Lloyd v Shen
2008 NY Slip Op 32996(U)
October 31, 2008
Supreme Court, New York County
Docket Number: 109287/07
Judge: Carol R. Edmead
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[* 1] SCANNED ON 1/6/2008

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

PRESENT: CAROL EDMEAD J.S.C. **PART** 35

Index Number : 109287/2007
LLOYD, KEITH B.
VS.
SHEN, MICHAEL ESQ.
SEQUENCE NUMBER : 002
DISMISS

INDEX NO.
MOTION DATE 7/23/08
MOTION SEQ. NO. 002
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

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

Upon the foregoing papers, it is ordered that this motion

The instant motion is decided in accordance with the annexed Memorandum Decision. It is hereby

ORDERED that the Law Firm's motion to dismiss the amended complaint is denied; and it is further

ORDERED that the defendants shall answer the amended complaint within 20 days from the date of service of a copy of this decision with notice of entry; and it is further

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

FILED
NOV 06 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 10/31/08

CAROL EDMEAD
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: I.A.S. PART 35

---------------------------------------X

KEITH B. LLOYD,

Plaintiff,

-against-

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

Defendants.

---------------------------------------X

Index No. 109287/07

FILED
NOV 06 2008
COUNTY CLERK'S OFFICE
NEW YORK

CAROL EDMEAD, J.:

Defendants Michael Shen, Esq., Ian Francis Wallace, Esq., and Michael Shen & Associates, P.C. (collectively, the Law Firm) move, pursuant to CPLR 3211 (a) (1) and (7), to dismiss the amended 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 (the Title VII claims) 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 Garden and Long subsequently moved for summary judgment. On July 6, 2006, that court dismissed all claims against Long because of plaintiff's failure to timely file and serve the amended complaint on Long. It also granted the Garden's application for summary judgement on all claims asserted against it. Plaintiff subsequently commenced this legal malpractice action.

The Law Firm previously moved to dismiss the plaintiff's complaint, which asserted seven causes of action for legal malpractice, and plaintiff cross-moved for leave to amend

the complaint. In this court's order dated March 31, 2008 (the Prior Order), this court dismissed the sixth and seventh causes of action in the proposed amended complaint submitted by plaintiff, granted plaintiff leave to amend the complaint, and deemed served the amended complaint in the proposed form upon service of a copy with the order with notice of entry.

The Law Firm now moves, pursuant to CPLR 3211 (a) (1) and (7), for an order dismissing the five causes of action for legal malpractice asserted in the amended complaint. In support of its motion, the Law Firm claims that the proffered documentary evidence, consisting of the pleadings and motion papers in the Underlying Action, demonstrates plaintiff's failure to state legal malpractice claims.

On a motion pursuant to CPLR 3211 (a) (7), the court is limited to ascertaining whether the pleading states any cause of action and not whether there is evidentiary support for the complaint (Guggenheimer v Ginzburg, 43 NY2d 268 [1977]). The complaint must be liberally construed in the light most favorable to the plaintiff, and all factual allegations must be accepted as true (id.; Morone v Morone, 50 NY2d 481 [1980]). Pursuant to CPLR 3211 (a) (1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense

to the asserted claims as a matter of law (see Leon v Martinez, 84 NY2d 83 [1994]).

As previously noted in the Prior Order, "to 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 2007], 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's first and second causes of action for legal malpractice in his amended complaint are based on the Law Firm's alleged failure to file and serve an amended complaint asserting violations of 42 USC § 1981 against the Garden and Long in the Underlying Action (first); and to plead violations of 42 USC §

[* 6]

1981 in the original complaint in the Underlying Action (second). The Law Firm refers to the original and amended complaints in the Underlying Action, and maintains that a comparison of the pleadings discloses that the allegations originally supporting the Title VII claim in the original complaint were repeated in the amended complaint in support of the race discrimination and hostile work environment claims under Title VII and 42 USC § 1981. The Law Firm further contends that Title VII and 42 USC § 1981 claims are analyzed by the courts under the same legal framework, and, thus, since the Title VII claims were dismissed by the court in the Underlying Action, plaintiff's 42 USC § 1981 claim would have also been dismissed.

As previously noted in the Prior Decision, the court in the Underlying Action stated that it had previously permitted plaintiff to amend his complaint to add a claim under 42 USC § 1981 against both Long and the Garden, and that the Amended Complaint was never filed or served on Long (7/6/06 Decision). It thus held that it would not consider any 42 USC § 1981 claim by plaintiff against either Long or the Garden (id.). It also dismissed the remaining claims in the complaint against the Garden, including the Title VII claims (id.).

This court acknowledges that section 1981

[* 7]

discrimination claims are analyzed using the same analytic framework that is used for Title VII discrimination claims (see Whidbee v Garzarelli Food Specialties, 223 F3d 62 [2d Cir 2000]). However, the proffered documentation discloses that, while the race discrimination claim under Title VII was dismissed on the merits, the hostile work environment claim was dismissed based on plaintiff's failure to exhaust his administrative remedies through the Equal Employment Opportunity Commission (EEOC), i.e., by failing to file a timely charge with the EEOC within 300 days of the alleged discriminatory acts (Holtz v Rockefeller & Co. Inc., 258 F3d 62 [2d Cir 2001]; see also Francis v City of New York, 235 F3d 763 [2d Cir 2000]), and to include allegations of a hostile work environment in the administrative charge he filed with the EEOC [the district court only has jurisdiction to hear claims that were either included in an EEOC charge or based on conduct subsequent to the charge which was reasonably related to that alleged in the EEOC charge (see Alfano v Costello, 294 F3d 365 [2d Cir 2002]; see also Holtz v Rockefeller & Co. Inc., 258 F3d 62, supra). Such failure, however, does not preclude a plaintiff from pursuing an action under section 1981 (Goss v Revlon, Inc., 548 F2d 405 [2d Cir 1976]), and his hostile work environment claim under section 1981 could have been addressed by

the court. Therefore, the Law Firm's proffered documentation does not conclusively establish a defense as a matter of law to the alleged negligent conduct asserted against it in the first and second causes of action (Leon v Martinez, 84 NY2d 83, supra).

An attorney may be liable for his or her failure to timely commence an action (see LaRusso v Katz, 30 AD3d 240 [1st Dept 2006]; Davis v Isaacson, Robustelli, 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]). Therefore, in liberally construing the amended complaint in the light most favorable to the plaintiff, and, in accepting all factual allegations as true (Morone v Morone, 50 NY2d 481, supra), plaintiff sufficiently alleges actionable conduct by the Law Firm in the first through fourth causes of action.

The second and third causes of action for legal malpractice are based on the Law Firm's alleged failure to follow the procedural requirements of Rule 56 of the Federal Rules of Civil Procedure in response to the summary judgment motion of Long and the Garden in the Underlying Action (third and fourth). The Law Firm submits, inter alia, the Rule 56.1 statement it

submitted on behalf of the plaintiff in the summary judgment motion in the Underlying Action, and argues that it demonstrates that it "responded to most, if not all, of the numbered paragraphs in the underlying defendants' Rule 56.1 Statement" (The Law Firm's Memorandum of Law, at 11-12).

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]bsent 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).

The court, in its determination of the summary judgment motion by Long and the Garden in the Underlying Action 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). A review of the Rule 56.1 Statement discloses that, as noted by the court therein, the procedural requirements of Federal Rule of Civil Procedure 56 (e) were not followed, including the failure to contain any citations to evidence as to each statement contained in the underlying defendants' Rule 56.1 Statement. The Law Firm's proffered documentation does not conclusively establish a defense to the negligent conduct asserted against it as a matter of law, but rather raises a question of fact as to whether the Law Firm's actions were reasonable under the circumstances (Bernstein v Oppenheim & Co., P.C., 160 AD2d 428, supra).

In the fifth cause of action, plaintiff 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 his ERISA and COBRA claims. The court in the Underlying

Action 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; that the Law Firm's proffered argument and case it relied on for the proposition that "whether or not a defendant is a plan administrator is an issue of fact not ripe for summary dismissal" 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, that Long was not liable to plaintiff for a violation of COBRA (The Law Firm's Exhibit E, the Underlying Court's Decision dated 8/10/04, n 2). As noted in the Prior Order, a review of this decision raises an issue of fact as to whether the Law Firm's actions were reasonable under the circumstances (Bernstein v Oppenheim & Co., P.C., 160 AD2d 428, supra). Therefore, plaintiff alleges negligent conduct by the Law Firm in the fifth cause of action.

The first through fifth causes of action also sufficiently assert proximate cause and damages. In liberally construing the amended complaint, accepting all the facts therein to be true and according the allegations the benefit of every possible favorable inference (Morone v Morone, 50 NY2d 481,

[* 12]

In view of the foregoing, it is

ORDERED that the Law Firm's motion to dismiss the amended complaint is denied; and it is further

ORDERED that the defendants shall answer the amended complaint within 20 days from the date of service of a copy of this decision with notice of entry.

Dated: October 31, 2008

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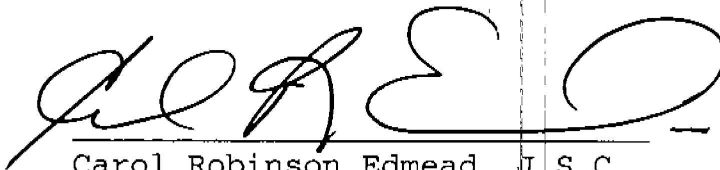

Carol Robinson Edmead, J.S.C.

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