Fusco v Fauci
2001 NY Slip Op 30102(U)
June 15, 2001
Supreme Court, New York County
Docket Number: 109704/98
Judge: Louis B. York

[* 1]

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

PRESENT: LOUIS B. YORK Justice PART 2

James Fusco

- v -

Maria Fauci

INDEX NO. 109704/98

MOTION DATE

MOTION SEQ. NO. 004

MOTION CAL. NO.

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

Motion is decided in accordance with accompanying memorandum decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 6/20/01

LOUIS B. YORK J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

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

Index No.: 109704/98

Part 2

JAMES FUSCO,

Plaintiff,

- against -

MARIA THERESA FAUCI, Individually and as Executrix of the Estate of JAMES ROBERT FAUCI, ESQ., CHRISTOPHER FAUCI and ANTHONY FAUCI,

Defendants.

DECISION/ORDER
Present:
Hon. Louis B. York
Justice, Supreme Court

LOUIS B. YORK, J.S.C.:

In this legal malpractice action, defendants move to vacate the portion of the Court's December 27, 2000 order which denied their cross-motion based on defendants' default. Defendants explain that because counsel only recently was listed correctly in the court computer as counsel for defendants, they were not notified of the argument date by the court or by their calendar service. As plaintiff points out, the parties to a lawsuit have an obligation to know when the court schedules motions and arguments with respect to their cases. However, in this instance defendants swear to the court that they did follow the case through their calendar service; and, plaintiff has not given the court any reason to disregard counsel's avowal. Moreover, the parties have vigorously litigated this case and have appeared before the court on numerous occasions. Thus, this is not a situation in which the defaulting counsel has neglected to defend the action. In light of the above, and

of the fact that the mix-up in the court's own computer system contributed to the confusion, the court shall reconsider the cross-motion.

The motion, which seeks to dismiss the remainder of the complaint for legal malpractice, also has merit. Legal malpractice claims consist of the following elements: (1) attorney negligence (2) proximately causing the loss; and (3) proof of damages. Tinter v. Rapaport, 253 A.D.2d 588, 677 N.Y.S.2d 325 (1st Dept. 1998). The damages are based on the value of the claim lost. Campagnola v. Mulholland, Minion & Roe, 76 N.Y.2d 38, 42, 556 N.Y.S.2d 239, 241 (1990).

As plaintiff argues, a legal malpractice action can remain viable notwithstanding the ultimate settlement of the underlying lawsuit. See Cohen v. Lipsig, 92 A.D.2d 536, 459 N.Y.S.2d 98 (2nd Dept. 1983). However, there must be a showing of damages due to the malpractice; otherwise, the plaintiff has failed to establish a prima facie case. Because of this, Cohen applies where the plaintiff was forced to settle the case because of his or her counsel's mistakes; or where the plaintiff can otherwise show a compensable injury notwithstanding the settlement. See id.; Titsworth v. Mondo, 95 Misc. 2d 233, 407 N.Y.S.2d 793 (Sup. Ct. Monroe County 1978). Where the plaintiff did not sustain an economic injury due to the settlement terms, on the other hand, the cause of action is no longer viable.

The underlying lawsuit here was settled for $1,250,000, and the settlement occurred seven years after defendants' initial failure to perfect the appeal of my decision setting aside the jury verdict. Plaintiff now seeks to collect the $1,250,000 plus interest that would have accrued over seven years.

Assuming malpractice, the measure of damages would be the collectible judgment but for the malpractice. Titsworth, 95 Misc. 2d at 243, 407 N.Y.s.2d at 798. Here, there is no issue of fact as to the valuation of these damages. The original jury verdict was for $1,250,000. However, plaintiff has stated that seven years ago he urged his attorney, Mr. James Fauci, to settle the case for $700,000. To make plaintiff whole, which is the purpose of this current lawsuit, see McKenna v. Forsyth, - A.D.2d -, -, 720 N.Y.S.2d 654, 657 (4th Dept. 2001), lv denied, - N.Y.2d -, - N.Y.S.2d - (2001), plaintiff should be awarded the $700,000 he wanted to receive seven years ago, plus the interest that would have accrued on this amount over seven years. At 9% straight interest, which is the rate generally awarded by the court, this amount would total $1,141,000. Plaintiff, as already noted, has settled for greater than this amount. Thus, he has not shown that the malpractice has damaged him financially, and he has not alleged a prima facie case.

Therefore, it is

ORDERED that the motion to vacate the default and allow reargument is granted; and it is further

ORDERED that, on reconsideration, the cross-motion is granted and the case is dismissed.

ENTER:

DATE: 6/15/01

Louis B. York, J.S.C.