Balakhov v McVann
2007 NY Slip Op 31047(U)
April 23, 2007
Supreme Court, Suffolk County
Docket Number: 0009136/2005
Judge: Joseph Farneti
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SHORT FORM ORDER COPY INDEX NO. 9136/2005

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:
HON. JOSEPH FARNETI
Acting Justice Supreme Court

ALEXANDER BALAKHOV,

Plaintiff,

-against-

THOMAS T. McVANN, JR., ESQ. and THE LAW FIRM OF THOMAS T. McVANN, JR.,

Defendants.

ORIG. RETURN DATE: OCTOBER 26, 2006
FINAL SUBMISSION DATE: FEBRUARY 8, 2007
MTN. SEQ. #: 002
MOTION: MD

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Upon the following papers numbered 1 to 5 read on this motion FOR SUMMARY JUDGMENT; Notice of Motion and supporting papers 1-3; Affirmation in Opposition and supporting papers 4, 5; it is,

ORDERED that this motion by defendants for an Order, pursuant to CPLR 3212, granting summary judgment dismissing the within complaint is hereby **DENIED** for the reasons stated hereinafter.

In this action, plaintiff seeks to recover damages for alleged legal malpractice based upon defendants' failure to timely assert plaintiff's rights under federal and/or state law with respect to the events surrounding plaintiff's arrest on July 6, 2002. By Order dated June 28, 2006 (Werner, J.), the Court denied plaintiff's motion for a default judgment against defendants. In the aforementioned Order, the Court noted that in opposition to the motion, defendants provided "documentary evidence demonstrating that defendants were never retained by plaintiff to represent plaintiff in any potential civil rights action."

In the instant application, defendants allege that they never represented plaintiff in any federal civil rights action; they only represented plaintiff in connection with his defense of numerous criminal charges filed in East Hampton Town Court. In support thereof, defendants have submitted two letters sent from defendant THOMAS T. McVANN, JR., ESQ. to plaintiff, dated March 10, 2004 and March 18, 2004, wherein Mr. McVann indicated that plaintiff may have a federal civil rights claim under 42 USC § 1983, that Mr. McVann does not handle such litigation, and that he suggests plaintiff find local counsel to assist him in this regard. Mr. McVann further informed plaintiff of the name, address, and telephone number of a local civil rights attorney. As such, defendants allege that there is no basis for a malpractice action for failure to provide services for which an attorney was never retained as counsel.

In opposition, plaintiff alleges that on July 6, 2002, plaintiff was improperly detained, arrested and "savagely beaten" by members of the East Hampton Police Department. Plaintiff further alleges that he retained defendant law firm to represent him in connection with the criminal charges, as well as to present his own claim for injuries. Plaintiff contends that defendant Mr. McVann failed to timely file a notice of claim and failed to timely commence a civil lawsuit. Plaintiff alludes to causes of action sounding in assault, false arrest and false imprisonment, but has not specifically delineated the causes of action that plaintiff alleges he was precluded from asserting. Plaintiff argues that the time to file a notice of claim began to run on the date plaintiff was released from custody (July 6, 2002), and expired ninety days thereafter, and that any application to file a late notice of claim must have been made within one year and ninety days after July 6, 2002, or by October 2003. Plaintiff further argues that the statute of limitations applicable to a state lawsuit alleging intentional tort is one year (CPLR 215[3]), the same statute of limitations period applicable to a federal civil rights claim under 42 USC § 1983. As such, plaintiff argues that defendants' letters in March of 2004 were of no avail to plaintiff, as his time to bring suit had long past. As will be discussed more fully below, plaintiff's arguments are on point with respect to any potential claims based upon state law, but are misplaced with respect to a potential federal claim under 42 USC § 1983.

On a motion for summary judgment, the test to be applied is whether or not triable issues of fact exist or whether on the proof submitted a court may grant judgment to a party as a matter of law (CPLR 3212[b]; *Andre v Pomeroy*, 35 NY2d 361 [1974]; *Akseizer v Kramer*, 265 AD2d 356 [1999]). It has been held that "the remedy of summary judgment is a drastic one, which should not be

granted where there is any doubt as to the existence of a triable issue . . . or where the issue is even arguable" (*Gibson v American Export Isbrandtsen Lines*, 125 AD2d 65 [1987] [citations omitted]; *see also Andre v Pomeroy*, 35 NY2d 361, *supra*; *Henderson v New York*, 178 AD2d 129 [1991]). It is well-settled that a proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Dempster v Overview Equities, Inc.*, 4 AD3d 495 [2004]; *Washington v Community Mut. Sav. Bank*, 308 AD2d 444 [2003]; *Tessier v N.Y. City Health and Hosps. Corp.*, 177 AD2d 626 [1991]). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Gong v Joni*, 294 AD2d 648 [2002]; *Romano v St. Vincent's Med. Ctr.*, 178 AD2d 467 [1991]; *Commrs. of the State Ins. Fund v Photocircuits Corp.*, 2 Misc 3d 300 [Sup Ct, NY County 2003]).

To succeed on a claim alleging legal malpractice, a plaintiff must establish that the defendant attorney failed to exercise the degree of care, skill, and diligence commonly possessed by a member of the legal community, that such negligence was the proximate cause of damages, and that, but for such negligence, the plaintiff would have prevailed in the action (*see Fillippo v Russo*, 296 AD2d 374 [2002]; *Briggs v Berkman*, 284 AD2d 423 [2001]; *Raphael v Clune, White & Nelson*, 201 AD2d 549 [1994]). For a defendant in a legal malpractice case to succeed on a motion for summary judgment, evidence must be presented in admissible form establishing that the plaintiff is unable to prove at least one of the essential elements (*see Fillippo v Russo*, 296 AD2d 374, *supra*; *Ostriker v Taylor, Atkins & Ostrow*, 258 AD2d 572 [1999]; *Ippolito v McCormack, Damiani, Lowe & Mellon*, 265 AD2d 303[1999]).

Although plaintiff argues that the applicable statute of limitations to file a federal civil rights claim pursuant to 42 USC § 1983 is one year, citing CPLR 215(3) and *Wilson v Garcia*, 471 US 261 (1985), the Supreme Court has subsequently held that the applicable statute of limitations period to bring such a claim in New York is not one year pursuant to CPLR 215(3), but rather three years pursuant to CPLR 214(5) (*Owens v Okure*, 488 US 235 [1989]; *see also Sank v City Univ. of N.Y.*, 112 Fed Appx 761 [2d Cir 2004]; *Lee v Donnaruma*, 63 Fed Appx 39 [2d Cir 2003]). Furthermore, the filing of a notice of claim is not a condition precedent to bringing a claim under 42 USC § 1983 (*see Kreutzberg v County of Suffolk*, 2006 US Dist LEXIS 84171 [EDNY 2006]; *Ahern v Neve*, 285 F Supp 2d 317 [EDNY 2003]).

In contrast, New York's General Municipal Law § 50-e requires a plaintiff in "any case founded upon tort," to serve a notice of claim upon a prospective municipal defendant no later than "ninety days after the claim arises" (General Municipal Law § 50-e[1][a]). While the notice of claims requirement applies to state-based claims, it does not apply to actions brought pursuant to 42 USC § 1983 (*see Felder v Casey*, 487 US 131 [1988]; *Tannenbaum v City of New York*, 30 AD3d 357 [2006]; *Rudgayzer & Gratt v Cape Canaveral Tour & Travel, Inc.*, 22 AD3d 148 [2005]). However, any alleged state-law violations asserted in federal court in connection with a Section 1983 claim would be subject to the applicable limitations period under New York law (*Gonzalez v City of Schenectady*, 2001 US Dist LEXIS 14406 [NDNY 2001]; *Greiner v County of Greene*, 811 F Supp 796 [NDNY 1993]).

As such, applying the aforementioned principles, plaintiff's time to bring a federal civil rights claim pursuant to 42 USC § 1983 did not expire until July 6, 2005, over one year after the March 2004 letters defendants sent to plaintiff. Moreover, plaintiff was not required to file a notice of claim against the municipality prior to filing a suit based solely upon Section 1983. Therefore, it appears that plaintiff was still within his rights to bring such a claim at the time defendants advised plaintiff to seek alternate counsel. In addition, the Court notes that the instant action for legal malpractice was filed on April 18, 2005, approximately three months before the statute of limitations on the federal civil rights claim expired.

However, with respect to any potential state-law based personal injury claims against a municipality, whether brought in state court or as pendent state law claims in federal court, a notice of claim was required to be filed within ninety days after July 6, 2002 (General Municipal Law § 50-e[1][a]); any application to file a late notice of claim must have been made within one year and ninety days thereof (General Municipal Law § 50-e[5]; *Williams v Nassau County Med. Ctr.*, 6 NY3d 531 [2006]; *Cohen v Pearl Riv. Union Free School District*, 51 NY2d 256 [1980]; *Carter v City of New York*, 2007 NY Slip Op 2500 [2d Dept 2007]); and any action for personal injury against a municipality must have been commenced within one year and ninety days after the "happening of the event upon which the claim is based," unless the statute had been tolled (General Municipal Law § 50-i[1]; *Carter v City of New York*, 2007 NY Slip Op 2500, *supra*).

In the instant application, although defendants allege that there is no basis for a malpractice action for failure to provide services for which an attorney

was never retained as counsel, defendants have failed to annex a copy of the retainer agreement between plaintiff and defendants which would indicate the nature and scope of the representation of plaintiff by defendants. Despite the fact that Mr. McCann's letters to plaintiff in March of 2004 indicate that he does not handle federal civil rights litigation, the letters are silent with respect to any potential state-law claims. The Court notes that while the aforementioned letters were sent to plaintiff within the applicable limitations period to bring a federal civil rights claim under 42 USC § 1983 (three years), the letters were sent well beyond the one year and ninety day statute of limitations period to bring a state-law based suit against the municipality for personal injury. There is no indication in this record that the statute was tolled for any reason.

In view of the foregoing, the Court finds that questions of fact exist that preclude the granting of summary judgment to defendants. Although it is undisputed that defendants never represented plaintiff in a federal civil rights lawsuit, and it appears that defendants timely notified plaintiff in March 2004 of an attorney who would be able to handle such a federal civil rights suit, questions of fact exist as to what transpired between plaintiff and defendants relative to any state-law based claims for personal injury. While plaintiff may have misapplied the applicable limitations period with respect to a federal civil rights cause of action brought in New York pursuant to 42 USC § 1983, plaintiff is correct with respect to the one year and ninety day limitations period applicable to state law actions for personal injury maintained against a municipality. As such, plaintiff may have been precluded from bringing such a suit due to defendants' actions or inactions. The Court is unable to make that determination on this record. Accordingly, defendants' motion for summary judgment dismissing the within complaint is denied.

The foregoing constitutes the decision and Order of the Court.

Dated: April 23, 2007

HON. JOSEPH FARNETI
Acting Justice Supreme Court