

Gersten v Lemke

2008 NY Slip Op 30470(U)

February 14, 2008

Supreme Court, New York County

Docket Number: 0110651/2007

Judge: Marylin G. Diamond

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

PRESENT: HON. MARYLIN G. DIAMOND

PART 48

Justice

BEN GERSTEN,

Plaintiff,

-against-

DENNIS M. LEMKE et al.,

Defendants.

INDEX NO. 110651/07

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

FILED

FEB 20 2008

NEW YORK COUNTY CLERK'S OFFICE

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that: Motion sequence numbers 001-004 are consolidated herein for decision. This is a legal malpractice action. In July, 1999, the plaintiff was charged in an indictment issued by a grand jury in Nassau County with the crimes of first degree sodomy, first degree sexual abuse and endangering the welfare of a child. The crimes were alleged to have occurred in March, 1995 and the victim was alleged to be the plaintiff's then nine year old daughter. The plaintiff retained the defendant Dennis M. Lemke, a criminal attorney, to defend him. Following a bench trial, the plaintiff was convicted on December 1, 1999 of all charges and was sentenced to serve multiple terms of imprisonment, including several consecutive indeterminate terms of 12½ to 25 years. He began his incarceration on December 1, 1999. After exhausting his state remedies, the petitioner sought a writ of habeas corpus in federal court on the ground that he had received ineffective assistance of counsel at the criminal trial. By decision and order dated January 15, 2004, the district court (Jack B. Weinstein, J.) agreed that the plaintiff had received ineffective assistance of counsel and granted the petition, directing that the plaintiff be released unless state criminal proceedings were commenced within sixty days. See Gersten v. Sendowski, 299 F Supp2d 84 (EDNY 2004). The order was affirmed on appeal. See 426 F3d 588 (2nd Cir 2005). Thereafter, the State elected not to pursue the charges and plaintiff was released from prison in November, 2005. By order dated September 12, 2006, the County Court of Nassau County (Donnino, J.) dismissed all criminal charges which had been brought against the plaintiff. This legal malpractice action was commenced on August 3, 2007.

In addition to Mr. Lemke, the action has been brought against two law firms in which Mr. Lemke was allegedly a partner (Peace Agresta & Lemke and Peace Agresta Carr Blum & Lemke) and four attorneys who were allegedly partners in one or both of these firms (Louis N. Agresta, Victor Carr, Andrew Blum and Ernest J. Peace). In motion sequence number 001, Mr. Carr has moved to dismiss the complaint in its entirety on the ground that the plaintiff's claim for legal malpractice is time-barred or, in the alternative, for summary judgment dismissing the complaint as against him. In motion sequence number 002, Mr. Blum has moved to dismiss the complaint in its entirety on the same ground or for summary judgment dismissing the matter as against only him. In motion sequence number 003, Peace Agresta Carr Blum & Lemke, by Mr. Blum, has also moved to dismiss the complaint in its entirety as time-barred or for summary judgment dismissing the action as against it. In motion sequence number 004, Mr. Blum has moved to quash two subpoenas served by the plaintiff upon two banks seeking financial information about each of the defendants. Finally, the plaintiff has cross-moved for partial summary judgment on the issue of liability as against Mr. Lemke, Mr. Agresta, Mr. Peace and defendant Peace Agresta & Lemke.

Discussion

A. The Defendants' Motions to Dismiss - - On their three motions to dismiss, the defendants argue that the plaintiff's legal malpractice claim is time-barred because he failed to commence this action

within three years of the date that they allegedly committed such malpractice. The defendants, however, have apparently conceded that this argument is without merit since they have not even attempted to respond to the plaintiff's contention, based on the Court of Appeals decision in *Britt v. Legal Aid Society, Inc.*, 95 NY2d 443 (2000), that the statute of limitations for legal malpractice committed during criminal proceedings only accrues when the criminal proceeding is terminated, i.e., on the date when the indictment against the plaintiff is dismissed. Since the indictment against the plaintiff herein was not dismissed until September 12, 2006, it is clear that this action was timely commenced within the applicable three-year statute of limitations. The defendants' motion to dismiss the complaint on this ground must therefore be denied.

As to liability, the plaintiff has not suggested that either Mr. Blum or Mr. Carr committed legal malpractice. Indeed, the plaintiff has not indicated that he has ever met either of these defendants, much less that they represented him in the criminal proceedings. Rather, he alleges that, as partners in the law firm of defendant Peace Agresta Carr Blum & Lemke, they are vicariously liable for any tort committed by their partner Mr. Lemke. It is true that, under Partnership Law §§ 24, 26(a)(1), a partner is ordinarily liable for the tortious conduct of another member or employee of the firm. *See Wright v. Shapiro*, 37 AD3d 1181, 1183 (4th Dept 2007). *See also Buechel v. Bain*, 97 NY2d 295 (2001). Here, however, Mr. Blum, Mr. Carr and Mr. Lemke have submitted affidavits in which they state that Peace Agresta Carr Blum & Lemke was dissolved a number of months before the plaintiff's trial, and that Mr. Blum and Mr. Carr were both associated with different firms during the entire period when Mr. Lemke represented the plaintiff. Both Mr. Carr and Mr. Blum have submitted a number of documents from these other firms which support these assertions. The plaintiff has not produced any evidence which seriously disputes the defendants' claim that Peace Agresta Carr Blum & Lemke was dissolved sometime in early 1999. Although plaintiff points to an application in court which Mr. Peace made on behalf of Peace Agresta Carr Blum & Lemke in 2002 for leave to transfer certain monies to the Lawyer's Fund for Client Protection, the application itself states that the firm was already dissolved and Mr. Peace was attempting to wind up its business.

In any event, there is no evidence that the firm of Peace Agresta Carr Blum & Lemke ever represented the plaintiff. Thus, the plaintiff has not submitted any invoices, agreements, checks or correspondence in which the name Peace Agresta Carr Blum & Lemke appears in connection with his case. The retainer agreement which plaintiff and Mr. Lemke executed does not refer to the firm and, significantly, the attorney of record in the criminal proceedings was listed during the criminal trial as the firm of Peace, Agresta and Lemke, by Mr. Lemke. Under the circumstances, it is clear that the firm Peace Agresta Carr Blum & Lemke was not retained by the plaintiff to represent him in the criminal proceedings and did not, in fact, represent him. As such, neither Mr. Blum, Mr. Carr nor the firm itself can be liable for any malpractice which Mr. Lemke may have committed. The complaint must therefore be dismissed as against these three defendants.

B. The Plaintiff's Cross-Motion for Partial Summary Judgment - - As already noted, the plaintiff has cross-moved for partial summary judgment on the issue of liability as against Mr. Lemke, Mr. Agresta, Mr. Peace and defendant Peace Agresta & Lemke. The motion is based on the fact that the federal courts have already ruled that Mr. Lemke failed to provide plaintiff with effective assistance of counsel at his criminal trial and that this ineffectiveness was sufficiently material so as to warrant overturning his conviction. The plaintiff argues that the finding of ineffective assistance of counsel is the equivalent of a finding of legal malpractice and that, under the doctrine of collateral estoppel, the defendants are bound by this determination.

Under the doctrine of issue preclusion or collateral estoppel, an issue expressly or necessarily decided in a criminal proceeding may be given preclusive effect in a subsequent civil action. *See Allstate Ins. Co. v. Zuk*, 78 NY2d 41, 45 (1991). A party may invoke collateral estoppel if the issue is identical in both actions, necessarily decided in the prior criminal action and decisive in the civil action, and if the party that is to be precluded from arguing its position in the civil action had a full and fair opportunity to litigate the issue in the criminal action. *See Allstate Ins. Co. v. Zuk*, 78 NY2d at 45; *D'Arta v. New York Cent. Mut.*

Fire Ins. Co., 76 NY2d 659, 667 (1990). Under this test, the plaintiff is not entitled to invoke collateral estoppel against the defendants. First, Mr. Lemke did not have a full and fair opportunity to litigate the issue of whether he provided the plaintiff with the effective assistance of counsel. Although he testified at the hearing in the habeas corpus proceeding, he was not a party and not in privity to any party to that proceeding. He was merely a witness. He could not call his own witnesses, present his own evidence or cross-examine the plaintiff. The plaintiff has failed to cite any case, and the court has found none, where a party has been found, for purposes of collateral estoppel, to have had a full and fair opportunity to litigate an issue based solely on the fact that he or she was a witness in the previous proceeding. Nor has the plaintiff cited any case where the reversal of a criminal conviction on the ground of ineffective assistance of counsel was given collateral estoppel effect in a later civil action for legal malpractice.

The second reason the plaintiff is not entitled to invoke collateral estoppel here is that the issues are not identical. To prevail on a legal malpractice claim arising from a criminal conviction which was overturned, a plaintiff must establish that he or she was actually innocent of the criminal charges. *See Britt v. Legal Aid Society, Inc.*, 95 NY2d at 447-448; *Carmel v. Lunney*, 70 NY2d 169, 173-174 (1987). It is for this reason that the cause of action for legal malpractice in a criminal proceeding does not accrue until the criminal proceeding is terminated since “[i]t is only when the criminal proceeding has terminated without a conviction that a plaintiff can assert innocence or at the very least a colorable claim thereof.” *Britt v. Legal Aid Society, Inc.*, 95 NY2d at 448. In this respect, neither the federal courts nor the County Court of Nassau County have found that plaintiff was innocent. Under the circumstances, the plaintiff’s cross-motion for partial summary judgment based on the doctrine of collateral estoppel must be denied.

Finally, the court notes that, in any event, there is question of fact as to whether Mr. Agresta, Mr. Peace and defendant Peace Agresta & Lemke should be vicariously liable for any malpractice committed by Mr. Lemke. As Mr. Agresta points out, the retainer agreement which plaintiff signed was expressly between plaintiff and “the firm of Dennis M. Lemke, Esq.” and did not mention the firm of Peace Agresta & Lemke. Moreover, the Consent to Change Attorney Form only mentions Mr. Lemke individually and the retainers checks were made payable to only Mr. Lemke. Finally, Mr. Agresta has submitted an affidavit in which he denies that there was ever a formal partnership between him, Mr. Peace and Mr. Lemke. When there is no written partnership agreement between the parties, the court must determine whether a partnership in fact existed from the conduct, intention and relationship between the parties. *See Community Capital Bank v. Fischer & Yanowitz*, ___ AD2d ___, 2008 WL 142100 (2nd Dept 2008). Here, Mr. Agresta has stated that he and Mr. Lemke were mere employees of Mr. Peace whose names were merely added to his letterhead and that no tax returns were ever filed for any such partnership. Whether a partnership in fact existed between these three attorneys and, if so, whether the partnership represented the plaintiff in the criminal proceedings against him are issues which cannot be resolved on this motion and should be explored through discovery.

C. The Defendants’ Motion to Quash - - Mr. Blum has moved to quash two subpoenas which the plaintiff’s counsel served on Citibank and JP Morgan Chase Bank, N.A., respectively, seeking the financial records of each of the defendants. Mr. Blum argues that the subpoena is an improper attempt to circumvent the discovery process. *See Matter of Greentree at Lynbrook Condominium No. 2 v. Bd. of Assessors of the Village of Lynbrook*, 81 NY2d 1037, 1038 (1993). The motion is granted on default. To the extent that the plaintiff is otherwise entitled to any of the information and documents sought in the subpoenas, they may be obtained through discovery pursuant to an order issued by the court at a preliminary conference with the parties.

Accordingly, in motion sequence number 001, Mr. Carr’s motion for summary judgment is granted and the complaint is hereby dismissed as against this defendant. In motion sequence number 002, Mr. Blum’s motion for summary judgment is granted and the complaint is hereby dismissed as against this defendant. In motion sequence number 003, the motion for summary judgment by Peace Agresta Carr Blum & Lemke is granted and the complaint is hereby dismissed as against this defendant. In motion sequence number 004, Mr. Blum’s motion to quash the subpoenas attached as Exhibit A to his motion papers is

granted on default and the subpoenas are hereby quashed. The plaintiff's cross-motion for partial summary judgment on the issue of liability as against Mr. Lemke, Mr. Agresta, Mr. Peace and defendant Peace Agresta & Lemke is hereby denied.

The remaining parties shall appear before the court in Room 412, 60 Centre Street, New York, New York on March 18, 2008 at 10:00 a.m. for a preliminary conference.

ENTER ORDER

Dated: 2/14/08



MARYLIN G. DIAMOND, J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

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