

Wisehart v Kiesel
2005 NY Slip Op 30533(U)
August 24, 2005
Supreme Court, New York County
Docket Number: 101619/05
Judge: Sherry Klein Heitler
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30**

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ARTHUR M. WISEHART,

Plaintiff,

Index N^o 101619/05

-against-

DECISION AND ORDER

MICHAEL T. KIESEL,

Defendant.

-----X
SHERRY KLEIN HEITLER, J.:

The action, sounding in legal malpractice, was commenced by plaintiff pro se, former attorney-at-law, Arthur M. Wisehart (Wisehart), against defendant Michael T. Kiesel (Kiesel), the attorney Wisehart hired to represent him and his prior law firm, Wisehart & Koch, in a summary proceeding commenced by the landlord of the building in which the Wisehart & Koch law office was located. That proceeding, currently pending in Civil Court of the City of New York, County of New York, is entitled *Lincoln Building Associates LLC v Wisehart & Koch and TROUTCO, INC.*,¹ L&T Index No. 93223/2004 (L&T action), and Wisehart now moves, by order to show cause, for an order, pursuant to CPLR 602 (b), removing the L&T action to Supreme Court to be litigated in conjunction with his malpractice action. Kiesel opposes Wisehart's motion, and cross-moves for an order, pursuant to CPLR 3012 (b), dismissing the action due to plaintiff's failure to serve a complaint, or in the alternative, for an order, pursuant to CPLR 3211 (a) (7), dismissing this action for failure to state a cause of action based on the allegations contained in plaintiff's motion papers.

Wisehart seeks an order removing the L&T action to Supreme Court on the grounds that the amount of money sought in the L&T proceeding (\$39,985.57) exceeds the monetary jurisdiction of

¹ Lincoln Building Associates has withdrawn its claims against TROUTCO, INC.

civil court (\$25,000.00), and because the facts underlying both actions are interrelated.

CPLR 602 (b) authorizes the Supreme Court, upon motion, to remove to itself, an action or proceeding pending in another court for consolidation, or joint trial, with the Supreme Court action. Factors to be considered by the court when faced with a motion for removal include: (1) whether the actions involve one or more common questions of law or fact; (2) whether substantial prejudice will result to one or more parties as a result of removal and consolidation; and (3) whether, at the time of the motion, the two actions are at similar, or markedly different, procedural stages (CPLR 602; Spain v 325 West 83rd Owners Corp., 302 AD2d 587 [2nd Dept 2003]). Accordingly, the court must review of the facts underlying both actions in order to properly evaluate the removal motion.

In the underlying L&T action, petitioner Lincoln Bldg Associates LLC (Lincoln Bldg) filed a notice of petition, dated October 5, 2004, seeking to evict tenant Wisheart & Koch from its offices in Lincoln Bldg's premises located at 60 East 42nd Street, New York, New York. Lincoln Bldg sought possession of the premises², and recovery of back rent in the amount of \$39,985.57. Lincoln Bldg also seeks to retain the \$22,680.00 security deposit, which was paid by Wisheart on May 6, 2000.

Motion practice in the L&T action consisted of a notice of motion, dated October 18, 2004, in which Wisheart & Koch, through its attorney Kiesel, sought a dismissal of the L&T action. By cross motion, dated October 26, 2004, Lincoln Bldg sought an order of summary judgment dismissing the respondent's affirmative defenses and counterclaims, striking respondent's jury demand, and requesting various other forms of relief. By notice of motion, dated October 29, 2004,

² Wisheart & Koch vacated the premises on October 22, 2004 (Kiesel Aff., Exhibit 6).

respondent sought an order adjourning a hearing on petitioner's cross motion for summary judgment until twenty-one days after Lincoln Bldg complied with respondent's discovery requests (the motion to compel). On November 1, 2004, a hearing was conducted on the motion to dismiss, and among the issues addressed, was the timing of respondent's motion to compel. After discussion with the court, Kiesel agreed to withdraw the motion to compel without prejudice to renew upon resolution of the motion to dismiss. However, prior to refiling the motion to compel, a dispute arose between Wisehart, of Wisehart & Koch, and Kiesel regarding Kiesel's compensation. Apparently, Kiesel expected to be compensated for his work on an hourly basis, albeit at a discounted rate, while Wisehart expected to pay Kiesel on a contingency basis only. As a result of their inability to resolve the compensation issue to Kiesel's satisfaction, Kiesel sought, and was granted, over Wisehart's objection, an order, dated December 17, 2004, relieving him as respondent's counsel in the L&T action. Shortly thereafter, Wisehart commenced the instant legal malpractice action against Kiesel.

The gravamen of the malpractice complaint is that Kiesel withdrew as counsel at a particularly crucial time in the summary proceeding; he improperly withdrew the motion to compel; and Kiesel engaged in unauthorized, and unproductive settlement discussions. The gravamen of the L&T action is that Lincoln Bldg commenced eviction proceedings and sought to recover back rent from Wisehart & Koch based on the law firm's failure to make timely rent payments for its leased office space.

It is undisputed that Kiesel was not involved in the relationship between Wisehart & Koch and Lincoln Bldg until he was retained to represent Wisehart & Koch in the L&T action.

An examination of the party's submissions, as well as a review of the records in both actions, do not support plaintiff's motion. The allegations of the legal malpractice action and the claims

involved in the L&T action are significantly dissimilar. They do not involve common questions of law or fact, and are currently at different stages of litigation. With respect to Wisehart's contention that the amount of money sought in the L&T proceeding exceeds the monetary jurisdiction of Civil Court, it is well settled that, not only is civil court the preferred forum for resolving landlord-tenant issues (44 - 46 West 65th Apt. Corp. v Stvan, 3 AD3rd 440, 441 [1st Dept 2004]), but that section 204 of the New York City Civil Court Act (CCA), specifically provides, in relevant part, that the Civil Court:

shall have jurisdiction over summary proceedings to recover possession of real property located within the city of New York, to remove tenants therefrom, and to render judgment for rent due without regard to amount. . . .

In enacting this section, the CCA carved out an exception to the \$25,000 jurisdictional limit in recognition of Civil Court as the preferred forum for these type of summary proceedings. Under the facts presented, there is no cause for removal of the L&T action. Therefore, plaintiff's motion, by order to show cause, for removal of the L&T proceeding from civil court, and consolidating it with the legal malpractice action pending in supreme court, is denied.

In his cross motion, Keisel initially sought a dismissal of the legal malpractice action on the grounds that plaintiff failed to serve a complaint, and because the facts which were put forth by plaintiff in an affidavit do not state a cause of action for legal malpractice. Wisehart did eventually, attempt to serve a complaint in this action, but Keisel rejected it on the ground that it was untimely.

Wisehart commenced this action by service of a summons dated February 3, 2005, and Keisel promptly responded by service of a notice of appearance and a demand for a complaint on or about February 9, 2005. Kiesel's service of the demand for a complaint triggered the twenty-day period, as set forth in CPLR 3012 (b), for Wisehart to complete service of a complaint.

CPLR 3012 (b) states, in relevant part:

[if] the complaint is not served with the summons, the defendant may serve a written demand for the complaint within the time provided in subdivision (a) of rule 320 for an appearance. Service of the complaint shall be made within twenty days after service of the demand.

The complaint, however, was apparently not served until March 28, 2005, and on the basis of tardiness, defendant rejected it and now seeks, as part of his cross motion, an order dismissing the complaint on the ground of lateness. In the event the court were to deny this aspect of his cross motion, Keisel alternatively seeks an order dismissing the complaint on the ground that it fails to state a cause of action (CPLR 3211 [a] [7]). To this end, Kiesel asserts that the entire malpractice action is not only meritless, but that it is premature, as the underlying L&T action is still pending. He argues that plaintiff has not, and cannot, plead that “but for” Kiesel’s negligence, Wisheart & Koch would have prevailed in the underlying proceeding, a requirement in a properly pled legal malpractice action.

In the state of New York, “an action for legal malpractice requires proof of three elements: the negligence of the attorney; that the negligence was the proximate cause of the loss sustained; and proof of actual damages” (Between the Bread Realty Corp. v Salans Hertzfeld Heilbronn Christy & Viener, 290 AD2d 380 [1st Dept 2002]). While not all legal malpractice actions require a conclusion of the underlying action (see Cicorelli v Capobianco, 89 AD2d 842 [2nd Dept 1982] affd 59 NY2d 626 [1983]), those malpractice actions which are based on errors in the conduct, or handling, of the litigation, ordinarily require both a conclusion to the litigation and a demonstrable, actual, loss as a result of the attorney’s handling of the case (Marks Polarized Corp. v Solinger & Gordon, 124 Misc 2d 266, 267 [Sup Ct, Queens County 1984]). Wisheart has not made the requisite showing.

The essence of Wisheart's claims is that, by withdrawing as counsel in the L&T action, and by withdrawing his law firm's motion to compel, Kiesel effectively sabotaged the prosecution of the motion to compel, "subverted" Wisheart & Koch's ability to obtain needed discovery, and precipitated "a crisis" in the L&T proceeding.

Common discovery practice in the state of New York follows CPLR 3214 (b) which dictates that "[s]ervice of a notice of motion under rule 3211, 3212, or section 3213 stays disclosure until determination of the motion unless the court orders otherwise." It appears that it was Wisheart & Koch's dismissal motion that caused discovery to be stayed in the L&T action. In addition, there is no evidence that Kiesel waived his client's right to seek discovery in the L&T action; that the defense was in any way compromised; or that Wisheart, or his former law firm, was prejudiced by Kiesel's withdrawal of the discovery motion, without prejudice, pending the outcome of the dispositive motions previously served. Contrary to Wisheart's assertions, Kiesel's handling of the motion to compel was in accordance with CPLR 3214 (b), and does not provide a basis for a claim of legal malpractice.

Wisheart also argues that Kiesel committed malpractice by moving, by order to show cause, in December 2004, for an order permitting him to withdraw as counsel in the L&T action. He argues that the timing of the motion to withdraw as counsel was so inopportune, and so prejudicial to Wisheart & Koch, that it reached the level of legal malpractice. However, it appears that Wisheart raised his concerns at a court conference on December 17, 2004, before the Hon. Debra R. Samuels, who, nevertheless, granted the motion over the respondent's objections, and issued an order, dated December 17, 2004, which, among other things, stayed the L&T proceedings for a period of thirty days, so that the respondent could retain new counsel with experience in L&T matters. The

circumstances surrounding Kiesel's motion to withdraw as counsel do not support a claim for legal malpractice.

It is evident that the relationship between Wisehart and Kiesel became acrimonious in or about December 2004, and that their disagreement centered around both compensation and strategy over how to best handle the L&T proceeding. The claims which pertain to Kiesel's handling of the litigation are premised on theoretical and tactical disagreements as to how to best represent Wisehart & Koch in the L&T action. The losses alleged by Wisehart are speculative, not actual, and Wisehart has failed to state a cause of action for legal malpractice in that he cannot show that "but for" the negligence of Kiesel, Wisehart & Koch would have prevailed in the underlying action (CPLR 3211 [a] [7]; Igen, Inc. v White, 250 AD2d 463, 465 [1st Dept 1998]).

The court has examined Wisehart's remaining contentions and find them to be without merit. Accordingly, it is

ORDERED that the motion, by order to show cause, for an order, pursuant to CPLR 602 (b), removing the L&T action to supreme court, is denied; and it is further

ORDERED that the cross motion to dismiss the complaint is granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This shall constitute the decision and order of the court.

DATED: AUGUST 24, 2005

FILED
AUG 26 2005
COUNTY CLERK'S OFFICE
NEW YORK


SHERRY KLEIN HEITLER
J.S.C.