

Krigsman v Goldberg
2018 NY Slip Op 30694(U)
April 19, 2018
Supreme Court, New York County
Docket Number: 151271 /16
Judge: Manuel J. Mendez
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ Justice

PART 13

RIMA KRIGSMAN, as Executor of the Estate of DORA AVRUMSON,

Plaintiff

- against-

ISRAEL GOLDBERG, GOLDBERG & RIMBERG PLLC, GOLDBERG & RIMBERG COUNSELORS AT LAW PLLC, GOLDBERG & RIMBERG & FRIEDLANDER PLLC, ISRAEL GOLDBERG PLLC, and NICHOLAS KOWALCHYN, ESQ.,

Defendants

ISRAEL GOLDBERG, GOLDBERG & RIMBERG PLLC, GOLDBERG & RIMBERG COUNSELORS AT LAW PLLC, GOLDBERG, RIMBERG & FRIEDLANDER PLLC, and ISRAEL GOLDBERG PLLC,

Third-party Plaintiff

- against-

NICHOLAS KOWALCHYN, ESQ.,

Third-party Defendant.

INDEX NO. 151271 /16
MOTION DATE 04-11-2018
MOTION SEQ. NO. 003
MOTION CAL. NO.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

The following papers, numbered 1 to 10 were read on this plaintiff's motion for partial summary judgment:

Table with 2 columns: Description of papers and PAPERS NUMBERED. Rows include Notice of Motion/ Order to Show Cause, Answering Affidavits, and Replying Affidavits.

Cross-Motion: [] Yes [X] No

Upon a reading of the foregoing cited papers it is ordered that plaintiff's motion for partial summary judgment on the issue of liability against defendants, ISRAEL GOLDBERG, GOLDBERG & RIMBERG PLLC, GOLDBERG & RIMBERG COUNSELORS AT LAW PLLC, GOLDBERG, RIMBERG & FRIEDLANDER PLLC, ISRAEL GOLDBERG PLLC (hereinafter referred to as "Goldberg Defendants") and to strike the second affirmative defense in their answer that asserts this action is barred by the statute of limitations, is granted.

Plaintiff claims that the Goldberg Defendants were retained by plaintiff's mother, Dora Avrumson (hereinafter "Dora") in March of 2003, about a month after the death of her second husband Shlomo Cyngiel (hereinafter "Shlomo"), who died on February 15, 2003. It is alleged that the Goldberg Defendants committed malpractice when they failed to exercise Dora's right of election in accordance with EPTL§5-1.1-A. It is further alleged that instead of exercising the right of election, the Goldberg Defendants filed objections against the Estate of Shlomo in a proceeding in Surrogate's court to probate Shlomo's Will, and commenced a separate action in New York State Supreme Court Kings County (Index 21521- 2003) on Dora's behalf, against Shlomo's Estate and his children, for the imposition of a constructive trust and a declaration of Dora's rights in Shlomo's property (hereinafter referred to as the "constructive trust action)." The Supreme Court Kings County action was transferred to Surrogates Court in October 2003. Dora died on November 28, 2008 during an ongoing dispute with Shlomo's Estate over the legality of

their marriage. She died without exercising her right of election. Plaintiff was substituted in the action as the Executor on behalf of Dora's estate (See amended complaint ¶¶4,5,6,7,8,36-47, Mot. Exh. 1).

The Goldberg Defendants withdrew from representing plaintiff on March 11, 2013 claiming she was behind in paying their legal fees. Plaintiff alleges she disputed the charges asserted by the Goldberg Defendants, retained and substituted Nicholas Kowalchyn, Esq. to represent the estate effective March 14, 2013, after about eleven years of representation by the Goldberg Defendants. Mr. Kowalchyn represented the plaintiff for approximately four months - through July 23, 2013 - when the the Kings County Surrogate granted a summary judgment motion filed by the executor of Shlomo's estate. The July 23, 2013 Kings County Surrogate Decision and Order found that Dora failed to exercise her right of election in accordance with the statutory requirements of EPTL §5-1.1-A, and that Dora's right of election died with her (Mot. Exh. 24).

Plaintiff retained the Goldberg Defendants a second time starting on August 26, 2013. The Goldberg Defendants filed an appeal of the July 23, 2013 Decision and Order of the Kings County Surrogate and on July 15, 2015 the Appellate Division Second Department affirmed the Surrogate's decision, holding that Dora "did not follow the procedure outlined in EPTL §5-1.1-A(d) for exercising a spouse's right of election"(see In re Cyngiel, 130 A.D. 3d 829, 12 N.Y.S. 3d 575 [2nd Dept., 2015], and amended complaint ¶¶63, 68, Mot. Exh. 1).

It is alleged that the Goldberg Defendants failed to take adequate party and non-party discovery and otherwise prepare the constructive trust action for trial prior to the discovery cut-off. On June 12, 2015, the constructive trust action was stricken from the trial calendar after the Goldberg Defendants informed the Kings County Surrogate that they could not try the action due to a scheduling conflict and sought an adjournment. Plaintiff alleges that when the Goldberg Defendants neglected the action and failed to move to restore the action to the trial calendar, the defendants in the action moved to dismiss the action for failure to prosecute.

The Goldberg Defendants sought to be relieved as counsel in the constructive trust action and that relief was granted. Plaintiff retained new counsel, Greenfield, Stein & Senior on March 31, 2016. Plaintiff's new counsel sought additional discovery in the action. In a Decision and Order dated May 10, 2016 additional discovery was denied by Kings County Surrogate, S. Johnson, stating: "in the month since Ms. Krigsman retained Greenfield Stein & Senior, the firm has developed this matter to a greater extent than prior counsel did in thirteen years of representation." (Mot. Exh. 35).

It is alleged that despite having accomplished nothing for Dora or the Estate during the thirteen (13) years of legal representation, the Goldberg Defendants charged Dora and her Estate in excess of \$100,000 for the retained matters, most of which is attributable to litigating the Goldberg Defendant's own failure to take the necessary steps to exercise Dora's right of election and, to a lesser extent, working on the constructive trust action which was stricken from the trial calendar due to the Goldberg Defendants' negligent acts and omissions (see amended complaint ¶¶69-74 Mot. Exh. 1; decision/order Hon. S. Johnson dated May 10, 2016 Mot. Exh. 35).

Plaintiff commenced this action on February 15, 2016 seeking to recover against the Goldberg Defendants for legal malpractice based on their failure to exercise the right of election on behalf of her mother, Dora, against the estate of her second husband Shlomo. The complaint also asserts claims against the Goldberg Defendants for breach of contract and unjust enrichment to recover for fees and expenses billed by the moving defendants to Dora, and subsequently to her estate, in connection with approximately thirteen years of litigation in an action brought to impose a constructive trust over the assets of Shlomo's estate. Plaintiff claims the fees were excessive and that the litigation was misguided, neglected and unnecessary but for the Goldberg Defendants own misconduct.

After serving an answer the Goldberg Defendants filed a Third-party complaint against Nicholas Kowalchyn, and plaintiff amended her complaint on March 29, 2017 to file a direct claim against the Third-party defendant.

Plaintiff's motion seeks an Order granting partial summary judgment on the issue of liability against the Goldberg Defendants, and striking the second affirmative defense in the Goldberg Defendant's answer that asserts this action is barred by the statute of limitations.

In order to prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (*Klein v. City of New York*, 89 N.Y. 2d 833,675 N.E. 2d 458,652 N.Y.S. 2d 723 [1996]). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence, in admissible form, sufficient to require a trial of material factual issues (*Amatulli v. Delhi Constr. Corp.*, 77 N.Y. 2d 525,571 N.E. 2d 645, 569 N.Y.S. 2d 337 [1999]).

Plaintiff has met the prima facie burden for obtaining summary judgment by showing that the Goldberg Defendants were negligent, were the proximate cause of the plaintiff's loss in the constructive trust action and for their failure to properly exercise the right of election, after more than thirteen years of providing representation, and that she is entitled to damages.

A claim for legal malpractice has three required elements, negligence, proximate cause of loss, and actual damages (*O'Callaghan v. Brunelle*, 84 A.D. 3d 581, 923 N.Y.S. 2d 89 [1st Dept., 2011] and *Between the Bread Realty Corp. v. Salans, Herzfeld, Heilbronn, Christy & Viener*, 290 A.D. 2d 380, 736 N.Y.S. 3d 666 [1st Dept., 2001]). 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, and that the plaintiff would have succeeded on the merits of the underlying action 'but for' the attorneys negligence" (*Leder v. Spiegel*, 9 N.Y. 3d 836, 872 N.E. 2d 1194, 840 N.Y.S. 2d 888 [2007] citing to *Am-Base Corp. v. Davis Polk & Wardwell*, 8 N.Y. 3d 428, 866 N.E. 2d 1033, 834 N.Y.S. 2d 705 [2007]). In order to establish proximate cause, plaintiff is required to prove that "but for" the attorney's negligence damages would not have been sustained (*Nomura Asset Capital Corp. v. Cadwalader, Wickersham & Taft, LLP*, 115 A.D. 3d 228, 980 N.Y.S. 2d 95 [1st Dept., 2014]).

Plaintiff has shown that the Goldberg Defendants failed to follow the proper procedure required under EPTL §5-1.1-A[d][1] which provides the procedure to exercise the right of election and specifically states:

"Written notice of such election shall be served upon any personal representative in the manner herein provided, or upon a person named as Executor in a will on file in the surrogate's court in a case where such will has not yet been admitted to probate, and the original thereof shall be filed and recorded, with proof of service, in the surrogate's court in which such letters were issued within six months from the date of the issuance of letters but in no event later than two years from the date of decedent's death..." (Emphasis added)

(McKinney's Consol. Laws of New York Annot., vol.17B, EPTL §5-1.1-A)

There was a continuous attorney-client relationship between the Goldberg Defendants and Dora and her estate from March of 2003 through March 14, 2013 when they were first substituted by Nicholas Kowalchyn, Esq.. Plaintiff relies on correspondence and the retainer agreement to show that the Goldberg Defendants were aware of their responsibility of properly exercising Dora's right of election (Mot. Exhs. 6, 7, 9 and 10). Plaintiff has shown that the Goldberg Defendants proximately caused her damage.

The Goldberg Defendants are collaterally estopped, from arguing that their conduct did not fall below the professional standard of care, by the Appellate Division Second Department Decisions. The record of the Surrogate Court case, related appeals, and decisions of the Appellate Division Second Department, show that the Goldberg Defendant's conduct fell below the professional standard. The Kings County Surrogate and the Appellate Division Second Department found that the Goldberg Defendants failed to properly do what was necessary and required to exercise Dora's right of election (Mot. Exhs. 29, 30 and 31).

The Goldberg Defendants failed to raise an issue of fact that they complied with the requirements of EPTL §5-1.1-A. The Goldberg Defendants admit that in the approximately ten year period they represented Dora and plaintiff on behalf of Dora's estate, before substitution by Nicholas Kowalchyn, Esq., they did not directly provide written notice of election. They argue that their filings constituted "substantial compliance." Their arguments of "substantial compliance" and that any failure is a result of the approximately four months of intervening representation by Nicholas Kowalchyn, Esq. are unavailing and fail to raise an issue of fact.

The intervening representation does not account for the Goldberg Defendants failure to properly comply with EPTL §5-1.1-A in the first place. The Goldberg Defendants had a further opportunity during the approximately five years they represented Dora while she was still alive and they could have corrected any defects in exercising the right of election yet they failed to do so. They argued on appeal to the Appellate Division Second Department that there was "substantial compliance" and that argument was completely rejected (See *In re Cyngiel*, 130 A.D. 3d 829, *supra* at pg. 830, and Reply Exh. 43, Goldberg Defendants' Appellate Brief). There is no statutory support or precedent for their position that their efforts were enough to satisfy the requirements of EPTL §5-1.1-A. Dora's death eliminated any ability to further seek to exercise her exclusive right of election, which is not extended to Dora's estate. The Goldberg Defendants' alleged "substantial compliance" was simply not enough. The Goldberg Defendants failure to exercise the right of election, as determined by the Kings County Surrogate and the Appellate Court, is the proximate cause of plaintiff's damages.

The Goldberg Defendants fail to provide proof in opposition to partial summary judgment on plaintiff's claims of their malpractice in the constructive trust action. The Goldberg Defendants' representation was also continuous in the constructive trust action commenced in May of 2003 through January 2016 when the Goldberg Defendants withdrew as counsel. The May 10, 2016 Decision and Order of Kings County Surrogate S. Johnson, states: "in the month since Ms. Krigsman retained Greenfield Stein & Senior, the firm has developed this matter to a greater extent than prior counsel did in thirteen years of representation." (Mot. Exh. 35). The Goldberg Defendants provide no proof that the delay and failure to obtain discovery in the constructive trust action was the fault of other attorneys. Ultimately dismissal of the constructive trust action was due solely to their lack of proper representation, further warranting partial summary judgment on liability to plaintiff.

The Goldberg Defendants have not established that plaintiff's motion should be denied because discovery in the form of plaintiff's deposition and co-defendant Kowalcyn's deposition remains outstanding.

Pursuant to CPLR §3212[f], summary judgment may be denied if there are facts essential to opposition in existence that cannot be stated, and there is evidence exclusively in the movant's possession that would enable the presentation of triable issues of fact. Summary judgment cannot be avoided by a claim that discovery is needed unless an evidentiary basis is provided establishing that the discovery sought will produce relevant evidence (*Miller-Francis v. Smith-Jackson*, 113 A.D. 3d 28, 976 N.Y.S. 2d 34 [1st Dept., 2013] and *Execu/Search Group, Inc. v. Scardina*, 70 A.D. 3d 451, 895 N.Y.S. 2d 41 [1st Dept., 2010]).

A deposition addressing the issue of plaintiff's initial retention of the Goldberg Defendants and discussions about the spousal elective share, would not produce evidence exclusively in her possession and those alleged facts have not been disputed. The parties exchanged paper discovery in which plaintiff produced over 11,000 pages of materials and she has fully responded to the Goldberg Defendants' 57 interrogatories. The Goldberg Defendants have not provided proof that plaintiff's deposition will provide additional relevant and necessary evidence.

The Goldberg Defendants failed to provide proof showing that there is evidence exclusively in Mr. Kowalchyn's possession that would affect a determination on summary judgment as to their alleged malpractice. Nicholas Kowalchyn's representation of plaintiff was part of the record on Appeal to the Appellate Division Second Department prepared by the Goldberg Defendants. They are aware of his knowledge of the Constructive Trust action and have not shown the relevance of plaintiff's decision related to his retention and dismissal of services on this motion.

The Goldberg Defendant's argument that the motion should be denied because plaintiff failed to provide an expert's affidavit in support of summary judgment, is unavailing. There is no need for plaintiff to provide an expert affidavit where as here, the allegations of malpractice rely on discrete factual issues, instead of issues that are complicated and essentially "byzantine" (Wo Yee Hing Realty, Corp. v. Stern, 99 A.D. 3d 58, 949 N.Y.S. 2d 50 [1st Dept., 2012]). The Goldberg Defendants' expert, John Morken, Esq. failed to address the alleged malpractice in the constructive trust action, or address the entire record in this action and failed to raise an issue of fact (Polanco v. Greenstein & Milbauer, 150 A.D. 3d 449, 55 N.Y.S. 3d 8 [1st Dept., 2017]). Mr. Morken limited his opinion to the alleged intervening actions of Nicholas Kowalchyn, Esq. and the Goldberg Defendants' alleged "substantial compliance" with EPTL §5-1.1-A. An expert is not required to render an opinion on an issue that has been decided by the Kings County Surrogate and the Appellate Division Second Department.

Plaintiff has shown that the Goldberg Defendants represented Dora and her estate after February 15, 2013, three years before the commencement of this action. The statute of limitations is three years (CPLR §214[6]). The statute of limitations is tolled by the continuous representation doctrine, under which "a person seeking professional assistance is placed in a difficult position if required to sue his or her attorney while the attorney continues to represent them on a particular legal matter." (Encalada v. McCarthy, Chachanover & Rosado, LLP, 2018 N.Y.Slip Op. 02434 [1st Dept. 2018]). The documentation provided by defendants in support of their argument that they ceased to represent plaintiff before the substitution by Nicholas Kowalchyn, Esq., does not prove that representation ceased prior to February 15, 2013, this warrants dismissal of the second affirmative defense.

Accordingly, it is ORDERED that plaintiff's motion for partial summary judgment on the issue of liability against defendants, ISRAEL GOLDBERG, GOLDBERG & RIMBERG PLLC, GOLDBERG & RIMBERG COUNSELORS AT LAW PLLC, GOLDBERG, RIMBERG & FRIEDLANDER PLLC, and ISRAEL GOLDBERG PLLC, and to strike the second affirmative defense in their answer that asserts this action is barred by the statute of limitations, is granted, and it is further

ORDERED that the plaintiff is granted partial summary judgment on liability against defendants, ISRAEL GOLDBERG, GOLDBERG & RIMBERG PLLC, GOLDBERG & RIMBERG COUNSELORS AT LAW PLLC, GOLDBERG, RIMBERG & FRIEDLANDER PLLC, and ISRAEL GOLDBERG PLLC, and it is further,

ORDERED that the second affirmative defense in the Answer of defendants, ISRAEL GOLDBERG, GOLDBERG & RIMBERG PLLC, GOLDBERG & RIMBERG COUNSELORS AT LAW PLLC, GOLDBERG, RIMBERG & FRIEDLANDER PLLC, and ISRAEL GOLDBERG PLLC, is stricken, and it is further,

ORDERED that plaintiff's damages from defendants, ISRAEL GOLDBERG, GOLDBERG & RIMBERG PLLC, GOLDBERG & RIMBERG COUNSELORS AT LAW PLLC, GOLDBERG, RIMBERG & FRIEDLANDER PLLC, and ISRAEL GOLDBERG PLLC are to be determined at the time of trial of this action, and it is further,

ORDERED that plaintiff's claims of liability in causes of action asserted against NICHOLAS KOWALCHYN, ESQ. shall continue and be determined at the time of trial, and it is further,

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

ENTER:



MANUEL J. MENDEZ,

Dated: April 19, 2018

J.S.C.

MANUEL J. MENDEZ
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE