

Angeles v Aronsky

2012 NY Slip Op 30851(U)

April 2, 2012

Sup Ct, NY County

Docket Number: 100091/2009

Judge: Judith J. Gische

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

PRESENT: HON. JUDITH J. GISCHE
J.S.C. Justice

PART 10

Index Number : 100091/2009
ANGELES, MANUEL
vs.
ARONSKY, JEFFREY A.
SEQUENCE NUMBER : 005
SUMMARY JUDGMENT

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

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s) _____

Answering Affidavits — Exhibits _____ | No(s) _____

Replying Affidavits _____ | No(s) _____

Upon the foregoing papers, it is ordered that this motion is

**motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.**

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

FILED

APR 03 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: April 2, 2012

J. Gischi
HON. JUDITH J. GISCHE J.S.C.
J.S.C.

- 1. CHECK ONE: _____ CASE DISPOSED
- 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 STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 10

-----X
Manuel Angeles,

Plaintiff,

-against-

Jeffrey A. Aronsky,

Defendant.

Decision and Order
Index No.: 100091/2009
Seq No.: 005

Present:
Hon. Judith J. Gische
J.S.C.

-----X
Recitation, as required by CPLR § 2219 [a] of the papers
considered in the review of this (these) motion(s):

Papers	Numbered
Aronsky n/m (3212) w/JBB, JAA, AM, AK affids, exhs	1,2
Angeles opp w/FVF affirm, MA, LC, JSK affids, exhs	3
Aronsky reply w/JBB affid, exhs	4
Depo trans Luna (sep exh)	5
Steno Minutes 1/5/12	6
Various stips	7

-----X
Gische J.;

This is an action for legal malpractice/negligence. On January 9, 2009, plaintiff commenced this action alleging legal malpractice in defendant's representation of him in the Underlying Claim. On April 28, 2011, plaintiff filed a note of issue and on August 26, 2011, defendant filed this motion for summary judgment. Defendant moves for summary judgment, pursuant to CPLR 3212, dismissing plaintiff's complaint. This motion is timely brought (CPLR § 3212; Brill v. City of New York, 2 N.Y.3d 648 [2004]).

For the reasons set forth below, the motion is denied.

Parties' Allegations and Underlying Background

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Plaintiff alleges that, on December 7, 2007, he was assaulted in the lobby of a building (the Building), located at 1745 Caton Avenue, Brooklyn, New York, in which he was a tenant and that he hired defendant to represent him in prosecuting his claim (the Underlying Claim) (complaint, ¶¶ 1, 4). Plaintiff contends that defendant never commenced an action against the Building's owner, defendant did not conduct an adequate investigation of the circumstances of the incident, and he was induced by defendant to settle the Underlying Claim against the Building's owner for \$8500, although this was inadequate compensation in light of the severity of his injuries which included having both his arms broken, a broken jaw and broken ribs (*id.*, ¶¶ 10, 17-18).

Defendant asserts that plaintiff voluntarily agreed to the settlement of the Underlying Claim, that the Underlying Claim had significant liability problems, warranting a low settlement amount, since plaintiff stated that the door lock leading into the lobby area of the Building was in working order on the day of the incident, that the alleged assailants were unknown and that there were no prior similar incidents in the Building (defendant affidavit, ¶¶ 14, 5-6). Defendant states that, on June 20, 2008, he advised plaintiff in a telephone conference of the potential difficulties in prosecuting the Underlying Claim, that he presented the offer from the Building owner's insurance carrier

without any recommendation and that plaintiff wanted to, and did, agree to accept the offer and signed a release settling the Underlying Claim (*id.*, ¶¶ 10-14; Marks affidavit, ¶¶ 3-7).

In this motion, defendant contends that plaintiff can not establish that "the assailants gained entry into the [B]uilding through a negligently maintained entrance" and, consequently, plaintiff could not succeed in the Underlying Claim (Kaminsky affirmation, ¶ 9). Defendant also claims that plaintiff is "second guessing" his decision to settle the Underlying Claim and that his signing of the release bars this action (Bruno affirmation, ¶¶ 3, 9). Finally, defendant asserts that his investigation of the circumstances of the incident was appropriate and that it was a reasonable judgment that cannot serve as the basis for a legal malpractice claim.

Summary Judgment

A party seeking summary judgment must make a prima facie case showing that it is entitled to judgment as a matter of law by proffering sufficient evidence to demonstrate the absence of any material issue of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If the movant fails to make this showing, the motion must be denied (*id.*). Once the movant meets its burden, then the opposing party must produce evidentiary proof in admissible form sufficient to raise a triable issue of material fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). In

deciding the motion, the court must draw all reasonable inferences in favor of the nonmoving party and deny summary judgment if there is any doubt as to the existence of a material issue of fact (*Dauman Displays v Masturzo*, 168 AD2d 204, 205 [1st Dept 1990], lv dismissed 77 NY2d 939 [1991]).

Premises Liability

Generally, a landowner must act as a reasonably prudent person in maintaining its property in a reasonably safe condition under all the circumstances, including the likelihood of injury, the potential seriousness of injury and the burden of avoiding the risk (*Peralta v Henriquez*, 100 NY2d 139, 144 [2003]).

Additionally, a party must be aware of the alleged defective or dangerous condition, either through having created it, actual knowledge of the condition or constructive notice of it through the defect's visibility for a sufficient amount of time prior to the accident to enable a defendant to discover and remedy it (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]).

In a premises security action, a landlord has "a 'common-law duty to take minimal precautions to protect tenants from foreseeable harm,' including a third party's foreseeable criminal conduct [and] ... an injured tenant may recover damages 'only on a showing that the landlord's negligent conduct was a proximate cause of the injury'" (*Romero v Twin Parks Southeast Houses*,

Inc., 70 AD3d 484, 484 [1st Dept 2010], quoting *Burgos v Aqueduct Realty Corp.*, 92 NY2d 544, 548 [1998]). Where the assailants are unidentified, plaintiff "may meet his proximate cause burden 'if the evidence renders it more likely or more reasonable than not that the [assailants were intruders] who gained access to the premises through a negligently maintained entrance'" (*Romero*, 70 AD3d at 484, quoting *Burgos*, 92 NY2d at 551).

Legal Malpractice

"In order to sustain a claim for legal malpractice, a plaintiff must establish both that the defendant attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession which results in actual damages to a plaintiff and that the plaintiff would have succeeded on the merits of the underlying action 'but for' the attorney's negligence" (*AmBase Corp. v Davis Polk & Wardwell*, 8 NY3d 428, 434 [2007] [internal citation omitted] ; see also *Estate of Nevelson v Carro, Spanbock, Kaster & Cuiffo*, 259 AD2d 282, 283 [1st Dept 1999]).

An "error of judgment ... [or the] selection of one among several reasonable courses of action does not constitute malpractice" (*Rosner v Paley*, 65 NY2d 736, 738 [1985]; *Rodriguez v Lipsig, Shapey, Manus & Moverman, P.C.*, 81 AD3d 551, 552 [1st Dept 2011]).

However, "settlement of an underlying claim does not

preclude a subsequent action for legal malpractice where the settlement was effectively compelled by the mistakes of counsel" (*Kutner v Catterson*, 56 AD3d 437, 437-438 [2d Dept 2008]; see also *Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438 [2007]; *Garnett v Fox, Horan & Camerini, LLP*, 82 AD3d 435 [1st Dept 2011]).

Discussion

Applying the above mentioned legal principles to this motion, defendant's motion for summary judgment must be denied.

Defendant states that a successful result in the Underlying Claim could not be established since plaintiff stated that the door locks were functioning properly on the day of the incident and plaintiff did not know who attacked him (plaintiff EBT, at 17, 19). Plaintiff has, however, presented evidence of accessibility to the Building through a side entrance and that three men with baseball bats were seen leaving the Building around the time of the alleged assault on plaintiff (*Sosa EBT*, at 52, 54, 59; *Luna EBT*, at 20-21). Since the court must view the evidence in the light most favorable to plaintiff on this motion (*Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 [2007]), plaintiff has raised a factual issue as to the accessibility to the Building through the unlocked side entrance (*Burgos*, 92 NY2d at 551).

Plaintiff has also presented evidence of a factual issue as

to the adequacy of defendant's investigation into the circumstances of the Underlying Claim, since neither defendant nor his investigator went to the Building or spoke with the Building's superintendent and, accordingly, they did not obtain information about the side entrance and its accessibility (defendant EBT, at 51-52). Defendant also failed to seek information as to prior similar incidents in the area which would be relevant to foreseeability (*id.* at 58).

Since defendant stated that he advised plaintiff as to the strengths and weaknesses of the Underlying Claim as part of his discussion with plaintiff on June 20, 2008 in connection with plaintiff's acceptance of the \$8500 settlement offer, the factual dispute regarding whether an appropriate investigation was made so defendant could present an accurate assessment of the adequacy of the settlement, is a material issue.

The factual disputes noted above also present a matter of credibility more properly resolved by a fact finder at trial (see *Aller v City of New York*, 72 AD3d 563, 564 [1st Dept 2010]). On this motion for summary judgment, the court must accept plaintiff's version of contested factual matters and, therefore, since defendant has failed to show entitlement to judgment as a matter of law, his motion must be denied (*Branham*, 8 NY3d at 932).

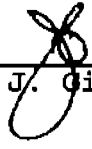
Conclusion

In accordance with the foregoing, defendant's motion for summary judgment dismissing plaintiff's complaint is denied. Since the note of issue has been filed, plaintiff shall serve a copy of this decision and order on the Office of Trial Support so this case may be scheduled for trial. Any relief not specifically addressed is hereby denied. This constitutes the decision and order of the court.

Dated: New York, New York

April 2, 2012

So Ordered:



Hon. Judith J. Gische, JSC

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