SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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SUSAN RAIBLE BIRCH,

Petitioner,

-against-

NOVICK & ASSOCIATES, P.C. and MICHAEL J. SULLIVAN,

Respondent.

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DECISION AND ORDER
Index №.: 161445/13
Motion Seq. Nos. 004 and 005

CAROL R. EDMEAD, J.S.C.:

Plaintiff (Raible Birch, or Plaintiff) moves, pursuant to CPLR 3212, for summary judgment on her claim of legal malpractice against defendants Novick & Associates (Novick) and Michael Sullivan (Sullivan) (collectively, Defendants) (motion seq. No. 004). Defendants move for summary judgment dismissing Plaintiff's complaint, or in the alternative dismissing discrete categories of damages alleged by Plaintiff (motion seq. No. 005). The motions are consolidated for disposition.

BACKGROUND

Plaintiff's father, Frank Raible, died in 1976. Plaintiff's mother subsequently married Donald Kappenberg (Kappenberg). Plaintiff's mother, Charlotte Raible Kappenberg, died on March 20, 2009. She was survived by Kappenberg, as well as Plaintiff and her two sisters, Charlotte Joan Raible and Veronica Raible.[1]

On April 2, 2009, Plaintiff retained Novick to represent her interests in her mother's estate, and Sullivan was the attorney at Novick principally responsible for her representation.

[1] Veronica Raible died in 2015.

The mother's will that was admitted to probate (the 2008 Will) provided for a $2.1 million trust for Kappenberg's benefit; that trust was to be divided among Plaintiff and her sisters upon Kappenberg's death. The total amount of the estate, however, was over $14 million and Plaintiff was concerned that Kappenberg would assert a right of election.

In an email dated July 31, 2009 Sullivan advised Plaintiff that Kappenberg had been discussing his right of election with his attorneys (NYSCEF doc No. 66). Plaintiff met with Sullivan on September 15, 2009. In an affidavit, Plaintiff recounts that she brought up the existence of a prenuptial agreement that, she believed, would bar Kappenberg's right to election:

> "we discussed, at length, the prenuptial agreement between my mother and Kappenberg. I knew that, by signing the prenuptial agreement, Kappenberg had waived rights to my mother's estate, but I was concerned that he had forgotten this (or would choose to ignore it) and that he would make a substantial claim on my mother's estate. Sullivan himself had performed an analysis and advised me that a right of election would decrease my inheritance significantly"

(NYSCEF doc No. 58, ¶ 12).

In October 2009, Kappenberg asserted his right of election. In an email dated October 26, 2009, Plaintiff reacted ("rather disturbing news") and hearkened back to the prenup: "As a reminder from our meeting … [Kappenberg] did sign a prenup late April/early May of 1981" (NYSCEF doc No. 69). Plaintiff also incorrectly identified Milbank, Tweed, Hadley & McCloy as the law firm that drafted the agreement (*id.*).

Plaintiff states that she continued to remind Sullivan about the prenup (NYSCEF doc No. 58, ¶ 58), and, on May 6, 2010 sent him an email detailing her vivid recollection of her mother executing a prenup in 1981 (NYSCEF doc No. 70). On July 19, 2010, Plaintiff sent Sullivan another email urging him to depose Kappenberg, and to ask him about the prenup, as Kappenberg "is unable to lie under oath as I witnessed years ago when Mom got into that mess

in Florida" (NYSCEF doc No. 71). Plaintiff alleges Sullivan responded by failing to take the steps necessary to locate the prenup.

On December 8, 2010, Sullivan emailed Plaintiff to advise her that he would appear on her behalf at a court conference on December 13, 2010 (NYSCEF doc No. 72). The purpose of the conference, Sullivan wrote, was "to resolve the scheduling issues and presumably set a deadline for the completion of discovery" (*id.*). The appearance was before Nassau County Surrogate's Court (File No. 355824, Hon. John B. Riordan).

According to Sullivan, "the purpose of the conference was to settle the objections to probate filed by Plaintiff's sister Veronica Raible, which was the only remaining objection to the probate of Plaintiff's mother's mother's 2008 Will" At the conference, Veronica Raible, who, as a disabled adult represented by a guardian *ad litem*, settled her formal objection.[2] Counsel for the estate, at an allocution of the settlement on the record, stated that "[t]here will be no objections to the right of election that has been filed by Donald Kappenberg" (NYSCEF doc No. 73 at 7).

Sullivan's contribution to the allocution was brief, but he did assert that he was authorized to enter into the stipulation settling Veronica Raible's objections to probate of the 2008 Will:

"THE COURT: As I understand it, your client, Susan Raible, is not contributing to the financial -- the financing of this settlement?

SULLIVAN: That correct, Judge.

THE COURT: And you're authorized to enter into the stipulation on her behalf?

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[2] The guardaian *ad litem* read the terms of the settlement into the record:

> "In the totality of the circumstances, the Ward will be the beneficiary of a total economic value of three hundred and forty-five thousand dollars, comprised in cash of one hundred ninety-five thousand dollars, and fifty thousand dollars will be forgiveness of debt"

(NYSCEF doc No. 73 at 8).

SULLIVAN: I am authorized to enter into the stipulation on her behalf"

(*id.* at 9-10).

Plaintiff did not authorize Sullivan to waive any objection to Kappenberg's right of election (NYSCEF doc No. 58, ¶ 19).[3] Following the December 13, 2010 appearance at Surrogate's Court, Plaintiff continued to push Sullivan regarding the prenup. Sullivan told her:

> "that opposing counsel was resisting his requests to search for the prenuptial agreement because he (Sullivan) had agreed to waive my objection to the right of election. Shortly after that, Sullivan provided me with a copy of the transcript of the December 2010 settlement .... That was when I first learned of the December 13, 2010 settlement in which Sullivan had allegedly waived my right to object to [Kappenberg's] right of election"

(NYSCEF doc No. 58, ¶ 20).

Plaintiff once again directed Defendants to locate the prenup. On January 25, 2011, Sullivan emailed Plaintiff to let her know that Novick had located a copy of the prenup--the law office of Farrell Fritz, P.C., had the copy (NYSCEF doc No. 74). Sullivan noted that "[a] copy is not enough to make the agreement enforceable, but it certainly gives us a 'lead' (*id.*).

After learning of what she describes as "an unauthorized settlement," Plaintiff "did not trust" Sullivan or Novick's "ability to correct the mistake" (NYSCEF doc No. 58, ¶ 23). Plaintiff states that she was "forced" by these circumstances to hire two additional attorney's, Alfred Marks (Marks) of Day Pitney LLP and Richard Weinblatt (Weinblatt) of Haley, Weinblatt & Calcagni (*id.*). Plaintiff also continued to retain Novick and Sullivan in this matter. Ultimately, Plaintiff settled her claims, in December 2012, with the estate paying Plaintiff $2.3 million (NYSCEF doc No. 134).

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[3] Plaintiff does not specifically argue that Defendant was negligent in entering into the stipulation absent a waiver of objections of Kappenberg's right of election.

On her claim for legal malpractice, Plaintiff seeks to recover $331,699.59 in legal expenses she paid in connection to the resolution of her mother's estate. This amount consists of the amount she paid to Novick before the November 12, 2010 conference, as well as the amount she paid to Novick, Day Pitney and Haley, Weinblatt & Calgani.

Plaintiff's contends that Defendants committed malpractice in two ways: (1) that Sullivan waived Plaintiff's objection to Kappenberg's right of election without her authorization; and (2) that Defendants failed to timely locate and enforce the prenuptial agreement. In these competing motions for summary judgment, Plaintiff argues that the malpractice is clear, and can be decided summarily, while defendants argue that their alleged negligence did not proximately cause any loss to Plaintiff.

DISCUSSION

"Summary judgment must be granted if the proponent makes 'a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact,' and the opponent fails to rebut that showing" (*Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). However, if the moving party fails to make a prima facie showing, the court must deny the motion, "'*regardless of the sufficiency of the opposing papers*'" (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008], quoting *Alvarez*, 68 NY2d at 324).

An action for legal malpractice requires proof of three elements: "(1) the negligence of the attorney; (2) that the negligence was the proximate cause of the loss sustained; and (3) proof of actual damages" (*Levine v Lacher & Lovell-Taylor*, 256 AD2d 147, 149 [1st Dept 1998]). To establish proximate causation and actual damages, plaintiffs must "meet the case within a case

requirement, demonstrating that but for the attorney's conduct the [plaintiff] client would have prevailed in the underlying matter or would not have sustained any ascertainable damages (*Leiblich v Pruzan*, 104 AD3d 462, 462-463 [1st Dept 2013] [internal quotation marks and citation omitted]).

I. Negligence

A. The Alleged Waiver of Objections to Kappenberg's Right to Election

Plaintiff refers to this branch of her negligence claim against Defendants as the "unauthorized settlement" claim.

"Rule 1.4 of the Rules of Professional conduct state that lawyers are to "promptly inform the client of: (i) any decision or circumstance with respect to which the client's informed consent" is required, … and (iii) material developments in the matter including settlement or plea offers." The Court of Appeals has held that "an attorney derives authority to manage the conduct of litigation on behalf of a client, including the authority to make certain procedural or tactical decisions … [b]ut that authority is hardly unbounded. Equally rooted in the law is the principle that, without a grant of authority from the client, an attorney cannot compromise or settle a claim" (*Hallock v State*, 64 NY2d 224, 230 [1984]).

The transcript of the allocution before Judge Riordan in the Surrogate's Court action is related to the settlement of Veronica's Raible's claims (NYSCEF doc No. 73). Plaintiff alleges that Sullivan waived Plaintiff's objections to Kappenberg's right of election without her authorization. No written waiver of those objections has been submitted, and Defendants deny that any such waiver took place.

Plaintiff's expert, Barry Seidel (Seidel), opines that Sullivan "got nothing in return for waiving her valuable right to object to Kappenberg's right of election" (NYSCEF doc No. 60).

This opinion assumes a fact that has not been established: that the Sullivan actually waived Plaintiff's objection to Kappenberg's right to election.

In an effort to establish this fact, Plaintiff submits her own affidavit, in which she states: "At some point after the conference, Sullivan told me, 'you're not going to like this,' but opposing counsel was resisting his requests to search for the prenuptial agreement because he (Sullivan) had agreed to waive my objections to the right of election" (NYSCEF doc No. 58, ¶ 20).

Moreover, a review of the transcript of the allocution of settlement of Veronica Raible's claims raises an issue of fact as to whether Sullivan waived Plaintiff's objections to Kappenberg's right of election. What is clear is that Maureen Dougherty, representing the estate, stated, in the context of stating the terms of the agreement between the estate and Veronica Raible, that "[t]here will be no objections to the right of election that has been filed by Donald Kappenberg" (NYSCEF doc No. 73 at 7).

Sullivan submits an affidavit in which he states that "the purpose of the conference was to settle the objections to probate filed by ... Veronica Raible," (NYSCEF doc No. 122, ¶ 12). Sullivan also states that while "Veronica Raible agreed to not challenge [Kappenberg's] right of election," it was his understanding that "the settlement which was read on the record ... did not impact Plaintiff's right to challenge [Kappenberg's] right of election" (NYSCEF doc No. 122, ¶¶ 15, 16).

Here, a question of fact remains as to whether Sullivan waived Plaintiff's objections to Kappenberg's right of election. Accordingly, this allegedly negligent act cannot serve as a basis for summary judgment in favor of Plaintiff on her claim for legal malpractice; nor can it serve as a basis to grant Defendants' application for summary judgment dismissing the compliant.

B. Failure to Timely Locate and Enforce the Prenuptial Agreement

Plaintiff claims that Sullivan was negligent in his search for the prenup. Plaintiff's expert, Seidel, states that "[u]nder the circumstances presented … it was incumbent on Sullivan and the Novick firm to locate and enforce the prenuptial agreement" (NYSCEF doc No. 60, ¶ 25). In his affidavit, Sullivan details the efforts Defendants made to locate the prenup:

> "Plaintiff possessed little information to assist us in locating a copy of the [prenup], except that she believed that it was drafted by the law firm Milbank, Tweed, Hadley & McCloy, LLP. Accordingly, we drafted a letter dated November 5, 2009 to the attorney representing the executors of the will of Charlotte Raible Kappenberg, and requested that he apprise us of his efforts to locate the purported [prenup] … On June 16, 2010, we wrote to the Milbank firm to ascertain whether they had a copy of the [prenup] in their possession … They advised that they did not possess a copy. Plaintiff advised us of another attorney, Carl Tunick, may have been involved in preparing the prenuptial agreement. However, Mr. Tunick predeceased [Plaintiff's mother]. We made reasonable efforts to contact Mr. Tunick's family members and former law partners, but they were unable to find anything in his files to substantiate the claim that Mr. Tunick was involved in preparing a prenuptial agreement for Plaintiff's mother"

(NYSCEF doc No. 122, ¶¶ 7-10).

Whether these efforts were reasonable under the circumstances is a question for the factfinder. As there are material questions of fact as to both branches of Plaintiff's negligence claims, Plaintiff's motion for summary judgment on her legal malpractice claim against Defendants must be denied.

II. Proximate Causation

Defendants argue that Plaintiff cannot establish proximate causation. Defendants' expert, Hochberg, opines: "Plaintiff could not have mounted a successful challenge to [Kappelberg's right of election], irrespective of when she first obtained a copy (not the original) of the prenuptial agreement. Thus, it is my opinion that Plaintiff will not be able to establish any act or omission on the part of [Defendants] proximately caused her to incur damages as a matter of

law" (NYSCEF doc No. 135, ¶ 13). Hochberg's position is based on his opinion that the best evidence rule would have barred submission of the copy of the prenuptial agreement (*id.*, ¶ 16). While acknowledging that secondary evidence is sometimes admissible, Hochberg opines that "Plaintiff has failed to provide any explanation as to how or why an original version of the prenuptial agreement was never found" and "[p]laintiff has also failed to produce any evidence capable of identifying the person who last had custody of the original" (*id.*, ¶ 18).

Plaintiff, in opposition, argues that the copy of the prenup could have been admitted by the Surrogate's Court under CPLR 4539 (a), which provides:

> "If any business, institution, or member of a profession or calling, in the regular course of business or activity has made, kept or recorded any writing, entry, print or representation and in the regular course of business has recorded, copied, or reproduced it by any process, including reproduction, which accurately reproduces or forms a durable medium for reproducing the original, such reproduction, when satisfactorily identified, is as admissible in evidence as the original, whether the original is in existence or not, and an enlargement or facsimile of such reproduction is admissible in evidence if the original reproduction is in existence and available for inspection under direction of the court. The introduction of a reproduction does not preclude admission of the original."

Defendants argument as to the admissibility of the copy is unpersuasive for several reasons. Initially, this issue was never before a court in the underlying matter. Thus, it would be speculative for this court to decide as a matter of law that the best evidence rule would have barred admission of the copy. As this case was settled, the parties did not have a full opportunity to develop through discovery facts that would inform a court's decision on whether secondary evidence is admissible. Finally, the parties were also deprived by settlement of an opportunity to develop a factual record that would clarify whether the application of CPLR 4539 (a) is applicable. For these reasons, Defendants argument that the inadmissibility of the copy prevents Plaintiff from establishing proximate causation is inconclusive.

III. Actual Damages

Defendants argue that the complaint must be dismissed, as Plaintiff has not sustained any ascertainable damages. Weinblatt, one of the attorney's Plaintiff hired after losing confidence in Defendants, who is also a CPA, sent Plaintiff an email on November 21, 2012, stating that her share of her residuary estate, "based upon [Kappenberg] receiving no elective share" was "$1,800,709.11"[4] Plaintiff submits no competing computation of what Plaintiff would have been awarded if she successfully challenged Kappenberg's right of election.

Since Plaintiff ultimately received $2.3 in the settlement, Defendants argue that she cannot show actual damages. Hochberg, Defendants' counsel, opines:

> "Plaintiff received a surplus of approximately $500,000 as a result of the efforts of [Defendants] and co-counsel .. I am advised that ... Plaintiff seeks ... to recover legal fees she paid in the amount of $331,699.59 .... [T]aking Plaintiff's claims at face value, the extra $500,00 [Defendants] obtained for Plaintiff more than offsets the *totality* of the legal fees paid by the Plaintiff concerning the Underlying Matter" (NYSCEF doc No. 25-27).

Plaintiff, in opposition, argues that the 1.8 million estimate does not take into account the residual right that Plaintiff would have had in the $2.1 million trust in Kappenberg's benefit provided for in the 2008 Will. Defendants, in reply, argue that the hypothetical worth of this residual right is impermissibly speculative and that Plaintiff waived her claim to any damages related to the residual right by not including it from its second amended damages chart.

Generally, a plaintiff in a legal malpractice action can recover for damages it expended mitigating the damage of an attorney's negligence (*Kagan Lubic Lepper Finklestein & Gold v 325 Fifth Ave. Condominium*, 2015 NY Slip Op. 31470[U] [Sup Ct, NY County, Kern, J]

[4] As to admissibility, Weinblatt's email containing the estimate would typically be privileged both as an attorney-client communication, and as a document created in contemplation of settlement. However, Plaintiff waives the privilege: (1) by contesting the estimate in her opposition to this point; and (2) by failing to object its admissibility.

[cognizable damages in a legal malpractice action include consequential damages sustained as a result of the attorney's malpractice, including expenses such as experts fees and attorney's fees"]). Here, as there are questions of fact relating to negligence, there are concomitant questions of fact related to consequential damages arising from the alleged negligence. That is, a factfinder could find that Defendants were negligent and that Plaintiff expended additional fees to remedy that negligence. In other words, a factfinder could find that, absent negligence, Plaintiff could have attained the $2.3 settlement without having to hire additional attorneys.

Moreover, it would it would be error for the court to determine that Plaintiff could not establish damages based on Weinblatt's estimate as to the amount Plaintiff would have received under the 2008 Will and the $2.3 million Plaintiff inherited under the settlement. While Defendants argue that Plaintiff's residual right to the Kappenberg trust provided for in the 2008 Will is too speculative to serve as a basis to deny summary judgment, the estimate that Defendants rely on is also, fundamentally, speculative. Moreover, the question of whether Plaintiff waived any damages claim based on this residual right is a question best reserved for the factfinder. As questions of fact as to damages remain, the branch of Defendants' motion that seeks dismissal of the complaint as Plaintiff cannot show actual damages must be denied.

Furthermore, Defendants' alternative application to limit certain categories of damages is, likewise, an issue for trial. With respect to the branch of this application that seeks dismissal of all damages related to representation prior to December 2013, the court has determined above that there is a question of fact as to whether Defendants were negligent in failing to assiduously search for the prenuptial agreement. If the factfinder answers this question in the affirmative, then damages related to Defendants' representation of Plaintiff prior to December 2013 would be appropriate.

As to the branch of the alternative application that seeks dismissal of damages related to legal bills paid by Plaintiff to Day Pitney, this question is best left the factfinder. Defendants argue that Day Pitney never made an appearance in the underlying matter and that it was unreasonable for Plaintiff to hire three law firms to help her navigate through the disposition of one estate. While "proof of consequential damages cannot be speculative or conjectural" (*Bi-Economy Mkt., Inc. v Harleysville Ins. Co. of N.Y.*, 10 NY3d 187, 193 [2008]), it would be error to determine the amount of appropriate consequential damages before the issue of liability is determined.

CONCLUSION

Accordingly, it is

ORDERED that Plaintiff's motion for summary judgment is denied; and it is further

ORDERED that the branch of Defendants' motion for summary judgment is denied; and it is further

ORDERED that counsel for Plaintiff shall serve a copy of this order on all parties within 10 days of entry.

Dated: June 14, 2019

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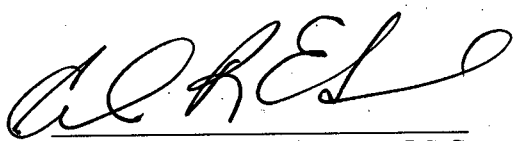

Hon. CAROL R. EDMEAD, J.S.C.

HON. CAROL R. EDMEAD
J.S.C.