

Mensch v Calogero

2023 NY Slip Op 30621(U)

February 28, 2023

Supreme Court, New York County

Docket Number: Index No. 155795/2022

Judge: Dakota D. Ramseur

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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. DAKOTA D. RAMSEUR PART 34M

Justice

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LOUISE MENSCH,

Plaintiff,

- v -

MICHAEL CALOGERO, BERNARD E CLAIR, COHEN,
CLAIR, LANS, GREIFER, THORPE & ROTTENSTREICH
LLP

Defendants.

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INDEX NO. 155795/2022

MOTION DATE 09/21/2022

MOTION SEQ. NO. 003

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 2, 3, 4, 5, 6, 7, 13, 19, 20, 21, 22, 23, 26, 29

were read on this motion to/for DISMISSAL.

Plaintiff, Louise Mensch (plaintiff), commenced this action for legal malpractice and breach of contract against the individual defendants Michael Calogero, Bernard E. Clair, and the defendant entity Cohen Clair, Lans Greifer, Thorpe Rottenstreich, LLP (collectively, defendants), for alleged legal malpractice stemming from defendants' legal representation of plaintiff in her divorce. Defendants now move pursuant to CPLR 311(a)(1) and (7) to dismiss the complaint, or in the alternative, dismissal of plaintiff's claim for breach of contract. The motion is opposed. For the following reasons, the motion is granted in part.

According to the complaint, on October 9, 2017, plaintiff retained defendant Cohen Clair, Lans Greifer, Thorpe Rottenstreich, LLP (law firm), including Michael Calogero and Bernard E. Clair in the underlying divorce action between plaintiff and her ex-husband in New York Supreme Court, New York County, entitled *Peter Mensch v. Louise Mensch* (index no. 309381/2017). The parties in the underlying divorce action contested the division of their assets. The divorce action settled pursuant to the July 19, 2019, filing of the so-ordered stipulation, providing for, among other things, the division of the parties' marital property.

Plaintiff alleges that she discovered certain state and federal income tax overpayments in the total amount of \$1.1 million made from accounts that were, at the time of the overpayment, parts of the marital estate, after entering into the stipulation. Plaintiff alleges that the law firm's failure to discover the tax refund amounts and the omission of those amounts in the stipulation constitute legal malpractice. Plaintiff further alleges that defendants failed to adequately divide the estate as required by the retainer agreement between plaintiff and defendants. The retainer agreement drafted by defendants and executed by both parties, describes the scope of services to be provided by defendants to plaintiff, including that defendants "[w]ill explain to you the laws pertinent to your situation, available options and the attendant risks."

Plaintiff commenced this action alleging that defendants, through omission and negligent acts, failed to advise plaintiff that there was \$1.1 million in tax overpayments made from accounts which were part of the marital estate or that a potential tax refund would be an asset class to investigate. Plaintiff further alleges that completely failed to take into account any possibility of marital funds being held by any tax authority in the drafting and negotiation of the Settlement Agreement. As a result, plaintiff alleges, she entered into the settlement agreement without knowing the true value of the marital assets. Had she known, plaintiff alleges, she would not have entered into the agreement.

In relevant part, the stipulation states that defendants have engaged in extensive discovery in the underlying action. The stipulation further states that:

“[b]oth parties expressly acknowledge that after due deliberation and careful analysis, they have instructed their attorneys not to continue to trial in this Action, or to seek further disclosure, inspection, depositions, or investigation of the other's assets and income. Each party acknowledges that he/she is sufficiently satisfied with the disclosure received to date”.

(NYSCEF doc no. 4, stipulation of settlement at § 8.2)

In support of their motion, defendants argue that the stipulation and plaintiff's allocution refute plaintiff's allegations of malpractice. Specifically, defendants contend that the stipulation indicated that the parties have engaged in discovery, that plaintiff was satisfied with the discovery received, and that plaintiff waived the opportunity to further investigate the assets that make up the marital estate. Defendants further contend that plaintiff acknowledged in the stipulation that defendants advised her to seek tax advice and that defendants are not tax attorneys. Next, defendants argue that plaintiff's breach of contract claim is duplicative of the legal malpractice, in that the facts underlying both claims are identical.

In opposition, plaintiff argues that plaintiff's claim for malpractice is not precluded by the settlement agreement, since the settlement was a product of defendants' negligence. Plaintiff further argues that the complaint states a claim for legal malpractice, since defendants failed to perform a full investigation into the marital assets, resulting in a reduced portion of the assets divided. Plaintiff also contends that Calogaro made an adverse statement, to the extent that he said that plaintiff would have obtained a more favorable settlement had defendants known about the refund at the time of the settlement negotiations. Plaintiff further argues that her cause of action against defendants should also survive, since defendants failed to provide for an adequate division of the marital estate.

DISCUSSION

CPLR § 3211(a)(1) states that: “A party may move for judgment dismissing one or more causes of action asserted against him on the grounds that a defense is founded upon documentary evidence.” Dismissal under CPLR 3211(a)(1) is warranted where the documentary evidence submitted “resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim” (*Fortis Financial Services, LLC v Fimat Futures USA*, 290 AD2d 383, 383 [1st

Dept 2002]. CPLR § 3211(a)(5) provides that “A party may move for judgment dismissing one or more causes of action asserted against him on the ground that...the cause of action may not be maintained because of...[the] statute of frauds.”

On a motion to dismiss pursuant to CPLR 3211(a)(7), the court must “accept the facts as alleged in the complaint as true, accord plaintiff 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]; *see also Chapman, Spira & Carson. LLC v Helix BioPhanna Corp.*, 115 AD3d 526, 527 [1st Dept 2014]). “Whether the plaintiff will ultimately be successful in establishing those allegations is not part of the calculus” (*Landon v Kroll Lab. Specialists, Inc.*, 22 NY3d 1,6 [2013], *rearg denied* 22 NY3d 1084 [2014] [internal quotation marks and citation omitted]).

To plead a cause of action for legal malpractice, a plaintiff must allege: (1) that the attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession; (2) that the attorney's breach of this duty proximately caused plaintiff's damages; and (3) actual and ascertainable damages. (*Nomura Asset Capital Corp. v Cadwalader, Wickersham & Taft LLP*, 26 NY3d 40, 49-50 [1st Dept 2015]).

Here, plaintiff states a cause of action for legal malpractice against defendants by alleging that plaintiff retained defendants to represent her interest in the underlying divorce action against her ex-husband, that defendants were negligent in failing to conduct a basic line of necessary investigations and inquiry regarding tax liabilities or obligations of the marital estate, and as a result, defendants were unable to properly advise plaintiff and limited the ability of plaintiff to knowledgeably participate in the negotiations in the division of marital assets—reducing her portion of the assets divided.

However, defendants demonstrate that plaintiff's claim is precluded by the settlement agreement. In *DeGregorio v Bender*, 4 AD3d 384, 385 [2d Dept 2004]), Appellate Division, Second Department reversed the lower court's denial of the defendants' motion for summary dismissal of plaintiff's claims for legal malpractice, finding that the claim was “[b]elied by the terms of the stipulation and her approval of those terms in open court” (*id.*). Specifically, the court in *DeGregorio* determined that “[t]he parties explicitly acknowledged that they had been advised by their respective attorneys of their right to disclosure regarding the value of their property and business interests, that certain disclosure had been conducted, and that to the extent it had not been conducted, they waived their right to any further disclosure” (*id.* at 385).

Here, like in *DeGregorio*, the stipulation indicates that plaintiff was satisfied with the discovery received as of the date of the settlement of the underlying action and further, plaintiff explicitly waived the opportunity to investigate further into the assets that made up the marital estate (*see Karakash v Trakas*, 163 AD3d 788, 790 [2d Dept 2018] [“stipulation of settlement in the divorce action, and a transcript from the divorce proceeding on the day the stipulation was signed by the parties” . . . “flatly refuted the plaintiff's allegation that the defendant had failed to engage in the necessary due diligence to determine the identity and value of the marital assets involved in the underlying divorce action”]).

Plaintiff does not distinguish *DeGregorio* or the other cases cited by defendants. Instead, plaintiff argues “[t]hat settlement of the action was effectively compelled by the mistakes of counsel” (*Tortura v Sullivan Papain Block McGrath & Cannavo, P.C.*, 21 AD3d 1082, 1083 [2d Dept 2005]). However, the decision in *Tortura*, including the other similar cases cited by plaintiff, are not anomalous to the circumstances herein, since, as discussed above, the stipulation of settlement clearly states plaintiff’s satisfaction with discovery at the time of the settlement. Accordingly, the branch of defendants’ motion to dismiss plaintiff’s claim sounding in legal malpractice is granted.

The Court declined to dismiss plaintiff’s claim for breach of contract. Defendants’ arguments concerning plaintiff’s breach of contract claim are focused on the circumstance where a legal malpractice claim is predicated upon the same fact and seeks the same relief as a breach of contract claim (*see Sabo v Alan B. Brill, P.C.*, 25 AD3d 420, [1st Dept 2006]; *Schulte Roth & Zabel, LLP v Kassover*, 80 AD3d 500, 501 [1st Dept 2011]). In those circumstances, the breach of contract duty claim is duplicative and should be dismissed. However, as discussed above, plaintiff’s legal malpractice claim is dismissed. As defendants’ do not argue an independent basis to dismiss the breach of contract claim, that branch of defendants’ motion is denied.

Accordingly, it is hereby

ORDERED that defendants’ motion pursuant to CPLR 3211(a)(1) is granted to the extent that plaintiff’s claim for legal malpractice is dismissed; and it is further

ORDERED that defendants shall answer the complaint within twenty (20) days; and it is further

ORDERED that defendants shall serve a copy of this decision and order upon plaintiff, with notice of entry, within ten (10) days of entry.

This constitutes the decision and order of the Court.

2/28/2023
DATE

DAKOTA D. RAMSEUR, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART OTHER
SUBMIT ORDER
FIDUCIARY APPOINTMENT REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: