

Mortenson v Shea

2008 NY Slip Op 30915(U)

March 25, 2008

Supreme Court, New York County

Docket Number: 0112001/2006

Judge: Judith J. Gische

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

PRESENT: HON. JUDITH J. GISCHE

PART 10

Index Number : 112001/2006

MORTENSON, JOSEPH

VS.

SHEA, ESQ. ROBERT C.

SEQUENCE NUMBER : 002

SUMMARY JUDGMENT

9

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

FILED

APR 1 2008

CLERK

CLERKS OFFICE

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

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

Dated: 3/25/08



HON. JUDITH J. GISCHE *J.S.C.*

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

-----X

JOSEPH MORTENSON,

Plaintiff,

Decision/Order

Index No.: 112001/06
Seq. No. : 002

-against-

ROBERT C. SHEA, ESQ. and R.C. SHEA
& ASSOCIATES, P.C.,

Present:
Hon. Judith J. Gische
J.S.C.

Defendants.

-----X

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	Numbered
Pltf's motion [sj] w/JAR affirm in support, memo	1
Def's x-mot and opp (JPF) w/exhs, memo	2
Def RCS affid in support of x-mot w/exhs	3
KS affid in support of x-mot	4
Pltf's reply and opp affirm (JAR) w/exhs	5
Def's reply and opp affirm (JPF) w/exhs	6

Upon the foregoing papers, the decision and order of the court is as follows:

This is an action by plaintiff Joseph Mortenson ("Mortenson"), a New Jersey resident, for damages arising from alleged legal malpractice. Plaintiff now moves for summary judgment in his favor. CPLR § 3212. Defendants oppose the motion and cross moves for summary judgment in their favor, or, in the alternative, for an order compelling plaintiffs to respond to discovery.

Defendants are Robert C. Shea ("Shea") and R. C. Shea & Associates, P.C. (the "Law Firm"). Shea is an attorney licensed to practice law in New Jersey. Shea is also a shareholder and employee in the Law Firm.

Summary judgment relief may be considered by the court since issue has been

joined, and the note of issue has not yet been filed. CPLR § 3212; Brill v. City of New York, 2 NY3d 648 (2004).

Certain facts are not disputed. On October 7, 2000, plaintiff was involved in a motor vehicle accident with Arshad Ali ("Ali") and Nosha Westi ("Westi"). Thereafter, plaintiff retained the law firm of Nassy, Hill, Langsam & Moin, LLP ("Nassy") and Melisande Hill ("Hill") to commence a personal injury action in New York against Ali and Westi. On March 1, 2002, Hill negotiated a settlement with Westi wherein Westi's insurance carrier paid its liability limit of \$25,000 and plaintiff agreed to discontinue the action against both Westi and Ali with prejudice. No contribution was sought from Ali. Plaintiff later learned that Ali also had insurance with a \$25,000 policy limit.

On June 23, 2002, Hill filed a notice of an under-insured motorist ("UIM") claim with plaintiff's automobile insurance carrier, GE Auto/Colonial Penn Auto Insurance Program ("Colonial Penn"), seeking further compensation for plaintiff's damages. Plaintiff then retained defendant Law Firm to represent him in the UIM claim against Colonial Penn. Defendants have provided a copy of the Agreement to Provide Legal Services (the "agreement"), dated November 5, 2002, which was executed by plaintiff and Michael C. Paxton, Esq., on behalf of the Law Firm. Paragraph 1 of the agreement provides that the scope of services provided by the Law Firm to plaintiff pertained to the following matter: "Joseph Mortenson v. Colonial Penn Insurance (UIM Claim)".

In October 2004, Colonial Penn took the position that because Ali was insured with a \$25,000 policy, it would only provide UIM coverage in the event plaintiff damages exceeded \$50,000. Plaintiff claims that because of Nassy and Hill's alleged failure to pursue Ali's insurance policy, he requested and the defendants specifically undertook

representation of him in his legal malpractice claims against Nassy and Hill. In his complaint, plaintiff maintains that the defendants committed legal malpractice when they failed to advise him of the Statute of Limitations in New York, applicable to his legal malpractice claim against Nassy and Hill, which expired on January 23, 2005. There is also no dispute that the defendants did not apprise plaintiff of the applicable Statute of Limitations. It is also undisputed that none of the attorneys with defendant law firm, Shea included, are not admitted to practice in New York State. There further seems to be no dispute that if a malpractice action needed to be commenced against Hill, a New York Law firm would have had to been separately retained.

The court is first addressing the motion and cross motion for summary judgment, since their disposition may render the additional relief requested moot.

Summary of the Parties' Arguments for Summary Judgment

Plaintiff argues that several letters constitute documentary evidence which establish all of the elements of his claim for legal malpractice. Plaintiff provides a letter dated October 19, 2004, in which Shea wrote to Hill the following:

[T]hat [he] must protect [plaintiff's] interest and, [he is] again, requesting that [Hill] please look in [her] file and contact [Shea's] office with respect to the issue of stacking in New York State" "so as to avoid any notice to [Hill's] malpractice carrier.

In another letter dated October 25, 2004, Shea stated that he "would respectfully request that [Hill] have this matter referred to [her] legal malpractice carrier and advise them to contact [Shea's] office directly."

By letter dated October 26, 2004, Shea informed plaintiff that he "placed [Hill] on notice of the fact that she should contact her malpractice carrier to inform them of a

possible mistake that she made with respect to this particular case.” Shea also stated that Colonial Penn offered to settle plaintiff’s claim for \$50,000 and that plaintiff had two options: [1] agree to settle the case with Colonial Penn for \$50,000 and try to recoup the \$25,000 credit from Hill’s malpractice carrier; or [2] not accept the settlement offer from Colonial Penn pending a resolution of the issues regarding the correctness of Colonial Penn and Ms. Hill’s position.

Shea, in his affidavit, states that he “fully apprised [plaintiff] of the risk involved in accepting a settlement for a discounted amount from Colonial Penn, and the possibility that he would not be able to recover from Ms. Hill’s malpractice carrier, particularly if it was ultimately determined that she had committed no malpractice.” Shea claims that plaintiff made a choice not to wait to collect his settlement money, and therefore opted to settle with Colonial Penn for \$50,000. Shea thereafter drafted a letter agreement, dated October 26, 2004, memorializing plaintiff’s authorization to settle with Colonial Penn (the “settlement authorization”). Plaintiff signed that agreement on October 30, 2004.

Shea also maintains that at the time plaintiff executed the settlement authorization, plaintiff had indicated to Shea that he wanted to institute a malpractice action against Hill and requested a referral. Shea claims that he advised plaintiff that none of his firm’s attorneys were admitted to practice in New York, and that he asked his paralegal, Kathleen Salvaggio (“Salvaggio”), to provide him with the name of a New York attorney that he then recommended to plaintiff. Salvaggio, in her affidavit, corroborates this claim. Shea believes that this attorney declined to represent plaintiff.

Salvaggio also states that Shea “repeatedly and explicitly advise[d] [plaintiff] that he would need to obtain an attorney licensed to practice [law] in the State of New York if

he wished to pursue a malpractice claim against [Hill].” Salvaggio maintains that plaintiff, “in no way misconstrued” Shea’s letters to Hill as an indication that Shea was representing plaintiff in a court action against Hill.

Shea has also provided a letter dated March 2, 2004, wherein he declined to represent plaintiff in connection with his personal injury claims against “Slim Fast” because none of his firm’s attorneys were admitted in New York and could not therefore undertake such representation. This letter provides that:

You should be aware that our firm has not commenced a formal lawsuit on your behalf and we will not do so. Please be advised that if a formal lawsuit is not commenced within the applicable Statute of Limitations, then this claim will be barred. Accordingly, you are urged to immediately consult with another attorney to protect your rights.

On March 10, 2005, Shea wrote another letter to Hill, stating that if he “did not hear from [Hill] within the next 24 hours, [his] client will have no choice but to file a complaint with the New York State Bar Association.”

On August 30, 2005, Shea wrote a letter to Hill wherein he stated:

We have recently been notified that your malpractice insurance carrier has denied coverage for the abovementioned matter. Coverage was denied because, you allegedly failed to notify your carrier within the appropriate time frame and that a denial letter was issued.

Upon your receipt of this correspondence, I would request that you contact me to discuss settlement of this matter prior to New York counsel being retained and suit being (sic) brought on behalf of [plaintiff].

If [Shea does] not hear from [Hill] within the next five (5) days, [Shea] will proceed to retain New York counsel.

Shea admits that, as a favor, he assisted plaintiff in preparing a grievance complaint against Hill with the New York Supreme Court, First Department, Disciplinary Committee. Shea maintains that plaintiff clearly indicated that "he in no way construed th[is] favor as [the law firm's] undertaking of a malpractice action against Ms. Hill." Defendants have provided a file copy of the grievance complaint, dated October 13, 2005.

Plaintiff claims that, on the advice of Shea, he contacted New York counsel to pursue a legal malpractice action against Nassy and Hill, at which time he learned that the statute of limitations had expired on January 23, 2005. Plaintiff claims that Shea never advised him that the statute of limitations would expire on January 23, 2005 and that a legal malpractice action must be commenced prior to that date. Plaintiff maintains that had Shea advised him of the statute of limitations for his claim against Nassy and Hill, he would have retained New York counsel before January 23, 2005 to file his lawsuit.

Discussion

On the respective motion and cross-motion for summary judgment, each proponent bears the initial burden of setting forth evidentiary facts to prove a *prima facie* case that would entitle it to judgment in its favor, without the need for a trial. CPLR § 3212; Winegrad v. NYU Medical Center, 64 NY2d 851 (1985); Zuckerman v. City of New York, 49 NY2d 557, 562 (1980). Only if this burden is met, will it then shift to the party opposing summary judgment, who must then establish the existence of material issues of fact, through evidentiary proof in admissible form, that would require a trial of this action. Zuckerman v. City of New York, *supra*. If the proponent fails to make out its

prima facie case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers. Alvarez v. Prospect Hospital, 68 NY2d 320 (1986); Ayotte v. Gervasio, 81 NY2d 1062 (1993).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue. Rotuba Extruders v. Ceppos, 46 NY2d 223 (1977). The court's function on these motions is limited to "issue finding," not "issue determination." Sillman v. Twentieth Century Fox Film, 3 NY2d 395 (1957). When only issues of law are raised in connection with a motion for summary judgment, the court may and should resolve them without the need for a testimonial hearing. Hindes v. Weisz, 303 AD2d 459 (2d Dept. 2003).

To recover for legal malpractice, plaintiff must first prove the existence of an attorney-client relationship. Wei Cheng Chang v. Katy Pi, 288 AD2d 378, 380 (2d Dept 2001). In determining the existence of such a relationship, the court must look to the actions of the parties. In order to establish a duty owed by the defendants, plaintiff must prove the existence of an attorney-client relationship with the defendants with respect to the particular underlying action which was allegedly mishandled. Id. A plaintiff's subjective belief that defendant is his attorney will not make plaintiff a client.

In any claim for legal malpractice a plaintiff must prove three essential elements: [1] negligence, ie that the attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession; [2] that the negligence was a proximate cause of the loss sustained and [3] damages. Rudolf v. Shayne, Dachs, Stanisci, Corker & Sauer, 8 NY3d 438 (2007) [internal citations and

quotations omitted]. Plaintiff claims that it has established the existence of an attorney client relationship and all three elements of a malpractice cause of action.

In support of its cross motion, defendant law firm claims that there was no attorney client relationship requiring it commence a malpractice action against Hill. It also argues that it exercised reasonable skill and knowledge required by members of the legal profession in rendering services to plaintiff. For a defendant in a legal malpractice action to succeed on a cross-motion for summary judgment, evidence must be presented in admissible form that the plaintiff is unable to prove at least one of the essential elements of a malpractice cause of action. Ippolito v. McCormack, Damiani, Lowe and Mellon, 265 AD2d 303 (2nd dept. 1999).

For the reasons set forth below the court denies the motion for summary judgment and grants the cross-motion for summary judgement dismissing the complaint. It is undisputed that defendant Law Firm represented plaintiff in connection with his claims against his own insurance company, Colonial Penn. It is also indisputable that defendant law firm was not retained and could not be retained to actually commence a malpractice action against Hill in New York State. This is because no attorney at defendant law firm was admitted to practice law in New York State. They were a New Jersey law firm. While plaintiff has presented evidence that defendant law firm attempted to informally settle a malpractice claim before any litigation was commenced, it is equally clear that plaintiff was informed he would need local New York counsel to commence such an action.

The court further rejects plaintiff claim that the limited services provided by defendant law firm to settle the matter informally carried with it duty to research and

advise plaintiff about the applicable New York State statute of limitations under the undisputed facts of this case. Defendant law firm never held itself out to possess any expertise in New York State law. Indeed, quite the contrary in this and other contexts, defendant informed plaintiff that no attorney at the firm was admitted in New York. Plaintiff does not deny that he was told he would have to retain New York counsel to commence a malpractice action against Hill. Nor does he deny that in October 2004, before the statute of limitations had expired, defendant law firm gave him a referral to a New York attorney for him to contact about any future malpractice action that could be commenced against Hill


Accordingly, plaintiff's motion for summary judgment is denied, and defendants' cross motion for summary judgment is granted. Since the court has finally disposed of this case, the court does not reach defendants' arguments in support of that portion of its cross motion to compel discovery.

Any requested relief not expressly addressed herein has been nonetheless been considered by the court and is denied.

This shall constitute the decision and order of the Court.

Dated: New York, New York
March 25, 2008

So Ordered:



HON. JUDITH J. GISCHE, J.S.C.