

Chu v Legere

2018 NY Slip Op 32269(U)

September 14, 2018

Supreme Court, New York County

Docket Number: 150065/2018

Judge: Arlene P. Bluth

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

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

-----X
**BARBARA CHU, as Executor of the ESTATE OF
ANNE MARIE CHU,**

Plaintiff,

**Index No. 150065/2018
Motion Seq: 001**

DECISION & ORDER

-against-

ARLENE P. BLUTH, JSC

MARK P. LEGERE, ESQ.,

Defendant.

-----X

Defendant’s motion to dismiss the complaint is denied.

Background

This legal malpractice case arises out of defendant’s relationship with plaintiff’s sister (“Anne”). Defendant met Anne in 1988 and began a friendship that lasted until Anne passed away on July 25, 2016. Defendant also represented Anne in various legal matters including, but not limited to, an uncontested divorce in the 1990s, a real estate transfer in 2003 and a lease agreement for a studio in Queens in 2010.

Plaintiff contends that her sister sought legal advice from defendant to ensure that the disposition of her artwork would conform to her wishes. Plaintiff alleges that defendant failed to prepare or execute an updated will, prepare an updated inventory of assets and create a trust (or similar vehicle) to convey Anne’s artwork as she desired. Plaintiff maintains that after Anne passed away, her estate has faced numerous baseless claims and that these problems arise directly from defendant’s malpractice.

Anne last updated her will in 2003 and plaintiff insists that in the thirteen years before her death, she had made many changes to her assets and had become estranged from her husband. Plaintiff contends that during a deposition in a parallel proceeding in Queens County Surrogate's Court, defendant admitted that he had not advised Anne about updating her will and waited until the final months of her illness when Anne was no longer able to attempt to complete the required tasks.

Plaintiff also alleges that there were a series of meetings between defendant and Anne about the sale and conservation of her artwork. At a meeting on June 30, 2016, plaintiff argues that defendant prepared three separate durable power of attorney ("POA") documents for Anne to execute and that two of the three were executed. Plaintiff insists that defendant did not include a statutory gift rider to these POAs which would have allowed an agent to assist Anne with estate planning.

Defendant moves to dismiss and contends that although he represented Anne in certain legal matters, he did not represent her in connection with any estate planning. Defendant argues that Anne was his friend and he tried to help her but his assistance had nothing to do with his occupation. Defendant argues that he had no experience with estate planning and gave Anne a recommendation for another attorney when she expressed an interest in creating a trust for her artwork.

Defendant argues that plaintiff failed to properly plead a legal malpractice claim because plaintiff does not allege facts demonstrating that an attorney-client relationship existed. Defendant contends that plaintiff has only set forth conclusory facts and that plaintiff failed to plead actual and ascertainable damages.

In opposition, plaintiff insists that Anne did not want her purportedly estranged spouse, Philippe Jacquet, to possess the majority of her artwork and defendant's failure to comply with this desire has caused unnecessary litigation expenses for the estate. Plaintiff argues that it has articulated actual and ascertainable damages because defendant's failure to act forced Anne's estate to make distributions of Anne's artwork from an outdated will rather than from a trust that could continue her legacy. Plaintiff also claims the artwork has lost value.

In reply, defendant contends that plaintiff cannot show that the estate would have obtained a more favorable outcome but for defendant's alleged malpractice. Defendant insists that he never undertook to establish the trust nor did Anne expect him to do so.

Discussion

"When considering these pre-answer motions to dismiss the complaint for failure to state a cause of action, we must give the pleadings a liberal construction, accept the allegations as true and accord the plaintiffs every possible favorable inference. We may also consider affidavits submitted by plaintiffs to remedy any defects in the complaint" (*Chanko v American Broadcasting Companies Inc.*, 27 NY3d 46, 52, 29 NYS3d 879 [2016]).

"In an action to recover damages for legal malpractice, a plaintiff must demonstrate that the attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession and that the attorney's breach of this duty proximately caused plaintiff to sustain actual and ascertainable damages. 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, Corker & Sauer*, 8 NY3d 438, 442, 835 NYS2d 534 [2007] [internal quotations and citations omitted]).

“While a plaintiff’s unilateral belief does not confer upon him or her the status of a client, an attorney-client relationship may exist in the absence of a formal retainer agreement. To establish an attorney-client relationship there must be an explicit undertaking to perform a specific task” (*Terio v Spodek*, 63 AD3d 719, 721, 880 NYS2d 679 [2d Dept 2009]).

Plaintiff has stated a cause of action for legal malpractice and defendant’s motion to dismiss is denied. Here, the Court must focus initially on the complaint which alleges that Anne wanted to place her artwork in a trust, sought defendant’s assistance in creating that trust and that a trust was never created (NYSCEF Doc. No. 2, ¶¶ 16, 17, 22). Although defendant points to his own testimony in a parallel proceeding in Surrogate’s Court as proof that he never represented Anne in an estate planning capacity, that is not enough to justify dismissal. The Court must take plaintiff’s allegations as true– and those claims contend that defendant was Anne’s long-time attorney, he prepared three POA documents for Anne to sign just a few weeks before she died and defendant’s failure to create a trust or update the will caused Anne’s estate damage. That states a cause of action for legal malpractice.

Plaintiff’s affidavit also defeats defendant’s motion. She claims that Anne told a group of people, including defendant, on June 30, 2016 that she had asked defendant to form a trust and that she witnessed defendant and Anne have a private meeting in which Anne signed papers including a POA (NYSCEF Doc. No. 18, ¶¶ 22-25). Plaintiff also claims that defendant visited Anne in the hospital in July 2016 with a revised will but that Anne was too ill to sign the document (*id.* ¶¶ 43-46).

In addition, plaintiff’s affidavit attaches an email from defendant to Beatrix Chu (plaintiff’s daughter and Anne’s niece) on July 15, 2016 in which defendant sent a list of

“specific items that Anne designated in her will. The purpose of providing you this is to assist you [in] determining whether these items still exist. I will be asking Anne if it is her continued desire that these items be designed for the same people as she set out in 2003. It will also help determine the remainder of the art that is intended by Anne to go into a trust” (NYSCEF Doc. No. 22). This email suggests that defendant was, at the very least, assisting in estate planning for Anne. Whether that was in his capacity as a friend or as an attorney will be determined later, but the email shows that defendant had some role and it compels this Court to deny defendant’s motion at this stage of the litigation.

With respect to the damages issue, the fact that Anne’s wishes were allegedly not followed constitutes actual and ascertainable damages. Plaintiff insists that these damages are evident in the expenses incurred in parallel litigations involving the estate and in a diminution of value in the artwork.

Summary

The Court recognizes that an attorney’s representation of a client on several distinct matters over many years does not automatically mean that the attorney represents a client for all matters. However, the fact that defendant was Anne’s sometime attorney helps defeat the motion to dismiss because, taking plaintiff’s allegations as true, it is clear that Anne did use his professional services at times. And plaintiff claims that defendant took actions in his capacity as an attorney relating to POAs and to update Anne’s will. Defendant’s denial of plaintiff’s allegations is not enough for this Court to grant his motion at this stage of the litigation.

Discovery may reveal that defendant was merely assisting his sick friend to gather information to present to a qualified estate attorney rather than acting as her attorney, that his

efforts caused the estate no damage or that, even if he did undertake to represent her, he simply did not have enough time to complete certain tasks before Anne passed away. But the Court cannot grant defendant's motion to dismiss under the circumstances here.


Accordingly, it is hereby

ORDERED that defendant's motion to dismiss is denied; and it is further

ORDERED that defendant is directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry and it is further

ORDERED that the parties are directed to appear for a preliminary conference in Room 432 at 60 Centre Street on December 11, 2018 at 2:15 p.m.

Dated: September 14, 2018
New York, New York



ARLENE P. BLUTH, JSC

HON. ARLENE P. BLUTH