

Deutsch v Ullman

2012 NY Slip Op 30748(U)

March 23, 2012

Sup Ct, New York County

Docket Number: 110595/2010

Judge: Saliann Scarpulla

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

SALIANN SCARPULLA
J.S.C.

PRESENT

PART 19

Index Number : 110595/2010

DEUTSCH, MARION

INDEX NO. _____

vs

ULLMAN, ESQ., DAVID

MOTION DATE _____

Sequence Number : 001

MOTION SEQ. NO. _____

SUMMARY JUDGMENT

MOTION CAL. NO. _____

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

decided per the memorandum decision dated 3/23/12
which disposes of motion sequence(s) no. 1

FILED
MAR 26 2012
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 3/23/12

Saliann Scarpulla
SALIANN SCARPULLA J.S.C.

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: CIVIL TERM: PART 19

----- X
MARION DEUTSCH,

Plaintiff,

- against-

Index No.: 110595/2010
Submission Date: 11/16/2011

DAVID ULLMAN, ESQ., DAVID ULLMAN, P.C.,
ULLMAN & HUBER, ULLMAN & HUBER, P.C.,
EZRA HUBER, ESQ., EZRA HUBER &
ASSOCIATES, P.C.,

Defendants.

----- X
Plaintiff, Pro se:
Marion Deutsch
7 Park Avenue, Apt. 8F
New York, NY 10016

For Defendants:
Litchfield Cavo LLP
420 Lexington Ave., Suite 2104
New York, NY 10170

Papers considered in review of this motion for summary judgment:

- Notice of Motion 1
- Aff in Support..... 2
- Mem of Law 3
- Aff in Opposition. 4

FILED
MAR 26 2012
NEW YORK
COUNTY CLERK'S OFFICE

HON. SALIANN SCARPULLA, J.:

In this legal malpractice action, defendants David Ullman, Esq., David Ullman, P.C., Ullman & Huber, Ullman & Huber, P.C., Ezra Huber, Esq. ("Huber"), Ezra Huber & Associates, P.C. (collectively "defendants") move for summary judgment dismissing the complaint.

In January 1992, plaintiff Marion Deutsch ("Deutsch") retained defendants to represent her in two actions against The City of New York and The Board of Education of

the City of New York (the "Board"). These actions arose from separate incidents that occurred in 1982 and 1983 while Deutsch worked as a public school teacher in Brooklyn, New York. In the first action (the "1982 action"), Deutsch alleged that she sustained personal injuries on or about April 29, 1982 after one of her second-grade students grabbed her left arm. Deutsch alleged in her complaint that the Board was negligent in failing to protect her from the student.

At the 50-h hearing held in connection with the 1982 action, Deutsch testified that before the incident, other students had complained that the student had called them names and hit them. Deutsch testified that she had reported this behavior to the school principal, John Graziani ("Graziani"). Deutsch further testified that over the course of these conversations, she requested that the student be transferred to a different class, but that Graziani told her it was not possible. According to Deutsch, Graziani promised that before Easter of 1982, approximately two weeks before the incident, "he would do what he [could] to get the child tested as soon as possible." When Deutsch returned to work after Easter, the school's social worker purportedly told her that the child would be placed on a list to be tested, a process which Deutsch knew could take months to complete.

The second action (the "1983 action") arose out of back injuries Deutsch allegedly sustained on October 16, 1983, while she attempting to close a window in her classroom. In her complaint, Deutsch alleged that the Board was liable for "improperly maintaining

windows in her classroom,” failing to provide a pole to open and close the windows and failing to provide personnel to close the windows.

At an arbitration hearing to determine whether Deutsch’s back injuries granted her “injury in the line of duty” status, Deutsch testified that she stepped onto the classroom’s radiator to allow her access to the window. When she attempted to push the window closed, the window jammed and she “felt a pain radiate down to her toes.” In an Opinion and Award dated June 17, 1993, arbitrator Bonnie Weinstock (“Weinstock”) found that Deutsch’s decision to step onto the radiator was “ill advised,” but also stated that she was “unwilling to characterize [Deutsch’s] action as ‘negligent’ or ‘reckless’ . . .”

In February 1993, Ullman & Huber successfully moved to consolidate the 1982 action and the 1983 action and to transfer venue to Kings County. From the papers it appears that both cases were marked off the calendar on June 28, 1994. Neither Deutsch nor defendants explain why the cases were marked off.

Nine years later, in June 2003, Ullman & Huber P.C. dissolved. After the firm’s dissolution, David Ullman, Esq. and Deutsch continued to maintain an attorney-client relationship. It is undisputed that Huber no longer represented Deutsch after the firm dissolved.

Deutsch commenced this action in December, 2010, asserting causes of action for professional negligence, poor due diligence, vicarious liability for the professional negligence, and breach of contract. In the professional negligence cause of action,

5]

Deutsch alleges that defendants “were negligent when they failed to prevent the two cases from being deposed [sic].” Deutsch further alleges that defendants failed to take relevant depositions and conduct proper investigations for the underlying suits. Deutsch alleges in the breach of contract cause of action that defendants breached their retainer agreements by lying to her about the alleged malpractice and its consequences.

Defendants now move for summary judgment, arguing that the professional negligence action against Ezra Huber, Esq. and Ezra Huber & Associates, P.C. is time-barred. Defendants further contend that the professional negligence cause of action as to David Ullman, Esq., David Ullman, P.C., Ullman & Huber and Ullman & Huber, P.C. should be dismissed because Deutsch would not have prevailed in either underlying suit. Specifically, defendants argue that Deutsch would not have prevailed in the 1982 action because the Board did not owe Deutsch a duty to protect her against injuries caused by students. Defendants further argue that in the 1983 action, Weinstock’s findings collaterally estop Deutsch from arguing that the Board was negligent. Lastly, defendants maintain that the remaining causes of action should be dismissed because they are duplicative of the legal malpractice claim and/or fail to state a cause of action.

In opposition, Deutsch argues that defendants Ezra Huber, Esq. and Ezra Huber & Associates, P.C. should be estopped from asserting the statute of limitations as a defense because defendants concealed facts from Deutsch, which prevented her from discovering that Ullman & Huber P.C. dissolved in July 2003. Deutsch further contends that it is too

6] early in the discovery process to determine whether she would have been successful in the underlying suits.

Discussion

A movant seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to eliminate any material issues of fact. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once a showing has been made, the burden shifts to the opposing party, who must then demonstrate the existence of a triable issue of fact. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980).

Here, defendants have made a *prima facie* showing that the complaint should be dismissed against Ezra Huber, Esq. and Ezra Huber & Associates, P.C. as time-barred. The statute of limitations on legal malpractice claims accrues on the date of the malpractice, and is tolled until the completion of the attorney's representation of the client. CPLR § 214; *see Glamm v. Allen*, 57 N.Y.2d 87, 93-94 (1982).

Deutsch does not dispute that she and Huber did not have an attorney-client relationship after Ullman & Huber's dissolution in July 2003, more than three years before she commenced this action. Nor does she dispute that the alleged legal malpractice occurred more than three years before this suit. However, Deutsch maintains that Huber should be equitably estopped from asserting the statute of limitations as a

defense because defendants concealed facts from Deutsch, which prevented her from discovering that the firm had dissolved.

To invoke equitable estoppel, a plaintiff “establish that subsequent and *specific* actions by defendants . . . kept [her] from timely bringing suit.” *Zumpano v. Quinn*, 6 N.Y.3d 666, 674 (2006) (emphasis added). Because Deutsch does not state with any specificity what defendants said or did that prevented her from discovering that the firm had dissolved, her allegations are insufficient to raise a triable issue of fact, *see Pulver v. Dougherty*, 58 A.D.3d 978, 980 (3d Dept. 2009), and the complaint is dismissed as to Ezra Huber, Esq. and Ezra Huber & Associates, P.C.¹

Further, Deutsch’s legal malpractice cause of action based on the 1982 action is dismissed as to the remaining defendants. To prevail in an action for legal malpractice, a plaintiff must demonstrate that she would have prevailed on the merits of the underlying action “but for” the attorney’s negligence. *Aquino v. Kuczinski, Vila & Assoc., P.C.*, 39 A.D.3d 216, 218-19 (1st Dept. 2007). A defendant in an attorney malpractice action is entitled to summary judgment where the defendant shows that the plaintiff would not have prevailed in the underlying action notwithstanding the alleged malpractice. *See Walker v. Glotzer*, 79 A.D.3d 737, 738 (2d Dept. 2010).

¹ As stated more fully below, to the extent that Deutsch attempts to recast her legal malpractice claim against Huber and Ezra Huber & Associates, P.C., as another tort claim or as a breach of contract claim, those claims are also dismissed as duplicative of the legal malpractice claim.

Defendants here have submitted sufficient evidence to show that Deutsch would not have prevailed in the 1982 action as a matter of law, even if the case had remained active. Absent a special relationship between Deutsch and the Board, the Board did not owe Deutsch a duty to protect her from injuries caused by students. *See Stinson v. Roosevelt U.F.S.D.*, 61 A.D.3d 847, 847-48 (2d Dept. 2009). To establish a special relationship, a plaintiff must show “(1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality’s agents that inaction could lead to harm; (3) some form of direct contact between the municipality’s agents and the injured party; and (4) that party’s justifiable reliance on the municipality’s affirmative undertaking.” *Cuffy v. City of New York*, 69 N.Y.2d 255, 260 (1987).

According to Deutsch, Graziani told her it would be impossible to transfer the student to another class. The only assurance Graziani made was that “before Easter he would do what he [could] to get the child tested as soon as possible.” When Deutsch spoke to the school social worker after Easter, the social worker told her that the child would be placed on a list to be tested, a process Deutsch admitted would take months and the outcome of which was completely uncertain. Deutsch’s own 50-H hearing testimony conclusively shows that the Board did not assume a special duty toward her. *See Dinardo v. City of New York*, 13 N.Y.3d 872, 874-75 (2009).

Deutsch now claims, in opposition to defendants' motion, that Graziani told her that the student would be removed from her class after the student was tested. But Deutsch also admits that testing did not occur after Easter, as Graziani had promised, and that "nothing much happened with the testing" even after she made a call to a Board supervisor. Given the Board's continued inaction after Deutsch's complaints, any purported reliance on their promises to remove the student from the class was not reasonable. *See Valdez v. City of New York*, 18 N.Y.3d 69, 81-82 (2011).

In contrast to the 1982 action, defendants have failed to make a *prima facie* showing that Deutsch would not have prevailed in the 1983 action as a matter of law. Defendants point to the arbitration Opinion and Award, in which Weinstock stated that it was "ill advised" for Deutsch to climb on the radiator to reach the window, and that Deutsch was "partially responsible" for her injuries. Defendants argue that because of this finding Deutsch is collaterally estopped from arguing that the Board could have been held liable for her injuries.

In the Opinion and Award Weinstock did not find that the defendants named in the 1983 action were free from negligence. Moreover, Weinstock was unwilling to describe Deutsch's actions as "negligent." Thus, the Weinstock's Opinion and Award does not prevent Deutsch from showing that she could have prevailed, at least in part, in the 1983 action. *See Pelzer v. Transel El. & Elec., Inc.*, 41 A.D.3d 379, 380 (1st Dept. 2007).

Lastly, the Court dismisses Deutsch's remaining causes of action against the remaining defendants. Poor due diligence and vicarious liability are theories of liability, not separate causes of action. Further, these causes of action are wholly duplicative of the legal malpractice allegations. *See Kvetnaya v. Tylo*, 49 A.D.3d 608, 609 (2d Dept. 2008).

In accordance with the foregoing, it is hereby

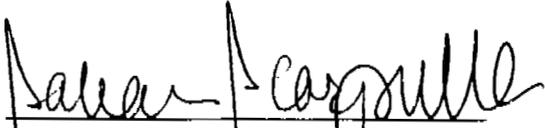
ORDERED that the motion for summary judgment by defendants David Ullman, Esq., David Ullman, P.C., Ullman & Huber, Ullman & Huber, P.C., Ezra Huber, Esq., Ezra Huber & Associates, P.C. is granted only to the extent that:

- 1) the complaint is severed and dismissed in its entirety as against Ezra Huber, Esq. and Ezra Huber & Associates, P.C.; and
- 2) all causes of action except the legal malpractice cause of action based upon the 1983 action are severed and dismissed against the remaining defendants; and the Clerk of the Court is directed to enter judgment accordingly.

The remaining cause of action against the remaining defendants for legal malpractice in connection with the 1983 action shall continue.

This constitutes the decision and order of the Court.

Dated: New York, New York
March 23, 2012

ENTER:

Saliann Scarpulla, J.S.C.