

Barrett v Goldstein

2017 NY Slip Op 30011(U)

January 4, 2017

Supreme Court, New York County

Docket Number: 154225/2016

Judge: Arlene P. Bluth

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 32**

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JOHN BARRETT,

Plaintiff,

-against-

LORI H. GOLDSTEIN, ESQ.; EVAN D. SCHEIN, ESQ.;
MARC FLEISCHER, ESQ and BERKMAN BOTTGER
NEWMAN & RODD LLP;

Defendants.

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**Index No. 154225/2016
Motion Seq: 002**

DECISION & ORDER

HON. ARLENE P. BLUTH

Defendants Schein, Fleisher (i/s/h/a Fleischer), and Berkman Bottger Newman & Rodd LLP (collectively, "defendants") motion to dismiss plaintiff's complaint is granted. As the Court already dismissed plaintiff's claims against Lori Goldstein, ^(see MS 1) the entire case is now dismissed.

Background

This action arises out of a post-nuptial agreement signed by plaintiff and his wife (Loren Comstock) on July 22, 2013. Plaintiff's complaint alleges that defendant Lori Goldstein acted as a mediator between Comstock and plaintiff and that Goldstein helped draft the post-nuptial agreement. Defendants claim they were counsel to plaintiff in connection with the review of Goldstein's draft agreement and in a subsequent divorce proceeding (initiated in October 2013) for five months, after which plaintiff retained new counsel. Plaintiff claims that defendants failed to advise him that he was waiving certain rights in the post-nuptial agreement and that defendants failed to help plaintiff challenge the validity of the agreement in the divorce litigation. The

nature of the instant dispute centers on the plaintiff's unhappiness with the post-nuptial agreement's distribution of certain assets, including Comstock's therapy business and plaintiff's farm.

Defendants claim that dismissal is warranted because the language of the post-nuptial agreement refutes plaintiff's claims and plaintiff fails to allege facts demonstrating that defendants' acts were the 'but for' cause of plaintiff's loss or that plaintiff suffered any damages. Defendants further assert that plaintiff's subsequent counsel retained in the divorce action had a chance to challenge the validity of the post-nuptial agreement (and chose not to) and that plaintiff's claims of legal malpractice and breach of fiduciary duty are duplicative. Defendants contend that documentary evidence refutes plaintiff's allegations and demonstrates that plaintiff entered into the post-nuptial agreement willingly and with an understanding of its terms.

In opposition, plaintiff claims that the legal advice provided by defendants was incompetent because the terms of the post-nuptial agreement were clearly one-sided in favor of Comstock. Plaintiff asserts that defendants did not educate plaintiff about the financial rights waived in the agreement, especially those rights relating to Comstock's therapy practice. Plaintiff also cites to a legal fees provision in the post-nuptial agreement as proof that defendants did not competently represent plaintiff. Plaintiff argues that the 'but for causation' test is satisfied for his legal malpractice claim because he never would have signed the post-nuptial agreement if defendants had properly advised him. Plaintiff asserts that he would have maintained his right to Comstock's therapy practice and preserved his separate property (the farm). Plaintiff claims that defendants' improper filing of the divorce action triggered a "poison pill" provision in the post-nuptial agreement, which made it far too risky to challenge the terms of the post-nuptial

agreement. Plaintiff claims that his damages (the value of the waived equitable distribution rights) can be determined by experts.

In reply, defendants argue that plaintiff is deemed to have knowledge of agreements that he signs and that he is bound by the terms of the post-nuptial agreement. Defendants also dispute plaintiff's poison pill argument. Defendants acknowledge that the post-nuptial agreement includes an indemnification provision which requires that if a party challenges the agreement in a matrimonial action and loses the challenge, then the challenger is responsible for the other party's attorneys' fees. Defendants claim this provision does not bar plaintiff from challenging the post-nuptial agreement or expose plaintiff to unnecessary risk.

Discussion

“On a CPLR 3211 motion to dismiss, the court will accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Nonnon v City of New York*, 9 NY3d 825, 827, 842 NYS2d 756 [2007] [internal quotations and citation omitted]). A motion to dismiss based on 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, 326, 746 NYS2d 858 [2002]).

Plaintiff asserts causes of action for legal malpractice and breach of a fiduciary duty both in connection with the post-nuptial agreement and with the subsequent divorce proceeding.

Legal Malpractice & the Post-Nuptial Agreement

“An action for legal malpractice requires proof of the attorney’s negligence, a showing that the negligence was the proximate cause of the plaintiff’s loss or injury, and evidence of actual damages” (*Pellegrino v File*, 291 AD2d 60, 63, 738 NYS2d 320 [1st Dept 2002]). “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]).

As an initial matter, the Court finds that the terms of the post-nuptial agreement utterly refute plaintiff’s legal malpractice allegations. The agreement purports to “fix and determine the rights and claims that will accrue to each of them [plaintiff and Comstock] for support and equitable distribution should this marriage ever be terminated, and to accept the provisions of this agreement in lieu of and in full discharge, settlement and satisfaction of all such rights and claims . . . if they do decide to separate or divorce, they agree that this agreement shall be binding” (affirmation of defendants’ counsel, exh A).

Paragraph 1.1 states, in part, that “Each party acknowledges that his or her separate legal counsel has examined the attached financial information, has advised him or her with respect to same, and that each party fully understands the contents of such financial information of the other. Each party acknowledges that the income and property of the other may be considerably greater or less than the amount set forth in the Exhibits hereto at the time of the death of the other party or at any time of an Operative Event . . .” (*id.*).

Paragraph 1.2 contains a series of representations made by both plaintiff and Comstock including “The provisions herein contained are fair and reasonable,” “He or she makes this

Agreement freely and voluntarily,” “He or she has been advised that he or she may have other rights granted to spouses in the event of . . . divorce . . . and that the aforementioned rights may be limited or forfeited by the provisions of the Agreement” (*id.*).

Paragraph 4.2 holds that the equity in the farm, including its mineral rights, shall be distributed 50/50 between Comstock and plaintiff (*id.*). Paragraph 4.6 provides that “the Husband hereby waives any valuation or distribution of the Therapy Practice, and any appreciation or expansion thereof” (*id.*).

Article XI provides that: “If either party (the “defendant”) shall be required to interpose the terms, conditions and covenants of this Agreement as a defense to an action or other proceeding instituted by the other party (the “plaintiff”) and such defense shall result in a judgment, decree or order in favor of the defendant, the plaintiff shall pay to the defendant the costs and expenses incurred by the defendant including reasonable attorneys’ fees” (*id.* at 14).

Taken together, these provisions utterly refute the allegations in the complaint. They evidence an agreement whereby plaintiff explicitly acknowledged that he might be giving up some rights, that he viewed these provisions as fair and reasonable, and that he was aware of Comstock’s financial information. Plaintiff does not dispute that he signed the agreement or claim that he did not understand the provisions.

Instead, he asks this Court to find that because (in his view) the agreement is one-sided in Comstock’s favor, no competent lawyer would have let plaintiff sign it. This unsubstantiated claim is not enough to defeat an agreement that states that the post-nuptial agreement was reasonable, that the financial consequences were understood by plaintiff, and that the agreement was entered into voluntarily. The challenged parts of the agreement are written simply; there is

no “legalese”. Plaintiff is bound by his signature on an agreement that specifically (and clearly) states that he understood its terms (*Bishop v Maurer*, 33 AD3d 497, 499, 823 NYS2d 366 [1st Dept 2006]). The Court declines to fundamentally change the terms of an unambiguous post-nuptial agreement because plaintiff, with the benefit of hindsight, dislikes its effects.

Besides, defendants also submitted emails demonstrating that plaintiff was indeed fully aware of the terms discussed. In fact, Goldstein (the drafter of the agreement) asked whether plaintiff had any further comments or questions about the agreement after receiving an email from Comstock (on which plaintiff was also a recipient) noting that the “farm is fine” (affirmation of defendants’ counsel exh C). Plaintiff responded “no” to this email (*id.*). Defendants also attached email correspondence that specifically mentions that plaintiff’s attorney reviewed the agreement and provided some comments (*id.* exh E). Plaintiff sent an email to Goldstein stating that it was always his intention to transfer the title to the farm to himself and Comstock (*id.*).

This documentary evidence reinforces plaintiff’s failure to establish that defendants were a ‘but for’ cause of plaintiff’s purported loss. In opposition, plaintiff’s counsel claims that there is an agreement in the divorce proceeding, but does not say how the post-nuptial agreement affected that settlement or caused plaintiff injury. Plaintiff’s counsel merely concludes that it caused a loss.

Legal Malpractice and the Divorce Action

Plaintiff’s argument that defendants were negligent in not challenging the post-nuptial agreement in the divorce proceeding fails to establish a cause of action for legal malpractice.

First, plaintiff does not explain why his subsequent divorce counsel could not have challenged specific terms of the post-nuptial agreement. This fact breaks the chain of causation against defendants (*see Maksimiak v Schwartzapfel Novick Tuhowsky Marcus, P.C.*, 82 AD3d 652, 652, 919 NYS2d 330 (Mem) [1st Dept 2011]).

Second, plaintiff's argument that defendants' approval of the "poison pill" -the indemnification provision (Article XI) - prevented plaintiff from contesting the validity of the agreement also fails. The provision encourages the parties to abide by the post-nuptial agreement rather than contest it in the event that one of the spouses filed for divorce. The purpose of the provision is obvious: because the parties wanted to make sure the agreement they were negotiating would govern any future break-up and not merely be a bargaining chip, they gave it teeth, which applied equally to both sides.

The indemnification provision allowed either party (to a divorce proceeding) to contest the validity of the agreement, but if the agreement was upheld, then the challenger would have to pay the costs and attorneys' fees of the defender. Plaintiff could have challenged the agreement in the divorce action he initiated; if he prevailed, then he would not have had to pay for Comstock's attorneys. Plaintiff asserts that he did not want to risk paying Comstock attorneys' fees if he lost a challenge to the agreement. And so it is clear that plaintiff knew that he was not prevented from challenging, he simply weighed the risks and made a tactical decision not to challenge. Plaintiff does not claim that he misunderstood this provision when he signed the post-nuptial agreement. The fact that plaintiff now dislikes this provision does not make it grounds for legal malpractice. Had Comstock filed for divorce and challenged the validity of the agreement, she would have faced the same choice.

Breach of a Fiduciary Duty

Plaintiff's breach of a fiduciary duty claim is duplicative of the legal malpractice claim and, therefore, is dismissed because it arises from the same facts (*Voutsas v Hochberg*, 103 AD3d 445, 446, 958 NYS2d 903(Mem) [1st Dept 2013]).

Conclusion

Just a few months after the post-nuptial agreement was signed, plaintiff filed for divorce, which he knew would trigger the post-nuptial agreement. Although now, with the benefit of hindsight, plaintiff may regret signing the post-nuptial agreement, that does not mean defendants committed legal malpractice. The documentary evidence demonstrates that the post-nuptial agreement was discussed for at least seven months before it was signed (November 2012 to July 2013). Plaintiff had ample opportunity to ask questions about the financial consequences of the agreement. The post-nuptial agreement expressly states that one of its purposes is to avoid conflict or controversy in the future.

Plaintiff did not challenge the agreement in the divorce proceeding. Despite plaintiff's efforts to challenge it now, plaintiff is bound by its terms.

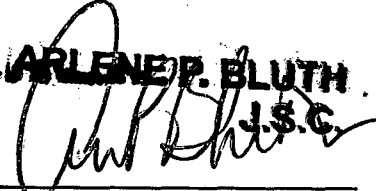
Accordingly, it is hereby

ORDERED that defendants' motion to dismiss plaintiff's complaint is granted. The case is dismissed.

This is the Decision and Order of the Court.

Dated: January 4, 2017
New York, New York

ARLENE P. BLUTH
J.S.C.



ARLENE P. BLUTH, JSC