

Knox v Aronson, Mayefsky & Sloan, LLP

2017 NY Slip Op 32952(U)

October 16, 2017

Supreme Court, New York County

Docket Number: 158738/2016

Judge: Carmen Victoria St. George

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. CARMEN VICTORIA ST. GEORGE

PART 34

Justice

JODI KNOX a/k/a JODI MCGINNIS,

INDEX NO. 158738/2016

Plaintiff,

MOTION DATE 08/10/2017

- v -

MOTION SEQ. NO. 003

**ARONSON, MAYEFKY & SLOAN, LLP, KAREN ROBARGE,
FREDMAN BAKEN & KOSAN, LLP,**

Defendants.

The following papers were read on this

PAPERS NUMBERED

Notice of Motion/Order to Show Cause – Affidavits – Exhibits

40-59, 68-71

Answering Affidavits – Exhibits

66-67, 92-97

Replying Affidavits

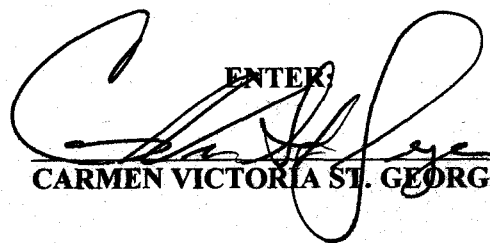
129-133

It is

ORDERED that motion sequence 003 is granted in part and denied in part for the reasons set forth in the accompanying order.

DATED: _____

10/16/2017

ENTER:


CARMEN VICTORIA ST. GEORGE, J.S.C.

**HON. CARMEN VICTORIA ST. GEORGE
J.S.C.**

- 1. CHECK ONE:
- 2. CHECK AS APPROPRIATE:.....MOTION IS
- 3. CHECK IF APPROPRIATE:

- CASE DISPOSED NON-FINAL DISPOSITION
- GRANTED DENIED GRANTED IN PART OTHER
- SETTLE ORDER SUBMIT ORDER DO NOT POST
- FIDUCIARY APPOINTMENT REFERENCE

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 34**

-----X
JODI KNOX a/k/a JODI MCGINNIS,

Plaintiff,

Index No. 158738/2016
Motion Sequence 003

-against-

Decision and Order

ARONSON, MAYEFKY & SLOAN, LLP, KAREN
ROBARGE, FREDMAN BAKEN & KOSAN, LLP,

Defendants.

-----X
ST. GEORGE, J.S.C.:

This is a legal malpractice case stemming from the divorce proceeding between plaintiff Dr. Jodi Knox and her former husband James McGinnis (McGinnis). Plaintiff asserts that her counsel -- defendant Aronson, Mayefsky & Sloan, LLP (AMS) and Karen Robarge (Robarge) (collectively, "defendants") -- colluded with McGinnis during the divorce proceeding so as to prevent the court from hearing her cross-motion for a protective order (the cross-motion).¹ The basis of the cross-motion was that McGinnis was both physically and emotionally abusive to her and to the couple's infant daughter. Plaintiff states that defendants repeatedly urged her to wait to make the cross-motion, and that when she refused to do so, they prepared ineffectual papers. In addition, on May 7, 2013, the cross-motion's return date, defendants submitted a stipulation of which plaintiff allegedly had no prior knowledge, and which withdrew the cross-motion's "explosive allegations" of abuse and provided for "relatively mundane provisions regarding visitation rights" (Complaint ¶ 21). The stipulation did not restrict McGinnis from harassing or

¹ The complaint also includes claims against Fredman Baken & Kosan, LLP (FBK), which represented her after AMS and Robarge withdrew as counsel. The Court addresses FBK's motion to dismiss in a separate order.

otherwise communicating with plaintiff and her daughter, and it stated McGinnis's visits with the child would be supervised for eight weeks and thereafter would not be supervised. In addition, it did not give plaintiff temporary custody. Plaintiff reasons that counsel had foreknowledge of the stipulation, as it was submitted on the cross-motion's scheduled argument date.

Moreover, plaintiff states, defendants misled her about the resolution of the cross-motion. She states that her attorney told her to remain in the hallway rather than come into the courtroom for the argument, and that afterward counsel informed her that Justice Ellen Gesmer, who presided over the matter, had denied the cross-motion and directed plaintiff to sign the stipulation. Because defendants resolved the cross-motion in this fashion, plaintiff states, the judge did not conduct a hearing on custody and fully consider the allegations of abuse by McGinnis. Further, she contends, because the cross-motion had not been litigated, when McGinnis moved for full custody of their daughter the judge believed that plaintiff had invented her allegations. Later, when plaintiff changed counsel, defendants allegedly violated a prior court order did not hand over "the Ravitz file"² – which included the cross-motion and related materials – to the new firm. Defendants' motive for resolving the custody dispute, plaintiff alleges, was financial; this tactic enabled counsel to preserve McGinnis' start up hedge fund – which, in turn, would enable plaintiff to collect attorney's fees from McGinnis.³ Their motive for hiding the Ravitz file, plaintiff states, was to keep Justice Gesmer from learning about their earlier subterfuge.

Next, in their motion to withdraw as counsel, defendants made statements that plaintiff alleges were detrimental to her in the underlying litigation. Plaintiff contends that in emails, defendants had supported and facilitated the move and approved of the timing, but that their motion

² As part of the temporary stipulation, Dr. Alan Ravitz of the Child Mind Institute conducted a forensic examination of both parents and of the child to evaluate custody and visitation issues.

³ Plaintiff also states in her complaint that defendants never moved for these fees.

made it appear to the court that by relocating to Connecticut and not moving back by the stipulated deadline, plaintiff was “gate-keeping,” or willfully attempting to block McGinnis’ access to their daughter.

Plaintiff additionally contends that defendants’ conduct negatively impacted subsequent court proceedings and impeded subsequent counsel in their efforts to protect her interests. For example, when plaintiff defaulted on a provision in a stipulation of settlement which required her to return to her New York apartment by a certain date, McGinnis moved for and obtained full custody of their daughter along with \$132,030.61 in attorney’s fees. Plaintiff argues that, had defendants pursued and argued the cross-motion for a protective order, Justice Gesmer would have known that she was not fabricating her claims of abuse to gain custodial advantage. She additionally alleges that AMS and Robarge’s negligence indirectly resulted in her loss of custody because they had advised her to evacuate her Manhattan residence and allow McGinnis to relocate there, and therefore she had to find a new apartment. Also, she states, had AMS and Robarge properly handled the earlier cross-motion, she would have prevailed and gained full custody, and none of the further litigation over custody would have occurred.

In plaintiff’s amended complaint, plaintiff asserts four causes of action against AMS and Robarge. First, she states that they were negligent and breached their duty of care to plaintiff because they did not move for attorney’s fees against McGinnis and they advised her to move to Connecticut and cede the Battery Park City apartment to McGinnis. The third cause of action asserts that they breached their fiduciary duty to plaintiff in that they colluded with McGinnis and his lawyer, delayed critical motions, resolved plaintiff’s cross-motion by stipulation rather than by argument, withheld critical documents from FBK following the change in counsel, and engaged in other improper activities. For her fourth cause of action, plaintiff asserts that AMS and Robarge

are guilty of fraud for its alleged conduct relating to the May 7, 2013 stipulation. The fifth cause of action asserts violations of Judiciary Law § 487 relating to the alleged misconduct in handling the temporary stipulation and to the alleged withholding of documents when they transferred the file to FBK.

Currently, AMS and Robarge make a pre-answer motion to dismiss all claims against them. The motion was argued before Justice Lucy Billings on June 1, 2017, and July 25, 2017 and this Court has reviewed and is guided by her thorough discussion and analysis. The Court additionally has read Justice Gesmer's order in the divorce proceeding that granted custody of the child to McGinnis as well as attorney's fees. AMS and Robarge argue that dismissal of the malpractice claim is proper under CPLR § 3211 (a) (1) because documentary evidence conclusively refutes plaintiff's claims against them. They state that the documentary evidence demonstrates that plaintiff would have lost her motion for a protective order. In support, they annex several emails in which they advised plaintiff not to proceed with the cross-motion. They point out that they made the cross-motion upon plaintiff's insistence. They assert that Justice Gesmer reviewed the cross-motion and did not find it meritorious, and they submit copies of emails in which they state this to plaintiff. They state that plaintiff signed the temporary stipulation and is responsible for knowing its details, thus freeing them of further obligations with respect to it. In addition, they state that their failure to apply for attorney's fees was not negligent, as they could have made this motion up to the time of the trial itself, and that this is especially true because they withdrew as counsel a few weeks after the issue became imminent, and because plaintiff had to – and did not – acknowledge the amount of her debt to counsel before they could make the application. In support, they submit a copy of their own order to show cause in the divorce proceeding, in which they state that plaintiff owed them money.

In addition, they state that plaintiff cannot show proximate cause. This is because 1) contrary to her statement in the complaint, she knew Justice Gesmer did not consider the cross-motion, 2) there is no proof that the cross-motion would have been granted, and plaintiff's statements to that effect are speculative, and 3) her claim that the judge would have denied McGinnis' later motion for custody had she been aware of the underlying facts of abuse which she detailed in the prior motion is speculate as well. As evidence of this, they point to the stipulation in which she stated she would move back to Manhattan by the specified date. They contend that because plaintiff acknowledges that she violated the stipulation of settlement, she cannot establish that but for their alleged negligence, she would not have sustained any damages. They state that plaintiff cannot establish proximate cause as a matter of law because she had six successor counsels who could have cured their purported errors. Finally, they seek dismissal of plaintiff's claims for fraud, breach of fiduciary duty, and violation of the judiciary law.⁴

When a party moves to dismiss under CPLR 3211 (a) (1), the Court accepts the allegations in the complaint as true, accords plaintiff every possible favorable inference, and decides whether the facts "fit within any cognizable legal theory" (*Kolchins v Evolution Markets, Inc.*, 128 AD3d 47, 57 [1st Dept 2015] [citation and internal quotation marks omitted]). The documentary evidence is sufficient only if it "utterly refutes plaintiff's factual allegations" (*Id.* at 58 [citation and internal quotation marks omitted]). A claim for legal malpractice must allege "(1) that the attorney failed to exercise the care, skill, and diligence commonly possessed and exercised by a member of the

⁴ Initially, plaintiff opposed the motion by submitting a proposed amended complaint which, she stated, rendered the motion moot. Defendants rejected this contention in their reply. Justice Billings, who formerly presided over this case, allowed the motion to go forward based on the amended complaint, giving the parties leave to file additional papers arguing the merits of the amended complaint. The Court has considered the additional filings for the purposes of deciding the motion.

legal profession, and (2) that such negligence was a proximate cause of the actual damages sustained” (*Randazzo v Nelson*, 128 AD3d 935, 937 [2nd Dept 2015]).

Based on the above, plaintiff has stated a cause of action for legal malpractice and defendants’ documentary evidence does not establish their right to dismissal. “A motion to dismiss pursuant to CPLR 3211 (a) (1) to dismiss the complaint on the ground that the action is barred by documentary evidence may be granted only when the documentary evidence utterly refutes the plaintiff’s factual allegations, thereby conclusively establishing a defense as a matter of law” (*Phillips v Taco Bell Corp.*, 152 AD3d 806, 806 [2nd Dept 2017]). Although emails can serve as documentary evidence (*see Kolchins*, 128 AD3d at 58), the emails here are not conclusive because they do not preclude contradictory findings with regard to defendants’ role in facilitating plaintiff’s move to Connecticut, their alleged deceit relating to her cross-motion for a protective order, and the alleged oral misrepresentations that led her to sign the temporary settlement (*Cf. Calpo-Rivera v Siroka*, 144 AD3d 568, 568 [1st Dept 2016] [invoices and emails did not preclude finding that party falsely “held himself out as performing architectural services for the defendants”). Their comment in the July 3 email, though persuasive, is not sufficient to sustain this CPLR § 3211 motion.

Justice Gesmer’s decision on the custody issue and attorney’s fees is not dispositive of plaintiff’s claim because it does not defeat plaintiff’s argument that defendants did not present and litigate all the critical information and therefore 1) plaintiff did not acquire full custody of her daughter and 2) the judge questioned plaintiff’s credibility and motives. The temporary stipulation is not conclusive because plaintiff alleges she signed it due to defendants’ misrepresentations to her. Defendants’ own notes about Justice Gesmer’s alleged comments about the cross-motion do not qualify as documentary evidence. Moreover, as Justice Billings stated, not all the materials

submitted were properly authenticated. The existence of successor counsel is not conclusive where, as here, plaintiff argues that defendants' negligence partially caused her later actions, such as the delayed motion for attorney's fees and her inability to comply with the relocation provision in the stipulation, to have a more detrimental impact. Further, it is not fatal that to some extent plaintiff's contentions are speculative (*See Randazzo*, 128 AD3d at 938). If the reverse were true, a plaintiff could rarely satisfy the "but-for" prong of a legal malpractice claim when a defendant moves for dismissal under CPLR § 3211.

The documents on which defendants rely are not conclusive on their face and are much more appropriate for a motion for summary judgment. "Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a prediscovery CPLR 3211 motion to dismiss" (*Endless Ocean, LLC v Twomey, Latham, Shea, Kelley, Dubin & Quartararo*, 113 AD3d 587, [2nd Dept 2014]). The Court notes that, in their papers in support, defendants cite to motions to dismiss and motions for summary judgment without distinction. The distinction, however, is critical. Defendants' emails and other documents may reveal that they selected one of "several reasonable courses of action," but this raises issues of fact that are best resolved by summary judgment (*Rodriguez v Lipsig, Shapey, Manu & Moverman, P.C.*, 81 AD3d 551, 552 [1st Dept 2011]), or by a factfinder at trial.

The Court next addresses defendants' motion to dismiss the breach of fiduciary duty and fraud claims as duplicative. To prevail, they must show that the claims "arise from the same facts as underlie that claim and involve no additional damages separate and distinct from those alleged in connection with the malpractice claim" (*Gourary v Green*, 143 AD3d 580, 581-82 [1st Dept 2016] [finding that claims were duplicative]). As Justice Billings stated at argument, the claim for

fraud rests on a set of facts distinct from the malpractice claim. The Court denies defendants' motion to the extent that it seeks to dismiss the Judiciary Law claim, as there are issues of fact as to whether the wrongs defendants allegedly committed are sufficiently egregious to support it. It does not matter whether the alleged deceit was successful but that it was attempted (*See generally Amalfitano v Rosenberg*, 12 NY3d 8 [2009]; *compare to Strumwassser v. Zeiderman*, 102 AD3d 630, 630 [1st Dept 2013] [allegation that defendant's counsel switched one document to conceal unreliability of start-up company's projections, without more, insufficient to support plaintiff's claim where, in addition, no proximate cause alleged]).

The Court grants the motion to dismiss the third cause of action for breach of fiduciary duty, as it replicates the allegations in the legal malpractice, judiciary law, and fraud claims. The Court agrees that plaintiff's allegations of collusion with McGinnis are too speculative to support an independent cause of action (*See Briarpatch Ltd, L.P. v Frankfurt Garbus Klein & Selz, P.C.*, 13 AD3d 296, 297-98 [1st Dept 2004]). The Court denies the application to dismiss the request for punitive damages for the same reason it denies the request to dismiss the Judiciary Law claim. The Court grants the dismissal of the application for emotional distress damages, as these damages are not proper on a claim for legal malpractice or under Judiciary Law § 487.

Although defendants' attacks on the merits of this case ultimately may be persuasive, they primarily speak to the credibility of the claims in the complaint and as such do not successfully show that plaintiff's complaint fails to state a cause of action. Courts are reluctant to grant dispositive relief, depriving a plaintiff of her or his day in court, especially at this early juncture, where defendants have not answered the amended complaint and the parties have not conducted any discovery. The Court has considered all the parties' arguments even if the decision does not discuss them. Therefore, it is

ORDERED that the motion is granted to the extend that it seeks to dismiss the third cause of action and the request for punitive damages, and that cause of action and request are severed and dismissed; and it is further

ORDERED that the remainder of the motion is denied; and it is further

ORDERED that the caption is amended to reflect the dismissal of FBK in this Court's order in motion sequence number 004, and the new caption shall read:

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 34**

-----X
JODI KNOX,

Plaintiff,

Index No. 158738/2016

-against-

ARONSON, MAYEFSKY & SLOAN, LLP, KAREN
ROBARGE,

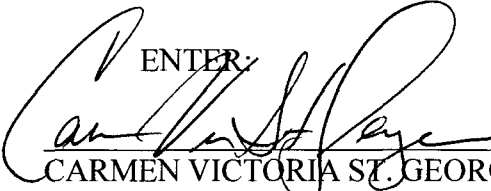
Defendants.

-----X

The Clerk shall note the amended caption in its records, and the parties shall use the amended caption going forward; and it is further

ORDERED defendants shall serve an answer to the amended complaint within 25 days from the date of this order.

Dated: 10/16, 2017

ENTER:

CARMEN VICTORIA ST. GEORGE, J.S.C.

**HON. CARMEN VICTORIA ST. GEORGE
J.S.C.**