

Panna Impex Pvt. Ltd v Gurtu & McGoldrick, LLP

2008 NY Slip Op 30391(U)

February 6, 2008

Supreme Court, New York County

Docket Number: 0115691/2005

Judge: Edward H. Lehner

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: EDWARD H. LEHNER
Justice

PART 19

PANNA IMPEX PVT LTD

INDEX NO.

115691/05

MOTION DATE

6/5/07

MOTION SEQ. NO.

001

MOTION CAL. NO.

GURTUS Mc GOURICK

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

_____ motion is decided in accordance

with accompanying memorandum decision

FILED

FEB 11 2008

NEW YORK
COUNTY CLERK'S OFFICE

Dated: FEB 06 2008



J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 19

-----X

PANNA IMPEX PVT. LTD. and
BENNY VARMA,

Plaintiffs,

Index No. 115691/05

-against-

GURTU & MCGOLDRICK, LLP and
CHAT GURTU, ESQ.,

Defendants.

-----X

Edward H. Lehner, J.:

In this legal malpractice action, plaintiffs Panna Impex Pvt. Ltd. (Panna) and Benny Varma (Varma) move, pursuant to CPLR 3103(a), for a protective order in connection with defendants' March 1, 2007 demand for documents. Defendants Gurtu & McGoldrick, LLP and Chat Gurtu, Esq. (Gurtu) cross-move for an order dismissing the Complaint. In the alternative, defendants seek an order striking the Note of Issue.

According to the Complaint, Panna is a foreign corporation doing business in the United States. Panna's principal place of business is in India. The Complaint describes Varma as Panna's "representative" in the Unites States. (Complaint at ¶ 3). Gurtu was a partner in defendant law firm Gurtu & McGoldrick, LLP.

This action arises from an underlying action in this court, titled Gunther By

Nash v Panna Impex Pvt Ltd and Habib American Bank, 602969/2000 (Gunther action), in which defendants represented Panna. According to the defendants here, plaintiff Gunther By Nash (Gunther) alleged that certain clothing shipped by Panna from India to Gunther was defective. In order to stop the release of money to Panna for the goods, Gunther commenced an action in this court and moved by order to show cause to prevent the bank from paying Panna. Panna retained Gurtu to represent it in the underlying action.

Gurtu states that before the return date of Gunther's motion, he faced an emergency in his family which required him to travel to India. He further states that his partner, Mr. McGoldrick, had retired and was therefore not available to appear in court on the motion. Gurtu unsuccessfully requested that Gunther's attorney agree to an adjournment of the motion. Gurtu's wife then appeared in court on the hearing date, but her request for an adjournment was denied. The court then held Panna in default on the motion, with the result that the motion was granted in Gunther's favor and Panna was not paid for the goods at issue. Gurtu states that he subsequently made two motions for rehearing of the motion, which were both denied.

Panna filed a complaint against Gurtu with the Disciplinary Committee of the Appellate Division, First Department. In a letter dated August 5, 2005, the Committee

stated that it found that there was professional misconduct on Gurtu's part in violation of the Lawyer's Code of Professional Responsibility. Specifically, the Committee found that from the Fall of 2000 to the Summer of 2001, Gurtu had failed to appear in court on Panna's behalf on several occasions, resulting in a default judgment against Panna precluding payment to Panna of approximately \$24,000. The Committee further found that Gurtu was not expeditious in filing successive, and ultimately unsuccessful, motions to vacate the default. The Committee specifically noted that Gurtu took approximately a year to file one motion after a previous one had been denied.

Plaintiffs commenced this action in January of 2006, asserting claims for legal malpractice. The Note of Issue was eventually filed on January 5, 2007.

On March 1, 2007, defendants served a Document and Information Request as well as a Notice for EBT. Plaintiffs now seek an Order of Protection against defendants' discovery demands.

Plaintiffs assert that defendants' document demand is improper because discovery was completed when the Note of Issue was filed. However, in a so-ordered Stipulation dated February 21, 2007, it was agreed that Gurtu would serve, within 15 days, a Notice for Discovery of certain items which had previously been requested by

defendants at Varma's EBT, with plaintiffs to respond within 15 days after receipt thereof.

Defendants are not entitled to a further EBT of Varma. Discovery was completed in this action when the Note of Issue was filed, except as set forth in the February 21, 2007 Stipulation, which did not provide for additional EBTS. Moreover, defendants have not demonstrated on this motion that such an EBT is warranted. Therefore, plaintiffs' motion is granted to the extent that Varma is not required to appear for an additional EBT.

Plaintiffs also seek to compel defendants to furnish them with a copy of the written response to the Appellate Division, First Department Disciplinary Committee. In the February 21, 2007 Stipulation, Gurtu was specifically directed to furnish plaintiff's attorney with a copy of such. Therefore, such a copy must be provided within 15 days of service of a copy of this order with notice of entry if it has not already been provided.

Defendants have cross-moved to dismiss the Complaint.¹ First, defendants argue that Panna is prohibited from bringing this action by Business Corporation Law

¹ Plaintiffs initially contend that the cross-motion is untimely because it was not made within the 60 days set forth in New York County Local Rule 17. However, that rule was amended in April 2006 to conform to the 120 day provision of CPLR 3212(a).

§ 1312, which precludes foreign corporations doing business in New York from maintaining an action here unless they are duly licensed and authorized to conduct such business in New York and they have paid any required fees and taxes.

A defendant relying on BCL § 1312 must demonstrate that the corporation's business activities in New York were not just casual or occasional, but so systematic and regular as to manifest continuity of activity in the jurisdiction. Acno-Tec Limited v. Wall Street Suites, LLC, 24 AD3d 392 (1st Dept. 2005); Uribe v. Merchants Bank of New York, 266 AD2d 21 [1st Dept 1999]. Here, defendants rely on an excerpt from Varma's deposition in which he indicates that, starting in 1992 or 1993, he would occasionally visit the United States to take orders for export to India. However, the portions of Varma's deposition relied on by defendants do not demonstrate that Panna was "doing business" in New York as contemplated by the statute. Varma states vaguely that beginning in 1992 or 1993, he would visit the United States two or three times a year to take orders. However, he also states that he sometimes would not visit the United States for two years at a time. He does not state which specific years he visited or when the last visit occurred. Therefore, the court finds that such testimony, lacking specific details, is insufficient to demonstrate that Panna was doing business here so as to require qualification under BCL § 1312.

Defendants also argue that this action is barred by the three year statute of limitations which applies to legal malpractice actions. See, CPLR 214(6). Defendants state that the underlying motion on which Gurtu defaulted was returnable on October 5, 2000 and plaintiffs did not commence the instant action until January 7, 2006.

A claim for legal malpractice accrues “when all the facts necessary to that claim have occurred and an injured party can obtain relief in court” McCoy v. Feinman, 99 NY2d 295, 301 (2002), but the statute of limitations for such a claim may be tolled until ongoing representation is completed Gamm v. Allen, 57 NY2d 87, 94 (1982).

Here, plaintiffs have demonstrated, and defendants do not dispute, that Gurtu continued to represent plaintiffs in connection with the underlying Gunther action at least until December 1, 2005. Therefore, the three-year statute of limitations does not bar the instant action.

“In order to state a cause of action for legal malpractice, the complaint must set forth three elements: the negligence of the attorney; that the negligence was the proximate cause of the loss sustained; and proof of actual damages.” Bishop v Maurer, 33 AD3d 497, 498 [1st Dept 2006], aff’d 9 NY3d 910 [2007]. “In order to establish proximate cause, a plaintiff must demonstrate that ‘but for’ the attorney's

negligence, the plaintiff would either have prevailed in the matter at issue, or would not have sustained any 'ascertainable damages'." Id.

Here, there is evidence, particularly in the form of the Disciplinary Committee findings, that Gurtu was negligent in his handling of the underlying action. However, even assuming the existence of such negligence, questions of fact exist as to whether, "but for" such negligence, plaintiffs would either have prevailed in the underlying action or sustained any ascertainable damages. Therefore, the cross-motion to dismiss is denied.

Defendants also seek to dismiss the Complaint to the extent that it asserts claims on behalf of Varma in his individual capacity. It is undisputed that Varma was not a party to the underlying Gunther action. Moreover, the Complaint in the instant action alleges only that defendants were retained to represent Panna in its corporate capacity in the underlying action. There is no allegation that defendants represented Varma in that action in his individual capacity. Therefore, Varma has no cause of action against defendants in the instant action and the cross-motion is granted to the extent of dismissing any claims asserted on behalf of Varma in his individual capacity.

Finally, defendants seek an order striking the Note of Issue on the grounds that

discovery remains outstanding. However, this court permitted such discovery pursuant to the February 21, 2007 so-ordered stipulation, which was executed after the Note of Issue had been filed. Therefore, this portion of the cross-motion is denied. Accordingly, it is

ORDERED that plaintiffs' motion for a protective order is granted to the extent that: 1) Gurtu must provide plaintiffs with a copy of his written response to the Appellate Division in connection with the Grievance Proceeding within 15 days of service of a copy of this order with notice of entry if it has not already been provided; and 2) plaintiffs must respond to defendants' discovery demand only insofar as that demand seeks the items which were referenced at Varma's EBT, within 15 days of service of a copy of this order with notice of entry. Plaintiffs' motion is otherwise denied. It is further

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ORDERED that defendants' cross-motion to dismiss the Complaint is denied to the extent that it asserts claims on behalf of Varma in his individual capacity, but is otherwise denied.

Dated: February 6, 2008



J.S.C.