

Ferdinand v Crecca & Blair

2002 NY Slip Op 30160(U)

October 1, 2002

Supreme Court, Suffolk County

Docket Number: 02-12234

Judge: Robert W. Doyle

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**SUPREME COURT - STATE OF NEW YORK
DCM PART - SUFFOLK COUNTY**

COPY

P R E S E N T :

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

Motion Seq. 001
Motion RD September 16, 2002
MG Case Disp

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

-----X
Paulette Ferdinand,
Plaintiffs, **Corrected**
-against- **Decision and Order**

Crecca & Blair and Andrew A. Crecca,
Defendants,

..... X

Plaintiffs Attorney
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Upon the following papers read on this motion by Notice of Motion and supporting papers 1-5 Exhibits A-E ; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers ____; Replying Affidavits and supporting papers _____; Other _____; it is

This Corrected Decision and Order is hereby issued to correct only typographical/transcription errors and does not change or alter the Decision and Order of September 18, 2002.

ORDERED application (001) by defendants Crecca & Blair and Andrew A. Crecca for an Order granting dismissal of the complaint of plaintiff Paulette Ferdinand pursuant to CPLR §3211(a)(5) in that the statute of limitations has run as to the fifth and seventh causes of action, and pursuant to CPLR §3211(a)(7) for failure to state a cause of action as to the first, second, third, fourth, sixth, eighth and ninth causes of action, and pursuant to Part 130 of the Rules of the Chief Administrator for an award for costs and sanction, unopposed by plaintiff, is decided as follows:

This action was commenced by the filing of a summons and verified complaint on May 21, 2002. It is not asserted that issue has been joined. The causes of action set forth in the complaint are premised upon defendants' representation of plaintiff from on or about December 13, 1999 through August 3, 2001, wherein plaintiff sought a divorce from her husband. However, before the divorce proceedings were completed, plaintiff and her husband entered into a stipulation discontinuing the divorce action on August 3, 2001, and plaintiff, Paulette Ferdinand discharged Crecca and Blair as her attorneys as set forth on that stipulation dated August 3, 2001. Procedurally, plaintiff did not respond to defendants' Notice of Right to Arbitrate with regard to the fee alleged to be owed defendants by plaintiff, so defendants commenced an action in District Court to collect their fee. Thereafter, plaintiff commenced the instant action.

In reviewing the complaint, plaintiff has set forth the following:

first cause of action sounding in breach of contract wherein it is alleged that defendant Crecca made reference to plaintiffs new born son, in front of her husband, that he could be the father of that child which interfered with a negotiated divorce settlement and caused emotional distress; and a

second cause of action sounding in fraud with regard to the concealing or alleged failure of defendant Crecca and Blair to mention to plaintiff that they permitted the stay of eviction to lapse, causing plaintiff to lose leverage to maintain interest in her house and to cause her to feel that her husband was prevailing in the divorce action; and a

third cause of action sounding in negligence and/or wilful and reckless conduct wherein it is claimed that defendants were negligent and caused plaintiff to suffer damages by sexually harassing plaintiff and defendant Crecca stating in front of her husband that he could be the father of her baby; and a

fourth cause of action sounding in fraud wherein it is alleged defendants failed to inform plaintiff that they allowed the stay to lapse and fraudulently deceived plaintiff by failing to advise plaintiff that they allowed the stay to lapse in the District Court action; and a

fifth cause of action sounding in intentional infliction of mental distress for the acts and conduct of defendants; and a

sixth cause of action for sexual discrimination against plaintiff in violation of New York Executive Law §296 by failing to provide plaintiff with the same quality, accommodations, privileges and kind of representation afforded members of the opposite sex at the same price and/or fees; and

seventh cause of action sounding in defamation by defendant Crecca based upon his alleged slanderous comment that "I could be the father of that child," in front of her husband and husband's attorney; and an

eighth cause of action for defendant Crecca's alleged violation of various sections of the New York State Code of Professional Responsibility; and a

ninth cause of action asserting that defendants were in violation of various sections of the New York State Code of Professional Responsibility.

With regard to that part of defendants' application pursuant to CPLR §3211(a)(5) asserting that the fifth and seventh causes of action are barred by the expiration of the applicable statute of limitations, it is determined that the fifth cause of action sounding in intentional infliction of emotional distress, and the seventh cause of action asserting defamation based upon an alleged slanderous statement by defendant Crecca, are both governed by a one year statute of limitations pursuant to CPLR §215, *Macholz v. Weiss*, 719 N.Y.S.2d 606. The alleged incidents giving rise to the fifth cause of action premised upon intentional infliction of emotional distress are asserted to have occurred on March 17, 2000, May 11, 2000, June 28, 2000. The alleged incidents giving rise to the seventh cause of action are alleged to have occurred on August 8, 2000. This action was commenced on May, 21, 2002, beyond the applicable one year statute of limitations for both causes of action. Accordingly, the fifth and seventh causes of actions are barred by the applicable statute of limitations and are therefore dismissed.

With regard to defendants' application for dismissal of the complaint pursuant to CPLR §3211(a)(7), it is well settled that in response to a motion 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 N.Y.2d 83,87, 401 N.Y.S.2d 182). 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 (*Matter of Board of Educ., Lakeland Cent. School Dist. Of Shrub Oak v. State Educ. Dept.*, 116 A.D.2d 939, 498 N.Y.S.2d 516). Only affidavits submitted by the plaintiff in support of the causes

of action may be considered on a motion of this nature (*Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 645-636, 389 N.Y.S.2d 314). 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).

In reviewing the remainder of the complaint, it is determined that plaintiff has pleaded a first cause of action for breach of contract with regard to defendant Crecca's representation of plaintiff in her divorce action. In that plaintiff reconciled with her husband, discontinued the divorce action by entering into a stipulation signed by both plaintiff and her husband, this first cause of action has been rendered academic. Also, the cause of action sounding in contract is actually a redundant claim for legal malpractice and is predicated upon the same factual allegations as the malpractice claim based upon the alleged statement made by defendant Crecca concerning her son and seeks damages which may be recovered on that cause of action, (*Meccav. Shang*, 685 N.Y.S.2d 458; *Tyborowski v. Ciddebacl & Onofry*, 279 A.D.2d 763, 765, 718 N.Y.S.2d 489 (N.Y.App.Div.2001)). Accordingly, the first cause of action sounding in breach of contract is dismissed for failure to state a cause of action.

The second and fourth causes of action sounding in fraud are actually a restatement of the third cause of action which sounds in negligence/intentional conduct and seeks the same damages which may be recovered on that cause of action. Plaintiff has not set forth separate damages relative to the claim of fraud distinct from the claim of the alleged malpractice, and damages are limited to "actual pecuniary loss sustained as the direct result of the 'wrong'", *Wolkstein v. Morgenstern*, supra. Additionally, an attorney's failure to disclose a malpractice does not give rise to claims for fraud and deceit separate from the underlying malpractice cause of action, *Weiss v. Manfredi*, 616 N.Y.S.2d, 83 N.Y.2d 974. Nor has plaintiff pleaded reliance upon defendants' alleged fraudulent acts or representations. Therefore, the second and fourth causes of action sounding in fraud are dismissed for failure to state a cause of action.

With regard to the third cause of action, it appears plaintiff attempted to set forth a cause of action sounding in legal malpractice. To establish a cause of action for legal malpractice, plaintiff must show that the attorneys were negligent, that negligence was the proximate cause of plaintiffs damages, and that plaintiff suffered actual damages as a direct result of the attorneys' actions, *Franklin v. Windard*, 606 N.Y.S.2d 162, 199 A.D.2d 220. Plaintiff does not assert actual damages claimed to be the result of any alleged malpractice on defendants' behalf. Nor has plaintiff pleaded the fourth element to be proven, this is, that plaintiff would have been successful in the underlying action had the attorney exercised due care, *Frank v. Pepe*, 717 N.Y.S.2d 873. Plaintiff reconciled with her husband and voluntarily discontinued the divorce action. Accordingly, the third cause of action fails to state a cause of action for legal malpractice or professional negligence and is dismissed.

Turning to the sixth cause of action premised upon defendants' alleged violation of Executive Law §296, plaintiff has failed to plead a cause of action in that she has not pleaded that she was a member of the class of persons which the statute seeks to protect. Plaintiff does not allege she was employed by defendants, or discriminated against by a labor organization or employment agency; owner, lessee, proprietor, superintendent, manager, agent, or employee of a place of public accommodation, or that she falls within any of the categories or sections set forth in Executive Law 5296. Accordingly, plaintiff has failed to state a cause of action premised upon defendants' alleged violation of New York Executive Law §296, and the sixth cause of action is therefore dismissed, *Gaiimo & Vreeburg*, 599 N.Y.S.2d 841.

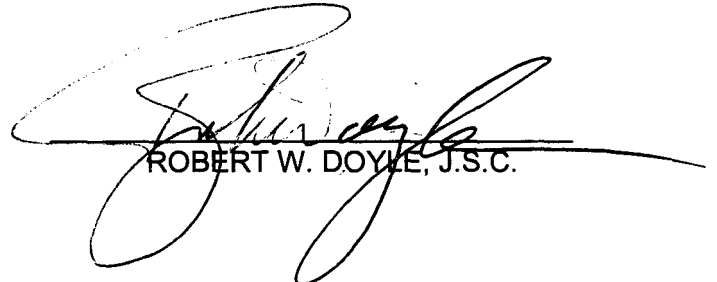
The eighth and ninth causes of action are premised upon defendants' alleged violations of various sections of the Code of Professional Responsibility and Disciplinary Rules. A violation of a

disciplinary rule, does not, in itself, generate a cause of action..., **Swift v. Choe**, 674 N.Y.S.2d 17; **Shapiro v. McNeill**, 677 N.Y.S.2d 48, although some of the conduct constituting a violation of a disciplinary rule may also constitute evidence of malpractice. While plaintiff may have set forth certain allegations in an attempt to support of a claim for breach of contract or negligence, plaintiff has not set forth a cognizable cause of action in either the eighth or ninth causes of action, therefore, the eighth and ninth causes of action, premised upon defendants' alleged violations of the various sections of the Code of Professional Responsibility, are hereby dismissed. It is

ORDERED that application (001) by defendants for an Order dismissing the first, second, third, fourth, fifth, sixth, seventh, eighth and ninth causes of action as asserted by plaintiff in the complaint, is granted, and the action is hereby dismissed. It is further

ORDERED that the moving defendants shall serve a copy of this Order with notice of entry on all parties within thirty days of the date of this Order.

Dated: October 1, 2002



ROBERT W. DOYLE, J.S.C.