

**Walker v Kramer**

2014 NY Slip Op 33372(U)

December 22, 2014

Supreme Court, Suffolk County

Docket Number: 5219/07

Judge: Paul J. Baisley

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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART XXXVI SUFFOLK COUNTY

COPY

**PRESENT:**

**HON. PAUL J. BAISLEY, JR., J.S.C.**

-----X

JUDITH WALKER,

Plaintiff,

-against-

LYNN ADAIR KRAMER, ESQ., GREGORY RABINOWITZ, ESQ., EACH INDIVIDUALLY AND OPERATING AS KRAMER & RABINOWITZ, LLC, DEBRA RUBIN, ESQ., KRAMER & RUBIN, PLLC AS SUCCESSOR IN INTEREST TO KRAMER & RABINOWITZ, LLC, GAIL ROSENBLUM, ESQ. and RUBIN & ROSENBLUM, PLLC AS SUCCESSOR IN INTEREST TO KRAMER & RUBIN, PLLC,

Defendants.

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INDEX NO.: 5219/07  
CALENDAR NO.: 2013022540T  
MOTION DATE: 8/14/14  
MOTION NO.: 009 MD; 010 MD  
011 XMG CDISPSUBJ

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Upon the following papers numbered 1 to 77 read on this motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-28; 29-59; Notice of Cross Motion and supporting papers 60-67; ~~Answering Affidavits and supporting papers~~; Replying Affidavits and supporting papers 68-77; ~~Other~~; (and after hearing counsel in support and opposed to the motion) it is,

**ORDERED** that the motion (motion sequence no. 009) of defendant Gregory Rabinowitz, Esq. for an order granting summary judgment and the motion (motion sequence no. 010) of defendants Lynne Adair Kramer, Esq. and Kramer & Rabinowitz, LLC for an order granting summary judgment are consolidated for the purposes of this determination and are decided together with the cross-motion (motion sequence no. 011) of plaintiff for an order granting renewal and upon such renewal granting summary judgment; and it is further

**ORDERED** that motion sequence no. 009 of defendant Gregory Rabinowitz, Esq. for an order pursuant to CPLR R. 3212 granting summary judgment dismissing plaintiff's complaint is denied; and it is further

**ORDERED** that motion sequence no. 010 of defendants Lynne Adair Kramer, Esq. and Kramer & Rabinowitz, LLC for an order pursuant to CPLR R. 3212 granting summary judgment dismissing plaintiff's complaint is denied; and it is further

**ORDERED** that motion sequence no. 011 of plaintiff for leave to renew her cross-motion for summary judgment which was denied as premature by order of this Court dated December 11, 2007, is considered under CPLR R. 2221, and is granted.

Plaintiff commenced this action to recover damages she allegedly suffered as a result of defendants' legal malpractice. By an order of this Court dated December 11, 2007, the complaint was dismissed in its entirety as against defendants Debra L. Rubin, Esq., Gayle Rosenblum, Esq., Rubin and Rosenblum, PLLC, and Kramer & Rubin, PLLC (*Walker v Kramer*, Sup Ct, Suffolk County, December 11, 2007, Baisley, J., Index No. 5219/07). Although the order dismissed the claims against Lynne Adair Kramer, Esq. and Kramer & Rabinowitz, LLC, pursuant to CPLR R. 3211(a)(1) and (7), the Appellate Division modified the order, reinstating the legal malpractice claims against them (*Walker v Kramer*, 63 AD3d 723, 880 NYS2d 677 [2d Dept 2009]). In its December 11, 2007 decision, this Court denied plaintiff's application for summary judgment, indicating that it was premature as no answers had been filed. Discovery having been completed, and a note of issue having been filed, defendants now move for summary judgment dismissing the complaint. They maintain that plaintiff has not sustained any damages, thus she cannot prove her claim for legal malpractice. Plaintiff opposes their motions and interposes a cross-motion, asking the Court to grant leave to renew her prior summary judgment motion and upon such renewal grant summary judgment in her favor. She claims that the Appellate Division decision (*id.*) constitutes the "law of the case" as it refers to liability by reason of defendants' legal malpractice.

On May 14, 2003, by written agreement, plaintiff retained the law firm of Wachtel & Rabinowitz to represent her in a divorce action she commenced against her former husband. Some eleven days thereafter, Gregory Rabinowitz, Esq. merged his law practice with that of Lynne Kramer, Esq. and formed Kramer & Rabinowitz, LLC which represented plaintiff until March 24, 2006. On April 4, 2004 plaintiff entered into a stipulation settling her matrimonial action, which was incorporated but not merged into a judgment of divorce dated November 18, 2004 and filed with the County Clerk on December 7, 2004. Pertinent portions of the stipulation of settlement stated

*Within ten (10) days from' the execution of the within Stipulation, the plaintiff's attorney shall prepare all of the necessary documents for the defendant, to transfer his right, title and interest in and to the premises to the Plaintiff and Defendant as "joint tenants in common" by Bargain and Sale Deed With Covenants Against Grantors Acts, which deed and transfer papers shall be immediately filed at the defendant's sole cost and expense. Plaintiff's attorney shall also prepare a Bargain and Sale Deed With Covenants Against Grantors Acts and any additionally required transfer documents necessary to transfer the residence from the parties as joint tenants in common to the defendant alone, which will be executed by the parties and held by Plaintiff's attorneys in escrow subject to the further terms and provisions hereinafter set forth. Within 5 days from execution of this Stipulation Defendant shall pay Plaintiff's attorneys \$500 to prepare the above deeds and shall thereafter pay the filing fees within 7 days of presentment of the title bill [.]*

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<sup>1</sup>Those portions of the stipulation appearing in italic print hereinabove were handwritten in the original stipulation of settlement.

In consideration and exchange of a tax free equitable distribution payment of THREE HUNDRED THOUSAND (\$300,000.00) DOLLARS to the Wife, she will waive all of her right, title and interest in and to the 10 Schoolhouse Way property.

The Defendant shall have *the later of July 19, 2004 or* four (4) months from the date of entry of a Judgment of Divorce between the parties to pay to the plaintiff, by a certified and/or bank check, a lump sum of at least TWO HUNDRED AND SEVENTY THOUSAND (\$270,000.00) DOLLARS payable to the order of "KRAMER & RABINOWITZ, LLC as attorneys for JUDITH WALKER". Simultaneously with the Husband's tender of said \$270,000.00 payment, the Wife's attorneys shall release the deed and recording documents held in escrow to the Husband and/or his designated representative and take all reasonably required actions to effectuate the immediate transfer of the 10 Schoolhouse Way property to the Husband.

The balance due to the Wife, if any, but which, in accordance with the parties agreement, shall in no event be more than \$30,000.00, shall be due and payable to the Wife no later than one year from the entry of the parties' Judgment of Divorce, together with interest on any such balance compounded monthly at the rate of nine (9%) percent for the period between four (4) months after the date of entry of the Divorce Judgment and the date the balance is satisfied in full.

...

The Wife shall continue to reside at the 10 Schoolhouse Way home (in the same portion of the house that she has been living for the past year) until either: (a) four (4) months after the entry of a Judgment of Divorce; or (b) forty-five (45) days from the date she receives her equitable distribution payment from the Husband of at least \$270,000.00 whichever occurs later. *Husband shall sleep in the basement section of the house, but shall have access to the kitchen, washer & dryer, and living areas when the children are there.*

...

Commencing with the execution of the within Stipulation, until the Wife vacates the 10 Schoolhouse Way home in accordance with the terms and provisions set forth in this Article, the Husband, in addition to all of the utilities, maintenance and all other carrying charges associated with the subject premises, shall continue to pay all items and obligations required by and as set forth in the two (2) page "So Ordered" Pendente Lite Stipulation of the parties dated December 19, 2001 and So Ordered by the Hon. Paul J. Baisley, Jr., including, but not limited to, payment of non taxable support to the Wife of \$250 per week.

The parties do not dispute that plaintiff's former husband paid defendant Kramer & Rabinowitz, LLC the \$500.00 legal fee required of him for the preparation of the deeds for the marital residence as mandated by the stipulation. However, also undisputed is the fact that no deed was ever prepared or filed by defendant Kramer & Rabinowitz, LLC in connection therewith. It appears that plaintiff's former husband refinanced the marital premises shortly after the parties were divorced, using the proceeds to satisfy an existing mortgage and retaining approximately \$800,000.00 for his own devices. Plaintiff alleges that she never received her \$300,000.00 tax free equitable distribution payment from her husband and that the failure of the defendants to secure her payment by preparing and recording a deed in to her as stated in the stipulation of settlement amounted to legal malpractice for which she should be compensated. Pursuant to the terms of the stipulation, plaintiff claims that she is entitled to recover from defendants the \$300,000.00 distributive award, plus nine percent interest per annum, less payments made to her by her former husband in the amount of \$36,708.80, for a total amount of \$503,299.20. Defendants maintain that because plaintiff received benefits amounting to more than the \$300,000.00 to which she was entitled as equitable distribution, such as \$250 per week in maintenance and the right to live in the marital residence "rent free," she cannot prove that she was damaged by their failure to prepare and record the deed. Thus, they argue that they are entitled to summary judgment dismissing plaintiff's legal malpractice claim.

Summary judgment is a drastic remedy and should only be granted in the absence of any triable issues of fact (*see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 413 NYS2d 141 [1978]; *Andre v Pomeroy*, 35 NY2d 361, 362 NYS2d 131 [1974]). It is well settled that the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient proof to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324, 508 NYS2d 923, 925 [1986]). Failure to make such a showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316, 318 [1985]). Further, the credibility of the parties is not an appropriate consideration for the Court (*S.J. Capelin Assocs., Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 357 NYS2d 478 [1974]), and all competent evidence must be viewed in a light most favorable to the party opposing summary judgment (*Benincasa v Garrubbo*, 141 AD2d 636, 637, 529 NYS2d 797,799 [2d Dept 1988]). Once this showing by the movant has been established, the burden shifts to the party opposing the summary judgment motion to produce evidence sufficient to establish the existence of a material issue of fact (*see Alvarez v Prospect Hosp., supra*).

"In an action to recover damages for legal malpractice, a plaintiff must demonstrate that the 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. 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 v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438, 442, 835 NYS2d 534 [2007] quoting *McCoy v Feinman*, 99 NY2d 295, 301-302, 755 NYS2d 693 [2002]). The plaintiff must show that the attorney's breach of a professional duty caused her actual damages in order to recover for legal malpractice; conclusory allegations of damages or injuries based upon speculation will not suffice (*Holschauer v Fisher*, 5 AD3d 553, 772 NYS2d 836 [2d Dept 2004]). To succeed on a summary judgment motion dismissing a complaint in an action to recover damages for legal malpractice, a defendant must demonstrate that the plaintiff is unable to prove at least one of the essential elements of its legal malpractice cause of action (*Gershkovich v Miller, Rosado & Algios, LLP*, 96 AD3d 716, 945 NYS2d 567 [2d Dept 2012]; *Boglia v Greenberg* 63 AD3d 973, 882 NYS2d 215 [2d Dept 2009]). Where the claims involve allegations that ordinary jurors could not evaluate based upon their own

knowledge and experience, an expert's affidavit delineating the proper standard of professional care and skill to which the defendant is required to adhere under the circumstances is required (*Natale v Jeffrey Samel & Assoc.*, 308 AD2d 568, 764 NYS2d 883 [2d Dept 2003], *appeal denied* 2 NY3d 701, 778 NYS2d 460 [2004]). An attorney's affirmation may serve as an expert opinion establishing the standard for determining the adequacy of the professional service rendered by the defendant (*Landa v Blocker*, 87 AD3d 719, 928 NYS2d 779 [2d Dept 2011]; *Zasso v Maher*, 226 AD2d 366, 640 NYS2d 243 [2d Dept 1996]).

Although plaintiff may have received more than was originally anticipated by way of maintenance and carrying charges, there is no question but that she did not receive the equitable share of marital property to which she was entitled. Defendants' arguments that plaintiff suffered no damages because she was paid a "windfall" of maintenance and carrying charges is unpersuasive. Moreover, such an argument is specious and speculative. Inasmuch as plaintiff was entitled to receive a "lump sum" payment of equitable distribution, the parties could just as easily speculate that she would have invested that money and made "millions" in a business or other investment. Defendants' failure to secure that payment cannot be set aside by their claims of "offset." The fact that the stipulation provided for longer duration maintenance and for the payment of carrying charges by plaintiff's former husband in the event he failed to pay the "lump sum" equitable distribution award was not in lieu of the equitable distribution, but was an inducement for him to make the payment in a timely fashion. Thus, defendants failed to prove their claim that plaintiff did not sustain any damages as a result of their failure to secure the equitable distribution payment by preparing the deed as provided by the stipulation of settlement, and summary judgment dismissing the complaint is denied.

The doctrine of *res judicata* prevents a party from relitigating an issue that was previously determined by the Court. Once the merits of a claim have been decided by the Court that determination is final and has a binding effect (*Landau, P.C. v LaRossa*, 11 NY3d 8, 862 NYS2d 316 [2008]; *see Farren v Lisogorsky*, 87 AD3d 713, 928 NYS2d 765 [2d Dept 2011]). However, "where a dismissal does not involve a determination on the merits, the doctrine of *res judicata* does not apply" (*Wilson v New York City Hous. Auth.*, 15 AD3d 572, 573, 791 NYS2d 567 [2d Dept 2005] *internal citations omitted*).

In applying the standards required to dismiss a cause of action pursuant to CPLR R. 3211(a)(1) and (7) in this case, the Appellate Division stated that "the Supreme Court properly denied that branch of the motion of the defendant Gregory Rabinowitz which was to dismiss so much of the complaint as sought to recover damages for legal malpractice based on his failure to prepare necessary papers in the plaintiff's underlying divorce action to transfer the marital residence for equitable distribution purposes . . . [Further], [t]he papers submitted by the Kramer defendants did not conclusively refute the material facts alleged in the complaint relating to claims of legal malpractice against them, nor did their documentary evidence conclusively establish that the plaintiff lacks a viable claim of legal malpractice against them (*Walker v Kramer, supra* at 724, *internal citations omitted*).

Plaintiff claims that this Court is bound by the doctrine of *res judicata*, and must grant summary judgment in her favor. She asserts that "the liability of the Defendant has been duly established by the Appellate Court in its written Decision dated June 2, 2009." However, the Appellate Division, in reviewing this court's December 11, 2007 decision, based its determination upon the standard for reviewing a motion to dismiss pursuant to CPLR R. 3211(a)(1) and (7). The Court may grant a motion

to dismiss pursuant to CPLR R. 3211(a)(1) “only where the documentary evidence utterly refutes plaintiff’s allegations, conclusively establishing a defense as a matter of law” (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 746 NYS2d 858 [2002]; *Sobel v Ansanelli*, 98 AD3d 1020, 951 NYS2d 533 [2d Dept 2012]; *Harris v Barbera*, 96 AD3d 904, 947 NYS2d 548 [2d Dept 2012]). In order to qualify as “documentary evidence” the printed materials “must be unambiguous and of undisputed authenticity” (*Fontanetta v John Doe 1*, 73 AD3d 78, 86, 898 NYS2d 569 [2d Dept 2010]). In determining whether to dismiss a complaint pursuant to CPLR R. 3211(a)(7), the Court must assume to be true the facts pleaded, give every favorable inference to the allegations, and determine only whether the alleged facts fit any cognizable legal theory (*Dickinson v Igoni*, 76 AD3d 943, 908 NYS2d 85 [2d Dept 2010]; *Tsutsui v Barasch*, 67 AD3d 896, 892 NYS2d 400 [2d Dept 2009]). The test is whether the pleading states a cause of action, not whether the plaintiff has a cause of action (*Sokol v Leader*, 74 AD3d 1180, 904 NYS2d 153 [2d Dept 2010]). “Whether a plaintiff can ultimately establish [his or her] allegations is not part of the calculus in determining a motion to dismiss” (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19, 799 NYS2d 170 [2005]). In determining if a pleading states a cause of action, “the sole criterion” for the Courts is whether “from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law” (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275, 401 NYS2d 182 [1977]).

The Appellate Division found that there was insufficient documentary evidence submitted by defendants in support of their earlier motion to dismiss, and that the facts in the complaint stated a cause of action for legal malpractice. The Appellate Division did not, however, determine the merits of the legal malpractice claim. Thus, the doctrine of res judicata is inapplicable and does not bind this Court (*see Wilson v New York City Hous. Auth., supra*). However, inasmuch as plaintiff has proven through her submissions that “but for” defendants’ failure to prepare and record a deed securing her equitable distribution award, she would have been able to receive her award through a sale of the premises prior to her former husband’s encumbering the marital residence with mortgages in excess of its value, she is entitled to summary judgment in her favor and her motion is granted.

Submit judgment.

Dated: December 22, 2014

HON. PAUL J. BAISLEY, JR.  
J.S.C.