

Shayan v O'Malley

2014 NY Slip Op 32144(U)

August 11, 2014

Supreme Court, New York County

Docket Number: 150447/2011

Judge: Ellen M. Coin

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 63

-----X
Ali Shayan,

Plaintiff,

-against-

Index No.: 150447/2011
Subm Date: April 30, 2014
Sequence No.: 002
DECISION AND ORDER

James A. O'Malley and James A.
O'Malley, P.C.

Defendants.

-----X
Appearances:

For Plaintiff:
Schwartz & Ponterio, PLLC
By Brian Levenson, Esq.
134 West 29th Street-Suite 1006
New York, New York 10001
(212) 714-1200

For Defendants:
Garbarini & Scher, P.C.
By Barry Rothman, Esq.
432 Park Ave. South, 9th Floor
New York, New York 10016
(212) 689-1113

Papers considered in review of this motion for summary judgment:

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Affirm. in Opp.....	<u>2</u>
Memorandum of Law in Opp.....	<u>3</u>
Affirm. in Reply.....	<u>4</u>

Ellen M. Coin, J.:

In this attorney malpractice action, defendants James A. O'Malley (O'Malley) and James A. O'Malley, P.C. (collectively, defendants) move pursuant to CPLR 3212 for summary judgment dismissing the complaint.

This action arises out of defendants' representation of plaintiff Ali Shayan (Shayan) concerning an immigration matter. Shayan, a native of Iran and citizen of Canada, claims that during defendants' representation of him from January 2008 until December 4, 2009, defendants failed to advise Shayan of the need to renew

his employment authorization document (EAD), and failed to file a proper and timely EAD renewal application, which led to the loss of his employment at Moody's Investors Service, Inc. (Moody's) for 11 weeks.

Shayan was born in Iran, and became a citizen of Canada in June 1997. He entered the United States in September 2004 as a visitor. From November 2004 to 2011, he was married to a United States citizen. On or about March 11, 2005, plaintiff retained an immigration attorney in California to change his immigration status from a B-2 visa to a "green card," which is a United States Permanent Resident Card (USCIS Form I-551), based on his marriage. In or around June 2005, Shayan received an EAD from the United States Citizenship and Immigration Services (USCIS). This EAD expired one year later, in 2006. He moved to New York some time in 2005.

In May 2007, Shayan was hired by Moody's as an associate analyst at an annual salary of \$105,000, plus bonus. According to Shayan's affidavit in opposition to defendants' motion, Shayan avers: "At the time I was hired, Moody's was aware that my EAD had expired and recommended I renew it. I immediately told my attorney in California . . . to renew it and she filed a renewal application in May or June 2007" (Affidavit of Ali Shayan, dated January 2, 2014, ¶ 9).

At the start of his employment with Moody's, Shayan signed an employment eligibility verification, an Immigration and

Naturalization Service I-9 form, on May 2, 2007. According to the form, Shayan checked the box that indicates: "I attest, under penalty of perjury, that I am . . . [a] lawful Permanent Resident (Alien #A095714383)" (Exhibit 5 to Affirmation of Barry Rothman, dated October 28, 2013). The alien number that appears on the I-9 form is the number that appears on Shayan's EAD. The forms of identification used to verify Shayan's employment eligibility were: a California driver's license and a social security card, which states: "valid for work only with INS authorization" (*id.*).

According to Shayan, in January 2008, he retained defendants to represent him in connection with his immigration case, "including all proceedings related to my green card application and EAD . . ." (Shayan aff, ¶ 9). Around that time, he learned from his attorney in California, that his application for a green card had been denied because he had missed an interview. There were deportation proceedings pending against him. Shayan avers that he did not discuss the EAD at his first meeting with O'Malley, because his first concern was the deportation (Shayan dep tr at 60:10-15).

According to Shayan's affidavit, in February or March of that same year, 2008, Shayan consulted with Diana Castaneda (Castaneda), an associate attorney at James O'Malley, P.C., with respect to his EAD, which was to expire on September 16, 2008. Castaneda told Shayan that first they had to have a hearing to reopen his case that was filed in California. Later in 2008, Shayan again spoke to Castaneda about the extension of his EAD. Shayan avers: "Attorney

Diana Castaneda assured me that she would timely take care of obtaining an extension of my EAD, but she never did" (Shayan aff, ¶ 14).

Around the summer of 2008, Castaneda assisted Shayan in learning the status of his EAD application, filed by his California attorney, and in getting fingerprinted in New York City to complete the application. As a consequence, in approximately July 2008, he received the actual EAD card, which was valid from September 17, 2007 through September 16, 2008. When he got the card, he informed Castaneda, who told him she would take care of getting a new card, since this one was about to expire.

At a December 2008 meeting between Shayan and O'Malley, the two discussed the status of his EAD as follows: "Now since Diana was gone I asked Mr. O'Malley . . . So I have two issues which Diana was working on for me. One is to postpone the Stokes interview. The second is to get my new EAD. Mr. O'Malley said, 'Don't worry about it. Diana is gone. I will take care of everything'"¹ (Shayan dep tr at 70:15-24).

In 2009, when Shayan asked O'Malley about his EAD, O'Malley advised him that "he was not required to renew his EAD, because he had not changed employers and that he was not required to renew his EAD unless he planned to change employers. The defendants took no action to extend [Shayan's] EAD and it expired" (complaint, ¶ 20,

¹A "Stokes" interview is a "formal investigatory interview procedure to determine the bona fides of his marriage to a United States citizen . . ." (Rothman aff, exhibit 8, expert report of David Grunblatt, ¶ 17).

Shayan aff, ¶ 17, Shayan dep tr at 72:8-12).

In May 2009, an associate from James O'Malley, P.C. appeared with Shayan in court and scheduled a further conference for December 18, 2009. On or about December 2, 2009, the defendants re-filed an immigration application, for adjustment of status, for Shayan "against his objection," because he did not believe he should pay an additional filing fee (complaint, ¶ 27, Shayan aff, ¶ 24). As part of the filing, defendants included an application for an EAD extension.

On or about December 3, 2009, Moody's terminated Shayan's employment on the ground that his EAD had expired, but agreed to allow Shayan to remain employed pending the outcome of the December 18, 2009 conference.

On December 4, 2009, Shayan met with O'Malley to discuss the potential termination of his employment and the December 18th conference. Shayan alleges that at that meeting, O'Malley advised him that he was not eligible for an EAD "and that he should work illegally" (*id.*, ¶ 32). Further, Shayan alleges, O'Malley advised him that defendants had filed an application for an EAD extension, as part of the December 2, 2009 filing, without Shayan's knowledge. Shayan was not satisfied with defendants' responses and terminated their representation on December 4, 2009.

Shayan then retained new counsel, Steven Klapisch, Esq., and learned that he was required to submit to a biometrics exam as part of his green card application. On December 18, 2009, Shayan went

to court to learn that the conference had to be re-scheduled. His employer was unwilling to further extend his employment, and Shayan lost his job. An email dated December 21, 2009 from human resources at Moody's states, in part: "A Termination or Completion has been processed. Please schedule an exit interview if the action below is Termination . . . Action/Reason: Termination/Work Authorization Expired Termination Date: 12/21/2009" (Levenson aff, exhibit 8).

Klapisch followed up on the EAD application filed by O'Malley, and was able to obtain a new EAD for Shayan on February 1, 2010. Shayan successfully obtained his green card as well. Moody's reinstated his employment on March 3, 2010.

In the complaint, Shayan alleges that as a result of defendants' negligence, he suffered damages because, he was unemployed from December 21, 2009 through March 3, 2010, and, therefore, lost two and one half months salary, over \$27,000. In addition, Shayan alleges that he lost his year-end bonus of \$10,000, incurred additional legal expenses in the amount of \$2,050.00, and incurred unnecessary legal expenses in excess of \$1,030.00.

In their motion for summary judgment, defendants argue that plaintiff's alleged damages were not caused by legal malpractice on the part of defendants. Defendants argue that plaintiff was let go because of the information he wrote on the I-9 form, and not as a result of defendants' advice or work. Specifically, defendants

argue:

"plaintiff was terminated by Moody's because on his employment application dated May 2, 2007, he falsely represented that he possessed unrestricted lawful authorization to work in the United States, and on his I-9 Employment Eligibility document, also dated May 2, 2007, he falsely represented that he was a lawful permanent resident alien of the United States. These misstatements were discovered during a Moody's internal audit of their I-9's, which revealed a deficiency in plaintiff's form in that he did not have a valid work authorization when he started employment in May 2007 . . . and was terminated because he could not show proof of valid work authorization"

(Rothman aff, ¶ 4).

Defendants further argue that Shayan retained them to represent him only during deportation hearings and a "Stokes" interview process. Defendants argue: "Plaintiff does not allege, nor is there any proof that, defendant did not perform these tasks successfully" (*id.*, ¶ 41). Defendants argue that the retainer agreement, signed by O'Malley in October 2008, reflects the limited purpose of their representation in the heading, which states: "Immigration Court Hearings and Immediate Relative Stokes Interview on behalf of Ali SHAYAN" (Levenson aff, exhibit 9).

During his deposition, O'Malley testified that he was aware that Castaneda was assisting Shayan to obtain his EAD renewal in the summer of 2008. When asked whether he told Shayan that he would assist with extending or renewing his EAD in November 2008, he responded that he could not recall.

Each party submitted an expert affirmation.

Discussion

It is well understood that summary judgment is a drastic remedy and should be granted only if the moving party has sufficiently established the absence of any material issues of fact, requiring judgment as a matter of law (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012], citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Regardless of the sufficiency of the opposing papers, the "[f]ailure to make such showing requires denial of the motion" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

"An action for legal malpractice requires proof of the attorney's negligence, a showing that the negligence was the proximate cause of the plaintiff's injury, and evidence of actual damages" (*Gladstone v Ziegler*, 46 AD3d 366, 366 [1st Dept 2007]). An attorney's negligence is predicated upon a failure to exercise the ordinary reasonable care, skill and diligence commonly possessed and exercised by a member of the legal profession. . . (see *InKine Pharm Co., Inc. v Coleman*, 305 AD2d 151, 154 [1st Dept 2003]). A plaintiff making such a claim must establish that "'but for' the attorney's negligence, the plaintiff would have prevailed in the matter in question. The 'failure to demonstrate proximate

cause mandates the dismissal of a legal malpractice action regardless of whether the attorney was negligent'" (*Tydings v Greenfield, Stein & Senior, LLP*, 43 AD3d 680, 682 [1st Dept 2007][citations omitted], *affd* 11 NY3d 195 [2008]).

"A plaintiff's burden of proof in a legal malpractice action is a heavy one. The plaintiff must prove first the hypothetical outcome of the underlying litigation and, then, the attorney's liability for malpractice in connection with that litigation" (*Lindenman v Kreitzer*, 7 AD3d 30, 34 [1st Dept 2004]). Plaintiff must establish that defendant's negligence "was the proximate cause of the plaintiff's loss since it prevented him from being properly compensated for his loss" (*id.*).

At the crux of Shayan's lawsuit is the claim that defendants were negligent in failing to apply for the extension or renewal of Shayan's EAD in 2008, when Castaneda assured him that she would apply for the extension. It was not until December 2009, that defendants submitted the application for the renewal. This application was successful within two months, as Shayan received the new EAD on February 3, 2010. Shayan alleges that but for this negligence, he would have been in timely possession of the renewed EAD, and would not have lost his job for the 10 weeks.

On their motion, defendants have not successfully argued that there is no question of fact with respect to Shayan's claim. First, defendants argue that Shayan is unable to establish the causation between any failure on defendants' part and Moody's

termination of Shayan, because Moody's terminated Shayan for lying on his I-9 form. The record, however, does not support this position. The December 21, 2009 email from human resources at Moody's to Susan Hourihan, a Human Resources Generalist at Moody's, indicates the reason for Shayan's termination as "Work Authorization Expired." At her deposition, Hourihan testified that Shayan's employment was terminated because of his failure to produce proof of a valid work authorization. There is nothing in the record establishing that Moody's terminated Shayan because he lied on his I-9 form.

Next, defendants argue that Shayan came to them seeking help only with respect to the deportation hearings and the Stokes interview, and not for the renewal of his EAD. However, the record reflects questions of fact on this point. Shayan's sworn testimony alleges that on several occasions both Castaneda and O'Malley had knowledge as early as July or August of 2008 of the ensuing expiration of Shayan's EAD, and offered assurances to Shayan that they would help him obtain a new EAD. He also testified that it was Castaneda's help that enabled him to get the EAD card in July 2008.

These assurances were given to Shayan with sufficient time to attempt to file the application and renew the card before Shayan's job was compromised. However, the defendants did not file an application to extend the EAD before December 2, 2009. Thus, if there is a question about the scope of representation provided to Shayan by defendants, the retainer agreement alone does not resolve

that question.² Indeed, "it was incumbent upon [defendants] to ensure that [Shayan] understood the limits of their representation" (*Unger v Horowitz*, 8 AD3d 62, 63 [1st Dept 2004]), if it was in fact so limited. The *Unger* court found that the scope of duty owed by the defendants' outgoing counsel to their client "was not governed exclusively by any formal substitution of new counsel, given plaintiff's sworn assertion, unchallenged, that the outgoing attorney would continue to work as his attorney on the case . . ." (*id.* [citation omitted]).

Defendants do not deny that Shayan's EAD had expired, that Shayan made requests to defendants for help with his EAD renewal, or that the firm filed an application for an extension or renewal of Shayan's EAD on December 2, 2009. Instead, defendants' position on this point is not entirely clear. Defendants argue that they were hired by Shayan to address only the deportation hearings and the Stokes hearing, and that they did so successfully. Defendants do not deny Shayan's need for the extension of his EAD, or explain Castaneda's actions assisting Shayan with his EAD application, or why they did not file an application for an extension of his EAD prior to December 2, 2009. During his deposition, when asked why he did not take steps to extend Shayan's EAD, O'Malley replied that

² The relevance of the written retainer agreement to determining the scope of the attorney-client relationship is quite limited as it was executed by the attorney on October 28, 2008, nine months into defendants' representation (Levenson Affirmation, dated January 6, 2013, Exhibit 9, JO'M 0001-0002). Further, the copy of the retainer agreement defendants produced in discovery does not bear Shayan's signature.

based upon conversations with Ali in "early 2008 into 2008," he "understood that [Shayan's] attorney in Los Angeles was dealing with that issue" (O'Malley tr at 81-82). Their expert's affirmation suggests that it was Shayan's negligence that led to Moody's termination of his employment. Defendants' expert opines that Shayan must have known that he had not executed a new application for an extension of his EAD and that despite this knowledge, he failed to take action to renew his EAD.

Thus, because there are material questions of fact as to whether defendants were negligent, this court denies defendants' motion for summary judgment.

In accordance with the foregoing, it is hereby

ORDERED that the motion of defendants James A. O'Malley and James A. O'Malley, P.C. for summary judgment pursuant to CPLR §3212 is denied.

Dated: *August 11, 2014*

ENTER

EM

Ellen M. Coin, A.J.S.C.