

Chanos v Sheresky

2011 NY Slip Op 30856(U)

April 1, 2011

Supreme Court, New York County

Docket Number: 116681/2009

Judge: Saliann Scarpulla

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

PRESENT: SALIANN SCARPULLA

PART 19

Index Number : 116681/2009
CHANOS, AMY
 VS.
SHERESKY, NORMAN
 SEQUENCE NUMBER : 001
 DISMISS ACTION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

1 this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

~~motion and cross motion~~^{is} are decided in accordance with accompanying memorandum decision.

This constitutes the decision and order of the Court.

FILED
 APR 08 2011
 NEW YORK
 COUNTY CLERK'S OFFICE

Dated: April 1, 2011

Saliann Scarpulla
SALIANN SCARPULLA, s.c.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 19

----- X

AMY CHANOS,
Plaintiff,

Index Number 116681/2009
Submission Date 1/6/11
Mot. Seq. No. 001, 003,
004, 005

DECISION and ORDER

NORMAN SHERESKY, individually, SHERESKY,
ARONSON, MAYEFKY & SLOAN, LLP, RONALD
J. KLEIN, KLEIN, LIEBMAN AND GRESEN LLC and
DOES 1 THROUGH 100, Inclusive,

Defendants.

----- X

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Papers considered in review of this motion to dismiss:

Papers	Numbered
Sheresky Notice of Motion/Affid/Memo. in Supp.	1
Affirm. of Counsel in Opp. to Defendant's Mot.	2
Klein Notice Motion/Affid/Memo. in Supp. of Mot	3
Affirm. of Counsel in Opp. to Klein's Mot.	4
Reply Affid. in Further Supp.	5
Reply Memorandum in Further Supp.	6

FILED
APR 08 2011
COUNTY CLERK'S OFFICE
NEW YORK

HON SALIANN SCARPULLA, J.:

In this action for professional malpractice arising out of the underlying divorce
action in this Court, *Amy Chanos v James S. Chanos*, Index No. 350362/2004, plaintiff

Amy Chanos (“plaintiff”) alleges that defendant law firm Sheresky, Aronson, Mayefsky & Sloan, LLP and Norman Sheresky, individually, (hereinafter collectively “Sheresky”) and defendant accountant firm Klein Liebman and Gresen LLC and Ronald J. Klein, individually, (hereinafter collectively “Klein”) did not properly investigate and analyze the assets of the marital estate. As a result of Sheresky’s alleged faulty legal advice, plaintiff asserts, she finalized a settlement of divorce on November 28, 2006 (hereinafter “the Agreement”), obtaining substantially less from her ex-husband, non-party James Chanos, than what she would have obtained in equitable distribution.

In paragraph 11 of the complaint, plaintiff alleges that “Plaintiff discovered Defendants’ improper conduct on or after April of 2007, when Plaintiff learned from various media reports that her former husband’s actual net worth was well in excess of what Defendants advised her during the Divorce Action . . . At or around the same time, Plaintiff also discovered that Defendant Sheresky was a golfing buddy and social friend of her former husband’s attorney’s law partner.” The first three causes of action in the complaint are against Sheresky for legal malpractice, breach of fiduciary duty and breach of contract. The fourth cause of action brought against Klein is for professional negligence and breach of fiduciary duties.

In motion sequence 001, Sheresky moves pre-answer to dismiss the complaint pursuant to CPLR 3211(a)(1) and (a)(7), arguing that a copy of the Agreement attached to the moving papers is the documentary evidence that bars this action. In the alternative,

Sheresky argues that the allegations of malpractice and the existence of unaccounted-for assets are speculative and facially defective.

In motion sequence 003, Klein moves pre-answer to dismiss the fourth cause of action as barred by the statute of limitations pursuant to CPLR 3211(a)(5). Klein argues that because plaintiff's last payment was made by a check dated November 15, 2006, plaintiff's filing of this action on November 25, 2009 fell just outside of the applicable three-year statute of limitations. Plaintiff opposes Klein's motion, arguing that the applicable accrual date extended to when the allegedly negligent accounting analysis caused plaintiff's injury. Hence, plaintiff estimates the accrual date to be November 28, 2006, the date of the execution of the divorce settlement. In addition, with respect to Klein's omission of the final written valuation report, plaintiff submitted a proposed amended complaint in which she asserted an additional cause of action against Klein for fraud. Plaintiff argues that the cause of action for fraud is timely, because the applicable statute of limitations is six years

To counter plaintiff's new claim of fraud, Klein filed an amended motion to dismiss. Attached to the amended motion, Ronald J. Klein submitted an affidavit and a copy of the signed retainer agreement, evidencing that on May 20, 2004, plaintiff retained Klein Liebman & Gresen, LLC as forensic accountants to value "James S. Chanos' various business interests including, but not limited to, Kynikos Associates, Ltd" as of the date of the divorce filing (Klein Am. Mot., Ex A). Klein attests that he performed a full

evaluation of the available financial data and conveyed all of the information to Sheresky.

In his affidavit, Klein's attests that Sheresky instructed Klein in May of 2006 not to issue a written report in order to lower the cost of Klein's services. Klein argues that plaintiff's proposed amended complaint must fail, because Klein provided an accurate financial analysis, and the absence of the written report resulted from Sheresky's instructions.

Klein also moves to dismiss the complaint and/or amended complaint as against Ronald J. Klein, individually, because the retention agreement was signed only on behalf of the corporate defendant.

In motion sequence 004, plaintiff formally seeks to file an amended and supplemental complaint, or alternatively pursuant to CPLR 3211(e) for leave to replead her complaint. The purpose of the amended complaint is to reflect Sheresky's instruction to Klein not to issue a written report. Further, paragraph 11 in the original complaint, renumbered paragraph 13, was supplemented with an allegation that plaintiff "has obtained an independent expert's opinion who has corroborated that at all relevant times, the marital estate was substantially undervalued . . ." (Pl. Am. Mot., Ex. A). In the proposed amended complaint, plaintiff asserts causes of action against Sheresky for professional negligence, breach of fiduciary duties, and fraudulent concealment. As against Klein, plaintiff asserts causes of action for negligence, breach of fiduciary duty and breach of written contract. Defendants oppose granting the leave to file an amended complaint as futile.

In motion sequence 005, plaintiff seeks a protective order maintaining confidentiality and privacy of the information and documents pertaining to the business and hedge fund interests of James Chanos and to commence discovery. Motion sequences 001, 003, 004 and 005 are consolidated herein for disposition.

Under the complained-of settlement agreement (hereinafter "the Agreement"), plaintiff received significant basic maintenance for a period of one hundred twenty months, until remarriage or the period of durational cohabitation; a large one-time payment of nine hundred thousand dollars at the signing and a substantial distributive award with payments to be made in installments until 2013. Plaintiff retained the contents of the apartment she occupied in New York City and acquired a fifty percent interest in the couple's East Hampton home, as well as full ownership, lien free, of another home in Boca Raton, Florida. James Chanos also paid all of plaintiff's outstanding legal fees.

The Agreement contains a comprehensive set of disclosures, disclaimers and waivers. The preamble to the agreement states in part that "[t]he parties acknowledge and agree that they have been informed to their satisfaction of the other's assets, property, holdings, income, expenses and liabilities . . . [T]he Husband and the Wife, as well as their respective counsel and forensic and financial experts, have completed extensive disclosure, exchange of valuations and settlement discussions, all of which have resulted in a settlement of all terms affecting the Children, equitable distribution of marital

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property and spousal and child support . . .” In relevant parts, the Agreement provides the following:

17.2 Each party confirms that he or she has received substantial financial information and disclosure of the other party’s assets from the other party and such other party’s attorneys, that the other party offered to respond fully and directly to all questions such party and such party’s attorneys might have concerning such financial information, that such party regards such information as full, fair and complete disclosure, both in form and substance, and that, upon the advice of such party’s independent counsel, such party is fully aware of and understands all of the rights which he or she is surrendering or releasing pursuant to this Agreement . . .

17.4 Each party acknowledges that in connection with the negotiation of this Agreement he/she has been represented by financial experts and counsel of his/her choice and that counsel has explained the legal effect of each provision hereof. Each is satisfied that the Agreement and all of the terms and provisions hereof, is fair and equitable. Each party further acknowledges that he/she is executing this Agreement freely and voluntarily and not as the result of any fraud, coercion or duress . . .

21.13 No representations or warranties have been made by either party to the other or by anyone else except as expressly set forth in this Agreement, and this Agreement is not being executed in reliance upon any representation or warranty not expressly set forth herein . . .

Discussion

As a preliminary matter, the Court must first determine whether to grant plaintiff leave to amend the complaint. CPLR 3025(b) provides that leave to amend a pleading shall be freely given, upon such terms as may be just. Mere lateness is not a barrier to the amendment; the party opposing amendment of a pleading must establish potential for significant prejudice. *Abdelnabi v New York City Tr. Auth.*, 273 A.D.2d 114, 115 (1st Dep’t 2000). Prejudice is not found in the mere exposure of a party to greater liability. *Loomis v Civetta Corinno Constr. Corp.*, 54 N.Y.2d 18, 23 (1981). Instead, “there must

be some indication that a [party] has been hindered in the preparation of its case or has been prevented from taking some measure in support of its position.” *Id.*

While highly liberal, CPLR 3025(b) is less forgiving when the party seeking amendment knew from the beginning the facts on which the proposed amendments are made and who could have pleaded without trouble earlier, but waited until the eve of trial to do so. *See L.B. Foster Co. v Terry Contracting, Inc.*, 25 A.D.2d 721, 722 (1st Dep’t 1966). Leave to amend must also be denied where it is futile, as when a party attempts to assert a claim that is subject to dismissal. *See Viacom Intl. v Midtown Realty Co.*, 235 A.D.2d 332, 333 (1st Dep’t 1997).

In this action, the Court denies plaintiff leave to amend the complaint, because the proposed amended complaint does not remedy the defects affecting the original complaint. Below the Court shall analyze both the original, as well as the proposed amended, complaints under CPLR 3211(a)(1) and (a)(7).

Upon considering a motion pursuant to CPLR 3211(a), the court must afford the pleading a liberal construction, “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 N.Y.2d 83, 87-88 (1994). It is only where the factual allegations in the complaint are “flatly contradicted by documentary evidence” or consist of bare legal conclusions that they are not presumed to be true or accorded every possible favorable inference. *See*

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Biondi v Beekman Hill House Apt. Corp., 257 A.D.2d 76, 81 (1st Dep't 1999); CPLR 3211 (a)(1),(7).

To succeed on a motion to dismiss based on documentary evidence under CPLR 3211(a)(1), "dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law," thereby definitively disposing of the opposing party's claims. *Leon*, 84 N.Y.2d at 88; *see also Fischbach & Moore v Howell Co.*, 240 A.D.2d 157, 157 (1st Dep't 1997). On a motion to dismiss for failure to state a claim under CPLR 3211(a)(7), the Court must determine whether plaintiff has a cause of action. *Id.*

To properly plead a legal malpractice cause of action, plaintiff must sufficiently allege three elements: "the attorney's negligence; that the negligence was the proximate cause of plaintiff's loss sustained; and actual damages." *Leader v Spiegel*, 31 A.D.3d 266 "While 'a claim for legal malpractice is viable, despite settlement of the underlying action, if it is alleged that settlement of the action was effectively compelled by the mistakes of counsel,'" the First Department also makes clear that an allocation at settlement wherein the client states that she is satisfied with the attorney's performance constitutes documentary evidence that contradicts an allegation of legal malpractice. *Katebi v Fink*, 51 A.D.3d 424, 425 (1st Dep't 2008), citing *Bernstein v Oppenheim & Co. P.C.*, 160 A.D.2d 428, 430 (1990).

The documentary evidence offered in support of the defendants' motions to dismiss is largely the Agreement itself and the terms contained therein. The waivers and releases in the Agreement provide a complete defense to plaintiff's claims. *See Katebi v Fink*, 51 A.D.3d 424, 425 (1st Dep't 2008); *see also Harvey v Greenberg*, 2009 N.Y. Slip Op. 32625U, *19-20 (Sup. Ct., New York County, November 10, 2009). Under the Agreement, plaintiff unequivocally stated that she was satisfied with the accounting and legal services she received, she was fully informed by her attorneys that she was not relying on any representations by any party *or by anyone else*, and that she waived her right to conduct further financial discovery.

Further, plaintiff's assertion that she did not receive half of the marital estate does not support the cause of action of legal malpractice, because nothing in the Agreement represents that the property distribution represented half of the marital estate or any specific share. Moreover, there is no provision in the Agreement containing, or even suggesting, a representation that all of James Chanos' assets were addressed or included within the transfer of specific assets to plaintiff. *See cf. Smith v Smith*, 29 Misc.3d 1226(A), *3-4 (Sup. Ct., New York County, November 5, 2010).

Plaintiff's assertion that Sheresky instructed Klein not to issue a final financial forensic report on James Chanos' assets is insufficient to plead the element of negligence, because the complaint does not contain any allegations that any of the allegedly hidden assets and valuations would have appeared on Klein's reports. The complaint makes no

allegation that Sheresky failed to consult Klein and did not obtain the sum and substance of the upcoming report, before allegedly cancelling the issuance of the final report.¹

Under such circumstances, plaintiff has not stated a valid cause of action of professional malpractice as against either Sheresky or Klein. *See Weissman v Kessler*, 78 A.D.3d 465, 466 (1st Dep't 2010).

Plaintiff's assertion in the several supporting affidavits that her husband must have had greater assets because he often flew to London and allegedly had numerous tangled business dealing in the United Kingdom is also unavailing because such information was available to plaintiff during the pendency of the divorce. Plaintiff's vague allegation that James Chanos admitted to her some time after the divorce was finalized that he was a "billionaire," is also of no import, because plaintiff does not specify to what time period James Chanos made references regarding his financial status. Any financial gains James Chanos made in the seven years after the commencement of the divorce proceeding are irrelevant.

As an alternative theory of negligence, plaintiff, in hindsight, argues that the fact that Sheresky chose to value James Chanos' assets as of the filing of the divorce proceeding on June 30, 2004, instead of the date of the potential trial sometime in 2007,

¹ In his affidavit, Ronald J. Klein attests that he met with Sheresky on several occasions to discuss the asset analysis and orally conveyed to him all of the information that would have gone into the report. While the Court may not consider defendants' testimonial evidence on a CPLR 3211 motion to dismiss, the Court notes that plaintiff does not allege in either original or amended complaint that the written report would have contained information that had not already been orally conveyed to Sheresky or plaintiff.

in and of itself is sufficient to support a claim of legal malpractice. This argument is unpersuasive. Domestic Relation Law (“DRL”) § 236 B(4)(b) provides that the court may establish “anytime from the date of commencement of the action to the date of trial” as the valuation date for parties’ assets in a matrimonial matter. For those assets which appreciate in value solely due to random market fluctuations outside the control of the parties, also known as passive assets, the valuation date is typically established as the date of commencement of the trial. *Greenwald v Greenwald*, 164 A.D.2d 706, 716 (1st Dep’t 1991). Active assets, those assets which appreciate primarily due to the efforts of the titled spouse, should generally be valued as of the date of commencement of the divorce action. *Id.*

Here, plaintiff does not allege that James Chanos had only passive assets, and neither the original nor the proposed amended complaint supports an allegation that the choice of the date of the filing of the divorce action for asset valuation purposes fell below the ordinary and reasonable skill and knowledge commonly possessed by a member of the legal profession, because the choice was consistent with DRL § 236 B(4)(b). *See Bernstein v Oppenheim & Co., P.C.*, 160 A.D.2d 428, 430 (1st Dep’t 1990) (citations omitted) (dismissing part of the complaint that alleged dissatisfaction with attorney’s strategic choices). Sheresky may not be held liable in malpractice as a result of “selection of one among several reasonable courses of action.” *Rosner v Paley*, 65 N.Y.2d 736, 738 (1985).

The Court also dismisses the causes of action for breach of fiduciary duty and fraudulent concealment as duplicative of the malpractice cause of action and unsupported by sufficient allegations of fact. Chanos ambiguously alleges in the complaint that her former counsel was a “golf buddy” with some unidentified attorney who was a partner at a law firm that at some prior time provided legal services to James Chanos, without stating the source of the information or alleging anything that would cast a shadow on Sheresky’s undivided loyalty to plaintiff. Such innuendo is devoid of any factual value and does not support a reasonable inference of breach of fiduciary duty, fraud or malfeasance.

On the same grounds, the Court dismisses all of the causes of action brought against Klein. Plaintiff may not maintain malpractice and breach of contract causes of action against Klein on the grounds of the absence of the written report, because plaintiff admits in the proposed amended complaint that Klein abstained from drafting the written report at the request of plaintiff’s attorney.

Further, plaintiff has not sufficiently alleged that Klein negligently performed financial asset valuation. Klein’s retainer agreement, which plaintiff admittedly reviewed and signed, expressly specifies the date of the commencement of the divorce proceeding as the valuation date. Any assets or profits James Chanos acquired after June 30, 2004 were outside of Klein’s review. Because plaintiff certified through the waivers and releases contained in the Agreement that she was satisfied with the performed accounting,

and because plaintiff failed to allege any facts sufficient to support a claim of professional malpractice, the Court dismisses all of the causes of action against Klein as well. In light of the dismissal under CPLR 3212 (a)(1) and (7), the Court does not address Klein's statute of limitations argument.

In accordance with the foregoing, it is

ORDERED that defendants' motions to dismiss the complaint as against them under CPLR 3211(a)(1) and (a)(7) (motion sequences 001 and 003) is granted, and the complaint is dismissed; and it is further

ORDERED plaintiff's motion for leave to amend the complaint (motion sequence 004) is denied; and it is further

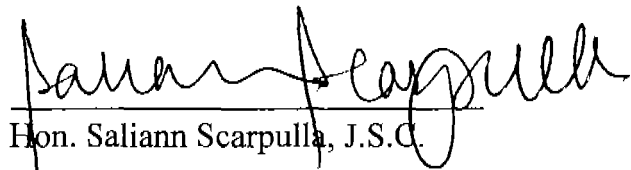
ORDERED plaintiff's motion for a protective order and order of discovery (motion sequence 005) is denied as moot; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: April, 2011
New York, New York

ENTER:


Hon. Saliann Scarpulla, J.S.C.

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