

Lee v Pierre

2011 NY Slip Op 32911(U)

November 1, 2011

Supreme Court, New York County

Docket Number: 403536/10

Judge: Anil C. Singh

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

HON. ANIL C. SINGH

SUPREME COURT JUSTICE

PRESENT:

PART 67

Justice

Index Number : 403536/2010

LEE, CALVIN

VS.

PIERRE, ESQ., ABEL L.

SEQUENCE NUMBER : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

1, 2

3

4, 5

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 *is granted in accordance with the annexed memoranda decision & order.*

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

FILED

NOV 02 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 11/1/11

Anil C. Singh
HON. ANIL C. SINGH J.S.C.

SUPREME COURT JUSTICE

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 61

-----X
CALVIN LEE,

Plaintiff,

-against-

ABEL L. PIERRE, ESQ.,

Defendant.
-----X

DECISION AND
ORDER

Index No.
403536/10

FILED

HON. ANIL C. SINGH, J.:

NOV 02 2011

This is an action by a convicted criminal defendant against his former
attorney for legal malpractice. Defendant moves for summary judgment pursuant
to CPLR 3212, contending that plaintiff has failed to show that he suffered any
injury as a result of defendant's conduct or that defendant's conduct prejudiced
plaintiff's opportunity of having his criminal case reviewed on the merits.

NEW YORK
COUNTY CLERK'S OFFICE

Plaintiff opposes the motion.

Plaintiff Calvin Lee is self-represented. He is in inmate at Green Haven
Correctional Facility in Stormville, New York.

Following a jury trial, Lee was convicted in September 1987 of murder in
the second degree; criminal possession of a weapon in the second degree; and
criminal possession of a weapon in the third degree. In November 1987, he was

sentenced to concurrent terms of imprisonment of 25 years to life for the murder count; 7 ½ years to 15 years for the second-degree possession; and 2 to 4 years for the third-degree possession, to run consecutively with Lee's uncompleted term under a separate indictment.

Immediately after conviction, Lee filed an appeal to vacate the judgment of conviction. The motion was denied, and his conviction was affirmed unanimously in 1989 (People v. Lee, 155 A.D.2d 556 [2d Dep't 1989], appeal denied by People v. Lee, 75 N.Y.2d 814 [1990], and Error Coram Nobis Denied by People v. Lee, 244 A.D.2d 505 [2d Dep't 1997]).

Defendant filed motions in 1997 and 2000 pursuant to Criminal Procedure Law 440.10 for an order vacating his judgment of conviction. Both motions were denied (Affidavit of A. Michael Furman, Esq. In Support, exhibit K, pp. 4, 6).

In 2007, Lee contacted the Supreme Court, Criminal Correspondence Unit, to request a copy of the indictment. In response, the unit notified Lee that no record of the requested information could be located. The unit suggested that Lee should try "contacting the Kings County District Attorney's Office for a possible copy of the ... indictment" (Affidavit of A. Michael Furman, Esq. , in Support, exhibit N). The Kings County District Attorney's Office also conducted an "exhaustive search" of its records; however, "a copy of a True Bill could not be

located” (Id., exhibit M).

Plaintiff retained defendant Abel L. Pierre, Esq., in October 2008. The retainer agreement stated that defendant’s fee was \$15,000.00. The agreement stated in pertinent part:

- 1. Law Office will represent Client in certain legal matters as counsel, to-wit:

Pursuit of legal claim against The State of New York and other defendants regarding violations of Federal and State Constitutional Claims. Primary vehicle of remedy shall be a motion for habeas corpus or other viable vehicle as Law Office may deem appropriate.

...

- 6. Client understands that Law Office does not and can not guarantee a successful outcome or any other outcome in Client’s matters.... Nevertheless, Law Office will utilize its best efforts and skill to represent and pursue Client’s interest and claims.

(Affidavit of A. Michael Furman, Esq. In Support, exhibit L).

Subsequently, defendant drafted a motion to vacate the judgment pursuant to Article 440.10 of the Criminal Procedure Law (“CPL 440.10”) and a memorandum of law in support of the motion (Affidavit of A. Michael Furman, exhibit D).

In June 2009, defendant filed the motion to vacate the judgment and dismiss the indictment or, in the alternative, for a new trial.

The memorandum of law asserted that, after a comprehensive search of

records in both the appropriate Kings County Courts and the Kings County District Attorney's Office, defendant had determined that there was no true bill from the presumed grand jury proceedings that resulted in Lee's indictment, trial and conviction. Without a true bill or any accurate record of a vote by a grand jury in favor of indictment, defendant asserted that the Court lacked jurisdiction to proceed against Lee. According to the legal memorandum, the lack of jurisdiction constituted grounds to vacate the judgment under CPL 440.10(1)(a).

Justice Danny K. Chun of Kings County Supreme Court denied the motion in a decision/order dated September 16, 2009. Noting that Lee had filed "numerous appeals and motions both in state and federal courts" over the previous 22 years, the Court found that Lee had "ample opportunity to raise the current claim in any of these previous appeals or motions;" that he had failed to do so; and that he was, therefore, summarily barred from raising such a claim. The Court added:

In any event, this court finds defendant's motion without merit under C.P.L. section 440.30(4)(d). The record shows that defendant was indeed properly indicted by the Grand Jury. Contrary to defendant's allegation, there was an indictment as evidenced by the People's Exhibit A in their response. See People's Ex. A. Defendant's allegation of no true bill is contradicted by the court record and unsupported by any other affidavit or evidence. See C.P.L. section 440.30(4)(d). Under such circumstances, there is no reasonable possibility that defendant's allegation is true.

(Affidavit of A. Michael Furman, exhibit E, p. 2).

Subsequently, Lee moved to appeal Justice Chun's decision by filing Notice of Appeal. The Notice of Appeal was filed by defendant on Lee's behalf.

In a decision/order dated November 6, 2009, the Appellate Division, Second Department dismissed the appeal, stating that the Justice Chun's order was not appealable by right and leave to appeal had not been granted (Affidavit of A. Michael Furman, Esq., in Support, exhibit P).

Upon learning that the appeal had been denied, Lee filed a pro se application to the Second Department for an extension of time for leave to take appeal of Justice Chun's decision (Id., exhibit Q).

In a letter dated January 27, 2010, the Clerk of the Appellate Division notified Lee that his papers were being treated as a motion for permission to appeal (Id., exhibit R).

In a decision/order dated March 25, 2010, Justice Joseph Covello of the Appellate Division denied Lee's application for a Certificate Granting Leave to Appeal. The decision/order states:

Application by the defendant, pursuant to CPL 450.15 and 460.15 for a certificate granting leave to appeal to this court from an order of the Supreme Court, Kings County, dated September 16, 2009, which has been referred to me for determination.

Upon the papers filed in support of the application and the papers filed in opposition thereto, it is

ORDERED that the application is denied.

(Id., exhibit F).

Plaintiff commenced the instant action by filing a summons and verified complaint on December 20, 2010. The complaint alleges that, had defendant correctly filed an Application for Certificate of Leave to Appeal pursuant to CPL section 460.15, rather than incorrectly filing a Notice of Appeal pursuant to CPL section 460.10(a), the Appellate Division would not have dismissed the appeal as not appealable as of right. Plaintiff alleges that defendant's malpractice deprived plaintiff of the opportunity to have his case heard by the Appellate Division on the merits.

Defendant is moving now for summary judgment, contending that plaintiff was not deprived of an opportunity to have his case heard by any higher court. Defendant asserts that plaintiff was permitted to file an Application for a Certificate Granting Leave to Appeal, which was eventually denied because the underlying Article 440 motion was completely meritless. Furthermore, defendant argues that the record is devoid of any evidence demonstrating that plaintiff sustained any actual injury whatsoever.

In a sworn affidavit in opposition to the motion for summary judgment, plaintiff contends that the defendant's wrongly filing the Notice of Appeal, instead of the Application for a Certificate Granting Leave to Appeal, deprived Lee of the opportunity to adequately and effectively present the issues of fact and law before the Appellate Division to review whether the lower court had erred in its ruling denying the CPL section 440 motion. According to Lee, defendant's mistake deprived Lee of "a whole judicial proceeding" and resulted in the loss of \$10,000 in financial resources. Moreover, he asserts that defendant had been retained to prepare and file a petition for habeas corpus, not a CPL section 440 motion.

Discussion

Since summary judgment "deprives the litigant of his day in court, it is considered a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues" (Andre v. Pomeroy, 35 N.Y.2d 361, 364 [1974]). The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form to demonstrate the absence of material issues of fact (Alvarez v. Prospect Hosp, 68 N.Y.2d 320 [1986]). A failure to make that showing requires the denial of the summary judgment motion, regardless of the adequacy of the opposing papers (Ayotte v. Gervasio, 81 N.Y.2d 923[1993]).

Once a prima facie showing has been made, the burden of production shifts to the party opposing the motion to produce sufficient evidence, also in admissible form, of the existence of a material issue of fact requiring a trial of the action (Id.; see also Zuckerman v. City of New York, 49 N.Y.2d 557, 562 [1980]).

The court's role in passing on a motion for summary judgment is solely to determine if any triable issues exist, not to determine the merits of any such issues (Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 [1957]). If there is any doubt as to the existence of a triable issue, the motion should be denied (Rotuba Extruders v. Ceppos, 46 N.Y.2d 223 [1978]; Stone v. Goodson, 8 N.Y.2d 8 [1960]).

“A cause of action to recover damages for legal malpractice requires proof of three elements: (1) that the defendant 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 defendant's negligence, the plaintiff would have been successful in the underlying action” (Cummings v. Donovan, 36 A.D.3d 648, 648 [2d Dept 2007]). “Furthermore, to state a cause of action for legal malpractice arising from negligent misrepresentation in a criminal proceeding, the plaintiff must allege his or her innocence or a colorable claim of

innocence of the underlying offense” (Id.) (see also Ben-Zvi v. Kronish Lieb Weiner & Hellman LLP, 278 A.D.2d 167 [1st Dep’t 2000]; Daly v. Peace, 54 A.D.3d 801 [2d Dep’t 2008]; Boomer v. Gross, 34 A.D.3d 1096 [3d Dep’t 2006]).

After careful consideration, the Court finds that the documents exhibited by defendant are sufficient to make out a prima facie case in favor of defendant. The Court finds further that plaintiff’s conclusory, self-serving affidavit is insufficient to establish the existence of any genuine issue of material fact or otherwise rebut defendant’s prima facie case.

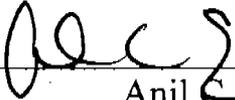
Accordingly, it is

ORDERED that defendant’s motion for summary judgment is granted, and the complaint is dismissed without costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

The foregoing constitutes the decision and order of the court.

Date: 10/1/11
New York, New York


Anil C. Singh

FILED

NOV 02 2011

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