

Kodsi v Gee

2011 NY Slip Op 34030(U)

June 20, 2011

Supreme Court, New York County

Docket Number: 109620/07

Judge: Carol R. Edmead

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

PRESENT: HON. CAROL EDMOND
Justice

PART 35

E
6/21/11
OC

Kodsi, Robert E.

INDEX NO. 109620/07

MOTION DATE 6/3/11

MOTION SEQ. NO. 08

MOTION CAL. NO. _____

- v -

Steven T. Gee et al.

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

JUN 20 2011

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that defendants' motion pursuant to CPLR §2221(a) for leave to reargue the portion of this Court's decision dated March 1, 2011 is granted, and upon reargument, the Court adheres to its determination; and it is further

ORDERED that plaintiff's cross-motion to amend the complaint to add a cause of action based on Judiciary Law §487 is denied; and it is further

ORDERED that all stays are hereby lifted.

This constitutes the decision and order of the Court.

Dated: 6/20/11

HON. CAROL EDMOND J.S.C.

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 35

-----X
ROBERT E. KODSI,

Plaintiff,

Index No. 109620/07

-against-

STEVEN T. GEE and STEVEN T. GEE, P.C.

Defendants.

-----X
HON. CAROL R. EDMEAD, J.S.C.

MEMORANDUM DECISION

In this legal malpractice action, defendants Steven T. Gee, P.C. and Steven T. Gee (“Mr. Gee”) (collectively, “defendants”) move pursuant to CPLR §2221(a) for leave to reargue the portion of this Court’s decision dated March 1, 2011, which denied their motion for summary dismissal of the complaint and upon reargument, for dismissal of the complaint.

In response, plaintiff cross moves to amend the complaint to add a cause of action based on Judiciary Law §487.

*Factual Background*¹

Mr. Gee is a lawyer, and the principal of Steven T. Gee, P.C. Plaintiff Robert E. Kodsi (“plaintiff”) is a former client of Mr. Gee. It is alleged that in June 2003, defendants were retained in connection with plaintiff’s separation and divorce from his then wife, Betty Chiang (“Chiang”).² No retainer was ever signed.

Defendants filed an action for divorce in November 12, 2004, in which plaintiff was

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¹ The Factual Background is taken in large part from the Court’s decision which is the subject of this motion.

² Plaintiff and Chiang are both practicing physicians. Plaintiff, however, is also an experienced real estate investor. Plaintiff and Chiang have one son together, and have never lived together as husband and wife.

named as the plaintiff and Chiang was named the defendant. The parties executed a Marital Settlement dated November 19, 2004 (the “Marital Stipulation”). Thereafter, the Marital Stipulation was rejected by the Court, Chiang commenced an action for divorce in 2005, and the parties signed a new separation agreement in July 2007 (the “New Separation Agreement”).

In this action, plaintiff alleges that Chiang would have been bound by the Marital Stipulation and that his potential liability and support obligations would have been much lower but for defendants’ failure to competently represent him in that they: delayed filing an action, failed to prosecute the action once filed, failed to obtain a divorce, and failed to properly negotiate the Marital Settlement. Plaintiff alleged six causes of action for monetary damages and emotional injuries as follows: malpractice (first and sixth); conflict of interest (second); failure to advise plaintiff of the consequences of purchasing a house in joint names (third); breach of contract (fourth); and fraud (fifth).

By order dated March 1, 2011, the Court granted defendants’ summary judgment motion to the extent of dismissing plaintiff’s causes of action relating to breach of contract, emotional injuries and fraud. The Court declined to dismiss plaintiff’s causes of action concerning malpractice (first and sixth causes of action), conflict of interest (second) and defendants’ alleged failure to advise plaintiff of the consequences of purchasing a house in joint names (the “Townhouse”)³ (third cause of action).

In support of reargument, defendants contend that the Court overlooked or misapprehended the facts or the law on several issues, and that summary judgment dismissing the remaining claims is warranted.

³ Plaintiff and Chiang purchased the Townhouse for Chiang to live in and raise their son.

Defendants argue that plaintiff failed to establish proximate cause. The court overlooked the fact that if plaintiff had directed Chiang to execute the uncontested divorce documents, as requested by defendants, the divorce proceeding could have gone forward without any purported damage suffered by plaintiff. Chiang testified that she would have re-signed the original documents when she first heard that they were rejected by the Court in February 2005, and offered to do so but was told to hold off by plaintiff since he was not going forward with the divorce; it is uncontested that plaintiff told her to “hold off, I'm just happy you signed it, it shows proof you are understanding my being upset in this marriage.” Proximate causation is negated since plaintiff's separate and independent act of advising Chiang to forgo the re-execution of the documents intervened between the purported malpractice and the alleged harm.

In addition, the Court overlooked the fact that plaintiff contributed to his own loss by directing Chiang not to re-execute the uncontested divorce documents. Such contribution negates any finding that defendants' alleged negligence was the proximate cause of the plaintiff's purported loss. Had Chiang re-executed the uncontested divorce documents when initially requested by defendants, any deficiencies now purported by plaintiff as a basis of legal malpractice, could have been corrected. There is no evidence that had it not been for plaintiff's own misconduct that Chiang would not have cooperated if documents needed to be amended and re-filed in connection to the uncontested divorce. Even if the original documents were deficient, the clerk of the matrimonial part would have given the parties an opportunity to cure the papers. However, such opportunity was lost when plaintiff directed Chiang not to re-execute the documents and eventually undermined the matter.

Plaintiff failed to provide any admissible evidence or affidavit from an accountant and/or

actuarial comparing the terms and provisions of the original and subsequent marital stipulations to establish that his damages are actual and ascertainable. Plaintiff's unsupported claim that he suffered damages because his mortgage payments and real estate tax obligations for the Brooklyn property had increased as a consequence of his subsequent divorce with Chiang is insufficient. While plaintiff claimed that he relinquished 45% in his Brooklyn property in the divorce, the Court overlooked the fact that plaintiff received other financial benefits, such as obtaining complete tax deduction benefits for these real estate expenses, retained possession and complete control over a larger portion of the Brooklyn property, and retains the rental income from the Brooklyn property. Plaintiff is also entitled under the new marital agreement to complete reimbursement of all mortgage payments for the Brooklyn property from Chiang, when she sells the property, which benefit was absent from the initial marital agreement. The court also relied on the unsupported, speculative claim that plaintiff would suffer damages in the future, such as nanny costs, educational costs for his son, and financial obligations for the Brooklyn property.⁴

Plaintiff's legal malpractice action is barred since plaintiff had negotiated and controlled the terms of the marital settlement and the timeline for completion and execution. Chiang testified that plaintiff controlled every aspect of the uncontested divorce, including instructing her not to re-execute the uncontested divorce documents, which delay ultimately caused Chiang to change her mind due to plaintiff's personal conduct. Plaintiff even testified that both he and Chiang were solely responsible for negotiating the terms and provisions of their marital

⁴ Defendants argue that under the New Separation Agreement, when plaintiff pays off the mortgage to the Brooklyn property before Chiang and their son Daniel vacate the house or prior to Daniel's emancipation, Chiang must pay plaintiff 100% of the sum of money she would have paid to satisfy the mortgage as if Chase Bank had retained the full mortgage (interest) plus 5% of the net equity or new proceeds of the same of this property.

agreement. And, plaintiff testified that defendants were not physically present when he and Chiang negotiated the terms of their divorce.

And, any technical deficiency in the papers prepared by Mr. Gee could have been corrected with the cooperation of Chiang, who was willing to re-sign the original documents. Since plaintiff was solely responsible for negotiating and controlling the terms of the marital agreement and directed Chiang to hold off on re-signing the uncontested documents, plaintiff cannot establish that defendants committed legal malpractice. Any technical mistakes concerning the initial filing of the uncontested divorce documents or the marital agreement could have been and would have been corrected had it not been for plaintiff's own conduct, which caused Chiang to hold off on re-signing the papers and ultimately changing her mind about the uncontested divorce. In addition, even if the original stipulation had been filed and executed with the Court, Chiang had the right to seek to vacate the original stipulation based upon the new information she discovered relating to plaintiff, such as lying about his own income and hiding his assets, his indiscretions,

The Court incorrectly opined that defendants may have committed legal malpractice by failing to make plaintiff aware of the legal effect of purchasing the Townhouse would have had on the issue of joint property. Plaintiff and Chiang had independently made a decision to purchase a home together during their marriage, which search was continual, until discovery of the Townhouse. The court found an issue of fact solely based on plaintiff's claim that he was unaware of the legal effect of purchasing the Townhouse, while still married to Chiang. Although, the court agreed that plaintiff's claim may be feigned because Gee was one of various lawyers consulted by plaintiff, the court overlooked Chiang's and plaintiff's testimony regarding

their goal to purchase a property for Chiang and their son. Said desire trumped any hesitation to purchase the property while they were married. Said desire also belies the fact that plaintiff and Chiang wanted to purchase a house before this divorce was finalized. Plaintiff's own testimony shows that he was looking to purchase a house for Chiang since 2000, which was almost four years before meeting with defendants. In addition, Chiang testified that the decision to purchase the Brooklyn property was mutual. Such testimony would defeat any claim that defendants committed legal malpractice for failing to make plaintiff aware of the effect of purchasing the Townhouse on the issue of joint property, while married. There is no evidence that plaintiff would have altered his plans to purchase the Townhouse before his divorce. Further, plaintiff was fully aware of the legal impact of purchasing a home with Chiang, while still married by the advisory letter received from attorney Bernard Dworkin. Although the Court referred to this letter, the court overlooked the fact that Dworkin particularly provided an opinion to plaintiff regarding the issue of purchasing a home for and/or with Chiang during their marriage.

The court overlooked the fact or law that the mere existence of a supposed conflict does not constitute malpractice absent the other necessary elements of the tort, including proximate cause and actual damages. In light of the facts and circumstances of the marital relationship and defendants' understanding with plaintiff and Chiang, simply preparing documents based on negotiations and agreed upon terms provided by these parties without defendants' assistance or participation does not give rise to a conflict of interest. Even if a conflict of interest may have arisen at some point, the Court must still dismiss this cause of action since the appearance of a conflict of interest alone does not constitute malpractice.

In opposition, plaintiff contends that defendants negotiated and drafted the Marital

Stipulation, which was supposed to settle all financial issues of the divorce. Defendants also advised plaintiff to purchase a \$1,750,000 home for Chiang.

In or about June 2005, plaintiff learned that defendants' filings were invalid, and that the Marital Stipulation was rejected by the court clerk due to its failure to comply with various legal requirements. Plaintiff also found he was still married to Chiang, was dealing with a newly purchased "marital" home (which had a mortgage that transformed plaintiff's separate property into a matrimonial asset subject to equitable distribution) but had an invalid Marital Stipulation and ineffective divorce action. Due to plaintiff's increased exposure because of the newly purchased home and significant gains he made from his successful purchase and sale of several investment properties, the ultimate divorce cost plaintiff several million dollars more than what it would have been in 2005. Rather than half of the cost of the home, included in the increased cost of the 2008 divorce was plaintiff's obligation to pay the entire mortgage and related taxes and plaintiff's half ownership (except for a 5% interest) of the Townhouse.

Plaintiff claims that it is uncontested that he facilitated the creation of a \$1,750,000 marital asset before the parties had an agreement in place, and defendants' failure to prepare, file and effectuate a valid, binding divorce and divorce agreement saddled plaintiff with the cost and burden of the Townhouse with the coterminous loss of ownership.

Plaintiff argues that defendants' errors and omissions constitute willful conduct for which defendants purposefully mislead plaintiff as to the progress (or lack thereof) of the purported filings and their purported rejection by the matrimonial clerk. The Marital Stipulation could not have been filed because of defendants' admitted failure to comply with numerous statutory and Court requirements for filing the matrimonial papers. Defendants' claim that Mr. Gee asked

plaintiff to have the Marital Stipulation re-signed never occurred, and the story as to why Mr. Gee did not effectuate a valid binding divorce incorporating the terms of the Marital Stipulation was simply a ploy to mislead plaintiff.

Further, plaintiff's Federal Express airbill proves that he executed and returned the Marital Stipulation to Mr. Gee soon after he received it from Chiang. Yet, Mr. Gee's email apologizing for the delay in submitting the papers shows he simply sat on them. Mr. Gee presented no proof that he attempted to file the Marital Stipulation, such as a Court-Clerk's stamp or notation, a calendar entry. If Mr. Gee intended to file the Marital Stipulation, it would have had to be accompanied by a host of required documents, none of which have been created or produced.

Likewise, Mr. Gee admitted that he knew that the Townhouse (which transaction Mr. Gee handled) was to be an essential part of the divorce settlement. By facilitating the purchase of the house, and not properly advising plaintiff of the consequences of not yet having a binding marital agreement in place, plaintiff's separate property was transformed into marital property. The claim the parties mutually decided to purchase the Townhouse is irrelevant. Defendants facilitated the creation of marital property at the time that they knew the parties were looking to be divorced. And, that plaintiff was an experienced real estate investor did not obviate his need and expectation that Mr. Gee would represent and advise him, nor was it a substitute for plaintiff's unrefuted testimony of his total lack of knowledge of the divorce process. Likewise, the reference to Mr. Dworkin's letters is misleading since they do not apprise plaintiff of the consequences of purchasing an apartment or house.

Plaintiff argues that in light of defendants' deceptive, egregious and inexcusable conduct,

the Court should grant plaintiff leave to amend his complaint to add Judiciary Law §487, which governs attorney's intent to deceive. Such amendment works no prejudice to defendants. Since Section 487 is to be read expansively and affects only the amount of the recovery, based upon defendants' deceit, no additional discovery is needed. Moreover, since the trial of this has been stayed, defendants have ample time to prepare a defense.

In opposition to the cross-motion, defendants argue that the application to amend to add a new theory of liability is untimely and prejudicial to defendants given that discovery is complete and the note of issue has been filed. Judiciary Law § 487 requires a showing of intent to deceive the court or any party and damages flowing therefrom, which issues have not been explored. Additionally, plaintiff's claim under Judiciary Law § 487 is time barred, since the alleged legal malpractice occurred before May 2005. Further, the original complaint does not contain any allegation to support this claim, and thus, the mere allegations of negligence and malpractice do not meet the pleading requirements of such section. There is no evidence that defendants were guilty of any deceit or collusion. And there is no reason for defendants to not attempt to submit the documents to the matrimonial clerk. There is no evidence of chronic and extreme pattern of legal deficiency. Nor is there any evidence that the filing of the uncontested divorce documents at issue were willful towards defendants' own financial gain. Plaintiff's conduct was the sole reason for the delay in the divorce action. Plaintiff could not explain the various gaps of time between first engaging defendants and returning them to defendants. And, Chiang attributed the delay to the fact that the couple had good and bad periods in their relationship.

In response, plaintiff contends that there is no showing of prejudice from the amendment. Defendants failed to explain what discovery is needed to explore their own intent to deceive.

Further, the Judiciary Law claim is timely under the relation-back theory since the same facts give rise to the Judiciary Law claim. In any event, the defendants' failures continued through the end of June 2005, when defendants notified plaintiff that they did not obtain the divorce or effectuate the Marital Stipulation. Defendants clearly deceived plaintiff to believing that the Marital Stipulation was filed, which is demonstrated by the absence of any clerk stamp or notation or other papers which would have prepared in connection with such filing.

Discussion

A motion for leave to reargue under CPLR 2221, "is addressed to the sound discretion of the court and may be granted only upon a showing 'that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision'" (*William P. Pahl Equipment Corp. v Kassis*, 182 AD2d 22 [1st Dept] *lv. denied and dismissed* 80 NY2d 1005, 592 NYS2d 665 [1992], *rearg. denied* 81 NY2d 782, 594 NYS2d 714 [1993]).

Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided (*Pro Brokerage v Home Ins. Co.*, 99 AD2d 971, 472 NYS2d 661) or to present arguments different from those originally asserted (*Foley v Roche*, 68 AD2d 558, 418 NYS2d 588; *William P. Pahl Equipment Corp. v Kassis*, *supra*). On reargument the court's attention must be drawn to any controlling fact or applicable principle of law which was misconstrued or overlooked (*see Macklowe v Browning School*, 80 AD2d 790, 437 NYS2d 11 [1st Dept 1981]).

In light of defendants' claims that the Court overlooked several facts submitted in their underlying motion, the Court grants reargument. However, upon reargument, the Court adheres to its earlier determination.

As the movants for the underlying motion for summary judgment, defendants had the burden of establishing that they exercised the degree of care, skill and diligence commonly possessed by a member of the legal profession, or the absence of proximate causation or actual damages (*Arnav Indus., Inc. Retirement Trust v Brown, Raysman, Millstein, Felder*, 96 NY2d 300 [2001]).

As stated in its prior decision, there is an issue as to whether defendants exercised the degree of care, skill and diligence commonly possessed by a member of the legal profession in connection with preparing and filing the uncontested divorce papers. Plaintiff claims that defendants' failure to file the Marital Stipulation to which Chiang originally agreed in a proper and timely fashion proximately caused the ultimate filing of the New Separation Agreement at great expense and damage to plaintiff. And, the purported facts that the Court allegedly failed to consider do not establish, as a matter of law, that plaintiff cannot satisfy the elements of his legal malpractice claim. While Chiang testified that she would have re-signed the Marital Stipulation, defendants' failed to show that such re-signing cured the alleged defects in the filing of the Marital Stipulation and other papers necessary to complete the divorce proceeding. Further, the Court considered defendants' claim that plaintiff negotiated and structured the transaction and terms of the divorce and found an issue of fact as to whether plaintiff would have obtained a more favorable result in the underlying action.

As to damages, defendants failed to establish that plaintiff's claim of damages are conclusory or speculative as a matter of law. Plaintiff's claims for damages based on the difference in payment obligations under the Marital Stipulation and the New Separation Agreement are based, in part, on concrete numbers and are thus, ascertainable. Whether plaintiff

in fact received a financial benefit from the New Separation Agreement is an issue to be determined by the trier of fact, and was not established, as a matter of law, by defendants.

And, defendants' failed to establish that the fact that plaintiff and Chiang decided to purchase the Townhouse before they met with defendants to handle the parties' divorce obviated defendants' obligation to advise plaintiff of the legal ramifications of such a purchase during the course of a divorce proceeding. Mr. Dworkin's letter advises that "it seems appropriate that any property either of you now has or will acquire in the future will remain the separate property of the person who acquired or will acquire that property." However, such letter does not establish that plaintiff was made aware of the legal consequences of purchasing the Townhouse or of defendants' obligation to advise plaintiff of same. Nor does Mr. Dworkin's letter explain the legal consequences of purchasing the Townhouse while the parties are married, but explains, in part, the tax implications of such purchase. Thus, as stated in this Court's prior decision, an issue remains as to whether plaintiff was in fact fully aware of the legal consequences of purchasing the Townhouse for Chiang and his son.

Further, while an alleged conflict of interest, "even if a violation of the Code of Professional Responsibility, does not by itself support a legal malpractice claim" in the absence of negligence and proximate cause (*Sumo Container Station, Inc. v Evans, Orr, Pacelli, Norton & Laffan, P.E.*, 278 AD2d 169, 170 [1st Dept 2000]), defendants failed to establish the absence of negligence or proximate cause. Thus, the Court declines to dismiss plaintiff's second cause of action for conflict of interest.

As to the cross-motion, plaintiff's request to amend the complaint to add a claim pursuant to Judiciary Law §487 is unwarranted.

Although leave to amend should be freely granted, the movant must make some evidentiary showing that the proposed amendment has merit, and a proposed pleading that fails to state a cause of action or is plainly lacking in merit will not be permitted (*Hynes v Start Elevator, Inc.*, 2 AD3d 178, 769 NYS2d 504 [1st Dept 2003]; *Tishman Constr. Corp. v City of New York*, 280 AD2d 374 [1st Dept 2001]; *Bencivenga & Co. v Phyfe*, 210 AD2d 22 [1st Dept 1994]; *Bankers Trust Co. v Cusumano*, 177 AD2d 450 [1st Dept 1991], *lv dismissed* 81 NY2d 1067 [1993]; *Stroock & Stroock & Lavan v Beltramini*, 157 AD2d 590 [1st Dept 1990]).

Judiciary Law §487 provides that "[a]n attorney or counselor who:

1. Is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party; or,
2. Wilfully delays his client's suit with a view to his own gain; or, wilfully receives any money or allowance for or on account of any money which he has not laid out, or becomes answerable for,

Is guilty of a misdemeanor, and in addition to the punishment prescribed therefor by the penal law, he forfeits to the party injured treble damages, to be recovered in a civil action.

While the new claim is based on the same facts and circumstances as those alleged in the original complaint, such facts are insufficient to state a claim that defendants intended to deceive plaintiff or that defendants engaged in chronic, extreme pattern of delinquency so as to support a Judicial Law § 487 claim (*cf. Scarborough v Napoli, Kaiser & Bern, LLP*, 63 AD3d 1531 [4th Dept 2009] (sustaining Judiciary Law § 487 claim where attorney requested client to sign stipulation of discontinuance based on representation that plaintiff could not prevail on his underlying claim when in fact, client's underlying case was already dismissed for failure by attorney to timely file the note of issue); *Izko Sportswear Co. v Flavum*, 25 AD3d 534 [2d Dept 2006] (sustaining Judiciary Law § 487 claim where attorneys allegedly advised plaintiff/client's

creditor/landlord that plaintiff/client was intending to file for bankruptcy and divulged confidential information to creditor/landlord which affected creditor/landlord's action against plaintiff for unpaid rent)).

Conclusion

Based on the foregoing, it is hereby

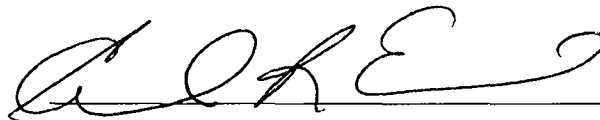
ORDERED that defendants' motion pursuant to CPLR §2221(a) for leave to reargue the portion of this Court's decision dated March 1, 2011 is granted, and upon reargument, the Court adheres to its determination; and it is further

ORDERED that plaintiff's cross-motion to amend the complaint to add a cause of action based on Judiciary Law §487 is denied; and it is further

ORDERED that all stays are hereby lifted.

This constitutes the decision and order of the Court.

Dated: June 20, 2011

A handwritten signature in black ink, appearing to read 'C. Edmead', written over a horizontal line.

Hon. Carol Robinson Edmead, J.S.C.