[* 1]

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

PRESENT: _____ Justice PART 35

Keith B. Lloyd

INDEX NO. 109287/07

MOTION DATE 11/19/08

v.

Michael Shaw, Esq. et al.

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

The within motion and cross motion are decided in accordance with the annexed Memorandum Decision. It is hereby

ORDERED that the Law Firm's motion to dismiss is granted to the extent of dismissing the sixth and seventh causes of action in the proposed amended complaint, and they are dismissed; and it is further

ORDERED that plaintiff's motion for leave to amend his complaint is granted, and the amended complaint in the proposed form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is further

FILED
APR 03 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: _____ J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

ORDERED that the defendant shall answer the amended complaint within 20 days from the date of said service; and it is further

ORDERED that counsel for defendants shall serve a copy of this order with notice of entry within twenty days of entry on plaintiff.

Dated 3/31/08 ENTER: J.S.C.

Check one: ☐ FINAL DISPOSITON ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

[* 3]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 35

----------X

KEITH B. LLOYD,

Plaintiff,

Index No.
109287/07

-against-

MICHAEL SHEN, ESQ., IAN FRANCIS WALLACE, ESQ., and MICHAEL SHEN & ASSOCIATES,

DECISION/ORDER

Defendants.

----------X

CAROL EDMEAD, J.:

MEMORANDUM DECISION

Defendants Michael Shen, Esq., Ian Francis Wallace, Esq., and Michael Shen & Associates, P.C. (the Law Firm) move, pursuant to CPLR 3211 (a) (1) and (7), for an order dismissing the complaint. Plaintiff pro se Keith B. Lloyd cross-moves for leave to amend the complaint.

This legal malpractice action arises from defendants' representation of plaintiff in a litigation commenced on plaintiff's behalf in September 2003, entitled Keith Lloyd v the New York Botanical Garden and Gregory Long (United States District Court for the Southern District of New York, Docket No. 03-7557) (the Underlying Action). The claims against the New York Botanical Garden (the Garden) and Gregory Long (Long) alleged, inter alia, race discrimination in violation of Title VII of the Civil Rights Act of 1984 and the Age Discrimination in

Employment Act (ADEA); unlawful disability discrimination in violation of the Americans with Disabilities Act (ADA); violations of the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) and the Employee Retirement Income Security Act; unlawful retaliation in violation of the New York Workers' Compensation Law § 120; and hostile work environment in violation of Title VII and the ADEA. On August 10, 2004, the underlying court dismissed all claims against Long personally, as well as several claims against the Garden (the 8/10/04 Decision). On September 17, 2004, the court therein granted plaintiff leave to amend the complaint to assert a claim against the Garden and Long for racial discrimination in violation of 42 USC § 1981 (the 9/17/04 Decision). The amended complaint was not timely filed and served upon Long. The Garden subsequently moved for summary judgment. On July 6, 2006, that court granted the Garden's application, finding that plaintiff's claims of (1) hostile work environment under Tile VII and the ADEA, and (2) denial of reasonable accommodation under the ADA were time-barred, because plaintiff failed to file an administrative charge within 300 days of the discriminatory acts; the court also noted that such claims were subject to dismissal on the merits (the 7/6/06 Decision). The court also granted the Garden summary judgment on the race and age discrimination claims on the merits (id.). Plaintiff

subsequently commenced this legal malpractice action.

Defendants now move, pursuant to CPLR 3211 (a) (1) and (7), for an order dismissing the complaint, claiming that the grounds asserted by plaintiff do not plead cognizable professional negligence. In opposition to defendants' motion, and in support of his cross motion, plaintiff submits a proposed amended complaint to remedy his initial inartfully pleaded complaint. His proposed amended complaint purports to state seven legal malpractice claims against the Law Firm.

Leave to amend a pleading should be freely given (see, CPLR 3025 [b]), except where the proposed amended pleading "clearly lacks merit or there is prejudice or surprise resulting directly from the delay" (Barbour v Hospital for Special Surgery, 169 AD2d 385, 386 [1st Dept 1991] [internal citations omitted]). "On a motion to amend pleadings, the court should examine, but need not decide, the merits of the proposed new pleading unless it is patently insufficient on its face" (Hospital for Joint Diseases Orthopaedic Institute v James Katsikis Environmental Contractors, Inc., 173 AD2d 210, 210 [1st Dept 1991]). The decision as to whether to grant such leave is within the court's sound discretion, and its determination will not be lightly disturbed (see Hickey v Hutton, 182 AD2d 801 [2d Dept 1992]).

"[T]o 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 actual damages" (Leder v Spiegel, 31 AD3d 266, 267 [1st Dept 2006], affd 9 NY3d 836 [2004]). "In order to establish proximate cause, plaintiff must demonstrate that 'but for' the attorney's negligence, plaintiff would either have prevailed in the matter at issue, or would not have sustained any 'ascertainable damages'" (id. at 267-268, citing Brooks v Lewin, 21 AD3d 731, 734 [1st Dept 2005]). "The failure to demonstrate proximate cause mandates the dismissal of a legal malpractice action regardless of whether the attorney was negligent" (id. at 268; see also Schwartz v Olshan Grundman Frome & Rosenzweig, 302 AD2d 193, 198 [1st Dept 2003]).

Plaintiff bases his first and second legal malpractice actions on the Law Firm's alleged failure to file and serve an amended complaint to allege violations of 42 USC § 1981 against the Garden and Long (first), and to plead in the alternative under 42 USC § 1981 in addition to the claims originally asserted under 42 USC § 1983 (second). The Law Firm argues that the alleged conduct is not actionable negligence, since the allegations supporting a 42 USC § 1983 claim based on race discrimination would have been analogous to those asserted in

plaintiff's title VII claim against Long, which claims were dismissed in the Underlying Action on August 10, 2004 (The Law Firm's Exhibit C, The Underlying Action, decision dated 8/10/04) (the 8/10/04 Decision).

The 8/10/04 Decision, relied upon by the Law Firm, reflects that, in response to a motion to dismiss by Long and the Garden, plaintiff withdrew certain of his causes of action, and that the court, inter alia, dismissed certain causes of action against Long (see, id.). However, the record is devoid of a copy of the complaint in the Underlying Action, and without it, this court is unable to view or determine what allegations were raised in that action. Further, a later decision in the Underlying Action granted plaintiff's request for leave to amend his complaint to assert a racial discrimination claim against the Garden and Long pursuant to 42 USC § 1981 (The Law Firm's Exhibit D, the Underlying Action, Decision dated 9/17/04), which the Law Firm admittedly did not do in a timely manner.

An attorney may be liable for his failure or her failure to timely commence an action (see LaRusso v Katz, 30 AD3d 240 [1st Dept 2006]; Davis v Isaacson, Lobustelli, Fox, Fine, Greco & Fogelgaren, P.C., 284 AD2d 104 (1st Dept 2001]), prosecute or defend an action (Bernstein v Oppenheim & Co. P.C., 160 AD2d 428 [1st Dept 1990]), or raise a particular issue in an

action (see Shopsin v Siben & Siben, 268 AD2d 578 [2d Dept 2000]). Thus, the first and second causes of action for legal malpractice sufficiently allege actionable conduct by the Law Firm.

The third and fourth causes of action are based upon the Law Firm's alleged failure to follow Rule 56 of the Federal Rules of Civil Procedure. Plaintiff asserts that this alleged negligent conduct is based upon a decision in the Underlying Action, in which the court therein noted that the procedural requirement of Rule 56 had not been followed (the Law Firm's Exhibit E, the Underlying Action, Decision dated 7/6/06) (the 7/6/06 Decision). In the 7/6/06 Decision relied on by plaintiff, the court found, inter alia, that:

> "plaintiff has failed to meet his obligations under Local Rule 56.1. Under Local Rule 56.1, a party opposing summary judgment must include a statement with numbered paragraphs corresponding to the movant's statement. Under Local Rule 56.1 (d), each statement of fact must be followed by citation to evidence which would be admissible set forth as required by Federal Rule of Civil Procedure 56 (e). Plaintiff does not dispute the majority of the paragraphs in defendants' Rule 56 Statement, and the majority of plaintiff's responses do not contain any citations to the record; instead plaintiff merely asserts, plaintiff disputes the facts asserted in paragraph [*sic*] of defendant's statement of facts ... . Facts alleged by defendant that are not properly refuted by plaintiff are 'deemed admitted' for purposes

of adjudicating this motion ...

(The Underlying Action, the 7/6/06 Decision, footnote 1). In his affidavit in support of his proposed complaint, he claims that the Law Firm failed not only to respond to each of the Garden's claims with numbered paragraphs as required by Rule 56, but also failed to provide the evidence for each claim. Plaintiff also contends that but for the Law Firm's negligence, his claims would not have been lost in the summary judgment motion made by Long and the Garden.

The Law Firm argues that the fact that it neither admitted nor disputed certain paragraphs in the Rule 56 Statement filed in the Underlying Action does not constitute malpractice. As argued by the Law Firm, actions or conduct which constitute an error of judgment or are found to constitute one of several alternative ways in which a reasonably prudent attorney would proceed are not actionable as legal malpractice (see Rosner v Paley, 65 NY2d 736 [1985]; Rubinberg v Walker, 252 AD2d 466 [1st Dept 1998]). However, "[a]absent such 'reasonable' courses of conduct found as a matter of law, a determination that a course of conduct constitutes malpractice requires findings of fact" (Bernstein v Oppenheim & Co., 160 AD2d at 430).

At this juncture, without any pleadings or motion papers from the Underlying Action in the record, this court

cannot determine as a matter of law whether the Law Firm's actions were reasonable under the circumstances. Thus, plaintiff sufficiently alleges conduct that could be viewed as actionable.

In the fifth cause of action, plaintiff essentially alleges that the Law Firm's negligence consisted of its failure to argue that Long was a COBRA administrator, which resulted in the dismissal of ERISA and COBRA claims. In his affidavit, he maintains that Long was an administrator, which was reflected in the Garden's employment manual that he gave to the Law Firm.

The Law Firm argues that the complained-of conduct is not actionable, since it exercised its professional judgment and chose to instead argue that "whether or not Long was a plan administrator was an issue of fact not ripe for dismissal" (The Law Firm's Memorandum of Law, at 14). The Law Firm refers to the 8/10/04 Decision, wherein the court found that a director of a corporate plan cannot be held liable under COBRA or ERISA unless he or she qualifies as an administrator; that Long, as the Garden's president, could not be liable for violations of COBRA; considered the Law Firm's proffered argument; found that the case relied on by the Law Firm was inapplicable to the Underlying Action; that plaintiff failed to even allege that Long was a plan administrator or sponsor; and thus, on the face of the complaint, Long was not liable to plaintiff for a violation of COBRA (the

Underlying Court, 8/10/04 Decision, footnote 2). A review of the 8/10/04 Decision relied on by the Law Firm raises an issue of fact as to whether the Law Firm's action was reasonable under the circumstances (Bernstein v Oppenheim & Co., P.C., 160 AD2d 428, supra). Therefore, plaintiff sufficiently alleges negligent conduct by the Law Firm in the fifth cause of action.

In the sixth cause of action, plaintiff alleges that the Law Firm's negligence consists of its failure to plead equitable tolling as to his reasonable accommodation and hostile work environment claims. He refers to the 7/6/06 Decision, wherein the court in the Underlying Action discussed that these claims may be subject to the equitable tolling doctrine. In his affidavit, plaintiff claims that the Law Firm never discussed or suggested equitable tolling to him. He also complains that, with respect to his race and age discrimination claims, they would not have been time-barred under the continuing violation exception.

This court notes that "[t]he doctrine of equitable tolling is generally applied to federal causes of action in New York" (Shared Communications Services of ESR, Inc. v Goldman, Sachs & Co., 38 AD3d 325, 325 [1st Dept 2007]). While the doctrine of equitable tolling was not raised by the Law Firm in the Underlying Action, that court, nonetheless, considered it. That court found that plaintiff would not be entitled to such

tolling, since "it is only appropriate in 'rare and exceptional circumstances'" (The Underlying Action, the 7/6/06 Decision, footnote 4, quoting Smith v McGinnis, 208 F3d 13, 17 [2d Cir 2000]). However, it still addressed the merits of plaintiff's time-barred ADA and hostile work environment claims. Thus, plaintiff could not allege proximate cause, that is, that but for the Law Firm's conduct, it would have prevailed with this doctrine in the aforementioned summary judgment motion.

As for the continuing violation exception, it "'extends the limitations period for all claims of discriminatory acts committed under an ongoing policy of discrimination even if those acts, standing alone, would have been barred by the statue of limitations'" (Quinn v Green Tree Credit Corp., 159 F3d 759, 765 [2d Cir 1998], quoting Annis v County of Westchester, 136 F3d 239, 246 [2d Cir 1998]). Here, in the 7/6/06 Decision, the court found that:

> while it is certainly debatable whether or not plaintiff's other allegations of race and age discrimination would fall within the continuing violation exception, defendants do not put forth such an argument and the Court will not dismiss plaintiff's other allegations of race and age discrimination on such grounds sua sponte

(The Underlying Action, 7/6/06 Decision, footnote 3). Thus, with respect to the alleged negligence of failing to set forth an

argument based on the continuing violation exception, plaintiff could not allege proximate cause, that is, that but for the Law Firm's conduct, he would have prevailed with the exception in the aforementioned summary judgment motion.

Therefore, the plaintiff fails to allege a malpractice claim against the Law Firm in the sixth cause of action.

The alleged negligence complained of in the seventh cause of action is the Law Firm's failure to timely file his Underlying Action. As previously discussed, although the court in the Underlying Action found that certain claims of the plaintiff were time-barred, it still considered those claims, and they were ultimately dismissed on the merits (the Underlying Action, the 7/6/06 Decision). Thus, with respect to this specific allegation of negligence, plaintiff could not allege proximate cause, that is, that but for the Law Firm's negligence, he would have prevailed in the Underlying Action.

The causes of action that allege an actionable negligence (first through fifth), also sufficiently allege proximate cause and damages. In considering the allegations in the complaint and in his affidavit, plaintiff sufficiently alleges that, but for the Law Firm's negligent conduct, he would have prevailed in his Underlying Action (Leder v Spiegel, 31 AD3d 266, supra), and that he sustained damages consisting of, inter

alia, salary losses of over $300,000, and long-term care insurance in excess of $4,000 annually (Pellegrino v File, 291 AD2d 60 [1st Dept 2002]).

In view of the foregoing, it is

ORDERED that the Law Firm's motion to dismiss is granted to the extent of dismissing the sixth and seventh causes of action in the proposed amended complaint, and they are dismissed; and it is further

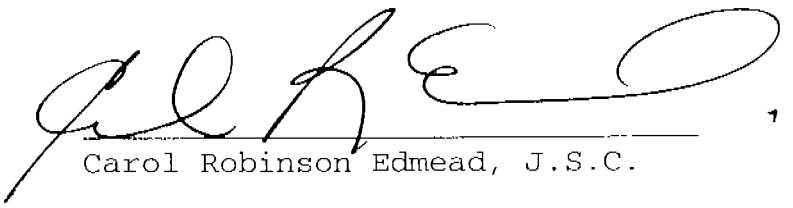
ORDERED that plaintiff's motion for leave to amend his complaint is granted, and the amended complaint in the proposed form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is further

ORDERED that the defendant shall answer the amended complaint within 20 days from the date of said service; and it is further

ORDERED that counsel for defendants shall serve a copy of this order with notice of entry within twenty days of entry on plaintiff.

Dated: March 31, 2008

ENTER:



Carol Robinson Edmead, J.S.C.