

Whaley v Joyce Law Firm

2008 NY Slip Op 32453(U)

September 4, 2008

Supreme Court, Broome County

Docket Number:

Judge: Ferris D. Lebus

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At a Motion Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District in the Broome County Courthouse, 92 Court Street, City of Binghamton, New York, on the 25th day of July, 2008.

PRESENT: HON. FERRIS D. LÉBOUS
Justice Presiding.

STATE OF NEW YORK
SUPREME COURT : : CHENANGO COUNTY

ADAM WHALEY and NATALIE WHALEY,

Plaintiffs,

DECISION & ORDER

vs.

Index No. 2008-0132
RJI No. 2008-0094-M

THE JOYCE LAW FIRM,
LEE, EMERSON & FARRERESE, LLP, and
DOUGLAS WALTON HILLER,

Defendants.

APPEARANCES:

COUNSEL FOR PLAINTIFFS:

KERNAN AND KERNAN, P.C.
BY: KEVIN G. MARTIN, ESQ., OF COUNSEL
OFFICE & POST OFFICE ADDRESS:
SUITE 600
258 GENESEE STREET
UTICA, NY 13502

COUNSEL FOR THE JOYCE
LAW FIRM:

HISCOCK & BARCLAY, LLP
BY: MATTHEW J. LARKIN, ESQ., OF
COUNSEL
POST OFFICE ADDRESS:
P.O. BOX 4878
SYRACUSE, NY 13221-4878

COUNSEL FOR LEE, EMERSON &
FARRERESE, LLP:

WALSH & WILKINS
BY: KEVIN D. WALSH, ESQ., OF COUNSEL
POST OFFICE ADDRESS:
1000 CATHEDRAL PARK TOWER
37 FRANKLIN STREET
BUFFALO, NY 14202

COUNSEL FOR DOUGLAS WALTON
HILLER:

LEVENE, GOULDIN & THOMPSON, LLP
BY: DAVID F. McCARTHY, ESQ., OF
COUNSEL
POST OFFICE ADDRESS:
P.O. BOX F-1706
BINGHAMTON, NY 13902

FERRIS D. LEBOUS, J.S.C.

By way of these three defense motions, defendant The Joyce Law Firm (hereinafter the "Joyce Firm"), defendant Lee, Emerson & Farrerese, LLP (hereinafter the "Lee Firm"), and defendant Douglas Walton Hiller (hereinafter "Hiller") move for dismissal of plaintiffs' complaint and all cross-claims on the grounds, inter alia, that this action is time barred. Plaintiffs oppose all motions.

BACKGROUND

On July 18, 2002, at approximately midnight, decedent John A. Whaley and defendant Hiller were each driving their own vehicles in the traveling lane on Route 88 eastbound in the Town of Afton, County of Chenango in the State of New York. A collision occurred between the two vehicles, the details of which are not pertinent here, resulting in the death of John A. Whaley. Decedent John A. Whaley was survived by three children, Adam Whaley, Natalie Whaley, and Emily Whaley, as well as his father John C. Whaley.

Although these defense motions seek to dismiss the complaint in the current action indexed as Chenango Index No. 2008-0132 (hereinafter "Action #2"), a prior - now dismissed - action indexed as Chenango Index No. 2004-0462 is relevant as well (hereinafter "Action #1"). Some factual background regarding the prior action, as well as the current action, is warranted.

1. ACTION #1

John C. Whaley, decedent's father, hired the Lee Firm to assist with the administration of the estate of his son, John A. Whaley, and to investigate the viability of a wrongful death action

against the other driver, Hiller. On October 2, 2002, John C. Whaley was appointed administrator of his son's estate by way of a Certificate of Appointment in Small Estate pursuant to SCPA Art 13. The Lee Firm conducted an investigation into the accident, including consultation with an experienced personal injury firm, and in 2003 advised John C. Whaley that it would not pursue any wrongful death claim on behalf of the Estate. The attorney-client relationship between the Lee Firm and John C. Whaley ended in 2003.

On July 12, 2004, days prior to the end of the two year wrongful death statute of limitations period, John C. Whaley met with and hired the Joyce Firm to commence the wrongful death action - which the Lee Firm had declined - on behalf of the Estate against defendant Hiller.

The Joyce Firm prepared a summons and complaint alleging wrongful death which was captioned John C. Whaley, Individually and as Administrator of the Estate of John A. Whaley, Deceased, vs. Douglas Walton Hiller. On July 14, 2004, the Joyce Firm mailed said summons and complaint for filing to the Chenango County Clerk's Office. However, due to a back log in that office, the summons and complaint was not officially filed until July 27, 2004 designated as Chenango Index No. 2004-0462.

On August 23, 2004, defendant Hiller served an Answer containing a statute of limitations defense which formed the basis for his subsequent motion for summary judgment.

On January 5, 2005, the Hon. Kevin M. Dowd issued a Memorandum and Decision granting defendant Hiller's motion to dismiss the complaint finding that the statute of limitations

had expired on July 18, 2004. Judge Dowd determined that the Summons and Complaint were not filed until July 27, 2004 due to processing delays in the Chenango County Clerk's Office. Nevertheless, Judge Dowd concluded that the affidavits from Chenango County Clerk's Office employees acknowledging that papers were not filed for several days after actual receipt in the mail did "[n]ot allow this Court to find that the plaintiff's filings were completed by July 18, 2004" (Memorandum and Decision of Hon. Kevin M. Dowd dated January 5, 2005, Index No. 2004-0462, attached as part of Exhibit A to Affidavit of David F. McCarthy, Esq. sworn to March 14, 2008). The Judgment dismissing Action #1 was entered on January 20, 2005. The Joyce Firm represents that it advised John C. Whaley of his right to pursue an appeal, but was informed he did not wish to pursue any appeal.

2. **ACTION #2**

On February 13, 2008, two of decedent's children Adam and Natalie, filed this action containing three separate causes of action. The first cause of action alleges negligence against defendant Hiller based upon the operation of his vehicle resulting in the death of their father. The second cause of action alleges legal malpractice against the Lee Firm for advising John C. Whaley to file for small estate administration.¹ The third cause of action alleges legal malpractice against the Joyce Firm based upon allegations it failed to advise John C. Whaley with respect to his capacity to sue and failed to timely file the wrongful death action. In lieu of answers, each of the defendants have moved to dismiss this complaint.

¹Plaintiffs argue that small estate administrators are not authorized to commence litigation on behalf of an estate which caused the dismissal of Action #1 and further allege that Judge Dowd dismissed Action #1 in part because of lack of standing (Plaintiff's Memorandum of Law, p 4). However, there is no mention in Judge Dowd's decision of Action #1 being dismissed due to the lack of standing of John C. Whaley.

Defendant Hiller argues the first cause of action against him is untimely, as well as barred by the doctrine of res judicata (CPLR § 3211 [a][3] & [a][5]).

Defendant Lee Firm argues the second cause of action alleged against it is barred by the three year statute of limitations applicable to legal malpractice claims (CPLR § 214 [6]) and plaintiffs' lack of standing. The Lee Firm argues that any attorney-client relationship it had with John C. Whaley ended in the summer of 2003 when it advised Mr. Whaley that it would not pursue a wrongful death action. Thus, the Lee Firm argues that Action #2 which was commenced on February 13, 2008 is untimely.

Defendant Joyce Firm alleges that the third cause of action against it is also barred by the three year statute of limitations applicable to legal malpractice claims (CPLR § 214 [6]) and plaintiffs' lack of standing. The Joyce Firm contends that any alleged malpractice on its part accrued at the latest when the Judgment dismissing Action #1 was filed on January 20, 2005 and, as such, Action #2 which was commenced on February 13, 2008 is untimely.

Plaintiffs' assert that all causes of action are timely because the statute of limitations was tolled based upon their infancy (CPLR § 208) and that there are special circumstances obviating the general privity rule with respect to the standing issue.

The court heard oral argument from all counsel on July 25, 2008. During oral argument, defense counsel conceded that plaintiffs may well have been infants at the time this matter accrued, but raised the fact that decedent had a third child - Emily - who was an adult when this

matter accrued. The court reserved decision at motion term on all the defense motions in order to permit the submission of additional proof regarding the existence of a third adult child of decedent.

DISCUSSION

Defendants have submitted post-argument documentation establishing that at the time of this accident in 2002 decedent did have an adult child, one Emily Whaley, born in 1978. There have been no submissions by plaintiffs arguing to the contrary. Case law is clear that when adult children exist they are potential personal representatives of an estate and the statute of limitations will not be tolled by the infancy of other children (*Hernandez v New York City Health & Hosps. Corp.*, 78 NY2d 687 [1991]; *Baez v New York City Health & Hosps. Corp.*, 80 NY2d 571 [1992]). Thus, this court must conclude that plaintiffs herein are not entitled to the tolling benefits provided under CPLR § 208 and, as such, this action is untimely with respect to all three causes of action and the complaint must be dismissed in its entirety.

Additionally, however, the court notes that with respect to the Lee Firm, the second cause of action fails to state a cause of action as well. A prima facie case of legal malpractice requires a showing that an attorney failed to exercise the degree of skill commonly exercised by an ordinary member of the legal community, but for the negligence there would have been a favorable result in the underlying action, and that the client sustained actual damages due to said negligence (*Ehlinger v Ruberti, Girvin & Ferlazzo, P.C.*, 304 AD2d 925, 926 [2003]). Here, the Lee Firm last consulted with John C. Whaley in 2003 at which time there was still plenty of time left on the underlying wrongful death statute of limitations and an opportunity, if necessary, for a

change in the capacity of Mr. Whaley's estate administration.

Finally, the court also finds plaintiffs lacked the capacity to sue either the Joyce Firm or Lee Firm as they were never clients of either firm. Quite simply, neither firm ever dealt with or had been contacted by plaintiffs, rather each firm dealt solely with John C. Whaley. In fact, during the time that the Joyce Firm represented the Estate via John C. Whaley, plaintiffs were represented by an attorney located in Missouri.

CONCLUSION

In view of the foregoing, the court finds that defendants' motions for dismissal should be GRANTED and plaintiffs' complaint and any and all cross-claims are hereby DISMISSED.

The foregoing constitutes an order of the court upon which judgment may be entered according to its terms.

It is so ordered.

September 4, 2008
Binghamton, New York

s/ Ferris D. Lebous
Hon. Ferris D. Lebous
Justice, Supreme Court