

**Mortenson v Shea**

2006 NY Slip Op 30043(U)

April 27, 2006

Supreme Court, New York County

Docket Number: 0112001/2006

Judge: Judith J. Gische

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

PRESENT: JUDITH J. GISCHE, J.S.C.

PART \_\_\_\_\_

Index Number : 112001/2006

MORTENSON, JOSEPH

vs

SHEA, ESQ. ROBERT C.

Sequence Number : 001

DISMISS ACTION

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

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

**motion (s) and cross-motion(s)  
decided in accordance with  
the annexed decision/order  
of even date.**

**FILED**

MAY 07 2007

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 4/27/07

JUDITH J. GISCHE, J.S.C. J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 10

-----X  
JOSEPH MORTENSON,

Plaintiff,

-against-

ROBERT C. SHEA, ESQ. and R.C. SHEA  
& ASSOCIATES, P.C.,

Defendants.  
-----X

**Decision/Order**

Index No.: 112001/06

Seq. No. : 001

Present:

Hon. Judith J. Gische

J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

**Papers**

Def's motion [dismiss] w/JPF affirm in support	.....	1
Pltf's affirm in opp (JAR) w/exhs	.....	2
Def's reply (JPF) w/exhs	.....	3

**FILED** Numbered

MAY 07 2007

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-----X  
*Upon the foregoing papers, the decision and order of the court is as follows:*

This is an action by plaintiff Joseph Mortenson ("Mortenson"), a New Jersey resident, for damages arising from alleged legal malpractice. Before the court is defendants' motion to dismiss the second cause of action for legal malpractice on the basis that plaintiff has failed to state a cause of action and plaintiff lacks standing to assert this cause of action. CPLR § 3211 (a).

**Background**

Defendants are Robert C. Shea ("Shea") and R. C. Shea & Associates, P.C. ("Shea & Associates"). Shea is an attorney licensed to practice law in New Jersey. Shea is also a shareholder and employee in the law firm Shea & Associates.

Plaintiff's rendition of the facts are as follows. On October 7, 2000, plaintiff was

[\* 3 ]

involved in a motor vehicle accident with Arshad Ali ("Ali") and Nosha Westi ("Westi"). Thereafter, plaintiff retained Melisande Hill ("Hill") to commence a personal injury action in New York against Ali and Westi. Hill is or was an attorney licensed to practice law in New York. On March 1, 2002, Hill negotiated a settlement with Westi wherein Westi's insurance carrier paid its liability limit of \$25,000.00 and plaintiff agreed to discontinue the action against both Westi and Ali with prejudice. No contribution was sought from Ali, even though Ali was insured with a \$25,000.00 policy limit.

On June 23, 2002, Hill filed a notice of an under-insured motorist ("UIM") claim with plaintiff's automobile insurance carrier, Colonial Penn Insurance Co. ("Colonial"). Plaintiff thereafter retained Shea in connection with his UIM claim. On October 8, 2004, Shea learned from Colonial that because Ali was insured with a \$25,000.00 policy, Colonial would only provide UIM coverage in excess of \$50,000.00.

Thereafter, plaintiff alleges that Shea contacted Hill "for the purpose of asserting a claim for legal malpractice on behalf of [plaintiff]." In support, plaintiff has provided several letters from Shea to Hill wherein he "informed [Hill] of her legal malpractice due to her failure to secure the additional... \$25,000.00" available through Ali's insurance carrier. Shea's letters were from his New Jersey office to Hill at her New York office. Plaintiff contends these acts resulted in the "unauthorized practice of law in the State of New York" as Shea is not licensed to practice law in New York.

Shea did not file a claim for legal malpractice against Hill within the applicable statute of limitations, which expired on March 1, 2005. Plaintiff then initiated the instant action against defendants, alleging two separate causes of action for malpractice. The first cause of action is that, but for the negligence of Shea, plaintiff would have obtained a judgment in the amount of \$25,000.00 against Hill. The second cause of action is that, but for Shea's

unauthorized practice of law in New York, plaintiff would have obtained a judgment in the same amount against Hill. Plaintiff seeks damages in the amount of \$25,000.00, plus interest from March 1, 2002, on each cause of action.

On its motion, defendants argue that dismissal of the second cause of action is warranted because plaintiff has no standing to raise a civil cause of action for "the unauthorized practice of law." Defendants rely on New York Judiciary Law 476-a(1), (2), which authorizes the New York State Attorney-General or the New York Bar Association to maintain a cause of action for the unauthorized practice of law.

Defendants separately argue that, even if plaintiff has standing to assert and unauthorized practice of law claim, he has failed to state a cause of action because plaintiff has failed to allege that defendants engaged in any activity which rises to the level of unauthorized practice of law. Defendants also contend that the second cause of action merely restates the first cause of action for legal malpractice.

In opposition, plaintiff contends that it has standing to bring the second cause of action because "[i]t is not a cause of action seeking damages for the alleged unauthorized practice of law," but rather, a cause of action for legal malpractice. Specifically, plaintiff states that defendants did not exercise "proper, skillful and diligent" care in their work and were unfamiliar with the applicable statute of limitations, all "[a]s a result of defendants unauthorized practice of law."

### **Discussion**

In determining whether a complaint is sufficient so as to withstand a motion to dismiss pursuant to CPLR § 3211 "the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law." Guggenheimer v. Ginzburg, 43 N.Y.2d

268 (1977). The facts as alleged must be accepted by the court as true, for purposes of such a motion, and are to be accorded every favorable inference. Morone v. Morone, 50 N.Y.2d 481 (1980); Beattie v. Brown & Wood, 243 A.D.2d 395 (1<sup>st</sup> dept. 1997).

Where the basis for the motion to dismiss is the purported failure to state a cause of action [CPLR § 3211 (a) (7)] the court's attention "should be focused on whether the plaintiff has a cause of action rather than on whether he has properly stated one." Rovello v. Orofino Realty Co., 40 N.Y.2d 633, 634 (1976).

To establish a *prima facie* case of legal malpractice, plaintiff must plead facts that show defendants: (1) failed to exercise that degree of care, skill, and diligence commonly possessed and exercised by an ordinary member of the legal community; (2) that such negligence was the proximate cause of the actual damages sustained by the plaintiff; and that (3) "but for" the defendants' negligence, plaintiff would have been successful in the underlying action. Laventure v Galeno, 307 A.D.2d 255 (1<sup>st</sup> dept. 2003). Thus, plaintiff must set forth facts demonstrating that "but for" the attorney's conduct, he would have prevailed in the underlying matter, or would not have sustained any ascertainable damages. Weil, Gotshal & Manges, LLP v. Fashion Boutique of Short Hills, Inc., 10 A.D.3d 267 (1<sup>st</sup> Dept. 2004). At least one court has likened this burden or requirement to the plaintiff having to prove a "case within a case." Weil, Gotshal & Manges, LLP v. Fashion Boutique of Short Hills, Inc., *supra* at 272.

Defendants contend that the second cause of action is merely a restatement of the first. Plaintiff admits that he has asserted two causes of action for legal malpractice. The distinction between each cause of action as pled is subtle, however, the underlying events of each are one and the same. The first cause of action is based on the alleged negligence of defendants in failing to properly file an action against Hill during the applicable statute of

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limitation. The second cause of action is that Shea, an attorney practicing law in New Jersey, negligently engaged in unauthorized practice of law in New York while representing plaintiff in connection with plaintiff's otherwise successful claim against Hill.

Plaintiff's damages arising out of the first cause of action are also the same as those damages claimed in the second cause of action. Taken in the light most favorable to plaintiff's claims, the second cause of action represents nothing more than an attempt to allege the first cause of action in another form and thereby obtain the identical relief. Further, plaintiff is not entitled to double recovery. Simon v. Royal Business Funds Corp. 34 A.D.2d 758 (1<sup>st</sup> Dept. 1970). Accordingly, the second cause of action is hereby severed and dismissed. The first cause of action continues.

Having dismissed the second cause of action, the court does not reach defendants other arguments.


Defendants shall serve their answer within twenty (20) from the date of this decision and order. Plaintiff may reply within the time provided by the CPLR.

**This matter is hereby scheduled for a preliminary conference on June 7, 2007 at 9:30 a.m. in Part 10, 80 Centre Street, Room 122.**

This shall constitute the decision and order of the Court.

Dated: New York, New York  
April 27, 2006

So Ordered:

  
\_\_\_\_\_  
HON. JUDITH J. GISCHE, J.S.C.

**FILED**

MAY 07 2007

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