

Noroian v Cohen

2003 NY Slip Op 30101(U)

January 10, 2003

Supreme Court, New York County

Docket Number: 0105719/2001

Judge: Louis B. York

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

PRESENT: LOUIS B. YORK

PART 2

Justice

Norocian

- v -

Cohen

INDEX NO. 105719/01
 MOTION DATE _____
 MOTION SEQ. NO. 001
 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: 1/10/03

Louis B. York **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 : IAS PART 2

----- X

GEORGE NOROIAN,

Decision/Order
Index No. 105719/01

Plaintiff,

- against -

STEVEN E. COHEN and GEOGHAN & COHEN, LLC,

Defendants.

----- X

LOUIS B. YORK, J.:

Plaintiff George Noroian sustained serious personal injuries in an automobile accident and retained defendant Steven E. Cohen, counsel at defendant law firm Geoghan & Cohen, LLC, to pursue plaintiffs uninsured/ under insured claim under his automobile liability policy with State Farm, which was plaintiffs own insurer. In addition to the State Farm automobile policy, Noroian also maintained a personal umbrella policy with State Farm; and, Cohen commenced a declaratory judgement action against State Farm Fire & Casualty Company and Noroian's insurance broker at State Farm ("the original action"). Cohen sought to establish that the insurance agent improperly changed Noroian's insurance coverage without first obtaining plaintiffs approval or request for the change.

The matter proceeded to trial in April, 2000. During a break at trial, the presiding judge, the Honorable Elaine Slobod, presented Cohen with allegedly dispositive

adverse case law, Brownstein v. Travelers' Co., and Madhvani v. Sheehan. Brownstein v. Travelers Co., 235 A.D.2d 811; 652 N.Y.S.2d 812 (3rd Dept. 1997) and Madhvani v. Sheehan Agency, 234 A.D.2d 652; 650 N.Y.S.2d 490 (3rd Dept. 1996). Cohen agreed that the cases were dispositive of his client's claim. The judge then remarked that she would dismiss the case unless the parties were able to procure a settlement, which they were unable to.

Based on the case law, Cohen conferred with Noroian and advised him to withdraw the case, which Cohen contended had no chance of success; the plaintiff assented. Cohen, on plaintiffs behalf, stipulated to withdraw the case in open court with prejudice.

Subsequently, Noroian instituted this action against his former attorney, Steven E. Cohen, ("Cohen"), and the firm, Geoghan & Cohen, LLC ("Firm"), asserting that defendants are guilty of legal malpractice. In the current action, plaintiff alleges that the declaratory judgment action was based on a valid claim; and that defendants - who did not conduct adequate legal research or otherwise investigate the pertinent issues - failed to exercise the requisite skill and professional care in their representation of plaintiff.

Further, plaintiff alleges that, based on the attorney-client relationship between them, both Cohen and the Firm owed him a duty of care; and, both of them breached their duty by their negligent investigation and prosecution of plaintiffs original action against State Farm and his insurance broker there. According to plaintiff, this malpractice was the proximate cause of plaintiffs damages, and the damages were reasonably foreseeable by both defendants. As a result, plaintiff contends, defendants

destroyed plaintiffs rights against State Farm Insurance and the insurance broker. Plaintiff seeks \$1,000,000 in damages, including all sums which plaintiff would have recovered from State Farm Insurance and/or the insurance brokers, attorney's fees, and all costs and disbursements paid by plaintiff in connection with this action.

Currently, defendants move to dismiss the case pursuant to CPLR §3212 on three grounds. First, they argue that plaintiffs theory of liability is premised on an incorrect analysis of the pertinent insurance law and a faulty understanding of the underlying record. Second, defendants contend that they correctly interpreted the applicable case law in the original action. Third, they assert that even if the court accepts plaintiffs legal analysis of the original action, the current complaint does not state a claim for legal malpractice. According to defendants, the issue of law presented in the original action is unsettled, and therefore defendants' judgment was reasonable.

Plaintiff first opposes on the ground that in deciding to discontinue the original action, defendants relied upon cases that were not applicable to plaintiff's original case and were not adversely dispositive of it. Second, facts necessary to justify opposition to defendant's motion exist but are in defendants' exclusive control; thus plaintiff must be afforded the opportunity to conduct discovery - including depositions and document demands -before he can adequately oppose the motion at hand. Third, he asserts that **his** claim for legal malpractice raises factual issues that must **be** resolved by a jury. Defendants respond that plaintiff relies on an unrecognized interpretation of insurance law and that the deficiencies of the complaint cannot be remedied by further discovery.

Legal Standard

Defendants move for summary judgment pursuant to CPLR §3212 on the ground

that plaintiff has failed to establish a prima facie case for legal malpractice and further discovery will not remedy the claim. The initial burden of coming forward with evidence establishing a prima facie right to summary judgment is on the movants. Nevelson v. Carro, Spanbock, Kaster, and Cuiffo, 259 A.D.2d 282, 284; 686 N.Y.S. 2d 404 (1st Dept. 1999).

In the original declaratory judgment action against State Farm Insurance and insurance agent Jim Reyle, plaintiff sought to establish that he was entitled the recovery he would have obtained from his under insured/hninsured motorist coverage, had his insurance agent not allegedly unilaterally deleted it. Plaintiff alleges he did not request the change, authorize it, or approve it. At the underlying trial, Justice Slobod presented Cohen with case law that she believed was controlling. Under these line of cases, once an insured receives a declaration page and insurance policy, he is charged with presumptive knowledge of the terms and limits of the policy. Chase Cigar Store, Inc. v. Stam Agency, Inc., 281 A.D. 2d 911, 912; 722 N.Y.S.2d 320 (4th Dept. 2001); Madhvani v. Thomas L. Sheehan & Sheehan Agency, 234 A.D.2d 652, 654; 650 N.Y.S.2d 490 (3rd Dept. 1996); Brownstein v. Travelers Co. v. B.V. Insurance Agency, 235 A.D.2d 811, 813; also available at 1997 N.Y. Slip Op. 00364 (3rd Dept. 1996). Applying this precedent, the judge felt that despite the plaintiffs contention that he did not request the deletion and did not notice the change had occurred on his subsequent policy statements and declaration page, plaintiff had presumptive knowledge of the changes.

In the original action, the parties factually disputed whether Noroain requested that the under insured/hninsured motorist coverage be dropped from his policy. In his deposition testimony, however, plaintiff acknowledges, that he received a mid-term

declaration page containing the changes indicating that his under insured/hninsured motorist coverage had been deleted. Plaintiff claims he did not notice that the defendants had changed his policy because he did not request them. Here, the plaintiff renewed the policy in question for three years, and his wife endorsed his name on the premium check that represented the refund from the deleted coverage. Plaintiff also denies knowledge of this since his wife handled bank and bill paying in his household.

Justice Slobod and Cohen concluded that plaintiff was chargeable with presumptive knowledge of the terms and limits of the policy. In Madhvani, parties' testimony was in conflict as to whether plaintiff requested full coverage from his agent, as plaintiff alleged and defendant-agent denied ever receiving such request. The court held that the plaintiff, having received the declaration page, had an opportunity to review the policy limitations and omissions and upon receipt of the declaration page is charged with "conclusive presumptive knowledge" of the terms and limits of the policy. Madhvani, 234 A.D.2d at 664-665. In Brownstein, plaintiff testified that he specifically requested certain coverage, but the policy he received did not include all the coverage he allegedly asked for. Though the plaintiff acknowledges receiving the declarations page, he neither read nor reviewed it. After a loss occurred plaintiff attempted to recover, whereupon the agency responded that he was not covered for this specific loss. The court held that as the plaintiff had the policy in his possession, although never read it, "in the absence of fraud or other wrongful act on the part of the other contracting party, plaintiffs are conclusively presumed to know its [policy] contents and to have assented to them." Brownstein, 235 A.D.2d at 813.

An exception to the rule that a party is charged with presumptive knowledge of a

policy's terms and limits once he receives a declaration page is if there is an inference of fraud or misrepresentation by the agent. Brownstein, 235 A.D.2d at 813; Lemendola v. Sebastian Mossa, 719 N.Y.S.2d 832,834; 186 Misc.2d 604 (N.Y. Civ. Ct. 2001). In the underlying action, plaintiff did not allege fraud or misrepresentation.

Plaintiff argues that the above cited cases are inapplicable and are not dispositive of plaintiff's claim. Plaintiff relies on the supposition that his request for additional liability coverage amounted to a renewal of the existing policy, the policy containing the under insured motorist coverage, and a new contract was formed only for the changed limits of additional liability insurance, while the details of the previous policy were to remain unaltered. In the complaint in the original action, however, plaintiff repeatedly refers to the changes only as "unrequested" and "unauthorized." Plaintiff cites Cappelli v. State Farm Mutual Automobile Insurance Co. which says that "a modification of a contract results in the creation of a new contract between the parties which *pro tanto* supplants the affected provisions of the original agreement while leaving the balance of it intact..." Cappelli v. State Farm Mutual Automobile Insurance Co., 259 A.D.2d 581, 582; 686 N.Y.S.2d 494 (2nd Dept. 1999). However, Cappelli was decided in 1999, and the underlying trial took place in 1998. Accordingly, the defendant cannot be charged with negligence based on his ignorance of its holding.

The other cases cited by the plaintiff are also inapplicable. In Guarascio, the court held that the plaintiff was not negligent for failing to discover a change that he allegedly did not authorize on his policy because the defendant had acted in bad faith in changing the terms of the policy. State Farm Mutual Automobile Ins. Co. v. Guarascio,

582 N.Y.S.2d 605, 607-608; 153 Misc.2d 485 (N.Y. Sup. Ct. 1992). The Guarascio Court specifically found not only bad faith, but possibly fraud in the alteration of the plaintiffs coverage. Id at 607-8. The court went on to say that the defendants' failure to receive testimony of the insurance agent and a claims examiner who handled the plaintiffs policy, permitted an unfavorable inference against those parties. Id at 607-608. In the original action, on the other hand, the insurance agent and various employees of the agency all testified that plaintiff requested additional insurance and asked that his under insured/ uninsured motorist coverage be dropped. In addition, as stated, plaintiff did not allege bad faith in the complaint.

Plaintiff further relies on an article published in the September/October 1998 edition of the New York State Bar Association discussing developments in under insured and uninsured motorist coverage, and he requests the court to adopt the interpretation of the law set forth in the article. The article which interprets an area of law its author acknowledges is evolving, is not a sufficient basis for a claim of malpractice, however as the defendants cannot be charged with knowledge of unsettled or debatable law. See Darby & Darby, P.C. v. VSI International, Inc., 95 N.Y.2d 308, 314; 716 N.Y.S.2d 378 (2000).

To succeed on a claim for legal malpractice, plaintiff must demonstrate that the underlying proceeding was governed by well settled, conclusive legal principles, and that the plaintiff suffered a loss because those principles were not asserted by his attorney on the client's behalf. Walter D. Peek v. Aqee, 235 A.D.2d 790 ; 652 N.Y.S.2d 359, 361 (3rd Dept. 1997). Gimbel v. Waldman, 84 N.Y.S. 2d 888; 193 Misc. 758 (Sup. County 1948). Furthermore, even if the attorney's judgment was incorrect and a

recommendation to his client proves unfavorable, a claim for malpractice will not lie if the advice was simply an error of judgment. "Selection of one among several reasonable courses of action does not constitute malpractice." Rosner v. Paley, 65 N.Y.2d 736, 738; 492 N.Y.S.2d 13 (1985). For this reason, New York courts have consistently dismissed claims for legal malpractice that assert no more than an error of judgment by the attorney. See, e.g., Allen v. Potruch, 282 A.D.2d 484,484; 723 N.Y.S.2d 101 (2nd Dept. 2001); Walter D. Peek, Inc. v. Agee, 235 A.D.2d 790, 792; 652 N.Y.S.2d 359 (3rd Dept. 1997). As defendants argue, the issue of law regarding coverage in the underlying case was an unsettled area of insurance law. Thus, plaintiff cannot show merit to his case based on the Bar Association article or the Cappelli decision.

Further, in order to prevail on a cause of action for a claim of legal malpractice based on the attorney's alleged failure to conduct adequate legal research and allegedly causing a meritorious cause of action to be dismissed with prejudice, in opposition to a motion for summary judgment, a plaintiff must demonstrate that the attorney "failed to exercise the degree of care and skill possessed by a member of the legal profession, that defendant's negligence was the proximate cause of the loss sustained, that the plaintiff incurred damages as a result of defendant's actions and that the plaintiff would have succeeded had defendant exercised due care." Twenty-Three Reality Assoc. v. Zack, 255 A.D.2d 111, 111; 679 N.Y.S.2d 144 (1st Dept. 1998); See also Hutt v. Kanterman & Taub, P.C., 280 A.D.2d 379, 379; N.Y.S.2d 781 (1st Dept. 2001). Defendants argue that dismissal is proper because plaintiff cannot show that Cohen's judgment regarding the legal validity of plaintiffs claims was unreasonable

under the circumstances. Defendants point to Justice Slobod's opinion that the record would not support a cause of action in light of two dispositive cases, and her remarks that she already reached a determination that she would dismiss the claim. After Judge Slobod made these remarks, Cohen could either have advised the client to withdraw the case and avoid costs and disbursements, or have incurred further expenses to prosecute an appeal. Cohen recommended to his client that he withdraw the case as he would probably not prevail in court because of Judge Slobod's predisposition to dismiss, or on appeal due to the prevailing New York law. As already state in another context, plaintiffs reliance on Cappelli and on the Bar Association Article is unpersuasive because (1) these sources demonstrate, at best, that there were several courses of actions available, and that this is not enough to allege malpractice; and, (2) the sources were published either after the initial action was being prosecuted or during it. Cohen's judgment to withdraw the case from trial was reasonable under the circumstances.

In opposing the defendant's motion, plaintiff contends that additional discovery is needed. As plaintiff notes, as of the filing of this motion, plaintiff had not been afforded the opportunity to take deposition testimony of Cohen in an effort to refute Cohen's *curren*t statements regarding his conduct. As plaintiff contends, parties may be permitted disclosure prior to determination of the motion if the opposing party cannot support its position without further disclosure to avail it of the information. CPLR §3212(f); Urcan v. Cocarelli, 234 A.D.2d 537, 537; 651 N.Y.S.2d 611 (2nd Dept. 1996). In further opposition to the motion for summary judgment, plaintiff argues that additional discovery is necessary to depose Cohen and allow the opportunity to cross examine

him and refute statements made by him in his previously submitted affidavit, and that Cohen possesses exclusive knowledge of his own actions and rationale for his conduct in the underlying trial. Plaintiff cites Krupp v. Aetna Life & Casualty Co which says that where a person possesses exclusive knowledge of material facts, the credibility of that person should not be ascertained by submission of affidavits and summary judgment be denied. Krupp v. Aetna Life & Causalv Co., 103 A.D.2d 252, 262-3; 479 N.Y.S.2d 992 (2nd Dept. 1984). Plaintiff points to contradictory statements allegedly made by defendant, arguing that this raises an issue of credibility that warrants further discovery and the taking of deposition testimony at a minimum, and a triable issue of fact for a jury to resolve. In the defendant's affidavit submitted for this action, he affirmed that he recalled reading Madhavani and concluded that "the plaintiff, as a matter of law, would likely be deemed to have conclusive presumptive knowledge of the terms of his policy." Allegedly contradicting this statement, defendant stated in court in the initial action that after reflecting on case law [Madhavani and Brownstein] brought to his attention by Judge Slobod, the plaintiff was unlikely to prevail and he then moved to withdraw the **case.**

The allegedly contradictory statements to which plaintiff refers do not show that defendants have "exclusive knowledge of material facts." Thus Plaintiffs reliance on Krupp is misplaced. In the first allegedly contradictory statement, Cohen states that when he read Madhvani before the commencement of the first trial, he believed it to be dispositive of plaintiff claim. Defendant's second statement is his court statement that "after reflection of case law that has been shown to me, it is the plaintiffs position that the likelihood of prevailing is nonexistent." These two statements **do** not amount to a

contradiction of material facts. Indeed they show that after his conference with the judge, Cohen's suspicion that the law might favor his adversary hardened into a certainty.

Plaintiffs asserts that defendant failed to exercise the level of care ordinarily exercised by a member of the legal profession and showed unreasonable judgment by advising his client to withdraw a case with a meritorious claim, and failure to conduct adequate research. Plaintiff points to the exchange with Justice Slobod and the defendant's subsequent advice to plaintiff to withdraw the case as conduct failing in the skill exercised by a reasonable member of the legal profession and unreasonable judgement. As discussed already, defendant's judgment under the circumstances was reasonable as the cases Brownstein and Madhvani are dispositive of the plaintiffs claim. Justice Slobod's judgment that the two cases mentioned earlier are dispositive of plaintiffs claim further attest to the reasonable judgment expressed by the defendant's advise to his client that the case had little chance of prevailing.

Defendants have met their burden on the motion for summary judgment by presenting competent evidence that their conduct in the initial did not amount to legal malpractice because it was reasonable under the circumstances. In opposition, the plaintiff has failed to submit evidence to the contrary. His legal argument that by adding additional liability insurance to his existing policy he created a new contract as to this term and a renewal for all other terms **does** not create a triable issue as this was not a triable issue of law at the time of trial. Further plaintiffs assertion that he would have been successful on appeal is too speculative. John P. Tilden, Ltd. v. Profeta & Eisenstein, 236 A.D.2d 292, ; 654 N.Y.S.2d 10 (1st Dept. 1997). Accordingly, it is

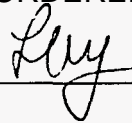
ORDERED that defendants' motion for summary judgment is granted; and it is further

ORDERED that this action is dismissed; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly.

Dated: January 10, 2003

SO ORDERED:

A handwritten signature in cursive script, appearing to read "L. York", is written over a horizontal line.

LOUIS B. YORK, J.S.C.