

Brion v Moreira

2015 NY Slip Op 32498(U)

December 31, 2015

Supreme Court, New York County

Docket Number: 155815/2014

Judge: Donna M. Mills

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 58**

MICHAEL A. BRION, individually and as
assignee of the ESTATE OF MIGUEL BRION
and BASONAS CONSTRUCTION CORP.,

Plaintiffs,

-against-

JORGE W. MOREIRA and MOREIRA AND
ASSOCIATES, PLLC,

Defendants.

INDEX NUMBER 155815/2014
Motion Sequence 003
DECISION & ORDER

DONNA MILLS, J.:

In this legal malpractice action, plaintiffs Michael A. Brion (Michael), individually and as assignee of the Estate of Miguel Brion (Miguel) and Basonas Construction Corp. (Basonas) move to strike the answer of defendants Jorge W. Moreira (Jorge) and Moreira and Associates, PLLC (the Firm) (together, Moreira) for failure to comply with outstanding discovery demands. Moreira cross-moves for preclusion of plaintiffs' evidence for failure to provide discovery.¹

FACTUAL BACKGROUND

Miguel founded Basonas in 1987, and employed his son Michael in 1990. In 2004, ownership of the outstanding stock in Basonas was divided 64% to Miguel, 36% to Michael. They also shared ownership of S.P. Realty LLC (SP), a company that owned the warehouse where Basonas was located, in the same proportions.

Jorge is a practicing attorney and a member of the Firm. In 2004, Miguel engaged

¹ Moreira's notice of cross motion seems to have been left over from its notice of motion filed on September 22, 2014, to change venue and/or dismiss the complaint, denied by the court on February 3, 2015. Instead of cross-moving for a change of venue, or, in the alternative, to dismiss the complaint, as the notice states, the instant cross motion actually requests preclusion of plaintiffs' evidence.

Moreira to draft his will, bequeathing his entire interest in Basonas and SP to Michael. In 2010, Miguel and Michael allegedly had a falling out, and Moreira drafted a new will for Miguel, bequeathing his entire interest in Basonas to another son, John. The 2010 will did not mention SP. Later, Miguel and Michael reconciled, and allegedly orally agreed that Miguel would sell his entire interest in Basonas and SP to Michael for a payment of \$10,000 monthly until Miguel died. Miguel, holding dual citizenship in the United States and Spain, then moved back to Spain. The 64%/36% ownership ratio still prevailed at the time.

On June 8, 2011, plaintiffs engaged Moreira to memorialize the agreement between Miguel and Michael. Moreira went to Spain and met with Miguel on June 26, 2011, who allegedly confirmed his oral agreement with Michael, requested that it be put in writing, and provided written instructions to Moreira to revoke the 2010 will once Michael signed the new written agreement. Moreira drafted an "Acknowledgment of Debt" (the Acknowledgment), memorializing the agreement, and returned to the United States. Michael signed the Acknowledgment on June 29, 2011, and Moreira notarized his signature. Moreira then physically destroyed the 2010 will. The Acknowledgment was not signed by Miguel and it lacked a signature line for him.

Moreira accepted \$10,000 payments from Michael, on Miguel's behalf, on July 1, 2011 and August 1, 2011, in accord with the Acknowledgment. Miguel died on August 2, 2011, in Spain. In November 2011, John filed petitions to probate the 2010 will and be appointed temporary administrator of his father's estate in Kings County Surrogate Court. Over Michael's objections, John was appointed temporary administrator on May 22, 2012, giving rise to litigation between Michael and John over ownership of Basonas and SP.

Michael and John stipulated to a settlement on September 4, 2013, which provided that

Michael acquire total ownership in Basonas and SP from Miguel's estate for approximately \$2.1 million. Additionally, plaintiffs claim to have spent over \$835,000 in legal fees to resolve the matter.

Plaintiffs filed the instant complaint on June 13, 2014, asserting a cause of action for legal malpractice. Ponterio affirmation, exhibit B.

DISCUSSION

Legal Standards for Malpractice

The standards to prove legal malpractice are high. "In order to establish a prima facie case of legal malpractice, a plaintiff must demonstrate that the plaintiff would have succeeded on the merits of the underlying action but for the attorney's negligence." *Davis v Klein*, 88 NY2d 1008, 1009-1010 (1996); *see also Arnav Indus., Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner*, 96 NY2d 300, 303-304 (2001) ("To sustain a cause of action for legal malpractice, moreover, a party must show that an attorney failed to exercise the reasonable skill and knowledge commonly possessed by a member of the legal profession").

Plaintiffs claim that Moreira was negligent in failing to give them proper advice on the transfer of Miguel's interests to Michael, the destruction of Miguel's 2010 will, and the revival of Miguel's 2004 will, and in failing to create a document or documents that effectuated the agreement between Miguel and Michael on the transfer of Miguel's interests to Michael, to properly destroy Miguel's 2010 will, and to properly revive Miguel's 2004 will.

Legal Standards for Discovery

"If a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order . . . , the party seeking disclosure may move to compel compliance or a response." CPLR 3124. Pursuant to CPLR 3126, penalties for failure to comply with a

discovery order or a reasonable discovery demand include striking pleadings, as plaintiffs move for here.

Plaintiffs' Motion to Strike the Answer

Plaintiffs served discovery demands on March 3, 2105. Ponterio affirmation, exhibit D. At a preliminary conference on March 13, 2015, the court ordered all parties to respond to outstanding discovery demands by May 13, 2015. *Id.*, exhibit E. Moreira responded on May 15, 2015, withholding responses to interrogatories and document production until "receipt of a responsive bill of particulars as demanded by Defendant on February 9, 2015 and which is at present the subject of a motion to preclude pending before the court." *Id.*, exhibit F. Moreira filed that motion on May 14, 2015, claiming that plaintiffs have failed to comply with its demand for a bill of particulars.

Moreira's Cross Motion for Preclusion

Moreira, in its cross motion, acknowledges that plaintiffs' counsel later provided an unverified bill of particulars, a copy of which is attached to plaintiffs' reply. Ponterio reply affirmation, exhibit 1. However, Moreira contends that this is an inadequate response to its discovery demands. Plaintiffs correctly maintain that an unverified bill of particulars is acceptable, pursuant to CPLR 3020, because the instant complaint is unverified. "Verification of a complaint is a matter of choice on the part of plaintiff," with a few exceptions not relevant here. *Matter of Joseph Durst Corp. v Leader*, 51 Misc 2d 72, 73 (Sup Ct, NY County 1966).

Plaintiffs' motion and Moreira's cross motion both reflect a lack of attentiveness to the discovery process and insufficient cooperation between the parties. With Moreira's immediate concern met by the production of a bill of particulars, the parties shall proceed to comply fully

and promptly with all outstanding discovery demands. Any objections to the production of any item demanded must be supported by current, pertinent case law. Failure to comply with this order will result in appropriate sanctions.

Accordingly, it is

ORDERED that the motion by plaintiffs Michael A. Brion, individually and as assignee of the Estate of Miguel Brion and Basonas Construction Corp. to strike defendants' answer is denied; and it is further

ORDERED that the cross motion by defendants Jorge W. Moreira and Moreira and Associates, PLLC for preclusion of plaintiffs' evidence is denied; and it is further

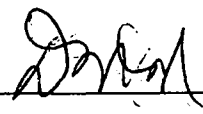
ORDERED that all parties shall respond to all outstanding discovery demands within 21 days of receipt of a copy of this order with notice of entry; and it is further

ORDERED that all parties shall appear at a conference with the court on Friday,

January 22, 2016, at 10:00 ~~a.m.~~ p.m.

DATED: December 31, 2015

ENTER:



J.S.C.

DONNA M. MILLS, J.S.C.