

Armstrong v Blank Rome LLP
2014 NY Slip Op 30570(U)
March 6, 2014
Sup Ct, NY County
Docket Number: 651881/2013
Judge: Anil C. Singh
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 61

-----X
KRISTINA M. ARMSTRONG,

Plaintiff,

INDEX NO.
651881/2013

-against-

BLANK ROME LLP, NORMAN S. HELLER,
DYLAN S. MITCHELL,

DECISION

Defendants.

-----X
HON. ANIL C. SINGH, J.:

Plaintiff seeks monetary relief for damages allegedly caused by her former divorce counsel, in the process of their professional representation, by reasons of breach of fiduciary duty, malpractice and fraud. The goal of defendants' instant motion is dismissal of certain portions of the First Cause of Action as scandalous and prejudicial and unnecessary within the meaning of CPLR 3024(b), and dismissal in their entirety, under CPLR 3211(a) (7), of the Second and Third Causes of Action for statutory relief, based respectively on Judiciary Law section 487 and General Business Law Section 349.

Plaintiff commenced divorce proceedings against Michael Armstrong in June of 2009. On or about November 17, 2009, plaintiff retained the services of

the defendants to represent her in these proceedings. Defendants undertook review of an extensive file generated by plaintiff's prior counsel, and consented to a scheduling order obliging the parties to exchange documents by December 31, 2009, and sworn net worth statements by January 9, 2010. On April 7, 2010, defendants hired Martin I. Blaustein, C.P.A. to advise on marital spending and lifestyle, the value of Mr. Armstrong's professional licenses and components of the latter's income. Defendants, allegedly based on the strategic advice of their expert, Mr. Blaustein, advised plaintiff to waive valuation, for distributive purposes, of Mr. Armstrong's professional securities licenses. In waiving this valuation on counsel's advice, the plaintiff complains that she improvidently deprived herself of her marital share of an asset valued by her own expert, Mr. Blaustein, at \$16,167,000.00.

The gravamen of plaintiff's conflict-of-interest allegations is the professional relationship between defendant Blank Rome and her ex-husband's employer, Morgan Stanley, for which Blank Rome was engaged in lucrative transactional representation in Pennsylvania. Plaintiff contends that the desire to maintain and augment Blank Rome's billings to Morgan Stanley, motivated the individual partners, defendants Norman Heller and Dylan Mitchell, as well as Blank Rome as an entity, to "throw her under the bus." Plaintiff maintains that the

position of her ex-husband, Mr. Armstrong, is so exalted at Goldman Sachs, and that his interests and his company's were so intertwined, as to lend credibility to her allegations. In any event, it is undisputed that no disclosure of this concurrent professional engagement with Morgan Stanley was ever made to plaintiff, nor was any waiver thereof obtained from her.

The first branch of the defendants' motion prays for the striking of scandalous, prejudicial and unnecessary allegations, pursuant to CPLR 3016(b) regarding professional conflict of interest as set forth, respectively, in the following paragraphs of the complaint: 18, 19, 20, 21, 22, 23, 24, 25, 26, 31, 40, 41, 42, 43, 44, 45, 46, 60, 65, 70. All of these paragraphs refer to defendants' commission of legal malpractice by engaging in 1) concealed conflict of interest, 2) fraud, in failure to disclose such conflict, and 3) breach of fiduciary duty by engaging in such conflict.

In order to sustain a claim for legal malpractice, a plaintiff must establish both that the defendant attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession which results in actual damages to a plaintiff [citation omitted] and that the plaintiff would have succeeded on the merits of the underlying action "but for" the attorney's negligence [citation omitted]. (*Ambase Corporation v Davis Polk Wardwell*, 8 NY3d 428, 434 [2007].)

These faithless acts alleged by plaintiff in her First Cause of Action are the

specifics of a failure by defendants to exercise that degree of care, skill and diligence commonly possessed by a member of the legal profession involved in similar cases in the community. “In general, we may conclude that ‘unnecessarily’ pleaded means ‘irrelevant.’ We should test this by the rules of evidence and draw the rule accordingly. . . . (I)f the item would be admissible at trial under the evidentiary rules of relevancy, its inclusion in the pleading, whether or not it constitutes ideal pleading, would not justify a motion to strike under CPLR 3024.” (David D. Siegel, Practice Commentaries, McKinney’s Cons Laws of N Y, Book 7B, CPLR C:3024:4 at 323 as cited in *Soumayah v. Minelli*, 41 AD3d 390, 393 [1st Dept 2007], app. withdrawn 9 NY3d 989) “‘Where evidence of the facts pleaded in the allegations has any bearing on the subject matter of the litigation and is a proper subject of proof, the presence of such matter involves no prejudice and the allegations are not irrelevant to the cause of action pleaded’ [citation omitted.]” (*Tomasello v Trump*, 30 Misc 2d 643, 649 [Sup Ct, Queens County, 1961].)

Measured by these standards, defendants have failed to show that the paragraphs complained of lack evidentiary relevance, apparent necessity, or have demonstrated any prejudice resulting from their inclusion. Accordingly, this branch of the motion to strike them is denied.

The second branch of the instant motion pursues dismissal of the Second

Cause of

Action, characterized by defendants as relief under Judiciary Law section 487.

This relief is demanded pursuant to CPLR 3211 (a) (7) and 3016 (b). Defendants support their prayer on plaintiff's alleged failure to plead, with particularity, the elements of Judiciary Law section 487 (1), that defendants are guilty of deceit or collusion with intent to deceive a party to a cause of action, and failure to "plead a pattern of delinquent, wrongful or deceitful behavior." (*Jaros-lawicz v Cohen*, 12 AD3d 160, 160-161 [1st Dept 2004]).

The court finds, to the contrary, that these pleading requirements are satisfied; e. g., paragraphs 21, 22, 23 of the complaint (annexed as exhibit 1 to the supporting affirmation of Philip Touitou, dated September 30, 2013) detailing defendants' nondisclosure of the known conflict of interest concerning defendants' retention by Goldman Sachs; paragraph 26 thereof, alleging nondisclosure of negotiations by defendants with Mr. Armstrong's attorney leading to the waiver of substantial rights; paragraphs 31-38 thereof concerning defendant's deception in advising plaintiff to execute a stipulation waiving her said rights without prior explanation or discussion with her; paragraph 44 thereof, concerning defendants' dilatory treatment of the plaintiff's pretrial discovery requirements; paragraph 46 and 47 thereof, alleging defendants' deceptive

attempts to influence plaintiff against her own interests by voluntarily relinquishing assets to Mr. Armstrong; and paragraph 49 thereof, alleging that defendants continuously deceived plaintiff as to the lack of value of Mr. Armstrong's securities licenses. Moreover, plaintiff is specific in the sum of the damages claimed; i.e. as per paragraph 57, \$8,035,500.00 representing her distributive share of the value of the securities licenses, and the refund of all her legal fees in the sum of \$239,323.

Accordingly, the second branch of the defendants' motion is denied.

The third branch of the defendant's motion asks for dismissal of the Third Cause of Action for violation of General Business Law section 349. To state a cause of action under that statute, a plaintiff "must, at the threshold, charge conduct that is consumer oriented. The conduct need not be repetitive or recurring but defendant's acts or practices must have a broad impact on consumers at large; "[p]rivate contract disputes unique to the parties . . . would not fall within the ambit of [GBL 349]" (*New York Univ. v. Continental Ins. Co.*, 87 NY2d 308, 320 [1995])" as cited in *Gomez-Jimenez v New York Law School*, 103 AD3d 13, 16 [1st Dept 2012] lv denied, 20 NY3d 1093[2013].

In the *Gomez-Jimenez*, students at New York Law School sued the defendant under General Business Law Sec. 349 for allegedly deceiving them with

false statistics on the marketability of their law school credentials. Although the Appellate Division, at the bottom line, held that there was no actionable fraud, and dismissed the complaint (*Gomez-Jimenez v New York Law School*, 103 AD3d at 18), it rejected defendant's contention that the dispute was not properly brought under GBL section 349 and found a consumer-oriented relationship to the dissemination of the complained of lawyer employment information. (*id.*, at 17.) "Here the challenged practice was consumer-oriented insofar as it was part and parcel of defendant's efforts to sell its services as a law school to prospective students. . . ." (*id.*)

Comparing the facts in *Gomez-Jimenez* to the case at bar, the latter is not a consumer-oriented transaction. How common an occurrence is it in the consumer community for a lawyer, providing a consumer service, to find that he or she is representing a clients with conflicting interests? How common is it, as plaintiff avers, for the said lawyer to make a practice of continuing to represent both parties without making the required disclosures because the benefits of the conflict are too lucrative to pass up? The case at bar is a private contract dispute peculiar to the parties, or a grievance based on the principles of legal malpractice arising from a particular relationship, but not one implicating the interests of consumers as a community.

Accordingly, plaintiff has failed to state a cause of action under GBL section 349 pursuant CPLR 3211 (a) (7), and the third branch of the defendants' motion for dismissal of the plaintiff's Third Cause of Action is granted.

WHEREFORE, it is

ORDERED, that the first branch of the defendant's motion for dismissal of paragraphs 18, 19, 20, 21, 22, 23, 24, 25, 26, 31, 40, 41, 42, 43, 44, 45, 46, 60, 65, 70 of the First Cause of Action on the grounds that they are scandalous, prejudicial and unnecessary pursuant to CPLR 3016 (b) is denied in all respects; and it is further

ORDERED, that the second branch of the motion for dismissal of the Second Cause of Action for damages pursuant to attorney misconduct, under Judiciary Law section 487, is denied in all respects; and it is further

ORDERED, that the third branch of the motion for dismissal of the Third Cause of Action for relief under General Business Law Section section 349 is granted and the Third Cause of Action is dismissed; and it is further

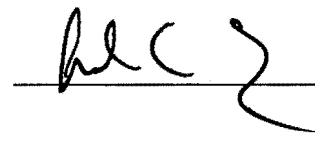
ORDERED, that defendants shall answer the complaint within twenty days of service of this order by plaintiff upon defendants; and it is further

ORDERED, that counsel are directed to appear for a preliminary conference in Room 320, 80 Centre Street on APRIL 30th, 2014, at

9:30 AM.

This constitutes the decision and order of the court.

Dated MARCH 6, 2014



J. S.C.