

<b>White v Chelli &amp; Bush</b>
2013 NY Slip Op 30491(U)
March 11, 2013
Supreme Court, Richmond County
Docket Number: 103745/11
Judge: Joseph J. Maltese
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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND DCM PART 3**

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**Index No.:103745/11  
Motion No.:002**

**MARSHA WHITE,**

*Plaintiff*

*against*

**DECISION & ORDER**

**HON. JOSEPH J. MALTESE**

**CHELLI & BUSH,  
MICHAEL H. BUSH, and  
JOHN DOE, ESQ. #1-3,**

*Defendants*

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The following items were considered in the review of the following motion to dismiss.

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1
Memorandum of Law in Support	2
Affirmation in Opposition	3
Declaration of Marsha White	4
Memorandum of Law in Opposition	5
Affirmation in Reply	6
Memorandum of Law in Reply	7
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

The defendants move to dismiss the plaintiff's third cause of action for legal malpractice. The motion is granted.

The plaintiff has been deaf since birth. After an automobile accident on or about April 16, 2007, the plaintiff retained Chelli & Bush to represent her in a personal injury litigation. According to the plaintiff's allegations, it was communicated to the attorneys that the plaintiff would require a sign language interpreter during all phases of the litigation. On or about November 28, 2007 the law firm of Chelli & Bush commenced a personal injury action on behalf of the plaintiff captioned *White v. Varsertriger*, Index No. 104489/2007. The plaintiff maintains

that the defendants failed to provide sign language interpreters as requested, except for the examination before trial and the preceding preparation.

The plaintiff alleges that on December 15, 2009 she was forced to participate in a judicial settlement conference without the benefit of a sign language interpreter. The plaintiff maintains that her attorney handed her a typed letter that stated the costs to proceed to a trial would be approximately \$60,000. Her attorney stated that these costs would reduce any potential recovery. While unclear from the plaintiff's complaint it appears as though the case settled in principle during that court appearance.

On December 17, 2009 the plaintiff appeared at the defendants' office to execute a standard release to complete the settlement of the case. Once again the plaintiff asserts that a sign language interpreter was not provided. The plaintiff then alleges that she did not understand the document and was unable to have her questions answered because of her inability to communicate with her attorney. However, she signed the document and the settlement was approved by the court on or about January 15, 2010 and filed with a statement of discontinuance on January 19, 2010. The plaintiff in opposition to the defendants' motion to dismiss discloses that the matter settled for \$50,000 on a \$100,000 insurance policy.

The plaintiff originally alleged two causes of action against the defendants. The first alleged a violation of New York State Human Rights Law; and the second alleged a violation of the New York City Human Rights Law. By decision and order of this court dated December 7, 2012 the plaintiff was permitted to amend her complaint to include a cause of action for legal malpractice. The defendants now move to dismiss this third cause of action pursuant to CPLR § 3211(a)(7).

### **Discussion**

When assessing the adequacy of a complaint in light of a CPLR 3211(a)(7) motion to

dismiss, the court must afford the pleadings a liberal construction, accept the allegations of the complaint as true, and provide the plaintiff the benefit of every possible favorable inference. Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining the motion to dismiss. Further, any deficiency in the complaint may be amplified by supplemental pleadings or other evidence.<sup>1</sup> Although on a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the narrow question is whether the complaint states a cognizable cause of action, the allegations in the complaint cannot be vague and conclusory. Allegations in support of a cause of action which are devoid of factual basis and are vague and conclusory are properly dismissed.<sup>2</sup>

To recover for legal malpractice, a plaintiff is required to show that the attorney failed to exercise the ordinary and reasonable skill and knowledge commonly possessed by a member of the legal profession, and that the attorney's breach of this duty caused the plaintiff to suffer actual and ascertainable damages.<sup>3</sup> Speculation or conclusory damages are insufficient, and dismissal is warranted when a plaintiff fails to establish any one of these elements.<sup>4</sup> Moreover, the "actual damages" requirement means that there must be some actual, ascertainable damage incurred by the plaintiff.<sup>5</sup> Here, the plaintiff fails to allege any recoverable damages.

The plaintiff's basis for her legal malpractice claim occurs at paragraphs 63 and 64 in her amended complaint that allege that the defendants inability to communicate with her represents a failure to comply with an attorney's basic ethical obligation. At paragraphs 66 and 67 the

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<sup>1</sup> *AG Capital Funding Partners, L.P. v. State Street Bank and Trust Co.*, 5 NY3d 582 [2005].

<sup>2</sup> *Stoianoff v. Gahona*, 248 AD2d 525 [2d Dep't. 1998].

<sup>3</sup> *See, Dombrowski v. Bulson*, 19 NY3d 347 [2012].

<sup>4</sup> *See, Russo v. Kaszovitz*, 301 AD2d 63 [1<sup>st</sup> Dep't 2002].

<sup>5</sup> *See, Zeitlin v. Greenberg, Margolis, Ziegler, Schwartz, Dratch, Fishman*, 209 AD2d 510 [2d Dep't 1994].

plaintiff alleges the following damages:

66. As a consequence of Defendants' actions and inactions, White experienced feelings of frustration, helplessness and inadequacy throughout the pendency of the litigation and during settlement conferences. Thereafter, she has experienced sleep and appetite disturbances, episodes of crying, fearfulness or trepidation, and feelings of worthlessness, anxiety and depression.

67. As a consequence of Defendants' actions and inactions, Plaintiff has been prejudiced and suffered severe emotional distress and is entitled to compensatory damages.

The Appellate Division, Second Department has made it clear that claims of damages stemming from the intentional infliction of emotional distress are not recoverable in legal malpractice actions.<sup>6</sup>

In opposition, the plaintiff seeks leave to further amend her complaint due to inartful drafting without cross-moving. While the failure to cross-move to seek to further amend the complaint is procedurally fatal to the relief sought by plaintiff, the purported grounds to allow the further amendment are without merit. To support the plaintiff's contentions that she was sustained damages due to the defendants' alleged malpractice the plaintiff asserts that she was required to ". . . order food out, thus far amounting to at least \$15,000. I used to cook everyday. Now I can't. . ." In addition, the plaintiff asserts that it was recommended that she continue physical therapy but ". . . [b]ecause I was not awarded damages for physical therapy, I did not continue treatment as I could not afford it on my own. The cost which would have been included for such medical expenses, but for the Defendants' malpractice, would have been about \$3500." And finally the plaintiff attempts to include the legal fees incurred in this action as damages that resulted from the defendants' alleged legal malpractice.

The purported damages springing from the defendants' alleged legal malpractice based on

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<sup>6</sup> See, *Epifano v. Schwartz*, 279 AD2d 501 [2d Dep't 2001]

ordering take out food and physical therapy are numbers seemingly conjured from thin air. Even if this court were to accept that these damages are properly flowing from the defendants' purported malpractice they are not substantiated in any form.

“Damages in a legal malpractice case are designed ‘to make the injured client whole’ . . . . A plaintiff’s damages may include ‘litigation expenses incurred in attempt to avoid, minimize, or reduce the damage caused by the attorney’s wrongful conduct’ . . .”<sup>7</sup> While the Court of Appeals has held that plaintiff may be awarded litigation expenses incurred to correct an attorney’s error, it specifically rejected the notion that a plaintiff could be reimbursed for the expenses incurred because of an attorney’s negligence.<sup>8</sup> Consequently, the plaintiff’s claims for damages based on the costs and attorney’s fees of this law suit is without merit.

Based on the foregoing the plaintiff’s third cause of action shall be dismissed.

Accordingly, it is hereby:

ORDERED, that the defendants’ motion to dismiss the plaintiff’s third cause of action for legal malpractice is granted; and it is further

ORDERED, that the parties shall return to DCM Part 3, 130 Stuyvesant Place, 3<sup>rd</sup> Floor, on **June 6, 2013 at 9:30 a.m.** for a Compliance Conference.

ENTER,

DATED: March 11, 2013

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Joseph J. Maltese  
Justice of the Supreme Court

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<sup>7</sup> *Rudolf v. Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438 [2007].

<sup>8</sup> *Id* at 443.