

Betz v Blatt
2013 NY Slip Op 3363€(U)
May 9, 2013
Supreme Court, Westchester County
Docket Number: 58938/11
Judge: Mary H. Smith
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DECISION AND ORDER

FILED & ENTERED

5/9/13

To commence the statutory period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this Order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
IAS PART, WESTCHESTER COUNTY

Present: HON. MARY H. SMITH
Supreme Court Justice

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DEBRA BETZ, as Administratrix of the Estate of
Carmelo Carbone aka Mel Carbone,

Plaintiff,

MOTION DATE: 5/3/13
INDEX NO.: 58938/11

-against-

ARNOLD W. BLATT, ANTHONY J. PIERAGOSTINI,
GEORGE A. SIRIGNANO, JR. and ENEA, SCANLAN
& SIRIGNANO, LLP,

Defendants.

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GEORGE A. SIRIGNANO, JR. and ENEA, SCANLAN
& SIRIGNANO, LLP,

Third-Party Plaintiffs,

-against-

GARY E. BASHIAN, ESQ. and BASHIAN & FARBER,

Third-Party Defendants.

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The following papers numbered 1 to 10 were read on this motion by third-party defendants for an Order pursuant to CPLR 3211, subdivision (a), paragraphs 1 and/or 7, dismissing the third-party complaint, etc.

Papers Numbered

Notice of Motion - Affirmation (Glenn) - Exhs. (1-16) -
 Memorandum of Law 1-4
 Answering Affidavit (Proscia) - Exhs. (Collectively)¹ -
 Memorandum of Law 5-7
 Answering Affirmation (Glenn) - Exh. - Memorandum of Law 8-10

Upon the foregoing papers, it is Ordered and adjudged that this dismissal motion by defendants is disposed of as follows:

This action and several related actions have been the subject of numerous motion practice, familiarity of which is assumed by the reader. The history and underlying facts therefore shall only briefly be referenced except to the extent necessary for resolution of the sub judice motion.

Defendants/third-party plaintiffs Sirignano and Enea, Scanlan & Sirignano, LLP (collectively "defendants Sirignano") had been one of three sets of attorneys that had provided legal representation to Michael Carbone a/k/a Mike Carbone ("Carbone"), brother of decedent Carmelo Carbone ("Mr. Carbone"), who pursuant to Mr. Carbone's Will had been named Executor of Mr. Carbone's Estate. Mr. Carbone's two daughters, Debra Betz and Kristin Carbone-Lopez, were the primary beneficiaries thereunder, with the Estate's estimated gross value at the time of Mr. Carbone's death to have been approximately \$2 million, comprised of various real estate

¹Counsel is referred to this Part's published rules which require separately tabbed motion exhibit. Future submissions which do not comply therewith shall not be accepted by the Court.

holdings, liquid assets and a 1962 Vintage Corvette. The record establishes that, from the inception of his qualifying and serving as Executor, Carbone had begun looting the assets of the Estate and indeed eventually essentially fully had depleted same.² Judgements against Carbone and others have been entered, and a bench warrant for Carbone's arrest previously had been issued; it is believed that he presently is beyond the Court's jurisdiction, in Italy.

Ms. Betz initially had retained moving third-party defendants Gary E. Bashian, Esq. and his firm Bashian & Farber, LLP (collectively third-party defendants "Bashian"), in March, 2010, to represent her interests solely as a beneficiary of her father's Estate. At that time, defendants third-party plaintiffs Sirignano had been representing Carbone as Executor.³ Thereafter, when Surrogates' Court stripped Carbone of his Executor responsibilities and gave Debra Betz limited letters testamentary, on May 11, 2011, Betz hired third-party defendants Bashian to represent the Estate. Betz ultimately had been named Executrix of the Estate, on November 30, 2011.

In prior motion practice, defendants Sirignano had moved to

²At the time that Surrogate Scarpino had suspended Carbone's letters testamentary, on April 13, 2011, the value of the Estate had been depleted to approximately \$110,000.00.

³The retainer agreement between Carbone, as executor, and defendants Sirignano is dated, November 9, 2009.

dismiss plaintiff's amended complaint. In its Decision and Order, dated August 1, 2012, this Court, while granting said dismissal motion with respect to certain of plaintiff's asserted claims, had denied dismissal of the legal malpractice claims. In its then analysis on that motion, this Court had noted, that from 2009-2011, Carbone had continued his looting of the Estate unrestrained, depleting it of another \$224,324.98 during the time that Carbone was represented by defendants Sirignano, including Carbone's continuing to take Estate assets from an Estate bank account after defendants Sirignano had been advised that Carbone had been removed as Estate executor and had been notified to hold three M&T bank accounts of the Estate. This looting of the Estate's assets had continued, according to plaintiff, because defendants Sirignano, as the Estate's then attorney, had failed to exercise the degree of professional care required to oversee Carbone's actions and prevent his self-dealing, wasting and looting of the Estate's assets. Plaintiff specifically alleges that defendants Sirignano never independently had analyzed the deficient Estate accounting and Carbone's actions as executor, and specifically his systematic depletion of Estate assets, that they never undertook examination of whether Carbone was continuing to deplete Estate assets and they had failed to undertake measures to correct the depletion of the Estate's assets, including his liquidation of an Estate bank

[*5]

account, in the sum of \$23,403.00, on May 2, 2011, notwithstanding Surrogate Scarpino's Order of September 15, 2012, enjoining "further money [from being] expended from the Estate," and the Surrogate's having placed a hold on three Estate M&T bank accounts, on April 29, 2011. In denying dismissal of the legal malpractice causes of action against defendants Sirignano, this Court had found that plaintiff sufficiently alleges that each defendant, during their respective representation of Carbone, as Executor, negligently had performed their duties and had breached their duties to the Estate and the beneficiaries, resulting in financial damages of the depletion of the Estate's assets and an increase in attorney's fees charged to the Estate.

Thereafter, defendants had commenced a third-party action against attorneys third-party defendants Bashian alleging claims for common law contribution and common law indemnification under the doctrine of respondeat superior, arguing that if defendants Sirignano are found to have departed from good and accepted legal standards of practices that proximately had caused damages to plaintiff, then said damages were due whole or in part to the negligence and legal malpractice of defendants Bashian who had represented Debra Betz regarding the Estate in both her individual and representative capacities, and had failed to properly and adequately protect and preserve the Estate's assets, made

inappropriate and unsuccessful applications to the Surrogate's Court, negligently had waited nine months before serving Justice Scarpino's Order, dated September 15, 2010, upon the banking institutions in which the Estate's bank accounts were maintained and had unreasonably delayed the prosecution of an action to nullify fraudulent real estate transfers and improper lien claims. According to defendants Sirignano, "but for" the negligence of defendants Bashian, plaintiff and Debra Betz would not have incurred any actual and ascertainable damages.

As previously stated by this Court, on a motion to dismiss for failure to state a cause of action, the Court initially must accept the facts alleged in the complaint as true and then determine whether those facts fit within any cognizable legal theory. See Campaign for Fiscal Equity, Inc. v. State, 86 N.Y.2d 307, 318 (1995); Leon v. Martinez, 84 N.Y.2d 83, 87-88 (1994); People v. New York City Transit Authority, 59 N.Y.2d 343, 348 (1983); Morone v. Morone, 50 N.Y.2d 481 (1980); Guggenheimer v. Ginzburg, 43 N.Y.2d 268, 274-275 (1977); Cavanaugh v. Doherty, 243 A.D.2d 92, 98 (3rd Dept. 1989); Klondike Gold, Inc. v. Richmond Associates, 103 A.D.2d 821 (2nd Dept. 1984). "Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claim, is irrelevant to the determination of a pre-disclosure motion to dismiss." Porcelli v.

Key Food Stores Co-op., Inc., 44 A.D.3d 1020 (2nd Dept. 2007).

Where extrinsic evidentiary material is considered, the Court need not assume the truthfulness of the pleaded allegations. The criterion to be applied in such a case is whether the plaintiff actually has a cause of action, not whether he has properly stated one. Guggenheimer v. Ginzburg, *supra* at 275; Kaufman v. International Business Machines Corp., 97 A.D.2d 925 (3rd Dept. 1983), *affd.* 61 N.Y.2d 930 (1984); Rappaport v. International Playtex Corporation, 43 A.D.2d 393, 395 (3rd Dept. 1974). Thus where it has been shown that a material fact or facts as claimed by the plaintiff "have been negated beyond substantial question" by the documentary evidence or affidavits and other evidentiary submissions, and/or where the very allegations set forth in the complaint fail to support any cause of action, the complaint should be dismissed. *See* CPLR 3211, subd. (a), par. 1; DePaulis Holding Corp. v. Vitale, 66 A.D.3d 816, 818 (2nd Dept. 2009); Biondi v. Beekman Hill House Apartment Corp., 257 A.D.2d 76 (1st Dept. 1999), *affd.* 94 N.Y.2d 659 (2000); Robinson v. Robinson, 303 A.D.2d 234 (1st Dept. 2003).

Further, in order to prevail upon a defense founded upon documentary evidence, the documents relied upon must resolve all of the factual issues as a matter of law. *See* Arnav Industries, Inc. Retirement Trust v. Brown, Raysman, Millstein, Felder & Steiner, 96

N.Y.2d 300, 303 (2000); Ofman v. Katz, 89 A.D.3d 909 (2nd Dept. 2011); Scott v. Bell Atlantic Corp., 282 A.D.2d 180 (1st Dept. 2001), *affd.* as *modf.* 98 N.Y.2d 314 (2002); Weiss v. Cuddy & Feder, 200 A.D.2d 665 (2nd Dept. 1994).

A viable legal malpractice cause of action is pleaded where there are allegations that the attorney had failed to exercise the ordinary reasonable skill and knowledge commonly possessed by the legal community and that this breach of duty proximately had caused plaintiff to sustain actual and ascertainable damages. See Board of Managers of Bay Club v. Borah, Goldstein, Schwartz, Altschuler & Nahins, P.C., 97 A.D.3d. 612 (2nd Dept. 2012); Lovino, Inc. v. Lavallee Law Offices, 96 A.D.3d 910 (2nd Dept. 2012).

Applying the foregoing principles to the motion and accepting the allegations as true and giving defendants Sirignano the benefit of every favorable inference, and upon the full record at bar, the Court finds that defendants Sirignano have failed to state any viable cause of action against third-party defendants Bashian and their motion for dismissal is granted in its entirety.

Notwithstanding defendants Sirignano's protestations to the contrary, the facts are that, during the time when defendants Sirignano had represented Carbone, Carbone had looted the Estate of another \$224,324.98 and third-party defendant Bashian did not then represent the Estate; instead, Bashian's representation at that

time had been limited to their representing Debra Betz in her individual capacity as a beneficiary.⁴ Necessarily then, third-party defendants Bashian had owed no duty to the Estate during this time period to protect the Estate assets from Carbone's thievery, as alleged by defendants Sirignano. Notably, defendants Sirignano do not allege and identify any specific depletion of an Estate asset which had occurred during the time that third-party defendants Bashian in fact had represented the Estate. The vague conclusory claims that third-party defendants Bashian "have departed from good and accepted standards of legal practice in failing to preserve and protect Estate assets" simply is unavailing. Insofar as defendants Sirignano only specifically assert that third-party defendants Bashian negligently had waited to serve Surrogate Scarpino's September 15, 2010, Order until on or about April 29, 2011, the record establishes that Bashian had not been retained to represent the Estate until April, 2011, at which time they promptly had served the Surrogate's Order. None of the foregoing alters the fact that defendants Sirignano themselves had actual notice of the existence of the Surrogate's Order and seemingly did nothing to protect the Estate from Carbone.

⁴Defendants Sirignano actually admitted same in paragraph 12 of their third-party complaint wherein it is alleged that "in or about March of 2012, Debra Betz, as a beneficiary of the Estate, retained" Bashian third-party defendants to represent her in her dispute against Carbone, as Executor of the Estate.

Moreover, in order to be found liable for contribution, defendants Sirignano would had to have alleged that defendants Bashian contributed to the same injury for which the Estate seeks damages. See Nassau Roofing & Sheet Metal Co., Inc. v. Facilities Development Corp., 71 N.Y.2d 599, 603 (1988), citing Dole v. Dow Chemical Co., 30 N.Y.2d 143 (1972); cf. Keeley v. Tracy, 301 A.D.2d 502, 503 (2nd Dept. 2003). Even the most cursory examination of the pleadings at bar however reveals that plaintiff Estate seeks damages against defendants Sirignano for their alleged malpractice with respect to their representation of the Estate, whereas defendants Sirignano seek contribution for third-party defendants Bashian's alleged failure to repair the damage caused by Carbone.

Accordingly, this Court finds as matter of law that third-party defendants Bashian cannot be held liable under any theory of contribution for the allegedly negligent acts claimed by defendants Sirignano, and accordingly third-party defendants Bashian's motion seeking dismissal of said claim is granted. See CPLR 1401; Rosner v. Paley, 65 N.Y.2d 736, 738 (1985); Crimi v. Black, 219 A.D.2d 610, 611 (2nd Dept. 1995).

The Court further takes this opportunity to note, in any event, that the record unequivocally establishes that third-party defendants Bashian, rather than their having caused harm to the Estate, have undertaken Herculean efforts, continuing to date, to

make the Estate whole, including their securing judgment against Carbone, attempting various means to obtain enforcement of said judgment against Carbone, and successfully reversing fraudulent transfers which Carbone had made.

Nor does defendants Sirignano's third-party common law indemnification claim fair any better.

The key element of a common-law cause of action for indemnification is a separate duty owed the indemnitee by the indemnitor. See Raquet v. Braun, 90 N.Y.2d 177, 183 (1977). In order to prevail upon a common law indemnification claim, the party seeking indemnification must not have committed actual wrong itself and must have delegated exclusive responsibility for the duties giving rise to the loss to the party from whom indemnification is sought. See Tiffany at Westbury Condo. v. Marelli Dev. Corp., 40 A.D.3d 1073, 1077 (2nd Dept. 2007).

The reader is referred to this Court's August 1, 2012, Decision and Order, and specifically this Court's factual and legal findings, now law of the case, with respect to defendants Sirignano having been retained to represent Carbone as the Executor of Mr. Carbone's Estate, their ensuing obligation to perform duties relating to the administration of the Estate with a degree of professional competence, their undivided duty of loyalty to the Estate and its beneficiaries during the period of their

representation, from November, 2009, until at least the time of Carbone's suspension as Executor on April 13, 2011, and plaintiff's legal sufficient allegations that defendants Sirignano had failed with respect thereto and their questionable compromised representation given by defendants Sirignano on behalf of both the Estate and Carbone personally.

The red-herring issue of Bashians' alleged failure to have disclosed their actual retainer agreement with Betz is unavailing to prevent summary dismissal of their claims against third-party defendants Bashian. Same simply is not necessary to establish that defendants Sirignano only, and not Bashian, had represented the Estate at the time of the Surrogate's removal of Carbone as Executor, and that Betz could not have retained counsel to represent the Estate until after the time of her having received Letters of Limited Administration, on May 11, 2011.

Mr. Bashian's testimony at the inquest before Justice Bruce E. Tolbert also does not raise any triable issue of fact regarding the date of third-party defendant Bashian's representation of the Estate, as nowhere does he state that he or his firm had been retained in March, 2010, the date from which Judge Tolbert had granted plaintiff interest on incurred legal fees.

Nor does a single obviously inadvertent scrivener's error in the Glenn affirmation at paragraph 16, upon which defendants

Sirignano seize, raise any triable issue of fact with respect to the issue of when third-party defendants Bashian had been hired to represent the Estate.

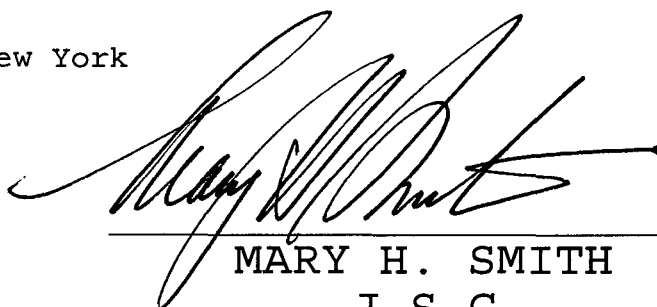
This Court necessarily finds as a matter of law that there exists no factual or legal basis for any claim of common law indemnification by defendants Sirignano against third-party defendants Bashian.

Lastly, in the exercise of this Court's discretion, third-party defendants Bashian's request for an award pursuant to 22 N.Y.C.R.R. 130-1.1 imposing costs and/or sanctions upon defendants Sirignano is denied.

Any arguments not specifically addressed above have been considered and either rejected or found not to be warranting of separate and further comment by the Court.

The parties shall appear in the Compliance Conference Part, at 9:30 a.m., on June 3, 2013, as previously scheduled.

Dated: May ~~15~~¹⁹, 2013
White Plains, New York



MARY H. SMITH
J.S.C.