Gross v Aronson, Mayefsky & Sloan, LLP
2018 NY Slip Op 31590(U)
July 10, 2018
Supreme Court, New York County
Docket Number: 153274/2017
Judge: Anthony Cannataro
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

Jacqueline Toboroff Gross and Leonard Toboroff, as guarantor,

Plaintiffs,

against

Aronson, Mayefsky & Sloan, LLP,

Defendant.

Index No.: 153274/2017

DECISION & ORDER

Anthony Cannataro, J.:

Defendant law firm in this legal malpractice action moves to dismiss plaintiffs' complaint, pursuant to CPLR 3211 (a) (1) and (7) based on documentary evidence and for failure to state a cause of action. For the reasons that follow, the motion is granted in part and denied in part.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff Jacqueline Toboroff Gross (Jacqueline) entered into a written retainer agreement with defendant Aronson, Mayefsky & Sloan, LLP (AMS) on September 18, 2013. The retainer provided that AMS would seek a settlement agreement with Jacqueline's husband, Fred Gross (husband), or if that was not possible, represent Jacqueline in subsequent matrimonial proceedings. Jacqueline's father, Leonard Toboroff (Leonard), served as guarantor on this agreement. When a settlement was not reached, a divorce action was commenced on November 7, 2013. At that time, Jacqueline and her husband's marital assets included $3,322,000 held in three investment accounts: Shwab Account ending in 6185; Shwab Account ending in 2091; Capital One Account ending in 8194 (together, the Marital Accounts).

Jacqueline and her husband entered into a "so-ordered" stipulation on November 17, 2014 (the November Stipulation) requiring the husband to pay Jacqueline $12,000 per month in temporary maintenance and child support, 100% of the children's extracurricular activity costs and certain additional expenses, and 50% of the cost of the children's nanny. The November Stipulation specified that the husband could access the Schwab Account ending in 6185 to make the required payments as an advance against his equitable distribution, subject to reallocation. It also required the husband to pay AMS $100,000 for Jacqueline's counsel fees from the Capital One Account ending in 8194.

The husband withdrew approximately $1.25 million from the Marital Accounts between November 17, 2014 and December 22, 2014. As a result, AMS moved by order to show cause on December 18, 2014 (the December OSC) for an order directing the husband to comply with the November Stipulation and restraining him from transferring assets from the Marital Accounts for any other purpose. AMS also sought a temporary order for the same relief (the December TRO). The December OSC was signed with a temporary restraining order on December 22, 2014. These issues were referred to a referee in conjunction with a trial of the financial issues on October 13, 2015. The OSC was not served on the financial institutions until December 31, 2015.

Due to alleged noncompliance with the restraining order, AMS moved on or about April 1, 2016 to hold the husband in contempt. A March 1, 2017 decision in the matrimonial court, held that the husband was not in contempt but found that of the $365,398.50 withdrawn by the husband after the December TRO went into effect, $195,053 was removed improperly and should be replaced to the Schwab Account ending in 6185.

Jacqueline and her husband also entered a Parenting Agreement on about February 23, 2015. Thereafter, the husband moved for sole custody of the children on the grounds that Jacqueline allegedly neglected their children in violation of the Parenting Agreement, but the motion was denied. Additionally, the parties entered a "so-ordered" stipulation on May 26, 2015 providing that the husband would pay AMS $70,000 for Jacqueline's counsel fees from the Schwab Account ending in 6185 as an advance against his equitable distribution, subject to

reallocation. Finally, after AMS was discharged, Jacqueline, with new counsel, sought and obtained an order of protection against her husband.

On November 21, 2017 a referee issued a decision in the divorce proceeding, awarding Jacqueline a net equitable distribution of more than $1.75 million and $108,000 in maintenance arrears from the filing date. The decision also awarded $250,000 in additional counsel fees to AMS.

ARGUMENTS

On its motion to dismiss, AMS argues that it zealously represented Jacqueline throughout three years of litigation, any delay and/or additional expenses were the result of the husband's recalcitrance, and the instant action is merely an attempt to avoid payment of legal fees. Defendant asserts that as Leonard was a guarantor rather than AMS' client, he has no privity of contract, and therefore his malpractice claims should be dismissed. Defendant further argues that Jacqueline's malpractice claims should be dismissed as she has failed to allege facts to support them and documentary evidence precludes a finding of negligence, proximate cause, or damages on the part of AMS. Finally, defendant asserts that the Judiciary Law § 487 claim fails as no extreme or egregious deceit has been alleged, documentary evidence shows that any prolonging of the action was due to the husband's actions, and any remedy could only be sought in the underlying matrimonial action.

In response, plaintiff claims that AMS ran up a large legal bill while failing and neglecting to protect Jacqueline's marital assets and equitable distribution rights. Plaintiffs argue that Leonard signed a written guaranty at AMS' specific request and insistence, creating privity. Plaintiffs assert that defendant's malpractice was a result of its failure to timely notify financial institutions of the pending matrimonial action and the December TRO which directly caused plaintiff to permanently lose her equitable distributive award. Plaintiffs also argue that the evidence defendant relied on is legally insufficient to be considered documentary evidence.

DISCUSSION

On a motion to dismiss pursuant to CPLR 3211 courts afford pleadings a "liberal construction" and "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" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]).
A motion to dismiss for failure to state a cause of action under CPLR 3211(a)(7) will be denied if the pleading's four corners provide factual allegations which taken together manifest any cause of action cognizable at law (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). "Under CPLR 3211(a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Leon* at 88).

"A cause of action for legal malpractice cannot be stated in the absence of an attorney-client relationship" (*Waggoner v Caruso*, 68 AD3d 1, 5 [1st Dept 2009], affd 14 NY3d 874 [2010]). A party may recover damages for attorney malpractice by "showing that there was either actual privity of contract between the parties or a relationship so close as to approach that of privity" (*Prudential Ins. Co. of Am. v Dewey, Ballantine, Bushby, Palmer & Wood*, 80 NY2d 377, 382 [1992]). To establish privity, the accused party must have been aware that their statements were relied upon by a known party to further a specific purpose and have engaged in conduct linking them to the relying party and evincing an understanding of such reliance (*Id).*

In this case, Leonard entered into a guarantee agreement with AMS for payment of legal fees associated with Jacqueline's divorce action and communicated with AMS about Jacqueline's ongoing case. No facts are alleged that would tend to show that AMS was aware Leonard was relying on their statements or did so for a specific purpose.

However, a third party may maintain a malpractice claim against an attorney without privity if the existence of fraud, collusion, malicious acts or other special circumstances is established (*Estate of Schneider v Finmann*, 15 NY3d 306, 308-309 [2010]).

Here, the only allegations of fraud, collusion, malicious acts, or other circumstances relate to plaintiffs Judiciary Law § 487 claim, which, as discussed below, is inapposite here. Thus, the malpractice claims on Leonard's behalf must be dismissed.

"An action for legal malpractice requires proof of three elements: (1) that the attorney was negligent; (2) that such negligence was a proximate cause of plaintiff's losses; and (3) proof of actual damages" (*Brooks v Lewin*, 21 AD3d 731, 734 [1st Dept 2005]). Plaintiff must demonstrate that defendant "failed to exercise the degree of care, skill and diligence commonly possessed by a member of the legal profession" (*Rubinberg v Walker*, 252 AD2d 466, 467 [1st Dept 1998]). To establish proximate cause, the "plaintiff must demonstrate that but for the attorney's negligence, she would have prevailed in the underlying matter or would not have sustained any ascertainable damages" (*Id.*).

Jacqueline's first cause of action asserts that AMS was negligent in their preparation of both the November 2014 Stipulation and the December OSC and in failing to timely notify financial institutions of the restraint on the Marital Accounts, causing her losses of $365,398 from the distributive award and $170,000 in legal fees. In response, AMS initially asserts that documentary evidence shows the March 1, 2017 decision on the contempt motion resolved the issue of the $365,398 in losses from the distributive award. However, that ruling does not conclusively establish a defense to the asserted claim of legal malpractice as a matter of law. AMS then asserts that the November 2017 decision issued in the underlying divorce proceeding, in which Jacqueline received a net equitable distribution of more than $1,750,000 representing, in part, 50% of the marital estate as of the date of commencement of the divorce action, conclusively provides a defense to plaintiff's legal malpractice claim. As plaintiff's award was based on the value of the Marital Accounts prior to the November 2014 Stipulation and the December OSC, plaintiffs cannot prove that AMS' alleged negligence caused a reduction in her equitable distribution. The portion of plaintiff's first cause of action alleging losses of $365,398 fails and the issue of collectability vis-à-vis Jacqueline's share of the equitable distribution does not arise because no damages due to AMS' actions can be shown.

Further, Jacqueline complains that AMS neglected to specify that counsel fees paid to AMS were attributable to or an advance against the husband's distributive share in equitable distribution, subject to reallocation. AMS again raises the defense of documentary evidence citing "so-ordered" stipulations. Here a November 17, 2014 "so-ordered" stipulation holds that the husband shall pay $100,000 in legal fees to AMS subject to reallocation against either party's ultimate entitlement to any equitable distribution of marital assets. The same language was used in a May 26, 2015 "so-ordered" stipulation addressing the remaining $70,000 in legal fees. Documentary evidence disproves the complained of failure to specify payment of legal fees. Thus, Jacqueline's first cause of action is dismissed both as to losses of the legal fees and losses of the distributive award.

Jacqueline's second cause of action alleges that AMS failed to enforce the November stipulation by not compelling the husband to make agreed upon payments for extracurricular activities and nanny expenses, amounting to $45,000 as of the time of filing and continuing. AMS cites to the December OSC as documentary evidence of their effort to enforce the stipulation to claim a lack of negligence, as well as to the husband's own actions tending to show that AMS was not the proximate cause, and to the Referee's award of $38,597.75 to demonstrate a lack of damages. While the December OSC demonstrates an effort to enforce the stipulation, it has not been conclusively established at this stage that this alone meets the standard of care possessed by a member of the legal profession under the circumstances. While the husband was responsible for not paying the required expenses, the attorneys may still be liable for failing to properly enforce the agreement. Finally, while Jacqueline was awarded $38,597.75 by the Referee, the complaint includes continuing expenses which may not have been addressed. Therefore, Jacqueline's second cause of action cannot be dismissed at this stage of litigation.

Jacqueline's third cause of action claims that defendant neglected to prepare an enforceable and properly tailored Parenting Agreement, which ultimately allowed the husband to seek custody of the children causing damage to Jacqueline in the form of legal fees in the amount of $100,000. Speculation on future events is insufficient to establish proximate cause

(*Brooks, supra*). Here, Jacqueline speculates that had the Parenting Agreement been written differently, the husband would not have taken action to obtain sole custody of the children. As that claim can only be speculative, there is no ability to demonstrate proximate cause. Therefore, Jacqueline's third cause of action relating to the Parenting Agreement is dismissed.

Jacqueline's fourth cause of action asserts that AMS was negligent in failing to seek an order of protection against the husband, and that she is entitled to damages in the amount of the $25,000, representing, fees paid to her subsequent attorneys. Jacqueline's complaint alleges ongoing harassment by the husband, however, this claim is lacking in particularity and does not conclusively demonstrate that failure to seek an order of protection constitutes negligence. Courts have held that when subsequent counsel has sufficient time and opportunity to protect a client's rights, defendant-attorney's alleged negligence cannot be considered a proximate cause of the client's injury (*Maksimiak v Schwartzapfel Novick Truhowsky Marcus, P.C.*, 82 AD3d 652, 652 [1st Dept 2011]). Jacqueline asserts that despite subsequent counsel's actions, the order of protection was not timely sought and her rights were not adequately protected. Although AMS raises in defense that the same cost of implementing an order of protection would have been incurred if they had taken such action themselves, the comparable expenses may differ and must be proven. As such, while the pleadings do not necessarily show negligence or damages, the fourth cause of action cannot be dismissed at this stage of litigation.

To prove a claim for relief under Judiciary Law § 487, plaintiff must show intentional deceit of a party or a court and that such deceit proximately caused plaintiff's injury (*All. Network, LLC v Sidley Austin LLP*, 43 Misc. 3d 848-859 [NY Sup 2014]). Relief under Judiciary Law § 487 is not available if the moving party "fails to show either a deceit that reaches the level of egregious conduct or a chronic and extreme pattern of behavior on the part of the defendant attorneys" (*Savitt v Greenberg Traurig, LLP*, 126 AD3d 506, 507 [1st Dept 2015]). The allegations regarding the alleged deceit, including the scienter element, must be pleaded with sufficient particularity (*Briarpatch Ltd., L.P. v Frankfurt Garbus Klein & Selz, P.C.*, 13 AD3d 296, 297 [1st Dept 2004]). Here, plaintiffs allege that defendant's actions in representing Jacqueline in the

underlying divorce action, including making misrepresentations and failing to advance her interests, amount to a scheme to prolong the litigation and churn legal fees. Such generalized allegations do not meet the requirement of a sufficiently particular pleading specifying egregious conduct or an extreme pattern of behavior. Thus, the Judiciary Law § 487 claim is lacking and must be dismissed. Accordingly, it is

ORDERED that defendant's motion to dismiss is granted to the extent that plaintiff Leonard Toboroff is dismissed from all causes of action; and it is further

ORDERED that defendant's motion to dismiss is granted with respect to the first, third and fifth causes of action; and it is further

ORDERED that the motion is in all other respects denied; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 490, 111 Centre Street, New York, New York on July 25, 2018 at 2:15PM.

Dated: 7/10/18

ENTER:

Anthony Cannataro, JSC

HON. ANTHONY CANNATARO
J.S.C.