

Lintz v Aretz

2018 NY Slip Op 30455(U)

March 12, 2018

Supreme Court, New York County

Docket Number: 651766/2015

Judge: Barbara Jaffe

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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JANICE SCHACTER LINTZ,

Plaintiff,

- v -

ROBERT ARETZ, DBA GEM APPRAISERS &
CONSULTANTS, DBA GEM APPRIASERS'
LABORATORY II, INC.,

Defendants.

INDEX NO. 651766/2015

MOTION DATE _____

MOTION SEQ. NO. 2

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118

were read on this application to/for summary judgment

HON. BARBARA JAFFE:

By notice of motion, defendants move pursuant to CPLR 3212 for an order summarily dismissing the complaint against them. Plaintiff opposes.

I. UNDISPUTED FACTS

In this action, plaintiff sues defendants for their allegedly negligent appraisal of her jewelry in the course of a divorce action initiated by plaintiff's husband in New York County Supreme Court. According to plaintiff, as set forth in her verified complaint, defendant Aretz was appointed by the justice presiding over the divorce to provide expert neutral valuation services related to jewelry owned by plaintiff and her husband. Plaintiff denies having received

or having signed a proposed retainer agreement or contract with Aretz related to his services. (NYSCEF 1).

By order issued in August 2012, the justice overseeing the divorce action directed, *inter alia*, that plaintiff and her husband cooperate and make available their jewelry collection in her and his respective control for appraisal at the appraiser's offices on, respectively, August 20, 2012, and August 21, 2012, without being present at the appraisal. Excepted from the appraisals was a Patek Phillipe watch (watch) that was being repaired. (NYSCEF 71).

According to Aretz:

- (1) in June 2012, he was advised by the husband's divorce attorney that he had been appointed to act as a neutral appraiser to appraise certain jewelry and render a written report in the divorce action;
- (2) he was never provided with a copy of the order or stipulation appointing him, nor does he know if any such order exists;
- (3) he believes that the parties mutually agreed to his engagement, with the husband advancing his fee and the husband's attorney in charge of arranging the appraisal;
- (4) he forwarded a copy of a retainer agreement to the husband's attorney, who signed and returned it to him on or about August 14, 2012;
- (5) on July 23, 2012, he spoke by telephone with plaintiff and her divorce attorney about the appraisal process, and the next day faxed them a copy of the retainer agreement he had sent to the husband's attorney along with a list of the jewelry provided him by the husband's attorney, which he understood to be the subject of the appraisal; and
- (6) neither plaintiff nor her husband complied with his request for a GIA diamond grading report for a Graff diamond ring at issue (ring).

(NYSCEF 65).

By email dated June 26, 2012, Aretz sent a copy of the proposed retainer agreement to plaintiff's husband's attorney, observing that he attached the agreement for the husband to sign but that since Aretz "will be a 3rd party neutral appraiser perhaps all parties should sign the

contract.” He requested details about the watch and stated that the ring cannot be valued correctly without a GIA diamond grading report. (NYSCEF 74).

The retainer agreement, dated June 26, 2012, is addressed to plaintiff’s husband in care of his attorney, and confirms their “agreement as to the preparation of the appraisal to be commenced on August 20, 2012.” Aretz therein requests insurance lists and/or invoices containing relevant information about the jewelry, such as stone weights and quality, states that a GIA diamond grading report for the ring “is crucial” as is a model number and/or photograph of the watch, and states that the appraisal will be prepared for the purpose of arriving at a fair market value (FMV) for equitable distribution “to be used by you only for such purpose.” He also advises that while the appraisal will represent his best judgment and opinion as to the jewelry’s current value, it “will not be a statement or representation of fact nor is it a representation or warranty with respect to authenticity, genuineness, or provenance.” The agreement is addressed to the husband in care of his attorney, and is signed by plaintiff’s husband to the extent that on the line delineated for the client, there is an illegible signature, whereas on another line, the attorney printed his name and the date. (NYSCEF 67).

After Aretz appraised the parties’ jewelry, he rendered a written appraisal on or about September 6, 2012, a copy of which was provided to plaintiff’s divorce attorney. In the report, he states that the objective of the appraisal is to determine the FMV for equitable distribution of the jewelry, and provides that “the value conclusions expressed herein are based on the appraiser’s best judgment and opinion and are not a representation or warranty that the items will realize those values if offered for sale at auction or otherwise.” He valued the ring at \$290,000 and the watch at \$20,000, noting that he did not examine the watch as it was being serviced in Switzerland. (NYSCEF 72).

The divorce trial commenced on November 20, 2012, and ended on June 19, 2013. In an amended post-trial decision, the justice held, as to distribution of the jewelry:

The parties agree that certain jewelry is marital property and subject to distribution. The parties agree that a Patek Philippe Watch is marital property. The Husband presented evidence that the watch is worth \$20,000. The Wife objected to this valuation claiming that the watch was never seen by the appraiser. However, since the value given was the highest value this watch could have in perfect condition, and since the Wife presented no evidence to establish a different value, the court finds the value of this asset is \$20,000. The Wife also objected that the Husband did not have his cufflinks valued. However, the Wife did not raise a timely objection to enable a valuation to occur. Therefore, there is no asset of value to be distributed due to failure of proof. Thus, the marital property jewelry and values to be distributed are:

Graff Diamond Ring \$290,000
Patek Philippe Watch \$20,000
Other Jewelry – In Defendant's Possession \$79,350
Other Jewelry – In Plaintiff's Possession \$8,125

While the justice ordered that the value of the marital property be equally distributed, given plaintiff's desire to retain certain jewelry, the court awarded her the ring and the other jewelry in her possession, awarded the husband the watch and the jewelry in his possession, and then in order to distribute the combined value of the jewelry equitably, granted the husband a credit against the distribution of other assets to plaintiff in the amount of \$170,612.50. (NYSCEF 39).

In her complaint, plaintiff alleges that Aretz acted negligently, violated his duties, failed to follow generally accepted appraisal procedures, and/or committed professional malpractice in various ways, which resulted in his valuation of the jewelry at approximately \$155,000 more than its actual value and caused the court to distribute the marital property inequitably by relying on the inaccurate value and permitting her husband to retain property believed to be of equal value. Plaintiff thus claims she sustained at least \$155,000 in damages. (*Id.*).

II. CONTENTIONS

Defendants move to dismiss the complaint on the ground that absent a contractual relationship or other privity between the parties, plaintiff may not maintain a cause of action for professional negligence or malpractice against them. They observe that there was no agreement between them, and deny any relationship of near privity between them, having been hired to evaluate the property to assist the court in its equitable distribution and not for plaintiff's personal use. Defendants also deny any negligence in appraising the property, alleging that they acted in accordance with the standards of the American Appraisal Association on the basis of information made available to them. (NYSCEF 82).

Plaintiff contends that numerous factual issues exist precluding summary judgment, such as the purpose and consequences of Aretz's behavior in obtaining the retainer agreement from her husband, the methods used in appraising the jewelry, and his conclusions as to value, and questions his neutrality. (NYSCEF 83).

In reply, defendants allege, as pertinent here, that plaintiff produces insufficient evidence to rebut their evidence that the agreement was faxed to her and her divorce attorney or as to whether Aretz was ordered by the court to perform the evaluation, and deny that an affidavit provided by a different appraiser during the divorce proceeding is probative here. (NYSCEF 114).

III. ANALYSIS

A party asserting a claim for professional malpractice or negligence must establish the existence of a contractual relationship or a bond between it and the professional that is the functional equivalent of contractual privity. (*Bullmore v Ernst & Young Cayman Is.*, 45 AD3d 461 [1st Dept 2007]). A relationship that constitutes the functional equivalent of contractual

privity is one where there is: (1) awareness that information will be used for a particular purpose; (2) reliance by a party in furtherance of that purpose; and (3) some conduct by the other party linking them to the party and indicating their understanding of their reliance. (*Ossining Union Free School Dist. v Anderson LaRocca Anderson*, 73 NY2d 417 [1989]).

Moreover, to the extent that a claim for negligent appraisal may be deemed one for negligent misrepresentation, the party asserting the negligence must establish both reliance and the existence of a special relationship between it and other party. (*See e.g., Ravenna v Christie's Inc.*, 289 AD2d 15 [1st Dept 2001] [where plaintiff brought negligent misrepresentation claim based on allegation that art specialist gave him wrong information about artwork's origin, causing damage, claim dismissed as no special relationship existed between them, notwithstanding specialist's awareness that plaintiff would rely on advice]).

Having inconsistently alleged that Aretz was both court-appointed and improperly retained only by her husband and that only her husband was Aretz's client, plaintiff thereby demonstrates: 1) that there was no contractual relationship or its functional equivalent between her and Aretz; and 2) that neither she nor her husband had either a special relationship or one constituting the functional equivalent of privity with Aretz, as Aretz's duty was to the court rather than to either litigant. While she alleges that defendants failed to provide her with the retainer agreement, thereby thwarting her from signing it and establishing a special relationship, defendants prove that a copy of the agreement was faxed both to her and to her divorce attorney. Thus, plaintiff's mere denial of receipt raises no triable issue of fact as to whether there was or should have been a contractual relationship between her and defendants. To the extent she now disputes the appointment, she does so in a fatally conclusory fashion, and fails to explain the contrary allegation in her complaint.

There is also no evidence that plaintiff was unable to hire her own appraiser or that, having received Aretz's appraisal before the trial, she could not verify it before it was offered at trial. And, while plaintiff alleges that Aretz's retainer agreement with her husband violated his ethical or expert duty to act as a neutral evaluator, that fact alone is insufficient to hold him liable. (See e.g., *Cohen v Kachroo*, 115 AD3d 512 [1st Dept 2014] [violation of rules of professional conduct or ethical rules, in and of itself, does not constitute malpractice]).


Given this result, I do not consider the parties' remaining arguments.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendants' motion for summary judgment is granted, and the complaint is hereby dismissed in its entirety, and the clerk of the court is directed to enter judgment accordingly.

3/12/2018
DATE



BARBARA JAFFE, J.S.C.
HON. BARBARA JAFFE

CHECK ONE:

- CASE DISPOSED
- GRANTED
- SETTLE ORDER
- DO NOT POST

DENIED

- NON-FINAL DISPOSITION
- GRANTED IN PART
- SUBMIT ORDER
- FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: