

Gowins v M. Weiss & Assoc., P.C.

2010 NY Slip Op 33101(U)

October 26, 2010

Supreme Court, New York County

Docket Number: 110928/08

Judge: Judith J. Gische

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

PRESENT: GISCHE
HON. JUDITH J. GISCHE Justice

PART 10

GOWINS, ALLAN H. J.S.C.

INDEX NO. 110928/08

MOTION DATE _____

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

- v -
M. WEISS + ASSOCIATES, P.C.
ET AL.

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...	_____
Answering Affidavits -- Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED

OCT 29 2010
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 10/26/10

JSG
HON. JUDITH J. GISCHE J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

FILED

OCT 29 2010

**NEW YORK
COUNTY CLERK'S OFFICE**

Supreme Court of the State of New York
County of New York: IAS Part 10

-----X

Allan M. Gowins,

Plaintiff,

DECISION/ORDER

-against-

Index # 110928/08
Mot. Seq. # 001

M. Weiss & Associates, P.C. and
Lee Jerushalmy, Esq.

Defendants.

-----X

Hon. Judith J. Gische:

Pursuant to CPLR 2219(A) the following papers were considered by the Court in connection with this motion and cross-motion:

PAPERS	NUMBERED
OSC, AMF affd., exhibits.....	1
Notice of Cross-Motion, AMG affd., exhibits.....	2
AMF affirm., exhibits.....	3
SFY reply affirm.....	4

Upon the foregoing papers the decision and order of the court is as follows:

Defendants have brought a motion to strike plaintiff's Note of Issue and an order directing discovery in this matter. Plaintiff has cross-moved for partial summary judgment on the issue of liability and partial damages. Plaintiff also seeks to amend his complaint to assert a cause of action under Judiciary Law §487. Both the motion and cross-motion are opposed. Issue has been joined and the cross-motion for summary judgment was timely filed. CPLR § 3212(a); Brill v. City of New York, 2 N.Y.3d 648 (2004).

The defendants are respectively a law firm and lawyer. Plaintiff was their former client. The underlying complaint sets forth two causes of action respectively for professional negligence (malpractice) and breach of contract.

Certain facts are not in dispute:

The plaintiff, during the course of his employment, was in an automobile accident occurring on March 13, 2002. Plaintiff filed a worker's compensation claim and was awarded benefits of \$400 per week. He also hired defendants to commence a personal injury action against, Luis Acevedo, the driver of the other moving vehicle involved in the accident. Plaintiff, after conducting an asset search, decided, based on defendants' advice, to accept a \$25,000 settlement offer in connection with the accident from Acevodo's insurance company .

It is undisputed that the acceptance of the settlement offer was made without obtaining prior approval from plaintiff's worker's compensation carrier. Consequently, the carrier discontinued the benefits to him.

Defendants then filed an action on behalf of plaintiff seeking an order confirming the personal injury settlement *nunc pro tunc* and seeking reinstatement of plaintiff's worker's compensation benefits (NY Co. Sup. Ct. index # 601732/07)("Worker's Comp. Action"). The carrier opposed any *nunc pro tunc* approval, and sought reimbursement of the worker's compensation lien, in an amount in excess of \$100,000. This Court ordered that a hearing be held on the parties' respective claims (order dated January 11, 2008). Settlement discussions ensued, and although a settlement had been reported to the court and the matter marked resolved, the settlement never reached a final conclusion.

Plaintiff then hired new counsel to commence the instant action. The Worker's Comp. Action was thereafter restored by motion made by the defendants. Settlement discussions in the Worker's Comp. Action resumed anew, with the Court's assistance.

The Worker's Comp. Action was settled to the extent that the plaintiff was granted the right to appear before the Worker's Compensation Board and request the restoration of his benefits as well as any arrears.¹

Plaintiff's counsel in this action filed a Note of Issue and Certificate of Readiness, claiming that discovery had been "waived." Discovery, however, had not been expressly waived, but neither has any discovery proceeded.

Summary of the Arguments Presented

Plaintiff claims that defendants committed legal malpractice when then failed to obtain the carrier's prior approval of the \$25,000 settlement, in violation of Worker Compensation Law § 29. They argue that this legal error resulted in plaintiff losing his worker's compensation and related benefits. Plaintiff seeks a judgment in the amount of the worker's compensation and related benefits he has lost to date. He is also claiming consequential damages, including the loss of his home in foreclosure, because he lost his disability payments. These consequential damages, plaintiff argues, should be determined in a separate damages trial.

Plaintiff claims that defendants have unduly delayed in conducting their discovery and have, therefore, through inaction, waived their right to proceed. They have no "intrinsic objection" to producing plaintiff for deposition on the issue of damages only, but they want defendants to pay for the cost of his travel from North Carolina, including food and lodging.

¹The actual settlement has not been made a part of this record. It was, however, reported to the Court and the general terms are contained in late submissions made by the parties on this motion.

Plaintiff seeks to amend the complaint to plead a cause of action, alleging violations of Judiciary Law § 487, based on claims of improper actions, misstatements and delays.

Defendants argue that this action for malpractice is premature because, until the Worker's Compensation Board acts on plaintiff's application for restoration of benefits, there are no damages. In any event, it claims that it is entitled to discovery on the further issues of the significant consequential damages sought by plaintiff in this case. Defendants also argue that the amendment of pleading should be denied because the new claim lacks merit.

Discussion

Summary Judgment

On a motion for summary judgment, it is the movant's burden to set forth evidentiary facts to prove its *prima facie* case that would entitle it to judgment in its favor, without the need for a trial. Only if this burden is met, must the party opposing the motion then demonstrate, by admissible evidence, the existence of a factual issue requiring a trial of the action, or tender an acceptable excuse for his/her failure so to do. CPLR § 3212; Winegrad v. NYU Medical Center, 64 NY2d 851 (1985); Zuckerman v. City of New York, 49 NY2d 557, 562 (1980). Where, however, the proponent fails to make out its *prima facie* case for summary judgment, then the motion must be denied, regardless of the sufficiency the opposing papers. Alvarez v. Propect Hospital, 68 N.Y.2d 320 (1986); Ayotte v. Gervasio, 81 NY2d 1062 (1993). When issues of law are the only issues raised in connection with a motion for summary judgment, the court may

and should resolve them without the need for a testimonial hearing. Hindes v. Weisz, 303 AD2d 459 (2d Dept 2003).

To establish a *prima facie* case of legal malpractice, plaintiff must plead facts that show defendants: (1) failed to exercise that degree of care, skill, and diligence commonly possessed and exercised by an ordinary member of the legal community; (2) that such negligence was the proximate cause of the actual damages sustained by the plaintiff; and (3) that "but for" the defendants' negligence, plaintiff would have been successful in the underlying action. Laventure v Galeno, 307 A.D.2d 255 (1st Dept. 2003). Thus, plaintiff must set forth facts demonstrating that "but for" the attorney's conduct, he would have prevailed in the underlying matter, or would not have sustained any ascertainable damages. Weil, Gotshal & Manges, LLP v. Fashion Boutique of Short Hills, Inc., 10 A.D.3d 267 (1st Dept. 2004). At least one court has likened this burden or requirement to the plaintiff having to prove a "case within a case." Weil, Gotshal & Manges, LLP v. Fashion Boutique of Short Hills, Inc., *supra* at 272.

The controlling appellate authority on the facts presented is the case of Northrop v. Thorsen, (46 AD3d 780 [2nd Dept. 2007]). In Northrop, the attorney being sued for malpractice, like the attorneys here, resolved an underlying tort action without first obtaining the required approval of either the worker's compensation carrier or the Court. Unlike the case at bar, no effort was made to have the court approve the settlement *nunc pro tunc*. The court held in Northrop, *supra*, that the lawyer's failure to comply with Worker's Compensation Law §29(5) constituted professional negligence, without the need for an expert witness. The court held further, however, that the duty to seek a *nunc pro tunc* approval of the settlement rested with the attorney and the failure to do

so was "part of defendant's malpractice."

This Court holds that plaintiff in this case is entitled to summary judgment on the issue of liability but otherwise denies summary judgment on any and all issues of damages. Since there is no dispute that the defendants failed to comply with the Worker's Compensation Law, their actions constituted professional negligence.

Northrop v. Thorson, *supra*. Although defendants instituted an action for *nunc pro tunc* approval of the settlement, they have not successfully obtained the restoration of plaintiff's Worker's Compensation Benefits.

The plaintiff, however, has not proven any entitlement to damages. It is still unclear whether plaintiff will regain his worker's compensation benefits. If they are restored, then plaintiff cannot also seek such benefits as an element of damages in this action, because that would be a double recovery or windfall to him.

The collateral claims of conflict of interest in the Worker's Comp. Action are not considered because that action has been settled and plaintiff not established what impact, if any, alleged conflict has on this particular action. This is without prejudice to raising this issue in any other appropriate forum.

Amend Pleadings

Plaintiff seeks to amend the complaint to assert a third cause of action based upon violations of Judiciary Law § 487. The gravamen of the complaint is that defendants deliberately delayed and failed to provide him information about this and/or the Worker's Comp. Action for their own gain and/or advantage. Defendants deny the underlying claim.

Leave to amend a pleading is freely given absent prejudice or surprise resulting

directly from the delay. CPLR § 3025 (b); McCaskey, Davies & Assoc. v. New York City Health & Hosps. Corp., 59 N.Y.2d 755 (1983); Stroock & Stroock & Lavan v. Beltrami, 157 A.D.2d 590 (1st Dept., 1990). Leave, however, may not be granted where the amended pleading fails to state a cause of action (Stroock & Stroock & Lavan v. Beltrami, *supra*).

At bar the a civil claim under Judiciary Law § 487 may stand even when there is also a claim for legal malpractice. Moormann v. Perini & Hoerger, 65 AD3d 1106 (2nd dept. 2009). Here, the proposed complaint states a cause of action. Defendants' factual disputes about the viability of the claim can be fairly resolved at trial.

The motion to amend the complaint is, therefore, granted. Plaintiff is directed to serve the proposed amended complaint in the form annexed to the motion within 30 days of the date of this decision and order. Defendants are to serve their answer in accordance with the time period set out in the CPLR.

Strike the Note of Issue

It is undisputed that no discovery has taken place int his action. Plaintiff has not shown that discovery was waived by defendants. This case is not ready for trial. The motion to strike the Note of Issue is, therefore, granted.

A compliance conference was previously set for this case for November 23, 2010. At that time the parties are to appear with a firm discovery schedule in place, otherwise the court will set one for them.

The court rejects plaintiffs's position that defendants are required to pay for him to travel and stay in the jurisdiction in order to obtain his deposition.

Conclusion

In accordance wherewith it is hereby

ORDERED that defendants motion to strike the Note of Issue is granted and the parties are directed to appear at the next scheduled court conference with a firm schedule for discovery or otherwise the Court will set a schedule at that time and it is further

ORDERED that the cross-motion for summary judgment is granted as to liability on the first cause of action for malpractice and otherwise denied, and it is further

ORDERED that the cross-motion to amend the complaint is granted and plaintiff is directed to serve the proposed amended complaint in the form annexed to the motion within 30 days of the date of this decision and order; defendants are to serve their answer in accordance with the time period set out in the CPLR, and it is further

ORDERED that any requested relief not otherwise expressly granted herein is denied, and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York: NY
October 26, 2010

SO ORDERED:

J.G. J.S.C.

FILED
OCT 29 2010
NEW YORK
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