

**Barrett v Goldstein**

2017 NY Slip Op 30010(U)

January 3, 2017

Supreme Court, New York County

Docket Number: 154225/2016

Judge: Arlene P. Bluth

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 32**

----- X  
**JOHN BARRETT,**

**Plaintiff,**

**-against-**

**LORI H. GOLDSTEIN, ESQ.; EVAN D. SCHEIN, ESQ.;**  
**MARC FLEISCHER, ESQ and BERKMAN BOTTGER**  
**NEWMAN & RODD LLP;**

**Defendants.**

----- X

**Index No. 154225/2016  
Motion Seq: 001**

**DECISION & ORDER**

**HON. ARLENE P. BLUTH**

Defendant Goldstein's motion to dismiss is granted.

**Background**

This action arises out of post-nuptial agreement signed by plaintiff and his wife (Loren Comstock). Plaintiff's complaint alleges that Goldstein acted as a mediator between Comstock and plaintiff and that Goldstein helped draft the post-nuptial agreement. Plaintiff's complaint further alleges that Goldstein failed to gain informed consent from plaintiff, failed to act as a reasonably competent attorney by denying plaintiff critical information about the equitable distribution rights in marital property, and, therefore, Goldstein breached her fiduciary duty and committed legal malpractice. The post-nuptial agreement was purportedly signed on July 22, 2013 and its terms became effective when plaintiff filed for divorce.

Goldstein claims that the post-nuptial agreement signed by plaintiff and Comstock states that each party had their own legal counsel advising them regarding the effects of the post-nuptial

[\* 2]

agreement. Goldstein claims that plaintiff failed to state a cause of action for legal malpractice/breach of fiduciary duty because plaintiff failed to establish the existence of an attorney-client relationship. Goldstein further claims that even if there was an attorney-client relationship, plaintiff failed to plead facts to establish that 'but for' Goldstein's alleged negligence, plaintiff would have received a larger distribution of the marital estate. Goldstein asserts that the complaint does not state what occurred in the divorce action and how the marital property was eventually divided, thereby precluding a finding of legal malpractice.

Goldstein further argues that the cause of action for breach of fiduciary duty and fraud are duplicative of the cause of action for legal malpractice and, therefore, must be dismissed.

In opposition, plaintiff disputes that Goldstein was a mediator and claims that Goldstein was hired by Comstock. Plaintiff insists that he had an attorney-client relationship with Goldstein and declares that the documentary evidence provided by Goldstein does not dispute that characterization. Plaintiff asserts that Comstock became entitled to a fifty percent interest in plaintiff's inherited land and mineral rights to which Comstock would not have otherwise been entitled under equitable distribution. Plaintiff claims the causes of action are not duplicative because if no attorney-client relationship is found, then a cause of action for fraud should remain.

This Court originally granted the instant motion to dismiss on default on July 19, 2016 (*see* NYSCEF Doc. No. 15). However, because the parties purportedly sought to vacate this default by stipulation, the Court hereby recalls its previous decision and order.

### **Discussion**

“On a CPLR 3211 motion to dismiss, the court will accept the facts as alleged in the

[\* 3]

complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Nonnon v City of New York*, 9 NY3d 825, 827, 842 NYS2d 756 [2007] [internal quotations and citation omitted]).

A motion to dismiss based on documentary evidence “may be appropriately granted only where the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law” (*Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 326, 746 NYS2d 858 [2002]).

### **Cause of Action for Legal Malpractice**

“An action for legal malpractice requires proof of the attorney’s negligence, a showing that the negligence was the proximate cause of the plaintiff’s loss or injury, and evidence of actual damages” (*Pellegrino v File*, 291 AD2d 60, 63, 738 NYS2d 320 [1st Dept 2002]). A threshold inquiry in a legal malpractice claim is whether an attorney-client relationship exists (*Sutch v Sutch-Lenz*, 129 AD3d 1141, 1142, 11 NYS3d 300 [3d Dept 2015]).

“In determining the existence of an attorney-client relationship, a court must look to the actions of the parties to ascertain the existence of such a relationship” (*Wei Cheng Chang v Pi*, 288 AD2d 378, 380, 733 NYS2d 471 [2d Dept 2001]). A purported client’s “unilateral beliefs and actions do not confer upon [him] the status of client” (*Jane Street Co. v Rosenberg & Estis, P.C.*, 192 AD2d 451, 451, 597 NYS2d 17 [1st Dept 1993]). Here, plaintiff’s complaint attempts to characterize Goldstein’s role as an attorney-client relationship with plaintiff, but plaintiff

[\* 4]

failed to allege any facts to substantiate this claim.

Goldstein also produced documentary evidence that utterly refutes plaintiff's claim that an attorney-client relationship existed. Plaintiff's complaint (Goldstein's counsel, exh A) attaches a copy of the post-nuptial agreement signed by both plaintiff and Comstock. Paragraph 1.1 of the post-nuptial agreement states that "Each party acknowledges that his or her separate legal counsel has examined the attached financial information, has advised him or her with respect to same, and that each party fully understands the contents of such financial information of the other" (*id.*). Paragraph 1.2 states that "Each party acknowledges that: (a) he or she has had legal counsel of his or her own selection who advised him or her fully with respect to his or her rights in and to the property and income of the other and with respect to the effect of this Agreement and that such party understands such advice" (*id.*).

This agreement makes clear that each party consulted with his or her own attorney before signing the agreement. Further, plaintiff's complaint supports this conclusion. Plaintiff alleges that defendants Fleischer and Berkman Bottger (the firm) were retained by plaintiff on or about March 22, 2013 to "review the Post-Nuptial Agreement drafted by Defendant Lori H. Goldstein" (plaintiff's complaint ¶ 51). Clearly, plaintiff did have his own individual counsel review the agreement before he signed it.

Goldstein attached emails establish that she was only *drafting* the post-nuptial agreement (*see* affirmation of Goldstein's counsel, exh B) rather than acting as counsel for plaintiff. In fact, the draft retainer agreement from Goldstein, attached in an email to both Comstock and plaintiff, states that Goldstein was "not being retained to give either of you [plaintiff or Comstock] legal

advice. You each agree to have the Agreement reviewed by separate counsel for each of you before signing it” (*id.*). Goldstein also cites to various emails while she was drafting the post-nuptial agreement that make clear that counsel for plaintiff and counsel for Comstock were reviewing the agreement before it was finalized (*see id.* exh C).

Drafting a post-nuptial agreement that the parties intend to sign only after consulting with **one’s own** attorneys does not constitute an attorney-client relationship. Even assuming *arguendo* that Goldstein did a poor job of drafting the agreement and that plaintiff waived certain rights in the agreement, that does not make out a cause of action for legal malpractice. Although Goldstein may have used her legal expertise to draft the agreement, plaintiff did not exclusively rely on that expertise before signing the agreement. He employed his own attorneys for that task.

In opposition, plaintiff failed to submit any further evidence, such as a different retainer agreement or other document, that might raise an issue of fact as to whether Goldstein was acting as plaintiff’s attorney.

### **Cause of Action for Breach of a Fiduciary Duty**

Because there is no cause of action for legal malpractice, there is also no claim for breach of a fiduciary duty. “A fiduciary duty arises between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation” (*Eurycleia Partners, LP v Seward & Kissel*, 12 NY3d 553, 561, 883 NYS2d 147 [2009]). “Ascertaining the existence of such a relationship inevitably requires a fact-specific inquiry” (*id.*). Here, plaintiff has alleged no facts to support the existence of a fiduciary

relationship. Goldstein simply drafted a post-nuptial agreement that plaintiff was free to sign or not sign. As stated above, plaintiff's complaint is internally inconsistent. Plaintiff alleges both that he hired attorneys to review the post-nuptial agreement **and** that Goldstein was his attorney. Plaintiff can't have it both ways.

In any event, plaintiff's breach of fiduciary duty claim, as well his fraud claim are duplicative of the legal malpractice claim and, therefore, should be dismissed because all three claims arise from the same facts (*Voutsas v Hochberg*, 103 AD3d 445, 446, 958 NYS2d 903(Mem) [1st Dept 2013]).

#### **Cause of Action for Fraud**

Even if the claim for fraud was not duplicative, plaintiff failed to state a cause of action for fraud against Goldstein. "The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages" (*Eurycleia Partners, LP*, 12 NY3d at 559).

Here, plaintiff claims the misrepresentations made by Goldstein were included in the draft post-nuptial agreement. Plaintiff's cause of action for fraud is dismissed because it ignores that fact that Goldstein only drafted the post-nuptial agreement; if plaintiff did not like the agreement, then he should not have signed the agreement. Even assuming that Goldstein did everything alleged in the complaint, plaintiff did not allege facts sufficient to satisfy the justifiable reliance element. Plaintiff claims that Goldstein intentionally omitted the value of Comstock's marital assets, thereby causing plaintiff to fail to receive his proper share. However, plaintiff failed to

**ARLENE P. BLUTH  
J.S.C.**

allege why it was reasonable to rely on Goldstein's draft agreement when he had his own attorneys review the post-nuptial agreement.

Accordingly, it is hereby

ORDERED that this Court recalls its decision granting Goldstein's motion to dismiss on default; it is further

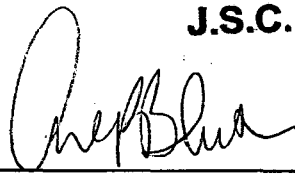
*EW*

ORDERED that Goldstein's motion to dismiss all claims against her is granted, and all claims against Lori Goldstein, ~~vs.~~sq. Are hereby severed and dismissed.

This is the Decision and Order of the Court.

Dated: January 3, 2017  
New York, New York

**ARLENE P. BLUTH  
J.S.C.**



\_\_\_\_\_  
ARLENE P. BLUTH, JSC