SUPREME COURT – STATE OF NEW YORK
TRIAL TERM, PART 56 SUFFOLK COUNTY

PRESENT:

Hon. Carmen Victoria St. George
Justice of the Supreme Court

LUIGI MADDALONI,

Plaintiff,

-against-

ROBERT DEL COL, ESQ.,

Defendant.

Index No.
618469/18

Motion Seq:
005 MG

Decision/Order

The following numbered papers were read upon this motion:

Notice of Motion/Order to Show Cause.....	118-136
Answering Papers.....	137-147
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Briefs: Plaintiff's/Petitioner's.....	
Defendant's/Respondent's.....	

Defendant, an attorney licensed to practice law in New York, represents himself in this legal malpractice action.[1] The defendant presently moves this Court for an Order granting summary judgment dismissal of the legal malpractice cause of action. Plaintiff, who is defendant's former matrimonial client, opposes the requested relief.

Defendant begins his affidavit in support of his motion with the following summary of the matrimonial proceedings that have given rise to this action. Defendant writes, "[t]his is an action for legal malpractice arising out of my office's representation of Plaintiff in an exceedingly contentious and acrimonious matrimonial action wherein both parties, at the risk of understating things, were overly litigious. . ."

Plaintiff alleges that defendant committed legal malpractice when he advised the plaintiff to present a 2011 amendment of a post-nuptial agreement executed in 1988, directly to plaintiff's

[1] The causes of action sounding in breach of contract and breach of fiduciary duty were dismissed by Decision and Order of the Court dated March 4, 2019 (Santorelli, J.).

wife, while the plaintiff's wife was represented by counsel in the pending matrimonial action. Essentially, the plaintiff claims that had he been properly advised by the defendant, he "would not have served and transmitted the proposed amendment directly to his wife," and then the amendment would not have been set aside by the Courts. As a result of the 2011 amendment being stricken, plaintiff alleges that he was damaged by having to pay an amount in excess of the amount set forth in the amendment, that he would have been able to pay a lower level of support had he not been improperly advised by Mr. Del Col to present the amendment directly to his wife, and that he was damaged by the inability to recover attorney fees.

In support of his motion, the defendant submits, *inter alia*, the lower court and Appellate Court decisions rendered in the matrimonial action, his own affidavit, prior affidavits from his former client, the plaintiff in this action, and some excerpts from an appellate brief.

Two of the affidavits purportedly made by plaintiff do not bear a signature, so they are not affidavits (Document Nos. 124 and 125). The affidavit sworn to by the plaintiff as part of the record on appeal of the decision in the matrimonial action states that Mr. Del Col provided plaintiff with a draft agreement the year prior, and in August 2011, plaintiff, his wife, and their adult children "came up with the terms in the 2011 agreement." Plaintiff further states in that affidavit that he then called Mr. Del Col's office and told his secretary "what blanks to fill in. Mr. Del Col did not even know. When I asked my wife to run things by her lawyer, she said she did and he told her not to sign. . .My ex-wife told me that she was signing anyway. . ." (Document No. 123).

Based upon the submitted Decisions and Orders, the amendment was set aside in the Suffolk County Supreme Court, by Decision and Order dated February 6, 2014 (MacKenzie, J.). It bears noting that Judge MacKenzie's December 11, 2012 Decision and Order issued after trial found the original 1988 post-nuptial agreement with which Mr. Del Col was not involved, to be "unconscionable;" therefore, any amendment to same was without validity.

In her lengthy and comprehensive2014 decision, Judge MacKenzie reviewed that the 1988 post-nuptial agreement was found to be unconscionable, and that the 2011 amendment was executed in the midst of the trial that found the 1988 agreement unconscionable. Judge MacKenzie further found that the 2011 amendment was given by the wife without consideration and should be set aside on that basis. Judge MacKenzie explained in her 2014 Decision and Order why the amendment could not stand, since it was more onerous than the original post-nuptial agreement:

> It is well settled that a post nuptial agreement is a contract which requires consideration Whitmore v. Whitmore, 8 A.D. 30 371 (2nd Dep't 2004). In this case, the Amendment (the name is a distinction without a difference as it is still a contract) contains the same consideration as to support as the original Agreement and *less* consideration for plaintiff's one-half interest in the marital residence afforded her under the original Agreement. Defendant contends that the consideration for the Amendment was the "reconciliation". Even if the Court were to accept defendant's contention that reconciliation constitutes consideration, which it does not, the consideration failed because defendant did not

> keep his end of the bargain. Plaintiff's testimony that defendant cheated on her during the reconciliation period is uncontroverted. Thus, there was a total failure of consideration for the Amendment. As such, the Amendment must be set aside (emphasis in original).

Accordingly, the amendment was doomed from the outset because it was premised upon an unconscionable agreement that was executed between husband and wife long before Mr. Del Col came to represent Luigi Maddaloni, and it provided even less consideration for the wife's one-half interest in the marital residence despite the passage of approximately twenty years since the 1998 agreement.

Judge MacKenzie further determined that, although Mr. Del Col did not himself present the amendment to the wife, that providing the amendment to Luigi Maddaloni knowing that Luigi Maddaloni could or would ask his wife to sign it caused Maddaloni to communicate with a represented person, in violation of 22 NYADC 12100.0, Rule 4.2, an ethics violation. Judge MacKenzie stated that this conduct "constitutes overreaching on the part of defendant [Luigi Maddaloni] and his counsel in content and delivery of the [a]mendment. As such, the [a]mendment must be set aside."

Judge MacKenzie also concluded that in the absence of a withdrawal of the underlying matrimonial action contemporaneous with the execution of the amendment, the amendment is invalid as a matter of law. Accordingly, Judge MacKenzie determined three separate reasons or bases upon which to declare the amendment invalid: "For all of the above reasons, the Amendment is hereby declared invalid and of no force and effect."

The Appellate Court affirmed the lower court's determination, but not on precisely the same grounds, namely the Second Department did not make any determination that Mr. Del Col violated Rule 4.2, but determined two bases for affirming the lower court decision. Specifically, the Court held that the amendment "was manifestly unfair to the [wife] due to the nature and magnitude of the rights that she waived and the vast disparity in the parties' income and net worth [citations omitted], and the defendant's [Luigi Maddaloni's] overreaching in presenting the amendment directly to the plaintiff for execution during the pendency of this [matrimonial] action notwithstanding that she was represented by counsel [citation omitted]. Accordingly, the court properly set aside the 2011 amendment [citations omitted]" (***Maddaloni v. Maddaloni***, 142 AD3d 646, 650 [2d Dept 2016]).

Defendant herein contends that because the 2011 amendment was stricken for multiple reasons having nothing to do with alleged malpractice, and that the Appellate Division did not mention Rule 4.2 or attorney misconduct in its Opinion, that the alleged malpractice is "not the 'sole proximate cause' for the amendment's demise," and "any advice [plaintiff] now claims was given to him concerning [the manner of] execution [of the 2011] amendment is decidedly not the proximate cause of his damages" (emphasis in original Affidavit in Support, ¶ 44).

The Court recognizes that summary judgment is a drastic remedy and as such should only be granted in the limited circumstances where there are no triable issues of fact (***Andre v. Pomeroy,*** 35 NY2d 361[1974]). Summary judgment should only be granted where the court finds as a matter of law that there is no genuine issue as to any material fact (***Cauthers v. Brite***

Ideas, LLC, 41 AD3d 755 [2d Dept 2007]). The Court's analysis of the evidence must be viewed in the light most favorable to the non-moving party, herein the plaintiff (***Makaj v. Metropolitan Transportation Authority***, 18 AD3d 625 [2d Dept 2005]).

The proponent of a summary judgment motion must tender sufficient evidence to demonstrate the absence any material issue of fact (***Winegrad v. New York University Medical Center***, 64 NY2d 851, 853 [1985]). Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (***Id.***) "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (***Alvarez v. Prospect Hospital***, 68 NY2d 320, 324 [1986]).

"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 plaintiff to sustain actual and ascertainable damages . . . To establish causation, a plaintiff must show that he or she would have prevailed in the underlying action or would not have incurred any damages, but for the lawyer's negligence" (***Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer***, 8 NY3d 438, 442 [2007] [internal citations omitted]; ***Davis v. Klein***, 88 NY2d 10081009-1010 [1996]). New York has traditionally applied a "but for" approach to causation when evaluating legal malpractice claims (***Carmel v. Lunney***, 70 NY2d 169, 173 [1987]).

"To succeed on a motion for summary judgment dismissing the complaint in a legal malpractice action, the defendant must present evidence in admissible form establishing that the plaintiff is unable to prove at least one essential element of his or her cause of action alleging legal malpractice" (***Scartozzi v. Potruch***, 72 AD3d 787, 789-790 [2d Dept 2010]).

Based upon the Decisions and Orders rendered by the trial and appellate courts presiding over the matrimonial action, it is established by the defendant that, even if he committed malpractice, the plaintiff cannot show that he would have prevailed in the underlying action "but for" Del Col's negligence.

As such, Mr. Del Col has established that the plaintiff cannot prove at least one element of his cause of action alleging legal malpractice: proximate cause; therefore, the defendant in this action has established his *prima facie* entitlement to summary judgment as a matter of law.

In opposition, the plaintiff offers the brief affirmation of counsel that incorrectly refers to the instant motion as defendant's "second motion for summary judgment." This is not the defendant's second motion for summary judgment. Defendant's prior motion was made pursuant to CPLR § 3211, and as previously noted, the breach of contract and breach of fiduciary causes of action were dismissed.

Plaintiff's contention that the defendant failed to offer expert testimony in support of his motion is unavailing; moreover, plaintiff cites no authority for this contention.

The defendant is not required to submit an expert opinion on matters that are readily understandable, especially in this matter where prior Decisions and Orders of the trial and appellate courts form factual basis for the relief requested (*see* ***Gourary v. Green***, 143 AD3d 580, 581 [1st Dept 2016]).

The purported "expert affidavit" offered by plaintiff is likewise unavailing. The "expert" states that he has handled commercial litigation since 2010. In fact, there is a bracketed portion of paragraph 37 of the "expert's" affidavit that appears to reveal by his own admission that he is not an expert in domestic relations law. It reads as follows:

> It is my opinion, with a reasonable degree of legal certainty that a spouse is permitted to agree to the terms of a divorce, when that spouse is represented, and an agreement is properly presented to both the spouses' attorney and the spouse. **[Is this necessary since I do not opine on domestic relations law. Can we say ... certainty that parties to an agreement, when both parties are represented and the agreement is properly presented to all sides are generally free to agree to their contractual terms. NOTE: In both the way you write it and I write it - what about unconscionability?]**

The "expert" also glosses over the many other reasons why the 2011 amendment was declared invalid, without explaining how the other fatal defects would not have resulted in the striking of the amendment irrespective of the manner of delivery of the amendment to Maddaloni's wife. Rather, the "expert" merely recites the incantation that, "[i]t is my opinion, with a reasonable degree of legal certainty that the manner of delivery was a proximate cause of the rejection of the amended post-nuptial agreement by Supreme Court, and that because of the manner of delivery an otherwise proper amendment to the 1988 postnuptial agreement was vacated and rendered of no effect." If the "expert" had carefully read the Decisions and Orders issued by the lower and appellate courts, it is obvious that the amendment was not "an otherwise proper amendment," apart from the manner of delivery; in fact the amendment, which was determined to be "manifestly unfair," and given without consideration, was far from "proper," and the document that it sought to amend was determined to be unconscionable. To be fair to the expert, he apparently wanted to consider "unconscionability" based upon the bracketed material that appears to be a note to plaintiff's present counsel, but for whatever reason, he did not address this critical issue. Accordingly, the "expert's" opinion is rendered hollow and unsupported, designed to raise a feigned issue of fact.

Plaintiff also submits his own self-serving affidavit that contradicts in material respect the affidavit that he provided in support of the appeal. Plaintiff's most recent affidavit sworn to on March 4, 2021 states that he gave the draft of the amendment to his former wife at the direction of Mr. Del Col, and based solely on Mr. Del Col's advice and direction to give it directly to her. In the affidavit that he submitted upon his appeal, which was sworn to on July 29, 2015, the plaintiff makes no such statements that Mr. Del Col directed him to give the amendment directly to Laura Maddaloni; instead, he stated therein that, "[w]e wanted closure, so we took the papers that Mr. Del Col drafted for me the June before and worked everything out for ourselves based upon what he wrote." Thus, plaintiff's current affidavit submitted in opposition is not only a

contradictory sworn statement, but it is obviously an affidavit designed to raise a feigned issue of fact, much as the "expert's" affidavit was apparently designed to do.

The Court is compelled to comment upon the plaintiff's statement made in paragraph 35 of his March 4, 2021 affidavit wherein he states that, "[h]ad the amendment been delivered to attorney Castrovinci [Laura Maddolini's matrimonial attorney] and then signed, it would have been honored." This statement utterly and completely ignores the fact that the plaintiff knew that Laura Maddaloni's attorney advised her not to sign the amendment. In his July 29, 2015 affidavit, the plaintiff swore that, "[w]hen I asked my wife to run things by her lawyer, she said she did and he told her not to sign;" "he was adamant that she not sign." The amendment was clearly "dead on arrival;" yet, the plaintiff persists in presenting this especially specious argument to this Court.

Further undermining his opposition, the plaintiff submits two affidavits from his adult son, Nicholas, stating that the agreement was "around the house for a month," and "[his] mother wanted to see it." The son also states in his April 2, 2012 notarized statement that "what my parents signed was something that we all took part in. It was not something that the lawyer was behind." The second affidavit sworn to by Nicholas is dated June 8, 2015, and in that statement, Nicholas states that his mother and her lawyer had discussed the proposed agreement and he had advised her not to sign it, but she said that she was going to sign it anyway. Nothing in these affidavits supports in any way plaintiff's belated affidavit that Mr. Del Col directed plaintiff to deliver the amendment directly to his wife; in fact, the affidavits, especially the 2012 affidavit, contradicts plaintiff's new version of the events.

Plaintiff's opposition fails to raise a triable issue of fact, and for all of these reasons enumerated herein, the defendant's summary judgment motion is granted, and the complaint is dismissed.

The foregoing constitutes the Decision and Order of this Court.

Dated: May 17, 2021
Riverhead, NY

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

FINAL DISPOSITION [X] NON-FINAL ISPOSITION [ ]