NEW YORK SUPREME COURT - COUNTY OF BRONX
PART 4

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

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JAMES BERNARDINI,

Plaintiff

Index No. 306141/08

DECISION/ORDER

-against-

GINARTE , O'DWYER , GONZALEZ & WINOGRAD,LLP
As Successors in Interest to GINARTE, O'DWYER & WINOGRAD, LLP and GINARTE , O'DWYER & WINOGRAD , LLP, JOSEPH GINARTE, JOHN O'DWYER , MANUEL GONZALEZ and RICHARD GONZALEZ

Defendants

Present

Howard H. Sherman
Justice

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This action for legal malpractice arises out of representation provided plaintiff in connection with a claim for damages sustained in an off-duty shooting by a fellow police officer.

FACTS AND PROCEDURAL BACKGROUND

Prior Action

After the incident, which occurred in a bar during the early morning hours of April 8, 1994, plaintiff retained the services of Ginarte, O'Dwyer, Winograd & Laracuente ["Ginarte firm"].

Plaintiff filed a Notice of Claim against the City of New York ("City") on April 28, 1994 , and, in May, commenced an action asserting that the shooting and the resulting injuries and damage to plaintiff were caused solely by the negligence, carelessness and recklessness of the defendants City and Angel Villirrini. Specifically, it was alleged that the incident was caused by the negligence of the City in its training and supervision of its employee, officer Angel Villirrini, and in its failure to promulgate guidelines and regulations regarding the proper carrying of firearms, and to train and to instruct its officers concerning such guidelines /regulations [Complaint ¶¶ 12-14].

By notice dated September 2006, the City moved for an award of summary judgment dismissing the complaint contending that as a matter of law there was no issue of material fact warranting a trial. Specifically, it was argued that based upon the deposition and police interviews there was no evidence from which supervisors should have reasonably foreseen the off-duty discharge of a weapon by Villarini. In opposition, plaintiff submitted a twenty-two page affirmation in which it was argued that

material issues of fact remained unresolved in the record precluding an award of summary judgment, including questions of the credibility of the witnesses of the incident, and the recommendation of the Chief of Internal Affairs , after a formal investigation, that the discharge of the weapon by the co-defendant be characterized as "reckless" , and not as accidental. Plaintiff argued that the findings of the ballistic unit's report confirmed that the weapon , including its safety mechanism , was in working order on the night of the incident and that the amount of pressure required to pull the trigger precluded the characterization of the discharge as "accidental", it being more accurately described as an intentional or reckless act. It was also argued that the City knew or should have known of Villarini's disregard of patrol guidelines concerning holstering of his weapon, his reckless use of the firearm and prior instances of intoxication. In addition, It was argued that plaintiff was entitled to an inference adverse to the movant in light of the fact that Villarini's command personnel files could not be located , having been lost while in the City's custody.

By decision and order of this court (Bowman, J.), dated March 21, 2007, the defendant's motion was granted, the court finding that the City established that it had no notice of the conduct of Villarini , "[t]here being no complaints made against Villarini and no prior disciplinary proceedings against [him] were reported[ ]" , and , "[a]s such the City had no notice of any dangerous propensity relating to Villarini or that off duty an incident like this might occur."

Plaintiff appealed and by order of the Appellate Division, First Department , dated November 27, 2007, the order of this court was affirmed , the court finding that upon defendant's prima facie showing, plaintiff " failed to raise a triable issue of fact as to whether the City knew or should have known that Villarini had either a propensity for reckless behavior with a gun or a drinking problem ." On February 12, 2008, plaintiff's motion for leave to appeal to the Court if Appeals was denied.

This action

In July 2008, plaintiff commenced this action alleging that as a result of defendants' negligence , delay, lack of skill, failure to follow up and to properly and timely prosecute it , the claim was dismissed. It was further alleged that the defendants failed to exercise the care, skill and diligence commonly possessed and exercised by a member of the legal profession and that the "defendants' negligence was a proximate cause of the loss sustained by plaintiff : the dismissal of his causes of action against The City of New York and Villarini." (Verified Complaint ¶ Twenty First) It is also alleged that "[b]ut for the negligence of the defendants Plaintiff would have prevailed against The City of New York and/or Villarini in the underlying action (Id. ¶ Twenty Third).

No answer has been interposed.

FILED Apr 16 2009 Bronx County Clerk

MOTION

Defendants now move for an order dismissing the complaint on the grounds that it fails to state a cause of action against defendants and that there is a complete defense founded on documentary evidence [CPLR 3211 § (a) (7) and (1)]. In support of the motion , defendants submit the affidavit of Joseph Ginarte, Esq. and copies of the summons and complaint (Exhibit A), the complaint in the prior action (Exhibit B) , the submissions on the summary judgment motion (Exhibits C,D), and the decision of this court and that of the appellate court (Exhibits F-H) . Defendants argue that the "vague, conclusory allegations ... are wholly insufficient to sustain a claim for legal malpractice " and that "plaintiff has failed to establish that the Defendants breached the applicable standard of care and proximate causation , and Plaintiff has not pled, nor can he prove, that he sustained 'actual and ascertainable' damages as a result if the Defendants' purported negligence." [Affirmation of Defendants in Support of Motion ¶ 5].

Affidavit of Joseph Ginarte

In support of the motion , Ginate, a member of the Ginate, O'Dwyer, Gonzalez & Winograd LLP, attests that sometime in April 1994, Roberto Laracuente, Esq., a former member of the firm, was retained by plaintiff to commence and prosecute a personal injury action against the City of New York and Angel Villarini and that Laracuente was the sole member of the firm responsible for the prosecution of the action from 1994 until January 2004, when he left the firm [Affidavit of Joseph Ginarte ¶ ¶ 4-6]. Ginarte further attests that the firm "vigorously pursued Plaintiff's personal inury action and subsequent appeal as evidenced by the attached documentary evidence." [Id. ¶11].

Opposition Papers

In opposition to the motion , plaintiff maintains that the complaint comports sufficiently with the requirements of a claim for legal malpractice by alleging defendants' 1) failure to exercise the care , skill and diligence commonly possessed by a member of the legal profession and , 2) that this failure was a proximate cause of plaintiff's loss , and 3) that plaintiff would have been successful in the underlying personal injury claim but for the negligence of the defendants in their failure to prosecute that action in a timely fashion, to properly follow up in discovery and litigation and in their failure to pursue the claim as against the co-defendant Villarini . With reference to the issue of damages, plaintiff argues that there were serious personal injuries sustained as a result of the negligence of the defendants in the underlying action, for which damages could be reasonably inferred.

CROSS-MOTION

Plaintiff also moves for an order compelling the defendants to produce their entire legal file and all documentary material in their possession including, but not limited to , all correspondence between or among all defendants and plaintiff. In opposition, defendants argue that the cross-motion should be denied as unnecessary as the parties will set a discovery schedule if their motion is denied.

DISCUSSION AND CONCLUSIONS

It is well established that "[i]n reviewing a motion to dismiss under CPLR 3211(a)(7) for failure to state a cause of action, the allegations of the complaint are deemed to be true []" and the

> pleading will be deemed to allege whatever may be implied from its statements by reasonable intendment and the court must give the pleader the benefit of all favorable inferences that may be drawn from the complaint , without expressing its opinion as to whether the plaintiff can ultimately establish the truth of the allegations before the trier of fact.
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> Johnson v. Kings County District Attorney's Office, 308 A.D.2d 278,284 [2d Dept. 2003]; see also, Goldman v. Metro. Life Ins.Co., 5 NY3d 561, 570-571 [2005]; Gamiel v. Curtis & Riess-Curtis P.C., 16 A.D.3d 140 [1st Dept. 2005]

Upon consideration of a motion made pursuant to CPLR 3211(a)(1) and (7), the court is obliged to accept the factual allegations of the complaint as true, and to accord plaintiff the benefit of every favorable inference, the court's role is to determine "only whether the facts as alleged fit any cognizable legal theory." (Weil, Gotshal & Manges, LLP v. Fashion Boutique of Short Hills, Inc., 10 A.D.3d 267, 270 [1st Dept. 2004]) However, allegations that consist of "bare legal conclusions" or that are "inherently incredible ," need not be accepted as true (see, Ullmann v. Norma Kamali, Inc., 207 A.D.2d 691, 692 [1st Dept. 1994]), nor are those factual claims flatly contradicted by documentary evidence "entitled to such consideration." (Ullmann, at 692; see also, Beattie v. Brown & Wood, 243 A.D.2d 395 [1st Dept. 1997]). Dismissal is warranted "only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." (Arnav Indus., Inc. Retirement Trust v. Brown, Raysman, Milstein, Fledr & Steiner, 96 N.Y.2d 300,303 [2001])

It is also settled that to recover for legal malpractice, in addition to establishing the existence of the attorney-client relationship, a plaintiff must demonstrate: the negligence of the attorney, that the negligence was the proximate cause of the loss sustained, as well as actual damages (see, Schwartz v. Olshan Grundman Frome &

Rosenzweig, 302 A.D.2d 193 [1st Dept. 2003]; Leder v. Spiegel, 31 A.D.3d 266 [1st Dept. 2006]).

A plaintiff must show that the attorney "failed to exercise the ordinary reasonable skill and knowledge, commonly possessed by a member of the legal profession " (Darby & Darby v. VSI Intl., 95 NY2d 308, 313[2000] and that the attorney's breach of this professional duty caused plaintiff's actual damages (see Prudetial Ins. Co. Of Amer v. Dewey, Ballantine, Bushby, Palmer & Wood, 170 A.D.2d 108, 114 [1st Dept. 1991], *affd* 80 NY2d 377 [1992], *reconsideration den.* 81 NY2d 955 [1993]. Clearly, "[a]ttorneys may select reasonable courses of action in prosecuting their clients' cases without thereby committing malpractice, so that a purported malpractice claim that amounts only to a client's criticism of counsel's strategy may be dismissed[.]" (Dweck Law Firm, LLP v. Mann, 283 AD2d 292 [1st Dept. 2001]; see also, Albansese v. Hametz, 4 A.D.3d 379 [2d Dept. 2005];Rosner v. Paley, 65 N.Y.2d 736 [1985]). Moreover, "[a] legal malpractice action is unlikely to succeed when the attorney erred because an issue of law was unsettled or debatable[]' as [t]he perfect vision and wisdom of hindsight is an unreliable test for determining the past existence of legal malpractice." (Darby & Darby v. VSI Intl.Inc., 95 N.Y.2d 308, 315 [2000] [internal citation omitted]).

With reference to the element of proximate cause, it is clear that

> [I]n order to establish proximate cause , plaintiff must demonstrate that "but for" the attorney's negligence, plaintiff would either have prevailed in the matter at issue, or would not have sustained any "ascertainable damages"[citation omitted]. The failure to demonstrate proximate cause mandates the dismissal of a legal malpractice action regardless of whether the attorney was negligent [citation omitted].
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> Leder v. Spiegel, 31 A.D.3d 266,267-268 [1st Dept. 2006]

It has been observed that in meeting this standard, "the client must meet the 'case within a case' requirement, necessitating an initial re-evaluation of the issues raised in the underlying proceeding to demonstrate that "but for" the attorney's conduct the client would have prevailed in the underlying matter or would not have sustained any ascertainable damages [internal citations omitted]." (Weil, Gotshal & Manges, LLP v. Fashion Boutique of Short Hills, op.cit at 272 ; see also, McKenna v. Forsyth & Forsyth, 280 A.D.2d 79 [4th Dept. 2001])

With respect to the issue of damages, it is settled that "[t]o survive a CPLR 3211 (a)(7) preanswer dismissal motion, a pleading need only state allegations from which damages attributable to the defendant's conduct may reasonably be inferred [internal citations omitted]" (Lappin v. Greenberg, 34 A.D.3d 277, 279 [1st Dept. 2006]; see also, Tenzer, Greenblatt, Fallon & Kaplan v. Ellenberg, 199 A.D.2d 45 [1st Dept. 1993]). In addition, it is also settled that the ultimate collectibility of any judgment that could have been obtained in the underlying action is not an element necessary to establish a

plaintiff's claim for legal malpractice, but may where applicable, be considered in mitigation of the consequences of an attorney's malpractice (see, Lindenman v. Kreitzer, 7 A.D.3d 30 [1st Dept. 2004]).

In consideration of these standards for determination of this pre-answer dismissal motion, and upon review of the submissions in support of the motion consisting of the complaint in the underlying personal injury action, and the papers in opposition to the City's dispositive motion , as well as the decisions upon the respective determination of that motion and the appeal therefrom, it is submitted that through their documentation, defendants have failed to conclusively controvert as either "flatly contradicted" or rendered "inherently incredible " (Beattie v. Brown & Wood, 243 A.D.2d 395 [1st Dept. 1997]), plaintiff's allegations that but for the failure of his former counsel, he would have been successful in his claims for damages arising out of the shooting as against the City and as against the individual defendant, who was the acknowledged shooter. It is further submitted that plaintiff fails to set forth any basis for the relief requested in the cross-motion.

Accordingly, it is ORDERED that the motion of the defendants to dismiss the complaint and the cross-motion of the plaintiff be and hereby are denied.

This constitutes the decision and order of this court.

April 13 , 2009

Howard H. Sherman

HOWARD H. SHERMAN