

Riordan v Cellino & Barnes, P.C.

2009 NY Slip Op 33415(U)

October 9, 2009

Supreme Court, Erie County

Docket Number: I2008-12314

Judge: Donna M. Siwek

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This opinion is uncorrected and not selected for official publication.

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

CLARENCE F. RIORDAN and
JEANNIE RIORDAN,

Plaintiffs,

v.

Index No. I2008-12314

CELLINO & BARNES, P.C.,
THE BARNES FIRM, P.C., and
MICHAEL J. COOPER,

Defendants,

Robert B. Nichols, Esq.
Paul William Beltz, P.C.
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Buffalo, New York 14202
Attorney for Plaintiffs

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SIWEK, J.,

MEMORANDUM DECISION

This decision will address the defendants' Notice of Motion for a protective order pursuant to CPLR § 3103 precluding plaintiffs from deposing Michael J. Cooper, Esq. and Jeffrey Sendziak, Esq. and other employees of the defendant law firm and motion to dismiss

plaintiffs' punitive damage claims and the plaintiffs' cross Notice of Motion seeking to have the defendants comply with two outstanding notices to produce dated June 10 and June 17, 2009 and to compel depositions of the named defendants.

This legal malpractice action arises from the defendants' representation of plaintiffs after an August 30, 2000 construction site accident. The defendants' amended answer admits negligence with regard to the allegations of legal malpractice in the underlying action, a claim pursuant to Labor Law § 240 and § 241(6). The defendants have admitted that they failed to properly identify the owner of the construction site (the East Rochester School District) until the time to file a Notice of Claim against that entity had expired and that they failed to properly handle a motion to file a late Notice of Claim, which motion was denied by the Appellate Division, Fourth Department. After the defendants' admission of negligence, plaintiffs served a deposition notice seeking to take the testimony of attorneys Cooper and Sendziak.

In support of their motion for a protective order, defendants assert that since negligence in the legal malpractice action has been conceded, the depositions of the attorneys are unnecessary, given that the case that remains to be litigated is the underlying personal injury case, which is based on alleged violations of the New York State Labor Law. The defendants argue that the only testimony they could offer which would be relevant would go to the question of whether or not legal malpractice was committed. Inasmuch as the defendants have admitted negligence with regard to the legal malpractice, they assert that such admission eliminates the need for such deposition testimony. The defendants argue that the depositions of the attorneys are not relevant to the Labor Law claim or damages allegedly sustained by the plaintiff. The defendants deny any personal knowledge as to the issue of whether the East Rochester School District violated the

Labor Law and any information relative to the workplace or the conditions that existed on the site on August 30, 2000. They assert that their testimony would amount to nothing more than an opinion, thus requiring them to testify as expert witnesses, which would be improper and inadmissible at the time of trial. Furthermore, the defendants deny that they have information relative to plaintiffs' damages, as they are not physicians and would not be competent to testify as to plaintiffs' injuries at trial.

As to the motion to dismiss the plaintiffs' claims for punitive damages, the defendants assert that the conduct alleged in the complaint does not rise to the level of being "so outrageous as to evince a high degree of moral turpitude and showing such wanton dishonesty as to imply a criminal indifference to civil obligations" and should therefore be dismissed.

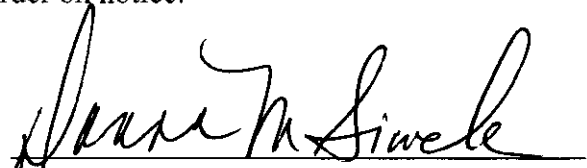
By way of cross motion, the plaintiffs seek compliance with two notices to Produce, which seek the production of the defendants' entire file and the defendants' "intake papers" and initial evaluation of the plaintiffs' claim. It is the court's understanding that the file has been made available to plaintiffs' counsel and that a privilege log has been prepared and forwarded to plaintiffs' counsel outlining 27 items which have been withheld from the production which were submitted to the court for an *in camera* review on September 24, 2009. Plaintiffs also oppose the defendants' motion to dismiss any claim for punitive damages until such time as they have had an opportunity to review the entire file.

Upon consideration of the arguments of counsel and pertinent case law, and in the exercise of our discretion, we grant the defendants' motion for a protective order precluding the depositions of the attorneys. We agree with defendants' counsel that the case of *Long v. Cellino & Barnes, P.C.*, 59 A.D.3d 1062, 873 N.Y.S. 2d 804 (4th Dept. 2009) is controlling on this issue.

In *Long*, the Fourth Department considered whether the admission of negligence in a legal malpractice action entitles the defendants to a protective order preventing plaintiff from deposing them. The plaintiffs rely on language in *Long* to suggest that there may be cases where additional evidence in the form of depositions of the attorneys is relevant and necessary to the issues to be determined at trial. In *Long*, the Fourth Department wrote “the court also properly exercised its discretion in granting that part of the second cross motion for a protective order precluding plaintiff from deposing defendants. Defendants admitted their negligence, and plaintiff failed to establish that the additional evidence he sought was relevant and necessary to the issues to be determined at trial. (See, generally *Wolin v. St. Vincent’s Hosp. & Med. Ctr. of N.Y.*, 304 A.D.2d 348, 757 NYS 2d 33 (1st Dept. 2003).” *Long* at 807. Like the Court in *Long*, we do not find that the plaintiffs have established that any additional evidence sought is relevant and necessary to the issues to be determined in this case. The defendants’ admission of negligence leaves only the underlying Labor Law case to be tried. The defendants have conceded that as a result of their negligence, the plaintiffs were denied the ability to try their Labor Law case against the proper party, the school district, which they will now have the opportunity to do. Unlike those cases cited by the plaintiffs in support of their motion, the operative factor in our decision is that the defendants have conceded or admitted their negligence; thus, their testimony is not relevant. See, eg. *Campecie v. Mathews*, 261 A.D.2d 870 (4th Dept. 1999) (motion for summary judgment on liability in legal malpractice case). For the foregoing reasons, and in particular, the Fourth Department’s Decision in *Long*, the defendants’ motion for a protective order is granted, the motion to dismiss the punitive damage claim is denied without

prejudice, and may be re-asserted upon the completion of discovery. A decision on the 27 items contained in defendants' file which have been submitted for *in camera* review will be sent under separate cover.

This is the Decision of the Court. Submit Order on notice.



Hon. Donna M. Siwek
Justice of the Supreme Court

Dated: October 9, 2009