

Weems v City of New York

2008 NY Slip Op 32285(U)

August 13, 2008

Supreme Court, New York County

Docket Number: 0404739/2006

Judge: Louis B. York

Republished from New York State Unified Court
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

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

PRESENT: **LOUIS B. YORK**

PART 2

Index Number : 404739/2006
WEEMS, KEVIN
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 002
DISMISS ACTION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

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

MOTION IS DECIDED WITH ACCOMPANYING
WITH ACCOMPANYING MEMORANDUM DECISION.

FILED
AUG 15 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 8/13/08

Luy

J.S.C.
LOUIS B. YORK
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 2**

-----x
KEVIN WEEMS,

Plaintiff,

Index No. 404739/06

-against-

**THE CITY OF NEW YORK, THE LEGAL AID
SOCIETY, STEPHANIE SCHWARTZ, ESQ., and
SEAN PARMENTER, ESQ.**

Defendant.
-----x

LOUIS B. YORK, J.:

Plaintiff pro se Kevin Weems brought this action for legal malpractice, negligent supervision, retention, training, and hiring, and constitutional violations, all related to defendant the Legal Aid Society's ("Legal Aid") representation of Plaintiff in a criminal matter. Legal Aid employed defendants Stephanie Schwartz, Esq. and Sean Parmenter, Esq. to represent Plaintiff in that matter, which ultimately led to Plaintiff's current incarceration. Plaintiff alleges that Schwartz improperly waived his right to testify before the grand jury, and that Schwartz failed to notify him of an upcoming grand jury proceeding. Parmenter succeeded Schwartz as Plaintiff's counsel after Schwartz was promoted and reassigned. Plaintiff alleges that Parmenter failed to make multiple court appearances. Plaintiff makes claims related to negligent hiring and supervision against defendant the City of New York ("the City"). Plaintiff asserts in his complaint that the City controls Legal Aid and its employees. Plaintiff also claims that this allegedly wrongful conduct resulted in constitutional and statutory civil rights violations. As a result of the alleged malpractice, plaintiff alleges that he has suffered physical and mental injuries. Plaintiff seeks more than \$1 million, along with punitive damages.

Plaintiff has moved in part to compel disclosure of documents concerning the relationship between Legal Aid and the City, and concerning those parties' professional standards for attorneys. Under CPLR §

FILED
AUG 15 2008
COUNTY CLERK'S OFFICE
NEW YORK

1102(a), plaintiff also asks for appointment of counsel; he already has been granted poor-person status in this matter. The City has cross-moved to dismiss the complaint, or in the alternative, to obtain an order granting summary judgment. Defendants Legal Aid, Schwartz, and Parmenter (collectively "the Legal Aid defendants") also have moved to dismiss. For the reason stated below, the Court grants both defendants' motions to dismiss and denies plaintiff's motions as moot.

Defendants' pending motions stay disclosure pursuant to CPLR 3214(b), although the Court has the discretion to vacate the stay. Accordingly, the Court considers these motions first. The City's motion principally argues that it is not a proper party to this action because it had no control over Legal Aid and its representation of plaintiff. The City has offered evidence that it does not own or control Legal Aid, including a printout of a New York Department of Corporations search page showing that Legal Aid is an independent entity. The Court also refers Plaintiff to cases such as Mitchell v. Fishbein, 377 F.3d 157 (2nd Cir. 2004) and to the Legal Aid Society's website, www.legal-aid.org – in particular the "about us" sections – for more information about the organization, its independence from the City and its purpose. Liability for the negligent acts of third parties does not arise when the defendant does not have authority to control the third parties. Purdy v. Public Administrator of County of Westchester, 72 N.Y.2d 1, 7, 526 N.E.2d 4, 8 (1988). Because Legal Aid is separately constituted, the City lacks the authority to control its actions. Accordingly, the court grants the City's motion and dismisses Plaintiff's second and third causes of action against the City. For the same reason it dismisses the claims against the City, the court also denies the prong of plaintiff's motion seeking to compel discovery from the City.

The Legal Aid defendants have moved to dismiss the complaint for failure to state a cause of action. CPLR 3211(a)(7). First, the Legal Aid defendants argue that plaintiff fails to state a claim for malpractice because his criminal conviction remains undisturbed. Plaintiff contends that he must merely show the basic elements of malpractice – that is, breach of duty and injury – to withstand a motion to dismiss. Plaintiff is incorrect. In this state, no action for malpractice lies in a criminal case if the underlying conviction remains in effect. Carmel v. Lunney, 70 N.Y.2d 169, 518 N.Y.S.2d 605 (1987). In addition to showing negligent representation, therefore, plaintiff must show that negligent representation was the proximate cause of his conviction. Britt v. Legal Aid Soc. Inc., 95 N.Y.2d 443, 446-47, 718 N.Y.S.2d 264, 266-67 (2000). Only if and when he frees himself of the conviction will he have a colorable claim in this

civil suit. See Casement v. O'Neill, 28 A.D.3d 508, 509, N.Y.S.2d 649, 650 (2nd Dept. 2006)(citing Britt, 95 N.Y.2d at 448, 718 N.Y.S.2d at 267).

Plaintiff alleges conduct that, if true, might indicate problems with the quality of Legal Aid's representation.¹ While the court is not unsympathetic and agrees that Plaintiff was entitled to competent representation in his criminal trial, that does not change the underlying law governing malpractice claims, which binds this Court. Based on the binding authority, plaintiff's allegations cannot sustain his malpractice claim as long as his conviction stands. Carmel, 70 N.Y.2d 169, 518 N.Y.S.2d 605. The court therefore dismisses Plaintiff's first cause of action.

Next, the Legal Aid defendants attack Plaintiff's fourth and sixth causes of action, which consist of claims under 28 U.S.C. § 1983 and the New York and United States constitutions. Under Section 1983, Plaintiff must allege a right violated by a person acting under color of state law. Similarly, a litigant alleging violations of the United States Constitution must establish that the challenged conduct amounts to "state action." Erbacci, Cerone, and Moriarty, Ltd. v. United States, 939 F.Supp 1045, 1054 (S.D.N.Y. 1996). The same applies to the alleged violations of the New York State Constitution. See Oefelein v. Monsignor Farrell High School, 77 Misc.2d 417, 417, 353 N.Y.S.2d 674, 674 (Sup. Ct. Richmond County 1974); see also Glendora v. Kofalt, 162 Misc. 2d 166, 174, 616 N.Y.S.2d 138, 143-44 (Sup. Ct. Westchester County 1994)(dismissing claim based on collateral estoppel). Plaintiff's allegations of civil rights violations rest on the assumption that the Legal Aid defendants acted as employees and/or agents of the City and thus under color of state law. However, as stated earlier, the City does not own or control Legal Aid or its employees. While the government must see that indigent persons have representation in criminal matters, this does not mean that the category of "state action" for purposes of Section 1983 extends to Legal Aid, a private organization that accepts court appointments. See D'Avino v. Trachtenburg, 149 A.D.2d 401, 403, 539 N.Y.S.2d 755, 757 (2nd Dept. 1989), lv denied, 74 N.Y.2d 611, 546 N.Y.S.2d 556 (1989). Therefore, the Court dismisses Plaintiff's fourth and sixth causes of action.

The Legal Aid defendants also argue that plaintiff's fifth cause of action for punitive damages should be dismissed. The Legal Aid defendants are correct that no separate cause of action lies for

¹ However, plaintiff asserts that he does not hold the Legal Aid defendants responsible for his conviction.

punitive damages. Crown Fire Supply Co., Inc. v. Cronin, 306 A.D.2d 430, 430, 761 N.Y.S.2d 495, 495 (2nd Dept. 2003). The Court also dismisses Plaintiff's fifth cause of action because no basis remains for any award of punitive damages. For the same reason, the Court also dismisses the portion of plaintiff's motion seeking to compel discovery as it applies to the Legal Aid defendants.

The Court notes that it is not deciding whether plaintiff's claims have merit or whether his allegations are true. Also, the Court notes that Plaintiff has widely researched and has cited decisions from other jurisdictions where the law sometimes differs as to a criminal defendant's ability to sue for malpractice. Here, however, New York State law governs these claims, and Carmel is the prevailing principle. Under Carmel, Plaintiff may not maintain his malpractice action while his conviction stands.

Finally, the Court denies the portion of plaintiff's motion seeking to appoint counsel without reaching its merits. As the case is being dismissed, this issue is moot.

Based on the above, therefore, it is

ORDERED that the motion to dismiss the complaint by defendants Legal Aid Society, Stephanie Schwartz, Esq. and Sean Parmenter, Esq. is granted; and it is further

ORDERED that plaintiff's motion to compel disclosure and to appoint counsel is denied; and it is further

ORDERED that the cross-motion to dismiss the complaint by defendant the City of New York is granted; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of defendants dismissing the complaint in its entirety, without prejudice.

Dated: ^{Aug} July 13 2008

FILED
AUG 15 2008
COUNTY CLERK'S OFFICE
NEW YORK

ENTER:



LOUIS B. YORK, J.S.C.

LOUIS B. YORK
J.S.C.