Dunston v Brecher, Fishman, Pasternack, Popish, Heller, Rubin & Rief, P.C.
2005 NY Slip Op 30623(U)
October 7, 2005
Supreme Court, New York County
Docket Number: 113275/04
Judge: Jane S. Solomon
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 55

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WILLIE DUNSTON,

Plaintiff,

INDEX NO. 113275/04

-against-

DECISION AND ORDER

BRECHER, FISHMAN, PASTERNACK, POPISH, HELLER, RUBIN & RIEF, P.C., DAVIS, SAPERSTEIN & SALOMON, P.C., MARC C. SAPERSTEIN, JAY S. HAUSMAN, RICHARD L. GELLER AND GELLER & HAUSMAN, PLLC,

Defendants.

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JANE S. SOLOMON, J.:

Defendants move to dismiss this legal malpractice action for failure to state a cause of action and based upon documentary evidence, or in the alternative, they seek a stay of this lawsuit pending the outcome of a proceeding in Kings County Supreme Court. For the reasons below, the motions are denied.

BACKGROUND

Plaintiff Willie Dunston ("Dunston") was in an automobile accident that occurred on April 13, 1999 while he was driving a car in connection with his job at the New York City Transit Authority ("NYCTA"). He claims that another car ran a red light and slammed into the car he was driving, and he suffered serious and permanent injuries as a result. Dunston filed a claim with his employer for workers compensation benefits.

Dunston retained defendant law firm Davis, Saperstein &

Salomon, P.C. (the "Saperstein firm"), by a written retainer dated May 1, 1999, to represent him regarding claims arising from the accident. The Saperstein firm referred Dunston to the law firm of Sher, Herman, Bellone & Tipograph P.C. to handle his workers compensation claim. Dunston ended his relationship with that firm and retained the defendant law firm of Brecher, Fishman, Pasternak, Popish, Heller, Rubin & Rief, P.C. ("Brecher firm") to represent him in connection with his workers compensation claim. At first, NYCTA (which is self-insured) denied the workers compensation claim. However, beginning in November 1999, it started paying lost wage benefits based upon Dunston's alleged disability while the parties continued to dispute the claim.

By a letter dated June 17, 1999, defendant Marc Saperstein of the Saperstein firm informed Dunston that defendants Richard Geller and Jay Hausman had become of counsel to the Saperstein firm, and that they would be handling his case. Geller and Hausman were partners in the defendant law firm of Geller & Hausman, PLLC ("Geller firm"). In April 2000, the Geller firm commenced a lawsuit in the New York State Supreme Court, Kings County, against Andres Felipe Gil and Beatriz Gil, the driver and owner of the car that struck Dunston (the "Gil action").

Hausman advised Dunston that the Gils had only $25,000 in automobile insurance coverage, and advised him to settle the

lawsuit. Dunston settled the Gil action for $22,500 in January 2001, as Hausman recommended. The Geller firm and the Saperstein firm split a contingency fee of approximately one third of the settlement amount. They discontinued the action by stipulation on February 13, 2001.

Nearly three years later, on December 3, 2003, Dunston attended a workers compensation hearing where he was represented by the Brecher firm. At the hearing, his settlement of the Gil action came to light. The administrative law judge ordered the suspension of workers compensation payments to Dunston because he failed to obtain NYCTA's consent for the settlement.

Under Workers Compensation Law ("WCL") § 29, the workers compensation carrier has a lien on any recovery a claimant receives from a third party for injuries arising from the same accident. A claimant may settle a third party action for an amount less than he is entitled to receive in workers compensation benefits provided that he receives written consent from the carrier or, in the alternative, judicial approval is sought within three months of the settlement. WCL § 29(5). Failure to obtain either the carrier's consent or judicial approval will bar the claimant from receiving further workers compensation benefits. Johnson v Buffalo & Erie County Private Industry Council, 84 NY2d 13 (1994).

Recognizing that Dunston failed to obtain consent for his settlement from either NYCTA or the court, the Brecher firm

contacted the Geller and Saperstein firms and requested that they take steps to obtain judicial approval nunc pro tunc. At about this time, the Saperstein firm prepared and filed an Office of Court Administration closing statement. Under the Rules of the Appellate Division, First Department, a lawyer is required to file a closing statement within fifteen days of receiving money in connection with a personal injury claim. 22 NYCRR § 603.7(b)(1). The closing statement prepared by the Saperstein firm is dated December 8, 2003. The Saperstein firm also provided its files regarding Dunston to Hausman, who was to prepare an application to the court.

On February 10, 2004, Hausman commenced a petition on Dunston's behalf in the Kings County Supreme Court seeking judicial approval of the settlement. Hausman affirmed that he was unaware of the workers compensation proceeding, so he did not know that consent was required.

Justice Dabiri, of Kings County Supreme Court, held that Dunston had satisfied his burden in showing that the settlement was reasonable under the circumstances, and that NYCTA was not prejudiced by it. See, Harosh v Diaz, 253 AD2d 850 (2d Dept. 1998). However, she found that Hausman's explanation for the failure to obtain pre-settlement consent from NYCTA, or timely judicial approval, was "insufficient". The court denied the petition without prejudice in a decision and order dated May 28, 2004 ("May 2004 Order").

Dunston commenced this malpractice action in September, 2004. The Brecher, Geller and Saperstein law firms are named as defendants, and attorneys Marc C. Saperstein, Jay S. Hausman and Richard L. Geller are sued individually. In the amended verified complaint, Dunston contends that Saperstein, Hausman and their law firms continuously represented him from the time they were retained until the date that Justice Dabiri denied his petition.

Defendants each move to dismiss. Hausman, the Geller firm and the Brecher firm contend that the complaint is barred by documentary evidence in the form of the May 2004 Order. Saperstein and the Saperstein firm (the "Saperstein defendants") argue that the complaint against them is barred by the statute of limitations.

These motions to dismiss came before this court for oral argument on March 28, 2005. After some discussion with the parties, I issued an interim order holding these motions in abeyance until June 6, 2005 "so that plaintiff, with consent of all defendants' counsel, may have an opportunity to renew his application to the Kings County court for an order pursuant pursuant to [WCL § 29(5)] approving nunc pro tunc the settlement of plaintiff's personal injury lawsuit." Dunston's counsel reported on June 6 that he had decided against taking advantage of that opportunity and to forego any further applications to the Kings County court.

DISCUSSION

Failure to State a Cause of Action and Statute of Limitations

The Saperstein defendants argue that the complaint is barred by the three year statute of limitations applicable to a legal malpractice action. CPLR 214(6). The Gil action was discontinued by stipulation on February 13, 2001, and this lawsuit was not commenced until September 2004, more than three years later. This argument is premised on the assumption that Saperstein's obligation to Dunston was extinguished when the stipulation of settlement was filed with the court. Dunston alleges in the complaint, however, that Saperstein committed malpractice by failing to obtain timely judicial approval of the settlement under WCL § 29. The attorneys' representation of Dunston in the underlying case, therefore, could have continued beyond the settlement date.

The complaint further alleges that the Saperstein firm agreed to continue representing Dunston in obtaining judicial approval of the settlement. For the purposes of this pre-answer motion, the Saperstein defendants admit the truth of that allegation. The allegation is corroborated by the fact that the Saperstein firm filed an OCA closing statement December 2003, allegedly in furtherance of the effort to obtain court approval. The Saperstein firm had retained Dunston's files up to that time, and shipped them to Hausman so he could prepare the petition. On its face, the latter action does not describe legal

representation, but it approximates the work performed by the Saperstein firm in earning a legal fee from Dunston's settlement. (There is no dispute that the Saperstein firm represented Dunston up to the date he settled the Gil action.)

The Saperstein defendants further argue that the complaint does not state a cause of action against them because they only "supervised" the Geller firm's representation of Dunston in the Gil action, and did not actually litigate the case. See, CVC Capital Corp. v Weil, Gotsha, Manges, 192 AD2d 324 (1st Dept. 1993).

When a party seeks dismissal for failure to state a cause of action, that cause of action must be liberally construed in the plaintiff's favor. See, Rovello v Orofino Realty Co., Inc., 40 NY2d 633 (1976). The court is required to view every allegation as true and resolve all inferences in favor of the plaintiff, regardless of whether the plaintiff will prevail on the merits. Gay Teachers Association v Board of Education of the City School District of the City of New York, 183 AD2d 478 (1st Dept 1992). Applying this standard, this branch of the motion must be denied. The complaint alleges that the Saperstein firm retained the Geller firm as co-counsel, and represented Dunston on a continuous basis until May 28, 2004. The Saperstein defendants' role in the Gil action, and in the petition for judicial approval of the settlement, is a fact issue which can not be resolved on this motion. Moreover, it is alleged that the

Saperstein firm referred Dunston's workers compensation matter to another law firm, so it may have had a duty to inform Hausman and the Geller firm of this fact in its admitted supervisory role.

Documentary Evidence: The May 2004 Order

Dunston alleges that he is forever barred from receiving workers compensation benefits. Complaint, at paragraph 80. Hausman and the Brecher firm argue that the May 2004 Order left open the possibility that Dunston could successfully apply again for judicial approval of the settlement, and therefore this lawsuit is premature. And if Dunston refuses ever to apply again, he can not succeed here.

This argument is logically appealing. Although the May 2004 Order denied the petition for judicial approval, it not only suggested that the petition would be approved on better papers, it describes what the better papers would say. A successful petition would include evidence of a reasonable excuse for the three year delay in seeking judicial approval. Judge Dabiri wrote that "While the reason for delay, not the length of the delay, determines the timeliness of a motion pursuant to [WCL § 29(5)], petitioner offers no plausible explanation as to why the instant petition . . . should be considered timely." May 2004 Order, pp 7-8 (Citation omitted). The only explanation for the delay in support of the petition was Hausman's affirmation stating that he was unaware of the workers compensation matter. The explanation is thin, but perhaps there is nothing more to

say.

The consequences of Dunston's present attorney's refusal to take advantage of my urging that the invitation to renew in Brooklyn be acted upon are beyond this motion. Perhaps some party here yet will make that application. As it stands, the May 2004 Order disposed of Dunston's petition, and there is no proceeding in Kings County to justify staying this lawsuit further. Defendants other arguments have been considered and are not availing, so it hereby is

ORDERED that the motions to dismiss and to stay this action are denied; and it further is

ORDERED that defendants shall serve answers to the amended verified complaint within twenty days of service of a copy hereof with notice of entry; and it further is

ORDERED that counsel shall appear in Part 55 for a preliminary conference on November 14, 2005 at noon.

Dated: October 7, 2005

ENTER:

J.S.C

JANE S. SOLOMON