

Ho Han Tran v Brackley

2008 NY Slip Op 32269(U)

August 13, 2008

Supreme Court, New York County

Docket Number: 0102956/2003

Judge: Jane S. Solomon

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

PRESENT: Hon JANE S. SOLOMON
Justice

PART 55

Index Number : 102956/2003
TRAN, HO HAN
vs.
BRACKLEY, PATRICK J.
SEQUENCE NUMBER : 006
SUMMARY JUDGMENT

INDEX NO. 102956/2003
MOTION DATE 3-10-2008
MOTION SEQ. NO. 006
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

1-3

4-5

6

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

Answering Affidavits – Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

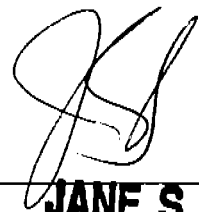
Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum decision and order.

FILED

AUG 14 2008

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 8/13/08



JANE S. SOLOMON 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 55

-----X

HO HAN TRAN and SUN MEI FOOD MARKET INC., INDEX NO. 102956/2003

Plaintiffs,

DECISION AND ORDER

-against-

PATRICK J BRACKLEY,

Defendant.

-----X

JANE S. SOLOMON, J.

FILED

AUG 14 2008

**NEW YORK
COUNTY CLERK'S OFFICE**

In this legal malpractice action, defendant Patrick J. Brackley ("Brackley") moves for summary judgment dismissing the Complaint or, in the alternative, to preclude plaintiffs Ho Han Tran and Sun Mei Food Market, Inc. (collectively, "Tran") from calling any undisclosed or expert witnesses at the trial, and to preclude Tran from presenting any evidence of lost business or profit. Tran opposes the motion, which is decided as follows.

In February 2003, Tran commenced this action against Brackley for legal malpractice. A Decision and Order dated February 25, 2005 granted defendant's cross-motion for summary judgment to the extent that it dismissed Tran's claim for punitive damages, and granted Tran's motion to serve an amended complaint consistent with the decision. The original and proposed amended complaints are described in the decision as "very similar", although the ad damnum was increased

significantly.¹

In the first cause of action, Tran alleges that Brackley committed malpractice in defending Tran in proceedings commenced by his landlord arising from a commercial lease for a retail store Tran operated. Tran alleges that Brackley failed to call the necessary expert witness and present evidence of a forged lease, and he failed to present the proper witnesses, among other things. In the second cause of action, Tran seeks damages stemming from a 1998 incident in which he allegedly was falsely arrested, assaulted and detained by the New York City Police Department, and Brackley allegedly failed to commence an action within the applicable statute of limitations.

On April 21, 2003, Brackley served a Demand for a Verified Bill of Particulars requesting information concerning Tran's damages and other matters, as well as a Notice of Discovery and Inspection, which requested documents related to the malpractice claims and damages amounts. Tran produced a Supplemental Verified Bill of Particulars dated November 15, 2004, which alleges that Tran suffered loss and damage to merchandise amounting to \$300,000, and that this was "directly and proximately related to defendant's malpractice."

¹ Tran never served an amended complaint; his then-attorney resigned from the bar for disciplinary reasons shortly after the decision was entered. The proposed amended complaint, but not the original, is annexed to defendant's motion.

An interim order, dated November 22, 2004, directed depositions to occur in December 2004. Tran was deposed on December 10 and December 16, 2004, and he provided a description of his losses in a list prepared from memory. At no time, however, did Tran produce any underlying documentation to prove the existence or ownership of what was on that list.

At a pre-trial conference on November 5, 2007, Tran contended that his legal malpractice claims could be proven by the expert testimony of an attorney who once had represented him in connection with the underlying cases. I indicated that this attorney was not an appropriate expert² and issued an order at the conference directing Tran to serve a witness list, to submit detailed requests to charge, and to serve expert disclosure pursuant to CPLR § 3101(d) by December 14, 2007. Tran failed to comply with the November 5, 2007 Order, and Brackley filed this motion.

Tran's opposition papers state that his failure to comply with the November 5, 2007 Order was due to his having "exhausted nearly all his savings on attorney's fees attempting to undo Defendant's wrongs" (Affirmation of Daniel F. Lynch, ¶ 5). Lynch states that Tran recently was able to obtain two experts, and submits the curriculum vitae of an attorney with

² The motion papers do not reveal the reason for this conclusion, but it appears that she may have been a material fact witness as well as an advocate in this proceeding.

experience in legal malpractice actions, and of a financial expert who can testify as to the amount of Tran's economic losses. Tran also seeks a court ordered subpoena for the records of the New York City Marshal for items that were seized when Tran was evicted.

In his reply papers, Brackley argues that it was only on February 26, 2008--more than two months after they were required--that Tran supplied the names and curricula vitae of his two proposed expert witnesses. Moreover, Brackley argues that the expert disclosures still do not satisfy CPLR § 3101(d), which require a party to identify each person who the party expects to call as an expert witness at trial and to disclose in reasonable detail the subject matter on which each expert is expected to testify, the substance of the facts and opinions on which each expert is expect to testify, the qualifications of each expert witness and a summary of the grounds for each expert's opinion.

At the oral argument on this motion, after the papers on this motion were fully submitted, Tran first produced an affirmation from his legal malpractice expert, Sanford F. Young, Esq. The affirmation sets out Mr. Young's qualifications, reviews the underlying facts, and provides his opinions on the matter. To date, there has been no disclosure of the expected expert testimony regarding Tran's economic damages.

The November 5, 2007 Order required Tran to produce

expert disclosures for both his malpractice claim and his alleged damages. He failed to produce the required expert disclosures for his claims in accordance with court orders, and still has not disclosed the substance of the facts or opinions regarding damages (CPLR 3101[d]). No expert opinion is offered in opposing defendant's motion. Tran's failure to comply with the court's order is grounds to preclude him from offering expert testimony at trial. Even if the tardy expert opinion from Mr. Young is considered, it does not raise a triable issue of fact, and defendant's motion still would be granted (AmBase Corp. v Davis Polk & Wardwell, 8 NY3d 428, 434 [2007]).

Although Mr. Young opines that Brackley mis-handled the landlord-tenant proceeding in a variety of ways, he does not set forth a standard of care that required Brackley to handle the matter as Mr. Young would have done, or how the outcome would have differed. He offers no opinion with respect to Brackley's handling of the false arrest action. As to the landlord-tenant matter, Mr. Young claims that: Brackley failed to inspect a disputed lease; failed to make a concerted effort to obtain a copy of the disputed lease before trial; failed to effectively confront opposing witnesses regarding the authenticity of the lease; failed to call a handwriting analyst, Jean Peetz, to testify at trial, even though she was available and present in the court room during the trial; failed to obtain the proper type

of expert; failed to challenge the landlord's prima facie proof of ownership and the terms of tenancy; failed to conduct direct examination of Tran and cross-examination of the landlord's witnesses in a focused and effective way; permitted Tran's sister to translate his direct testimony, which, in Mr. Young's opinion (the basis for his expertise on language translation is not disclosed), she did poorly; consented to consolidate two non-payment proceedings commenced by the landlord; and although he filed a timely notice of appeal, which ultimately did not succeed, Brackley failed to obtain a stay pending the appeal (Affirmation of Sanford F. Young, Esq., dated March 6, 2008, §§ 47-66).

Legal malpractice consists of the failure of an attorney to exercise that degree of skill commonly exercised by a member of the legal profession (see Darby & Darby v. VSI International, 95 N.Y.2d 308 [2000]). "In order to sustain a claim for legal malpractice, a plaintiff must establish both that the defendant attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession which results in actual damages to a plaintiff . . . , and that the plaintiff would have succeeded on the merits of the underlying action 'but for' the attorney's negligence" (AmBase Corp. v. Davis Polk & Wardwell, 8 NY3d at 434 [citations omitted]).

With respect to Mr. Young's opinion of Brackley's failure to call an expert to testify at trial, he states that the expert present in the court room - the handwriting expert Jean Peetz - was the wrong type of expert. Mr. Young opines that what was called for was a forensic document examiner. However, there is no opinion or report of a forensic document examiner in the record to show that Tran would have prevailed had Brackley offered such testimony. Nor is there evidence of what Ms Peetz's testimony would have been and how it would have contributed to a different outcome.

Moreover, Mr. Young states that "the most cursory examination of [the contested lease] raises numerous red flags over its authenticity. Between the white-outs, add-ons, differing type styles and formats, differing inks, and multiple staple holes, the document reeks of phoniness" (Young Aff., § 52). As described, the contested lease obviously was not pristine, and Tran fails to explain why any expert was needed to bring that fact to the judge's attention. Indeed, the factual recitation in Mr. Young's affirmation shows that the question of the lease's authenticity was contested, and the judge found that Tran failed to present evidence that the lease was materially altered "without his consent" (Young Aff., § 43). Mr. Young offers no opinion as to how an expert would have assisted the judge in finding that the material alterations were made with or

without Tran's consent. Tran has failed to establish that he would have succeeded "but for" Brackley's negligence in failing to call the appropriate expert.

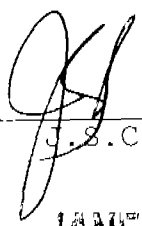
Further examination of the Young affirmation reveals no evidence that Tran would have succeeded "but for" Brackley's other alleged failings. That Mr. Young would have handled the underlying matters differently does not establish that Brackley departed from a standard of care appropriate to the matters for which he was engaged (Russo v Feder, Kaszovitz, Isaacson, Weber, Skala & Bass, LLP, 301 AD2d 63 [1st Dept 2002]). For example, Brackley's alleged failure to seek a stay of eviction pending appeal would not have changed the final result, or prevented any loss.

Finally, Brackley has established that Tran proffered no evidence of a departure in the professional standard of care resulting in a loss with respect to Tran's claim that Brackley negligently handled his wrongful arrest lawsuit. Tran does not oppose that branch of the motion. Accordingly, it hereby is

ORDERED that the motion for summary judgment is granted, and the complaint is dismissed, with costs and disbursements to defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly.

Dated: August 13, 2008

ENTER:



J.S.C.
JANE S. SOLOMON

FILED
AUG 14 2008
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