Brion v Moreira
2016 NY Slip Op 31828(U)
September 30, 2016
Supreme Court, New York County
Docket Number: 155815/2014
Judge: David B. Cohen

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 58

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MICHAEL BRION, MICHAEL A. BRION AS THE ASSIGNEE OF THE ESTATE OF MIGUEL BRION, BASONAS CONTRUCTION CORP.,

Plaintiffs,

-against-

JORGE MOREIRA, MOREIRA AND ASSOCIATES, PLLC

Defendants.
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DECISION/ORDER
Index No. 155815/2014

JORGE MOREIRA, MOREIRA AND ASSOCIATES, PLLC

Third Party Plaintiffs

-against-

BRIAN M. DeLAURENTIS PC, and BRIAN M. DeLAURENTIS

Third Party Defendants
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This action was initially brought by Michael Brion, Michael A. Brion as the Assignee of the Estate of Miguel Brion, and Basonas Contruction Corp.[1], (hereinafter combined as "plaintiffs") against Jorge Moreira and Moreira and Associates, PLLC (the "defendants") for malpractice allegedly committed by defendants handling of the revocation of the 2010 will of Miguel Brion and the subsequent failure to properly reinstate the 2004 will. Defendants then filed a third party action against Brian M. DeLaurentis PC, and Brian M. DeLaurentis ("DeLaurentis") seeking contribution. In the third party complaint, defendants allege that it was not the malpractice of defendants that led to plaintiffs' damages but the legal counsel and advice of DeLaurentis in a subsequent probate matter concerning the wills. Defendants specifically allege that DeLaurentis (1) advised plaintiffs to settle the probate matter and not continue to litigate it; (2) did not subpoena or seek the testimony of defendants in the probate matter; and (3) filed unnecessary motions and applications in the probate matter and caused excessive fees in that matter. Defendants seek that to the extent they

[1] By order of the Appellate Division dated April 21, 2016 Basonas Construction Corp has been dismissed from this action (*Brion v. Moreira*, 138 AD3d 580 [1st Dept 2016]).

are found liable to plaintiffs, they should be entitled to recover any damages from DeLaurentis for its part in the damages.

DeLaurentis filed this motion to dismiss pursuant to CPLR 3211(a)(1) and (7). DeLaurentis argues that plaintiffs' lawsuit seeks recovery for defendants' malpractice and that documentary evidence establishes that said malpractice occurred. Further, DeLaurentis asserts that as a matter of law, the acts alleged by defendants' do not constitute legal malpractice and therefore, even if DeLaurentis had performed those acts, defendants' would not be entitled to any recovery. Defendants' argue that DeLaurentis wrongful advice and advocacy, caused or exacerbated plaintiffs' damages and, had DeLaurentis offered proper counsel, there possibly would have been no damages. Finally, defendants argue that a portion of damages sought relate to legal fees paid to DeLaurentis in connection with the probate matter and that DeLaurentis contributed to those by filing unnecessary motions and applications.

It is well settled law that that an attorney sued for malpractice may assert a claim for contribution against another lawyer who advised the plaintiff on the same matter (*Millennium Import, LLC v Reed Smith LLP*, 104 AD3d 190 [1st Dept 2013]). In *Schauer v Joyce* (54 NY2d 1 [1981]), the Court of Appeals explained the malpractice contribution theory stating:

> CPLR 1401, which codified this court's decision in Dole v Dow Chem. Co. (30 NY2d 143), provides that "two or more persons who are subject to liability for damages for the same personal injury, injury to property or wrongful death, may claim contribution among them whether or not an action has been brought or a judgment has been rendered against the person from whom contribution is sought." The section "applies not only to joint tortfeasors, but also to concurrent, successive, independent, alternative, and even intentional tortfeasors" (Siegel, New York Practice, § 172, p 213; see McLaughlin, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 1401, pp 362-363).

Id. at 5.

The *Schauer* Court continued and explained that the relevant question under CPLR 1401 is not whether the third-party defendant owed a duty to defendant but whether they each owed a duty to plaintiff and by breaching their respective duties each contributed to the ultimate injuries (*id.*). "The 'critical requirement' for apportionment by contribution under CPLR article 14 is that "the breach of duty by the contributing party must have had a part in causing or augmenting the injury for which contribution is sought" (*Raquet v Braun*, 90 NY2d 177, 183 [1997]). Thus, for defendants to successfully state a cause of

action here against DeLaurentis, it must allege that DeLaurentis had a duty to plaintiffs and that DeLaurentis' conduct breached such duty.

It is not disputed that DeLaurentis was retained to represent plaintiffs in the probate matter and to attempt to resolve the issues about the wills. Thus, DeLaurentis clearly had a duty to plaintiffs. DeLaurentis does contend that its duty was different, i.e, defendants' duty was to revoke the 2010 will and reinstate the 2004 will while its duty was to litigate the probate matter. However, because the cause of action alleges that the DeLaurentis representation and counsel in the probate matter contributed to the plaintiffs' damages, defendants' have properly stated that the allegations have contributed to plaintiffs' ultimate injuries. Indeed, Courts have found that a cause of action for contribution was properly stated when a complaint alleged that a subsequent law firm exacerbated the damages by failing to timely correct the legal errors allegedly committed by a predecessor law firm resulting in damages (*U.S. Bank Nat. Ass'n v Stein*, 81 AD3d 927 [2d Dept 2011]).

In the Bill of Particulars, plaintiffs' seek damages relating to defendants' alleged malpractice in the amount of $2,935,000. Of that amount, plaintiffs seek $2,100,000 for payments made by Michael Brion in settlement of the probate matter and $835,000 for the legal expenses in the probate matter. For defendants' to maintain a claim for contribution defendants must properly state that DeLaurentis *breached* their duty and how the subsequent actions of DeLaurentis had a part in causing, exacerbating or augmenting plaintiffs' injuries. Defendants' specifically allege three "deficiencies" in DeLaurentis representation; that DeLaurentis (1) advised plaintiffs to settle the probate matter and not continue to litigate it; (2) did not subpoena or seek the testimony of defendants' in the probate matter; and (3) filed unnecessary motions and applications in the probate matter and caused excessive fees in that matter.

If defendants are successful in their defense of this matter, the claim for contribution will be academic as defendants will not be liable for malpractice. If plaintiff is successful in this matter and defendants' are found to be liable for malpractice for its failure to revoke the 2010 will and reinstate the 2004 will, defendants' first two theories for contribution could not have had a part in causing, exacerbating or augmenting plaintiffs' injuries as to the $2,100,000 sought. The malpractice injury solely stems from defendants' alleged (in)actions. There is no

allegation here that DeLaurentis augmented the injury be also failing to revoke/reinstate the wills in question. In fact, based upon the facts presented, DeLaurentis' involvement began with the representation of plaintiff after the death of Miguel Brion and, thus, could not have revoked the will and stopped the injury (*see Pellegrino v File*, 291 AD2d 60 [1st Dept 2002]). To the extent that defendants' contend that DeLaurentis' advice was faulty and had DeLaurentis litigated the probate matter the result would have been different, if that contention is correct then, defendants would not be liable for malpractice. Plaintiffs' entire action for damages hinges on that very question and plaintiffs can only be successful if they prove otherwise, i.e., that the 2010 will was not revoked. Therefore, to the extent that defendants' seek contribution relating to the portion of plaintiffs' claim for $2,100,000, that claim is dismissed.[2]

However, plaintiffs also seek $835,000 in damages for legal fees relating to the probate matter. Defendants have properly stated a cause of action for contribution in that portion. Defendants' contention that a portion of those legal fees are higher than they should be because of wrongful motion practice, poor advice and failure to seek defendants' testimony all could have exacerbated the total legal fees and thus, defendants' have properly stated a cause of action for contribution. DeLaurentis argues that those decisions are legal strategical decision and cannot rise to the level of malpractice. DeLaurentis cites to *Rosner v. Paley,* 65 NY2d 760 [1985] and *Mars v. Dobrish,* 66 AD3d 403 in support of this theory. However, *Rosner* and its progeny stand for the proposition that neither an error in judgment nor in choosing a reasonable course of action constitutes malpractice (*id.*; *Hand v Silberman*, 15 AD3d 167 [1st Dept 2005]). Here, defendants are not alleging that the actions of DeLaurentis constitute malpractice. Rather, they allege that to the extent that plaintiffs suffered $835,000.00 of damages in legal fees, the actions of DeLaurentis augmented and exacerbated a portion of that amount and seek contribution for that portion. Because defendants have stated a cause of action for contribution and not malpractice, that portion of the complaint survives.

[2] DeLaurentis also argues that as a matter of law and pursuant to documentary evidence, including a decision in the probate matter, the matter regarding whether defendants' properly revoked the 2010 Will has already been decided. However, the Court, takes no position in deciding that question at this time.

It is therefore

ORDERED, that DeLaurentis' motion to dismiss is granted to the extent of dismissing any claims relating to $2,100,000 of damages claimed by plaintiff; and it is also

ORDERED that the cause of action for contribution against DeLaurentis with respect to the legal fees is not dismissed.

DATE : 9/30/2016

COHEN, DAVID B., JSC