SHORT FORM ORDER

INDEX No. 04-14856
CAL No. 06-02117-OT

SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 1-31-07
ADJ. DATE 3-30-07
Mot. Seq. # 001 - MG; CASEDISP

GEORGE OUELLETTE, Plaintiff, - against - SCOTT MICHAEL MISHKIN, P.C. and SCOTT MICHAEL MISHKIN, Defendants.	BERNBACH LAW FIRM PLLC Attorneys for Plaintiff 245 Main Street, 5th Floor White Plains, New York 10601 L'ABBATE, BALKAN, COLAVITA, et al. Attorneys for Defendants 1001 Franklin Avenue Garden City, New York 11530

Upon the following papers numbered 1 to 17 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 5 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 6 - 12 ; Replying Affidavits and supporting papers 13 - 17 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendants for summary judgment dismissing the complaint for legal malpractice is granted.

This legal malpractice action arises out of the defendants' representation of, and advice to plaintiff in connection with a severance agreement which ended plaintiff's employment with Macy's East, Inc., a division of Federated Department Stores, Inc. ("Macy's"). Plaintiff had a 21-year career with Sterns Department Stores before it was acquired by, and he became an employee of Macy's in July 2001.

Plaintiff retained defendants to review, and subsequently to negotiate the terms and conditions of a severance agreement which had been offered by Macy's. Defendant Scott Mishkin ("Mishkin") testified during his examination before trial that he met plaintiff and his wife for the first time in his law office in August 2003. During this initial meeting, Mishkin was informed that plaintiff had received poor performance evaluations and had been offered a severance agreement to terminate his employment with Macy's. Mishkin testified that plaintiff and his wife believed Macy's was terminating plaintiff because of his age. Plaintiff was advised that to commence an age discrimination claim against Macy's, a complaint would first have to be filed with the EEOC. Mishkin testified that plaintiff wanted to accept a severance package from Macy's and did not want to file a complaint.

Mishkin initiated correspondence with Macy's seeking a severance package which included additional compensation and COBRA benefits. In the initial letter to Macy's, Mishkin conveyed plaintiff's suspicion that the severance package was being offered as a pretext to terminating him based

on his age. In response, a counter-offer was received from Macy's which was discussed with plaintiff. Mishkin also advised that based on the preliminary information received from Macy's, he formed the opinion that there arguably was a non-discriminatory basis for terminating plaintiff. Mishkin testified that plaintiff, however, did not want any research conducted on an age discrimination claim and just wanted to settle with Macy's.

Questioning revealed that Mishkin negotiated a more favorable severance agreement, including additional compensation and COBRA benefits, in exchange for plaintiff waiving any claims against Macy's for, *inter alia*, age discrimination. Additionally, testimony revealed that Mishkin reviewed with plaintiff and his wife the terms of the final version of the severance agreement and confirmed that once executed plaintiff could not bring an age discrimination claim. When asked by plaintiff's wife, under what circumstances the severance agreement could be "opened," Mishkin advised "if entered into under duress or if there was fraud or misrepresentation. It would be an uphill battle to open it." Shortly thereafter, plaintiff executed the severance agreement dated September 5, 2003. At that time, plaintiff was 61 years old.

Plaintiff subsequently discovered that his replacement at Macy's was a younger person. On March 4, 2004, plaintiff and his wife returned to defendants' law office. Mishkin testified plaintiff and his wife indicated they had consulted with an attorney who was an expert in age discrimination and were advised they had a great age claim. Mishkin further testified that plaintiff and his wife indicated that they were going to sue defendants as plaintiff never wanted to sign the severance agreement, and Mishkin knew they had a great claim for age discrimination but did not want to represent them in a lawsuit.

In his complaint, plaintiff alleges that he had a meritorious lawsuit in which he would have prevailed against Macy's for discrimination under the Age Discrimination in Employment Act of 1967 and the New York State Human Rights Law. Plaintiff alleges that he would not have executed the severance agreement waiving his right to file an age discrimination lawsuit, but for defendants' erroneous advice that he would not be barred from instituting litigation against Macy's in the event evidence could be produced that he was replaced by a younger individual and that age was the motivating factor in his termination. Plaintiff seeks damages from defendants for, *inter alia*, the amount he would have been awarded in a successful age discrimination lawsuit against Macy's.

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 of a malpractice cause of action (***Russo v Feder, Kaszovitz, Isaacson, Weber, Skala & Bass, LLP***, 301 AD2d 63, 67, 750 NYS2d 277 [2002]; ***Pellegrino v File*** 291 AD2d 60, *lv denied* 98 NY2d 606, *lv denied* 98 NY2d 606 [2002]; ***Ippolito v McCormack, Damiani, Lowe & Mellon,*** 265 AD2d 303, 696 NYS2d 203 [1999]; ***Ostriker v Taylor, Atkins & Ostrow,*** 258 AD2d 572, 685 NYS2d 470, *lv denied* 93 NY2d 809, 694 NYS2d 631 [1999]). To establish a cause of action to recover damages for legal malpractice, a plaintiff must prove (1) that the defendant attorney failed to exercise that degree of care, skill, and diligence commonly possessed by a member of the legal community, (2) proximate cause, (3) damages, and (4) that the plaintiff would have been successful in the underlying action had the attorney exercised due care (***Ippolito v McCormack, Damiani, Lowe & Mellon,*** *supra*; ***Iannarone v Gramer,*** 256 AD2d 443, 682 NYS2d 84 [1998]; ***Volpe v Canfield,*** 237 AD2d 282, 654 NYS2d 160, *lv denied* 90 NY2d 802, 660 NYS2d 712 [1997]). It has been made clear that the

"remedy relies on prima facie proof that the client would have succeeded" (***Russo v Feder, Kaszovitz, Isaacson, Weber, Skala & Bass, LLP***, *supra*, at 67; ***Pellegrino v File***, *supra* at 63). Thus, "[e]ven if counsel improperly advises the client, the advice is not the proximate cause of the harm if the client cannot demonstrate its own likelihood of success absent such advice" (***Pellegrino v File***, *supra* at 63; ***Hill v Fisher & Fisher***, 203 AD2d 328, 610 NYS2d 848 [1994]; ***Parmisani v Grasso***, 218 AD2d 870, 629 NYS2d 865 [1995]).

Defendants have established that they are entitled to a judgment in their favor on plaintiff's legal malpractice claim. Plaintiff's contention that defendants' alleged erroneous advice was the sole reason that he accepted the settlement offer and executed the severance agreement, to the extent that such allegations can even be construed as constituting a factual predicate on which a claim for malpractice would lie, is belied by plaintiff's deposition testimony. Plaintiff testified that he was given the option by Macy's to continue working until an agreement was reached with regard to a severance package, or to continue working to correct his job performance deficiencies. Plaintiff testified that he did not consider the second option because he did not want to deal with the pressure being placed upon him to correct his performance deficiencies as he believed he would be ultimately terminated no matter what he did. Moreover, defendants did what they were retained to do, i.e., review and negotiate a severance agreement with more favorable terms.

Nevertheless, settlement of a claim does not preclude a subsequent action for legal malpractice in situations where settlement was compelled by mistakes of counsel (*see, e.g.*, ***Rau v Borenkoff*** 262 AD2d 388, 691 NYS2d 777 [1986]; ***Wolstencroft v Sassower*** 124 AD2d 582, 507 NYS2d 728 [1986]). Here, as plaintiff has not alleged that settlement was made necessary by any such attorney error, or that he was coerced into the settlement by defendants, in order to prevail, plaintiff would have to establish that settlement was an "[un]reasonable course of action" (***Rosner v Paley*** 65 NY2d 736, 738, 492 NYS2d 13 [1985]; *see*, ***Williams v Brentwood Farmers Market, Inc.***, 256 AD2d 613, 683 NYS2d 134 [1998]). In light of Mishkin's preliminary assessment of the case, and plaintiff's expressed desire not to commence a lawsuit and to obtain a severance package from Macy's, settlement of the claim was not an unreasonable course of action (*see*, ***Colleran v Rockman***, 275 AD2d 222, 712 NYS2d 108 [2000]; *see also*, ***Rosner v Paley***, *supra*; ***Dweck Law Firm, LLP v Mann***, 283 AD2d 292, 727 NYS2d 58 [2001]; ***Williams v Brentwood Farmers Market, Inc.***, 256 AD2d 613, 683 NYS2d 134 [1998]). Furthermore, no evidence has been submitted to show that Mishkin's negotiations of the severance package in lieu of a trial, or his advice to accept the terms thereof, was in any manner wrongful or negligent (*see*, ***Rosner v Paley***, *supra*; ***Jaffe & Asher LLP v Ross***, 6 AD3d 357, 775 NYS2d 522 [2004]; ***Sei Yong Choi v Dworkin***, 230 AD2d 780, 646 NYS2d 531 [1996]).

Moreover, plaintiff has failed to establish causation and damages. These elements of malpractice are closely related to each other because if causation is lacking, it can frequently be said that there are no damages (*see e.g.*, ***Cramer v Spada***, 203 AD2d 739, 610 NYS2d 662 [1994] [no malpractice where plaintiff failed to establish damages resulting from attorney's error]). The attorney's conduct must have caused damages that are actual and ascertainable as "[m]ere speculation of a loss resulting from an attorney's alleged omission is insufficient to sustain a prima facie case in malpractice" (***Luniewski v Zeitlin***, 188 Ad2d 642, 643, 591 NYS2d 524 [1992]; ***Zarin v Reid & Priest***, 184 AD2d 385, 585 NYS2d 379 [1992]; ***Brown v Samalin & Bock, P.C.***, 168 AD2d 531, 563 NYS2d 426 [1990]).

Plaintiff's allegation that he would have recovered more if his lawyers had not advised him to execute the severance agreement, does not demonstrate "actual and ascertainable" damages necessary for a malpractice claim. He has presented nothing to support an allegation that he would have received judicial determinations which would have been more favorable (***Zasso v Maher***, 226 AD2d 366, 640 NYS2d 243 [1996]). The speculative nature of what a plaintiff might recover at trial is precisely the risk that pre-trial settlement avoids (***Schweizer v Mulvehill***, 93 F. Supp. 2d 376 [SDNY 2000]; *see also,* ***Perkins v Norwick***, 257 AD2d 48, 693 NYS2d 1 [1999] [damages based on what "might" or "would" have been done are "couched in terms of gross speculation"]). Thus, plaintiff's damages based on an amount he might have been awarded in an age discrimination lawsuit is too speculative to maintain his claim for legal malpractice.

Having made out a prima facie case for summary judgment, the burden shifts to plaintiff to lay bare his evidence to show the existence of issues of fact requiring a trial (*see,* ***Cohen v City of New York*** 128 AD2d 748, 513 NYS2d 459 [1987], or to establish by admissible evidence all four elements of a legal malpractice action (***Ippolito v McCormack, Damiani, Lowe & Mellon***, *supra;* ***Iannarone v Gramer***, *supra;* ***Volpe v Canfield***, *supra).* Plaintiff has failed to do so.

Expert evidence is required if the basis for judging the adequacy of professional service is not within the ordinary experience of the fact finder, although an affirmation from the plaintiff's attorney may be sufficient (***Zasso v Maher,*** *supra*). Here, plaintiff's counsel did not submit an affidavit from an expert nor has he established his expertise in the field of age discrimination law. Moreover, the arguments made by plaintiff's attorney are tinged with the sense that since he would have done things differently, defendants were incompetent. "Such a contest of strategies is easily reduced to a malpractice standard that impermissibly compares the defendant-attorney's choice of strategies with the afterthoughts later offered by plaintiff's now-favored attorney, for whom bias is a necessary concern, rather than measuring counsel's performance against the much more objective standard of the profession's commonly prevailing practices" (***Russo v Feder, Kaszovitz, Isaacson, Weber, Skala & Bass, LLP***, *supra* at 69).

Accordingly, the motion for summary judgment is granted and the complaint dismissed.

Dated: AUG 2 3 2007

J.S.C.

_X_ FINAL DISPOSITION _ _ NON-FINAL DISPOSITION