. Day never asserted rights under the 2000 Agreement and he, therefore, believed the 2000 Agreement was inoperative. Furthermore, he asserts Ms. Day subsequently promised him she would never enforce any provision of the 2000 Agreement. Mr. Robinson asserts that he was thus lulled into inaction and never sought to modify or rescind the 2000 Agreement prior to bringing this action, approximately 10 years later.

In 2003, an attorney, David Depinto (Mr. Depinto) appeared on the scene. Mr. Depinto then was Ms. Day's attorney and now was retained as Mr. Robinson's accountant and attorney. In 2004 Mr. Depinto allegedly told Mr. Robinson that he was in serious trouble with the Internal Revenue Service (IRS), but could avoid IRS attachments, and possible jail time, by putting his income stream into a limited liability company. Heeding such advice, a limited liability company called Robinson-Day (Robinson-Day) was formed and Mr. Robinson transferred 100%

of his extant Princeton Review income to Robinson-Day pursuant to a 2005 Agreement (the 2005 Agreement). Now, in Mr. Robinson's view, he asserts that this transfer was fraudulent, unconscionable, procured under duress and was the product of Mr. Depinto's conflicted, unethical and improper legal advice.

Subsequently, in 2009, Mr. Robinson informed Ms. Day that he was terminating their relationship and moving out of her apartment. However, he continued to maintain contact with Ms. Day and her son. At some point Ms. Day, in the presence of her son, allegedly took advantage of Mr. Robinson's psychological infirmities and manipulated him into agreeing to transfer his interest in Robinson-Day to her. This was allegedly effectuated by playing on Mr. Robinson's insecurities with respect to his relationship with her son. Mr. Robinson also alleges that Ms. Day previously had threatened to ruin his life and deprive him of any contact with her son.

In 2009, pursuant to an Option Agreement (Option Agreement), Mr. Robinson granted Ms. Day an option to purchase his interest in Robinson-Day. Mr. Robinson alleges that he did so as Ms. Day promised she would use the cash flow from the transferred royalty payments to discharge Mr. Robinson's tax liabilities and solely for his personal needs. Shortly thereafter, Mr. Robinson executed an unambiguous agreement (Transfer Agreement) transferring his interest in Robinson-Day to Ms. Day. Mr. Robinson alleges that each of the agreements entered into in 2009 was fraudulent, lacked fair consideration, breached a fiduciary duty and was the product of undue influence and duress.

Furthermore, Mr. Robinson asserts that each of the agreements entered into in 2009 was also the product of Mr. Depinto's unethical involvement in his affairs. Mr. Robinson alleges

Mr. Depinto acted at this time as counsel to both himself and Ms. Day and unscrupulously neglected to protect Mr. Robinson's interest in these circumstances.

Discussion

The basis of Mr. Robinson's numerous claims against Ms. Day is that she dominated him to the point that he was unable to possess the requisite faculties to know that signing away his rights with respect to royalty income was not in his best interest. Further, he also asserts that he did so only because Ms. Day manipulated him into believing that she would use the cash flow to provide for his needs and return it to him in the event that their relationship terminated. These basic facts form the foundation for the numerous legal theories of this lawsuit, ranging from fraud to breach of fiduciary duty which Mr. Robinson now asserts against Ms. Day.

The court first addresses the circumstances surrounding the 2000 Agreement. The allegations in the complaint portray Mr. Robinson as anxious with respect to his relationship with Ms. Day's son and Ms. Day herself. No allegation is made that Mr. Robinson, although anxious and perhaps less forceful in his dealings with Ms. Day than he might have been, was incapable of independent action. The law in New York with respect to claims of undue influence and duress is set out clearly in *In re Am. Comm. for the Weizmann Inst. of Sci. v Dunn*. (36 AD3d 419 [1st Dept 2007] *aff'd* 10 NY3d 82 [2008]). There the court said that in order to prevail on a claim of undue influence the plaintiff must allege moral coercion which restrained independent action and destroyed free agency. In other words, plaintiff must allege an absence of meaningful choice on his part. (*Wachovia Sec., LLC v Joseph*, 56 AD3d 269, 270 [1st Dept 2008] (allegation that plaintiff fell into defendant's "trap" that price was unfair was insufficient to survive a motion to dismiss)).

The court is of the opinion that the complaint is devoid of assertions that would permit it to make such a finding with respect to the 2000 Agreement. Ms. Day's aggressive, demanding personality, which is the most negative influence the court can draw from the complaint, is not nearly enough to meet the *Weizmann* test. The complaint is bare of allegations that in 2000 Mr. Robinson no longer possessed free agency. Accordingly, the court dismisses any cause of action arising out of the 2000 Agreement. The court also notes that the events regarding the 2000 Agreement are considerably without the statute of limitations applicable to any claim that Mr. Robinson alleges with respect thereto. However creative Mr. Robinson's arguments may be regarding the circumstances surrounding the 2000 Agreement, they simply cannot surmount this impediment.

The court now turns to the creation of Robinson-Day in 2004 and the transfer in 2005 by Mr. Robinson of his remaining rights to royalty and other income to Robinson-Day. Mr. Robinson's first contention is a conclusory allegation that Robinson-Day was a company in name only and served no function whatsoever except as a vehicle to further Ms. Day and Mr. Depinto's scheme to defraud Mr. Robinson of his income. He further alleges, on information and belief, that Robinson-Day was not a valid entity as its members never complied with numerous procedural requirements of the entity's operating agreement. In any event, Mr. Robinson in 2005 made the transfer referenced above.

Mr. Robinson alleges that he only consented to the 2005 Agreement for the purpose of assigning the royalty income to the LLC to prevent the IRS from seizing his royalty income. Therefore, he allegedly complied with Ms. Day's suggestions because of the high degree of trust and confidence he placed in Ms. Day and Mr. DePinto, and the threat of prison if he did not do as he was told. Mr. Robinson once again alleges that this agreement was unconscionable,

fraudulent, lacked fair consideration, was procured under duress, and was the product of conflicted, unethical and improper legal advice.

Mr. Robinson's allegations with respect to the 2005 Agreement support the conclusion that he contracted freely. He alleges that he signed the 2005 Agreement because he believed that by transferring assets to a limited liability company that he only partially owned he would be able to secure a better deal from the IRS. If true, that allegation would support the conclusion that Mr. Robinson's execution of that agreement was a strategic decision he made; an exertion of free will.

The court does not find persuasive Mr. Robinson's characterization of the royalties as his. Mr. Robinson avoided taxation for years by reporting no royalty rights to the IRS, but instead reporting that the bulk of his income consisted of the 50% distributions he received from Robinson-Day, as a 50% member of that entity. The court therefore recognizes that this claim is wholly inconsistent with the information Mr. Robinson reported to the IRS. It is New York law that "[a] party to litigation may not take a position contrary to a position taken in an income tax return[.]" (*Mahoney-Buntzman v Buntzman*, 12 NY3d 415, 422 [2009]; see also *Zemel v Horowitz*, 815 NYS2d 496 [NY Co Sup Ct 2006]).

The principles of the *Weizmann* test used in the court's discussion of the 2000 Agreement are applicable here. Also, the court will not investigate the adequacy of the consideration exchanged for this Agreement. Under the traditional principles of contract law, the parties to a contract are free to make their bargain, even if the consideration exchanged is grossly unequal or of dubious value. Absent fraud or unconscionability, the adequacy of consideration is not a proper subject for judicial scrutiny. It is enough that something of "real value in the eye of the law" was exchanged. (*Apfel v Prudential-Bache Sec., Inc.* 81 NY2d 470, 475-76 [1993]). The

above discussion compels a finding that Mr. Robinson's causes of action surrounding the 2005 Agreement have no merit.

The court now turns to the events of 2009. Mr. Robinson alleges that, pursuant to the Option Agreement, Ms. Day was granted the right to purchase Mr. Robinson's interest in Robinson-Day. Again, Mr. Robinson asserts in starkly conclusory terms that the Option Agreement suffered from the same infirmities as the 2005 Agreement. It is said to have been entered into under duress, without consideration, and in reliance on Ms. Day's promise to use any royalty or other income solely for Mr. Robinson's benefit.

Mr. Robinson alleges a classic case of free will exercised based on "ties of attachment." (*Weizmann*, 36 AD3d at 419-420). Mr. Robinson claims that in April 2009, he executed the 2009 Option Agreement because he did not wish to "appear[] uncaring in [Ms.] Day's son's eyes." According to the complaint, by this point: (i) Mr. Robinson had "told [Ms.] Day that he no longer could continue in the relationship," (ii) Mr. Robinson had moved out of Ms. Day's apartment – notwithstanding her alleged warning that "if he left her, he would never see her son again," (iii) Mr. Robinson had, despite that purported threat, "continued to visit Ms. Day's son," and (iv) Ms. Day's son had turned 17 years old. These allegations, and Mr. Robinson's claim that, after breaking up with Ms. Day and moving out of her home, he still wanted to provide for Ms. Day's son, would establish that Mr. Robinson acted deliberately, not against his own wishes.

The Agreement was signed before a notary, where Mr. Robinson confirmed that the agreement was "the product of negotiation among sophisticated parties, who have been encouraged to obtain independent legal advice." Further, Mr. Robinson's emails reflect that he

acted freely. (“Is there anything I need to do with [David] Depinto to make sure you have all my interest in royalties, I really want to follow through with that.”).

Once again the court’s discussion of *Weizman* is applicable to the 2009 Option Agreement. The above discussion compels a finding by the court that Mr. Robinson’s causes of action surrounding the 2009 Option Agreement have no merit.

Further, in regards to the 2009 Transfer Agreement, Mr. Robinson again makes the same conclusory allegations. Mr. Robinson contends this Agreement was unconscionable, lacked fair consideration and was the product of fraud, undue influence, duress and mistake.

Additionally, Mr. Robinson alleges that the purported transfer arising out of the 2009 Transfer Agreement never lawfully occurred because Ms. Day (and Mr. Robinson) did not comply with the provisions of the Operating Agreement, which are conditions precedent before a transfer is effectuated. Additionally, he alleges that the purported transfer is also invalid because it violates the provision of the Operating Agreement, which requires that the “purchase price shall be an amount that a willing buyer would pay to a willing seller for the Interest, both with knowledge of all relevant facts and neither being under any compulsion to buy or sell.” Mr. Robinson therefore contends that because he was under a compulsion to sell, resulting from alleged threats from Ms. Day playing on his psychological infirmities, the transfer is not valid.

However, in the 2009 Transfer Agreement, Mr. Robinson “represent[ed] and warrant[ed]” that he had “complied with the terms of the Operating Agreement in order to transfer, assign, set over convey and deliver the Interest” to Ms. Day. Moreover, Mr. Robinson agreed to “take such further steps and actions . . . as may be necessary to better evidence the transfer” and appointed Ms. Day as his “lawful attorney in fact, with full power of substitution, to take all steps and actions” to “better vest” title in Ms. Day. Mr. Robinson also argues that as

Ms. Day was not allowed to transfer any of Robinson's royalty income or any other funds from Robinson-Day, unless done within the boundaries of the Operating Agreement, any money that Ms. Day transferred from Robinson-Day to herself or any other entity or person was unlawful self-dealing and a breach of her fiduciary duty.

The court finds Mr. Robinson's causes of action surrounding the 2009 Transfer Agreement devoid of merit. In the agreement, Mr. Robinson represented that the transfer was "for good and valuable consideration the receipt and sufficient of which" he explicitly "acknowledged." The *Weizmann* test, as discussed in numerous instances above, is also applicable here. The court also finds it necessary to address one other significant hole in Mr. Robinson's argument regarding the 2009 transfer. Mr. Robinson contends that Ms. Day promised to return all royalty income to Mr. Robinson if their relationship came to end. However, this transfer occurred after Mr. Robinson had terminated their relationship. As a result, this allegation is wholly inconsistent with the facts.

The court finds, based on a close analysis of the mostly conclusory allegations of the complaint, that none of Mr. Robinson's claims against Ms. Day sets forth a valid cause of action under any of the many legal theories he has employed. There is no basis for a cause of action for duress or unconscionability, and no claim of fraud is stated in the required particular manner; rather, conclusory allegations abound, which are insufficient as a matter of law. There are no facts asserted which could form the basis of a fiduciary relationship. In short, Mr. Robinson may now regret his actions in dealing with Ms. Day, but the complaint tells the story of an enamored man pleasing his lover or ex-lover. His behavior may be viewed as careless or impulsive, but the complaint does not set forth allegations which can avoid dismissal.

The court now turns its attention to the malpractice and fraud causes of action brought against Mr. Depinto.

An attorney is liable for malpractice if it can be proven that his or her conduct fell below the ordinary and reasonable skill and knowledge commonly possessed by a member of the profession, that the attorney's negligence was the proximate cause of the loss sustained and proof of actual damages. (*Iocovello v Weingard & Weingard, P.C.*, 262 AD2d 156 [1st Dept 1999]). This standard requires that the plaintiff establish that counsel “failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession” and that “‘but for’ the attorney's negligence” the plaintiff would have prevailed in the matter or would have avoided damages (*AmBase Corp. v Davis Polk & Wardwell*, 8 NY3d 428, 434 [2007]; see *Barbara King Family Trust v Voluta Ventures LLC*, 46 AD3d 423, 424 [2007]). In order to survive dismissal, the complaint must show that but for the counsel’s alleged malpractice, the plaintiff would not have sustained some actual ascertainable damages. (*Id.*). For a malpractice claim to survive a motion to dismiss, “a pleading need only state allegations from which damages attributable to the defendants conduct may be reasonably inferred.” (*Fielding v Kupferman*, 65 AD3d 437, 442 [1st Dept 2009]).

It is well settled that the relationship of client and counsel is one of “unique fiduciary reliance” (*Matter of Cooperman*, 83 N.Y.2d 465, 472 [1994]) and that the relationship imposes on the attorney “[t]he duty to deal fairly, honestly and with undivided loyalty . . . including maintaining confidentiality, avoiding conflicts of interest, operating competently, safeguarding client property and honoring the clients' interests over the lawyer's” (*Id.*). Thus, any act of disloyalty by counsel will also comprise a breach of the fiduciary duty owed to the client. An action for breach of fiduciary duty is governed by a considerably lower standard of recovery. It

requires only that the plaintiff identify “a conflict of interest which amounted merely to a substantial factor in [the plaintiff’s] loss” *Estate of Re v Kornstein Veisz & Wexler*, 958 F Supp 907, 924 [SDNY 1997], *appeal dismissed* 159 F3d 1346 [2d Cir 1998] [internal quotation marks and citation omitted]. However, under New York law, in the context of an action asserting attorney liability, the claims of malpractice and breach of fiduciary duty are governed by the same standard of recovery (*Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267, 271 [1st Dept 2004]).

In this case, the court concludes that to recover under a claim for damages against an attorney arising out of the breach of the attorney’s fiduciary duty, the plaintiff must establish the “but for” element of malpractice, irrespective of how the claim is denominated in the complaint. Mr. Robinson alleges that Mr. Depinto’s representation is the proximate cause of his loss. He contends that if Mr. Depinto had not represented both Ms. Day and himself, he would not have suffered any damages. On the other hand, Mr. Depinto contends that Mr. Robinson waived his right to such a claim because Mr. Robinson recognized a potential conflict of interest yet proceeded with such dual representation nonetheless. The court is of the opinion that although legal counsel may not evade its professional responsibilities to a client through such waivers, (*see Swift v Ki Young Choe*, 242 AD2d 188, 192 [1998], *citing* Code of Professional Responsibility DR 6-102(A) [22 NYCRR 1200.31(a)]), Mr. Robinson still must establish the “but for” element to survive dismissal.

Further, legal counsel may simultaneously represent the competing interests of two opposing clients only with the client’s consent after full disclosure of the *dual representation* and its consequences (*see e.g. Matter of Metropolitan Transp. Auth. (Cohen)*, 222 AD2d 340, 341 [1995]; Code of Professional Responsibility DR 5-105 [22 NYCRR 1200.24]). However,

violation of the ethical constraint against *dual representation* does not, without more, support a claim for recovery of damages (*Schwartz v Olshan Grundman Frome & Rosenzweig*, 302 AD2d 193, 199 [2003]); to recover against an attorney, a client or third party is required to prove both the breach of a duty owed to it (*see Prudential Ins. Co. of Am. v Dewey, Ballantine, Bushby, Palmer & Wood*, 80 NY2d 377 [1992]) and damages sustained as a result (*see Estate of Steinberg v Harmon*, 259 AD2d 318 [1999]; *Senise v Mackasek*, 227 AD2d 184, 185 [1996]).

To dismiss Mr. Robinson's attorney malpractice and breach of fiduciary duty claims the court must find that the documentary evidence the defendant submits "utterly refutes plaintiff's factual allegations, conclusively establish[ing] a defense as a matter of law." (*Goshen v Mutual Life Ins. Co.*, 98 NYS2d 314, 326 [2002] (citation omitted)). Upon review, it is unclear as to whether and to what extent Mr. Depinto ascertained that Mr. Robinson fully understood and appreciated the risk he was undertaking and whether he advised him to best protect his interests in these situations. As the circumstances of Mr. Depinto's representation of Mr. Robinson are sufficiently questionable, until factual findings are made, the court cannot determine whether Mr. Depinto was indeed the proximate cause of Mr. Robinson's loss. The court therefore finds against dismissing these causes of action.

Claims of attorney malpractice are barred by a three-year statute of limitations. Therefore, Mr. Depinto contends that all instances of attorney malpractice alleged by Mr. Robinson prior to 2007 must be dismissed. However, as it is not clear that each instance was distinct as opposed to being inter-related, the court does not dismiss these claims at present.

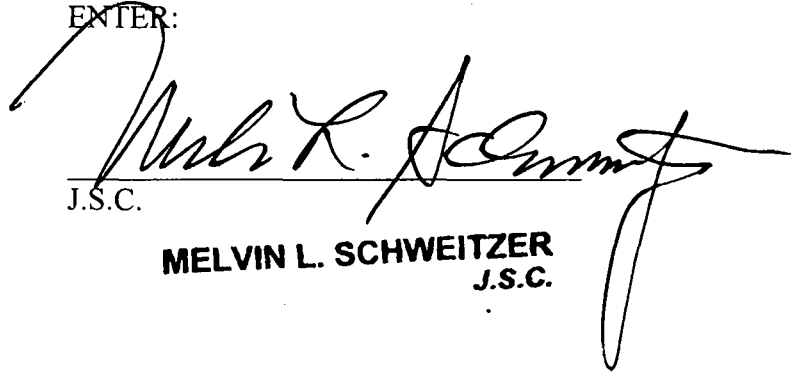
Accordingly, it is

ORDERED that defendants' Laura Day, Robinson Day, LLC, and Laura Day, Inc. motions to dismiss plaintiff's complaint are granted; and it is further

ORDERED that defendant DePinto Normes and Associates, LLP motion to dismiss is denied.

Dated: August 30, 2011

ENTER:



A handwritten signature in black ink, appearing to read 'Melvin L. Schweitzer', is written over a horizontal line. The signature is stylized and extends to the right of the line.

J.S.C.

MELVIN L. SCHWEITZER
J.S.C.