

Ippolito v Haber

2015 NY Slip Op 32658(U)

September 30, 2015

Supreme Court, Richmond County

Docket Number: 150156/2015

Judge: Charles M. Troia

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E-FILE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

-----X
DOMINICK IPPOLITO, III

Plaintiff,

-against-

BENJAMIN HABER

Defendants.
-----X

DCM PART 1

Present:
HON. CHARLES M. TROIA

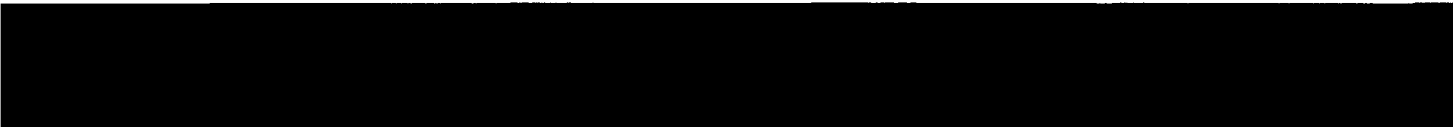
DECISION AND ORDER

Index No. 150156/2015

The following papers (along with all exhibits annexed thereto) numbered 1 to 5 were marked fully submitted on the 17th day of July, 2015:

	Pages Numbered
Notice of Motion by defendant (dated April 27, 2015).....	1
Memorandum of Law by defendant (dated April 27, 2015).....	2
Affirmation in Opposition by plaintiff (dated July 9, 2015).....	3
Memorandum of Law by plaintiff (dated July 9, 2015).....	4
Reply Affirmation by defendant (dated July 16, 2015).....	5

This is an action to recover damages for legal malpractice. Plaintiff maintains that he retained defendant attorney to represent him in an action in the Family Court wherein he sought downward modification of child support. The application for a downward modification was denied. Plaintiff's complaint asserts two causes of action. The first cause of action alleges that defendant committed legal malpractice by failing to "seek and obtain financial disclosure from the respondent-mother in the Family Court Proceeding prior to December 14, 2011, or to properly investigate and determine the respondent-mother's actual financial condition". The second cause of action alleges that defendant deviated from accepted legal standards by failing "to call the



respondent-mother to testify and inquire of her, at the hearing , as to her income and assets”.

Defendant moves to dismiss plaintiff’s complaint pursuant to CPLR 3211(a) (7) maintaining that plaintiff’s complaint fails to plead a cause of action for malpractice . Defendant also moves pursuant to CPLR 3211 (a) (1) based on documentary evidence. Plaintiff opposes the motion.

Failure to state a Cause of Action

Defendant maintains that assuming all factual allegations asserted by plaintiff are correct , the pleading fails to set forth a cause of action for legal malpractice. Defendant asserts that both causes of action allege that defendant departed from good and accepted practice in that he failed to obtain any information regarding the income of the respondent in the in Family Court proceeding. Defendant argues that under the Family Court Act at the time of that proceeding , the income of the respondent was not a factor to be considered in deciding an application for a downward modification. Defendant asserts that since respondent-mother’s financial information was irrelevant to the proceeding , any failure to obtain this information could not be a proximate cause of any alleged malpractice.

Documentary Evidence

Alternatively, defendant argues that the transcript of the proceeding demonstrates that the petition for modification was denied because the Support Magistrate found plaintiff’s account of his finances and income to be totally incredible. Defendant also maintains that the modification was denied without prejudice and that another proceeding could have been commenced and the respondent-mother’s financial information obtained. In support of this argument defendant annexes a transcript of the hearing conducted by the Magistrate wherein she sets forth her findings.

Opposition

In opposition to the motion plaintiff argues that in a motion brought pursuant to CPLR 3211, the complaint must be viewed in a light most favorable to plaintiff. Plaintiff also argues that in determining the issue of child support the income and assets of both parents are considered. Finally plaintiff maintains that as noted by the affirmance by the Appellate Division, Second Department, defendant did not object to proceeding with the downward modification hearing even though it had only been scheduled to be a discovery conference.

Decision

In a petition for downward modification of support provisions which were executed prior to the 2010 amendments of Section 451 of the Family Court Act, petitioner has the burden of establishing a substantial and unanticipated change in petitioner's financial circumstances (*see, Dimaio v Dimaio*, 111 AD3d 933, 976 NYS2d 133 (2d Dept. 2013)). Here, plaintiff was seeking a downward modification of his support obligation based on the change of his financial circumstances, specifically plaintiff maintained that he was "laid-off" by his employer. Accordingly, as argued by defendant, any financial information that plaintiff may have received from respondent-mother would have been in fact irrelevant to the issue before the Support Magistrate. The issue that was to be determined was the change in circumstances of plaintiff, not the other parent.

In reviewing the complaint in a light most favorable to plaintiff, it does not plead a cause of action in legal malpractice. The two causes of action alleged in the complaint clearly and specifically state that the allegation of legal malpractice was the failure to obtain or inquire of the other parent her financial information. The complaint does not allege that defendant departed from good and accepted legal practice by failing to object to proceeding with the hearing. Further, even

if the complaint had alleged failure to object to proceeding with the hearing as part of the malpractice, the only discovery plaintiff would have obtained would have been the other parent's financial information, discovery irrelevant to the issues in the application for a downward modification.

In that defendant has established that plaintiff's complaint fails to plead a cause of action in legal malpractice, defendant's motion to dismiss is granted.

This constitutes the decision and order of the Court.

Dated: September 30, 2015

ENTER

GRANTED
SEP 30 2015
[Signature]
CLERK

[Signature]

Hon. Charles M. Troia
Justice of the Supreme Court

