Urias v Daniel P. Buttafuoco & Assoc., PLLC
2012 NY Slip Op 32792(U)
November 14, 2012
Supreme Court, Suffolk County
Docket Number: 11-7186
Judge: Daniel Martin
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

[* 1]

SHORT FORM ORDER

INDEX No. 11-7186

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 9 - SUFFOLK COUNTY

PRESENT:

Hon. DANIEL MARTIN
Justice of the Supreme Court

MOTION DATE 10-28-11 (#001)
MOTION DATE 1-9-12 (#002)
ADJ. DATE 5-8-12
Mot. Seq. # 001 - MotD
002 - MG

----------X

DELFINA URIAS, as Guardian of the Person and Property of MANUEL URIAS, and DELFINA URIAS, Individually,

Plaintiffs,

- against -

DANIEL P. BUTTAFUOCO & ASSOCIATES, PLLC, DANIEL P. BUTTAFUOCO LLC, DANIEL P. BUTTAFUOCO, ESQ., and JOHN NEWMAN, ESQ.,

Defendants.

----------X

DANIEL A. ZAHN, P.C.
Attorney for Plaintiffs
1597 Grundy Avenue
Holbrook, New York 11741

CATALANO GALLARDO & PETROPOULOS
Attorney for Defendants Buttafuoco
100 Jericho Quadrangle Suite 214
Jericho, New York 11753

L'ABBATE, BALKAN, COLAVITA & CONTINI, L.L.P.
Attorney for Defendant Newman
1001 Franklin Avenue, Room 300
Garden City, New York 11530

Upon the following papers numbered 1 to 91 read on these motions to dismiss; Notice of Motion/ Order to Show Cause and supporting papers 1 - 34, 37 - 60 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 63 - 85 ; Replying Affidavits and supporting papers 86 - 87, 88 - 89 ; Other memoranda of law 35 - 36, 61 - 62, 90 - 91 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that these motions are hereby consolidated for purposes of this determination; and it is further

ORDERED that the motion by the defendants Daniel P. Buttafuoco & Associates, PLLC, Daniel P. Buttafuoco LLC, and Daniel P. Buttafuoco, Esq., for an order pursuant to CPLR 3211 (a) (1), (5), and (7), dismissing the complaint is granted to the extent of dismissing the plaintiff's First, Second, Third, Fourth and Fifth causes of action pursuant to CPLR 3211 (a) (1), and is otherwise denied; and it is further

ORDERED that the motion by the defendant John Newman, Esq. for an order pursuant to CPLR 3211 (a) (1), and (7), dismissing the complaint is granted.

This action was commenced to recover damages allegedly sustained by the plaintiff as the result of the actions of the defendants Daniel P. Buttafuoco & Associates, PLLC and Daniel P. Buttafuoco, Esq. (Buttafuoco) in taking an excessive legal fee for representing the plaintiff in an underlying medical malpractice action. In addition, the plaintiff alleges that the defendant John Newman, Esq. (Newman) failed to properly present motions to enable the courts to review Buttafuoco's request for legal fees. The amended complaint in this action sets forth six causes of action against Buttafuoco sounding in violations of Judiciary Law § 487, breach of fiduciary duty, breach of contract, conversion, fraud and legal malpractice respectively, and includes Newman in the sixth cause of action for legal malpractice.

Buttafuoco now moves for an order dismissing the complaint against him pursuant to CPLR 3211 (a) (1), (5), and (7). Newman now moves for an order pursuant to CPLR 3211 (a) (1), and (7) for an order dismissing the complaint against him. Initially, the Court notes that, in response to the defendants' motions, the plaintiff has served an amended complaint which omits the seventh and eighth causes of action pled in the original complaint, and omits any causes of action against the defendant Daniel P. Buttafuoco, LLC.[1] The defendants do not oppose the service of the amended complaint, ***Sage Realty Corp. v Proskauer Rose LLP***, 251 AD2d 35, 675 NYS2d 14 [1st Dept 1998], and/or they have elected to have the instant motions applied to the amended pleading (***D'Addario v McNab***, 73 Misc 2d 59, 342 NYS2d 342 [Sup Ct, Suffolk County 1973]). It is well settled that a motion to dismiss which is addressed to the merits will not be defeated by an amended pleading (***Terrano v Fine***, 17 AD3d 449, 793 NYS2d 451 [2d Dept 2005]; ***Livadiotakis v Tzitzikalakis***, 302 AD2d 369, 753 NYS2d 898 [2d Dept 2003]; *but see* ***Lipary v Posner***, 96 Misc 2d 578, 409 NYS2d 363 [Sup Ct, Monroe County 1978]). Accordingly, all references herein are to the amended complaint dated February 21, 2012, and that branch of Buttafuoco's motion which seeks to dismiss the plaintiff's seventh cause of action in the original complaint pursuant to CPLR 3211 (a) (5) is deemed academic.

It is undisputed that Buttafuoco represented the plaintiff in prosecuting an underlying medical malpractice action in Suffolk County Supreme Court for injuries to her husband, Manuel Urias. The subject retainer agreement provided that Buttafuoco's legal fees would be calculated pursuant to Judiciary Law 474-a (2) and (4). Due to her husband's physical condition, Buttafuoco successfully made application to the Supreme Court Nassau County (Guardianship Court) to have the plaintiff appointed as the guardian for her husband. The order and judgment of the Guardianship Court required the plaintiff to seek the approval of said court regarding the settlement and award of legal fees in the medical malpractice action. The malpractice action was settled in open court, with the plaintiff present, on April 2, 2009 in the sum of $3,700,000. In May 2009, the plaintiff retained Newman in place of Buttafuoco to

---

[1] The Court notes that, in his affidavit in support of his motion, Daniel P. Buttafuoco swears that Daniel P. Buttafuoco, LLC is a real estate holding company that owns the building in which his law firm conducts its practice. It is presumed that this is the reason that the plaintiff omitted said defendant from its amended complaint. Regardless, the Court deems the dropping of said defendant as appropriate whether considered as a misjoinder under CPLR 1002 (CPLR 1003), or considered as a grant of Buttafuoco's motion to dismiss because the amended complaint contains no allegations against said defendant.

seek the necessary approvals from the Guardianship Court. On July 20, 2009, counsel for the parties in the medical malpractice action appeared before the Hon. Paul J. Baisley to obtain a change in the settlement terms of that action not relevant herein. At that appearance, Buttafuocco submitted an exhibit (Exhibit 3) setting forth his calculation of the legal fees due to his firm by applying the statutory sliding scale of Judiciary Law 474-a (2) against the settlement amounts attributable to the four defendants in the medical malpractice action, and he indicated that "we followed the schedule." On or about September 29, 2009, Newman moved by order to show cause seeking, among other things, the necessary approvals from the Guardianship Court. By order dated October 27, 2009, the Guardianship Court (Phelan, J.) approved the transfer of assets from the plaintiff's husband to her pursuant to Mental Hygiene Law §81.21, and denied approval of the settlement of the medical malpractice action and the legal fees due "without prejudice to renewal after the Supreme Court, Suffolk County, has had an opportunity to revisit the legal fees." Said order noted that "There were several defendants, and the total sum was allocated among the various defendants. Section 474-a of the Judiciary Law was used to calculate the legal fees based upon each individual defendant's settlement amount, which resulted in a greater legal fee than if the calculations had been based upon the total sum recovered." On or about November 9, 2009, Newman moved the Supreme Court, Suffolk County for an order "confirming the amount of legal fees awarded to Plaintiff's counsel and the manner in which such legal fees were calculated ..." By order dated March 24, 2010, the Court (Baisley, J.) confirmed "the amount of the legal fees awarded to plaintiff's counsel and the manner in which such legal fees were calculated ..." On or about May 20, 2010, Newman moved the Guardianship Court for an order approving the settlement of the malpractice action, "including the amount of legal fees awarded to Plaintiff's counsel and the manner in which such legal fees were calculated ..." By order dated June 7, 2010, the Guardianship Court (Phelan, J.) granted said motion citing the findings of the Hon. Paul J. Baisley, Jr. that "the legal fees approved by the court comport with the language and mandates of the statute ..."

In her complaint, the plaintiff alleges that, at the July 20, 2009 appearance, Buttafuoco misrepresented to the court that he was following the schedule set forth in Judiciary Law § 474-a (2), and that the legal fees set forth in Exhibit 3 likewise were in accordance with that schedule. The plaintiff further alleges that Buttafuoco "intentionally materially misrepresented" to her that his legal fees and expenses as set forth in Exhibit 3 were in accordance with their written retainer agreement, that Buttafuoco illegally and improperly took the sum of $710,000 as a legal fee instead of the "lawful and proper legal fee in the amount of $516,226.40," and that Buttafuoco deceived the plaintiff by using the Court's approval of his legal fees in the amount of $864,552.37 to make her think that his taking a fee of only $710,000 benefitted her and her husband. In addition, the plaintiff alleges that Buttafuoco disbursed a check payable directly to her husband prior to Newman's application to the Guardianship Court for an order permitting the transfer of all of his assets to her, which made her husband ineligible for Medicaid benefits from the Nassau County Department of Social Services, and resulted in an additional lien against the settlement proceeds in the medical malpractice action.

In her complaint, the plaintiff alleges, among other things, that Newman failed to attach any proof pertaining to the medical malpractice action in his motion papers dated September 29, 2009 seeking approval of the settlement therein, that Newman failed to research or discover that the legal fee requested by Buttafuoco was illegal and contrary to plaintiff's written retainer with Buttafuoco, and that

Newman failed to advise Buttafuoco that the settlement proceeds could not be distributed until the Guardianship Court had approved the same.

The Court now turns to that branch of Buttafuoco's motion which seeks an order dismissing the complaint pursuant to CPLR 3211 (a) (1). Pursuant to CPLR 3211 (a) (1), a cause of action will be dismissed when documentary evidence submitted in support of the motion conclusively resolves all factual issues and establishes a defense as a matter of law (***Leon v Martinez***, 84 NY2d 83, 614 NYS2d 972 [1994]; ***Vitarelle v Vitarelle***, 65 AD3d 1034, 885 NYS2d 320 [2d Dept 2009]; ***Mazur Bros. Realty, LLC v State of New York***, 59 AD3d 401, 873 NYS2d 326 [2d Dept 2009]). In support of his motion, Buttafuoco submits, among other things, a copy of the subject retainer agreement, the "so ordered" transcript of the July 20, 2009 appearance before the Hon. Paul J. Baisley, Exhibit 3, and copies of the motion papers and court orders referenced above. A review of the papers and documents submitted reveals that there are no factual issues to be determined herein, and that Buttafuoco has established his defenses as a matter of law to the First through Fifth Causes of Action in the amended complaint.

The doctrine of collateral estoppel precludes the plaintiff from re-litigating the manner in which Buttafuoco calculated his legal fee in the determination of this action (*see* ***Parker v Blauvelt Volunteer Fire Co., Inc***., 93 NY 2d 343, 690 NYS2d 478 [1999]; ***Chisolm-Ryder Co. Inc., v Sommer & Sommer***, 78 Ad2d 143, 434 NYS2d 70 [4th Dept. [1980]). Collateral estoppel, a corollary to the doctrine of res judicata, "precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same" (***Ryan v New York Tel. Co.***, 62 NY2d 494, 500, 478 NYS2d 823 [1984]). The two basic requirements of the doctrine are that the party seeking to invoke collateral estoppel must prove that the identical issue was necessarily decided in the prior action and is decisive in the present action, and that the party to be precluded from relitigating the issue had a full and fair opportunity to contest the prior determination (***D'Arata v New York Cent. Mut. Fire Ins. Co.***, 76 NY2d 659, 664, 563 NYS2d 24 [1990]; ***Matter of New York State Site Dev. Corp. v New York State Dept. of Envtl. Conservation,*** 217 AD2d 699, 630 NYS2d 335 [2d Dept 1995]). Here, the documentary evidence clearly indicates that the identical issue has been determined and that the plaintiff had a full and fair opportunity to contest the matter.

The plaintiff correctly points out that there is an exception to the doctrine of collateral estoppel if the plaintiff was deceived in the prior action or proceeding (***Breslin Realty Dev. Corp. v Shaw***, 72 AD3d 258, 893 NYS2d 95 [2d Dept 2010]; ***Izko Sportswear Co. v Flaum***, 25 AD3d 534, 809 NYS2d 119 [2d Dept 2006]). Here, the documentary evidence, and to some degree the complaint, reveals that the plaintiff was aware that Buttafuoco had calculated his legal fee at a higher amount than if it had been based upon the total sum recovered, that the plaintiff had objected to that calculation, and that the plaintiff retained Newman to seek the courts' review of the legal fees. Thus, the exception does not apply under these circumstances. Accordingly, Buttafuoco's motion to dismiss the complaint is granted to the extent of dismissing the plaintiff's First, Second, Third, Fourth and Fifth causes of action.[2]

---

[2] Counsel for Buttafuoco contends that the complaint should be dismissed in its entirety because the plaintiff's sole remedy under the circumstances is an application in the medical malpractice action pursuant to CPLR 5015 (a) (3). While the Court acknowledges that such an application may have been appropriate, it takes no position

In addition, Buttafuoco moves pursuant to CPLR 3211 (a) (7) to dismiss the Sixth Cause of Action sounding in legal malpractice. Pursuant to CPLR §3211 (a) (7), pleadings shall be liberally construed, the facts as alleged accepted as true, and every possible favorable inference given to plaintiffs (***Leon v Martinez***, *supra*). On such a motion, the Court is limited to examining the pleading to determine whether it states a cause of action (***Guggenheimer v Ginzburg***, 43 NY2d 268, 401 NYS2d 182 [1977]). In examining the sufficiency of the pleading, the Court must accept the facts alleged therein as true and interpret them in the light most favorable to the plaintiff (***Pacific Carlton Development Corp. v 752 Pacific, LLC***, 62 AD3d 677, 878 NYS2d 421 [2d Dept 2009]; ***Gjonlekaj v Sot***, 308 AD2d 471, 764 NYS2d 278 [2d Dept 2003]). On such a motion, the Court's sole inquiry is whether the facts alleged in the complaint fit within any cognizable legal theory, not whether there is evidentiary support for the complaint (***Leon v Martinez***, *supra*; ***International Oil Field Supply Services Corp. v Fadeyi***, 35 AD3d 372, 825 NYS2d 730 [2d Dept 2006]; ***Thomas McGee v City of Rensselaer***, 174 Misc2d 491, 663 NYS2d 949 [Sup Ct, Rensselaer County 1997]). Upon a motion to dismiss, a pleading will be liberally construed and such motion will not be granted unless the moving papers conclusively establish that no cause of action exists (***Chan Ming v Chui Pak Hoi et al,*** 163 AD2d 268, 558 NYS2d 546 [1st Dept 1990]).

In order to establish a prima facie case of legal malpractice, a plaintiff must demonstrate that the breach of the attorney's duty proximately caused the plaintiff actual and ascertainable damages (*see* ***Leder v Spiegel***, 9 NY3d 836, 840 NYS2d 888 [2007]; ***Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer***, 8 NY3d 438, 835 NYS2d 534 [2007]; ***McCoy v Fienman***, 99 NY2d 295, 755 NYS2d 693 [2002]; ***Darby & Darby, P.C. v VSI Intl Inc.***, 95 NY2d 308, 716 NYS2d 378 [2000]; ***Kluczka v Lecci***, 63 AD3d 796, 880 NYS2d 698 [2d Dept 2007]).

Here, a review of the complaint reveals that the plaintiff has plead a cognizable cause of action for legal malpractice. In her complaint, the plaintiff alleges that Buttafuoco disbursed a check payable directly to her husband prior to Newman's application to the Guardianship Court for an order permitting the transfer of all of his assets to her, which made her husband ineligible for Medicaid benefits from the Nassau County Department of Social Services, and resulted in an additional lien against the settlement proceeds in the medical malpractice action. Accordingly, that branch of the defendant's motion which seeks to dismiss the plaintiff's Sixth Cause of Action for legal malpractice pursuant to CPLR 3211 (a) (7) is denied.

Newman now moves for an order pursuant to CPLR 3211 (a) (1), and (7) for an order dismissing the complaint against him. The Court notes that the allegations against Newman relate solely to plaintiff's Sixth Cause of Action for legal malpractice. A review of the documentary evidence pursuant to CPLR 3211 (a) (1) reveals that the motions brought on by Newman herein clearly set forth the issue of Buttafuoco's method of calculating his legal fee in the malpractice action, and asks the respective courts to review those fees. The Court finds that the plaintiff's allegations against Newman are essentially that he did not properly frame the issue of Buttafuoco's malfeasance in his motion papers, and that he

---

regarding the claim that such an application is plaintiff's sole remedy regarding her allegations against Buttafuoco.

improperly asked the courts "to approve" the settlement and the legal fees. However, a review of the documentary evidence negates those allegations.

In addition, the plaintiff has failed to state a cause of action for legal malpractice against Newman. The complaint does not set forth, and it is clear that the plaintiff cannot allege, that any amount of legal research by Newman would have resulted in finding legal authority making Buttafuoco's calculation of his legal fee improper. Furthermore, the plaintiff does not allege that Newman knew or should have known that Buttafuoco would prematurely distribute the settlement proceeds directly to the plaintiff's husband before Newman could make application to the Guardianship Court for an order permitting the transfer of all of his assets to her. It is well settled that an attorney's decision to pursue one of several reasonable courses of action does not constitute malpractice even where the attorney's selection of one of several reasonable courses of action, when viewed in hindsight, appears to be an error in judgment (*see* ***Rosner v Palley***, 65 NY2d 736, 492 NYS2d 13 [1985]; ***Dimond v Kazmierczuk & McGrath***, 15 AD3d 526, 790 NYS2d 219 [2d Dept 2005], *lv denied* 5 NY3d 715, 807 NYS2d 16 [2005]; ***Holschauer v Fisher***, 5 AD3d 553, 772 NYS2d 836 [2d Dept 2004]; ***Magnacoustics, Inc. v Ostrolenk, Faber, Gerb, & Soffen***, 303 AD2d 561, 755 NYS2d 726 [2d Dept 2003], *lv. denied* 100 NY2d 511, 766 NYS2d 165 [2003]). Accordingly, Newman's motion to dismiss the complaint against him is granted.

Dated: NOVEMBER 14, 2012.

J.S.C.

____ FINAL DISPOSITION ___X___ NON-FINAL DISPOSITION