

McCluskey v Gabor & Gabor

2009 NY Slip Op 32066(U)

August 28, 2009

Supreme Court, New York County

Docket Number: 002978/07

Judge: Arthur M. Diamond

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SUPREME COURT - STATE OF NEW YORK

Present:

HON. ARTHUR M. DIAMOND
Justice Supreme Court

-----X
PETER MCCLUSKEY

Plaintiff,

-against-

**GABOR AND GABOR, DAVID GABOR,
HOPE SENZER GABOR**

Defendant.

-----X

**TRIAL PART: 19
NASSAU COUNTY**

INDEX NO: 002978/07

MOTION SEQ. NO: 5,6

SUBMIT DATE: 6/22/09

The following papers having been read on this motion:

- Notice of Motion.....1**
- Opposition 2**
- Reply..... 3**

Plaintiff's motion for leave to reargue defendants' motion for summary judgment is denied.
Defendants' motion for sanctions is denied.

This is an action for legal malpractice. Plaintiff Peter McCluskey was an adjunct professor in the theater department at Suffolk County Community College. After plaintiff was denied a full-time position on the faculty, he brought an action against the College, asserting claims for breach of contract, unjust enrichment, fraud, and age discrimination. Defendants represented plaintiff in that action. On the College's motion for summary judgment in the underlying action, Supreme Court, Suffolk County dismissed the breach of contract, unjust enrichment, and fraud claims. Only the breach of contract and fraud claims are germane to the present motion.

In the underlying action, plaintiff alleged that pursuant to his oral employment contract, in exchange for his working as an adjunct, the College promised to appoint him as a full-time professor at some unspecified time. In granting the College summary judgment dismissing the breach of contract claim, Justice Jones held that the alleged oral contract was vague and therefore not capable of enforcement.

With respect to the fraud claim, plaintiff alleged that Wayne Pevey, the Chairperson of the

theater department, falsely represented that adjuncts who applied for full-time positions were “always granted interviews” and that “adjuncts with seniority” were given a “preference” in the hiring process.¹ Plaintiff further alleged that Pevey made these false representations to induce him to forego an opportunity to teach in the public school system and accept a position as an adjunct.² In granting the College summary judgment dismissing the fraud claim, Justice Jones held that the facts underlying the fraud claim were “duplicative” of the facts underlying the breach of contract claim. Thus, in Justice Jones’ view, the fraud claim related to a breach of contract.³ Justice Jones did not address the issue of whether plaintiff was seeking “special damages” not recoverable in an action for breach of contract.

Defendants were relieved from representing plaintiff on the eve of trial, and plaintiff proceeded pro se on the age discrimination claim. After the jury returned a defendants’ verdict in the underlying action, plaintiff, still acting pro se, commenced the present malpractice action. While plaintiff alleged a number of acts of malpractice, only two are relevant to the present motion: 1) whether defendants committed malpractice by failing to offer evidence of special damages in support of the fraud claim, and 2) whether defendants committed malpractice by failing to appeal Justice Jones’ order dismissing the fraud claim.

By order dated January 25, 2008, this court granted defendants summary judgment dismissing the malpractice claim based upon failure to offer evidence of special damages but denied defendants summary judgment as to the malpractice claim based on failure to appeal. This court noted that a fraud claim will not be duplicative of a claim for breach of contract where plaintiff seeks special damages, which are proximately caused by the false representations but not recoverable in a breach of contract action (*Rivas v. Amerimed, Inc.*, 34 AD3d 250 [1st Dep’t 2006]). The special damages which will differentiate a fraud claim from a claim for breach of contract are actual “out-of-pocket” damages (*Fusco v Parade Publications*, 63 AD2d 643 [2d Dept 1978]; See also *Kaufman v Torkan*, 51 AD3d 977, 980 [2d Dept 2008]).

¹Defendants’ ex. B at 91, ¶ 20; 82.

²Defendants’ ex. B at 92, ¶ 87).

³Defendants’ ex. B at 112.

In dismissing the malpractice claim based on failure to offer evidence of special damages, the court held that defendants had offered evidence of special damages in the form of lost income that plaintiff would have earned as a public school teacher. Ironically, defendants themselves now concede that because lost income is not an out-of-pocket loss, this item of damages is not recoverable on a fraud claim.⁴ Nevertheless, as will be shown below, the court correctly concluded that “defendants sufficiently argued special damages in an effort to distinguish plaintiff’s fraud claim from a breach of contract.”⁵

With respect to the malpractice claim based upon failure to appeal, this court held that plaintiff’s allegation that Pevey falsely represented that adjuncts received some type of advantage or special consideration in the hiring process sufficiently distinguished plaintiff’s fraud claim from a claim for breach of contract. Thus, the court concluded that defendants had not carried their burden of establishing prima facie that plaintiff would not have prevailed on an appeal from the dismissal of the fraud claim. By order dated May 7, 2008, the court denied a prior motion by plaintiff for leave to reargue the summary judgment motion.

By order dated April 7, 2009, the Appellate Division reversed the denial of summary judgment with respect to the malpractice claim based upon failure to appeal and granted summary judgment to defendant dismissing that malpractice claim. The Appellate Division held that because plaintiff’s fraud claim was “properly dismissed” in the underlying action, an appeal would not have been successful.⁶ In view of the Appellate Division’s citing of *Kaufman v Torkan*, supra, it appears that the basis of its decision was that plaintiff failed to offer evidence of special damages in the underlying action. Upon plaintiff’s cross-appeal, the Appellate Division affirmed this court’s denial of partial summary judgment to plaintiff with respect to the failure to appeal malpractice claim and affirmed this court’s denial of plaintiff’s motion for leave to amend the complaint to assert a cause of action for violation of Judiciary Law § 487.

By notice of motion dated April 27, 2009, plaintiff moves pursuant to CPLR 2221(a) for

⁴Affirmation of Joan Martino Faley in support of defendants’ cross-motion at ¶ 8.

⁵Defendants’ ex. B at 20.

⁶Plaintiff’s ex. 3, Decision and Order of the Appellate Division at 2.

leave to reargue the summary judgment motion. Plaintiff seeks to reargue to the extent that the court dismissed plaintiff's malpractice claim based upon defendants' failure to offer evidence of "special damages," i.e. damages recoverable in fraud but not in a breach of contract action.

In opposition to the College's motion for summary judgment in the underlying action, plaintiff submitted an affidavit stating that he "attended classes at HB Studios for a period of three years."⁷ Plaintiff's attending classes at HB Studios was arguably in anticipation of obtaining a full-time position with the College and in reliance upon Pevey's representations. The tuition and other costs of this course of study were out-of-pocket damages, not recoverable in breach of contract, which plaintiff might have recovered on a fraud claim. Thus, defendants did in fact offer evidence of special damages in an effort to distinguish plaintiff's fraud claim from a breach of contract claim.

Contrary to plaintiff's argument, Justice Jones did not determine that defendants failed to offer evidence of special damages in the underlying action. Rather, Justice Jones appears to have overlooked the evidence of plaintiff's taking the HB Studios course and its relevance to the special damages issue. Perhaps because neither Justice Jones nor this court considered the HB Studios course, the Appellate Division failed to discuss this evidence in granting summary judgment to defendants with respect to the failure to appeal malpractice claim. Nevertheless, plaintiff has failed to establish that this court overlooked or misapprehended any matter of fact or law which would change its prior determination with respect to the failure to offer evidence of special damages malpractice claim (CPLR §2221[d][e]). Accordingly, plaintiff's motion for leave to reargue is denied.

The Rules of the Chief Administrator provide, "The court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court,..., costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defined in this Part" (22 NYCRR § 130-1.1[a]). Part 130 defines frivolous conduct as conduct which is "completely without merit in law and cannot be supported by a reasonable argument for an extension, modification, or reversal of existing law" (Id [c]). Conduct is also frivolous if it is "undertaken primarily to delay or prolong the resolution of the litigation, or

⁷Defendants' ex. B at 117, ¶ 20.

to harass or maliciously injure another,” or if it “asserts material factual statements that are false” (Id). In determining whether conduct was frivolous, the court shall consider, “1) the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and 2) whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party” (Id).

Defendants argue that the present motion was made in bad faith to prolong the resolution of the action and harass defendants. Defendants note that this court denied a prior motion by plaintiff for leave to reargue the summary judgment motion. Defendants assert that the Appellate Division affirmed this court’s granting of summary judgment to defendants with respect to the failure to offer evidence of special damages malpractice claim. Defendants further assert that the frivolous nature of plaintiff’s conduct was called to his attention when counsel for defendants requested that plaintiff withdraw his reargument motion.

As a preliminary matter, the court notes that its granting of summary judgment to defendants with respect to the malpractice claim based upon failure to offer evidence of special damages was not before the Appellate Division. Plaintiff’s notice of cross-appeal states than an appeal was being taken “from each and every portion of [the court’s January 25, 2008] order.”⁸ However, plaintiff’s brief in the Appellate Division addressed only the issue of whether this court erred in denying plaintiff partial summary judgment with respect to his failure to appeal malpractice claim.⁹ The Appellate Division’s decision and order confirms that plaintiff’s cross-appeal was limited by his brief. In determining the cross-motions for summary judgment with respect to the failure to appeal malpractice claim, the Appellate Division presumably reviewed the record as to special damages in the underlying action. Nevertheless, because the Appellate Division did not review the sufficiency of plaintiff’s malpractice claim based upon failure to offer evidence of special damages, its order has no direct bearing on the frivolousness of the present motion.

A motion for reargument is not designed to provide an unsuccessful party with successive

⁸Defendants’ ex. B at 5.


⁹Defendants’ ex. D.

opportunities to present arguments different from those already presented (*Woody's Lumber Co. v Jayram Realty Corp.*, 30 AD3d 590, 593 [2d Dept 2006]). Nevertheless, the evidence as to special damages suggests that plaintiff did not bring the present motion for delay or harassment. Rather, plaintiff appears to have brought a second motion for leave to reargue because of the perceived merit of his failure to appeal malpractice claim. Accordingly, as a matter of discretion, defendants' motion for sanctions is denied.

This shall constitute the decision and order of the court.

DATED: August 28, 2009

ENTER


HON. ARTHUR M. DIAMOND
J. S.C.

ENTERED

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