

**M.H. Kane Constr. Corp. v Lieb**

2007 NY Slip Op 33577(U)

October 30, 2007

Supreme Court, Suffolk County

Docket Number: 0025227/2005

Judge: Peter Fox Cohalan

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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 24 - SUFFOLK COUNTY

**PRESENT:**

Hon. PETER FOX COHALAN  
Justice of the Supreme Court

MOTION DATE 2-21-07  
CAL. DATE 8-22-07  
Mot. Seq. # 002 - MotD  
Mot. Seq. # 003 - XMG

-----X  
M.H. KANE CONSTRUCTION CORP., :  
 :  
 Plaintiff, :  
 :  
 - against - :  
 :  
 DAVID K. LIEB, ESQ. and DAVID K. LIEB, :  
 P.C., :  
 Defendants. :  
-----X

GOLDBERG & CONNOLLY  
Attorneys for Plaintiff  
66 North Village Avenue  
Rockville Centre, New York 11570  
  
L'ABBATE, BALKAN, COLAVITA &  
CONTINI, L.L.P.  
Attorneys for Defendants  
1001 Franklin Avenue  
Garden City, New York 11530

Upon the following papers numbered 1 to 59 read on this motion for summary judgment and cross motion for leave to amend complaint; Notice of Motion/ Order to Show Cause and supporting papers 1 - 13; Notice of Cross-Motion and supporting papers 14 - 24; Answering Affidavits and supporting papers 25 - 47; Replying Affidavits and supporting papers 48 - 54; Other 55 -59; and after hearing counsel in support and opposed to the motion it is,

**ORDERED** that this motion by defendants, David K. Lieb, Esq. and David K. Lieb, P.C. (collectively, "Lieb") for an order granting summary judgment dismissing the complaint of the plaintiff is decided as follows; and it is

**ORDERED** that this cross-motion by the plaintiff for an order granting it leave to serve an amended complaint is granted and the amended complaint attached to the cross-motion as exhibit 6 is hereby deemed served upon service of a copy of the order upon all parties.

The plaintiff (hereinafter Kane) commenced this action to recover damages allegedly suffered as a result of legal malpractice committed by Lieb in connection with a case originally brought against the plaintiff. In the underlying case, Kane had contracted with URS Corp., (hereinafter URS) to provide construction services for the public school system in Queens. A subcontractor of Kane instituted an action against Kane and URS to foreclose a mechanic's lien. Kane retained Lieb to represent it in the lien foreclosure action. In that action, Lieb asserted a cross-claim on Kane's behalf against URS to recover money Kane stated it was owed. URS filed a cross-claim against Kane for indemnification in the lien foreclosure action. URS subsequently filed a motion for summary judgment dismissing Kane's cross-claim, arguing that Kane failed to comply with the Alternate Dispute Resolution (hereinafter ADR) provision of their contract.

Lieb did not file opposition to the motion. Instead, Lieb and the attorneys for URS executed a stipulation agreeing to mutually discontinue all cross-claims against each other, with prejudice.

Kane commenced the instant action, stating that it never consented to withdrawing the cross-claims with prejudice, and that Lieb committed malpractice by signing such a stipulation. Kane alleges it would have obtained a judgment against URS on its cross-claim if Lieb had not breached his duty to the plaintiff by executing the stipulation with prejudice and that as a result of Lieb's malpractice, Kane is foreclosed from pursuing its remedy against URS.

Lieb now move for an order granting summary judgment dismissing the complaint against the defendants arguing that David K. Lieb Esq. properly exercised his judgment in accordance with the standard of care utilized by a reasonably prudent attorney. Specifically, Lieb argues that the contract between URS and Kane did contain an ADR provision and that Kane was bound by its terms to utilize ADR to assert its claims. Lieb contends that Kane was not foreclosed from bringing this claim, that even URS's attorneys agreed that Kane could and should assert its claims in a manner consistent with the ADR provision of the contract. Furthermore, Lieb argues that Kane hired subsequent attorneys who have put forth the same claim as that contained in the discontinued cross-claim in a direct action against URS. When the trial court in that matter (Mr. Justice O'Donoghue, Supreme Court, in and for Queens County), granted URS's motion to dismiss, Kane appealed, arguing that the ADR provision was not broad enough to include Kane's claims for unpaid balances due. The Appellate Division, Second Department, in a recent decision (42 AD3d 512, 840 NYS2d 133), (hereinafter Appellate Division), affirmed Mr. Justice O'Donoghue's decision, stating that the ADR provision at issue did encompass the claims being asserted by Kane against URS, which precluded the courts from considering the merits of Kane's claims.

In the instant case, Lieb argues that, based on the Appellate Division's decision, Kane is foreclosed from attempting to prove that Lieb committed malpractice in signing the stipulation. Specifically, Lieb argues that the Appellate Division decision establishes that Lieb's motion for summary judgment dismissing the cross-claim would have been granted and therefore Kane cannot prove that it would have succeeded in the underlying action but for the Lieb's action in signing the stipulation withdrawing the cross-claim against URS.

Initially, Kane argues, in opposition, that there are issues of fact which would preclude the granting of summary judgment, including the issue of whether all of the plaintiff's claims against URS are indeed subject to the ADR provision. However, in light of the Appellate Division's decision, which was reached during the pendency of the defendants' motion, Kane now seeks an order amending its complaint to add a claim that Lieb committed malpractice in failing to properly pursue Kane's claim under the ADR provision. In the proposed amendment, the plaintiff argues that Lieb's representation of it, such as it was, continued until 2005.

Lieb opposes the motion, arguing that Kane has failed to offer any excuse for the delay in adding a cause of action based on this set of facts and that the cross-motion is untimely. Additionally, Lieb asserts that no malpractice action can be maintained because Kane either did timely assert a claim pursuant to the ADR provision of the contract or could have asserted

such a claim through either of the two attorneys it has hired since the date Lieb signed the subject stipulation. Furthermore, Lieb points to Kane's failure to include an expert affidavit or other evidence of this claim as reason for denial of the cross-motion.

Kane, in reply, argues that its motion was timely and that the reason it has now filed the motion is because the Appellate Division, Second Department's decision has "altered the legal landscape." Specifically, Kane states that it did not state a claim for legal malpractice against Lieb for failure to properly pursue ADR because Kane believed that, prior to the Appellate Division's decision, all of its claims were not subject to ADR. Furthermore, Kane argues that, absent prejudice, mere delay is not a bar to granting the amendment. Kane states that Lieb will still have a full opportunity to conduct discovery herein as the discovery phase of this action has only just begun. Finally, Kane argues that the evidence presented clearly attests to the merits of the proposed claim.

To establish a cause of action 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) the attorney's negligence was the proximate cause of the loss sustained, and (3) damages. To show proximate cause, the plaintiff must establish that but for the attorney's negligence, the plaintiff would have been successful in the underlying action (see, *Ippolito v McCormack*, 265 AD2d 303, 696 NYS2d 203 [1999]; *Raphael v Clune*, 201 AD2d 549, 607 NYS2d 743 [1994]). For a defendant in a legal malpractice action 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 these essential elements (*McCormack v Krim*, 283 AD2d 464, 465, 724 NYS2d 643 [2001], citing *Suydam v O'Neill*, 276 AD2d 549, 550, 714 NYS2d 686 [2000]; *Ippolito v McCormack*, *supra*; *Purificati v Meyer & Diesenhouse*, 243 AD2d 697, 665 NYS2d 308 [1997]). Submission of an attorney's affirmation supported by deposition testimony provides such a proper evidentiary showing (*Gaeta v New York News*, 62 NY2d 340, 350, 477 NYS2d 82, 86 [1984]; *Zuckerman v City of New York*, 49 NY2d 557, 563, 427 NYS2d 595, 598 [1980]). However, an attorney's selection among several reasonable strategies does not constitute malpractice, even if the strategy is ultimately unsuccessful (*Rosner v Paley*, 65 NY2d 736, 492 NYS2d 13 [1985]). Furthermore, speculative damages cannot form the basis for establishing the damages in a malpractice action (*Pellegrino v File*, 291 AD2d 60, 738 NYS2d 320 [2002]).

Inasmuch as the Appellate Division, Second Department has decided that the plaintiff's claims against URS must be decided in accordance with the terms of the ADR provision of the contract between Kane and URS, and that the courts are therefore precluded from deciding those claims, the defendants have established that Lieb did not commit malpractice when David K. Lieb, Esq. agreed to sign the stipulation withdrawing those cross-claims with prejudice. In particular, Lieb has established as a matter of law that Kane cannot prove that it would have been successful on the underlying claim against URS. Indeed, quite the opposite is true. In accordance with the Appellate Division decision, URS's motion for summary judgment dismissing the cross-claims of Kane would have been granted.

Turning to Kane's cross-motion for an order granting it leave to amend its complaint, absent prejudice or unfair surprise to the defendant, leave to amend a bill of particulars or a pleading should be freely given (see, **Scheuerman v Health & Hosps. Corp. of City of N.Y.**, 243 AD2d 553, 663 NYS2d 123 [1997]; **Volpe v Good Samaritan Hosp.**, 213 AD2d 398, 623 NYS2d 330 [1995]). However, a plaintiff guilty of an extended delay in seeking leave to amend a pleading must establish a reasonable excuse for the delay and submit an affidavit demonstrating the merits of the proposed amendment by a person with direct knowledge of the pertinent facts (see, **Smith v Plaza Transp. Ambulance Serv.**, 243 AD2d 555, 665 NYS2d 513 [1997]; **Kyong Hi Wohn v County of Suffolk**, *supra*; **Raies v Apple Annie's Rest.**, 115 AD2d 599, 496 NYS2d 260 [1985]). "[L]eave should be denied if the proposed amendment is palpably insufficient as a matter of law or is totally devoid of merit" (**Leszczynski v Kelly & McGlynn**, 281 AD2d 519, 722 NYS2d 254 [2001]).

Here, Kane has established a reasonable excuse for the delay and Lieb has not offered any evidence that Lieb would suffer any prejudice if the Court were to grant the plaintiff's motion, particularly since discovery in this case has only just begun. Kane has established that there is merit to its proposed cause of action alleging legal malpractice committed in connection with the pursuit of Kane's claim pursuant to the ADR provision of the contract. In opposition, Lieb has failed to prove that the proposed amendment is palpably insufficient as a matter of law.

Therefore, consistent with the foregoing, Lieb's motion for an order granting summary judgment dismissing Kane's complaint is granted to the limited extent set forth above and in all other respects is denied, and Kane's cross-motion for an order granting it leave to serve an amended complaint is granted. The amended verified complaint attached to the across-movant's papers as Exhibit 6 is hereby deemed served as of the date of the service of a copy of this order. The temporary restraining order previously signed by this Court in conjunction with the Order to Show Cause to be relieved as counsel, dated October 2, 2007, is hereby modified to the extent to allow service of the order and an amended complaint as provided for in the order of this Court herein this date.

Dated: October 30, 2007



J.S.C.

\_\_\_\_ FINAL DISPOSITION     X  NON-FINAL DISPOSITION