

<b>Sutch v Sutch-Lenz</b>
2013 NY Slip Op 33934(U)
October 24, 2013
Supreme Court, Saratoga County
Docket Number: 20131154
Judge: Thomas D. Nolan
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STATE OF NEW YORK

SUPREME COURT

COUNTY OF SARATOGA

BENJAMIN SUTCH,

Plaintiff,

-against-

**DECISION AND ORDER**  
**RJI No. 45-1-2013-0724**  
**Index No. 20131154**

DEBERA C. SUTCH-LENZ a/k/a DEBERA C. SUTCH,  
WILLIAM J. CADE, ESQ., CADE & SAUNDERS, P.C.,  
JAMES G. SNYDER, ESQ. as Guardian ad Litem of BENJAMIN SUTCH,  
and DEAN COON, ESQ. as Guardian ad Litem of BENJAMIN SUTCH,

Defendants.

**PRESENT: HON. THOMAS D. NOLAN, JR.**  
**Supreme Court Justice**

**APPEARANCES: TOWNE, RYAN & PARTNERS, P.C.**  
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The factual underpinnings for this legal malpractice action arise from two long-ago concluded lawsuits. To place the presently pending dismissal motion by defendants William J. Cade, Esq. and Cade & Saunders, P.C. (collectively Cade) in proper context, a synopsis of those lawsuits, both of which this court presided over follows.<sup>1</sup>

**Action No. 1 - Sutch v Yarinsky**

The first action, initially titled Debera Sutch and Alfred Sutch, Jr. v Steven Yarinsky, M.D., (Sup Ct, Saratoga County, index No. 96-2244), commenced in 1996, alleged that plaintiff Debera Sutch (Mrs. Sutch) sustained disfiguring permanent injuries from negligently performed breast reduction surgery and that her husband, plaintiff Alfred Sutch, Jr. (Mr. Sutch) sustained derivative losses. Plaintiffs' initial counsel was replaced in 1997 by Wayne P. Smith, Esq. (Smith) and Smith later retained Cade as trial counsel. Before the case was tried, Mr. Sutch was killed in an airplane crash, and Mrs. Sutch was appointed limited administratrix of his estate. Mr. Sutch, in addition to his wife, was survived by two minor children - a daughter, Jessica, and a son, Benjamin, the plaintiff herein. In September 2000, Mrs. Sutch, was substituted as Administratrix in the malpractice action in place of her deceased husband. In October 2000, the action was tried before this court and a jury. Attorneys Cade and Smith represented plaintiffs at trial and plaintiffs recovered a verdict totaling \$940,000.00 - \$840,000.00 for Mrs. Sutch's permanent injuries, pain and suffering and medical expenses and \$100,000.00 for her deceased husband's derivative claim. The verdict and resulting judgment totaling \$915,000.00 after the future medical expense award to Mrs. Sutch was reduced from \$40,000.00 to \$15,000.00, was

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<sup>1</sup>The information recited herein is principally based on documents filed in those actions in the Saratoga County Clerk's Office.

affirmed on appeal [292 AD2d 715 (3<sup>rd</sup> Dept 2002)] and thereafter paid in December 2002. In this action as discussed in greater depth later, plaintiff alleges that the \$100,000.00 derivative award was not paid into Mr. Sutch's estate due to the negligence of defendant Cade and the other defendants, and therefore he, as a distributee, never received his share of that estate asset.

**Action No. 2 - Estate of Sutch v Richmor Aviation, Inc.**

Following Mr. Sutch's death, Mrs. Sutch, represented by attorney John Sutton, obtained from Saratoga County Surrogate's Court, Limited Letters of Administration and then retained attorney Smith to prosecute claims arising from her husband's death. In December 2000, Smith commenced a proceeding on behalf of the Estate under CPLR 3102 (c) for disclosure to preserve information, and the application was granted to the extent that petitioner was afforded the right to inspect the remains of the airplane and that the airplane's owner was directed to preserve and protect the remains. [Matter of Estate of Sutch, Sup Ct, Saratoga County, Nolan, J., (index No. 2000-3367)]. Thereafter, Mrs. Sutch as Administratrix discharged Smith as the Estate's attorney in the disclosure proceeding and hired Cade. In July 2001, a wrongful death action titled, Debera S. Sutch, as Administratrix of the Estate Alfred W. Sutch, Jr., Deceased v Richmor Aviation, Inc. and Cessna Aircraft Company, (Sup Ct, Saratoga County, index No. 2001-1947) was commenced and Cade represented the Estate in that action. In September 2003, the action was tentatively settled. The settlement terms included a confidentiality agreement, which as relevant now, precluded all parties from disclosing details of the settlement. Before approving the settlement, the court appointed James G. Snyder, Esq. (Snyder) as guardian ad litem to review the proposed settlement on behalf of the two children - plaintiff and his sister, Jessica. In December 2003, the court signed an order approving the settlement and directing how the net proceeds, after payment

of attorneys' fees and disbursements, would be allocated between Mrs. Sutch and her two children. As now relevant, plaintiff's portion of the settlement was used to purchase a series of annuities for him.

Years later, plaintiff, now of age, as well as his sister, became dissatisfied with length of the schedule of payments from the annuities settlement, and represented by counsel, both negotiated a restructure of the annuities, inter alia, with revised payout schedules, and an order approving modifications to the plaintiff's annuities was signed in October 2012.

### **Present Action**

In this action against Cade, Snyder, the court appointed guardian ad litem in the wrongful death action, and Dean Coon (Coon), the guardian ad litem appointed by Surrogate's Court in Mr. Sutch's estate proceeding, plaintiff contends that all three attorneys were negligent in their representation of him. In addition, he sues his mother for negligence in her administration of the estate and in the settlement of both actions.

Now pending is a motion by Cade, made pre-answer under CPLR 3211 (a), seeking dismissal of the five causes of action asserted against him. Those causes of action sound in legal malpractice, breach of implied contract, an accounting sought, breach of fiduciary duty, and disgorgement of legal fees collected and are challenged on the following CPLR 3211 grounds: a defense established by documentary evidence, plaintiff's lack of legal capacity to sue for legal malpractice, the affirmative defenses of payment, res judicata, and collateral estoppel and that all five causes of action fail to state a cause of action and/or are duplicative. Briefly, Cade urges that the essential predicate to pursue a legal malpractice claim - an attorney/client relationship - had never been created or established between plaintiff and Cade and that therefore plaintiff, as a

matter of law, cannot pursue any claims arising from Cade's representation of plaintiff's mother as the Administratrix of the Estate of Alfred Sutch, Jr. in the wrongful death and medical malpractice actions. Moreover, Cade contends that once a settlement of the wrongful death action was reached, plaintiff's interests became represented by the court appointed guardian ad litem Snyder and that the court's subsequent and independent review and approval of the settlement validated the adequacy and propriety of the settlement and its distribution. Cade further avers that in the medical malpractice action, once the judgment was paid, plaintiff's mother - the estate's administratrix - became responsible for the administration and distribution of the derivative portion of the award and that in all estate proceedings, plaintiff's interests were represented by his court appointed guardian Coon. Cade's motion is supported by the verified complaint and other documentation including transcripts of court proceedings related to the settlement of the wrongful death action, the report and affidavit of guardian ad litem Snyder, and a copy of the order approving the settlement and its distribution.

Plaintiff opposes and cross-moves for permission pursuant to CPLR 3025 (b) to serve an amended complaint adding a sixth cause of action against Cade, alleging that he violated Judiciary Law § 487 by wilfully and intentionally deceiving the court and the plaintiff in connection with the settlement of the wrongful death action and in his placement of plaintiff's share in allegedly unsuitable annuities. Plaintiff argues, based on the facts alleged in his verified complaint and conceding plaintiff did not specifically retain Cade, that his complaint states a prima facie case that Cade had a relationship with plaintiff "tantamount to one of contractual privity" sufficient to sustain a legal malpractice causes of action. Moreover, plaintiff contends that his other four causes of action, not specifically alleging legal malpractice, are not duplicative

and should not be dismissed on that ground.

### **Discussion and Analysis**

“On a motion to dismiss under CPLR 3211, the pleading is to be given a liberal construction, the allegations contained within in are assumed to be true and the plaintiff is to be afforded every favorable inference.” Simkin v Blank, 19 NY3d 46, 52 (2012). “[W]hether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a CPLR 3211 motion to dismiss”. EBC I v Goldman, Sachs & Co., 5 NY3d 11, 19 (2005); Crepin v Fogarty, 59 AD3d 837 (3<sup>rd</sup> Dept 2009). Yet, “[t]hat favorable treatment is not limitless”, Tenney v Hodgson Russ, LLP, 97 AD3d 1089 (3<sup>rd</sup> Dept 2012), and “allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration”. Maas v Cornell Univ., 94 NY2d 87, 91 (1999).

To justify dismissal under CPLR 3211 (a) (1), the documentary evidence relied upon must as a matter of law conclusively establish a complete defense to the claims asserted. Beal Savings Bank v Sommer, 8 NY3d 318, 324 (2007); 511 West 232<sup>nd</sup> Owners Corp. v Jennifer Realty Co., 98 NY2d 144, 152 (2002); Leon v Martinez, 84 NY2d 83, 88 (1994). Stated another way, “the documentary evidence upon which the motion is predicated [must] resolve all factual issues as a matter of law and definitively disposes of the plaintiffs’ claim”. Ozdemir v Caithness Corp., 285 AD2d 961 (3<sup>rd</sup> Dept 2001), lv denied 97 NY2d 605 (2001); quoting Unadilla Silo Co. v Ernst & Young, 234 AD2d 754, 755 (3<sup>rd</sup> Dept 1996). For defendant Cade to succeed on his motion, the documentary evidence must resolve in his favor all factual issues as a matter of law and conclusively establish a defense. Weston v Cornell Univ., 56 AD3d 1074 (3<sup>rd</sup> Dept 2008).

The long adopted rule in New York is that “a third party, without privity, cannot maintain a claim against an attorney in professional negligence, ‘absent fraud, collusion, malicious acts or other special circumstances’” (citation omitted). Estate of Schneider v Finmann, 15 NY3d 306, 308-309 (2010). In Schneider, supra, at 309, the Court of Appeals carved out an exception where “that privity or a relationship sufficiently approaching privity exists between the personal representative of an estate and the estate planning attorney” and reinstated the complaint of the personal representative of an estate based on allegedly substandard legal advice the attorney gave to the decedent before he died which resulted in an increased estate tax liability. However, in its opinion, the court noted that “strict privity remains a bar against beneficiaries and other third-party individuals’ estate planning malpractice claims absent fraud or other circumstances”. 15 NY3d at 310. Again, the privity rule is not absolute and has exceptions. For example, the president and sole shareholder of a corporation was found to have a relationship with the corporation’s attorney “tantamount to one of contractual privity” sufficient to sustain a legal malpractice claim. Good Old Days Tavern, Inc. v Zwirn, 259 AD2d 300 (1<sup>st</sup> Dept 1999). However, courts in New York have consistently barred estate beneficiaries from suing an estate’s attorney. Weiss v Manfredi, 83 NY2d 974, 977 (1994); Rovello v Klein, 304 AD2d 638 (2<sup>nd</sup> Dept 2003).

Analysis of the facts alleged does not support a finding that plaintiff had a relationship tantamount to privity with Cade. Moreover, there are no special circumstances or any malicious acts ascribable to Cade’s representation to permit plaintiff to maintain this action simply by virtue of his status as a distributee. In the wrongful death suit, Cade secured a significant

settlement for the estate,<sup>2</sup> and plaintiff was allocated a fair and adequate percentage of the settlement's net proceeds. What plaintiff overlooks is that when the settlement was reached, he was a minor under the general guardianship of his mother, a co-defendant and the administratrix, who acted within her authority to decide to place plaintiff's settlement funds in annuities to provide payments over plaintiff's life, rather than over a shorter period or to receive the entire settlement when he reached 18. Although Cade appears to have assisted Mrs. Sutch in procuring the annuities, there is nothing inherently malicious or wrong about such conduct. No settlement funds have been misappropriated, and more significantly, plaintiff's annuities have been renegotiated with terms he finds more favorable. The claim that Cade "structured" his attorney's fee allegedly on more favorable terms is a "red herring" argument. At the time, Cade was middle-aged, so his financial goals were presumably quite different from plaintiff's. Cade's fee was court approved, and it mattered not to the Estate (or to plaintiff) whether he took it in cash or had annuities purchased for him with it.

Even accepting the fact that Cade did not file with the clerk the settlement order or did not get specific court approval of the annuities before they were purchased or may have recommended to Mrs. Sutch annuities that were "back-end" loaded, plaintiff was not a client of Cade nor in direct privity nor in a relationship "tantamount to one of contractual privity".

Defendant Cade's motion is granted and the first cause of action in plaintiff's complaint is dismissed, without costs.

Now, the remaining five causes of action. The second and fourth causes of action

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<sup>2</sup>Terms of the settlement are sealed by agreement between the Estate and the defendants in that case.

alleging breach of contract and breach of fiduciary duty are duplicative of a legal malpractice claim and are redundant. DiTondo v Meagher, 85 AD3d 1385 (3<sup>rd</sup> Dept 2011); Tabner v Drake, 9 AD3d 606 (3<sup>rd</sup> Dept 2004).

Defendant Cade's motion is granted and the second and fourth causes of action are dismissed without costs.

Plaintiff's third cause of action seeking an accounting also fails. Cade represented the administratrix in prosecuting the wrongful death action and the malpractice action and did not represent her in administering Mr. Sutch's estate. Thus, he had no obligation to account to plaintiff or any other distributee; that obligation rests upon the Administratrix.

Cade's motion is granted and the plaintiff's third cause of action is dismissed, without costs.

The fifth cause of action, now standing alone, denominated as one in equity, seeks judgment directing that Cade return (disgorge) all legal fees he was paid (presumably in both actions) as well as reimburse plaintiff for legal fees he incurred in obtaining a restructuring of the annuities. Such cause of action lacks precedential support and in the court's assessment lacks merit as a matter of law.

Defendant Cade's motion is granted and the plaintiff's fifth cause of action is dismissed, without costs.

Finally, the cross motion. Plaintiff seeks to add a sixth cause of action predicated on Judiciary Law § 487 which reads as follows:

An 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 fully receives any money or allowance for or on account or on money which he has not laid out, or becomes answerable for, for is guilty of a misdemeanor, and in addition to the punishment prescribed therefore by the penal law, he forfeits to the party injured treble damages, to be recovered in a civil action.

As a general rule, leave to amend a pleading "rests within the trial court's discretion and should be freely granted in the absence of prejudice or surprise resulting from the delay except in the situation where the proposed amendment is wholly devoid of merit". Berger v Water Commr. of Town of Waterford, 296 AD2d 649 (3<sup>rd</sup> Dept 2002); Leclair v Fort Hudson Nursing Home, Inc., 52 AD3d 1108 (3<sup>rd</sup> Dept 2008). "In assessing the merit of a proposed amendment, however, the proponent is required only to make an evidentiary showing sufficient to support the proposed claim. (citations omitted). A summary judgment standard is not to be applied. (citations omitted)." Bast Hatfield, Inc. v Schalmont Cent. School Dist., 37 AD3d 987, 988 (3<sup>rd</sup> Dept 2007). Rather, the movant must "simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit". MBIA Insurance Corp. v Greystone & Co., Inc., 74 AD3d 499 (1<sup>st</sup> Dept 2010).

Here, even accepting plaintiff's allegations in his proposed sixth cause of action as true, the court finds it devoid of merit. Cade, as a matter of law, is not guilty of any deceit or collusion nor did he deceive the court.


Plaintiff's cross motion is denied, without costs.

This constitutes the decision and order of the court. The original decision and order is forwarded to counsel for defendant Cade. All original motion papers are delivered to the Supreme Court Clerk/County Clerk for filing. Counsel for defendant Cade is not relieved from

the applicable provisions of CPLR 2220 relating to filing, entry and notice of entry of the decision and order.

So Ordered.

DATED: October 24, 2013  
Saratoga Springs, New York

  
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HON. THOMAS D. NOLAN, JR.  
Supreme Court Justice

ENTERED  
Peter R. Martin  
  
Saratoga County Clerk

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SARATOGA COUNTY  
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BALLSTOWN SPA, NY

ENTERED