

Lyons v Cronin & Byczek, LLP

2010 NY Slip Op 30006(U)

January 6, 2010

Supreme Court, Suffolk County

Docket Number: 15745/2007

Judge: Paul J. Baisley

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SUPREME COURT - STATE OF NEW YORK
DCM-J - SUFFOLK COUNTY

PRESENT:

Hon. Paul J. Baisley, Jr. _____

 MALACHY P. LYONS, JR.

Plaintiff(s),

-against-

CRONIN & BYCZEK, LLP.

Defendant(s).

ORIG. RETURN DATE: December 12, 2007

FINAL RETURN DATE: January 28, 2008

MTN. SEQ. #: 001 - MD

PLTF'S ATTORNEY:

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DEFT'S ATTORNEY:

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Upon the following papers numbered 1 to 31 on this motion: Notice of Motion and supporting papers 1 - 14; Affirmation in Opposition and supporting papers 15 - 23; Reply Affirmation 24 - 31; it is

ORDERED that that part of this motion (001) by the defendant seeking summary judgment dismissing this action pursuant to CPLR 3212 is denied; and it is further

ORDERED that that part of this motion seeking, in the alternative, an order to preclude is decided to the extent that, pursuant to 22 NYCRR 202.8(f), the parties are directed to appear for a preliminary conference on January 6, 2010 at the Supreme Court, DCM Part, Room A362, One Court Street, Riverhead, New York at 10:00 a.m.

This is an action sounding in legal malpractice brought by the plaintiff, Malachy P. Lyons (hereinafter Lyons) - an attorney appearing pro se - against certain former attorneys of his, Cronin & Byczek, LLP (hereinafter the Cronin firm), for legal malpractice arising out of the Cronin firm representing Lyons in another legal malpractice action brought by Lyons.

Factual background:

According to the complaint in this action, Lyons was "illegally" terminated as an employee of the Long Island Railroad (hereinafter LIRR) in December of 1985 and brought a federal action against the LIRR sometime in 1987 (hereinafter the LIRR case). In the LIRR case, Lyons was represented by the law firm of Gandin, Schotsky, Rappaport, Glass & Greene, LLP (hereinafter the Gandin firm).

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In October of 1992, while the LIRR case was still pending, Lyons filed a Chapter 7 bankruptcy petition. The LIRR case was not made part of the bankruptcy petition and the Gandin firm was not aware of this filing. Lyons was subsequently discharged from bankruptcy on April 15, 1993.

In 1997, ten years after the case was commenced, the LIRR case was settled but although Lyons agreed to the settlement and even is alleged to have signed a release, he was dissatisfied with the settlement because he alleges that the strength of his case against the LIRR was weakened by the failure of the Gandin firm to properly disclose expert information during the litigation.

Lyons then retained the defendants herein, the Cronin firm, to bring a legal malpractice action against the Gandin firm (hereinafter the Gandin case). The Gandin firm alleges it was not told by Lyons that Lyons had filed for bankruptcy and when it learned of the former bankruptcy proceeding, it moved to dismiss the Gandin case on the ground that the LIRR case should have been included in the bankruptcy proceeding and that the alleged malpractice on the part of the Gandin firm occurred while the bankruptcy proceeding was pending and, thus, the trustee in bankruptcy was the proper party to bring any action for legal malpractice. The Gandin firm's motion to dismiss was based upon Lyons' lack of capacity to bring the action.

The trial court granted the motion to dismiss on May 22, 2003; and, the appellate division affirmed the dismissal on June 7, 2004.

The instant malpractice action (the Cronin case) was brought by Lyons against the Cronin firm based upon his claim that the Cronin firm, within the context of the Gandin case, should have advised Lyons within six months of the dismissal to reopen the bankruptcy proceeding to permit the trustee in bankruptcy to recommence the Cronin action within six months from the dismissal (pursuant to CPLR 205) so that Lyons would not have a problem with the statute of limitations period having expired on that legal malpractice action (the Gandin case).

This motion:

The Cronin firm now brings this motion seeking, in part, summary judgment dismissing the complaint upon the grounds of statute of limitations (CPLR 3211[a][5]), release (CPLR 3211[a][5]) and failure to state a cause of action (CPLR 3211[a][7]).

Statute of Limitations

In terms of the statute of limitations period within which to bring a legal malpractice action (CPLR 214[6]; three years), the Cronin firm argues that the action for legal malpractice accrued on June 22, 2003 - six months from the initial dismissal in the Gandin case; the period during which the trustee in bankruptcy could have recommenced the action against the Gandin firm. If correct in this contention, then this Cronin case would have been time barred as it was commenced on May 24, 2007 - a month short of four years from the "June 22, 2003" date.

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In opposition, Lyons argues that the accrual date was tolled due to the continuing representation of Lyons by the Cronin firm which handled the appeal of the dismissal in the Gandin case. Therefore, according to Lyons, the three year period within which to bring this malpractice action against the Cronin firm did not start until the date of the affirmance (June 7, 2004) of the dismissal in the Gandin case. Using the June 7, 2004 date as the starting point, then this action is timely as it was brought two weeks before the three-year period to bring such an action lapsed.

The Court of Appeals has held that the running of the statute of limitations may be tolled in a legal malpractice case by continuous representation (*see Greene v Greene*, 56 NY2d 86, 93-95, 451 NYS2d 46 [1982]) where it is shown that the subject law firm continued to represent the client within the limitations period (*see Melnitzky v Hollander*, 16 AD3d 192, 791 NYS2d 96 [1st Dept 2005]) and that “the representation was on the very matter that is the subject of the malpractice action” (*Amendalo v Kendzia*, 17 AD3d 1105, 1108-1109, 793 NYS2d 811 [4th Dept 2005, *citing Shumsky v Eisenstein*, 96 NY2d 164, 168, 726 NYS2d 365 [2001]).

In the Gandin case - in which the Cronin firm represented Lyons - the basis for the dismissal was the lack of capacity of Lyons to bring that action. That, therefore, was the issue on the appeal on which the Cronin firm continued to represent Lyons. If Lyons prevailed on that appeal, then Lyons would have had the legal capacity to sue and, obviously, there would have been no basis for a claim of malpractice against the Cronin firm. Accordingly, the issue brought up on the appeal in the Gandin case by the Cronin firm was the “very matter” which is the subject of the instant malpractice action against the Cronin firm. As such, the continuous representation of Lyons by the Cronin firm in the appeal of the Gandin case tolled the running of the statute of limitation until the decision in the appeal affirming the dismissal of the Gandin case.

Using the date of the affirmance by the appellate division as the accrual date for bringing this legal malpractice action, the court finds that this action against the Cronin firm is timely brought.

Release

The release referred to by the Cronin firm was purportedly signed as part of the settlement in the LIRR case; an action brought before the Cronin firm was ever retained which allegedly addressed the underlying issues in the context of the claim for “illegal” termination. The Cronin firm argues that the purported release protected the Gandin firm from an action for legal malpractice arising out of the LIRR case and, thus, even if the Cronin firm committed malpractice in the Gandin action, it did not matter since such an action was covered by the release.

There is no merit to this argument. Indeed, there is no indication that the Gandin firm used this argument as a ground for dismissal in its malpractice case. In any event, a copy of the release is not submitted on this motion and, thus, cannot be considered by the court.

Accordingly, the request to dismiss this complaint based upon a release is denied.

Failure to State a Cause of Action for Legal Malpractice

In order to sustain an action sounding in legal malpractice, a plaintiff must show that the attorney failed to exercise the degree of care, skill and diligence commonly possessed by members of the legal community, that the attorney's conduct was the proximate cause of the plaintiff's loss, that the damages were sustained as a direct result of the attorney's actions and that the plaintiff would have otherwise been successful but for the attorney's negligence if the attorney had exercised due care (*see Lamana v Pearson & Shapiro*, 43 AD3d 1111, 843 NYS2d 143 [2d Dept 2007]; *Town of North Hempstead v Winston & Strawn, LLP*, 28 AD3d 746, 748, 814 NYS2d 237, 239 [2d Dept 2006]).

Although it is well settled that on a motion for summary judgment the moving party has the burden of making a prima facie showing of entitlement to summary judgment as a matter of law and must offer sufficient evidence to show the absence of material issues of fact (*Winegrad v New York University Medical Center*, 64 NY2d 851, 487 NYS2d 316 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]), on a summary judgment motion with regard to legal malpractice, the attorney-defendant need only show, in admissible form, that just one of the essential elements cannot be proven (*see Lamana v Pearson & Shapiro*, 43 AD3d 1111, 843 NYS2d 143 [2d Dept 2007]; *Kotzian v McCarthy*, 36 AD3d 863, 827 NYS2d 875 [2d Dept 2007]; *Ostriker v Taylor, Atkins & Ostrow*, 258 AD2d 572, 685 NYS2d 470 [2d Dept], *lv denied* 93 NY2d 809, 694 NYS2d 631 [1999]).

If the attorney-defendant fails to show that just one of the essential elements cannot be proven and, moreover, fails in his or her general burden to show entitlement to summary judgment as a matter of law and the absence of material issues of fact, then the motion must be denied. If, however, this burden is satisfied, then the burden shifts to the opposing party to establish the existence of material issues of fact requiring a trial (*see Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]) and, more specifically, that all of the essential elements of legal malpractice can be proven (*see Lamana v Pearson & Shapiro*, 43 AD3d 1111, 843 NYS2d 143 [2d Dept 2007]; *Kotzian v McCarthy*, 36 AD3d 863, 827 NYS2d 875 [2d Dept 2007]; *Ostriker v Taylor, Atkins & Ostrow*, 258 AD2d 572, 685 NYS2d 470 [2d Dept], *lv denied* 93 NY2d 809, 694 NYS2d 631 [1999]).

Professional Standards:

With regard to whether the Cronin firm exercised the degree of care, skill and diligence commonly possessed by members of the legal community in its representation of Lyons, neither side submits affidavits from any experts. The Cronin firm argues that Lyons, who knew of the former bankruptcy proceeding and knew of the argument raised by the Gandin firm as to lack of capacity based upon the bankruptcy proceeding, had all the information necessary for his taking the prudent steps on his own behalf to seek to reopen the bankruptcy proceeding and, thus, should have done so without any necessity for the Cronin firm to advise him to do so.

Lyons, not admitted to the practice of law until 2006 - two years after the affirmance of the Gandin case dismissal - puts the onus on his attorneys, the Cronin firm, to have advised him in this regard.

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In the absence of expert affidavits on this motion and there appearing no legal precedent on this particular issue, the court finds that whether the Cronin firm failed to exercise the degree of care, etc., possessed by members of the legal community is a question of fact which cannot be determined on this motion.

Proximate Cause/Damages:

The basis of Lyons' claim in this action is that he would have recovered "far in excess" of the settlement in the LIRR case if it was not for the malpractice of the Gandin firm and that he was unable to recover against the Gandin firm due to the malpractice of the Cronin firm.

The Cronin firm contends that Lyons' claims are "wholly founded on speculation" and that Lyons' alleged damages are, therefore, insufficient to support a claim for legal malpractice. Moreover, the Cronin firm argues, Lyons cannot support his claim that he would have recovered "far in excess" of the settlement in the LIRR case if it was not for the malpractice of the Gandin firm. Thus, there can be no showing of proximate cause resulting in his injuries in the LIRR case and the related Gandin case (*see Pelligrino v File*, 291 AD2d 60, 738 NYS2d 320 [1st Dept], *lv denied* 98 NY2d 606, 746 NYS2d 456 [2002]).

In opposition, Lyons refers to another legal malpractice action he brought, where, after the alleged malpractice in the instant action, different attorneys representing Lyons in that other case did advise Lyons to apply to the bankruptcy court to reopen his bankruptcy proceeding for the purpose of having the trustee in bankruptcy continue to prosecute that other legal malpractice action. This was done and the bankruptcy court did, indeed, reopen the proceeding and authorized the trustee to take the necessary steps to prosecute that other action. Accordingly, Lyons argues, if so advised by the Cronin firm, this could have been done in the Gandin case and would have preserved his rights as against the Gandin firm.

Lyons thus argues that it is not mere speculation that this was a viable option to pursue to keep the Gandin case alive and, since there is a material question of fact as to whether the Cronin firm acted within the standards of the legal community, there is more than speculation that any damages suffered by Lyons were due to professional negligence on the part of the Cronin firm resulting from the alleged fault of said firm in not taking appropriate steps to ensure the continuing of the malpractice case against the Gandin firm.

Lyons also argues that there must be merit in the claim against the Gandin firm because, otherwise, the Cronin firm would not have taken the case in the first instance. Moreover, if the initial alleged malpractice of the Gandin firm resulted in a settlement substantially below the worth of the case and if the alleged malpractice of the Cronin firm resulted in Lyons' losing his remedy to proceed against the Gandin firm, then Lyons' damages are real and not speculative.

In short, as to proximate cause and damages, the plaintiff Lyons raises questions of material fact sufficient to defeat a motion for summary judgment on the issues of proximate cause and damages.

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Success “but for” the defendant’s negligence:

As to the “but for” factor, the defendant contends that the plaintiff has failed to show that the defendant did not exercise due care in the performance of its professional duties and even if, arguendo, it failed to exercise such due care, that the plaintiff would have otherwise been successful in pursuing his claim against the Gandin firm.

Since the court has already determined that there is a question of fact as to whether the Cronin firm exercised the proper level of professional representation, in the context of this action it cannot be said that Lyons would not have prevailed in his malpractice action against the Gandin firm. Thus, it can be argued that “but for” the alleged malpractice attributed to the Cronin firm, Lyons would have recovered against the Gandin firm.

Here, again, the court finds that the plaintiff has met his burden of showing the existence of material facts sufficient to support the denial of summary judgment as to the claim of legal malpractice.

Conclusion:

While the opposition put forth by the plaintiff on this motion for summary judgment may or may not ultimately be sufficient to support a trial verdict in his favor, such opposition does raise material issues of fact sufficient to defeat this motion for summary judgment. Accordingly, the defendant’s motion for summary judgment is denied.

This constitutes the decision and order of the court.

Dated: Jan. 6, 2010

HON. PAUL J. BAISLEY, JR.

HON. PAUL J. BAISLEY, JR., J.S.C.