Hearl v Schoenfeld & Schoenfeld, LLP

2007 NY Slip Op 32903(U)

September 4, 2007

Supreme Court, Suffolk County

Docket Number: 0028700/2004

Judge: Robert W. Doyle

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SHORT FORM ORDER

INDEX No. 04-28700
CAL. No. 07-00213-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 6-12-07
ADJ. DATE 7-26-07
Mot. Seq. # 001 - MD
002 - XMD

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MEREDITH R. HEARL, individually, CHARLES R. HEARL and MEREDITH R. HEARL, as parent and natural guardian of ZACHARY C. HEARL,

Plaintiffs,

- against -

SCHOENFELD & SCHOENFELD, LLP, ROBIN B. SCHOENFELD, ESQ., HARRIS SCHOENFELD, ESQ., MICHAEL P. SCHOENFELD, ESQ. and DAVID A. PICUS, ESQ.

Defendants.

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Upon the following papers numbered 1 to 39 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1- 12 ; Notice of Cross Motion and supporting papers 13-29 ; Answe ring Affidavits and supporting papers_; Replying Affidavits and supporting papers 30-33; 37-39 ; Other 34-36 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (001) by plaintiffs, Meredith R. Hearl, Charles R. Hearl, and Zachary C. Hearl, an infant, pursuant to CPLR 3212 for summary judgment is denied; and it is further

ORDERED that this motion (002) by defendants Schoenfeld & Schoenfeld, L.L.P., Robin B. Schoenfeld, Esq., Harris Schoenfeld, Esq., Michael P. Schoenfeld, Esq., and David A. Pincus, Esq., pursuant to CPLR 3212 for summary judgment dismissing the complaint of Charles Hearl and Zachary Hearl, and further order dismissing the complaint as to Michael P. Schoenfeld, Esq., is denied as untimely pursuant to CPLR 3212(a).

This is an action sounding in professional negligence arising out of the alleged legal malpractice by defendants during the period of time they allegedly represented plaintiffs. The underlying claim upon which this action is premised arises out of an incident which occurred on May 29, 2000, when plaintiffs took their two and one half year old son, Zachary, to Lime Rock Race Track, Connecticut. While Meredith Hearl was walking with her son from the outfield area to her car after the last car race was over, she heard screams, and turned to see a Ben & Jerry's ice cream pushcart on wheels barreling down the grassy hill towards plaintiff and her son. Plaintiff claims she tried to shield her child from the cart, but the cart struck her, throwing her a distance to the ground. The cart continued down the hill, dragging Zachary with it until it was finally stopped by some men at the bottom of the hill.

The complaint sets forth a first cause of action alleging the Schoenfeld defendants were negligent in their representation of plaintiffs with regard to the underlying matter in that they failed to timely commence an action on their behalf within the applicable two year statute of limitations as provided by Connecticut law for the commencement of a personal injury action. Plaintiffs claim they had a meritorious action in the underlying claim and would have recovered a substantial monetary judgment against the tortfeasors in that action, but for the negligence of defendants in this matter. A second cause of action sounds in vicarious liability based upon the alleged negligence of the defendants as employees of Schoenfeld and Schoenfeld, L.L.P.

In motion (001), plaintiffs seek summary judgment as a matter of law on the issue of professional negligence by defendants in failing to commence the action within two years pursuant to the statute of limitations as provided by Conn. Gen. Stat. §52-584 [2007]. Plaintiffs further seek summary judgment as a matter of law on the issue that plaintiffs would have prevailed in their personal injury action had it been timely commenced.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Sillman v Twentieth Century-Fox Film Corporation***, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Medical Center***, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. Medical Center***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (***Joseph P. Day Realty Corp. v Aeroxon Prods.***, 148 AD2d 499, 538 NYS2d 843 [2nd Dept 1979]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (***Castro v Liberty Bus Co.,*** 79 AD2d 1014, 435 NYS2d 340 [2nd Dept 1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (***Friends of Animals v Associated Fur Mfrs.***, 46 NY2d 1065, 416 NYS2d 790 [2nd Dept 1979]).

In support of motion (001), the plaintiffs have submitted copies of the pleadings; a copy of the transcript of the examination before trial of defendant Robin Schoenfeld; an unsworn report of John M. Orkiwsji, Forensic Engineer; letter dated August 23, 2000 to Meredith Hearl from Priscilla Titus of Schoenfeld & Schoenfeld; letters dated September 17, 2001, July 12, 2002, November 1, 2002, and March 19, 2003, and an undated letter, from Robin Schoenfeld to The Hartford; letter dated February 1, 2002 to Dr. Scott Alpert, M.D.; a copy of a Retainer dated June 30, 2000; and a photograph.

To establish that a claim of legal malpractice under New York law, a plaintiff must demonstrate that (1) an attorney-client relationship existed; (2) the attorney failed to exercise the degree of care commonly exercised by an ordinary member of the legal community; (3) the attorney's negligence proximately caused plaintiff's injury; and (4) plaintiff incurred damages as a direct result of the attorney's alleged malpractice act (***Steinfeld v Marks,*** 1997 US Dist Lexis 13569 [1997]).

When proving legal malpractice, the plaintiff must also demonstrate that she would have "succeeded on the merits of the underlying action but for the attorney's negligence (***Maillet v Campbell,*** 280 A.D.2d 526, 720 N.Y.S.2d 203 [2nd Dept 2001] **,** quoting ***Davis v Klein,*** 88 N.Y.2d 1009-1010, 648 N.Y.S.2d 871; *see also,* ***Sloane v. Reich***, No. 90 Civ. 8187, 1994 WL 88008, at 3. [S.D.N.Y. March 11, 1994] holding that to establish legal malpractice, the plaintiff must prove "but for" causation, a requirement which "seeks to insure a tight causal relationship exists between the claimed injuries and the alleged malpractice"). The "but for" causation requirement necessitates the trier of fact "in effect [to] decide a lawsuit within a lawsuit, "because it demands a hypothetical re-examination of the events at issue absent the alleged legal malpractice (***Littman Krooks Roth & Ball, PC v. New Jersey Sports Prods. Inc. and Square Ring Prods, Inc.,*** No. 00 Civ. 9419, 2001 WL 963949, at 3 [S.D.N.Y. Aug. 22, 2001] internal citations omitted; *see also* ***Zarin v. Reid & Priest***, 184 A.D.2d 385, 386, 585 N.Y.S.2d 379, 381 [1st Dept 1992] holding that the plaintiff must prove that but for the legal malpractice in the underlying representation the unfavorable outcome would have been a favorable outcome).

Here, plaintiffs have submitted a Retainer signed by Meredith Hearl and letters indicating defendants were representing Meredith Hearl for injuries alleged to have been sustained by Meredith Hearl on May 29, 2000. At her examination before trial, Robin Schoenfeld testified that she made a note on her fact sheet on June 30, 2000 that Meredith Hearl had retained Schoenfeld & Schoenfeld, and that they would not be representing her infant son. She had also been advised that Mrs. Hearl had previously retained attorney Berger on this matter, and that she had to be substituted in his place, which she testified was accomplished after about three months. Ms. Schoenfeld also testified that she had a note in her file under the date of September 14, 2001 wherein she queried as to the Connecticut statute of limitations on a personal injury action, and although she did not write it down, she stated it was two years. Therefore, she had approximately eight months remaining to commence the action at that time as the statute of limitations expired May 29, 2002.

Ms. Schoenfeld also testified that she discussed with Meredith Hearl about commencing an action, but advised her that an action could not be commenced because they did not have a diagnosis for Ms. Hearl's injuries upon which to base a lawsuit. Ms. Hearl started treatment for a short period of time and then had a year hiatus in treatment. She had seen Dr. Zitner who did not necessarily think plaintiff's problem was accident related and that she was fine. Meredith Hearl's physical therapy records note plaintiff had been in a car accident September, 2000, but when Ms. Hearl was asked about this, advised

Ms. Schoenfeld that this was a typo and should read "cart." Thereafter, Ms. Hearl started to see Dr. Alpert in February, 2002. She was given a shot of cortisone into her knee and another MRI was performed. Ms. Hearl advised Ms. Schoenfeld that she was not going back to him again because "he didn't see a reason for surgery." Therefore, she was going to go back to Dr. Zitner.

On December 17, 2002, Selective Insurance made an offer to settle the case on behalf of Meredith Hearl for Three Thousand Dollars, but later increased the offer to Five Thousand Dollars. Sometime between January and March of 2003, there was an offer to settle on behalf of Meredith Hearl from The Hartford for Seventeen Thousand Five Hundred Dollars. However, when Ms. Schoenfled advised Ms. Hearl of this total settlement of Twenty Two Thousand Five Hundred Dollars, Ms. Hearl stated she wanted to go back to Dr. Alpert. After receiving Dr. Alpert's report, Ms. Schoenfeld recommended to Ms. Hearl that she accept the settlement. The release was sent out, but Ms. Hearl wanted to go to a new doctor, Dr. Gurtowski. Thereafter, Ms. Schoenfeld left her father's law office in May, 2003. Her father, Harris Schoenfeld, was in an automobile accident March 2, 2004 and was out of work for about six months. She had dictated a memo on the Hearl file for whomever took over the file when she left, and left a copy of the memo on the two partners' desks. Ms. Schoenfeld stated she never received a signed release from Ms. Hearl accepting the settlement.

Conn. Gen. Stat. §52-584 [2007]provides for a two year statute of limitations in commencing a negligence action premised upon personal injury of the plaintiff. An attorney's failure to commence an action within the statute of limitations is grounds for a legal malpractice claim *(**Nitis v Goldenthal**,* 128 A.D.2d 687, 688, 513 N.Y.S.2d 186, 188 [2nd Dept 1987]). Ms. Schoenfeld testified that it was her opinion that she did not depart from generally accepted standards of legal practice other than the statute of limitations. She also stated she never recommended to Ms. Hearl that she consult with a Connecticut attorney to commence a lawsuit against defendants.

Based upon the foregoing, plaintiffs have demonstrated as a matter of law that defendants did not commence a lawsuit on behalf of Meredith Hearl concerning the underlying matter within the applicable two year statute of limitations. However, it has not been demonstrated by plaintiffs that there was any agreement that the law office of Schoenfeld & Schoenfeld was retained to represent Mr. Hearl or the infant Zachary. The Retainer submitted by plaintiffs is in the name of Meredith Hearl only. Letters and correspondence maintained by Ms. Schoenfeld address only representation and issues concerning Meredith Hearl. The adduced testimony supports Ms. Schoenfeld was only retained to represent Meredith Hearl. Plaintiffs have not submitted any supporting evidence to demonstrate to this court that defendants' law office was retained to represent Charles Hearl or Zachary Hearl. Therefore, plaintiffs have not demonstrated prima facie entitlement to summary judgment as a matter of law on the issue that defendants were retained to represent Charles Hearl and Zachary Hearl, or on the issue that defendants permitted the statute of limitations to run as to Charles Hearl or Zachary Hearl.

While plaintiff Meredith Hearl has established that defendants failed to commence a timely personal injury action on her behalf, she has not demonstrated she would have prevailed on the underlying claim. To prove a prima facie case of negligence, the plaintiff must establish the existence of a duty on the defendant's part to the plaintiff, the breach of the duty, and that the breach of the duty was a proximate cause of an injury to the plaintiff (***Gordon v Muchnick,*** 180 AD2d 715, 579 NYS2d 745 [2nd Dept 1992]). Meredith Hearl has not submitted a sworn medical report or a physician's affirmation causally relating any

[* 5]

claimed injury to the incident claimed herein. Thus plaintiff has not demonstrated prima facie that there are no factual issues on injuries and proximate cause.

Additionally, the report of plaintiff's engineer submitted in support of this motion is not in admissible form as it is unsworn. Therefore, in addition to Meredith Hearl not demonstrating damages and proximate cause, she has failed to demonstrate prima facie that she would have prevailed on the issue of negligence, even relying on res ipsa in the underlying action, had an action been timely commenced.

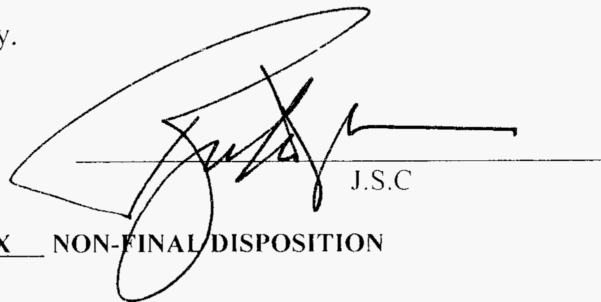
Accordingly, plaintiffs' motion for summary judgment is denied.

Turning to motion (002), defendants seek summary judgment dismissing the complaint on the basis that defendants were not retained to represent either Charles Hearl or Zachary Hearl. Defendants further seek dismissal of the complaint as to Michael P. Schoenfeld, Esq. in that he practiced law as a partner in a limited liability partnership of Schoenfeld & Schoenfeld, L.L.P., did not commit any negligent or wrong act, nor did anyone under his direct supervision or control commit any negligent or wrong act.

The note of issue was filed in this action on January 29, 2007. CPLR 3212(a) provides in pertinent part that a motion for summary judgment shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown. Motion (002) was served on July 2, 2007, more than one hundred twenty days after the note of issue was filed. The moving defendants have made no application for leave of court on good cause shown to file this cross motion beyond the statutory one hundred twenty days, and in fact, have not submitted any reason for the delay (*see*, ***Brill v City of New York***, 2 NY3d 648, 781 NYS2d 261 [2004]).

Accordingly, motion (002) is denied as untimely.

Dated: SEP 04 2007



J.S.C

_____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**