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

PRESENT: MARTIN SHULMAN J.S.C. PART 1
*Justice*

Index Number : 108692/2007
PONCE, JUANA FRANCO
vs.
SIMMONS, HOWARD
SEQUENCE NUMBER : 004
SUMMARY JUDGMENT

INDEX NO. 108692/07
MOTION DATE
MOTION SEQ. NO. 004

The following papers, numbered 1 to ____, were read on this motion to/for summary judgment

Notice of Motion/~~Order to Show Cause~~ — Affidavits — Exhibits A-NN | No(s). 1, 2
Answering Affidavits — Exhibits A-G | No(s). 3
Replying Affidavits | No(s). 4

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

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

FILED
AUG 30 2012
NEW YORK
COUNTY CLERK'S OFFICE

Dated: August 23, 2012

MARTIN SHULMAN, J.S.C.
MARTIN SHULMAN J.S.C.

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 STATE OF NEW YORK
COUNTY OF NEW YORK: PART 1

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JUANA FRANCO PONCE and FELIPE ROJAS,

Plaintiffs,

-against- Index No. 108692/07

HOWARD SIMMONS, P.C. and HOWARD D. SIMMONS,

Defendants.

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**MARTIN SHULMAN, J.:**

Defendants Howard Simmons, P.C. (the P.C.) and Howard D. Simmons (Simmons) move pursuant to CPLR 3212 for summary judgment dismissing the complaint in this legal malpractice action. Plaintiffs oppose the motion.

**Background**

The complaint alleges that in February 2001, plaintiffs Juana Franco Ponce (Ponce) and Felipe Rojas (Rojas) retained Simmons "to represent them in their interest with respect to immigration applications for permanent resident alien status in the United States of America." (Vrhovc Aff. in Supp., Exh. A at ¶ 10). Specifically, plaintiffs sought to apply for permanent resident status pursuant to section 245 (i) of the Legal Immigration Family Equity Act (LIFE Act) (8 USC § 1255 [i]), which enabled certain immigrants who were in the United States illegally to adjust their status. Plaintiffs allege that defendants negligently "failed to file the appropriate applications and supporting papers with the proper governmental agencies and/or entities on or before the deadline date" of April 30, 2001. *Id.* at ¶24.

Plaintiffs were both born in Mexico. When they sought legal representation from defendants they were living in Staten Island, New York. Although neither plaintiff had proper papers allowing them to work in the United States, Ponce worked as a babysitter and housekeeper for James Gavrity (Gavrity) and Rojas worked as a cook at a restaurant, the Blue Water Grill.

Both Ponce and Rojas first came to the United States in 1988, crossing the border illegally near Tijuana and ultimately settling in the New York City area. They met in New York and began living together in 1989. They are now married and have two children, both born in the United States.

Initially, Ponce worked in a factory packing dresses and placing buttons on shoulder pads. In Mexico, she had worked as a helper in a liquor store, a cashier in a bakery and a furniture maker.

In Mexico, Rojas worked making cardboard cartons. After arriving in New York, he worked in a series of restaurants in jobs ranging from dishwasher to cook. Rojas began working at Blue Water Grill in 1999, presenting the restaurant with a false green card and a false social security number. At the time of his September 2011 deposition, Rojas still worked at Blue Water Grill but his employment there was terminated in December 2011.

On or about March 13, 1994, U.S. Immigration and Naturalization Service (INS) agents raided the factory where Ponce was working. As INS was unable to take her into custody at that time, they directed her to appear at Federal Plaza the next day, which she did. Deportation proceedings were initiated against her, and she was given

the opportunity to voluntarily depart the United States on or before December 22, 1995. It appears that Ponce did so, accompanied by Rojas and their two children.

Approximately one year later, in December 1996, Rojas returned to the United States illegally and Ponce returned in February 1997, also illegally. Their children, who are U.S. citizens, returned legally.

In or about 1999 Ponce obtained employment with Gavrity, taking care of his children and doing housekeeping. According to Ponce, Gavrity referred her to Simmons to "fix [her] immigration situation." *Id.* at Exh. U, p. 80. Ponce met with Simmons on February 22, 2001 and paid him a retainer of $2,500 for "immigration services." Before that meeting, Gavrity had told Ponce that he would "sponsor" her for permanent residency by signing a labor certification application on her behalf. On or about March 24, 2001, Rojas met with Simmons and paid him an additional $2,500 retainer for his immigration case.

According to Ponce, Simmons told her that they would proceed with an application for her, rather than for Rojas, because it would be faster, since she already had a record with the INS and because her employer was willing to sponsor her. According to plaintiffs, Simmons advised them to get married and to file for adjustment of status for Ponce, and told them that when she obtained her adjustment of status, Rojas could apply as her spouse. As a result, Ponce and Rojas married.

Both Ponce and Rojas testified that Rojas' employer offered to support his application but that he turned it down because Simmons had indicated that he would file for Ponce. According to Rojas, when he heard a conversation at work among his coworkers about the fact that Blue Water Grill was helping some workers with their

immigration status, he spoke with his immediate supervisor, Luis Nieto, and asked if he would help him. Rojas testified that when he went to see Simmons, he told him that his employer would help him, but that Simmons "said to leave it the way it was. That through my wife it was going well." *Id.* at Exh. T, p. 101.

It is undisputed that Simmons failed to file Ponce's application for labor certification (ETA 750) with the Department of Labor by April 30, 2001, as required by the LIFE Act. Rather, Simmons filed the ETA 750 with the INS. As a result, Ponce's application for adjustment of status was denied.

The verified complaint alleges that as a result of Simmons' negligence, the plaintiffs would not be able to obtain permanent resident status in the United States[1] and that they suffered monetary damages as a result. The complaint asserts two causes of action for legal malpractice against Simmons and for negligent supervision against the P.C.

**Analysis**

An award of summary judgment is appropriate when no issues of fact exist. *See* CPLR 3212(b); *Sun Yau Ko v Lincoln Sav. Bank,* 99 AD2d 943 (1st Dept.), *aff'd* 62 NY2d 938 (1984); *Andre v Pomeroy,* 35 NY2d 361 (1974). The proponent of a motion for summary judgment "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact." *JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d 373, 384 (2005). The burden then shifts to the motion's opponent to "present facts in admissible

[1] Ponce ultimately obtained a green card under a different immigration law provision.

form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art,* 27 AD3d 227, 228 (1st Dept 2006); see *Zuckerman v City of New York,* 49 NY2d 557, 562 (1980).

As stated in *AmBase Corp. v Davis Polk & Wardwell*, 8 NY3d 428, 434 (2007):

> 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 (citations omitted).

To be awarded summary judgment dismissing a legal malpractice action, "the defendant must present evidence in admissible form establishing that the plaintiff is unable to prove at least one essential element of his or her cause of action alleging legal malpractice (citations omitted)." *Gershkovich v Miller, Rosado & Algios, LLP,* 96 AD3d 716 (2d Dept 2012).

In a legal malpractice action, "expert testimony is generally required to establish a breach of the standard of professional care, except where the daily experience of the fact finder provides a sufficient basis for judging the adequacy of the professional service." *Kulak v Nationwide Mut. Ins. Co.*, 40 NY2d 140, 148 (1976); *S & D Petroleum Co., Inc. v Tamsett,* 144 AD2d 849 (3d Dept 1988). In the context of a motion for summary judgment, the burden rests upon the moving party, in this case the defendant, "to establish through expert opinion that he did *not* perform below the ordinary reasonable skill and care possessed by an average member of the legal community (citations omitted)." *Suppiah v Kalish,* 76 AD3d 829, 832 (1st Dept 2010). Defendant is

required to "establish through an expert's affidavit that even if he did commit malpractice, his actions were not the proximate cause of the plaintiff's loss (citation omitted)." *Id.*

Defendants do not submit an expert affidavit regarding either whether Simmons' actions and/or inactions constituted malpractice or whether those actions were or were not the proximate cause of plaintiffs' loss. "By failing to submit the affidavit of an expert, defendant never shifted the burden to plaintiff." *Id.*

Instead, defendants' counsel improperly attempts to satisfy this burden by submitting a reply affirmation averring that he is an immigration law expert and incorporating by reference the arguments made in the Defendant's Brief in Support of the Motion for Summary Judgment. Vrhovc Reply Aff. at ¶¶ 15-20. It is, however, generally improper for counsel to function as both an advocate and an expert witness. *See Ellis v Broome County,* 103 AD2d 861, 861 (3d Dept 1984)("An obvious justification for the advocate-witness rule is avoidance of the unseemly circumstance of placing an attorney in a position in which he must argue the credibility of his own testimony"); *Emery Celli Brinckerhoff & Abady, LLP v Rose,* 2012 WL 1656077 *24-25, 2012 NY Misc LEXIS 2136 *29-30, 2012 NY Slip Op 31198(U) (Sup Ct, NY County 2012); *see also* Rule 3.7 of the Rules of Professional Conduct (22 NYCRR 1200.0 [previously Rule 1200.21 (DR 5-102) of the Code of Professional Responsibility].

In any event, even if defendants had provided an expert affidavit, their motion for summary judgment would still be denied as issues of fact exist. Defendants argue that dismissal is warranted because: 1) plaintiffs cannot prove that they would have

succeeded in obtaining their adjustment of status "but for" Simmons' negligence; and 2) plaintiffs have not shown damages.

Simmons contends that when he met with Ponce he informed her that her chances of getting a "green card" as a babysitter or housekeeper were slim and that Rojas would have a better chance of success as a cook if his employer cooperated. According to Simmons, Ponce did not know whether her husband's employer would be willing to help him. Simmons states that when he met with Rojas, Rojas said that Nieto indicated that he would try to help. Simmons further states that Rojas told him to contact James Ladota, the human resources manager at the Blue Water Grill, but told him that the restaurant did not know that he did not have proper immigration papers, and he was concerned that if they learned that fact he would be fired. Simmons states that he told Rojas that he would try not to tell Ladota, but also told Rojas that the restaurant might wonder why he needed to be sponsored if he already had proper papers. According to Rojas, however, when he asked Nieto for help, he admitted to Nieto that he was in the country illegally because he trusted him.

Simmons contends that he contacted Ladota but Ladota indicated that the restaurant would not sponsor Rojas "because he did not fill an important enough niche." Simmons Aff. in Supp., ¶ 12. Simmons alleges that he spoke with Ladota more than once about the possibility of sponsoring Rojas but that he always received a negative response. According to Simmons, for that reason, he went forward with Ponce's application, using Gavrity as her sponsor.

Defendants argue that plaintiffs cannot prove that they would have succeeded on the merits of the application for adjustment of status "but for" Simmons' negligence.

Specifically, Simmons contends that even had the application been properly filed, the case was a "long shot" because Ponce's application was the weaker of the two, but he had to proceed with it because Rojas' employer was unwilling to sponsor him.

According to defendants, Ponce cannot prove that her application would have been successful because she has not shown that she could have met the various requirements for a green card under the provisions of the Code of Federal Regulations (CFR) then in effect. Defendants argue that for a housekeeper[2] to obtain a labor certification, the employer had to go through certain procedures to obtain a waiver to proceed with the application, including but not limited to advertising in local newspapers to establish that no American was willing to take the job. Only after the employer could show that he could not find a qualified American worker could he obtain certification.

Furthermore, according to defendants, Ponce could not have met the requirement of establishing she had prior paid work experience as a housekeeper because her job with Gavrity was her first job as a housekeeper. *See* 20 CFR Part 656, Labor Certification Process for Permanent Employment of Aliens in the United States, in effect 2001. Finally, defendants argue there is no evidence that Gavrity would have been willing to provide the financial documentation necessary to establish his ability to pay the offered wage as required by the regulations.[3] *See* 8 CFR § 204.5 (g) (2).

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[2] The CFR lists housekeeping as a "Schedule B" occupation, or one for which there are generally sufficient United States workers willing to do the job.

[3] In making this argument defendants improperly attempt to shift their burden of proof as the moving party to plaintiffs.

With respect to Rojas, defendants argue that plaintiffs cannot establish that Rojas would have succeeded had an application been made on his behalf because plaintiffs have not presented evidence from someone in authority at Blue Water Grill indicating that the restaurant would have been willing to sponsor Rojas in 2001.[4] Simmons avers in his supporting affidavit that he contacted Ladota and Ladota allegedly advised him that the restaurant would not sponsor Rojas. This statement conflicts with Rojas' and Ponce's deposition testimony concerning Blue Water Grill's willingness to sponsor Rojas and is also inconsistent with Ladota's affidavit (Monaco Aff. in Opp. at Exh. D) and Nieto's EBT testimony.

In his affidavit submitted in support of this motion, Ladota generally states that the decision makers at BR Guest, Blue Water Grill's parent company, felt that assisting employees in adjusting their immigration status pursuant to the LIFE Act "was an opportunity to give back to its valued employees." *Id.* at p. 1. The company therefore authorized Nieto and the head chefs at other restaurants to select "valued employees who were eligible for sponsorship by the company." *Id.* According to Ladota, he authorized Nieto to select employees at the Blue Water Grill, but he does not remember if Rojas was one of those Nieto selected for sponsorship. Ladota states that BR Guest did in fact sponsor more than a dozen employees, including some Blue Water Grill employees. Ladota recalls that at least one sponsored Blue Water Grill employee received labor certification and resident alien status.

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[4] Here, defendants again appear to be seeking to reverse the applicable burden of proof.

Nieto testified at his deposition that when the opportunity arose for Blue Water Grill to sponsor employees seeking a status adjustment, he asked Rojas whether he was interested, but Rojas indicated that he was going through the process through his wife with an attorney and that, therefore, he was not interested. He further testified that he had asked Rojas because he felt that he was a valuable employee, contradicting Simmons' claim that Ladota said that Rojas did not fill a sufficiently important niche to warrant assisting him.

Defendants also rely on the deposition of Jennifer Hooper, who currently runs human resources for BR Guest, who testified that if she learned that an employee had lied about their immigration status on the job application they would be fired. Defendants note that Rojas was fired the day after Hooper's deposition. They argue both that Hooper's testimony indicates that Blue Water Grill was not willing to assist Rojas and that had he sought the restaurant's assistance his status as an illegal immigrant would have been revealed and he would have been fired. However, Hooper was not employed by the company at the time in question, so at best she can only testify that the company presently would not hire someone who did not have proper legal papers. At the very least, issues of fact exist regarding whether Rojas would have been able to obtain sponsorship from Blue Water Grill, and whether Simmons could and should have filed an application for adjustment of status on his behalf in addition to, or instead of, the application on behalf of Ponce.

Finally, assuming it were appropriate for Vrhovc to function as an expert witness here, his interpretation of what constitutes "success" with respect to an application to adjust status pursuant to the LIFE Act for the purposes of the "but for" rule and his

opinion regarding whether Simmons' failure to file any application on behalf of Rojas constituted negligence, would at best, result in a conflict of expert opinion precluding summary judgment. Plaintiffs submit an expert affirmation from George Akst, Esq., an attorney specializing in immigration practice, who opines that Simmons was negligent and committed legal malpractice in his representation of plaintiffs by failing to timely file Forms ETA 750 A and B with the Department of Labor on Ponce's behalf *and* for failing to file any application on Rojas' behalf.

Contrary to defendants' opinion that filing Ponce's application was a lost cause *ab initio*, Akst explains that when an application is timely filed, even if it is denied for any reason whatsoever, it could be reopened with the same or a different sponsor at any time in the future or an "adjustment of status" could be sought on a different basis.[5] Thus, according to Akst, had Simmons timely filed the proper papers on behalf of the plaintiffs he would have preserved their rights under Section 245 (i), which he failed to do. Akst contends that, even if Ponce could not have met all of the requirements to obtain a green card with Gavrity as her sponsor, if her papers had been properly filed, she could have re-opened her application at a future date with another employer. Furthermore, Akst contends that had Simmons properly filed applications for Ponce and

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[5] Paragraph 9 of Akst's expert affirmation cites an Interoffice Memorandum written by William R. Yates, Associate Director for Operations of the U.S. Citizenship and Immigration Services of the U.S. Department of Homeland Security, stating that pursuant to the LIFE Act, "once an alien files a timely and proper labor certification that is 'approvable when filed' and can establish physical presence in the United States on December 21, 2000 the alien receives the benefits of protection under § 245 (i)." See Monaco Aff. in Opp. at Exh. C.

Rojas under the LIFE Act, their oldest daughter, who is a U.S. citizen, could have filed for an adjustment of status for her parents on her 21st birthday.

Addressing Rojas' situation, Akst contends that the defense that Simmons could not ask Blue Water Grill to be his sponsor because then the restaurant would know that he was undocumented and had given the restaurant false papers is baseless because the whole point of the LIFE Act was to "provide a pathway for undocumented and/or 'illegal' aliens to obtain legal status in the United States." Akst points out that at the time, it was common for restaurant workers to be undocumented, and that the restaurant had to know that it was employing some undocumented workers, because otherwise there would have been no need for sponsorship or for their employees to apply for an adjustment of status.

Akst concludes that, barring some new legislative enactment, Rojas will not be able to adjust his status. Thus, Akst contends that Simmons' failure to file on Rojas' behalf constituted malpractice and Rojas was irreparably harmed. The conflicting "expert" opinions and the conflicting testimony regarding whether the Blue Water Grill was willing to support Rojas in an application for adjustment of status are sufficient to preclude summary judgement.

Turning to defendants' claim that plaintiffs cannot establish actual damages, this argument is yet another attempt to shift the burden of proof to plaintiffs. Defendants cite plaintiffs' alleged failure to comply with a May 17, 2011 conference order directing documentation of plaintiffs' damages to be produced (Vrhovc Aff. in Supp. at Exh. MM), yet they have not sought discovery sanctions.

For all of the foregoing reasons, it is hereby

ORDERED that the motion for summary judgment of defendants Howard Simmons, P.C. and Howard D. Simmons is denied; and it is further

ORDERED that the case be referred to the Administrative Coordinating Part (Part 40) to be calendared for trial.

The foregoing constitutes this court's Decision and Order. Courtesy copies of this Decision and Order have been provided to Counsel for the parties.

Dated: New York, New York
August 23, 2012

HON. MARTIN SHULMAN, J.S.C