

**Lieberman v Green**

2014 NY Slip Op 33741(U)

June 3, 2014

Supreme Court, Westchester County

Docket Number: 70043/2012

Judge: James W. Hubert

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for 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  
COUNTY OF WESTCHESTER

-----X

MITCHELL P. LIEBERMAN and  
LIEBERMAN & LeBOVIT,

Plaintiffs,

-against-

DAVID GREEN,

Defendant.

-----X

HUBERT, A.J.S.C.

**DECISION & ORDER**

Index No. 70043/2012  
Motion Seq. 1  
Motion Date: Mar. 29, 2013  
Decision Date: June 2, 2014

The following papers were read on this motion by plaintiffs pursuant to CPLR 3211(a)(1) and (7) to dismiss defendant's counterclaims:

- Notice of Motion, Affirmation in Support, Exhs. A-C
- Lieberman Affirmation, Exhs. A-C
- Affirmation in Opposition, Exh. A
- Reply Affirmation
- Affidavits of Service

On the foregoing papers, the motion is determined as follows:

Defendant David Green retained Plaintiff Mitchell P. Lieberman, of the law firm of Lieberman & LeBovit, to represent him in a divorce proceeding commenced against him by his former wife, Janet Bogenschultz. *See Bogenschultz v Green*, Index No. 3423/2010 (Sup. Ct., Putnam Co.). Exactly one year later, on March 9, 2012, before commencing depositions, the parties entered into a detailed stipulation of settlement on the record. The parties agreed, *inter alia*, for a "30-day window" to prepare a written stipulation containing language to facilitate the terms of the stipulation. The attorneys for the parties also agreed that it was their "intention" to submit the stipulation to the Court to be so-ordered. The transcript indicates that Lieberman

conducted a voir dire of both parties, during which Ms. Bogenschultz indicated that she was “recluctant” to enter into the stipulation, that she had taken prescription medication that morning, and was not thinking clearly. At that point, there was a discussion off the record. Back on the record, Mr. Lieberman again asked Ms. Bogenschultz whether she was thinking clearly, to which she answered “yes.” Mr. Lieberman also asked “do both of you desire to have the judge next Friday so order this stipulation, and it becomes part of your divorce judgment?” Both parties answered “yes.” Defendant states that he gave Ms. Bogenschultz a \$1,000 check to satisfy certain initial terms and conditions of the settlement agreement, and she cashed the check.

According to Defendant, “shortly thereafter, Bogenschultz repudiated the settlement agreement set forth in the Stipulation of Settlement. Despite negotiating the check that was delivered to her by Green as part of and pursuant to the Stipulation of Settlement on March 9, 2012, Bogenschultz thereafter refused to proceed with and be bound by the Stipulation of Settlement.”

The parties were due in Court on their matrimonial matter the following week. As far as this Court can ascertain, it does not appear that the settlement agreement, as transcribed by the stenographer at the depositions, was formalized in a written document to be signed by the parties, nor was such a document ever presented to the Putnam County Judge to be so-ordered. Instead, the matrimonial action was adjourned several times and continued.

Another law firm was substituted as counsel for Defendant on or about August 21, 2012, and additional motions were filed. It is unclear whether Defendant moved to enforce the settlement agreement or whether the issue came up in a different context, but in any event, by Decision and Order dated October 4, 2012 (Nicolai, J.), the matrimonial court ruled that the settlement agreement entered into by the parties was not binding because it did not meet any of the statutory requirements of DRL 236(B)(3). By further Decision and Order dated March 28,

2013, the Court rejected Defendant's argument that his tender of \$1,000 to Ms. Bogenschultz, and her acceptance of the check, constituted ratification of the settlement agreement.

*Bogenschultz v. Green*, \_\_ Misc. 3d \_\_, Index No. 3423/2010 (Sup. Ct. Putnam Co. 2013), citing *A-1 Communications, Inc. v WTZA-TV Assocs.*, 245 A.D.2d 940, 941, 666 N.Y.S.2d 810, (3d Dep't 1997).

Plaintiff then commenced the instant action to recover outstanding legal fees from Defendant in the amount of \$19,615.00. Defendant's answer, dated January 24, 2013, interposes counterclaims for legal malpractice and breach of contract. The first counterclaim alleges, *inter alia*, that Lieberman was negligent in failing to ensure that the settlement agreement was signed and acknowledged by the parties, and so-ordered by the Court. Defendant specifically contends that "[h]ad Lieberman properly completed the settlement set forth in the Stipulation of Settlement, the matrimonial action would have ended shortly after March 9, 2012." The counterclaim alleges that Lieberman's failure to do so violated his duty of care to exercise a reasonable attorney's skill, prudence and diligence in representing his client, which ultimately led to "increased risk" in the matrimonial action, and caused Defendant to incur additional legal expenses in defending that action and to suffer mental anguish. Defendant's second counterclaim, for breach of contract, alleges that the law firm Lieberman & LeBovitz failed to timely send him properly itemized invoices.

In the motion sub justice, Plaintiffs move to dismiss defendant's counterclaims for failure to state a cause of action. In support of their motion, Plaintiffs argues that (1) Lieberman did not commit malpractice inasmuch as he had no duty to perfect the settlement agreement; (2) Defendant cannot show actual and ascertainable damages on his counterclaims because the matrimonial action is ongoing; and (3) the breach of contract counterclaim is duplicative of the legal malpractice claim.

In order to prevail in an action to recover damages for legal malpractice, a plaintiff must establish both that the defendant attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession, resulting in actual damages to the plaintiff, and that “but for” the attorney's negligence, the plaintiff would have succeeded on the merits in the underlying action. *AmBase Corp. v. Davis Polk & Wardwell*, 8 N.Y.3d 428, 434, 834 N.Y.S.2d 705 (2007)(internal quotation marks omitted); *Rosenbaum v Sherefsky Aronson Mayefsky & Sloan LLP*, 100 A.D.3d 731 (2d Dep’t 2012). A plaintiff's burden of proof in a legal malpractice action is therefore “a heavy one.” *Lindenman v. Kreitzer*, 7 A.D.3d 30, 775 N.Y.S.2d 4 (1st Dep’t 2004). However, in determining whether a complaint is sufficient to withstand a motion to dismiss pursuant to CPLR 3211(a)(7), the sole criterion is whether the pleading states a cause of action. If from the four corners of the complaint, factual allegations are discerned which, taken together, manifest any cause of action cognizable at law, a motion to dismiss will fail. *511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 N.Y.2d 144, 152, 746 N.Y.S.2d 131 (2002). The court’s function is to “accept. . . each and every allegation forwarded by the plaintiff without expressing any opinion as to the plaintiff's ability ultimately to establish the truth of these averments before the trier of the facts.” *219 Broadway Corp. v Alexander's, Inc.*, 46 N.Y.2d 506, 509, 414 N.Y.S.2d 889 (1979). The pleading is to be liberally construed and the pleader afforded “the benefit of every possible favorable inference.” *511 West 232nd Owners Corp., supra*.

As noted above, Defendant’s counterclaim states that Ms. Bogenschultz repudiated the settlement agreement “shortly after” it was reached on March 9, 2012, and that she “refused to proceed with and be bound by the Stipulation of Settlement.” This Court therefore concludes that Defendant has failed to state a cognizable cause of action for legal malpractice against Lieberman for having failed to obtain Ms. Bogenschultz’ signature to the settlement agreement.

Additionally, Defendant's allegation that Lieberman was negligent in failing to obtain Ms. Bogenschultz's signature on the date of March 9, 2012, is contradicted by the terms of the stipulation of settlement itself, which provided for a "30-day window" for the attorneys to prepare a "further written stipulation" for signature by the parties. Thus, nothing within the four corners of the counterclaim manifests Lieberman's failure to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession.

To the extent that Defendant contends that Plaintiffs engaged in legal malpractice by pressuring Defendant to retain an expert, this claim fails since Defendant has failed to sufficiently allege any "but for" causation.

With respect to Defendant's counterclaim for breach of contract against the Plaintiff law firm for allegedly failing to comply with the billing requirements of the retainer agreement, the court notes that this claim is also raised in Defendant's sixth affirmative defense to the complaint. "By its very nature, a counterclaim seeks affirmative relief." *P.J.P. Mech. Corp. v. Commerce & Indus. Ins. Co.*, 65 A.D.3d 195, 882 N.Y.S.2d 34 (1<sup>st</sup> Dep't 2009). A counterclaim constitutes an independent cause of action through which a defendant may obtain affirmative relief. Here, however, Defendant's second counterclaim states that "as a result of [Plaintiffs'] failure to invoice Green no less frequently than every 60 days, [Plaintiffs] are precluded from seeking recovery of their alleged attorneys' fees." While Defendant purports to seek damages on this counterclaim, no actual damages or other affirmative relief is available under the facts pleaded. This counterclaim is therefore dismissed as well.

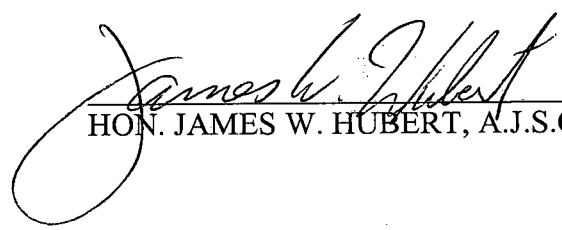
The Court has considered the remaining contentions of the parties and finds them to lack merit. Accordingly, it is hereby:

ORDERED that the branch of Plaintiffs' motion to dismiss Defendant's counterclaims is granted, and the same is dismissed with prejudice; and it is further

ORDERED that plaintiffs shall serve this Decision and Order, with Notice of Entry, on defendant within seven days of the date hereof.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York  
June 3, 2014

  
HON. JAMES W. HUBERT, A.J.S.C.

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