

Castano v Richman

2011 NY Slip Op 32686(U)

October 11, 2011

Sup Ct, Nassau County

Docket Number: 007770/11

Judge: Jeffrey S. Brown

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T : HON. JEFFREY S. BROWN
JUSTICE

-----X
ANTOINETTE RHONDA CASTANO,

TRIAL/IAS PART 21

INDEX # 007770/11

Plaintiff,

Motion Seq. 1
Motion Date 7.18.11
Submit Date 9.22.11

-against-

X X X

KEITH RICHMAN, ESQ., and RICHMAN &
LEVINE, P.C.,

Defendants.

-----X

The following papers were read on this motion:

Papers Numbered

Notice of Motion, Affidavits (Affirmations), Exhibits Annexed.....	1
Memorandum of Law.....	2
Answering Affidavit	3
Reply Affidavit.....	4

Defendant moves by notice of motion for the following relief: a) pursuant to CPLR 3211(a)(1),(5) and (7), dismissing plaintiff's complaint and the within action in its entirety based upon the grounds that a defense is founded upon documentary evidence, that the action may not be maintained because of release and *res judicata*, and that the complaint fails to state a cause of action.

Defendant represented plaintiff in a divorce action pursuant to a retainer agreement signed by both parties on August 28, 2006. The divorce action was settled pursuant to open court stipulations entered into on May 28, 2008 and May 30, 2008 (Marber, J.). Plaintiff alleges that she entered into the settlement based upon representations and assurances by defendant that any errors or omissions in the stipulation would be separately dealt with later on by a "private agreement" with the attorney for the plaintiff's former husband. Plaintiff alleges that defendant

failed to inform her that she had no recourse to obtain alleged necessary financial items not included in the stipulation of settlement upon allocution in open court. Plaintiff contends that she would never have entered into the settlement if defendant had not promised her that she could later enter into a side agreement.

Defendant now moves to dismiss the action, *inter alia*, based on documentary evidence, to wit: the retainer agreement; the open court stipulations dated May 28, 2008 and May 30, 2008; and an affidavit of John A. Gemelli, Esq., attorney for plaintiff's former husband.

Defendant states that throughout the course of his representation of plaintiff, they discussed the issue of settlement to no avail. A trial commenced on May 14, 2008 and continued on May 15, 2008, May 22, 2008, May 27, 2008 and May 28, 2008 before the Hon. Randy Sue Marber. After extensive settlement negotiations between counsel with the aid of the court, the first of two stipulations of settlement was entered into on the record on May 28, 2008. On this day plaintiff was fully allocuted in open court. Plaintiff indicated that she understood the terms and conditions of the stipulation; that she understood that she could proceed to trial on the issues rather than enter into the stipulation; that she had an opportunity to discuss the settlement with her attorney; and that she was satisfied with the representation of her attorney.

This stipulation left open one item, which was the issue of maintenance. Defendant states that the issue was fully discussed between the parties, and a lump sum award was agreed to on May 30, 2008. This agreement was placed on the record and the plaintiff, again, was fully allocuted. Plaintiff indicated that she understood the terms of the remaining stipulation of settlement; that it was her wish to settle the remaining portion of the case under those terms; that no one has used any type of force, threats, or pressure to get her to enter into the agreement; that she had the opportunity to confer with her attorney with respect to the issues encompassing the stipulation; and that she was satisfied with the representation of her attorney.

Defendant states that in the months following the stipulation of settlement, plaintiff and her boyfriend communicated complaints about the settlement, all of which were without merit. He indicates that plaintiff's former husband would not agree to change any of the terms of the agreement.

An affidavit of John A. Gemelli, Esq., indicates that he represented plaintiff's former husband in the divorce action. He indicates, *inter alia*, that the court strongly urged the parties to negotiate a settlement while the trial of the action was taking place. He denies ever having a "private and/or side agreement" with defendant in connection with the divorce action as alleged by plaintiff in her verified complaint. Mr. Gemelli states that defendant zealously represented his client in a most professional manner before the court.

Plaintiff, pro se, opposes the application stating that defendant told her to say "yes" to any questions posed by the court in its allocution. Plaintiff indicates that certain financial issues remained open and that defendant specifically told her that those issues would be resolved since

he had an agreement with John A. Gemelli, Esq. Plaintiff indicates that she spoke with defendant several times after May 30, 2008 and realized she was getting "stone walled" and that his representations to her were untrue. She avers that she had no alternative but to document that defendant lied and tricked her into settling the action when there were monetary issues which remained unresolved. Plaintiff, therefore, tape recorded two conversations she had with defendant on September 4, 2008 and October 30, 2008. Plaintiff describes a litany of steps she undertook to authenticate the tape recording for this court to deem it admissible evidence. She alleges that in these recordings, defendant admits his liability.

In reply, defendant reiterates that the stipulations of settlement were placed on the record almost three years prior to this action being instituted just short of the statute of limitations expiring on the instant action. Plaintiff's last communication with defendant's office was in November 2008, more than two and one-half years ago.

Defendant avers that plaintiff failed to tell the court about the numerous, extensive pre-stipulation conversations and the four post-stipulation conversations between the parties before the dates referenced in her opposition papers. During all of the post-stipulation conversations, plaintiff raised her dissatisfaction with certain terms of the stipulation. However, plaintiff previously agreed to the terms that she was now having issues with. Defendant indicates that the stipulations accurately reflected her agreement at the time the stipulations were placed on the record and she fully allocuted to same.

Defendant admits that he prepared plaintiff for the allocution to the extent that he advised her of its purpose, including that it was utilized to advise the court that she was satisfied with the provisions of the stipulation, and that she understood and voluntarily agreed to the terms of the stipulation.

Defendant states that the four issues that plaintiff focused on post-stipulation were not the only issues in the case; that there were many other issues in the case that clearly benefitted her and certain significant monetary issues in the case. Moreover, the issues that she now complains about were fully discussed and negotiated prior to placing the stipulations on the record.

According to the retainer agreement executed between the parties, defendant's representation of plaintiff concluded at the entry of the final Judgment of Divorce on September 11, 2008. Thus, defendant indicates that his obligations ceased then and any post-judgment applications required the execution of a new retainer agreement, which plaintiff failed to do. However, acknowledging plaintiff's dissatisfaction with the agreement, defendant attempted to resolve her complaints on an informal basis to no avail. He indicated that he advised plaintiff that the settlement was favorable to her and that any post-judgment application would be inadvisable.

Based on the foregoing, the decision of the court is as follows:

On a motion to dismiss based on documentary evidence under CPLR 3211(a)(1), "dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law," thereby definitively disposing of the opposing party's claims. (*Leon v Martinez*, 84 N.Y.2d 83, 88; see also *Fischbach & Moore v Howell Co.*, 240 A.D.2d 157.)

On a motion to dismiss for failure to state a cause of action, pursuant to CPLR § 3211 (a) (7), the court must determine whether, from the four corners of the pleading "factual allegations are discerned, which taken together, manifest any cause of action cognizable at law." (*Salvatore v. Kumar*, 45 A.D.3d 560 [2nd Dept. 2007], lv to app den. 10 N.Y.3d 703 [2008], quoting *Morad v. Morad*, 27 A.D.3d 626, 627 [2006]). Further, the pleading is to be afforded a liberal construction, the facts alleged in the complaint accepted as true, and the plaintiffs accorded the benefit of every possible favorable inference (see *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 [1994]). However, "[w]hile the allegations in the complaint are to be accepted as true when considering a motion to dismiss . . . , 'allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration' " (*Garber v. Board of Trustees of State Univ. of N.Y.*, 38 A.D.3d 833, 834 [2nd Dept. 2007], quoting *Maas v. Cornell Univ.*, 94 N.Y.2d 87, 91 [1999]).

"While '[a] claim for legal malpractice is viable, despite settlement of the underlying action, if it is alleged that settlement of the action was effectively compelled by the mistakes of counsel' (*Bernstein v Oppenheim & Co.*, 160 AD2d 428, 430, 554 NYS2d 487 [1990]), here, the complaint is contradicted by the evidentiary material submitted on the motion to dismiss (see *Guggenheimer v Ginzburg*, 43 NY2d 268, 275, 372 NE2d 17, 401 NYS2d 182 [1977])." (*Katebi v. Fink*, 51 AD3d 424.) The two separate allocutions by plaintiff on May 28, 2008 and May 30, 2008 with respect to her underlying matrimonial action, constitute documentary evidence that contradicts the allegation of legal malpractice. On each occasion during which plaintiff was allocuted by the court, plaintiff indicated that she was satisfied with the settlement of the action; that she was satisfied with the services of her attorney; that she understood the terms of the settlement; that she knew she was giving up the right to a trial of the action; and that she was entering into the stipulation by her own free will.

Plaintiff's claim that defendant told her what to say for the allocutions is without merit. It would be ineffective assistance of counsel if defendant hadn't advised plaintiff of the types of questions the court would ask her in the allocutions. Additionally, the recorded conversations between the parties is inadmissible evidence on this motion as plaintiff has failed to properly authenticate same by clear and convincing evidence that the tape is genuine and has not been tampered with (see generally, *People v. Ely*, 68 N.Y.2d 520).

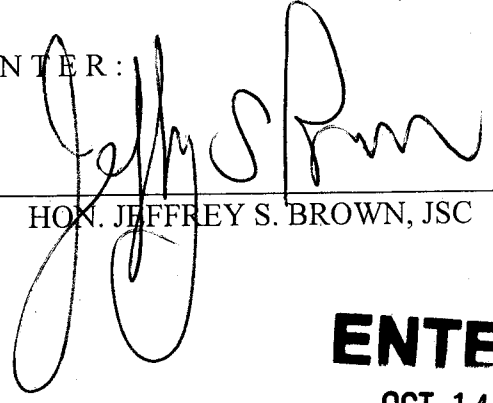
Accordingly, it is

ORDERED, that pursuant to CPLR 3211(a)(1) and (7) the **action is dismissed** with prejudice.

The foregoing constitutes the decision and order of this Court. All applications not specifically addressed herein are denied.

Dated: Mineola, New York
October 11, 2011

ENTER:



HON. JEFFREY S. BROWN, JSC

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Woodbury, NY 11797

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ENTERED
OCT 14 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE