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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: LUCY BILLINGS J.S.C. PART 46

Justice

Index Number : 111667/2009

SHUTZMAN, JACK

vs.

IRA GARR

SEQUENCE NUMBER : 002

DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

n this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, It is ordered ~~that this motion~~ and adjudged that:

The court grants defendants' motion to dismiss the complaint pursuant to the accompanying decision. C.P.L.R. § 3211(a)(5) and (7).

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 5/18/12

LUCY BILLINGS J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

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JACK SHUTZMAN, Index No. 111697/2009

Plaintiff

- against - DECISION AND ORDER

IRA GARR PC, IRA GARR, and JUDITH WHITE,

Defendants

LUCY BILLINGS, J.S.C.:

I. BACKGROUND

Plaintiff Jack Shutzman sues to recover damages for defendants' legal malpractice while representing plaintiff in an action where his former wife sought to relocate their children to Texas. Before plaintiff commenced this malpractice action, defendant law firm, Ira Garr PC, commenced an action for breach of contract against Shutzman to recover attorneys' fees for the firm's services in that same post-divorce action for which he sues here. In the firm's action against Shutzman, the court awarded the firm a judgment for much, although not all, of the fees claimed. Ira E. Garr, PC v. Shutzman, Index No. 379TS08 (Civ. Ct. N.Y. Co. June 7, 2010). Shutzman appealed the judgment against him, but the Appellate Term dismissed his appeal March 1, 2012. Ira E. Garr, PC v. Shutzman, 2012 N.Y. Slip Op. 665983(U) (App. Term 1st Dep't Mar. 1, 2012).

Defendants move to dismiss this action on the grounds of collateral estoppel and failure to state a claim. C.P.L.R. §

3211(a)(5) and (7). For the reasons explained below, the court grants defendants' motion and dismisses this action.

II. THE CIVIL COURT DECISION

In the firm's action against Shutzman for attorneys' fees, the Civil Court found that the experience of defendants here, the firm and its individual attorneys Garr and White, in child custody and visitation litigation merited the hourly rate claimed. Shutzman claimed defendants' representation was unsatisfactory to him, but did not articulate their incompetence or malpractice or any actions by them without his consent.

Shutzman specifically objected to the fees claimed for a cross-motion defendants filed on his behalf to restrain his former wife's relocation. The Civil Court disallowed all but a portion of those fees, finding the cross-motion unnecessary after the court in the post-divorce action already had scheduled a hearing on whether to permit the relocation. The Civil Court allowed solely those fees attributable to defendants' preparation for the hearing. The only other claimed fees that the Civil Court disallowed were for conferences between the firm's attorneys, finding those fees unwarranted in view of the experience that the attorneys' high rates reflected.

III. PLAINTIFF'S CLAIMS IN THIS ACTION

In contrast to the Civil Court action commenced by defendant firm, in this action by plaintiff Shutzman he now claims that defendants were incompetent in representing him, in that they failed to seek the judge's recusal in the post-divorce action

when the judge became biased against Shutzman because he refused to agree to a proposed settlement. Although the Civil Court did not address this issue directly, the court nowhere indicated that defendants' failure to seek recusal devalued the effectiveness of their representation.

Plaintiff further claims that defendants attempted to settle the post-divorce action on his behalf contrary to his directions. By awarding defendant firm attorneys' fees for the attorneys' work on the settlement, however, the Civil Court necessarily determined that defendants' services in negotiating a settlement were warranted and valuable. Moreover, because the parties never reached a settlement of the post-divorce action, leaving the judge presiding over it to issue an interim order permitting plaintiff's former wife to relocate with their children, plaintiff fails to draw any causal connection between defendants' work on the settlement and the unfavorable order. Defendants advised plaintiff to appeal the order and offered their services toward that end, but plaintiff discharged defendants, never appealed the order, and, insofar as the record reveals, never pursued a more favorable permanent result in the trial court.

IV. APPLICABLE STANDARDS

A. Defendants' Motion to Dismiss Plaintiff's Claims

Upon defendants' motion to dismiss claims pursuant to C.P.L.R. § 3211(a)(7), the court may not rely on facts alleged by defendants to defeat the claims unless the evidence is in admissible form, demonstrates the absence of any significant

dispute regarding those facts, and completely negates the allegations against defendants. Lawrence v. Graubard Miller, 11 N.Y.3d 588, 595 (2008); Goshen v. Mutual Life Ins. Co. of N.Y., 98 N.Y.2d at 326; Leon v. Martinez, 84 N.Y.2d 83, 87-88 (1994); Yoshiharu Igarashi v. Shohaku Higashi, 289 A.D.2d 128 (1st Dep't 2001). The court must accept the complaint's allegations as true, liberally construe them, and draw all reasonable inferences in plaintiff's favor. Nonnon v. City of New York, 9 N.Y.3d 825, 827 (2007); Goshen v. Mutual Life Ins. Co. of N.Y., 98 N.Y.2d at 326; Harris v. IG Greenpoint Corp., 72 A.D.3d 608, 609 (1st Dep't 2010); Vig v. New York Hairspray Co., L.P., 67 A.D.3d 140, 144-45 (1st Dep't 2009). The court may dismiss a claim based on C.P.L.R. § 3211(a)(7) only if the allegations completely fail to state a claim. Leon v. Martinez, 84 N.Y.2d at 88; Harris v. IG Greenpoint Corp., 72 A.D.3d at 609; Frank v. DaimlerChrysler Corp., 292 A.D.2d 118, 121 (1st Dep't 2002); Scott v. Bell Atl. Corp., 282 A.D.2d 180, 183 (1st Dep't 2001).

Defendants also seek dismissal pursuant to C.P.L.R. § 3211(a)(5) under the doctrine of collateral estoppel, which bars relitigation of an issue that necessarily has been decided in a prior action, as long as the party against whom the doctrine is invoked was provided a full and fair opportunity to contest the prior controlling decision. Tydings v. Greenfield, Stein & Senior, LLP, 11 N.Y.3d 195, 199 (2008); Buechel v. Bain, 97 N.Y.2d 295, 303-304 (2001); Maher v. Campagna, 60 A.D.3d 1009, 1011 (2d Dep't 2009). The Civil Court's final judgment on

defendant firm's prior claim for attorneys' fees thus precludes relitigation of claims actually litigated and determined in the Civil Court action and claims for different relief that arise from the same transactions between the parties and could have been determined in the prior action. Landau v. LaRossa, Mitchell & Ross, 11 N.Y.3d 8, 12 (2008); Josey v. Goord, 9 N.Y.3d 386, 389-90 (2007); Matter of Hunter, 4 N.Y.3d 260, 269 (2005); Parker v. Blauvelt Volunteer Fire Co., 93 N.Y.2d 343, 347 (1999).

Defendants bear the burden to demonstrate that plaintiff's claims in his current action for legal malpractice are the same as the defenses he raised or could have raised in the prior action for attorneys' fees. See Lusk v. Weinstein, 85 A.D.3d 445, 446 (1st Dep't 2011); North Am. Van Lines, Inc. v. American Intl. Cos., 38 A.D.3d 450, 451 (1st Dep't 2007); AmBase Corp. v. Pryor Cashman Sherman & Flynn LLP, 35 A.D.3d 174, 175 (1st Dep't 2006). Since that prior action determined the value of the services by the individual attorneys Garr and White as well as defendant firm, that result binds Shutzman equally against all defendants. Buechel v. Bain, 97 N.Y.2d 295, 303-304; Lau v. Capital One Bank, 63 A.D.3d 641 (1st Dep't 2009); Academic Health Professionals Ins. Assn. v. Lester, 30 A.D.3d 328, 329 (1st Dep't 2006). See Rand v. Texaco, Inc., 305 A.D.2d 285 (1st Dep't 2003).

B. Legal Malpractice Claim

To establish legal malpractice, plaintiff must plead and ultimately prove that defendant attorneys' professional

negligence proximately caused him actual damages. Rudolf v. Shayne, Dachs, Stanisci, Corker & Sauer, 8 N.Y.3d 438, 442 (2007); Kaminsky v. Herrick, Feinstein LLP, 59 A.D.3d 1, 9 (1st Dep't 2008); Russo v. Feder, Kaszovitz, Isaacson, Weber, Skala & Bass, 301 A.D.2d 63, 67 (1st Dep't 2002); Between The Bread Realty Corp. v. Salans Hertzfeld Heilbronn Christy & Viener, 290 A.D.2d 380 (1st Dep't 2002). Defendant attorneys must have failed to use reasonable skill and knowledge that members of the legal profession ordinarily possess. Rudolf v. Shayne, Dachs, Stanisci, Corker & Sauer, 8 N.Y.3d at 442; McCoy v. Feinman, 99 N.Y.2d 295, 301 (2002); Arnav Indus., Inc. Retirement Trust v. Brown, Raysman, Millstein, Felder & Steiner, 96 N.Y.2d 300, 303-304 (2001); Kaminsky v. Herrick, Feinstein LLP, 59 A.D.3d at 9. To establish causation, plaintiff must show that he would have prevailed in the post-divorce action but for defendants' negligence. Rudolf v. Shayne, Dachs, Stanisci, Corker & Sauer, 8 N.Y.3d at 442; AmBase Corp. v. Davis Polk Wardwell, 8 N.Y,2d 424, 428 (2007); Kaminsky v. Herrick, Feinstein LLP, 59 A.D.3d at 9; Between The Bread Realty Corp. v. Salans Hertzfeld Heilbronn Christy & Viener, 290 A.D.2d 380.

V. PLAINTIFF FAILS TO ALLEGE ANY LACK OF PROFESSIONAL SKILL THAT CAUSED THE UNFAVORABLE RESULT IN THE POST-DIVORCE ACTION.

Plaintiff admits that he understood the proposed settlement terms and does not claim that defendants failed to explain the terms or consequences to him or that defendants themselves believed the proposal was less than the best possible resolution

in the post-divorce action. See Harvey v. Greenberg, 82 A.D.3d 683 (1st Dep't 2011); Garnett v. Fox, Horan & Camerini, LLP, 82 A.D.3d 435 (1st Dep't 2011). Nor does he ever allege that the settlement he rejected as a full and final resolution was less favorable than the relief awarded.

Unless plaintiff shows that defendants' mistakes or shortcomings in representing him caused the unfavorable result, he fails to sustain a claim for legal malpractice. Kaminsky v. Herrick, Feinstein LLP, 59 A.D.3d at 12; CITES. See Garnett v. Fox, Horan & Camerini, LLP, 82 A.D.3d 435; Katebi v. Fink, 51 A.D.3d 424, 425 (1st Dep't 2008); Sutherland v. Milstein, 266 A.D.2d 33, 34 (1st Dep't 1999). Other than seeking recusal and refraining from efforts toward settlement, he never specifies what means defendants could have employed or any legal theory that might have prevented his children's relocation during the school year or reversed the earlier award of custody to their mother. Although he insists that recusal was warranted after his attorneys negotiated a settlement that he never authorized and hence rejected, triggering the judge's negative reaction, he offers no concrete grounds beyond his impression of hostility and suspicion of bias on which a motion for recusal likely would have been successful and the outcome before a different more favorable. Nor does plaintiff point to anything in the judge's decision demonstrating bias. Kaminsky v. Herrick, Feinstein LLP, 59 A.D.3d at 8.

Other than by presenting plaintiff an objectionable

proposal, plaintiff does not indicate that defendants' settlement efforts caused the unfavorable litigated outcome or that this or other tactics, strategic choices, or exercises of judgment by defendants were so unreasonable as to demonstrate professional incompetence. Rodriquez v. Fredericks, 213 A.D.2d 176, 178 (1st Dep't 1995). Thus, even though plaintiff may claim defendants' representation was ineffective, he fails to draw a connection between any mistakes or failures and the result. Kaminsky v. Herrick, Feinstein LLP, 59 A.D.3d at 12. In fact, had he followed defendants' advice and either agreed to the proposed settlement or appealed the unfavorable interim order, or had he pursued a more favorable permanent order, the ultimate result might have been more favorable. He thus precluded defendants' "pursuit of the very means by which defendants' representation of plaintiff . . . could have been vindicated" by ultimately prevailing in the post-divorce action. Rupert v. Gates & Adams PC, 83 A.D.3d 1393, 1396 (4th Dep't 2011). See Rodriquez v. Fredericks, 213 A.D.2d at 178.

VI. THE CIVIL COURT'S AWARD OF ATTORNEYS' FEES FOR DEFENDANTS' REPRESENTATION IN THE POST-DIVORCE ACTION BARS PLAINTIFF'S RECOVERY IN THIS ACTION.

The portions of defendants' claim for attorneys' fees that the Civil Court disallowed were unrelated to defendants' care or skill in negotiating a settlement or opposing the relief sought by plaintiff's former wife. Those disallowed fees were all for unnecessary work, not for careless or unskillful mistakes or shortcomings. In awarding defendant firm attorneys' fees for the

entire remainder of defendant attorneys' representation of plaintiff, including their work both on the proposed settlement and on opposing his children's relocation and advocating his rights to custody and visitation, the Civil Court necessarily determined that those services did not constitute malpractice. Kinberg v. Garr, 28 A.D.3d 245, 246 (1st Dep't 2006); Koppelman v. Liddle, O'Connor, Finkelstein & Robinson, 246 A.D.2d 365, 366 (1st Dep't 1998); Maher v. Campagna, 60 A.D.3d at 1011; Altamore v. Friedman, 193 A.D.2d 240, 246-47 (2d Dep't 1993).

The Civil Court decision's preclusive effect depends on whether Shutzman was provided a full and fair opportunity to contest the decision and to litigate the attorneys' incompetence, failures, and neglect. Tydings v. Greenfield, Stein & Senior, LLP, 11 N.Y.3d at 199; Buechel v. Bain, 97 N.Y.2d at 303-304; Maher v. Campagna, 60 A.D.3d at 1011; Altamore v. Friedman, 193 A.D.2d at 245. The decision itself reflects that the scope of the action was unlimited, so that Shutzman was free to present and cross-examine any evidence regarding the nature and quality of the attorneys' legal representation, even if he did not actually articulate or litigate a malpractice claim as directly as in this action. Gerstein v. 56 7th Ave. LLC, 88 A.D.3d 189, 202-203 (1st Dep't 2011); Alamo v. McDaniel, 44 A.D.3d 149, 154 (1st Dep't 2007); Koppelman v. Liddle, O'Connor, Finkelstein & Robinson, 246 A.D.2d at 366; Altamore v. Friedman, 193 A.D.2d at 245-46. Nor does he contend that he was in any way constrained in the prior action or that there was any understanding that the

attorneys' fees litigation would not affect the merits of any legal malpractice claim. Gerstein v. 56 7th Ave. LLC, 88 A.D.3d at 203; Alamo v. McDaniel, 44 A.D.3d at 154; Altamore v. Friedman, 193 A.D.2d at 248.

Since malpractice was a defense to the attorneys' action to recover for their professional services, and the dispute over fees and the malpractice claims arose from the same transaction, Shutzman may not now limit the preclusive effect of the decision in the action for fees to the quantitative issues regarding rates and whether the attorneys expended the hours claimed. Koppelman v. Liddle, O'Connor, Finkelstein & Robinson, 246 A.D.2d at 366; Altamore v. Friedman, 193 A.D.2d at 246-47. Instead, defendants' successful prosecution of their action to recover fees for the same legal services that plaintiff now claims were performed negligently bars this malpractice action. E.g., Koppelman v. Liddle, O'Connor, Finkelstein & Robinson, 246 A.D.2d at 366; Pirog v. Ingber, 203 A.D.2d 348, 349 (2d Dep't 1994); Altimore v. Friedman, 193 A.D.2d at 247. See Gerstein v. 56 7th Ave. LLC, 88 A.D.3d at 202-203; Weissman v. Kessler, 78 A.D.3d 465, 466 (1st Dep't 2010).

VII. CONCLUSION

For each of the reasons explained above, the court grants defendants' motion to dismiss the complaint. C.P.L.R. §§ 3211(a)(5) and (7). This decision constitutes the court's order and judgment of dismissal.

DATED: May 18, 2012

LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C.