

Becovic v Poisson & Hackett

2007 NY Slip Op 32496(U)

August 10, 2007

Supreme Court, New York County

Docket Number: 0118056/2004

Judge: Jane S. Solomon

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 55

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JUSUF BECOVIC and HATIDZA BECOVIC,

Plaintiffs,

Index No.: 118056/04

DECISION AND ORDER

-against-

POISSON & HACKETT, PATRICK J. HACKETT and
WILLIAM J. POISSON,

Defendants.

-----X

HON. JANE SOLOMON, J.S.C.:

In this legal malpractice action, defendants move, pursuant to CPLR 3212, for summary judgment to dismiss the complaint, and plaintiffs cross-move for an order to strike and to impose related penalties, pursuant to CPLR 3126 and/or the doctrine of spoliation. For the following reasons, both motions are denied.

BACKGROUND

The Parties

This legal malpractice action arises from plaintiff Jusuf Becovic's (Becovic) allegation that the defendant law firm Poisson & Hackett (P&H), and two of the partners therein, Patrick J. Hackett (Hackett) and William J. Poisson (Poisson), wrongfully permitted the statute of limitations to expire on a negligence claim that he and his wife, Hatidza Becovic, had previously retained them to prosecute. The relevant facts are as follows.

On September 8, 1998, Becovic was injured during the

course of his employment as the superintendent of a building located at 350 East 52nd Street in the County, City and State of New York (the building). See Notice of Cross Motion, Becovic Affidavit, ¶ 3. Specifically, Becovic received a severe electric shock while moving metal studs that had been stacked against an outside wall in an alleyway adjacent to the building. Id. At his deposition, Becovic stated that the alleyway was part of the building's property, all of which was controlled by his employer, Koeppel Management, Inc. (Koeppel). Id.; Exhibit L, at 36. Becovic further stated that he was told by emergency services personnel employed by the New York City Fire Department (FDNY) that the shock had been caused by current from a large electric sign that hung over the entrance to a parking garage located next door to the building. Id.; Exhibit L, at 52.

This account was corroborated by Koeppel's bookkeeper, Maria Pennolino (Pennolino), who visited the garage on the day that Becovic was injured in order to fill out an incident report for her employer to present to the Workers' Compensation Board. At her deposition, Pennolino stated that she had spoken to several garage personnel who told her that a stray wire from the garage's electrical sign had come into contact with the metal studs in the building's alley. Id.; Exhibit N, at 13-14. Pennolino reported this information on the Workers' Compensation incident report, along with the additional information that the

alley and garage were wet at the time of Becovic's injury as a result of rainwater from a storm the previous night. Id.; Exhibit V. The report specifically lists the "object or substance that directly injured employee" as "act of God - open wire line from an electrical sign." Id. Becovic also stated that he recalled the alley being wet, but claimed that he had neither seen, heard nor smelled anything that would have indicated that the metal studs in the alley were electrified. Id.; Exhibit L, at 40-42. Becovic claims that he is now permanently disabled as a result of his injury. Id.; Becovic Affidavit, ¶¶ 9, 21.

In March of 1999, the Becovics retained P&H to commence a personal injury action. Id.; Varcadipane Affirmation, ¶ 7; Exhibit B. P&H's investigation disclosed that the parking garage was managed by a company called GSL Enterprises, Inc. (GSL), and operated by an entity called Support Parking (Support Parking), whose corporate status P&H was then unable to ascertain.¹ Id.; Exhibit M, at 66-67. After interviewing Becovic, Hackett prepared a summons and complaint naming GSL and Support Parking as defendants, and setting forth a cause of action for negligence on behalf of Jusuf Becovic, and one for loss of consortium on behalf of Hatidza Becovic. Id.; Exhibit M, at 59-60; Exhibit C.

¹ Becovic's current counsel learned that Support Parking is actually an LLC duly registered to do business in New York State.

At his deposition, Hackett stated that he caused the summons and complaint to be filed with the court in a timely fashion, but that P&H's process server attempted, and evidently failed, to effect proper service on either defendant. Id.; Exhibit M, at 57, 64-66, 67-73. Hackett also stated that, following the process server's attempt at service, his office inadvertently filed Becovic's case file with the firm's closed cases. Id.; Exhibit M, at 73-78. Thereafter, the Becovics' claims became time-barred on ~~September 9, 2001 when the governing three-year~~ negligence statute of limitations expired.

Becovic alleges that P&H failed to disclose that they had not served a complaint or to notify him that the statute of limitations had expired on his claim in 2001. Id.; Becovic Affidavit, ¶ 14. Becovic also alleges that P&H thereafter misled him to believe that his case was actually progressing normally. Id.; Becovic Affidavit, ¶ 11. Becovic claims that he became dismayed in 2003 when Hackett began an eight-month pattern of ignoring his requests for status updates on his case, and neglecting to return his phone calls. Id.; Becovic Affidavit, ¶ 12-13. As a result, Becovic claims that, on May 5, 2004, he discharged Hackett and retained his current counsel, the law firm of Ripka, Rotter & King, LLP (RRK). Id.; Becovic Affidavit, ¶ 17; Exhibit D. RRK states that they requested Becovic's file from Hackett on May 5, 2004, and that they received it on June

25, 2004. Id.; Varcadipane Affirmation, ¶ 9; Exhibits E, F. Becovic states that this was the point at which he first became aware that he had lost the right to proceed on his personal injury claim. Id.; Becovic Affidavit, ¶ 14.

Prior Proceedings

As a result, on December 20, 2004, RRK instituted this legal malpractice action on behalf of the Becovics. Id.; Varcadipane Affirmation, ¶ 10; Exhibit G. Discovery is now ~~complete. During the course of that discovery in 2006, RRK~~ requested records pertaining to Becovic's accident from the FDNY, from Support Parking, from Koeppel and from Federated Legal Services, Inc. (Federated Legal), the company that employed the process server that P&H had used to attempt to effect service on GSL and Support Parking. Id.; Varcadipane Affirmation, ¶¶ 17-26. RRK was able to obtain deposition testimony and some incident records from Koeppel. Id.; Varcadipane Affirmation, ¶ 23-24; Exhibits N, U, V, W. However, the FDNY responded that, as of 2006, it no longer maintained or possessed records that went back as far as the year 1998. Id.; Varcadipane Affirmation, ¶ 18; Exhibit P. After it was subpoenaed, Support Parking similarly responded that, as of 2006, it no longer maintained or possessed any personnel or incident records that went back to 1998, or any records of citations, violations, sanctions, electrical problems and/or maintenance pertaining to the garage sign. Id.;

Varcadipane Affirmation, ¶¶ 19-22; Exhibits Q, R, S, T. Finally, after it was also subpoenaed, Federated Legal responded that the process server in question, one Bill Pettas (Pettas), was no longer employed by it and that it had no record of his current whereabouts. Id.; Varcadipane Affirmation, ¶¶ 25-26; Exhibits X, Y, Z.

The Becovics' complaint in this action sets forth one claim of legal malpractice against P&H, Hackett and Poisson ~~(Hackett's law partner). Id.; Exhibit G. Defendants interposed~~ an answer on July 26, 2005. Id.; Exhibit J. Defendants now move for summary judgment to dismiss the complaint, and plaintiffs cross-move for an order to strike defendants' answer and/or to impose other procedural penalties, pursuant to CPLR 3126 and/or the doctrine of spoliation.

DISCUSSION

Defendants' Motion

As previously mentioned, defendants' motion seeks summary judgment to dismiss plaintiffs' legal malpractice claim, which alleges that P&H failed to pursue their claim against GSL, and as a result, their viable cause of action against the responsible party was irreparably prejudiced because it was time barred. See Notice of Cross Motion, Exhibit G, ¶¶ 14-17.

When seeking summary judgment, the moving party bears the burden of proving, by competent, admissible evidence, that no

material and triable issues of fact exist. See e.g. Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 (1985); Sokolow, Dunaud, Mercadier & Carreras LLP v Lacher, 299 AD2d 64 (1st Dept 2002). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action. See e.g. Zuckerman v City of New York, 49 NY2d 557 (1980); Pemberton v New York City Tr. Auth., 304 AD2d 340 (1st Dept 2003). The court's function, on a motion for summary judgment, is one of issue identification, not issue determination. See e.g. Sillman v Twentieth Century-Fox Film Corp., 3 NY2d 395 (1957); Grullon v City of New York, 297 AD2d 261 (1st Dept 2002). The Court of Appeals holds that:

In order to sustain a claim for legal malpractice, a plaintiff must establish both that the defendant attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession which results in actual damages to a plaintiff, and that the plaintiff would have succeeded on the merits of the underlying action 'but for' the attorney's negligence [internal citations omitted].

AmBase Corp. v Davis Polk & Wardwell, 8 NY3d 428, 434 (2007).

Here, defendants argue the last of the three foregoing points; i.e., that they are entitled to summary judgment dismissing Becovic's legal malpractice claim because Becovic would not have succeeded on the merits of his underlying negligence claim. See

Defendants' Memorandum of Law, at 13-21. After carefully reviewing evidence, however, the court disagrees for the following reasons.

Pursuant to New York law, "the traditional common-law elements of negligence" are: "duty, breach, damages, causation and foreseeability." Hyatt v Metro-North Commuter R.R., 16 AD3d 218 (1st Dept 2005). The element of duty is at issue in these motions. The court notes that Becovic's underlying negligence claim was not a simple case of "premises liability" in which a plaintiff may rely on a landowner's legal obligation to maintain its property in a reasonably safe condition in order to establish the existence of the element of duty. See e.g. Peralta v Henriquez, 100 NY2d 139 (2003). Rather, Becovic's deposition testimony was that his own employer, Koepfel, was the entity in possession and control of the alleyway in which he was injured instead of the named defendants, GSL and Support Parking, who merely managed and operated the garage in the building next door. See Notice of Cross Motion, Exhibit L, at 36. Under such circumstances, it is incumbent on the plaintiff to demonstrate that the non-owner/defendant either created the condition which caused the injury, or had actual or constructive notice of that condition. See e.g. Hoberman v Kids R Us, 187 AD2d 187 (1st Dept 1993).

Here, defendants argue that there is no evidence "that

the underlying defendant, Support Parking, created the alleged defect or had 'actual' or 'constructive' notice of the same." See Defendants' Memorandum of Law, at 13. Defendants conclude that this lack of evidence would have prevented Becovic from establishing the duty element of his underlying negligence claim against GSL and Support Parking, and that his ensuing legal malpractice claim against themselves must therefore consequently fail, as a matter of law. Id., at 19-21.

With respect to the question of whether Support Parking actually created the condition that caused Becovic's injury (i.e., the discharge of electrical current into the metal studs that he was engaged in moving), defendants refer to Support Parking's response to the subpoena that it does not maintain any personnel or incident records that went back to 1998, and does not possess any records of citations, violations, sanctions, electrical problems and/or maintenance pertaining to the garage sign. See Notice of Cross Motion; Varcadipane Affirmation, ¶¶ 19-22; Exhibits Q, R, S, T. Defendants argue that this absence of evidence renders Becovic unable to establish that Support Parking's employees actually created the condition that caused his injury and, thus, owed him a duty of care to rectify it. See Defendants' Memorandum of Law, at 17-18. In response, Becovic presents an expert affidavit from engineer Martin Izaak (Izaak), whom RRK retained to conduct an inspection of Support Parking's

garage sign on April 5, 2007. See Notice of Cross Motion, Izaak Affidavit. Izaak opines that "with the limited information currently available for my review it is still possible to discern, with a reasonable degree of engineering certainty, the nature of the condition that caused Mr. Becovic's injury," and concludes "to a reasonable degree of engineering certainty, that the condition that caused Mr. Becovic electrical shock resulted from improper installation, repair or maintenance of the electric display sign" by its owner, Support Parking. Id., ¶ 12.

Defendants reply that Izaak's opinion is clearly speculative, because it is based on an inspection of the sign that he conducted nearly nine years after Becovic was injured. See Defendants' Reply Memorandum, at 9-11. The court agrees. The passage of so much time has clearly wrought a change in the conditions that obtained at the time of Becovic's injury and Izaak's opinion is, thus, no more than speculative at this point. It is axiomatic that "'averments merely stating conclusions, of fact or of law, are insufficient' to 'defeat summary judgment [citation omitted].'" Banco Popular North America v Victory Taxi Management, Inc., 1 NY3d 381, 383 (2004). Therefore, Izaak's expert opinion is of little value, but defendants' motion is nevertheless denied.

Both Becovic's and Pennolino's deposition testimony include statements that they spoke to employees of the FDNY and

of Support Parking either at the time of, or shortly after, Bencovic was injured, and were told by both sets of employees that a wire from the garage's electric sign had come into contact with the metal studs that Becovic was moving at the time he was injured. See Notice of Cross Motion, Exhibit L, at 52; N, at 13-14. Further, the Workers' Compensation report that Pennolino prepared contemporaneously also states that the "object or substance that directly injured employee" as "act of God - open wire line from an electrical sign." Id.; Exhibit V. There appears to be no question that GSL and Support Parking were responsible for the garage's sign. Defendants do not address this evidence anywhere in their moving or reply papers, however. This lack of response is fatal to defendants' motion. The foregoing evidence could provide a jury with sufficient grounds from which to reasonably infer that Support Parking's failure to adequately maintain its sign led to the condition that caused Becovic's injury. Further, the fact that said evidence is based, at least in part, upon hearsay does not affect its admissibility under these circumstances. See e.g. Maldonado v Townsend Ave. Ents., 294 AD2d 207 (1st Dept 2002). This evidence presents a triable issue of fact which, if proven, would have enabled Becovic to establish the "duty" element of his underlying negligence claim.

Defendants failed to raise any argument as to Becovic's

ability to prove any of the other elements of his underlying negligence claim. They chose to focus, instead, on the questions of whether Support Parking had actual or constructive notice of the condition that caused Bencovic's injury. With respect to the former, defendants highlight Bencovic's deposition testimony that he had neither seen, heard nor smelled anything that would have indicated that the metal studs in the alley were electrified. See Notice of Cross Motion, Exhibit L, at 40-42. With respect to the latter, defendants correctly note that, in order to constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it (see Gordon v American Museum of Natural History, 67 NY2d 836 [1986]) and that a "general awareness" that a dangerous condition may be present is legally insufficient to constitute notice of a particular condition that causes a plaintiff's injury (see Piacquadio v Reçine Realty Corp., 84 NY2d 967 [1994]). See Defendants' Memorandum of Law, at 13-14. Defendants then argue that no evidence was ever adduced as to either how long the metal studs had been electrified, or as to whether Support Parking's employees had any knowledge that they had been. Id. at 15-17. RRK's opposition papers did not address these points. Because there is simply no extant evidence on the issue of notice, defendants are correct on this point. Nonetheless, because there

is sufficient evidence to raise a triable issue of fact on the issue of whether Support Parking's employees caused the condition that resulted in Becovic's injury, defendants' notice argument is unavailing.

Because the court finds that there is a triable issue of fact as to the viability of Becovic's underlying claim, defendants' argument that Becovic's current legal malpractice claim must fail because of the absence of a "but for" connection to that underlying claim is rejected. Defendants failed to challenge the two other elements of Becovic's legal malpractice claim, i.e., that they "failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession [in the prosecution of the underlying claim] which result[ed] in actual damages to a plaintiff." AmBase Corp. v Davis Polk & Wardwell, 8 NY3d at 434. Thus, defendants failed to disprove the existence of triable issues of fact with respect to Becovic's legal malpractice claim. Accordingly, defendants' motion for summary judgment dismissing that claim is denied.

Plaintiffs' Cross Motion

Plaintiffs' cross motion seeks an order to, inter alia, strike defendants' answer and counterclaims, prohibit defendants from offering any evidence regarding the dangerous condition that caused Becovic's injuries in his underlying negligence claim, granting Becovic the benefit of the inferences that any evidence

regarding the dangerous condition that caused those injuries was rendered unavailable by defendants and would have proven the elements of his underlying negligence claim, sanctioning defendants for causing the loss of such evidence and entering judgment against defendants. See Notice of Cross Motion, Vardicapane Affirmation, ¶ 2. Plaintiffs purportedly request this relief, in the first instance, pursuant to CPLR 3126, which provides that:

If any party, or a person who at the time a deposition is taken or an examination or inspection is made is an officer, director, member, employee or agent of a party or otherwise under a party's control, refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed, pursuant to this article, the court may make such orders with regard to the failure or refusal as are just, among them:

1. an order that the issues to which the information is relevant shall be deemed resolved for purposes of the action in accordance with the claims of the party obtaining the order; or
2. an order prohibiting the disobedient party from supporting or opposing designated claims or defenses, from producing in evidence designated things or items of testimony, or from introducing any evidence of the physical, mental or blood condition sought to be determined, or from using certain witnesses; or
3. an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party.

CPLR 3126. However, plaintiffs fail to present any proof that defendants either "refused to obey a [court] order for disclosure" or "wilfully fail[ed] to disclose information," as the statute requires. Indeed, neither plaintiffs' opposition nor their reply papers makes any mention of the statute at all, and the court concludes that plaintiffs have abandoned it as a ground for the relief they seek in their cross motion.

Instead, plaintiffs' cross motion argues that the court should find against defendants based on the doctrine of spoliation of evidence. See Notice of Cross Motion, Vardicapane Affirmation, ¶¶ 41-49. In Standard Fire Ins. Co. v Federal Pacific Elec. Co. (14 AD3d 213 [1st Dept 2004]), the Appellate Division, First Department, reiterated the rule that:

When a party alters, loses or destroys key evidence before it can be examined by the other party's expert, the court should dismiss the pleadings of the party responsible for the spoliation ... Spoliation sanctions ... are not limited to cases where the evidence was destroyed willfully or in bad faith, since a party's negligent loss of evidence can be just as fatal to the other party's ability to present a defense.

Id. at 218, quoting Squitieri v City of New York, 248 AD2d 201, 202-203 (1st Dept 1998). Here, plaintiffs cite the New Jersey Supreme Court's decision in Jerista v Murray (185 NJ 175 [2005]) in which it determined that an attorney who recklessly misled his client for nine years about the fact that the client's underlying negligence claim had been dismissed had committed spoliation of

the evidence that was lost over that time period, and which afforded the client the benefit of an inference of negligence in that underlying claim, pursuant to the doctrine of *res ipsa loquitor*. See Notice of Cross Motion, Vardicapane Affirmation, ¶ 45. Plaintiffs then ask this court to follow the same logic and reach the same conclusion. Defendants reply that such relief is not warranted because there is no proof that any of the items of evidence that plaintiffs seek ever existed in the first place, and because there has not been an egregiously long period of delay herein, as there was in the Jerista case. See Defendants' Reply Memorandum, at 11-14. Defendants also suggest that plaintiffs' new counsel may be responsible for the unavailability of some such posited evidence because they also delayed their efforts in seeking it. Id. Plaintiffs' reply papers merely deny this last argument. See Vardicapane Reply Affirmation, ¶¶ 6-8. The court notes that neither party presents any New York State case law to support their arguments.² In the absence of any controlling precedent, this court is unwilling to accord that doctrine any further reach than the Appellate Division, First Department, currently acknowledges - i.e., to the "negligent

² Plaintiffs cite a factually inapposite decision by the Appellate Division, Second Department, Gumbs v Friedman & Simon (35 AD3d 362 [2d Dept 2006]), wherein the Court dismissed a claim against the City on the ground that there was no evidence that the City's employees had created the dangerous condition that caused the plaintiff's injuries. That case does not deal with the doctrine of spoliation of evidence.

destruction" of evidence by a party described in Standard Fire Ins. Co. v. Federal Pacific Elec. Co. (14 AD3d at 213). The New Jersey Supreme Court's decision to extend coverage of the doctrine to situations where an attorney has "consciously disregarded a substantial risk that key evidence would not be available when needed by plaintiffs" is not the law in this State and is not binding on this court. Jerista v Murray, 185 NJ at 203. In the absence of any compelling rationale to adopt this extension, the court rejects plaintiffs' argument to do so, and plaintiffs have presented no grounds for the relief that they seek in their cross motion. Accordingly, plaintiffs' cross motion should be denied.

DECISION

ACCORDINGLY, for the foregoing reasons, it is hereby ORDERED that defendants' motion for summary judgment dismissing the complaint is denied; and it further is

ORDERED that plaintiffs' cross motion, pursuant to CPLR 3126 and the doctrine of spoliation, is denied; and it further is

ORDERED that counsel shall appear for a pre-trial conference in Part 55 on September 17, 2007 at 2 PM.

Dated: August 10, 2007

ENTER:



J.S.C.