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SUPREME COURT - STATE OF NEW YORK

Present:

HON. ARTHUR M. DIAMOND
Justice Supreme Court

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CELESTE SIEMSEN, Administratrix, C.T.A. of the Estate of VIRGINIA LENZOVICH,

Plaintiff,

-against-

LISA MEVORACH, As Guardian for Virginia LENZOVICH, and as Attorney for VIRGINIA LENZOVICH,

Defendants.

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TRIAL PART: 7

NASSAU COUNTY

INDEX NO: 4300-2016

MOTION SEQ #: 1

SUBMIT DATE: 8/18/16

The following papers having been read on this motion:

Notice of Motion.....1
Opposition.....2
Reply.....3

Defendant moves this Court for an order dismissing Plaintiff's complaint in its entirety pursuant to CPLR§ 3211(a)(1), (a)(5), and (a)(7). Plaintiff opposes the motion herein. Based upon the following, Defendant's motion is granted in its entirety and Plaintiff's complaint is hereby dismissed.

On a motion to dismiss the complaint pursuant to CPLR §3211(a)(7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. Clarke v. Laidlaw Tr., Inc., 125 AD3d 920 (2nd Dept. 2015). Thus, a motion to dismiss made pursuant to CPLR§ 3211(a)(7) will fail if, taking all facts alleged as true and according them every possible inference favorable to the plaintiff, the complaint states in some recognizable form any cause of action known to our law. Id.

A motion to dismiss on the ground that the action is barred by documentary evidence may be appropriately granted only where the documentary evidence utterly refutes Plaintiff's factual allegations, conclusively establishing a defense as a matter of law. Goshen v. Mutual

Life Ins. Co. of New York, 98 NY2d 314, 746 NYS2d 858 (2002). In order for evidence to qualify as documentary, such as may provide bases for dismissal of complaint, it must be unambiguous, authentic, and undeniable. Sunset Café, Inc. v. Mett's Surf & Sports Corp., 103AD3d 707, 959 NYS2d 700 (2nd Dept., 2013). If documentary proof disproves an essential allegation of the complaint, dismissal based upon documentary evidence is warranted even if the allegations, standing alone, could withstand a motion to dismiss for failure to state a cause of action. Mill Financial, LLC v. Gillett, 122 AD3d 98, 992 NYS2d 20 (1st Dept., 2014).

For collateral estoppel to apply, there must be an identity of issue which has necessarily been decided in the prior action and is decisive of the present action, and there must have been a full and fair opportunity to contest the decision now said to be controlling; the litigant seeking the benefit of collateral estoppel must demonstrate that the decisive issue was necessarily decided in the prior action against a party, or one in privity with a party. Davidson v. American Bio Medica Corp., 299 AD2d 390, 749 NYS2d 98 (2nd Dept., 2002). Since consequences of a determination that a party is collaterally estopped from litigating a particular issue are great, strict requirements for application of collateral estoppel doctrine must be satisfied to ensure that a party is not precluded from obtaining at least one full hearing on his or her claim. North Shore Long Island Jewish Health System, Inc. v. Aetna US Healthcare, Inc., 27 AD3d 439, 811 NYS2d 424 (2nd Dept. 2006).

An action for legal malpractice requires proof of three essential elements: 1) the attorney's failure to exercise that degree of care, skill, and diligence commonly possessed by a member of the legal profession, 2) causation, and 3) actual damage. Dombrowski v. Bulson, 19 NY3d 347, 948 NYS2d 208 (2012). Plaintiff must ordinarily establish the existence of an attorney-client relationship. Moran v. Hurst, 32 AD3d 909, 822 NYS2d 564 (2nd Dept., 2006). In the absence of fraud, collusion, malicious acts or other special circumstances, the malpractice liability of an attorney ordinarily does not extend to third persons with whom there is no privity. *See* Rovello v. Klein, 304 AD2d 638, 757 NYS2d 496 (2nd Dept., 2003).

In the instant case, Defendant was the court-appointed guardian for Virginia Lenzovich Plaintiff has asserted two causes of action, one for breach of a fiduciary duty and another for legal malpractice. Pursuant to Mental Hygiene Law §81.19, an attorney can be appointed as guardian for an incapacitated person, but is not the only person that can be appointed. For

example, a family member can be appointed as guardian in the best interests of the incapacitated person. *See* In re Lisa D., 99 AD3d 901, 951 NYS2d 913 (2nd Dept., 2012). Although the Plaintiff alleges that Defendant as a licensed attorney can be found liable for legal malpractice in her role as guardian for the decedent, this Court does not find that such an attorney-client relationship is created by the appointment of a guardian in an action under Mental Hygiene Law Article 81, and therefore, Plaintiff's cause of action must fail. This Court also does not find that there was fraud, collusion, malicious acts, or other special circumstances that would give rise to an exception in the instant matter. Plaintiff has failed to properly cite to authority indicating that such a relationship does exist. Accordingly, Plaintiff's second cause of action for legal malpractice is properly dismissed.

Now turning to Plaintiff's first cause of action, in order to establish a breach of a fiduciary duty, a plaintiff must prove the existence of a fiduciary relationship, misconduct by the Defendant, and damages that were directly cause by the defendant's misconduct. Deblinger v. Sani-Pine Products Co., Inc., 107 AD3d 658, 967 NYS2d 394 (2nd Dept., 2013). In reviewing Plaintiff's claims, this Court does not find that Plaintiff has sufficiently alleged misconduct on the part of Defendant in order to sustain this cause of action. Moreover, this Court does not find that Plaintiff may collaterally attack the funds and accounts that were turned over to her at the conclusion of the guardianship action; rather, Plaintiff's remedy was to either contest the final account submitted by Defendant, move the guardianship Court pursuant to MHL §81.43, or to contest the estate of the deceased in Surrogates Court. Plaintiff has failed to cite sufficient authority in the moving papers to be able to sustain this cause of action. Therefore, Plaintiff's first cause of action for breach of a fiduciary duty is properly dismissed.

This hereby constitutes the decision and order of this Court.

ENTER

DATED: August 29, 2016

HON. ARTHUR M. DIAMOND
J. S.C.