

Betz v Blatt

2014 NY Slip Op 34068(U)

September 15, 2014

Supreme Court, Westchester County

Docket Number: Index No. 58938/2011

Judge: Joan B. Lefkowitz

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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-COMPLIANCE PART

-----X
DEBRA BETZ, Administratrix of the Estate of
Carmelo Carbone aka Mel Carbone,

Plaintiff

-against-

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

Defendants
-----X

LEFKOWITZ, J.

DECISION and ORDER

Index # 58938/2011
Seq. No. 13
Motion Date: Sep. 15, 2014

The following papers were read on this motion by plaintiff for a protective order directing that plaintiff not be required to appear for a further deposition in this matter and for such other and further relief as this court deems just and proper.

- Order to Show Cause dated August 1, 2014
- Affirmation in Support; Exhibits A-G
- Affirmation in Opposition; Exhibits 1-5; Memo of Law

Upon the foregoing papers and oral argument heard on September 15, 2014 this motion is determined as follows:

Carmelo Carbone died testate on May 13, 2004. His will, drafted by defendant Arnold W. Blatt, Esq. (hereinafter to be referred to as Blatt), named his brother Michael Carbone as executor of his estate. Carmelo Carbone's two daughters, Debra Betz (hereinafter to be referred to as Betz and who, in her capacity as executor of the estate of Carmelo Carbone, is plaintiff herein), and Kristin Carbone-Lopez, were the named beneficiaries thereunder. The estimated gross value of the estate at the time of Carmelo Carbone's death was \$ 2 million.

Defendants are all attorneys who allegedly represented the estate and/or Michael Carbone sequentially throughout the probate process. On or about August 15, 2004, Blatt filed a petition for probate on behalf of Michael Carbone. After letters testamentary were awarded to Michael Carbone, Blatt became the estate's attorney and he represented the estate from August 15, 2004

until the summer of 2006.

In or about February 2009, defendant Anthony J. Pieragostini (hereinafter “Pieragostini”), was retained to prepare and file an estate accounting. Pieragostini filed an estate accounting which was initially found to be inadequate and insufficient by the Surrogate.

Defendants Sirignano, and his firm, Enea, Scanlan & Sirignano, LLP (hereinafter to be referred to jointly as the “Sirignano defendants”), were retained in or about November, 2009. Surrogate Scarpino suspended the letters testamentary of Michael Carbone, on April 13, 2011 at which time the value of the estate was depleted to about \$ 110,000. Judgments against Michael Carbone and others have been entered and there is a bench warrant for the arrest of Michael Carbone who, it is believed, is presently beyond this court’s jurisdiction, in Italy. In or about June, 2011, the Surrogate ordered Michael Carbone to pay to the estate a sum over \$ 700,000.

Plaintiff was deposed on November 30, 2010 and questioned by the Sirignano defendants, among others, in the underlying accounting action which gave rise to the instant action. A review of the transcript of that deposition reveals that plaintiff testified as to the estate’s assets and the accounting that was filed.

In March, 2012, plaintiff retained Gary E. Bashian, Esq., and his firm, Bashian & Farber, LLP, (hereinafter to be referred to jointly as “Bashian”) to represent her interests in the estate. When the Surrogate’s Court suspended the letters testamentary of Michael Carbone and gave limited letters to plaintiff, she hired defendants Bashian to represent the estate. Plaintiff was named executor of the estate in November 2011.

The present action was commenced on or about November 21, 2011. At that time, defendants moved for an order directing a more definite statement of plaintiff’s allegations. The motion was granted and the court (Smith, J.), by decision and order dated March 6, 2012 directed plaintiff to replead and serve an amended complaint. In her amended complaint, plaintiff asserted five causes of action: (1) legal malpractice; (2) breach of fiduciary duty; (3) fraud and breach of trust; (4) disgorgement and restitution of attorneys’ fees and expenses; and (5) breach of Judiciary Law § 487. The Sirignano defendants moved to dismiss the claims asserted against them in the complaint.¹ By decision and order dated August 1, 2012, the court (Smith, J.), in regards to the Sirignano defendants, dismissed all the claims asserted against them except for the claim sounding in legal malpractice. Plaintiff appealed from this decision. The Sirignano defendants, too, appealed from this decision seeking the dismissal of the surviving cause of action.

In or about September, 2012, the Sirignano defendants commenced a third-party action against Bashian alleging claims for common law contribution and common law indemnification

¹The other defendants also moved for dismissal of the claims asserted against them.

under the doctrine of respondeat superior, arguing that if the Sirignano defendants were found to have committed legal malpractice, then said damages were due in whole or in part to the negligence and legal malpractice of Bashian who represented Betz first in her individual, and then in her representative, capacities. By decision and order dated May 9, 2013 the court (Smith, J.), dismissed the third-party action. The Sirignano defendants appealed from this decision and that appeal is presently pending.

During the pendency of these appeals, plaintiff's examination before trial was conducted over a period of two days on March 11, 2014 and March 12, 2014.

A decision in this matter was rendered by the Appellate Division, Second Department on April 16, 2014. The appellate court modified the order rendered by this court (Smith, J.) on August 1, 2012. More particularly, in regards to the Sirignano defendants, the appellate court granted dismissal of the legal malpractice claim asserted against them but reinstated the claim seeking disgorgement and restitution of attorneys fees from them. In reinstating this claim the appellate court noted that plaintiff pleaded sufficient facts to assert such a claim when they alleged that the Sirignano defendants' fees for representing Michael Carbone were paid from estate assets even though those services were not beneficial to the estate and were, in fact, adverse to it.

Subsequent to the appellate court's decision the Sirignano defendants served a notice to continue their examination before trial of plaintiff. The notice, dated April 7, 2014 requested the production of any and all documents relative to the 14th claim in the amended verified complaint wherein plaintiff claimed that the Sirignano defendants received fees from the estate for services which did not benefit the estate but rather were adverse to it and were not for legitimate estate services and by which claim plaintiff sought disgorgement and restitution of all attorneys' fees.

This motion for a protective order followed plaintiff's refusal to appear for a further deposition. Plaintiff asserts that the Sirignano defendants have not explained the need for a further deposition. Plaintiff contends that the same facts, circumstances and damages which form the basis of the present disgorgement claim were the basis of the former legal malpractice claim. Plaintiff also argues that the specific facts regarding the disgorgement claim are within the knowledge of the Sirignano defendants and their client Michael Carbone and not with her. Plaintiff further asserts that another examination before trial would cause unnecessary expense as well as her absence from work and family.

This motion is opposed by the Sirignano defendants who contend that the reinstatement of the separate, distinct and independent cause of action sounding in restitution, coupled with the dismissal of the legal malpractice claim, results in their right to a continued examination before trial of plaintiff. The Sirignano defendants further contend that plaintiff has failed to show that she will be prejudiced by having to appear for a further deposition.

Parties to an action are entitled to reasonable discovery of facts that are relevant to the

controversy at issue and CPLR 3101 (a) permits discovery of “all matter material and necessary in the prosecution or defense of an action.” However unlimited disclosure is not mandated and the court may deny, limit, condition or regulate the use of a disclosure device to prevent unreasonable annoyance, expense, embarrassment, disadvantage or other prejudice to any person or the courts (see *Diaz v City of New York*, 117 AD3d 777 [2d Dept 2014]). The proponent of a CPLR 3103 (a) motion must make an appropriate factual showing to be entitled to a protective order (*Willis v Cassia*, 255 AD2d 800 [3rd Dept 1998]). The court finds that plaintiff herein failed to make that showing. A review of plaintiff’s deposition taken on November 30, 2010 shows that she was not questioned about how the Sirignano defendants were unjustly enriched in this matter. At her deposition on March 11 and 12 of this year, plaintiff was questioned by the defendants including the Sirignano defendants. As plaintiff now concedes, she was questioned about 67 exhibits regarding the estate and its assets. However the court finds that she was not questioned extensively or meaningfully about how the Sirignano defendants were unjustly enriched in this matter.

The claim of legal malpractice is different from that of unjust enrichment. To prevail in an action to recover damages for legal malpractice a plaintiff must demonstrate that the attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession and that the attorney’s breach of this duty proximately caused the plaintiff to suffer actual and ascertainable damages (*Wald v Berwitz*, 62 AD3d 786 [2d Dept 2009]). To prevail on a claim of unjust enrichment a party must show that the other party was enriched at that party’s expense and that it is against equity and good conscience to permit the other party to retain what is sought to be recovered (*Mobarak v Mowad*, [2d Dept 2014]). There is a clear distinction between these two claims, as the appellate court implicitly found when it dismissed the malpractice claim and reinstated the restitution claim. Moreover, when plaintiff was previously deposed, unjust enrichment was not a claim in this action. Therefore, the Sirignano defendants should be given the opportunity for a continued examination before trial of plaintiff.

As a general matter, a plaintiff will be required to submit to a deposition upon oral questions conducted within the county in which the action is pending unless it is shown that hardship would result. Plaintiff has not made this showing here. A trip from Massachusetts to New York is not such a hardship as to warrant a protective order (*Mount Vernon Fire Insur. Co., v Lundy*, 217 AD2d 574 [2d Dept 1995]; *Cooper v Met Mdse.*, 54 AD2d 859 [1st Dept 1976]). Also, the affirmation of plaintiff’s attorney only in support of the hardship assertion is inadequate insofar as it isn’t based upon personal knowledge (*Foley v Hafmeister*, 156 AD2d 541 [2d Dept 1989]). Accordingly, it is:

ORDERED that plaintiff’s motion for a protective order is denied; and it is further,

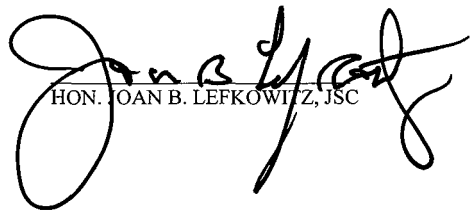
ORDERED that plaintiff is directed to appear for a further deposition on or before October 10, 2014 limited to questions regarding her 14th cause of action set forth in the amended complaint dated April 4, 2012, at a place and time convenient to the parties; and it is further,

ORDERED that the parties are directed to appear for a conference in the Compliance Part, Room 800 on October 14, 2014 at 9:30 A.M.; and it is further,

ORDERED that plaintiff is directed to serve a copy of this order upon all parties within seven days of entry.

The foregoing constitutes the decision and order of this Court.

Dated: White Plains, New York
September 15, 2014



HON. JOAN B. LEFKOWITZ, JSC

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cc: Compliance Part Clerk