Gersh v Nixon Peabody LLP
2017 NY Slip Op 30363(U)
February 27, 2017
Supreme Court, New York County
Docket Number: 155668/2016
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 35

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HOLLISE B. GERSH, Individually and as the Executor of the Estate of Edward I. Gersh,

Plaintiff,

-against-

NIXON PEABODY LLP and JOHN T. FITZGERALD, JR.,

Defendants.

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Index No. 155668/2016

DECISION/ORDER

Motion Seq. 001

HON. CAROL R. EDMEAD, J.S.C.:

MEMORANDUM DECISION

This is an action for legal malpractice and negligence.

Defendants, Nixon Peabody LLP and John T. Fitzgerald, Jr. (collectively "Defendants"), now move to dismiss the complaint ("Complaint") of plaintiff Hollise B. Gersh, individually and as the Executor of the Estate of Edward I. Gersh ("Plaintiff"), pursuant to CPLR §§ 3211[a][1] and [a][7].

Factual Background

Edward I. Gersh ("Edward") married his first wife, Gertude, in 1941 and had two children, Laurie and Ellynn. In 1963, Edward and Gertrude divorced and entered into a separation agreement ("Separation Agreement"). The Separation Agreement provided, in relevant part, that "if Gertrude survived Edward, and if the couple's younger child had reached the age of 21 by the time Edward dies, then Edward was obligated to leave 50 percent of his estate in trust for Gertrude, with the corpus passing to both children upon their mother's death" (Def. MOL, at 4; *see* Separation Agreement ¶ 11).

Thereafter, Edward married Plaintiff in 1987.

On or about November 2003, Edward and Plaintiff ("the Gershes") jointly retained Defendants to provide legal and planning advice. By letter dated November 13, 2003 ("Retention Letter"), Defendants advised, in relevant part, that:

> [I] enclose a short statement about our policy on client confidences and how we approach the joint representation of spouses as well as a copy of our privacy policy
>
> . . . . .
>
> Client Confidences
> Good estate planning requires the parties to tell the lawyer everything about their financial arrangements, as well as many private aspects of their family situation. Full disclosure and frank and open discussion of anything that would affect the plan is the key to identifying and dealing properly with the issues of the case (Retention Letter, at p.1-2).

In November 2003, Defendants prepared a will which Edward executed (the "2003 Will") (Ex. B to Fitzgerald Aff.). The 2003 Will is a "pour over will," wherein "other than Edward's personal effects and tangibles, applicable death taxes, and administrative expenses incurred by the executor, all the rest of Edward's property was to be added to the principal of the Edward I. Gersh Revocable Trust" dated February 5, 1991 ("Revocable Trust") (Def. MOL at 6; Ex. B to Fitzgerald Aff., at Art. I & II). The 2003 Will also named Plaintiff as the executor (Art. IV). Further, the 2003 Will specified that "[n]o executor . . . shall be required to post a bond or other security in such capacity in any jurisdiction" (*id.* at Art. V(B)).

Defendants also drafted amendments to the Revocable Trust. Defendants state that the last of those amendments, the 14th Trust Amendment to and Restatement of Edward I. Gersh Revocable Trust ("14th Trust Amendment") dated January 7, 2013, included a provision specifying that "[n]o Trustee [or] Successor Trustee . . . or other such fiduciary however styled,

shall be required to post a bond or other security in such capacity in any jurisdiction (Ex. C to Fitzgerald Aff. [Trust], at Art. XVII(B)).

Edward died on June 15, 2014; Gertrude died three months later on September 24, 2014. Soon thereafter, Laurie and Ellynn claimed that they were entitled to half of Edward's estate pursuant to the Separation Agreement. In September 2014, the Suffolk County Surrogate's Court (the "Surrogate's Court") ordered that preliminary letters testamentary issue to Plaintiff as preliminary executor of Edward's estate under the 2003 Will (Surrogate's Court September 5, 2014 Order) ("September Order"). The September Order also required that Plaintiff file a bond for approximately $4.7 million for her to serve as the preliminary executor of Edward's estate.

In December 2014, Laurie and Ellynn filed a claim against Edward's estate for 50 percent of the value of his estate, pursuant to the terms of the Separation Agreement. Laurie and Ellynn alleged that the total value of the estate was approximately $17.5 million. As the executor of Edward's estate, Plaintiff refused their claim. Laurie and Ellynn next filed a Verified Petition against Edward's estate, which Plaintiff as executor settled for $2.367 million.

Consequently, Plaintiff filed the instant action alleging that Defendants provided erroneous estate planning advice to the Gershes, resulting in "millions of dollars of losses to [Plaintiff] and Edward's [e]state, in addition to substantial legal and accounting fees to minimize the consequences of [D]efendants' malpractice" (Compl. at 2). As to the First Cause of Action for legal malpractice, Plaintiff alleges that Defendants were aware that Edward was divorced twice, but failed to advise Edward and Plaintiff of "the potential consequences and impact of the Separation Agreement on Edward's estate" (¶39). Specifically, Plaintiff alleges that "[D]efendants never inquired about or obtained a copy of Edward's Separation Agreement" and

they failed to "advise [the Gershes] that Gertrude, Laurie and Ellynn had a potential claim to 50% of Edward's 'estate' . . . ." (¶25). Further, Defendants failed to advise Edward and Hollise on "how, in light of the Separation Agreement, to effectuate Edward's desire to leave virtually all of his assets to Hollise consistent with the terms of the 2003 Will after he passed away.' (¶26) Further, Defendants allegedly failed to properly prepare the 2003 Will (¶41).

As to the Second Cause of Action for legal malpractice, Plaintiff alleges that Defendants advised that she "would be the executor for the estate and that she would not be required to post a bond with the Surrogate's Court to act in that capacity" (¶48). Further, the 14th Amendment "did not state that a preliminary executor would not be required to post a bond or security" (¶50). As a result, Plaintiff was required incur an "unnecessary cost" in posting a $4.7 million bond to act as the preliminary executor for Edward's estate (¶50).

Finally, the Third Cause of Action for negligence alleges that "Defendants failed to advise [the Gershes] that Edward's estate was subject to claims by Laurie and Ellynn under the Separation Agreement" (¶56).

Defendants' Motion

In support of Defendants' motion to dismiss the First and Third Causes of Action, Defendants argue that they were not negligent in not discovering the Separation Agreement. Although an attorney is responsible for investigating and preparing every phase of a client's case, "an attorney should not be held liable for ignorance of facts which the client neglected to tell him or her" (Def. MOL 10). Despite his knowledge of the Separation Agreement, Edward failed to notify Plaintiff and Defendants of its existence. Further, Defendants' Retention Letter informed Edward that "in order to be able to provide estate-planning services, Defendants needed Edward

tell them 'everything about [the Gershs'] financial arrangements, as well as many private aspects of their family situation'" (Def. MOL, at 11, quoting Retention Letter, p.2).

Next, Plaintiff fails to establish that Defendants were the proximate cause of her injury. First, Plaintiff speculates that had Defendants "asked Edward about the possible existence of prior divorce or settlement agreements," then "Edward would have disclosed the existence of the Settlement Agreement . . . ." (Def. MOL at 12). Second, Plaintiff further speculates that had Defendants "advised him to do so, Edward 'would have' taken steps to leave 'little or no estate to probate and/or subject to claims by Laurie and Ellynn" (*id.*, citing Compl. at ¶ 33). Additionally, Plaintiff fails to allege that she had the ability or authority to take the aforementioned steps, but rather, alleges that Defendants "'could have' advised Edward about such steps, and that if he had been so advised, Edward 'would have' taken them" (Compl. ¶¶ 32-33).

Next, Defendants argue that the Third Cause of Action should be dismissed as duplicative of the First Cause of Action, as both claims are predicated on the same causation theory.

Finally, the Second Cause of Action is refuted by documentary evidence, as both the 2003 Will and 14th Trust Amendment included a bond-waiver provision. Further, even if the bond-waiver provision was omitted, such omission cannot, as a matter of law, have been the proximate cause of the Surrogate's Court's order requiring Plaintiff to file a bond, since the Surrogate's Court Procedure Act ("SCPA") § 1412 affords the Surrogate's Court complete discretion to require a person seeking preliminary letters testamentary to file a bond.

Plaintiff's Opposition

Plaintiff argues that Edward did not conceal the Separation Agreement from Defendants. First, the cover letter of the Retention Letter does not request that Edward make a "full

disclosure" (Opp. at 10). Plaintiff argues that a layman, like Edward, reading the Retention Letter would "assume that the attorneys will simply keep confidential anything that is disclosed to them, not that [Edward] is obligated to disclose everything to the attorney without prompting about what might be relevant to [Edward's] estate planning." (*id.*)

Further, the paragraph addressing "Client Confidences" in the Retention Letter does not demonstrate to a client what documents may affect their estate planning, as it fails to "direct [Edward] to tell [Defendants] about separation agreements or divorce decrees, or even give a list of sample documents that should be produced by [Edward]" (*id.* at 11). Moreover, the "Privacy Policy" paragraph lead "[the Gershes] to expect [that Defendants] would tell them exactly what types of documents they should produce" (*id.*).

Further, Plaintiff argues that Defendants failed to exercise the ordinary skill and knowledge commonly possessed by estate planning attorneys. First, Defendants were aware that Edward had two prior marriages, and based on that knowledge, should have inquired about the Separation Agreement (*id.* at 13-14).

Additionally, the Retention Letter fails to "utterly refute" the "factual allegations in the complaint or establish a conclusive legal defense for defendants" (*id.* at 13). In fact, the Retention Letter supports Plaintiff's claim that Edward expected Defendants to tell him what documents they needed and caused the Gershes to believe that Defendants "had a duty to gather additional information once [Edward] disclosed his prior marriages and divorces" (*id.*).

Plaintiff next argues that Defendants' negligence was the proximate cause of Plaintiff's damages. Defendants' argument that Edward "actively concealed anything from [Plaintiff] or lied to her" is baseless (*id.* at 16) Likewise, Defendants' argument that "it is pure speculation that

Edward would have taken steps to leave 'little or no estate to probate and/or subject to claims by Laurie and Ellynn' if defendants properly advised him on the potential claim to his estate . . ." is belied by the fact that Edward's estate plan leaves Plaintiff a bulk of his estate upon his death (*id.* at 17, quoting Def. MOL at 12). Had Defendants "inquired about or obtained a copy of the [Separation Agreement] or subsequent divorce judgment, they could have advised Edward on various ways to protect his assets from any potential claim based on the Separation Agreement . . . ." (*id.* at 18; Compl. at ¶ 32). Specifically, Plaintiff suggests that Edward could have:

> (a) transferr[ed] assets during his lifetime either directly to Hollise and/or to trusts for Hollise's benefit so as to minimize the assets in Edward's Estate that could be subject to any claim under the Separation Agreement; (b) enter[ed] into an agreement with Gertrude, Laurie and/or Ellynn to void and/or modify the terms of the Separation Agreement, the consideration for which could have been, among other things, certain *inter vivos* gifts that Edward made to Laurie and Ellynn after he engaged defendants to provide legal services; and/or (c) limit the amount of and/or not make any *inter vivos* gifts in favor of Laurie and/or Ellynn to account for the fact that they would receive certain sums upon Edward's death under the terms of the Separation Agreement.
> (Compl. at ¶ 32; Opp. at 18).

Further, Plaintiff argues that her Third Cause of Action for negligence is not duplicative of her First Cause of Action for legal malpractice, because "they are based on different theories of recovery" (Opp. at 20).

Next, Plaintiff argues that neither the 2003 Will, nor 14th Trust Amendment include the language that a "preliminary executor" shall not be required to file a bond. Defendants' "should have anticipated that [Plaintiff] would be required to apply for Preliminary Letters and [Defendants] should have included a bond-waiver provision for the Preliminary Executor" (*id.* at 23). Finally, Defendants' caselaw is factully distinguishable.

Defendants' Reply

Defendant contends that they requested that Edward disclose his financial arrangements. Specifically, the Retention Letter informs the Gershes to "tell the lawyer everything about their financial arrangements, as well as many private aspects of their family situation," and that "[f]ull disclosure and frank and open discussion of anything that would affect the plan is the key to identifying and dealing properly with the issues of the case" (Retention Letter, p.2).

Further, Plaintiff fails to provide authority for her "unsworn speculation as to how a 'layman' would interpret the [Retention Letter]" (at 6); that Defendants' "policy" requested "everything about [the Gershes] financial arrangements and anything that might affect his estate plan"; and Plaintiff speculates that Edward would not know exactly what would affect his estate plan (Reply MOL at 6-7).

Moreover, Plaintiff was aware of the Separation Agreement, as "Edward allegedly made payments to his first wife pursuant to the Separation Agreement" while married to Plaintiff (Reply at 7; Opp. at 16). And, since Defendants "had nothing to do with Edward's decision to enter the Separation Agreement," they "cannot be held liable for it" (Reply MOL at 8).

Furthermore, speculation about what her late-husband would have done is insufficient to establish proximate cause in her legal malpractice action.

Finally, as to Plaintiff's Second Cause of Action, "Plaintiff cites no authority for the purported distinction between an executor and a preliminary executor in a bond-waiver provision, nor does she cite any instance in which that distinction was held to have legal significance" (Reply at 12-13). Additionally, Article V(B) of the 2003 Will accurately embodies Edward's desire to that no executor be required to file a bond.

Discussion

In determining a motion to dismiss a complaint pursuant to CPLR § 3211[a][7], the Court's role is deciding "whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail" (*African Diaspora Maritime Corp. v. Golden Gate Yacht Club*, 109 A.D.3d 204, 968 N.Y.S.2d 459 [1st Dept 2013]; *Siegmund Strauss, Inc. v. East 149th Realty Corp.*, 104 A.D.3d 401, 960 N.Y.S.2d 404 [1st Dept 2013]). On a motion to dismiss made pursuant to CPLR § 3211, the court must "accept the facts as alleged in the complaint as true, accord plaintiffs "the benefit of every possible favorable inference," and "determine only whether the facts as alleged fit into any cognizable legal theory" (*Siegmund Strauss, Inc. v. East 149th Realty Corp.*, 104 A.D.3d 401, *supra; Nonnon v. City of New York*, 9 N.Y.3d 825 [2007]; *Leon v Martinez*, 84 N.Y.2d 83, 87-88, 614 N.Y.S.2d 972, 638 N.E.2d 511 [1994]). However, "allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not" presumed to be true or accorded every favorable inference (*David v. Hack,* 97 A.D.3d 437, 948 N.Y.S.2d 583 [1st Dept 2012]; *Biondi v. Beekman Hill House Apt. Corp.*, 257 A.D.2d 76, 81, 692 N.Y.S.2d 304 [1st Dept 1999], *affd* 94 N.Y.2d 659, 709 N.Y.S.2d 861, 731 N.E.2d 577 [2000]; *Kliebert v. McKoan*, 228 A.D.2d 232, 643 N.Y.S.2d 114 [1st Dept], *lv denied* 89 N.Y.2d 802, 653 N.Y.S.2d 279, 675 N.E.2d 1232 [1996]), and the criterion becomes "whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275, 401 N.Y.S.2d 182, 372 N.E.2d 17 [1977]; *see also Leon v. Martinez*, 84 N.Y.2d 83, 88, 614 N.Y.S.2d 972, 638 N.E.2d 511 [1994]; *Ark Bryant Park Corp. v. Bryant Park Restoration Corp.*, 285 A.D.2d 143,

150, 730 N.Y.S.2d 48 [1st Dept 2001]; *WFB Telecom., Inc. v. NYNEX Corp.*, 188 A.D.2d 257, 259, 590 N.Y.S.2d 460 [1st Dept], *lv denied* 81 N.Y.2d 709, 599 N.Y.S.2d 804, 616 N.E.2d 159 [1993] [CPLR § 3211 motion granted where defendant submitted letter from plaintiff's counsel which flatly contradicted plaintiff's current allegations of prima facie tort]).

Pursuant to CPLR § 3211 [a][l], a party may move for judgment dismissing one or more causes of action asserted against him on the ground that "a defense is founded upon documentary evidence." A motion to dismiss on the basis of a defense founded upon documentary evidence may be granted "only where the documentary evidence utterly refutes [the complaint's] factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 326, 746 N.Y.S.2d 858 [2002]; *Mill Financial, LLC v. Gillett*, 122 A.D.3d 98, 992 N.Y.S.2d 20 [1st Dept 2014]). "Dismissal pursuant to CPLR 3211[a][1] is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Mill Financial, LLC v. Gillett*, *supra*, citing *Art and Fashion Group Corp. v. Cyclops Production, Inc.*, 120 A.D.3d 436, 992 N.Y.S.2d 7 [1st Dept 2014]).

In order to state a claim for legal malpractice, Plaintiff must allege that (1) Defendants owed her a duty to exercise the degree of care, skill and diligence commonly possessed by a member of the legal profession, (2) Defendants breached that duty, and (3) that actual damages were proximately caused by the breach (*see Gonzalez v. Ellenberg*, 5 Misc.3d 1023 [Sup. Ct. N.Y. Cnty. 2004] *citing Hatfield v. Herz*, 109 F. Supp. 2d 174, 179 [S.D.N.Y. 2000]). To establish the third element of proximate cause and actual damages, Plaintiff "must meet the 'case within a case' requirement, demonstrating that 'but for' the attorney's conduct the client would have prevailed in the underlying matter or would not have sustained any ascertainable damages"

had Defendants exercised due care (*Levine v. Lacher & Lovell-Taylor*, 256 A.D.2d 147 [1st Dept 1998]; *Rubinberg v. Walker*, 252 A.D.2d 466 [1st Dept 1998]; *Perks v. Lauto & Garabedian*, 306 A.D.2d 261 [2d Dept 2003]; *see also*, *Bazinet v. Kluge*, 14 A.D.3d 324 [1st Dept 2005]; *Gonzalez v. Ellenberg*, 5 Misc.3d 1023 [Sup. Ct. N.Y. Cnty. 2004]). As such, to establish "proximate cause," Plaintiff must establish that Edward's estate would not have been subject to probate and claims from Laurie and Ellynn but for (1) Defendants' failure to inquire about and obtain the Separation Agreement, (2) Defendants' failure advise Edward of the potential consequences and impact of the Separation Agreement, or (3) Defendants' failure to properly prepare Edward's 2003 Will to ensure that his assets were distributed according to his wishes and not subject to probate and claims under the Separation Agreement (*see Leff v. Fulbright & Jaworski, L.L.P.*, 78 A.D.3d 531, 533 [1st Dept 2010]).

Inasmuch as the Complaint expressly asserts that Defendants "*never inquired about or obtained* a copy of Edward's Separation Agreement with Gertrude" (25), Defendants' conflicting claim in their *memorandum of law* that Edward concealed such Agreement from them is insufficient, in and of itself, to establish that the Complaint fails to state they departed from the requisite standard of care (emphasis added). Further, Defendants' reliance on the Retention Letter to refute such allegation in the Complaint is misplaced. While the Retention Letter requests "[f]ull disclosure and frank and open discussion of anything that would affect the plan . . . " (Retention Letter, at p. 2), it does not specifically request that the Gershes furnish Defendants with a copy of any agreements resulting from his prior divorces. Nor does the Retention Letter indicate which documents, if any, Edward did or did not provide the Defendants during their representation of Edward. And, any purported failure of Edward to follow Defendants' advice or

instruction in the Retention Letter to "tell the lawyer everything about their financial arrangements, as well as many private aspects of their family situation"

On the other hand, as to the claim that Defendants failed to advise Edward of the potential consequences and impact of the Separation Agreement, and to the extent Defendants' alleged failure to properly prepare Edward's 2003 Will rests on the impact of the Separation Agreement, an attorney cannot be held liable for legal malpractice for failing to disclose facts already known to the client. In *Green v. Conciatori*, an action for legal malpractice, plaintiff alleged that his former attorneys in a personal injury suit, failed to discover facts about the underlying incident that differed from what plaintiff had given defendants (*Green v. Conciatori*, 26 A.D.3d 410, 809 N.Y.S.2d 559 [2d Dept 2006]). The undiscovered facts were known to plaintiff, but never disclosed to defendants (*Id.* at 411). The court held that while plaintiff's claim is time-barred, defendants "should not be held liable for ignorance of facts which the client neglected to tell him or her" (*Id.*).

Similarly in *Ableco Fin. LLC v. Hilson* (109 A.D.3d 438, 970 N.Y.S.2d 775 [1st Dept 2013]), cited by Defendants, plaintiff was in "the business of making commercial loans." Plaintiff loaned a business funds to be used to purchase assets from the bankruptcy estate of a retail clothing chain, and defendants represented plaintiff in the transaction. Plaintiff subsequently filed an action alleging that defendants failed to advise plaintiff that the loan it made was collateralized by only a portion of retail clothing chain's inventory, rather than the entire inventory and failed to advise plaintiff that it was not getting a first priority lien on the entire inventory. Plaintiff alleged that it would not have made the loan had it known that the loan was only collateralized by a portion of the inventory. The court found that documentary evidence

of an underlying related bankruptcy proceeding press release defeated plaintiff's "pivotal claim" that it made the loan without knowing that it was not getting a first priority lien (*id.* at 439). Accordingly, the court dismissed the legal malpractice claim (*id.*; *e.g. Macquarie Capital (USA) Inc. v. Morrison & Foerster LLP*, (2016 N.Y. Slip Op. 31405(U), 8 [Sup. Ct. N.Y. Cnty. July 14, 2016]).

Here, it is undisputed that Edward knew about the contents of the Separation Agreement prior to and during the drafting of the 2003 Will and 14th Amended Trust. Plaintiff acknowledges that Edward was a party to the Separation Agreement (Compl. 6-8), and that "Edward had been making payments to Gertrude" pursuant to the Separation Agreement (Opp. at. 16). The Complaint also acknowledges that Edward did not notify Defendants of its existence of the Separation Agreement (albeit, at the alleged fault of Defendants). Plaintiff also does not attempt to distinguish *Ableco*.

In any event, and even assuming Defendants breached any obligation to investigate Edward's prior agreements, Defendants established that Plaintiff cannot establish that any negligent representation on behalf of the Defendants was the proximate cause of her damages. Plaintiff's assertion of what Edward would have done had he received difference advice is speculative and insufficient to support a legal malpractice claim (*see Leff v. Fulbright & Jaworski, LLP*, 2009 N.Y. Slip Op. 31445(U) [Sup. Ct. N.Y. Cnty. June 30, 2009], *aff'd* 78 A.D.3d 531, 533 [1st Dept 2010]). In *Leff*, the complaint alleged that defendants who drafted her late husband Leff's will committed legal malpractice by failing to advise Leff about a separation agreement that required him to leave half of his probated estate to his son (78 A.D.3d at 533). Leff's separation agreement provided that "[i]n the event the parties shall be divorced and the

[plaintiff] shall have remarried, [Leff] shall provide by Will that no less than one-half (1/2) of his probate estate shall pass to the Child . . . ." (*id.*). Plaintiff claimed that Leff would have taken various different actions to increase her inheritance had defendants discovered and advised Leff of the separation agreement. The trial Court rejected plaintiff's speculation that Leff "would most likely have provided for inter-vivos gifts, created trusts, or joint accounts outside the probate estate to attain that goal" as "pure conjecture" (*id.*) The Court held that a "jury would only be speculating about how Leff might have solved the problem of the Separation Agreement," and therefore, Plaintiff failed to establish that "but for defendants' negligence, she would have come out of probate a richer woman" (*id.*)

The First Department affirmed, explaining that:

> [P]laintiff cannot recover damages that are grossly speculative [internal citations omitted]. Defendants demonstrated that plaintiff could not satisfy the causation element of her malpractice claim because she could not prove that her inheritance would have increased if defendants had advised her late husband about a separation agreement that required him to leave half of his probated estate to his son. While plaintiff suggests various things her late husband could have done to ensure her more money than she eventually received, she cannot prove precisely what he would have done had he received different advice. Therefore, she cannot establish that but for defendants' failure to advise her late husband of the separation agreement, she would have received more money. In this regard, we note that plaintiff's late husband had the right to reduce her inheritance at any point in time.
> *Leff*, 78 A.D.3d at 533.

As in *Leff*, Plaintiff's claims here are too speculative to support a claim for legal malpractice. Specifically, Plaintiff's arguments that Edward could have transferred assets, entered into an agreement, and limit *inter vivos* gifts to Laurie and Ellynn, are speculative and plaintiff's

allegations are insufficient to support her claim of what Edward would have done had he received different advice.

Therefore, dismissal of legal malpractice claim (First Cause of Action) and negligence claim (Third Cause of Action), is warranted.

The Court also finds that plaintiff's Third Cause of Action is subject to dismissal on the additional ground that it is duplicative of her First Cause of Action. Claims "which are predicated on the same allegations and seek relief identical to that sought in the malpractice cause of action" must be dismissed as duplicative (*see Sage Realty Corp. v. Proskauer Rose,* 251 A.D.2d 35, 38 [1st Dept 1998] ("Contrary to plaintiffs' assumption, it is not the theory behind a claim that determines whether it is duplicative") *citing Santulli v. Englert, Reilly & McHugh,* 78 N.Y.2d 700, 706 [1st Dept 1998]; *Conklin v. Owen,*72 A.D.3d 1006, 900 N.Y.S.2d 118 [1992]; *see also Dinhofer v. Med. Liab. Mut. Ins. Co.*, 92 A.D.3d 480, 481, 938 N.Y.S.2d 525 [1st Dept 2012] (holding that plaintiff's "fraud claim is duplicative of his legal malpractice claim since it arose from the same underlying facts and alleged similar damages"). Here, the First and Third Causes of Action are predicated on the same facts: that Defendants failed to discover and advise the Gershes of the Separation Agreement and its effect on Edward's estate planning.

Furthermore, dismissal of Plaintiff's Second Cause of Action is warranted. Although the Second Cause of Action sufficiently states a claim for legal malpractice,[1] the 2003 Will and 14th Trust Amendment utterly refute Plaintiff's claim, since both documents include a bond-waiver

[1] Specifically, Plaintiff alleges that by failing to include a bond-waiver provision in the 14th Trust Amendment, Defendants failed to perform the contracted-for legal services for the Gershes with the requisite skill, care and diligence possessed by members of the legal profession, and that Plaintiff suffered damages as a result (Compl. 51-52).

provision that abolishes the requirement that the executor post a bond to serve in that capacity.

Further, according to SCPA § 1412[5],

> [w]here the will explicitly dispenses with the filing of a bond, the court shall grant such letters without bond, unless it determines there are extraordinary circumstances in the particular case to warrant filing of a bond, in which case the court shall have discretion to require the person seeking such letters to file a bond in such amount as the court deems advisable.

The bond-waiver provision in the 2003 Will clearly dispenses with the requirement that Plaintiff file a bond to act as the preliminary executor to Edward's estate. Yet, despite the existence of the bond-waiver provision in the 2003 Will, the Surrogate's Court exercised its discretion pursuant to SCPA § 1412[5] in ordering Plaintiff to file a bond to act as the preliminary executor. Therefore, Defendants' motion to dismiss the legal malpractice claim (Second Cause of Action), is granted.

CONCLUSION

Based on the forgoing, it is hereby:

ORDERED that the branch of Defendants motion to dismiss Plaintiff's Complaint pursuant to CPLR §§ 3211[a][1] and [a][7], is granted. It is further;

ORDERED that Defendants shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: February 27, 2017

Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL R. EDMEAD
J.S.C.