



1 of 2 DOCUMENTS

Beck & Beck, LLC v. James T. Costello

CV115029609S

**SUPERIOR COURT OF CONNECTICUT, JUDICIAL DISTRICT OF FAIRFIELD
AT BRIDGEPORT**

2013 Conn. Super. LEXIS 2181

**September 26, 2013, Decided
September 27, 2013, Filed**

NOTICE: THIS DECISION IS UNREPORTED AND MAY BE SUBJECT TO FURTHER APPELLATE REVIEW. COUNSEL IS CAUTIONED TO MAKE AN INDEPENDENT DETERMINATION OF THE STATUS OF THIS CASE.

CASE SUMMARY:

OVERVIEW: HOLDINGS: [1]-The trial court lacked jurisdiction to consider a former client's counterclaims for breach of contract and legal malpractice; [2]-The counterclaims were not justiciable because the client could not show any injury resulting from counsel's representation or an order of another court on the client's application for appointment of a receiver.

OUTCOME: Counterclaims dismissed.

JUDGES: [*1] Mary E. Sommer, J.

OPINION BY: Mary E. Sommer

OPINION

CORRECTED MEMORANDUM OF DECISION RE

MOTION TO STRIKE (MOTION #211.00)

INTRODUCTION

This action by plaintiff for payment of an alleged outstanding balance of \$1,980 for legal services was transferred from small claims court to the superior court based on defendant's four counterclaims. The four counterclaims are 1) breach of contract, 2) breach of covenant of good faith and fair dealing, 3) professional malpractice and 4) violation of Connecticut Unfair Trade Practice Act *C.G.S. 42-110b* (CUTPA).

The following is a reference to portions of prior proceedings and orders which are relevant to this motion.

On November 28, 2011, this court (Levin, J.) granted the plaintiff's motion to strike all four Counterclaims on the grounds that the defendant failed to satisfy elements required by law to maintain a cause of action in legal malpractice, breach of contract, breach of covenant of good faith and fair dealing and CUTPA. Order 111.20. The court affirmed this order on December 1, 2011. On August 8, 2012, the defendant submitted amended Counterclaims which are essentially identical to defendant's previous Counterclaims submitted on August 17, 2011. On January 17, [*2] 2013 this court (Radcliffe, J.) granted the defendant's motion to cite in a new

defendant and ordered that the August 8, 2012 Answer be the operative pleading. On February 4, 2013, plaintiff filed the subject motion to strike all Amended Counterclaims and Cross Claims on the grounds that the Amended Counterclaims and Cross Claims mirror the Counterclaims and Cross Claims previously submitted and stricken for failure to allege elements required to state a valid cause of action for each of the above four counts.

The action underlying this case was an application by defendant for appointment of a receiver for a condominium association. By way of background, plaintiff filed a motion in that case which the court heard on October 22, 2010 and denied. Thereafter, defendant terminated plaintiff's services and filed a pro se appearance on January 3, 2011. He then filed three successive motions for order. The court scheduled hearings on those motions for August 29, 2011 and September 6, 2011. Pursuant to *Practice Book section 14-3*, the court dismissed defendant's claim for failure to prosecute. Defendant has not presented any facts which would support a finding by this court that any court order [*3] issued in the underlying action for appointment of a receiver was the result of plaintiff's actions. Defendant's own conduct, or failure to act, not anything attributable to the plaintiff, resulted in dismissal. The action for appointment of receivership remained pending for almost a year after Costello terminated representation by plaintiff. There is no indication that the dismissal was related in any way to plaintiff's action. In fact, the record establishes that defendant's own actions or failure to act while representing himself were the cause of the dismissal. Furthermore, even upon dismissal of his case, defendant was not without a remedy. Connecticut law provides a statutory remedy to reinstate a dismissal case, the Accidental Failure of Suit statute *Conn. Gen. Stat. 52-592*. On October 22, 2010, Judge Tyma stated that defendant could bring another Motion for the Appointment of Receiver, and that he should consider retaining an expert. Based on the record in this case, defendant cannot claim he was harmed by the court's decision on October 22, 2010.

Rather than follow the court's suggestion, defendant has persisted in his assertions against his former attorney which he claims [*4] excuse his failure to pay according to the terms of the retainer agreement.

The basis for each of the four counts of defendant's

Counterclaim is his dissatisfaction with the legal services rendered by the plaintiff and his assertion that he suffered damages thereby. He has framed his claims by allegations of breach of contract and or malpractice for negligence by his former attorney. Defendant misapprehends the law

1) Legal malpractice

In general, the plaintiff in an attorney malpractice action must establish (1) the existence of an attorney-client relationship; (2) the attorney's wrongful act or omission; (3) causation; and (4) damages . . . All legal malpractice cases are based on underlying rights, for which the plaintiff originally sought legal representation. (Citations omitted; internal quotation marks omitted.)

Mayer v. Biafore, Florek & O'Neill, 245 Conn. 88, 92-93, 713 A.2d 1267 (1998).

In *Weiner v. Clinton*, *supra*, 100 Conn.App. 760, the Appellate Court similarly addressed requirements for a legal malpractice case. There, the plaintiffs alleged that the defendant's negligent failure to respond to discovery requests in a prior case resulted in the entry of a default judgment against [*5] them. *Id.*, 755. At the time the plaintiffs brought their malpractice suit, however, the appeal of the underlying case was still pending. Because the default judgment had not yet been fully adjudicated, the defendants argued that the plaintiffs' damages had not yet been realized and the case was not ripe for adjudication. *Id.*, 756. The Appellate Court disagreed stating that "[a] claim's justiciability is wholly separate from its merits . . . As such, an inability to establish the exact amount of damages is indicative of a defect in the plaintiff's capacity to prove his or her case, not of a deficiency in the court's subject matter jurisdiction . . . [w]e conclude that neither *Mayer* nor *Fontanella* can properly be read as requiring the dismissal of a legal malpractice action if 'damages [are] contingent upon other matters.' " *Id.*, 762-63. "We also are convinced that requiring dismissal on ripeness grounds whenever the amount of damages is 'contingent upon other matters' not only contravenes the holding and spirit of *Mayer* but ultimately leads to results that are in some instances impracticable and, in all cases undesirable." *Id.*, 763 n.5.

In *Mayer*, *supra*, the Supreme Court provided a

thorough [*6] analysis of the issue of justiciability relating to claims of legal malpractice by a client against a former attorney. It is fundamental that a case that is nonjusticiable must be dismissed for lack of subject matter jurisdiction. *Kleinman v. Marshall*, 192 Conn. 479, 484, 472 A.2d 772 (1984). "Justiciability requires (1) that there be an actual controversy between or among the parties to the dispute . . . (2) that the interests of the parties be adverse . . . (3) that the matter in controversy be capable of being adjudicated by judicial power . . . and (4) that the determination of the controversy will result in practical relief to the complainant." (Internal quotation marks and citations omitted.)

Based on the above principles and the facts before it, the Supreme Court found that an actual controversy existed, whether the statute of limitations had run and the ability to file an uninsured motorist claim on behalf of the plaintiff. Unlike the *Mayer* case, here is no actual controversy. The Defendant appears to insist that the fact that the court denied a petition for appointment of receiver forms the basis for a claim of legal malpractice against his former attorney. As noted, the underlying [*7] receivership action remained pending and was dismissed almost a year later for defendants' own failure to prosecute. It is not possible under the facts of this case for the defendant to satisfy any of the aforementioned requirements for justiciability of his claim. As stated in the case of *Lee v. Halston, Adams & Friedman*, 116 Conn.App. 289, 975 A.2d 715 (2009). "Even if Defendant

could have proven that the attorney had given bad advice, the Defendant could not have proven that this bad advice proximately caused legal injury before they knew the outcome of the underlying case. In most instances, while the underlying case remains pending there would be no legal injury proximately caused by the attorney's action or omission until and unless the Defendant lost the underlying case . . ."

According to the record in the underlying case, at the time Judge Tyma denied the motion for appointment of receiver on October 22, 2010, he told the defendant he could bring another motion for appointment of receiver and if he did so, should consider retaining an expert. Defendant was not damaged, nor was he precluded from asserting his rights or prosecuting his claim as a result of the October 22, 2010 court order. Defendant [*8] chose not to pursue his claim or in any way protect his own rights.

The plaintiff submitted the above argument to Judge Levin who granted the motion to dismiss on November 22, 2011. The present status of the defendant's counterclaims remains that he has failed to submit a justiciable claim to the court, thus depriving the court of jurisdiction, that is, the authority to decide those claims on their merits, because it lacks jurisdiction as a matter of law.

SOMMER, J.