

**Gross v Aronson, Mayefsky & Sloan, LLP**

2019 NY Slip Op 32972(U)

October 9, 2019

Supreme Court, New York County

Docket Number: 153274/2017

Judge: Anthony Cannataro

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. ANTHONY CANNATARO PART IAS MOTION 41EFM**

*Justice*

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JACQUELINE TOBOROFF GROSS, LEONARD  
TOBOROFF

Plaintiff,

- v -

ARONSON, MAYEFSKY & SLOAN, LLP,

Defendant.

-----X

INDEX NO. 153274/2017  
MOTION DATE 06/19/2019  
MOTION SEQ. NO. 002

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 88, 89, 92

were read on this motion to/for RENEWAL.

In its decision dated July 10, 2018, this Court granted the defendant’s motion to dismiss plaintiff’s first, third, and fifth causes of action in this action for legal malpractice. Plaintiff, Jacqueline Toboroff Gross, now moves for leave to renew so much of the prior order as dismissed her first cause of action on grounds that new facts have come to light that were not available when the motion was decided. Plaintiff’s first cause of action alleges that the defendant law firm was negligent in failing to restrain her ex-husband's access to marital accounts, failing to timely notify relevant financial institutions and freeze those accounts, and failing to specify that legal fees paid to defendants were attributable to or an advance against the ex-husband's share of the equitable distribution.

The present motion is based on transcripts of proceedings conducted before a referee in the matrimonial action and an affidavit of the ex-husband’s net worth. Plaintiff argues this new evidence demonstrates that her ex-husband is unable to pay his share of the equitable distribution judgment, which she attributes to

defendant's failure to timely freeze marital accounts, a contention which plaintiff also asserts was not addressed by the Court in its prior order. In opposition, defendant argues that plaintiff has not offered any material facts that were not known to the Court at the time of the original motion and which would change the outcome of the motion.

Defendant likewise cross-moves for leave to renew its motion to dismiss plaintiff's second and forth causes of action which alleged that defendant failed to compel the ex-husband to pay for the children's nanny and extracurricular activity expenses and failed to obtain an order of protection against the ex-husband. The cross-motion to renew relies upon transcripts indicating that successor counsel, retained after defendant's services were terminated, moved to collect these expenses and on filings in a separate action showing that successor counsel sought an order of protection against the ex-husband based solely on events that occurred after defendant's representation had ended. Plaintiff opposes the cross-motion, arguing that dismissal is inappropriate as she has not recovered the expenses due to her ex-husband's inability to pay the outstanding judgment and that the grounds for the order of protection sought by successor counsel arose while defendant was still representing plaintiff.

A motion to renew is properly made "to draw its attention to material facts which, although extant at the time of the original motion, were not then known to the party seeking renewal and, consequently, were not placed before the court" (*Matter of Beiny*, 132 AD2d 190, 209-10 [1st Dept 1987, citing *Foley v Roche*, 68 AD2d 558, 568]). The new facts relied upon must change the prior determination (*see Am. Audio Serv. Bur. Inc. V AT & T Corp.*, 33 AD3d 473, 476 [1st Dept 2006], quoting CPLR 2221).

Plaintiff's motion to renew this Court's decision as to the first cause of action relies entirely on evidence that tends to establish that her ex-husband is presently unable to pay the outstanding equitable distribution judgment. While the documents relied upon here were not previously provided to the Court, the Court was well aware

of the ex-husband's current financial difficulties and their impact on his ability to pay the judgment. Renewal is not "available to argue new legal theories which could have been previously relied upon but were not on the assumption that what was submitted was adequate" (*Matter of Beiny* at 210). Here, plaintiff simply attempts to add an argument concerning the collectability of the judgment, which is inappropriate on a motion to renew.

Defendant provides new information that materially alters this Court's decision on both remaining causes of action. In support of its motion to renew the second cause of action, defendant relies on transcripts from a separate proceeding in which a referee recommend that a judgment be entered in plaintiff's favor for outstanding expenses through December 2018 in the amount of \$109,916.18. As this judgment includes the extracurricular and nanny expenses at issue in the second cause of action, it represents a new and material fact that warrants renewal. Where documentary evidence establishes that successor counsel had sufficient time and opportunity to adequately protect plaintiff's rights, prior counsel's alleged negligence cannot be considered a proximate cause of plaintiff's alleged damages (*Maksimiak v Schwartzapfel Novick Truhowsky Marcus, P.C.*, 82 AD3d 652, 652 [1st Dept 2011]). Upon renewal the Court finds that as successor counsel obtained a judgment covering the exact expenses that defendant allegedly failed to recover, defendant's failure to seek such expenses cannot be a proximate cause of her damages and therefore plaintiff's second cause of action must be dismissed.

Defendant also provides a copy of an order to show cause seeking an order of protection against plaintiff's ex-husband filed by her new counsel. The document shows that the emergency application relied primarily on new behaviors that occurred after defendant's representation of plaintiff ended. This new information confirms that the damages sought in the present claim are too speculative, since successor counsel's action in seeking an order of protection cannot correlate to defendant's alleged

malpractice in not seeking one. Further, the cost to plaintiff, or actual damages, caused by defendant's alleged malpractice in not seeking an order of protection sooner is even more speculative and uncertain. Thus, plaintiff's fourth cause of action must also be dismissed. There being no surviving causes of action, the entire action against defendant is now disposed.

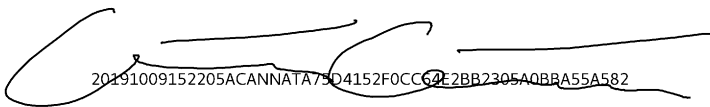
Accordingly, it is

ORDERED that plaintiff's motion for leave to renew as to the dismissal of her first cause of action is denied; and it is further

ORDERED that defendant's cross-motion for leave to renew is granted; and it is further

ORDERED that, upon renewal, defendant's motion to dismiss plaintiff's second and forth causes of action is granted.

10/9/19  
DATE



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ANTHONY CANNATARO, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE