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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

EMILY JANE GOODMAN

PART 17

Index Number : 100135/2011
D'ALESSANDRO, GIUSEPPE
vs
CARRO, JOHN
Sequence Number : 001
DISM ACTION/ INCONVENIENT FORUM

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

Notice of Motion/Order to Show Cause _____ | for _____ | No(s). 1-3
Answering Affidavits — Exhibits _____ | No(s). 4-6
Replying Affidavits _____ | No(s). 7-8

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum decision and order.

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

FILED
MAR 06 2012
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 2/29/12

Emily Jane Goodman, J.S.C.
EMILY JANE GOODMAN

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 17

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GIUSEPPE D'ALESSANDRO,

Index No.: 100135/2011

Plaintiff,

DECISION & ORDER

-against-

JOHN CARRO, JOHN S. CARRO, BARTLY MITCHELL, DASIL ELIUS VELEZ, CARRO & MITCHELL, LLP., and CARRO, VELEZ, CARRO & MITCHELL, LLP.,

Defendants.

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EMILY JANE GOODMAN, J.S.C.:

Plaintiff Giuseppe D'Alessandro (Plaintiff) sues defendants John Carro, John S. Carro, Bartly Mitchell, Dasil Elius Velez, Carro & Mitchell, LLP., and Carro, Velez, Carro & Mitchell, LLP. (collectively Defendants) for legal malpractice stemming from representation in a 1993 criminal appeal. Plaintiff seeks damages of $26 million for being subjected to wrongful incarceration, loss of reputation, income and consortium, and for emotional and physical distress. Defendants move to dismiss on the grounds of documentary evidence (CPLR 3211[a][1]), and that the complaint fails to state a cause of action (CPLR 3211[a][7]). In the alternative, they seek to dismiss the non-pecuniary damages claims.

In November 1989, Plaintiff was indicted for felony kidnapping in the second degree and several related charges, including assault. It was alleged that Plaintiff, a restaurant manager, came to believe that one of his employees stole $3,000

from the restaurant. While at work, Plaintiff accosted the employee with a firearm and forced him into the restaurant basement, where he held his employee captive for several hours. In 1990, Plaintiff moved to dismiss the indictment on the grounds that CPL 30.30, the "speedy trial" statute, had been violated.[1] The trial court denied the motion. The jury found Plaintiff guilty, and Plaintiff began serving a 15 year sentence.

In 1995, Plaintiff hired Defendant to handle the direct appeal of his conviction. The Appellate Division affirmed the conviction on the basis of the evidence adduced at trial (*People v D'Alessandro*, 230 AD2d 656 [1st Dept 1996]). The issue of the speedy trial violation was not addressed on appeal; that is the central issue of this matter.

Plaintiff served 14 and a half years of his term and was released on parole. He then moved for a writ of error *coram nobis*[2] on the ground that the trial court improperly determined that the speedy trial provision was not violated, and noted his attorney's failure to appeal the issue in the direct appeal.

The appellate court granted the writ (*People v. D'Alessandro*, 2010 WL 2652447 [1st Dept 2010]). It found that

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[1] The statute creates a time frame wherein the People must be ready for trial, and if the People are not "effectively" ready for trial, the defendant can be released from custody or the case can be dismissed.

[2] Generally, a writ of error coram nobis is the remedy for setting aside an erroneous judgment that resulted from an error of fact in the proceeding.

the speedy trial argument was "clearly meritorious" and determined that, notwithstanding Defendants' otherwise effective assistance, its failure to raise that "clear cut and dispositive" argument warranted the grant of the writ. The court held:

> Because it is "clear-cut" that defendant would have prevailed on the speedy trial issue had his appellate counsel raised it, he is entitled to a writ of error coram nobis.
>
> ***
>
> [T]he application for a writ of error coram nobis is granted, the decision and order of this Court entered on August 22, 1996 ... is hereby recalled and vacated, and the judgment of the Supreme Court, New York County, (Jerome Hornblass, J), rendered April 20, 1993, convicting defendant, after a jury trial, of kidnapping in the first degree, assault in the second degree, coercion in the first degree, attempted robbery in the first degree, and attempted grand larceny in the second degree is reversed, on the law, and the indictment dismissed.

(*Id.*). This action followed, wherein Plaintiff seeks $26 million in damages arguing that Defendants failure to raise the speedy trial argument on appeal constitutes legal malpractice.

Sufficiency of Pleadings

In an action to recover damages for legal malpractice, a plaintiff must demonstrate that the attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession and that the attorney's breach of this duty proximately caused plaintiff to sustain actual and ascertainable damages (*Pellegrino* v. *File*, 291 AD2d 60, 63 [1st Dept 2002]).

Defendants first argue that plaintiff failed to allege the necessary elements of a legal malpractice cause of action, specifically, causation. In order to establish proximate cause in a malpractice case, "the plaintiff must show that but for the attorney's negligence, what would have been a favorable outcome was an unfavorable outcome" (*Zarin v Reid & Priest*, 184 AD2d 385, 387 [1st Dept 1992]). The complaint alleges that but for the Defendants' failure to raise the speedy trial violation, he would not have been incarcerated for 15 years. In support, he cites to the decision quoted above. Accordingly, the complaint alleges causation.

Next, Defendants argue that plaintiff does not, and cannot, make a colorable claim of innocence.

> [T]o state a cause of action for legal malpractice arising from negligent representation in a criminal proceeding, plaintiff must allege his innocence or a colorable claim of innocence of the underlying offense ... for so long as the determination of his guilt of that offense remains undisturbed, no cause of action will lie ... This requirement is central to the determination of causation in a cause of action for legal malpractice arising from a criminal proceeding...
>
> ***
>
> We require that the criminal client bear the unique burden to plead and prove that the client's conviction was due to the attorney's actions alone and not due to some consequence of his guilt

(*Britt v Legal Aid Soc., Inc.*, 95 NY2d 443, 446 [2000][citations omitted]). Where an individual cannot assert his innocence, public policy "prevents maintenance of a malpractice action against his attorney" (*Carmel v Lunney*, 70 NY2d 169, 173 [1987].

In other words, an otherwise guilty individual should not be able to profit from his criminal acts due to the procedural mistakes of his attorney.

Defendants argue that plaintiff cannot prove that the conviction was due to his attorney's actions alone because "the plaintiff is factually guilty." In support, Defendants cite to several items of documentary evidence to prove guilt, including the 1993 judgment of conviction, which was reversed, and the 1996 appeal decision, which was recalled and vacated. Defendants also cite to the 1993 jury verdict, which was not explicitly vacated; however, the indictment from which that verdict followed was dismissed (*People v D'Alessandro*, 2010 WL 2652447 [1st Dept 2010]). Finally, Defendants provide an unsigned affidavit of plaintiff, dated September of 1996, wherein he stated "[i]f I was told or knew that kidnapping in the first degree carried a mandatory fifteen year sentence . . . I would have sought a plea disposition in this case, regardless of my guilt or innocence" (Hyland Aff., Ex. E). Defendants claim this unsigned, unsworn affidavit is an acknowledgment of guilt. It is not.

While to a casual reader, rather than a legal scholar, it may be sufficient to rely on the conviction as proof of guilt, but for the denial of the 30.30 motion, it would not have gone to a jury. And, if not for the failure to raise the 30.30 decision on appeal, the duration of plaintiff's incarceration would have been dramatically reduced.

A motion to dismiss based on documentary evidence may be appropriately granted "only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 326 [2002]). Defendants rely solely on court documents that are not longer valid or binding, and an unsigned affidavit of dubious value. Accordingly, for the purposes of this motion, Defendants have not conclusively established their burden.

Damages

Defendants argue that any claims for non-pecuniary damages must be dismissed because New York limits damages from legal malpractice to pecuniary damages. It cites to *Wilson v City of New York* (294 AD2d 290 [1st Dept 2002]) wherein the court cited the general rule that "[a] cause of action for [civil] legal malpractice does not afford recovery for any item of damages other than pecuniary loss" i.e., monetary, economic loss (*id.* at 292-3, citing *Wolkstein v Morgenstern*, 275 AD2d 635 [1st Dept 2000]), and applied that determination to legal malpractice in a criminal case. Defendants counter that the Fourth Department directly opposes *Wilson* and allows recovery for non-pecuniary losses, including loss of liberty (*see Dombrowski v Bulson*, 79 AD3d 1587 [4th Dept 2010]).

The plaintiff in *Wilson* sued his attorney for legal

malpractice in a criminal prosecution. Included in his claim against his former defense attorney was a claim for "loss of liberty." Wilson contended that the bar against non-pecuniary damages in civil malpractice cases should not be extended to criminal cases, "because the primary harm caused by attorney malpractice in criminal cases, typically an unwarranted extended loss of liberty, is necessarily nonpecuniary in nature" (*Wilson*, 294 AD2d at 292).

Notwithstanding this argument, the court determined that Wilson had not established but-for causation, and dismissed the malpractice claim. While the court found that malpractice had not been established, a discussion of and rejection of damages for loss of liberty nevertheless ensued. Most respectfully, since that discussion did not apply to the facts of Wilson, the case that was under consideration, its application to the case herein is troublesome.

The ten year old *Wilson* theory of damages was not adopted by the Fourth Department in the recent case of *Dombrowski, supra*. In that matter, plaintiff was convicted of two felonies. He moved to vacate the conviction for ineffective assistance of counsel. The motion was denied. Plaintiff then commenced a habeas corpus proceeding contending ineffective assistance of counsel. The petition was granted and the indictment dismissed; however, plaintiff had served five years in

jail. Plaintiff then sued his defense attorney for legal malpractice for, *inter alia*, loss of liberty. The Supreme Court granted summary judgment dismissing the complaint on the ground that he had no right to recover non-pecuniary damages. The Fourth Department reversed the decision. It noted that the trend amongst many other states is to allow recovery for loss of liberty in criminal legal malpractice cases, and held that

> [A] plaintiff who establishes that he or she was wrongfully convicted due to the malpractice of his or her attorney in a criminal case may recover compensatory damages for the actual injury sustained, i.e., loss of liberty

(*Dombrowski*, 79 AD3d, at 1590).

Placed in the current context, if the Appellate Division, First Department had the occasion to revisit the instant case, or a similar one where malpractice has been established and the issue of damages is central, perhaps it would be viewed differently.

Here, all underlying charges having been dismissed by the First Dept on the coram nobis proceeding. Loss of liberty is the most serious punitive measure in this state and the plaintiff herein served 14 1/2 years in prison, approximately ten more years than he would have served if the direct appeal had addressed the 30.30 error of the trial judge (and, though not part of this lawsuit, more than the period of incarceration had the original 30.30 motion been

granted). Some would argue that imprisonment is a fate worse than loss of life. Yet a physician can be assessed non-pecuniary damages in malpractice causing the loss of life. The inability to seek damages for the taking of freedom, even after due process--but in error--strikes this court as paradoxical and an unintended diminution of the effects of loss of liberty.

Accordingly, it is hereby

ORDERED that defendants' motion is denied; and it is further

ORDERED that the defendants are directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Part 17, Room 581, 111 Centre Street, on April 30, 2012 at 10:00 AM.

Dated: February 29, 2012

Enter:

J.S.C.
EMILY JANE GOODMAN