

**Varanelli v Edelstein**

2007 NY Slip Op 34299(U)

December 19, 2007

Supreme Court, Suffolk County

Docket Number: 0011213/2007

Judge: Paul J. Baisley

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SHORT FORM ORDER

INDEX NO. 011213/2007

SUPREME COURT - STATE OF NEW YORK  
DCM-J - SUFFOLK COUNTY

**PRESENT:****Hon. Paul J. Baisley, Jr.**  


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ANDREW A. VARANELLI

Plaintiff(s),

-against-

LEWIS C. EDELSTEIN

Defendant(s).

**ORIG. RETURN DATE:** June 28, 2007  
**MTN. SEQ. #:** 001 - CASEDISP

**PLTF'S ATTORNEY:**  
 GRESHIN ZIEGLER & AMICIZIA LLP  
 199 E. MAIN ST., POB 829  
 SMITHTOWN, NY 11787

**DEFT'S ATTORNEY:**  
 CALLAN KOSTER BRADY & BRENNAN LLP  
 ONE WHITEHALL ST, 10TH FLOOR  
 NEW YORK, NY 10004

Upon the following papers numbered 1 to 10 read on this motion to dismiss: Notice of Motion and supporting papers 1 - 4; Affirmation in Opposition and supporting papers 5 - 10; it is,

**ORDERED** that this pre-answer motion by the defendant for an order dismissing the complaint pursuant to CPLR 3211 is granted; and it is further

**ORDERED** that counsel for the defendant is directed to serve a copy of this Order and Decision upon counsel for plaintiff pursuant to CPLR 2103(b)(1), (2) or (3) within 30 days of the date hereof and thereafter file proof of service with the Clerk of the Court.

In this legal malpractice action, the defendant is moving for dismissal of the complaint upon the following grounds: Statute of limitations (CPLR 3211[a][5]), collateral estoppel (CPLR 3211[a][5]) and failure to state a cause of action (CPLR 3211[a][7]).

The legal malpractice claim stems from the defendant's representation of the plaintiff in the context of the plaintiff claiming he was wrongfully discharged from his employment with the Suffolk County Water Authority (hereinafter SCWA). According to the plaintiff, who was the Director of General Services for the SCWA, he expressed his concerns to the SCWA's Chief Operating Officer regarding the safety of an SCWA building which had a faulty roof. When rebuffed by the CEO, the plaintiff brought his concerns to another SCWA officer and, in so doing, he made disparaging remarks about the CEO, both in emails and orally, and engaged in heated disagreement. As a result of this behavior, which the SCWA found to be unprofessional and disruptive, and not, according to the SCWA, for the plaintiff's underlying message and concerns, the SCWA discharged the plaintiff on June 6, 2001.

Page 2

Index No. 11213/2007

Varanelli vs Edelstein

The plaintiff then retained the defendant on July 23, 2001 (47 days after the discharge) to bring an action against the SCWA in order to be reinstated with back pay. The defendant commenced that action against the SCWA on August 16, 2001 (71 days after the discharge) alleging a violation of Labor Law §740, a general “whistle blower” statute, which, insofar as applicable to these facts, requires, inter alia, proof of a disclosure to a supervisor of an act or practice of the employer which is “in violation of law, rule or regulation which violation creates and presents a substantial and specific danger to the public health or safety” (LL §740[2][a]).

The defendant, however, did not file a Notice of Claim against the SCWA or the County of Suffolk, as required by GML §50-e, and did not include a claim under Civil Service Law §75-b which, unlike LL §740, applies specifically to allegedly retaliatory actions by public employers (such as the SCWA) against public employees (such as the plaintiff) and, unlike LL §740, allows recoveries not only for situations involving actual violations of laws, rules or regulations but also widens the scope of protection for public employees to cover situations where the employee merely has a reasonable belief that the public employer’s actions constituted an “improper governmental action” (CSL §75-b[2][a][ii]).

In October of 2002, the plaintiff terminated the services of the defendant and retained other counsel.

The new counsel brought a motion to amend the complaint to add a claim under CSL §75-b as well as a claim under 42 USC §1983 (civil rights/free speech violation). The court, in a decision and order dated September 30, 2003, denied that part of the motion seeking to add the CSL §75-b claim but allowed the addition of the “1983” claim. In denying the CSL §75-b claim, the court noted that a notice of claim was never served on the plaintiff’s behalf, that it was too late to move for leave to file a late notice of claim and that, in any event, by commencing the action pursuant to LL §740, the plaintiff waived his right to seek his remedies under CSL §75-b as a matter of law (*Varanelli v Suffolk County Water Authority*, Sup Ct, Suffolk County, Sept. 30, 2003, Oliver, J., Index No. 18369/01)(hereinafter the Oliver decision).

Subsequently, the SCWA moved for summary judgment dismissing the complaint and that motion was granted in a decision and order dated January 31, 2007 (*Varanelli v Suffolk County Water Authority*, Sup Ct, Suffolk County, Jan. 31, 2007, R. W. Doyle, J., Index No. 18369/01)(hereinafter the Doyle decision).

In granting summary judgment, Justice Doyle noted that the plaintiff failed to raise a question of fact as to the SCWA not having committed any violation of a law, rule or regulation (a necessary element for a claim under LL §740); and, more importantly for consideration of the instant motion, the SCWA showed and the plaintiff failed to raise a question of fact as to there being a legitimate predicate for the plaintiff’s discharge, to wit: the plaintiff’s disruptive conduct.

As to the statute of limitations issue, this will not be addressed in view of the court finding grounds to grant summary judgment on the basis of failure to state a cause of action and collateral estoppel.

Page 3

Index No. 11213/2007

Varanelli vs Edelstein

The court notes, however, that an interesting issue is raised by the parties as to when the legal malpractice action accrued. According to the defendant, that action accrued when his services were terminated in October of 2002 or, at the very latest, when the Oliver decision was issued on September 30, 2003 when the new counsel's application to add a cause of action under CSL §75-b was denied. In either event, the instant legal malpractice action was commenced over three years later (the applicable statute of limitation period per CPLR 214[6]).

According to the plaintiff, this action could not accrue until there were actual and ascertainable damages which did not occur until the summary judgment motion issued on January 31, 2007 dismissing the plaintiff's action against the SCWA. Up until that point, the plaintiff argues, he could have possibly prevailed under LL §740 and, thus, would not have been damaged by the defendant's alleged negligence.

This statute of limitations issue in the area of legal malpractice is interesting because, with regard to an accrual date, the cases clearly hold that the malpractice occurs when committed, not discovered (*see Williamson V PricewaterhouseCoopers LLP*, 9 NY3d 1, 4, 840 NYS2d 730 [2007]) while some cases use language referring to "actual damages" and state that a malpractice action does not accrue until all if its elements occur and note that one of the elements is when the actionable injury occurs (*see McCoy v Feinman*, 99 NY2d 295, 301-302, 755 NYS2d 693, 697 [2002]).

The plaintiff argues that "actual damages" can only mean, in the context of this case, when the plaintiff's underlying action ended with an unfavorable result. In urging the court to adopt the view that this legal malpractice did not accrue until the "actual damages" occurred in the form of the plaintiff losing his day in court on the date of the Doyle decision (January 31, 2007) when the SCWA's motion for summary judgment was granted dismissing his complaint, the plaintiff cites only one case directly on point, to wit; *Wright v Diebold*, 28 Misc 2d 978, 217 NYS2d 238 (Sup Ct 1961). The problem with relying upon the *Wright* case is that it is 46 years old, cited no authority for its holding and has never been cited by another court.

Turning now to the issue of failure to state a cause of action (CPLR 3211[a][7]), in general, in considering a motion to dismiss pursuant to CPLR 3211, the court's role is limited to "determining whether a cause of action is stated within the four corners of the complaint, and not whether there is evidentiary support for the complaint [citations omitted]" (*Frank v Daimler Chrysler Corp.*, 292 AD2d 118, 121, 741 NYS2d 9, 12 [1<sup>st</sup> Dept 2002], *lv denied* 99 NY2d 502, 752 NYS2d 589 [2002]). In addition, the pleading "is to be afforded a liberal construction (CPLR 3026), and the court should accept as true the facts alleged in the complaint, accord the plaintiff the benefit of every possible inference, and only determine whether the facts, as alleged, fit within any cognizable legal theory [citations omitted]" (*Id.*, at 120-121, 12).

In addition, the court shall consider allegations as true in any affidavits in support of the complaint and in opposition to a motion to dismiss pursuant to CPLR 3211 (*see Grossfield v Grossfield*, 224 AD2d 583, 639 NYS2d 712 [2d Dept 1996]).

Page 4  
Index No. 11213/2007  
Varanelli vs Edelstein

In order to support a claim for legal malpractice, the plaintiff must allege and prove that the attorney failed to exercise the skill and knowledge commonly possessed by a member of the legal community; that said negligence was the proximate cause of the plaintiff's loss which was actual and ascertainable; and, that the plaintiff would have otherwise succeeded in his action but for the negligence of the attorney (*see McCoy v Feinman*, 99 NY2d 295, 301-302, 755 NYS2d 693, 697 [2002]).

Assuming the facts alleged by the plaintiff in his complaint and his affidavit submitted on this motion to be true, it can reasonably be said that the defendant was negligent in his not having filed a timely notice of claim and his failing to bring a cause of action under CSL §75-b. Civil Service Law §75-b, however, expressly states that a public employee who brings an action pursuant to its provisions does so "under the same terms and conditions as set forth in article twenty-C of the labor law" (CSL §75-b[3][c]). Labor Law §740, which is contained in Article 20-C, includes among its terms and condition that it shall be a "defense to any action brought pursuant to this section that the personnel action was predicated upon grounds other than the employee's exercise of any rights protected by this section" (LL §740[4][c]).

Since this very defense was a basis in the Doyle decision for the granting of summary judgment in dismissing the LL §740 claim, and since a CSL §75-b claim would be subject to this same term and condition, it can only be concluded that a CSL §75-b claim would fail on the basis of this same defense and the plaintiff would be collaterally estopped from claiming otherwise (*see Ryan v New York Tel. Co.*, 62 NY2d 494, 500, 478 NYS2d 823, 826 [1984]). Accordingly, it must be concluded that the plaintiff cannot claim or prove that but for the alleged negligence of his attorney that he would have prevailed on a CSL §75-b claim (*see Salvatore v Kumar*, \_\_AD3d\_\_, \_\_NYS2d\_\_, 2007 NY Slip Op 8435 [2d Dept, Nov. 7, 2007]); *Billis v Dinkes & Schwitzer*, 30 AD3d 260, 817 NYS2d 257 [1<sup>st</sup> Dept 2006]).

That being so, this legal malpractice action must be dismissed on the basis of collateral estoppel and the failure to state a cause of action.

This decision constitutes the order of the court.

Dated: *December 19, 2007*

**HON. PAUL J. BAISLEY, JR.**

**HON. PAUL J. BAISLEY, JR., J.S.C.**