

<b>Bachman-Richards v Pomeroy</b>
2022 NY Slip Op 33315(U)
January 21, 2022
Supreme Court, Tompkins County
Docket Number: Index No. 2014-1008
Judge: Joseph A. McBride
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At a Motion Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District at the Broome County Courthouse, Ithaca, New York, on the 3<sup>rd</sup> day of September 2021.

PRESENT: HON. JOSEPH A. MCBRIDE  
Justice Presiding

STATE OF NEW YORK  
SUPREME COURT : TOMPKINS COUNTY

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RACHEL J. BACHMAN-RICHARDS

Plaintiff,

-vs-

WILLIAM J. POMEROY, ESQ., INDIVIDUALLY, and  
POMEROY, ARMSTRONG, CASULLO & MONTY, LLP  
Defendant(s).

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**DECISION AND ORDER**

Index No. 2014-1008

APPEARANCES:

COUNSEL FOR PLAINTIFF:

By: Edward Kopko, Esq.  
308 N. Tioga Street, Second Floor  
Ithaca, NY 14850

COUNSEL FOR DEFENDANTS:

COSTELLO, COONEY & FEARON, PLLC  
By: Paul G. Ferrara, Esq.  
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**JOSEPH A. MCBRIDE, J.S.C.**

The case before the Court follows a legal malpractice claim filed by Rachel J. Bachman-Richards (“Plaintiff”) against Defendants, William J. Pomeroy, Esq. (“Attorney Pomeroy”), individually, and Pomeroy, Armstrong, Casullo & Monty, LLP (“The Firm”) (collectively Defendants”). Defendants filed this current motion for summary judgment pursuant CPLR §3212 seeking to dismiss the Complaint on the grounds that: (a) defendants were not negligent; (b) Plaintiff would not have succeeded in the underlying action absent the alleged malpractice; (c) collateral estoppel bars the action; (d) defendants are not proximate cause of the plaintiff’s alleged damages; and (e) Plaintiff has not sustained any actual damages. Plaintiff filed a response in opposition. The case was heard at oral argument on September 3, 2021. Court received and reviewed said motion and decided; as discussed below.<sup>1</sup>

**BACKGROUND FACTS**

The underlying legal action at issue was a contested matrimonial. Prior to the commencement of the divorce action, Plaintiff met with Attorney John Orkin for advice in a potential divorce proceeding. Despite Plaintiff having paid Attorney Orkin a retainer, she attended meetings with her husband and his attorney, Jim Miller Esq. alone, without counsel present. Plaintiff would go back to Attorney Orkin with a proposed separation agreement, which Attorney Orkin advised her to “not sign.” Contrary to Attorney Orkin’s advice, Plaintiff signed a separation agreement on April 9, 2010. As a provision in the separation agreement, Plaintiff stipulated that she would not be entitled to her potential marital portion of her husband’s 16.33 shares he owned in Ongweoweh Corporation stock, a company for which he worked. (Mr. Richards maintains this stock was a gift and separate property.) Pursuant the separation agreement, in June 2010, Plaintiff received \$275,000 as a distributive award as well as commencement of payments for child support and maintenance. On or about April 22, 2011, Mr. Richards commenced the divorce action against Plaintiff. On April 27, 2011, Plaintiff retained Attorney Pomeroy to represent her in the divorce proceeding. On May 13, 2011,

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<sup>1</sup> All the papers filed in connection with this motion are included in the electronic file maintained by the County Clerk and have been considered by the Court.

Attorney Pomeroy, on behalf of Plaintiff filed an answer and counterclaim that alleged the separation agreement, which was entered into without counsel present was unfair, unreasonable, and unconscionable. Specifically, the answer and counterclaim alleged that the distribution of marital assets was inequitable and that there had been no appraisal or independent evaluation of Mr. Richard's ownership interest in the Ongweoweh Corporation stock.

On June 22, 2011, Mr. Richards filed a motion for summary judgment to dismiss the counterclaim arguing that Plaintiff consulted with an attorney prior to signing the agreement and therefore consciously waived her interest in Mr. Richards' stock. Attorney Pomeroy asserted that Mr. Richards misrepresented his income and Plaintiff was unaware that the stock was marital property. On August 8, 2011, Hon. Mulvey denied the motion for summary judgment stating there was "issues of fact with regard to the adequacy of the financial disclosure."

Over the next few months, the divorce attorneys engaged in discovery and settlement negotiations. Attorney Pomeroy retained the services of a CPA to undertake a forensic evaluation of the Ongweoweh Corporation stock. In her affidavit, Plaintiff claims that Attorney Pomeroy told her she *might* be entitled to the first five shares of the Ongweoweh Corporation stock, but it would not be worth pursuing them as it would be an expensive endeavor and she *might* not get any of them. On November 7, 2011, Plaintiff received the final proposal from Mr. Richards' attorney which did not include a distribution of the Ongweoweh Corporation stock but did give an additional \$75,000 in distributive award. Plaintiff claims that she did not want to accept the final proposal, however, Attorney Pomeroy "threatened her" when he stated that she either take what Mr. Richards offered or she might not get anything, and Attorney Pomeroy would no longer represent her. On November 10, 2011 Plaintiff went, with Attorney Pomeroy, to Attorney Jim Miller's office to sign the modification of separation agreement. Plaintiff claims that when there, on the way from one conference room to another, to sign the modification of the separation agreement, Attorney Pomeroy "forced" her to sign a letter stating she would waive her right to pursue a legal malpractice claim against Attorney Pomeroy for failing to determine the actual value of the marital assets. The modification of separation agreement as well as the letter was signed on November 10, 2011, and the parties were granted a judgment of divorce on December 12, 2011. Subsequent to the divorce proceedings, Plaintiff filed a lawsuit against her former husband, Mr. Richards for fraudulent concealment of assets. Mr. Richards cashed in his

Ongweoweh Corporation stock for \$2,585,000.00. On December 1, 2014, Plaintiff's suit for fraud against Mr. Richards was dismissed by Decision and Order signed by Hon. Mulvey on the grounds that Plaintiff relied on the advice of Attorney Pomeroy in choosing to enter the modification of separation agreement. Plaintiff now argues that the "anxiety and duress" Attorney Pomeroy caused her "deprived" her of "acting independently."

On November 5, 2014, Plaintiff served a Summons with Notice and then on April 23, 2015, Plaintiff filed a Verified Complaint initiating the current action. Plaintiff alleged Legal Malpractice against Defendants for "abandoning his efforts" of valuating the marital estate and "coerced [Plaintiff] into signing the Modification Agreement" in the underlying matrimonial action seeking \$2,052,989.03 in damages. Defendants filed this current motion for summary judgment in which Plaintiff responds in opposition. With the moving papers, Defendants submit an expert affidavit who opines Attorney Pomeroy did not commit legal malpractice. In opposition, Plaintiff submits excerpts of deposition testimony and argues that Attorney Pomeroy did commit legal malpractice.

#### LEGAL DISCUSSION AND ANALYSIS

Pursuant CPLR §3212(b), the motion for summary judgment shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of either party. When seeking summary judgment, the movant must make a *prima facie* showing of entitlement to judgment as a matter of law, by offering evidence which establishes there are no material issues of fact. Winegrad v. N.Y. Univ. Med. Ctr., 64 N.Y.2d 851, 853 (Ct. of App. 1985); Zuckerman v. New York, 49 N.Y.2d 557 (Ct of App. 1980). Once this burden is met, the burden shifts to the respondent to establish that a material issue of fact exists. Alvarez v. Prospect Hosp., 68 NY2d 320, 324 (Ct. of App. 1986); Winegrad, 64 N.Y.2d 851, 853. "When faced with a motion for summary judgment, a court's task is issue finding rather than issue determination (see, Sillman v. Twentieth Century-Fox Film Corp., 3 NY2d 395, 404 [Ct. of App. 1957]) and it must view the evidence in the light most favorable to the party opposing the motion, giving that party the benefit of every reasonable inference and ascertaining whether there exists any triable issue of fact." Boston v. Dunham, 274 AD2d 708, 709 (3<sup>rd</sup> Dept. 2000); see, Boyce v. Vazquez, 249

AD2d 724, 726 (3<sup>rd</sup> Dept. 1998). The motion “should be denied if any significant doubt exists as to whether a material factual issue is present or even if it is arguable that such an issue exists.” Haner v. DeVito, 152 AD2d 896, 896 (3<sup>rd</sup> Dept. 1989); Asabor v. Archdiocese of N.Y., 102 AD3d 524 (1<sup>st</sup> Dept. 2013). Mere conclusions and expressions of hope are insufficient to conquer a motion for summary judgement and the defendant must submit admissible evidence when stating their defense. See Zuckerman, 49 N.Y.2d 557. Finally, it “is not the function of a court deciding a summary judgment motion to make credibility determinations or findings of fact.” Vega v. Restani Constr. Corp., 18 NY3d 499, 505 (Ct. of App. 2012).

“Legal malpractice is established by evidence that an attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession which results in actual damages to a plaintiff, and that the plaintiff would have succeeded on the merits of the underlying action “but for” the attorney's negligence” Levine v. Horton, 127 A.D.3d 1395, 1397 (3<sup>rd</sup> Dept. 2015). “In an action alleging legal malpractice during the course of an underlying action that resulted in a settlement, the focus becomes whether settlement of the action was effectively compelled by the mistakes of counsel.” Carbone v Brenizer, 148 A.D.3d 1806, 1806 (4<sup>th</sup> Dept. 2017); citing Chamberlain, D’Amanda, Oppenheimer & Greenfield, LLP v Wilson, 136 A.D.3d 1326, 1327-28 (4<sup>th</sup> Dept. 2016).

In Carbone, the Fourth Department held that, “although the settlement agreement in the underlying action contained a comprehensive waiver of plaintiff's rights ... the language of that waiver does not conclusively establish that plaintiff was not effectively compelled to settle by defendants' allegedly deficient representation.” 148 AD3d at 1806. In Chamberlain, the Court held that the client arguing legal malpractice could not establish a question of fact to overcome the summary judgment standard because in a case she based her affidavit on speculation of whether the trial court “would have” granted attorney’s fees. 136 AD3d at 1328.

The facts in the case at hand are nearly identical to the facts in Carbone. Although Plaintiff signed a waiver, Plaintiff raises an issue of fact that is rooted in the circumstances around how the settlement agreement was signed. Plaintiff argued that she was “threatened” and “coerced” into signing the settlement agreement as well as the waiver. Distinguishable from Chamberlain, where the Fourth Department decided that the client’s speculation was not enough to overcome the motion for summary judgment, here, this case is a question of credibility. Here,

while Attorney Pomeroy argued that Plaintiff was fully aware of what she was signing, Plaintiff argued that Attorney Pomeroy was aware that the shares might have some value and did not even proceed to evaluate the possible value and/or the potential marital or separate property classification. Instead, Plaintiff claimed she was encouraged to sign the first settlement offer presented. Therefore, as it is not a function of the Court to make credibility determinations within summary judgment motions, Plaintiff has presented a material issue of fact based on the credibility of the parties of whether the “settlement of the action was effectively compelled by the mistakes of counsel.” Therefore, the motion for summary judgment is DENIED on the grounds that there is a question of material fact of whether Attorney Pomeroy was negligent and the proximate cause of the alleged damages.

Defendants further argue that the current litigation is barred by collateral estoppel. “*Res judicata* bars litigation of a claim that was either raised or could have been raised in a prior action, provided that the party to be barred had a full and fair opportunity to litigate the claim and the disposition was on the merits.” Lanuto v. Constantine, 215 A.D.2d 946, 947 (3<sup>rd</sup> Dept. 1995). In New York, “once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy.” In re Hunter, 4 N.Y.3d 260, 269 (Ct. of App. 2005). To decide, “a court must apply a pragmatic test and analyze how the facts are related as to time, space, origin or motivation.” Aponte v Estate of Rene Aponte, 172 A.D.3d 970, 972 (2<sup>nd</sup> Dept. 2019).

Here, while the Court is not quite persuaded by Plaintiff’s fruit analogy, the Court does agree that the previous matter against Mr. Richards to void the separation agreement for fraud and concealment and the current litigation do not arise out of the same series of transactions. The case against Mr. Richards was to void the separation agreement based on the theory that Mr. Richards concealed marital assets. A distinct case against her former husband for hiding assets. The current matter more legal malpractice is for damages based on Attorney Pomeroy’s “threats” and “coercion.” A case against her attorney for mistakes of counsel.

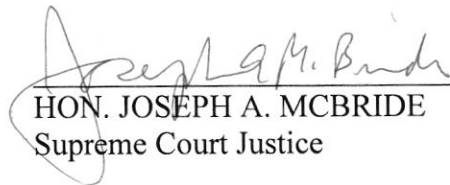
Therefore, looking at the facts in the light most favorable to the non-moving party and giving every reasonable inference, Defendants’ motion for summary judgment is DENIED.

**CONCLUSION**

Based on all the factors and the foregoing discussion, Defendants' motion for summary judgment is DENIED. As such, the matter will be scheduled for trial.

This constitutes the **DECISION AND ORDER** of the Court. The transmittal of copies of this DECISION AND ORDER by the Court shall not constitute notice of entry (see CPLR 5513).

Dated: 1/21, 2022  
Norwich, New York

  
HON. JOSEPH A. MCBRIDE  
Supreme Court Justice

Entered 01/21/2022