

Schrowang v Biscone
2014 NY Slip Op 33725(U)
August 12, 2014
Supreme Court, Greene County
Docket Number: 13-1029
Judge: Richard L. Mott
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF GREENE**

-----X
PATRICIA SCHROWANG,

Plaintiff,

-against-

DECISION/ORDER

**R.J.I. No. 19-13-7319
Index No. 13-1029
Richard Mott, J.S.C.**

MICHAEL J. BISCONE,

Defendant.
-----X

Motion Return Date: July 23, 2014

APPEARANCES:

Plaintiff:

**Philip A. Wellner, Esq.
Law Offices of Philip A. Wellner, PLLC
6 Warren Street
P.O. Box 457
Hudson, NY 12534**

Defendant:

**Robert P. Roche, Esq.
36 South Pearl Street
Albany, NY 12207**

Mott, J.

In this legal malpractice action, Defendant Michael J. Biscone (Defendant) moves to dismiss the complaint, pursuant to CPLR §3211, and for summary judgment. Plaintiff Patricia Schrowang (Plaintiff) opposes and cross-moves for summary judgment of liability.

Background

Defendant is the attorney who represented Plaintiff in a divorce action. According to Plaintiff, Defendant, who had allegedly failed to serve required subpoenas and

inadequately prepared for trial, arrived at the Greene County Courthouse on the date of trial and was informed that there were other cases set for trial and, accordingly, that he should resolve the case. Plaintiff alleges that Defendant then and there coerced and threatened her into signing a Separation Agreement drafted by her husband's attorney, which failed to address her husband's alleged absconding with various items of marital property and to protect her single most important desire, namely that she remain in the marital residence with her invalid mother and daughter¹. According to Plaintiff, she signed the Agreement under duress and left the courthouse, refusing to allocute as to the agreement in open Court. Thereafter, she immediately advised Defendant that she renounced the Agreement.

Subsequently, Plaintiff hired another lawyer and moved in Supreme Court to set aside the Separation Agreement. By order dated March 1, 2013 this Court (McDonough, J) denied the application². The Court wrote in relevant part:

As to the issue of duress, the plaintiff maintains that her prior attorney told her that if she didn't come to an agreement the Judge was going to throw herself, her daughter from outside the marriage and her mother out of the marital residence. She also notes that she prior to the Agreement being handed to her she had never read it. Further she points out that she could not read the handwritten portions of the Settlement Agreement.

The Court finds absolutely no merit to plaintiff's duress argument. Plaintiff failed entirely to describe any actions on the part of defendant or defendant's counsel that would constitute duress. Similarly, her apparent allegation of duress against her own counsel has not been remotely established...

¹Plaintiff also asserts that when her husband repeatedly violated a Family Court order of protection, Defendant refused to pursue such violations.

²Plaintiff did not appeal from the denial.

Threatening the performance of a legal act does not constitute duress... The actions attributed to plaintiff's own former counsel do not constitute duress but rather merely constitute legal advice regarding one of the possible outcomes if a trial were to be held....

Thereafter, Plaintiff commenced the instant legal malpractice action in September, 2013.

Motion To Dismiss

On a motion to dismiss pursuant to CPLR §3211(a)(7), the facts alleged in the complaint are accepted as true, the plaintiff is accorded the benefit of every possible favorable inference, and the court's function is to determine only whether the facts as alleged fit within any cognizable legal theory. See, *Grant v. LaTrace*, ___ A.D.3d ___, 2014 WL 3236713, 2014 N.Y. Slip Op. 05155 (2d Dept. 2014) citing *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994) and *Goldfarb v. Schwartz*, 26 A.D.3d 462, 463 (2d Dept. 2006).

To establish a cause of action to recover damages for legal malpractice, a plaintiff must prove (1) that the defendant attorney failed to exercise that degree of care, skill and diligence commonly possess by a member of the legal community, (2) proximate cause, (3) damages and (4) that the plaintiff would have been successful in the underlying action had the attorney exercised due care. *Id.*, citing *Rudolf v. Shayne, Dachs, Stanisci, Corker & Sauer*, 8 N.Y.3d 438, 442 (2007), *Siracusa v. Sager*, 105 A.D.3d 937, 938 (2d Dept. 2013), *Markowitz v. Kurzman Eisenberg Corbin Leven & Goodman, LLP*, 82 A.D.3d 719 (2d Dept. 2011). Further, "A claim for legal malpractice is viable, despite settlement of the underlying action, if it is alleged that settlement of the action was effectively compelled by the mistakes of counsel." *Benishai v. Epstein*, 116 A.D.3d 726, (2d Dept. 2014) citing *Tortura v. Sullivan Papain Block McGrath & Cannavo PC*, 21 A.D.3d 1082, 1083 (2d Dept.

2005) quoting *Bernstein v. Oppenheim & Co.*, 160 A.D.2d 428, 430 (1st Dept. 1990).

Specifically, as the Court wrote in *Tortura*, supra, the Complaint must allege that “but for the defendant’s alleged negligence, there would have been a more favorable outcome in the underlying action.”

Here, although the underlying matrimonial action had been settled, Plaintiff contends that the Separation Agreement is unfavorable to her, that she was coerced by her attorney to sign it, that he failed to prepare for trial, to protect marital assets allegedly dissipated by the Husband and to preserve her continued occupancy in the marital dwelling. These allegations in Plaintiff’s Complaint and the inferences therefrom are sufficient to state a malpractice cause of action.

However, Plaintiff’s allegations concerning Defendant’s alleged refusal to assist her in enforcing a Family Court order of protection (Complaint, ¶¶33-36) do not set forth a proper claim of legal malpractice. Further, her assertions regarding the manner in which Defendant allegedly coerced her into signing the Separation Agreement (Complaint, ¶¶43, 44) fail to state a proper cause of action for legal malpractice in the absence of proof that the Separation Agreement should have been more favorable to Plaintiff.

Defendant’s motion to dismiss, pursuant to CPLR §3211(a)(7), is denied.

Motions For Summary Judgment

Summary judgment is a drastic remedy and should be granted only when no material facts are sufficiently disputed as to warrant a trial. *Gadani v. Dormitory Auth. of State of N.Y.*, 43 A.D.3d 1218, 1219 (3d Dept. 2007), citing *Matter of LaBier v. LaBier*, 291

A.D.2d 730, 732 (3d Dept. 2002). The totality of evidence should be viewed in the light most favorable to the non-moving party and the Court should accord it the benefit of every reasonable inference. *Id.*, citing *Tenkate v. Tops Mkts.*, 38 A.D.3d 987, 989 (3d Dept. 2007). The Court's function is issue finding, not issue determination, and where a genuine issue of fact exists, summary judgment must be denied. *Id.*, citing *Pronti v. Ciccora*, 35 A.D.3d 1207 (3d Dept. 2006).

Here, although Plaintiff's complaint is legally sufficient to support a cause of action for legal malpractice, there exist sharply disputed factual issues as to whether Defendant's performance of legal services was, as measured against that of an attorney of reasonable skill and knowledge, negligent. See, e.g., *Kluczka v. Lecci*, 63 A.D.3d 976, 978 (2d Dept. 2009), *Kutner v. Catterson*, 56 A.D.3d 437 (2d Dept. 2008). Substantively, the factual disputes raised are whether as a result of Defendant's failure to issue timely subpoenas for necessary trial witnesses and to prepare for trial, he exerted pressure on Plaintiff to sign an unfavorable Separation Agreement and failed to protect Plaintiff's interest in marital property and occupancy of the marital residence. Accordingly, the summary judgment motions must be denied.

Further, despite Defendant's argument to the contrary, this Court's March 1, 2014 Decision/Order is not dispositive of the issues in this case. Generally, issue preclusion applies where (1) the parties to the instant action are the same as those in the prior litigation, the outcome of which is now alleged to control; (2) there is an identity of issues which have been decided in the prior action which is decisive in the present action; and (3) there must have been a full and fair opportunity to contest the issues alleged to be

controlling. *Kret v. Brookdale Hosp. Medical Center*, 93 A.D.2d 449, 456 (2d Dept. 1983), aff'd 61 N.Y.2d 861 (1984), *Schwartz v. Public Administrator of County of Bronx*, 24 N.Y.2d 65, 69 (1969).

Here, the parties in the instant malpractice action differ from those in both the earlier divorce action as well as the motion to set aside the Separation Agreement. Moreover, the issue decided in the prior litigation concerns the viability of the Separation Agreement, not whether the Defendant here committed legal malpractice. Merely sustaining the agreement did not determine the issue of the adequacy of counsel's performance or whether the agreement, although legally sustainable, should have been more favorable to Plaintiff³.

The motions for summary judgment are hereby denied.

This constitutes the Decision and Order of this Court. The Court is forwarding the original Decision and Order directly to Plaintiff, who is required to comply with the provisions of CPLR §2220 with regard to filing and entry thereof. A photocopy of the Decision and Order is being forwarded to all other parties who appeared in the action. All original motion papers are being delivered by the Court to the Supreme Court Clerk for transmission to the County Clerk.

³In the application to set aside the Separation Agreement, this Court's holding that Defendant did not exert duress upon Plaintiff also is not "law of the case" here because it did not occur in an earlier stage of *this* particular action. See, e.g., *Hampton Valley Farms, Inc. v. Flower & Medalie*, 40 A.D.3d 699 (2d Dept. 2007). In addition, since proof of legal malpractice was clearly not germane to the proof adduced in the application to set aside the Separation Agreement, plaintiff did not have a full and fair opportunity to address the issue in this case. See, *Frankson v. Brown & Williamson Tobacco Corp.*, 67 A.D.3d 213, 217 (2d Dept. 2009)(requiring a full and fair opportunity to address the issue).

Dated: Claverack, New York
August 12, 2014

ENTER



RICHARD MOTT, J.S.C.

Documents Considered:

1. Notice of Motion, dated June 20, 2014, Affidavit in Support of Robert P. Roche, Esq., dated June 17, 2014, Affidavit in Support of Michael J. Biscone, Esq., dated June 19, 2014, with Exhibits A-1 - D, Memorandum in Support, dated June 17, 2014;
2. Notice of Cross-motion, dated July 28, 2014, Affirmation of Philip A. Wellner, Esq., dated July 28, 2014 with Exhibits 1-12, Statement of Uncontested Facts, dated July 28, 2014, Memorandum of Law in Opposition, dated July 28, 2014,
3. Reply of Robert P. Roche, Esq., undated, received August 4, 2014.