

Cohen v Law Offices of Leonard and Robert Shapiro
2004 NY Slip Op 30172(U)
March 12, 2004
Supreme Court, New York County
Docket Number: 0604455/2000
Judge: Barbara Kapnick
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. **BARBARA R. KAPNICK**

PART 12

Justice

ROBERT S. COHEN et al

INDEX NO.

604455/00

MOTION DATE

MOTION SEQ. NO.

001

MOTION CAL. NO.

LAW OFFICES OF LEONARD and ROBERT SHAPIRO

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 and cross-motion

are decided in accordance with accompanying memorandum decision.

FILED

MAR 19 2004

NEW YORK COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO

JUSTICE DATED:

Dated: 3/12/04

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

BARBARA R. KAPNICK

J.S.C.

J.S.C.

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 12

-----X
ROBERT S. COHEN, MEDSTAR, INC. and
MAXIMED, INC.,

Plaintiffs,
-against-

LAW OFFICES OF LEONARD AND ROBERT
SHAPIRO, LEONARD SHAPIRO,

Defendants.

-----X
BARBARA R. KAPNICK, J.:

DECISION/ORDER

Index No. 604455/00
Motion Scq. No. 001

Plaintiffs Robert S. Cohen, Medstar, Inc., and Maximed, Inc. commenced this action against defendants Law Offices of Leonard and Robert Shapiro and Leonard Shapiro, for legal malpractice allegedly committed by defendants in their representation of plaintiffs in a prior action, Belmac Hygiene, Inc. v. Mcdstar, Inc., Maximed, Inc. and Robert S. Cohen, 94 Civ. 8897 (RWS), which was litigated in the United States District Court for the Southern District of New York.

Plaintiffs now move for summary judgment on the ground that the liability and damages assessed against plaintiffs in the underlying action were the result of numerous negligent acts by defendants.

Defendants oppose the motion and cross-move for summary judgment dismissing plaintiffs' complaint.

The underlying lawsuit involved a claim by Belmac, Inc. against Cohen, Medstar and Maximed for fraudulent inducement. Belmac claimed that it had agreed to contribute capital to a joint venture formed with the plaintiffs for the purpose of producing and marketing both a new controlled-release intra-vaginal drug delivery system and a vaginal contraceptive originally known as "Lotus Espernil" and later known as "Lotus 24". Belmac claimed that plaintiffs misled it into believing that the device and the contraceptive were ready to be commercially produced by preparing a business plan and a letter to the Food and Drug Administration ("FDA") falsely stating that certain required stability tests had been performed on the device and the contraceptive.

Stability tests, which determine whether a product degrades over a given shelf life, are required to be performed on a representative commercial batch comprising 10% of the amount of product that the company is planning to sell, See, Belmac Hygiene, Inc. v. Medstar, Inc., 910 F.Supp. 966, 970 (S.D.N.Y.1996). "Stability testing on a representative commercial batch in accordance with FDA regulations presupposes that there is a qualified manufacturer for the product."

In fact, plaintiffs had not yet identified a qualified manufacturer, but had only performed in vitro testing.

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The Federal District Court held that Florida law should govern the action. Although the Court found that the business plan and the letter to the FDA contained material misrepresentations, it held that plaintiffs had failed to conduct even a 'minimal' investigation regarding the accuracy of the representations in the Business Plan and FDA letter and thus could not have justifiably relied upon those misrepresentations. *Belmac Hygiene, Inc. v. Medstar, Inc.*, supra at 976. The Court thus dismissed the action.

On appeal, the United States Court of Appeals for the Second Circuit agreed 'chat Florida law applied, but disagreed with the District Court's legal conclusion that Belmac's reliance did not meet the threshold necessary to establish a claim of fraudulent inducement, since the Florida Supreme Court had previously adopted § 540 of the Restatement (Second) of Torts, which provides that "[t]he recipient of a fraudulent misrepresentation of fact is justified in relying upon its truth, although he might have ascertained the falsity of the representation had he made an investigation,..." *Belmac Hygiene, Inc. v Medstar, Inc.*, 121 F.3d 835, 840 (2nd Cir. 1997), citing, *Besett v. Basnett*, 389 So. 2d 995, 998 (Sup. Ct., Fla. 1980).

On remand, Belmac's attorney sent a letter to U.S. District Court Judge Robert Sweet urging the Court to enter final judgment: in its favor as there were no remaining issues to be tried or determined. The court treated that letter as a motion for summary

judgment and counsel for plaintiffs advised the Court that they had been discharged as counsel of record. Apparently, plaintiffs had someone at the call of the calendar to argue on their behalf, but the next day the Judge awarded Belmac a judgment in the amount of \$7,686,000.00. The judgment was subsequently affirmed by the Court of Appeals for the Second Circuit. Belmac Hygiene, Inc. v Mcdstar, Inc., 162 F.3d 1147 (2nd Cir. 1998) (unpublished opinion).

Plaintiffs' complaint in this action alleges that: (i) defendants were negligent in failing to represent plaintiffs' interests in a proper, competent skillful and diligent manner - specifically, plaintiffs contend that defendants failed to identify, cite and/or craft legal strategy around Florida law¹ and failed to identify and/or rely on numerous documents which would have completely insulated them from liability by proving that plaintiffs did not fraudulently induce Belmac to enter into the joint venture agreement (first cause of action); (ii) defendants breached their contractual, ethical and fiduciary duty to plaintiffs by failing to oppose Belmac's motion for summary judgment after the Court of Appeals remanded the case to the District Court (second cause of action); (iii) defendants failed to

¹ It is undisputed that Shapiro tried the case on the basis of New York law, citing only New York cases and federal cases applying New York law, but failed to argue that New York law should apply. It is also undisputed that after the District Court found that Florida law applied, Shapiro neither argued to the Court of Appeals that the holding was wrong nor cited any Florida cases in his brief.

advise plaintiffs that their inability to pay further attorneys' fees did not permit defendants to cease their representation of plaintiffs without prior Court approval, and improperly advised the District Court that they had been discharged without informing the court that they had told plaintiffs they would do no further work on the case unless their fees were paid (third cause of action); and (iv) that, by virtue of the acts alleged in the third cause of action, defendants violated Section 487 of the Judiciary Law (fourth cause of action).

It is well settled that an "action for legal malpractice requires proof of the attorney's negligence, a showing that the negligence was the proximate cause of the injury, and evidence of actual damages", as well as a showing that "but for counsel's alleged malpractice, the plaintiff would not have sustained some ascertainable damages (citations omitted)." Russo v Feder, Kaszovitz, Isaacson, Weber, Skala & Bass, LLP, 301 A.D.2d 63,67 (1st Dept 2002). See also, Pellegrino v. File, 291 A.D.2d 60 (1st Dep't 2002. lv to app den., 98 N.Y.2d 606 (2002); Stroock & Stroock & Lavan v Beltramini, 157 A.D.2d 590 (1st Dept 1990).

Defendants argue that the alleged failure to introduce certain documentary evidence and to cite Florida law to the trial and appellate courts does not as a matter of law constitute negligence. Rather, defendants contend that Shapiro made a legitimate judgment call to show that Belmac did not justifiably rely on

representations contained in the joint venture's² business plan and in the letter to the FDA that implied that LOTUS 24 was ready to be marketed in the United States. They note that Shapiro presented testimony to show that the representatives of Belmac were far more knowledgeable in the field of pharmaceutical development and FDA processing for marketing than the Cohen/Maximed plaintiffs.

However, based on the papers submitted and the oral argument held on the record on July 9, 2003, this Court finds that, even if defendant Shapiro was negligent, the alleged failure to cite to Florida law or to introduce additional documentary evidence cannot be deemed a proximate cause of the reversal by the Second Circuit, since the plaintiffs have made no showing that either the District Court or the Second Circuit would have applied New York law had Shapiro argued in favor of applying New York law.' In addition, plaintiffs actually prevailed at the District Court level even though the Court applied Florida rather than New York law.

Moreover, plaintiffs' claim that had Shapiro emphasized documents showing that Belmac actually knew that Lotus 24 was not ready to be marketed the District Court would have decided the case

² In fact, the District Court specifically found that the application of Florida's law regarding the breach of the Agreement, (which expressly provided for the application of Florida law) and allegations of fraudulent inducement "is consistent with a choice of **law** analysis." Belmac Hygiene, Inc. v. Medstar, Inc., 910 F.Supp at 975.

on that basis is entirely speculative. Therefore, the first cause of action must be dismissed.

Defendants further argue that plaintiffs' second, third and fourth causes of action, which are based upon the alleged refusal of Shapiro to continue representing the plaintiffs on the informal motion for summary judgment and hearing before Judge Sweet on remand must be dismissed because plaintiffs allegedly discharged them to avoid incurring additional legal fees.

There is no dispute that Shapiro wrote a letter dated December 10, 1997 to Cohen seeking assurance "at this time that the service expended to date (six hours plus conference for Rob and myself and my services will be fairly compensated)." Shapiro claims that Cohen then contacted him and "said he could not afford to pay [defendants'] fees and that he would handle the motion before Judge Sweet by himself."

By letter dated December 15, 1997, a copy of which was sent by facsimile to Cohen, Shapiro notified Judge Sweet that his firm had been "discharged...as counsel of record and from all other responsibilities in this matter" and that Cohen would "be appearing pro-se on behalf of all defendants in opposition to plaintiff's motion." It appears that Cohen or someone else appeared in Court on defendants' behalf on the calendar call, and that Cohen never disputed that he had discharged counsel, thus obviating the need

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for Shapiro to seek permission from the Court to withdraw as attorney of record.

Moreover, plaintiff's' contention that had Shapiro filed a brief opposing Belmac's motion for summary judgment and appeared for oral argument the District Court would have scheduled the matter for a second trial is without any support, since the Court of Appeals specifically noted in its affirmance of the District Court's judgment that there was no need for a further hearing on liability because it had already determined liability on Belmac's fraud claim, and that there was no need for a hearing on the issue of damages "because testimony regarding damages had already been provided at trial."³ [162 F.3d 11471.

In addition, plaintiffs' claim pursuant to Judiciary Law § 487 must be dismissed because the allegations in the complaint have failed "to establish a chronic and extreme pattern of legal delinquency (citations omitted)" or, in light of the Second Circuit's affirmance of the District Court's judgment "that the

³ Moreover, plaintiffs can only speculate that had Shapiro tried to persuade the District Court to use the "out-of-pocket" measure of damages (see, American Eagle Credit Corp. v. Select Holding Inc., 865 F.Supp 800 [S.D. Fla 1994]) rather than the "benefit-of-the-bargain" damages he would have succeeded even though, as the Court of Appeals pointed out, Florida courts have adopted the "flexibility theory" which allows courts "to do justice as the circumstances demand" [Nordvne, Inc., v. Florida Mobile Home Supply, Inc., 625 So.2d 1283, 1286 (Fla.App. 1st Dist. 1993) review dism'd 630 So.2d 1100 (Fla 1993) quoting Martin v. Brown, 566 So.2d 890,891 (Fla.4th DCA 1990)]. See, Belmac Hygiene, Inc. v. Medstar, Inc., 162 F. 3rd at * * 2.

actions of the attorney defendants caused plaintiff damages (citation omitted)." Havell v. Islam, 292 A.D.2d 210 (1st Dep't 2002).

Accordingly, the second, third, and fourth causes of action in the complaint must also be dismissed.

Thus, based on the papers submitted and the oral argument held on the record on July 9, 2003, plaintiffs' motion for summary judgment is denied and defendants' cross-motion for summary judgment is granted.

The Clerk may enter judgment dismissing plaintiffs' complaint with prejudice and without costs or disbursements.

This constitutes the decision and order of this Court.

Dated: March 12, 2004



BARBARA R. KAPNICK
J.S.C.

BARBARA R. KAPNICK
J.S.C.

FILED

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