

Rizzo v Timothy Charles Parlatore

2017 NY Slip Op 30439(U)

March 3, 2017

Supreme Court, New York County

Docket Number: 151153/16

Judge: Kathryn E. Freed

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 5

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RAMONA RIZZO,

Plaintiff,

DECISION/ORDER

-against-

Index No. 151153/16
Seq. No. 001

TIMOTHY CHARLES PARLATORE, ESQ.,
BRUCE CUTLER, ESQ. and
CUTLER & PARLATORE, PLLC,

Defendant.

-----X
HON. KATHRYN E. FREED:

RECITATION, AS REQUIRED BY CPLR 2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION.

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIRMATION IN SUPPORT	1,2
MEMORANDUM OF LAW IN SUPPORT	3
AFFIRMATION IN OPPOSITION	4 (Exs. 1-2)
MEMORANDUM OF LAW IN OPPOSITION	5
REPLY AFFIRMATION	6 (Exs. A-B)
REPLY MEMORANDUM OF LAW	7

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

In this legal malpractice action, defendants Timothy Charles Parlatore, Esq. and Cutler & Parlatore, PLLC move, pursuant to CPLR 3211(a)(7), to dismiss plaintiff Ramona Rizzo's complaint for failure to state a cause of action.¹ Defendants also move, pursuant to 22 NYCRR 130-1.1, for sanctions against plaintiff arising from her allegedly frivolous conduct. Plaintiff opposes the motion. After oral argument, and after a review of the motion papers and relevant statutes and case

¹Although defendant Bruce Cutler, Esq. also moved to dismiss the complaint, the claims against him were withdrawn by stipulation filed December 23, 2016. NYSCEF Doc. No. 23.

law, defendants' motion is **denied**.

Factual and Procedural Background:

In her amended verified complaint, filed with this Court on February 16, 2016 (NYSCEF Doc. No. 1), plaintiff alleged that, on or about August 10, 2011, plaintiff Ramona Rizzo was in a car which was stopped by police officers on the New Jersey side of the Lincoln Tunnel. Ex. 1, at par. 10.² At that time, plaintiff, who had appeared on a television show called "Mob Wives," was with her boyfriend, Joseph Sclafani, who was under investigation by law enforcement authorities. *Id.*, at par. 11. Later that day, agents of the United States Department of Justice Drug Enforcement Administration ("DEA"), executing a search warrant, seized property, including jewelry valued at approximately \$184,000, from Sclafani's home. *Id.* Plaintiff allegedly owned 42 pieces of the jewelry seized, which items were worth approximately \$154,000. *Id.*, at pars. 11, 14.

Following the seizure of the jewelry, plaintiff retained defendant Timothy Charles Parlatore, Esq. of defendant law firm Cutler & Parlatore, PLLC ("the firm") to represent her before the asset forfeiture section of the DEA in an attempt to have the jewelry returned to her. *Id.*, at par. 15. On or about November 9, 2011, Parlatore wrote to forfeiture counsel setting forth his intention to submit, on plaintiff's behalf, a request for remission of the forfeiture. *Id.*, at par. 16. On or about December 15, 2011, the DEA notified Parlatore that the application he submitted on plaintiff's behalf was filed incorrectly and had to be resubmitted within 20 days. *Id.*, at par. 17. However, Parlatore allegedly failed to resubmit the application within the 20-day period. *Id.*, at par. 18.

²Unless otherwise noted, all references are to the exhibits annexed to the affirmation of Fred Lichtmacher, Esq. submitted in opposition to the motion.

By correspondence dated January 23, 2012, Parlatore advised the DEA that, since he did not receive its December 15, 2011 letter until January 11, 2012, his submission was made within the 20-day time limit. *Id.*, at par. 19. However, in a letter to Parlatore dated February 15, 2012, the DEA advised that the deadline for filing a claim had expired on January 16, 2012. *Id.*, at par. 20. The DEA further advised Parlatore that plaintiff's only available remaining avenue for having the jewelry returned was a petition for remission or mitigation of forfeiture which would require plaintiff to be interviewed. *Id.*, at par. 21.

By correspondence dated October 15, 2012, the DEA advised Parlatore that the petition he submitted on plaintiff's behalf was deficient insofar as it failed to establish a valid, good faith and legally cognizable interest in the seized property as an owner or lienholder and plaintiff's qualification as an "innocent owner." *Id.*, at par. 23.

Plaintiff alleged that, since the DEA's investigation concluded that it was possible that illicit drug-related funds were used to purchase the forfeited property, Parlatore had to provide evidence that the funds used to purchase the same were not drug-related, and he failed to make this showing. *Id.*, at pars. 25-26. She further claimed that, had Parlatore diligently pursued the matter, he would have been able to provide the DEA, in a timely fashion, with "documents to substantiate her claim" (*id.*, at pars. 27-28) and that, since the DEA was not provided with the necessary documentation in a timely manner, it determined that the forfeiture was justified. *Id.*, at par. 29.

Parlatore subsequently learned that he had an opportunity to seek reconsideration of the DEA's decision, but only if such request were based on information or evidence not previously submitted. *Id.*, at par. 30. An additional investigation was conducted in connection with the request for reconsideration. *Id.*, at par. 32. During the investigation, Parlatore was advised that plaintiff was

required to produce documentation regarding each piece of jewelry she wanted returned to her. *Id.*, at par. 33. Although Parlatore requested reconsideration, he did not assist plaintiff in providing the necessary documentation and did not diligently pursue the necessary proof in a timely manner insofar as he failed to advise plaintiff that there was a deadline for the production of such documentation. *Id.*, at pars. 31, 34-35. Plaintiff alleged that, despite the fact that the DEA left Parlatore several telephone messages requesting the necessary documentation, he “failed to make an effort to produce sufficient information or documents from a legitimate source in a timely manner [al]though such information was available.” *Id.*, at par. 36.

On February 4, 2013, Special Agents Dodge and Waddell interviewed plaintiff and Parlatore regarding the origin of the items and, again, Parlatore allegedly “failed to inform [her as to] what was needed nor did he assist her in providing the requisite documentation to back her claim in a timely manner.” *Id.*, at par. 37. Plaintiff alleged that, had Parlatore done so, “she would have been able to obtain at a bare minimum some of the documentation that was needed in a timely manner.” *Id.*, at par. 38.

On February 13, 2013, Special Agent Dodge again requested that Parlatore provide any of the documents which had been requested and again he allegedly “failed to act to either provide the documentation or to inform the plaintiff what was necessary so that she could obtain the documentation in a timely manner.” *Id.*, at par. 39. Plaintiff further claimed that, since the interviews with the Special Agents, her request for reconsideration was denied because Parlatore failed to help her provide the documents requested by the DEA in a timely manner. *Id.*, at par. 40.

By correspondence dated July 14, 2015 (Ex. 2), Vicki Rashid, Esq., forfeiture counsel for the DEA, advised Parlatore that, despite requests by Special Agent Dodge, he (Parlatore) had failed to

produce documentation establishing that legitimate income had been used to purchase the items sought to be recovered by plaintiff. *Id.*, at par. 41.

Plaintiff alleged that Parlatore's "negligence has led to the forfeiture of plaintiff's property." *Id.*, at par. 42. She claimed that, had Parlatore advised her that there was a deadline for the production of documents, she "would have been able to recover at least a significant portion of her property and she was precluded from doing so due to the defendants' negligence." *Id.*, at par. 45.

In alleging a claim for legal malpractice, plaintiff alleged, *inter alia*, that defendants failed to: 1) adequately request a remission of the forfeiture on her behalf; 2) request remission of the forfeiture in a timely manner; 3) file a petition for remission or mitigation of forfeiture in a timely manner; 4) produce evidence "that the funds used to purchase the jewelry came from an independent, non-drug related source, even though such evidence was available to[,] and could have been obtained by[,] the plaintiff in a timely manner if defendants had informed her of the need to do so;" 5) diligently pursue, in connection with plaintiff's request for reconsideration, necessary documents in a timely fashion; 6) respond to the February 13, 2013 letter from Special Agent Dodge requesting documents, advise what documents were requested in the letter, or even advise her that the letter was received; and 7) seek an extension of time to respond to the DEA's February 13, 2013 letter. *Id.*, at par. 52.

Plaintiff alleged that, as a result of defendants' legal malpractice, she was damaged "in the sum of approximately \$154,000." *Id.*, at pars. 50, 53, and 56.

On April 25, 2016, defendants filed the instant motion seeking to dismiss the complaint pursuant to CPLR 3211(a)(7) on the ground that it failed to state a cause of action. NYSCEF Doc. No. 6. Defendants also seek sanctions pursuant to 22 NYCRR 130-1.1 based on plaintiff's allegedly

frivolous conduct. Since, as noted above, the claims against defendant Cutler were discontinued on December 23, 2016 (NYSCEF Doc. No. 23), the instant motion is brought only by defendants Parlatore and the firm. Plaintiff opposes the motion.

Positions of the Parties:

In support of their motion to dismiss the complaint, defendants argue that plaintiff failed to adequately plead the element of causation required in a case of legal malpractice. Specifically, they maintain that plaintiff failed to allege that she was an “innocent owner.” They further assert that plaintiff and her attorney should be sanctioned for their frivolous conduct in bringing the instant action, since it is without merit.

In opposition, plaintiff argues that the motion must be denied since she has properly pleaded a claim for legal malpractice. She further asserts that, since she has stated a claim, defendants’ motion for sanctions must be denied.

In their reply, defendants assert that they considered a possible discontinuance of that branch of their motion seeking sanctions against plaintiff if she showed them the documents which she claims would have established that she was the rightful owner of the jewelry. However, since plaintiff never showed defendants this evidence, they maintain that such documents do not exist. Defendants further assert that, since plaintiff knew which documents needed to be provided to the DEA, she cannot claim that they were negligent in failing to provide the same. Defendants concede that “although false, the allegations [of negligence] in the complaint are legally sufficient to survive a motion to dismiss” and that the instant motion “challeng[es] only the sufficiency of the causation element” of plaintiff’s legal malpractice claim. Defendants’ Reply Memo. of Law, at p. 4, n. 3.

Conclusions of Law:

In reviewing a motion to dismiss pursuant to CPLR 3211(a)(7), “the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory.” *Leon v. Martinez*, 84 N.Y.2d 88, 97 (1994); *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 (1977). This Court must deny a motion to dismiss “if from the pleadings’ four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law.” *511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 (2002).

In order to state a claim for legal malpractice, a plaintiff must allege that his or her 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.” *Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438, 442 (2007) quoting *McCoy v Feinman*, 99 NY2d 295, 301-302 (2002). “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*, NY3d, at 442 (citations omitted). More specifically, plaintiff must plead that, because of the attorney’s negligence, “what would have been a favorable outcome was an unfavorable outcome.” *Zarin v Reid & Priest*, 184 AD2d 385, 386 (1st Dept 1992).

As noted above, defendants concede that plaintiff has sufficiently pleaded a negligence claim

(Defendants' Reply Memo. of Law, at p. 4, n. 3)³ and limit their attack on the complaint to the issue of proximate cause. Plaintiff alleged in her complaint that defendants failed to perform a litany of legal tasks in a competent manner, including, inter alia, submitting documents which showed that plaintiff was the "innocent owner" of the jewelry she sought to recover; meeting deadlines; reminding plaintiff that she needed to produce documents by a certain date; and seeking an extension of time to submit the documents in question, which acts she claimed were a "proximate cause" of her damages. Ex. 1 to Plaintiff's Aff. In Opp., at par. 52. Importantly, however, she also pleaded that:

Had the defendants informed [her] of the pending deadlines to produce documentation, [she] would have been able to recover at least a significant portion of her property and she was precluded from doing so due to the defendants' negligence."

Ex. 1 to Plaintiff's Aff. In Opp., at par. 45.

Given the foregoing language, this Court concludes that plaintiff sufficiently pleaded proximate cause claiming, essentially, that but for defendants' actions, "what would have been a favorable outcome was an unfavorable outcome." *Zarin*, 184 AD2d, at 386.

Since plaintiff has adequately pleaded a claim for legal malpractice, and this Court cannot, at this nascent stage of the litigation, evaluate the substantive merits of the said cause of action, this Court also denies that branch of defendants' motion seeking to impose sanctions against plaintiff.

See Southern Blvd. Sound v Felix Storch, Inc., 167 Misc2d 731 (App Term, 1996).

³Although defendants claim that the allegations against them are false, they make this representation based on the letter from the DEA to Parlatore. However, since they are not moving to dismiss based on documentary evidence pursuant to CPLR 3211(a)(1), this argument fails. Moreover, this Court cannot consider this argument since it is first raised in their reply memorandum of law. *See McNair v Lee*, 24 AD3d 159 (1st Dept 2005).

Therefore, in accordance with the foregoing, it is hereby:

ORDERED that the motion by defendants Timothy Charles Parlatore, Esq. and Cutler & Parlatore, PLLC seeking to dismiss the complaint pursuant to CPLR 3211(a)(7) and for sanctions against plaintiff Ramona Rizzo pursuant to 22 NYCRR 130-1.1 is denied; and it is further,

ORDERED that plaintiff Ramona Rizzo shall serve a copy of this order, with notice of entry, on all other parties and the Trial Support Office at 60 Centre Street, Room 158; and it is further,

ORDERED that the parties shall appear for a preliminary conference in this matter on June 6, 2017 at 80 Centre Street, Room 280, at 2:30 p.m.; and it is further,

ORDERED that this constitutes the decision and order of the Court.

Dated: March 3, 2017

ENTER:



HON. KATHRYN E. FREED, J.S.C.